HEWAMANNE

v.

DE SILVA AND ANOTHER

SUPREME COURT
WANASUNDERA, J., PERERA, J.,
RANASINGHE, J., CADER, J.
AND RODRIGO, J.
S.C. APPLICATION NO. 2/83
9TH, 10TH, 11TH, 12TH, 13TH,
16TH, 17TH, 18TH, 19TH, 20TH,
30TH, 31ST MAY, 1ST, 6TH AND
7TH JUNE 1983.

Contempt of Court - Publication of a news item prominently displayed under eye-catching headlines - News item impeaching the integrity of two Judges of the Supreme Court and also casting most serious aspersions on their conduct as Judges - What constitutes Contempt - Can a reproduction of a notice of a motion contained in an Order Paper of Parliament be a contempt?

The respondents the Editor and the owner, Printer and Publisher respectively of the Publication 'Daily News' were charged with contempt of court in respect of a news item prominently displayed under the headlines, "Select Committee probe of Mr. K.C.E. de Alwis' representations" and "F.D.B's pleadings prepared in Judge's chambers?" published, in the Daily News of 7th March,1983. This news item was a reproduction of a notice of a motion in the Order Paper of Parliament for 8th March,1983.

The 1st respondent in an affidavit stated that Justice K.C.E. de Alwis was a member of the Special Presidential Commission which recommended imposition of civic disabilities on Mr.Felix Dias Bandaranaike and others.Thereafter Mr Bandaranaike instituted proceedings against Justice de Alwis and the court prohibited Justice de Alwis from functioning as a member of the Commission. Subsequently Justice de Alwis made representations to His Excellency the President and the Cabinet decided to move a resolution in Parliament for the appointment of a Select Committee.

The 1st respondent also stated that in view of the public interest and concern on the said subject matter and also its constitutional importance the said Order Paper was published as a news item on 7th March, 1983 in the Daily News.

The respondents in this action raised the following arguments-

(1)The freedom of speech and expression which is a Fundamental Right of the public, guaranteed by Article 14 of Constitution, must be given precedence over the law of contempt of court.

(2)At present the legal and political sovereignty of the State vests in the people.Hence the public must be afforded a greater right to criticise the judiciary and accordingly the law of contempt of court has to be reviewed and modified.

(3)In English Law a fair and accurate publication of a document forming part of the proceedings of the House is immune from proceedings for contempt or libel. The said principle is also applicable in Sri Lanka.

(4)In case law, particularly the present English case law, the impugned publication would not constitute a contempt of court since now the courts

allow a greater latitude to the public to criticise Judges and the administration of justice.

Held , Perera, J. and Ranasinghe, J. dissenting

1.The law of contempt of court which had hitherto existed will,in view of the provisions of Article 16 of the Constitution, continue to operate untrammelled by the Fundamental Right of speech and expression.

2(i) Although the legal sovereignty of the State is in the People, the right of the public to get involved in discussions on the working of the judiciary is limited, so as to safeguard the integrity and impartiality of the judiciary which is basic to the administration of justice.

(ii) Apart from Article 107 (2) of the Constitution, which provides for the Legislature to inquire into the conduct of judicial officers,the law at all times allows fair and temperate comments on decisions and the administration of justice.But the judges and the judiciary should not be exposed to wide open discussion by the mass media and the general public.

3(i) Our Parliamentary Powers and Privileges Act has deliberately omitted a provision recognised in English Law, which granted parliamentary privilege to the publication of proceedings of Parliament.Thus, there is no privilege in our law to protect the impugned publication.

(ii) There is no unfettered right to publish judicial and particularly Parliamentary proceedings. Even on the analogy of slander and defamation cases, such immunity cannot be conceded and a libel action between private parties, is irrelevant to the question of the impugned publication.

(iii) The English statutory law and the case law, have laid down the provision that when a publication is of any matter which the law has prohibited or which would be incompatible or which would frustrate the very proceedings, such a publication will not be entitled to any qualified privilege.

4.(i) In Dominion countries the offence of contempt by scandalising the court is very much alive and far from obsolete.

(ii) In England, the offence of contempt by scandalising the court is not yet obsolete. In the recent past, even in spite of a change of attitude towards a more liberal view, the law of contempt is still operative and an attack on the honesty and impartiality of the judiciary has always been held to be contempt.

(iii) In Sri Lanka too, the offence of contempt by scandalising the court is still very much in force, especially to preserve the dignity and respect of the court.

(iv) The statute law of Sri Lanka also recognises the offence of contempt against or in disrespect of the court.

The impugned publication therefore constitutes a contempt of court. The respondents, by this publication have committed a contempt of court.

Held further -

Per Wanasundera J.,

5. "Although the Constitution does not specifically refer to the press, the provisions guaranteeing the Fundamental Right of speech and expression to every citizen are adequate to ensure the freedom of the press in this country".

6. The power vested in the Judges to safeguard the welfare and the security of the people is also a delegated part of the sovereignty of the People, referred to in Article 3 and 4 of the Constitution.
Contempt against the judges is therefore an insult offered to the authority of the People and their Constitution.

7. In this instance as the offence has not been committed calculatedly and with deliberate intention of interfering with the administration of justice, the court did not impose any punishment.

Per Cader, J.,

8. "Parliament is a responsible body and can well be expected to preserve and foster the dignity of the Courts in the interest of the public. But an equal duty rests on the Courts to safeguard that same dignity".

Cases referred to

(1) *Wason v. Walter (1868 - 69) L.R. 4 Q.B. 73*
(2) *Namboodrepad v. Nambier A.I.R. (57) 1970 S.C.2015*
(3) *Leo Roy v. R. Prasad 1958 A.I.R. (Punjab) 377*
(4) *The State v. Ram Chander Sharma - A.I.R. (46) 1959, 41*
(5) *Liyanage v. The Queen (Liyanage's Case) (1965) 68 N.L.R. 265*
(6) *Bribery Commissioner v. Ranasinghe [1965] A.C.172, (1964) 66 N.L.R.73*
(7) *Harrison v. Bush (1855) 5 E & B 344; 119 EE.R. 509*
(8) *R. v. Rule [1937] 2 K.B. 375*
(9) *Morris v. The Crown Office [1970] 1 All E.R.1079*
(10) *Skipworth's Case (1873) L.R. 9 Q.B. 230, 28 LT 227*
(11) *R. v. Davis [1906] 1 K.B. 32*

(12)A.G. v. Times Newspaper [1974] A.C. 273, [1973] 3 All. E.R 54, [1973] 1 All E.R. 815, [1973] 3 W.L.R. 298
(13)Bridges v. California (1941) 314 U.S. 252
(14)Stockdale v. Hansard (1839) 9 Ad. & El (1837) 2 M & Rob 9, 3 St.Tr. (n.s.) 861, 112 E.R. 1112
(15)Mangena v. Edward Lloyd Ltd., (1908) 98 L.T. 640
(16)M.S.M. Sharma v. Sri Krishna Sinha A.I.R. (46) 1959 S.C.395
(17)R. v. Wright. 1799 8 T.R. 293, 101 ER 1396
(18)R. v. Lord Abingdon 1794, 1 Esp. 226
(19)Rex v. Creevey (1813) 1 M & S 273
(20)Bromage v. Prosser 4 B & C 247, 107 E.R. 1051
(21)Taylor v. Hawkins 16 Q.B. 321, 20 L.J. Q.B. 314
(22)Davidson v. Duncan 7 E & B 231, 26 L.J. (Q.B.) 106
(23)Cook v. Alexander [1973] 3 All E.R. 1037
(24)Sri Surendra Mohanty v. Sri Nabakrishna Choudhoury A.I.R (46) 1958 Orissa 168
(25)R. v. Border Television Ltd., ex p. A.C. (1978) 68 Cr. App. Rep. 375, (1978) Crim.L.R. 221
(26)Attorney General v. Leveller Magazine (1979) 68 Cr. App. R. 43, [1979] 1 All E.R. 745, [1979] 2 W.L.R. 247 (H.L.), [1979] A.C. 440
(27)Johnson v. Grant 1923 S.C. 789
(28)Bluemenfield (1912) 28 T.L.R. 308
(29)Woodgate v. Ridout 4 F & F 202, 176 E.R. 531
(30)Bognuda v. Bawkes Bay Newspapers (1963) N.Z.L.R. 45, 501
(31)Lucas & Son (Nelson Mail) Ltd., v. O'Brien 1978 (2) N.Z.L.R 289 (32) R. v. Clement (1821) 4 B & Ald 218, 106 E.R.918
(33)Re Evening Star (1884) N.Z.L.R. 3 S.C. 8
(34)De Buse v. McCarthy [1942] 1 K.B. 156
(35)Rex v. Rich [1937] 2 K.B. 375
(36)Webb v. Times Publishing Co., [1960] 2 Q.B. 535, [1960] 2 All E.R. 789
(37)King v. Almon (1765) Wilm 243, 97 E.R. 94
(38) Wede v. Robinson 109 C.L.R. 593

(39)Re The Evening News (1880) 1 N.S.W. L.R. 211
(40)R. v. Gray [1900] 2 Q.B. 36, [1900] 3 All. E.R.59
(41)Mc Leod v. St. Aubyn [1899] A.C. 549
(42)Re Vidal, The Times 14th October 1922
(43)R. v. Freeman (1925) Times, 18 November
(44)R. v. New Statesman (Editor) Ex p DPP (1928) 44 T.L.R. 301
(45)R. v. Wilkinson (1930) Times, 16th July
(46)R. v. United Fisherman and Allied Workers' Union (1968) 2 C.C.C. 257, 65 D.L.R. (2d) 579
(47)R. v. Murphy (1969) 4 D.L.R. (3d) 289
(48)Re Borowski (1971) 19 D.L.R. (3d) 537, 3 C.C.C.(2d) 402
(49)A.G. v. Blundell (1942) N.Z.L.R. 287
(50)R. v. Western Printing and Publishing Ltd., (1954) 111 C.C.C. 122
(51)Rex v. Wiseman [1969] N.Z.L.R. 55
(52)A.G. v. Re Goodwin (1969) 70 S.R. (N.S.W.) 413
(53)R v Metropolitan Police Commissioner ex p Blackburn No. 2 [1968] 2 All. E.R. 319, [1968] 2 Q.B. 150
(54)Thalidomide Cases Re (1) and Taylor's Application [1972] 2 Q.B. 369
(55)Attorney General v. B.B.C. [1981] A.C. 303, [1979] 3 W.L.R. 312, [1980] 3 All E.R. 161
(56)The King v. Nicholls (1911) 12 C.L.R. 230
(57)Ambard v. The Attorney General of Trinidad and Tobago [1936] 1 All. E.R. 704, [1936] A.C. 322
(58)Debi Prasad Sharma v. Emperor A.I.R. (36) 1943 P.C. 202
(59)Rule on P.A. Capper (1896) 1 Br. 317
(60)Rule on Armand de Souza (1914) 18 N.L.R. 41.
(61)Rule on Armand de Souza (1914) 18 N.L.R. 33
(62)Rule on Hulugalle (1936) 39 N.L.R. 294
(63)Veerasamy v. Stewart (1941) 42 N.L.R. 481
(64)Perera v. The King (1951) 52 N.L.R. 293
(65)In Re Wickramasinghe (1954) 55 N.L.R. 511
(66)Vidyasagara v. The Queen (1963) 65 N.L.R. 25
(67)M.G. Perera v. A.V. Peiris (1948) 50 N.L.R. 145, [1949] A.C. 1

(68)Cooper v. Union of India A.I.R. (57) 1970 S.C. 1318
(69)Macintosh v. Dun [1908] A.C. 390
(70)Stuart v. Bell [1891] 2 Q.B. 341
(71)Kandoluwe Sumangala v. Mapitigama Dharmarakitta (1908) 11 N.L.R. 195
(72)Re Jayatilaka (1961) 63 N.L.R. 282
(73)James v. Robinson (1963) 109 C.L.R. 593
(74)Read and Huggonson Re (St. James' Evening Post case) (1742) 26 E.R. 683, 2 Atk 469
(75)R. v. New Statesman ex p D.P.P. (1928) 44 T.L.R.301
(76)Badry v. D.P.P. of Mauritius [1982] 3 All E.R.973
(77)The King v. Fletcher Ex p Kisch (1935) 52 C.L.R.248
(78)R. v. Mulgaokar A.I.R. 1978 (S.C.) 727
(79)In Re Subrahmanian A. I. R. (30). 1943 Lahore 329
(80)Sambhu Nath Jah v. Kedar Prasad Sinha A.I.R. (59) 1972 S.C. 1515
(81)Re Bahama Islands [1893] A.C. 138
(82)R. v. Colsey (1931) Times, May 9
(83)Steele v. Brannan (1872) L.R. 7 C.P. 261
(84)R. v. Mary Carlile (1819) 3 B & Ald 167, 106 E.R. 624
(85)Kielly v. Carson 4 Moore's (P.C.) Reports 1841 45 p. 69
(86)Superintendent and Remembrancer of Legal Affairs, Bihar v.Murali Manohar Prasad (1941) 42 Cr. L. Jnl 225, A.I.R. (28) 1941 Patna 185
(87)Metropolitan Music Hall Co. v Lake (1889) 58 L.J. Ch. 513, (1889) 60 LT 749, 5 T.L.R. 329
(88)In re Cornish, Staff v. Gill (1893) 9 TLR 196
(89)Sarat Chandra Biswal v. Surendra Mohanty A.I.R. (56) 1969 Orissa 117
(90)Allbutt v. General Council of Medical Education and Registration (1889) 23 Q.B.D. 400

Rule for an act of contempt of the Honourable Supreme Court.

S. Nadesan Q.C. with Miss *Suriya Wickramasinghe*, *S.H.M. Reeza* and *Kumar Nadesan* for the petitioner.
K.N.Choksy S.A.A.L. with *D.H.N. Jayamaha*, *Harsha Soza*, *Ronald Perera*, Miss *I.R. Rajepakse* and *Nihal Fernando* for the 1st respondent.
Mark Fernando with *M.A. Bastiansz* for the 2nd Respondent.
Shiva Pasupathi S.A.A.L. Attorney-General with *Suri Ratnapala* S.S.C. and *Kalinga Wijewardena* S.C. appeared as *Amicus Curiae*.

Cur. adv. vult.

July 28, 1983.

WANASUNDERA, J.

This is a Rule for an act of contempt of court issued on the 1st respondent, the Editor of the newspaper "Daily News", and the 2nd respondent, the owner, printer and publisher of the newspaper, for jointly and severally printing and publishing in the issue of the Daily News of 7th March , 1983, a news item carried on the front page, prominently displayed under the headings "Select Committee probe of Mr. K.C.E de Alwis' representations" and " F.D.B.'s pleadings prepared in Judge's Chambers?". Prima facie, this news item impeaches the integrity of two judges of this Court and casts the most serious aspersions on their conduct as Judges. No reasonable person can come to any other view. This news item was a verbatim reproduction of a notice of a Motion contained in the Order Paper of Parliament for March 8, 1983, except for two eye-catching head-lines and the introductory paragraphs. The whole of the news item, however, contained no new material other than what was contained in the proposed Resolution.

The alleged contempt was brought to our notice by a petition filed by S.R.K.Hewamanne, an attorney-at-law. On 16th March 1983, in due course, the petition was taken up for hearing in open

court. Mr.Nadesan,Q.C., supported the petition and, after hearing his submissions, the Court was satisfied that a prima facie case was established against the respondents and it thereupon directed the Registrar to issue a Rule on the two respondents. The Court also requested the Attorney-General to appear as amicus and assist the Court at the trial.

On 29th March 1983, when the Rule matter was taken up for trial, the respondents appeared before Court and pleaded not guilty to the charges. Their counsel submitted that they had cause to show against the Rule. On this occasion all counsel present agreed that, having regard to the fact that some of the legal issues that arose for consideration were of great public importance, it was desirable that this matter be heard and disposed of by a larger bench, so that an authoritative decision could be obtained on those issues. In deference to this request the three Judges before whom the matter came up (two of whom are members of the present Divisional Bench) requested the Chief Justice to constitute a larger bench to hear this matter. The present Divisional Bench has assembled consequent to such a direction given by the Chief Justice.

The 1st respondent filed an affidavit, along with a number of annexes, in defence of the charges against him. The case has been tried upon this material, as all counsel indicated that they did not wish to adduce any further evidence. We called upon the respondents to begin.

The submissions of Mr. Choksy, Mr. Mark Fernando, and the Attorney- General, which were to the effect that the offence of contempt cannot be established either on the law or the facts, to a great extent traverse common ground. When these submissions are examined closely, it seems to me

that the Attorney General and Mr.Fernando elaborated and dealt more fully with certain aspects of the matters already outlined or foreshadowed by Mr. Choksy. All these arguments could be summarised broadly as follows:-

(1) By reason of the fundamental right of the freedom of speech and expression guaranteed by the Constitution and its corollary, the corresponding right of the public to know and be informed, the newspapers had a right to bring to the attention of the general public any matter of public interest. Consequently, this right of the public must be given precedence over the law of contempt of court.

(2) In any event, having regard to the provisions of Articles 3 and 4 of the Constitution, which vests in the People both the legal and political sovereignty of the State, the People have a right now to participate actively in the administration of the country, including discussions on the working of the judiciary. Accordingly the law on contempt of court has to be reviewed and modified in the light of this shift of sovereignty to the People, and the public should now be afforded a greater right to critise the judiciary.

(3) The Attorney-General submitted more specifically that, having regard to the practice and principles applicable in the U.K.., (which he said would also apply here), a fair and accurate publication of a document forming part of the proceedings of the House is immune from proceedings for contempt of libel. For this he relied primarily on the decision of *Wason v. Walter* (1) referred to later.

(4) Under the principles of the ordinary law of contempt of court as enunciated in the case law, particularly in more recent U.K. cases the impugned publication would not constitute a contempt of court, since today the courts allow a greater latitude to the public to criticise judges and the administration of justice.

The first submission admits of a short and simple answer. The Supreme Court is the " highest and final superior court of record in the Republic" and has been established by the Constitution. It is vested with a power to punish for contempt and this power is found in Article 105 (3). The law of contempt, which is a concept known to English law was well known in this country from early British times. This English law of contempt, modified to some extent in its application here, was in operation immediately prior to the coming into operation of this 1978 Democratic Socialist Republican Constitution. It had been continued in operation by the earlier Republican Constitution of 1972, which also kept alive the then existing law of contempt of court. Our Constitution has a chapter on fundamental rights, including freedom of speech and expression. Those provisions, if applicable, may have modified probably to some degree the existing law of contempt of court, but in view of the provisions of Article 16, it is not necessary to go into that question in any detail. Article 16, which is one of the Articles contained in the Chapter on Fundamenl Rights, states that :

"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."

The short answer, therefore, to Mr. Choksy's first submission is that the law of contempt of court which had hitherto existed would operate untrammelled by the fundamental right of freedom of speech and expression contained in Article 14.

Even if Article 14 were applicable, Article 14 would be subject to any law made by Parliament relating to contempt of court. I do not think that in any event Article 14 would have been of much avail to Mr. Choksy. Mr. Choksy presented his case with great restraint and even he did not advocate the licence to criticise courts obtaining under the American law based on the fundamental rights should apply here. The Indian courts have rightly refused to follow the American decisions in this regard. But, if Mr. Choksy was contending for the principle that precedence should be given to the freedom of expression as against the due administration of justice, the views expressed in the Indian case law may come as a surprise to him.

Article 19 (1) (a) of the Indian Constitution guarantees to every citizen freedom of speech and expression. This includes the freedom of the Press. Article 19(2) saves existing laws which include the law of contempt, provided such laws are considered reasonable. It would be observed that in India the fundamental right of freedom of expression is directly called into play when one has to deal with the law of contempt.

The Indian courts in a number of decisions have held that the liberty of the freedom of expression and the liberty of the Press should be subordinated to the independence of the judiciary and the proper administration of justice. *Namboodrepad v. Nambiar* (2) *Leo Roy Frey v. R. Prasad* (3), In *State v. Ram Chander* (4), the Court said:

" Freedom of press, liberty of speech and action so far as they do not contravene the law of contempt are to prevail without let or hindrance. But at the same time the maintenance of the dignity of the courts is one of the cardinal principles of the rule of law in a free democratic country and when the criticism which may otherwise be couched in language that appears to be mere criticism results in undermining the dignity of courts and the course of justice in the land, it must be held repugnant and punished. No Court can look on with equanimity on a publication which may have the tendency to interfere with the administration of justice."

These views expressed by the Indian courts are relevant not only in the context of this submission, but also spill over to the other submissions made by the respondent. This brings me then to the second submission on which Mr.Mark Fernando laid great emphasis.

The respondents have argued that, with the shift of sovereignty from the Queen to the People, as found in the present Constitution, the People would now have a supervisory interest over the acts of the Government and of its components; this would include the right of discussion and criticism and would enable the people to participate in the process of Government in a more meaningful way than under any previous Constitution. In particular, Mr Fernando submitted that, since both Parliament and the Supreme Court derived their ultimate authority from the People by virtue of Articles 3 and 4 of the Constitution, they were answerable to the People and that today both the People and Parliament as the People's representatives had a right to be interested in the administration of justice, in a manner and to a measure that did not exist prior to 1972.

The first respondent in the affidavit filed before us has mentioned the appointment of the Special Presidential Commission comprising Justice J.G.T.Weeraratne, Justice S. Sharvananda and Justice K.C.E. de Alwis; the recommendation the Commission had made for imposing civic disabilities on Mrs Sirima Bandaranaike, former Prime Minister and at that time a member of Parliament, and on Felix R. Dias Bandaranaike; the consequent Resolutions in Parliament in imposing such civic disabilities and the expelling of Mrs Sirima Bandaranaike from the House. Those acts the affidivit stated aroused great public interest and were given wide publicity. As a sequel to these events, proceedings against members of the Commission had been instituted in Court by the former Prime Minister and the former Minister of Justice to have these findings invalidated.

Thereafter, on or about 9th July 1982, Mr. Felix R.Dias Bandaranaike instituted proceedings for the issue of a writ of Quo Warranto against Mr Justice K.C.E. de Alwis, a member of the Commission, on the ground that the latter had become disqualified from acting as a member of the Commission by reason of a financial transaction with one A.H.M. Fowzie, a former Mayor of Colombo, whose conduct was a subject of investigation by the Commission. This application was heard by a bench consisting of the Chief Justice, Justice D. Wimalaratne and Justice Percy Colin Thome. The majority- Justices Wimalaratne and Colin Thome - directed the issue of a writ of Quo Warranto against Justice K.C.E. de Alwis, prohibiting him from functioning any further as a member of the Commission.

Subsequently, Justice K.C.E.de Alwis made representations to His Excellency the President alleging bias against himself on the part of Justices Wimalaratne and Percy Colin Thome,and

asked for an inquiry.These events which counsel described as unprecedented aroused further public discussion. The Bar Association had discussed the proposal to appoint a Special Presidential Commission, but expressed objection to the proposal. A Cabinet decision to the effect that the Minister of Justice would move a Resolution in Parliament on 8th March 1983 for the appointment of a Select Committee of Parliament to investigate and report on the allegations made by Mr K.C.E. de Alwis was announced to the press at the weekly Press briefing given by the Minister of State. The proposed motion was included in the Order Paper of Parliament for Tuesday, March 8th, 1983.

In accordance with the prevailing practice of sending copies of Order Papers to Members of Parliament,newspapers, certain officials and institutions (according to a distribution list compiled by the Secretary General), the first print of the Order Paper was delivered to the 2nd respondent on 5th March 1983. It is not claimed that this publication was done under the authority of Parliament.

The 1st respondent states that in view of the public interest and concern in the subject matter its constitutional importance and the people's right to know that such a Resolution was before Parliament, he decided to publish this news item on the front page of the Daily News of 7th March 1983.

The 1st respondent also states that certain of the questions referred to the Select Committee for inquiry and report were already well known to the public. Two new questions had emerged. And accordingly the news item prepared in his office under his direction and supervision gave prominence and emphasis to these two new questions. The 1st respondent states that, since the news

item concerns a pending inquiry, he ensured that the news item was purely factual and did not contain any comments.

Both counsel for the respondents stressed the public interest in the events stated above and elaborated on the right of the public to be informed so that any member of the public, if he so wished, could go to his Member of Parliament and make representations in this matter, which was undoubtedly one of great public importance.

Mr. Nadesan challenged some of the factual statements and submissions. He denied that the news item was published bona fide without an intention to commit contempt of court. All the events which were subsequent to the publication on 7th March 1983 like the debate in Parliament, Mr. Nadesan said, were irrelevant to the issue under consideration, except perhaps as a factor to be considered in imposing punishment. Mr. Nadesan also drew our attention to the wording of the 1st respondent's affidavit and said that though there was an averment that the public were interested in these events, he did not find any express statement to the effect that this publication was for the public benefit or in the interest of the public.

Mr. Nadesan also stated that the mass of material produced by the respondents to show public discussion of these events in the media reveal that Mr. K.C.E. de Alwis had made a general complaint of prejudice and none of the serious and specific allegations now contained in the motion had earlier appeared in the media.The prominent headlines picking out two sensational items had been done by the 1st respondent with full knowledge of its implications so as to give the news item the maximum publicity. He said that counsel for the 1st respondent admitted that one of the allegations

was of a shocking nature and the 1st respondent thought that for that reason it would be a matter in which the public would be greatly interested. Mr.Nadesan also submitted that the argument that this was done in the public interest to enable the public to participate and indicate their views on this matter was a specious argument, because the news item appeared on the day immediately preceding the Parliamentary proceedings and gave hardly any time to the public to make any useful representations. The motion which was reproduced also did not sufficiently indicate the particulars or the evidence supporting the allegations so that it would have been difficult for the general public to be of real assistance in this matter. Further, what was placed before the House was a mere resolution regarding a formal inquiry to be held by a Select Committee on a later date. If representation were permissible at all, the proper authority should be to the Select Committee and the proper time when its sittings began. The affidavit also states that a Select Committee has now commenced sittings on the matter, and we understand that those sittings are being held in camera without publicity.

It seems to me that the people's right to know, upon which the respondents claim the right to publish, has ultimately to be decided as a legal issue upon the interpretation of the Constitution and other applicable legal provisions. How valid then is the respondents' submission that under the present Constitution the public enjoys a greater right than before to discuss, criticise and participate in the administration of justice?

The submission that since 1972 there has been a radical shift of the legal sovereignty of the State from the Queen to the people is undoubtedly well founded. The people in the exercise of their franchise now select the

President (who is the head of the Executive) and also Parliament by direct elections. These two elected representatives of the people therefore exercise the powers of Government by virtue of a mandate periodically given by the people. It therefore follows that the acts and conduct of such representatives must be accountable to the People and this means that they would be subject to criticism and discussion by the People. In fact, modern social and political conditions demand a continuous dialogue between the People and their elected representatives who hold a mandate from them.

How does the Judicature stand in the matter? Even a cursory glance at the Constitution is sufficient to indicate that there are features in the Judicature and in the Administration of Justice which distinguish the courts and judges from other organs of government and other public officers. Mr. Nadesan invited our attention in this connection to the Preamble to the Constitution which is a concise statement of its genesis . This Preamble recites the Mandate given by the People to the founding fathers of the Constitution. It assures to all peoples, FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of Sri Lanka. These principles constitute the basic fundamental rights of the People and were thought by the People to be so valuable and sacrosanct that they were enshrined in the mandate and repeated in bold type in the Preamble. It is significant that both "Justice" and " the Independence of the Judiciary" are given particular emphasis and Mr. Nadesan said that, as far as he is aware, in no other Constitution is the independence of the judiciary emphasised to this degree or given that importance.

When we next examine the body of the Constitution, we see that aspirations of the People for an independent judiciary are given precise legal form and effect. Article 4(c) states that -

> "(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law."

On a plain reading of this provision, it is clear that the judicial power of the People can only be exercised by "judicial officers" as defined in Article 170, except in regard to matters relating to the privileges, immunities and powers of Parliament. I think no counsel before us disputed that these provisions indicate an unmistakable vesting of the judicial power of the People in the judiciary established by or under the Constitution and that Parliament acts as a conduit through which the judicial power of the People passes to the judiciary. Whatever the wording of Article 4 (c) may suggest, there could be little doubt that at the lowest this provision, read with the other provisions, has brought about a functional separation of the judicial power from the other powers in our Constitution and accordingly the domain of judicial power (except the special area carved out for Parliament), has been entrusted solely and exclusively to the judiciary.

One of the cases relied on by both Mr. Nadesan and Mr. Mark Fernando was the judgment of the Privy Council in *Liyanage's case* (5), relating to the separation of powers under the Soulbury Constitution of 1946. In that case the Privy Council observed:-

> "..... But the importance of securing the independence of judges and maintaining the dividing line between the judiciary and the executive (and also, one should add, the legislature) was appreciated by those who framed the Constitution" (see *Bribery Commissioner v. Ranasinghe*) (6) .The Constitution is significantly divided into parts: 'Part 2 The Governor-General', 'Part 3 The Legislature ', 'Part 4 Delimitation of Electoral Districts',' Part 5 The Executive', 'Part 6 The Judicature', 'Part 7 The Public Service', 'Part 8 Finance'. And although no express mention is made of vesting in the Judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a Judicial Service Commission which shall not contain a member of either House but shall be composed of the Chief Justice and a Judge and another person who is or shall have been a judge. Any attempt to influence any decision of the Commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.
>
> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be

vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature."

If we examine the present Constitution the identical features making for a separation of the judiciary from the other organs of the government indicated by the Privy Council are found to be present. We find Chapters VII,VIII and IX are headed, 'The Executive'. Chapter VII relates to the President, Chapter VIII to 'The Cabinet of Ministers' and Chapter IX to 'The Public Service'. Chapter X, XI and XII all deal with the Legislature. Chapter X relates to Parliament, Chapter XI to the Procedure and Powers of the Legislature and Chapter XII to the Amendment of the Constitution. Chapter XV and XVI deal with the Judiciary. Chapter XV is headed ' The Judiciary' and contains a separate section entitled 'Independence of the Judiciary'. Chapter XVI is headed ' The Superior Courts' and contains two parts - one relating to the Supreme Court and the other relating to the Court of Appeal. As under the 1946 Order in Council, we find the provisions for the appointment, transfer and disciplinary control over the minor judiciary vested in an independent Judicial Service Commission consisting of the Chief Justice and two Judges of the Supreme Court. In the Soulbury Constitution, one member could be a retired judge, but today the position is even better. Article 116 states that any interference with the exercise of judicial powers is an offence. Article 107 provides that a judge of the Supreme

Court and the Court of Appeal shall hold office during good behaviour and shall not be removed except by an order of the President, made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present).

These constitutional provisions have established and constituted the Judiciary as one of the three principal organs of the State and have also proceeded to ensure the independence of the judiciary as its essential feature. The peculiar standing and position of judges in our Constitution are very much similar to the position of judges in the U.K. Sir Winston Churchill, in a speech made in the House of Commons when the increase of the salaries of judges was being discussed in the House, described with his characteristic eloquence the unique position the judges occupy in the framework of government. The quotation is taken from a lecture entitled "Independence and Impartiality of Judges" given by Lord Denning at the Faculty of Law Witswatersrand University, S.Africa, and contained in S.A.L.J., page 349;

> "There is nothing like them at all in our island. They are appointed for life. They cannot be dismissed by the executive Government. They cannot be dismissed by the Crown either by the Prerogative or on the advice of Ministers. They have to interpret the law according to their learning and conscience. They are distinguishable from the great officers of State and other servants of the Executive, high or low, and from the leaders of commerce and industry. They are also clearly distinguishable from the holders of less exalted judicial office. Nothing but an address from both Houses of Parliament, assented to by the Crown, can remove them."

Sir Winston continued:

> "The principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the laws passed by Parliament which have received the Royal assent. The judge has not only to do justice between man and man. He also - and this is one of his most important functions considered incomprehensible in some large parts of the world - has to do justice between the citizens and the State . . . The British Judiciary, with its traditions and record, is one of the greatest living assets of our race and people and the independence of the Judiciary is a part of our message to the ever-growing world which is rising so swiftly around us." (M.C.Debates, 23rd March 1954, column 1061)

The proper administration of justice requires judges who are skilled and learned. It is even more important that their decisions are honest and impartial and are arrived at without pressures or interference however slight or from whatever quarter. For, truly, justice must not only be done but it must also appear to be done. Thirdly, the public must have an abiding confidence in the purity of the administration of justice. Apart from the law, it is, I believe, for these reasons that the public generally refrain from indulging in

public discussion of the acts and conduct of judges or do not discuss them to the same degree as other public officers. The Constitution and the State however afford other channels to the public to register their complaints against judges. The Justice Report (1959) under the Chairmanship of Lord Shawcross recommended that the appropriate means of making a bona fide complaint against judges was a letter to the Lord Chancellor or to his member of Parliament.

In *Harrison v. Bush* (7), followed in *R. v. Rule* (8), the defendant, an elector and an inhabitant of a borough, bona fide signed (with other persons) and sent to the Home Secretary, a memorial complaining of the conduct of the plaintiff, a Magistrate for the county in which the borough was situated. It was held that the memorial was privileged. "If" said Lord Campbell, C.J., "Dr. Harrison has so misconducted himself as a Magistrate, he had committed an offence; and it was the duty of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished..... In this land of law and liberty all those who are elected with public authority may be brought to the notice of those who have the power and the duty to inquire into it and to take steps which may prevent the repetition of it."

I would like to digress at this stage to clear a misconception based on a general statement that at one stage appealed to one of my brothers, namely, that proceedings for the removal of a judge should be held in public.This could be misunderstood as an alternate and much narrower way of stating the public interest in this matter, but is really based on an isolated remark made in a case. This general statement is clearly referable to the historical development which led to safeguards being provided in regard to the removal

of judges and does not have the wider connotation now suggested. At one time the Sovereign claimed the right to dismiss judges, who incurred his displeasure, at his will and pleasure. The pleasure principle was contested and replaced by the principle that a judge could only be removed for misconduct.

If the matter remained there it would still have been open to the Executive to remove a judge unjustly on the pretext that the Executive is subjectively satisfied that misconduct has been establised in a given case or by holding some unfair administrative inquiry behind closed doors. As a further safeguard against abuses of this nature, the Constitutions of democratic states now provide for a fair and formal inquiry to be held by an impartial tribunal of the highest level. Generally it is the Legislature itself which will hold this inquiry. Our Constitution framed on these lines provides that a judge could be removed on the ground of proved misbehaviour or incapacity. Vide Article 107(2) of the Constitution:

> "107.(2) Every such judge shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity;
>
> Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one third of the total number of Members of

Parliament and sets out full particulars of the alleged misbehaviour or incapacity."

See also Indian Contempt of Court Act, No. 70 of 1971.

This is the public inquiry the Constitution has in mind, namely, one held by the representatives of the People at the highest level and not by the Executive, and the removal to be decided only after a debate in the House to which the public are generally admitted. In this context it would be far-fetched to argue that each and every member of the public should be afforded an opportunity of directly and actively participating at such an inquiry or that it should be carried out in the open before the public from the beginning to the end. Even if some publicity is permissible from the point charges are framed and even this is debatable -there is no warrant at all for publicity to be given to the preliminary proceedings that lead to the formal inquiry unless there is a prima facie case and the public airing of every complaint, many frivolous and vexatious, can do untold harm to the image of the judiciary.

To resume the discussion on the main issue, namely the freedom of speech in relation to the administration of justice, the following passage from judgments in the U.K. throw considerable light on the problem:

In *Morris v. The Crown Office* (9) Salmon J., said:

"Everyone has the right publicly to protest against anything which displeases him and publicly to proclaim his views, whatever they may be. It does not matter whether there is any reasonable basis for his protest or whether his views are sensible or silly. He can say or write or indeed sing what he likes when he likes and where he likes, provided that in doing so he does not

infringe the rights of others. Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty. The appellants, rightly or wrongly, think that they have a grievance. They are undoubtedly entitled to protest about it, but certainly not in the fashion they have chosen. In an attempt, and a fairly successful attempt to gain publicity for their cause, they have chosen to disrupt the business of the courts and have scornfully trampled on the rights which everyone has in the due administration of justice; and for this they have been very properly punished, so that it may be made plain to all that such conduct will not be tolerated - even by students. The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented (*Skipworth's Case* (10) and *R. v Davies* ,(11). This power to commit for what is inappropriately called 'contempt of court' is sui generis and has from time immemorial reposed in the judge for the protection of the public..... "

The following passage from Lord Simon's opinion in *A.G. v. Times Newspaper* (12), where the matter is approached in terms of fundamental norms is even more persuasive:

The first public interest involved is that of freedom of discussion in democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed of facts and arguments relevant to the decisions. Much of such fact finding and argumentation necessarily has to be conducted vicariously, the public press being the principal instrument. This is the justification for investigative and campaign journalism. Of course it can be abused - but so may anything of value. The law provides some safeguards against abuse; though important ones (such as professional propriety and responsibility) lie outside the law.

" The law as to contempt of court is not one of the legal safeguards against abuse of the public's right (arising from the very necessity of democratic government) to be informed and to hear argument before arriving at a decision. The law of contempt of court is a body of rules which exists to safeguard another, quite different, institution of civilised society. It is the means by which the law vindicates the public interest in due administration of justice - that is, in the resolution of disputes, not by force or by private or public influence, but by independent adjudication in courts of law according to an objective code. The alternative is anarchy (including that feudalistic anarchy which results from arrogation to determine disputes by other than those charged by society to do so in impartial arbitrament according to an objective code).

The objective code may well be defective, either generally or in particular circumstances indeed, since it is a human product, it is inherently likely to be

> defective in at least some circumstances. Its method of application, also being subject to human fallibility, is likely to be less than perfect. Nevertheless it is the essence of the due administration of justice that this objective code should be allowed to be applied by those charged by society with applying it, until it, or its method of application, is duly changed.
>
> The foregoing seems to me to arise from the very nature of the judicial process and its function in society....."

The *Times case* (supra) no doubt, dealt with the narrow point of the pre-judgment of a case by reason of public discussion of the issues of the case. This was found to be wholly objectionable and amounting to a contempt of court. The reasoning is that the public has delegated its decision making to the courts, namely to the trained personnel who man them, and the public has no right to interfere with the acts of the delegate as long as the delegation continues.

Even the Court of Appeal condemned "trial by newspaper" and the difference between the views of the two courts lay not so much in principle but as to where the line should be drawn when a court should say that public discussion beyond that stage will be regarded as damaging. The necessity to look at the matter somewhat narrowly even in the House of Lords is no doubt due to the prevailing attitudes there, where the tendency is to give the widest latitude for public discussion. The same need not apply here.

The House of Lords did however refer to the far-reaching side effects of prejudgment, namely its long term effects of creating a general atmosphere of disrespect for the law and the

courts. If public pressure on pending litigation is considered to be pernicious, how much more desirable is it to avoid any disparagement of the judge himself, who is the controlling element of the whole mechanism. Allegations of dishonesty and impartiality cannot but undermine the very basis of his functions as a judge. The dicta of the House of Lords, though given in relation to the narrow issue of prejudgment, has wider implications and can certainly be called in aid in the present matter.

Let me now look at certain other passages from the judgment of the House of Lords, bearing the above observations in mind. At page 81 Lord Simon added:

> "The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves. The public thus has a permanent interest in the general administration of justice and the general course of the law. This is recognised by justice being openly administered and its proceedings freely reported, by public debate on the law and on its incidence. But, as regards particular litigation, society, through its political and legal institutions, has established the relevant law as a continuing code, and has further established special institutions (courts of law) to make the relevant decisions on the basis of such law. The public at large has delegated its decision making in this sphere to its microcosm, the jury or judge. Since it would be contrary to the system for the remit to be recalled pendente lite, the paramount public interest pendente lite is that the legal proceedings should progress without interference."

The dangers of permitting public discussion of issues before court are elaborated by Lord Reid in the following words:-

> "I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible 'mass media' will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the process of the law could follow and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer..... "

On the same lines we find Justice Frankfurter's powerful dissent in *Bridges v. California* (13) which is also worthy of reproduction:

> "..... A trial is not a ' free trade in ideas' nor is the best test of truth in courtroom ' the power of the thought to get itself accepted in the competition of the market' ... A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws and by age old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and

the protection of liberties which according to the wisdom of the ages can only be enforced and protected by observing such methods and traditions ..... The Fourteenth Amendment does not forbid a State to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humour and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a State may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its natural tracks into the more primitive melees of passion and pressure. The need is great that courts be criticised but just as great that they be allowed to do their duty."

The pernicious impact that public discussion may have on the judicial process in its subjective aspect cannot be discounted. Such public discussion would also engulf the judges and they would find themselves in a position where they would be directly exposed to the passing winds of popular excitement and sentiment. The words of another great American Supreme Court Judge and a Jurist in his own right, Justice Cardozo, exposing this danger, would be pertinent here:

> "Historic liberties and privileges are not to bend from day to day because of some accident of some immediate overwhelming interest which appeals to the feelings and distorts judgment. A country whose judges would be willing to give it whatever law might gratify the impulse of the moment would find that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of statute in accordance with established forms."

The import of these passages is clear. They show that there is a consensus that in the hierarchy of values and principles that sustain a democratic society, preponderance must be given to the proper functioning of the administration of justice, as this is central to the very functioning of the State as a civilized and ordered society. The integrity and impartiality of the judge are basic to the very conception of the administration of justice: Therefore the reasoning in the passages cited is no less valid in the present situation as in the circumstances referred to in those cases. This cannot in any way imply that judges are above the law. Apart from the authorised channels available for making complaints, the law at all times allows fair and temperate comments on decisions and the administration of justice.I am

therefore unable to assent to the proposition that judges and the judiciary should be exposed for wide open discussion by the mass media and the general public. The latter view, I believe, would in the long term be actually counter productive and destructive of the public welfare.

I shall now turn to the third ground set out earlier. Counsel for the respondents and the Attorney-General developed their arguments on the basis that what was published was " a proceeding of Parliament". I take it that in formulating their arguments in terms of this expression, well known in constitutional law, they sought to take advantage of Parliamentary privilege and rely on it as automatically covering this publication. Conceding that the motion is "a proceeding in Parliament", because it concerns the internal business of Parliament with which no outsider can interfere, the question is: Does the privilege of Parliament as expressed in Article 9 of the Bill of Rights 1688 apply to this publication,which has been done outside Parliament and by a person not connected with the House?

The expression "a proceeding of Parliament" is taken from Article 9 of the historic Bill of Rights, which was declaratory of certain important privileges asserted by Parliament and which Parliament managed to wrest from the monarch, not without fierce struggle. The Bill of Rights provided that -

> " ..... freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

As the wording indicates, this confirmed the long-standing claims of Parliament to exclude any outside interference within its walls (Erskine May, 16th Edn, p. 59) and to allow Parliament - meaning

the members individually and the House generally - absolute freedom in the conduct of its business.

But there are acts which may be performed by members or the House falling outside the above category. There could also be acts having some connection with Parliament, performed by outsiders outside the four walls of Parliament, either with the authority of the House or without such authority such as the publication of Parliamentary proceedings. Parliament claimed such a privilege in respect of the publication of parliamentary papers when published by the authority of the House, but this was denied by the courts. In this second phase of its struggle for the recognition of its rights, Parliament came in to collision with courts. It commenced with the encounter in the first *Stockdale v. Hansard case* (14), but fortunately was resolved to a great extent by the enactment of the Parliamentary Papers Act 1840 (3 & 4 Vict. c.9). It should be noted that the privilege claimed was in respect of publications authorised by the House. At no time has the House claimed privilege for publications not authorised by it as in the present case.

A publication of a proceeding in Parliament, using the expression in the widest sense, (technically "speech, debate and proceeding in Parliament" in the Bill of Rights carry different concepts), has to be considered in three aspects for the purpose of any worthwhile discussion. The following break-down would be a convenient method of treatment:

(a) In relation to the privileges of Parliament which should again be dealt under two heads;

i.e. (i) Parliament's sole right to publish or authorise the publication of its

proceedings and to punish as a breach of privilege any transgression of this right.

(ii) The duty of the courts to recognise such a privilege or extended privilege granted by statute.

(b) In relation to ordinary civil proceedings in the courts such as in a libel action between private parties where no privilege as in (a) (ii) exists.

(c) In relation to the offence of contempt of court.

Such discussion would help to place the issue before us in its proper perspective.

In this connection it should be emphasised that a privilege designed for one type of act would not cover a different type of act, e.g., the privilege of freedom of speech and the privilege of publication are two separate privileges.A privilege is restricted strictly to the particular subject matter it is meant to apply to, and any act outside it would not enjoy that protection. Just to give one illustration of this, may I refer to *Mangena v. Edward Lloyd* (15), where Darling, J.,after referring to the Parliamentary Papers Act which protected the printing and distribution of copies of parliamentary papers said: "it gives no protection to people who publish what is in a Blue Book by other means than by printing that is by reading it out at a meeting for example . . . "

As regards (a)(i) above, the existence of such a right must now be accepted. The Resolution of 1971 of the Commons clearly establishes this. Vide also the careful survey of precedents tracing this privilege in the judgment of Chief Justice S.R.Das

of the Indian Supreme Court in *M.S.M.Sharma v. Sri Krishna Sinha* (16). The present practice in the U.K. as regards this privilege is modified by the said Resolution passed in 1971, which, while reciting that right, states that "notwithstanding the resolution of the House on 3rd March , 1762 and other Resolutions, this House will not entertain any complaint of contempt of the House or breach of privilege in respect of the publication of the debates or proceedings of the House or of its Committees except when any such debates or proceedings shall have been conducted with closed doors or in private or when such publication shall have been expressly prohibited by the House." An earlier Resolution to this same effect in May 1875 by Lord Hartington had been rejected by the House. In this connection see our legislation: Parliamentary Privileges & Powers Amendment Act, No. 17 of 1980.

Although this resolution does not amount to an abandonment of this privilege - the resolution can be rescinded by the House at any time - such publications of debates or proceedings by outsiders today would not run the risk of action by the House. This is in so far as Parliamentary privilege is concerned. They may also stand on a steadier ground than before in ordinary litigation before the courts and would justify to some extent the calculated risk the courts took when they viewed such publication as having the toleration, if not the implied authority of the House. This is what Cockburn., C.J. said in *Wason's case* (1).

> "Practically , such publication is sanctioned by Parliament. It is essential to the working of our Parliamentary system and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either House of Parliament ever be so ill-advised as to

prevent its proceedings from being made known to the country - which certainly never will be the case-any publication of its debates made in contravention of its orders would be a matter between the House and the publisher.For the present purpose, we must treat such publication as in every respect lawful and hold that while honestly and faithfully carried on, those who publish them will be free from legal responsibility."

It would be seen that this judgment was therefore based on not too firm a foundation, though it is now accepted as good law. Even the learned Chief Justice was constrained to admit the existence of such a right in Parliament, but hoped that Parliament would be restrained in the exercise of that power or that circumstances would militate against Parliament exercising such a privilege. This flaw in the Chief Justice's reasoning is brought out by Frank Thayer in his book Legal Control of the Press, page 31, apparently written prior to the Resolution of 1971:

"Parliamentary privileges as part of the unwritten English Constitution is the exclusive right of either House to decide what constitutes interference with its duties, its dignity, and its independence. Its power to exclude strangers so as to secure privacy of debate closely follows the right of Parliament to prevent the publication of debates. Attendance at Parliamentary debates and the publication of debates are by sufferance only, although it is now recognized that dissemination of information on debates and Parliamentary proceedings is advantageous to English democracy and, in fact necessary to public safety. By judicial dictum it has been stated that there is a right to publish fair

and accurate reports of Parliamentary debates, but actually the traditional privilege of Parliament continues in conflict with judicial opinion. There is still a standing order forbidding the publication of Parliamentary debates, an order that by custom and the right of sufferance has become practically obsolete; yet the threat of such an order and the possibility of a contempt citation for its abuse, should Parliament deem it advantageous to withhold some particular discussion, serve as check upon careless reporting and distorted comment."

I have already mentioned the enactment of the Parliamentary Papers Act 1840, which came close upon the heels of *Stockdale v. Hansard* (14) in which the courts disputed the privilege of such publication. Halsbury in Laws of England, Vol. 28 (4th Edn), para. 104, sets out the present legal position as follows:

"104. Authorised reports and copies of parliamentary proceedings -

"Without prejudice to any of the privileges of Parliament persons who publish under the direct authority of either House of Parliament have the statutory protection of a summary stay of proceedings, civil or criminal, in respect of reports, papers, votes or proceedings of either House while those who, although not acting under the direct authority of either House publish a correct copy of such reports,papers, votes or proceedings have a somewhat similar statutory protection."

Erskine May deals with this matter in greater detail as follows:

" Privilege does not protect a publisher

publishing a paper presented to Parliament and printed by order of the House (except under the statutory certificate or proofs).- It is no defence, at common law, that defamatory statements have been published by order of the House.

Stockdale v. Hansard (supra). An action against the publisher of a report made to Parliament by a statutory body, and ordered by the House to be printed, succeeded on the ground that defamatory statements in the report were not privileged by virtue of the House's order for printing. In Lord Denman's judgment, a distinction was drawn between what the House may order to be printed for the 'use of its members,' and what may be published and sold 'indiscriminately.'

The controversy between the House and the Court of Queen's Bench, of which this decision forms a part, led to high words on both sides and raised a wider question, as to the relation of courts of law to questions of privilege (see p. 187). But the decision in this case prescribes the limits of the right of the House to publish its proceedings or matters connected therewith, and lays down that, apart from statutory protection, such publication, if defamatory, is actionable unless it is confined to members of the House.

Statutory protection for Parliamentary publication:

By the Parliamentary Papers Act 1840, passed in consequence of the decision of the Court of Queen's Bench in the case of *Stockdale v. Hansard* (supra), it was enacted that proceedings, criminal or civil, against persons for the publication of papers printed by order of either House of Parliament,

shall be immediately stayed, on the production of a certificate, verified by affidavits to the effect such publication is by order of either House of Parliament. Proceedings are also to be stayed, if commenced on account of the publication of a copy of a parliamentary paper, upon the verification of the correctness of such copy; and in proceedings commenced for printing any extract from, or abstract of, a parliamentary report or paper, the defendant may give the report in evidence under the general issue, and prove that his own extract or abstract was published bona fide and without malice; and if such shall be the opinion of the jury, a verdict of not guilty will be entered."

The above is a paraphrase of sections 1, 2 and 3 of the Parliamentary Papers Act 1840. The first two sections appear in substance as section 19 of our own Parliamentary Powers and Privileges Act (Cap. 383), but these sections do not arise for consideration in this case. Section 3 of the U.K. Act is worded as follows:-

> "And ... it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published bona fide and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendants."

Having regard to the intention behind this Act, there is no doubt that sections 1 and 2 are in effect statutory extensions of the absolute privilege of Parliament to the publications concerned. They ordain that all court proceedings should be brought to a halt upon the production of

the required certificate from the relevant Parliamentry officer or upon the required verification being produced. Section 3 is different in kind from the two earlier sections and appears to belong to an altogether different category. It gives a lesser defence of qualified privilege. This section operates on the conduct of the trial,on its procedures and evidence showing that the court will continue to be seized of the case. In short it is not cast in terms of parliamentary privilege at all.The question whether or not this Act applies to ordinary civil and criminal proceedings only, and is not capable of taking in contempt proceedings as argued by Mr. Nadesan, is one that need not be gone into here, as our inquiry is restricted to section 3. Section 3 contains expressions like "evidence under the general issue", and "opinion of the jury".It is evident that such language is singularly inappropriate in the case of summary contempt proceedings. In any event our Parliamentary Powers and Privileges Act (Cap. 383) has deliberately omitted a provision such as section 3 of the U.K. Act. Therefore, whatever be the immunity contained in section 3 of the U.K. Act, no such immunity can be recognised here. The resulting position, as far as the present case is concerned, is that there is no privilege recognised by our law that would protect the impugned publication.

The Attorney-General however relied on the passage from Erskine May at page 80 for the propositions he advanced before us. If he meant to say that the present case dealt with the publication of a proceeding of Parliament and therefore was automatically entitled to parliamentary privilege, I am afraid this passage does not support him. It is reproduced in toto to prevent any misconstruction:

" . . . Consideration must now be given to the principles upon which the publication of reports of Parliamentary debates and proceedings is privileged against actions in courts. Although the privilege of freedom of speech protects what is said in debate in either House, this privilege does not protect the publication of debate outside Parliament. Nor does an order of the House for their printing and publication confer parliamentary privilege on proceedings published outside Parliament. A Member who publishes his speech made in either House separately from the rest of the debate is responsible for any libellous matter it may contain under the common law rules as to defamation of character. But the publication, whether by order of the House or not, of a fair and accurate account of a debate in either House of Parliament is protected by the same principles as that which protects fair reports of proceedings in courts of justice, namely, that the advantage to the public outweighs any disadvantage to individuals unless malice is proved. Statutory protection has been given, by the Parliamentary Papers Act 1840, to papers published by order of either House of Parliament from proceedings in any court of law."

It would be convenient to pause here to refer to a submission made by Mr. Mark Fernando, which appears to be mistaken and a perpetuation of an error made at one time by the English courts. My recollection is that the Attorney-General himself took the same stand. At one time there was a misconception that the parliamentary privilege which safeguarded freedom of speech and debate, gave protection to the publication of such speeches and debates. The argument was simple, namely, that a proceeding of Parliament enjoyed a privilege

whether it took place inside the House or was reported outside the House in the form of a report. In fact, the leading case setting out this view was Lord Kenyon's judgment in *R.V.Wright* (17). This case was strongly relied on by Mr. Fernando in the course of his submissions. But this view was recognised as being clearly erroneous. This becomes apparent from this same quotation from Erskine May, which we continue:

> "The close relation between a proceeding in Parliament, such as a debate, and the publication of that proceeding seems to have misled members of both Houses and the courts into thinking that the same privilege protected both the proceeding and its publication.
>
> In his judgment in *R. v. Wright*.,(supra), Lord Kenyon thought it 'impossible to admit that the proceeding of either of the Houses of Parliament could be a libel' upon which it was afterwards observed that the most learned judge 'here confounds the nature of the composition with the occasion of publishing it' (By Lord Denman in *Stockdale v. Hansard* , (supra). The notion seems to have been either that the privilege attaching to the proceedings themselves was transferred to their publication or that anything which formed part of the proceedings of Parliament became permanently divested of all libellous character. But Lord Kenyon himself decided that a speech which had been made in the House of Lords was not privileged, if published separately from the rest of the debate (*R. v. Lord Abingdon* (18)).In *Stockdale v. Hansard* (supra) in 1837 it had been decided that publication by order of the House did not confer privilege on a paper which had been ordered to lie upon the Table

of the House, and so might be regarded as a proceeding of the House. It was not until 1868 that it occurred to any litigant to bring an action for libel against the publisher of a debate in one of the Houses of Parliament, and, in this case, although the publication was decided to be protected, the principle on which it was protected was held not to be that of parliamentary privilege but the same principle as that on which accurate reports of proceedings in courts of justice are privileged, (see *Wason v. Walter*, (1)).

Once again I would like to interrupt this citation, for it would be pertinent at this stage to emphasise one or two basic matters. It is essential that we bear these distinctions in mind if we are to understand the issues before us. The expression "proceedings of Parliament" bears the widest connotation. Whatever business of Parliament that takes place within the Chamber would undoubtedly enjoy an absolute privilege. Such privilege may be of different kinds. But when we come to matters done or having effect outside the Chamber, a number of different factors come into play, e.g., in regard to the publication of the spoken debates there could be privilege, or extended privilege, qualified privilege or no privilege, as the case may be. In fact, it has been said that if a member publishes his speech made in the House, his printed statement is a separate publication unconnected with any proceeding in Parliament. Then there is the Parliamentary Papers Act which deal with a separate matter altogether, namely the publication of documents or papers on orders of the House and the publication of Parliamentary papers as in the case before us.

Now to proceed with the quotation:

"Privilege does not protect a Member publishing his own speech apart from the rest of a

debate: - If a Member publishes his speech, his printed statement becomes a separate publication unconnected with any proceedings in Parliament.

Abingdon's case, (supra). - An information was filed against Lord Abingdon for a libel. He had accused his attorney of improper professional conduct, in a speech delivered in the House of Lords, which he afterwards published in several newspapers at his own expense. Lord Abingdon pleaded his own case in the Court of King's Bench, and contended that he had a right to print what he had, by the law of Parliament, a right to speak; but Lord Kenyon said, that 'a member of Parliament had certainly a right to publish his speech, but that speech should not be made a vehicle of slander against any individual; if it was, it was a libel.' The court gave judgment that his lordship should be imprisoned for three months, pay a fine of £ 100 and find security for his good behaviour (see *Rex v. Creevey*, (19); *Stockdale v. Hansard*, (supra); *Wason v. Walter* (1)

Creevey's case, (supra)-Mr Creevey, a member of the House of Commons, had made a charge against an individual in the House, and incorrect reports of his speech having appeared in several newspapers, Mr Creevey sent a correct report to the editor of a newspaper, with a request that he would publish it. Upon an information filed against him, the jury found the defendant guilty of libel, and the King's Bench refused an application for a new trial (See Lord Ellenborough's judgment). Mr Creevey, who had been fined £ 100, complained to the House of the proceedings of the King's Bench, but the House refused to admit that there was a breach of privilege (C.J. (1812-13), 604; Parl. Deb. (1812-13) 26 c.898)."

Halsbury's Laws of England, Vol. 28, (4th Edn) para. 103 states the Law in almost the identical manner:

"103.Proceedings in Parliament: Words spoken by a member of Parliament in Parliament are absolutely privileged, and the court has no jurisdiction to entertain an action in respect of them. When Parliament is sitting and statements are made in either House, the member making them is not amenable to the civil or criminal law, even if the statements are false to his knowledge, and a conspiracy to make such statements would not make the members guilty of it amenable to the criminal law. However, this privilege does not extend to a statement published by a member outside the House, even where it is a reproduction of what was said in the House, and made in consequence of the appearance of an incorrect publication in the newspapers; and a letter from a member to a minister, even on a matter of public concern, is probably not entitled to absolute privilege."

With this background in mind I shall now turn to *Wason v. Walter* , (1), on which the Attorney-General placed almost the entire weight of his case. In this case the plaintiff presented a petition to the House of Lords charging a high judicial officer, with having 30 years before made a false statement in order to deceive a Committee of the House of Commons and praying for an inquiry and removal of this officer. There was a debate on this matter and in the course of the debate it was found that the allegations made by the plaintiff were utterly unfounded.

The Times newspaper published a faithful report of this debate.As a sequel,the plaintiff brought an action for libel against the owner of the newspaper. It would be observed that this was a common law action for libel and was not a case of contempt of court. In any event the facts alleged could not have constituted a contempt of court for

a libel on a judge in his personal capacity constitutes a libel and not a contempt. The court in holding the publisher not liable for libel held that the publication should be regarded as privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, namely that the advantage of the publicity to the community at large outweighs any private injury resulting from the publication.

The following two quotations from the judgment (the first cited in all standard texts relating to libel and slander as a correct statement of the law) demonstrate the reasoning behind the decision:-

> " To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged, apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them,more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted."

The court also set out the basis on which publication of judicial proceedings are accorded immunity, namely predominence being given to the public interest as against a limited private interest:

> "it is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals

may incidentally suffer,are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible."

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice, is meant, while by legal malice, as explained by Bayley, J.,in *Bromage v. Prosser* (20),is meant no more than wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise.'The rule,' said Lord Campbell, C.J., in the case of *Taylor - v. Hawkins* (21),'is that if the occasion be such as repels that presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.'

It is thus that in the case of reports of proceedings of courts of justice,though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is

founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great,that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice,it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence,J,in *Rex v. Wright* (supra) namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davidson v. Duncan* (22), Lord Campbell says, 'A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges.The inconvenience therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity.' And Wightman,J, says:- 'The only foundation for the exception

is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to the individuals, though that at times may be great.'

Both the principles on which the exception from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable in the case before us.The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil.We entirely concur with Lawrence, J., in *Rex v. Wright* (supra), that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in parliament."

And again at page 94:

"It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete,all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report,or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon* (supra),and *Rex v. Creevey* (supra),as to such a speech being privileged if bona fide published by a member for the

information of his constituents.But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament."

These passages speak for themselves.They merely set out the principles guiding a court in deciding a libel action between private parties involving the reporting or the publication of a parliamentary debate. At no point has the court thought it necessary to embark on an inquiry as to the existence or the extent or the applicability of the privileges of Parliament or of the powers of the courts in respect of contempt. My understanding of this matter is borne out fully by the judgment of Chief Justice S .R. Das of the Indian Supreme Court in *M. S. M. Sharma v. Sri Krishna Sinha* (supra), where he himself came to the same conclusion. The facts of this case are somewhat complex. It was a case dealing with the privileges of the Bihar Legislative Assembly. At the annual budget debate a member of the Assembly made " one of the bitterest attacks against the way the Chief Minister was conducting the administration of the State".The petitioner who was the editor of a paper published this speech. A member of the Assembly raised the question of a breach of privilege of the House and the matter was referred to the Committee of Privileges. After some delay, the petitioner was served with a notice from the House asking him to show cause why he should not be punished for a breach of privilege. As submitted to us by the Attorney-General, the learned advocate for the petitioner relied on *Wason v. Walter* (1) and contended:

"..... that this decision establishes that the Press had the absolute privilege of publishing a report of the proceedings that take place in Parliament, just as it is entitled to publish a

faithful and correct report of the proceedings of the Courts of justice, though the character of individuals may incidentally suffer and that the publication of such accurate reports is privileged and entails neither criminal nor civil responsibility.This argument overlooks that the question raised and actually decided in that case, as formulated by Cockburn C.J. himself at p.82, was simply this:-

'The main question for our decision is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual,as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question.'

The issue was between the publisher and the person whose character had been attacked. The question of the privilege, as between the House and the newspaper, was not in issue at all. In the next place, the observations relied upon as bearing on the question of privilege of Parliament were not at all necessary for deciding that case, and as Frank Thayer points out at p.32 of his Legal Control of the Press, 'this part of the opinion is purely dictum'.

So much for the decision in *Wason v. Walter*. (1). *Cook v. Alexander*, (23), was another authority relied on by the respondent. It is a case similar in principle to *Wason v. Walter* (1). It relates to the reporting of words spoken in the debate of Parliament. It too does not deal with a publication of parliamentary papers. In fact, Lord Denning begins his judgment as follows:-

"This case raises a point of considerable importance. It is about the reporting of

proceedings in Parliament. It has not come up for full discussion in the courts for over 100 years; that is since *Wason v. Walter* (1)."

The facts of this case are as follows: The plaintiff was a teacher at an approved school and had publicly criticised the school for its excessive severity in the punishment of the students. Consequent to this criticism the Government held an inquiry and the Home Secretary made an order closing the school. This matter came up for discussion in the House of Lords in which the closure order was criticised by the opposition and defended by the Government. Eleven speakers spoke in the debate, lasting over three hours, and the record filled 94 columns of Hansard. One of the main contributions was a speech made by a bishop who condemned the plaintiff in strong terms. A Government spokesman rebutted that criticism calling it "a monument of unfairness".

On the next day the "Daily Telegraph" reported the debate fully in three columns in an inside page of the newspaper. The report gave extracts of all the speeches and was a fair and accurate summary of the debate. There was also on the back page an item in the form of "Parliamentary sketch", i.e. an impression of the debate as the reporter saw and heard it. It was a selective report highlighting certain portions of the debate which the reporter thought would be of special public interest. The sketch gave prominence to the bishop's speech and had an arresting headline and stated that the bishop had made a scathing attack on the plaintiff. There was a passing reference to the rebuttal. This sketch also gave two page references to the inside page which contained the full debate.

The Court of Appeal, following *Wason v. Walter* (1) held that the qualified privilege

enjoyed by a report of proceedings in Parliament in the form of a precis of the words spoken could be extended to a sketch of Parliamentary proceedings if the sketch was made fairly and honestly with the intention of giving an impression of the impact of the proceedings made on the hearer. The importance of this judgment lies on the fact that this was the first time a Parliamentary "sketch" came up for consideration. Lord Denning said:

> "The Parliamentary sketch is thus a different thing from a report of proceedings in Parliament. A report of proceedings in Parliament, as usually understood, is a report of the words spoken in the debate, summarised so as to fit into the space available. In short a precis. Such a report was considered in 1868 in *Wason v. Walter*, (1)"

Lawton, L.J., said:

> "The reporter represents the public in Parliament; he is their eyes and ears: and he has to do his best, using his professional skill to give them a fair and accurate picture of what went on in either the House of Lords or the House of Commons. He cannot report everything that happened; he must from the very nature of things be selective and what he may well find himself alone in answering is the question: Well, if I were a fair minded, reasonable member of the public, what would I have remembered about this debate? He is in my judgment entitled to set out what he remembers."

It would be thus seen that these authorities can be distinguished from the instant case in two important particulars. First, these are cases of libel and not relating to contempt of court and,

second, they deal with the publication of the spoken words in a debate and not with a publication of what is contained in a parliamentary paper or document as in this case. In the context of this matter, I deem it of utmost importance that these distinctions should be borne in mind.

If *Wason v. Walter* (1) and this case have any bearing on the issue before us, it is to show that the protection that was recognised by them to publication of parliamentary proceedings was granted not by virtue of the law of parliamentary privilege or the statutory extension of the privilege, but by principle of the common law, where the judges by analogy extended to the report of parliamentary proceedings, a like protection as obtaining in respect of the publication of judicial proceedings. Apart from that, I have got little assistance from them since they have no real bearing on the actual issue before us.

The foregoing discussion would show that neither the absolute privilege of Parliament nor the extended statutory privilege can have application to this case; nor does *Wason v. Walter* (1) relied on by the Attorney-General carry his case any further. Fortunately for us, there is an Indian decision very much in point - which the respondents tried to brush aside - and other dicta and the opinion of text writers which provide the clearest guidelines for resolving this matter without resorting to the libel cases which were extensively relied on by the respondents.

The libel cases are therefore, in my view, irrelevant and this case could very well be decided without reference to them.However,in deference to the arguments of counsel and having regard to the time taken on the analysis of those cases, I think I owe it to counsel to say something about those

arguments and cases for whatever they are worth.

First, let me deal with the cases that are in point. There is this Indian case *Mohanty v. Nabakrishna Choudhoury*, (24). This case lays down without any hesitation that a fair and accurate publication by a newspaper of a parliamentary debate enjoys no protection if it constitutes a contempt of court. In this case the Chief Minister of Orissa made a statement during proceedings in the Legislature, where he referred to the "immaturity of the High Court" and added that in many instances the Supreme Court had corrected the High Court and also held that the High Court had abused its powers. This debate was published by the 2nd respondent, the editor of the newspaper "Matrubhumi". Both respondents were noticed by the High Court on a charge of contempt.

The main argument was as to whether the Chief Minister was answerable for the speech made in the Legislature. The High Court proceeded on the basis that the contents of the speech amounted, prima facie, to contempt and the issue was whether it was protected by Article 194(2) of the Constitution which provided for privilege of the freedom of speech in the House. It was argued that Articles 194(1) and (2) were subject to the other provisions of the Constitution, in which case an absolute freedom of speech in the Legislature could not have been claimed. The court however held that there was a difference in the wording of Articles 194 (1) and (2) and the Chief Minister was entitled to claim immunity under Article 194(2). The 2nd respondent however was held to have committed contempt of court by publishing that debate. He tendered an unconditional apology.

This case which covers the present situation squarely shows that the publication of a speech made in Parliament - even though immunity attaches

to the speech - can amount to contempt of court, if it contains objectionable material. In answer, the respondents could only say that, since the accused had pleaded guilty, the case had been decided without a discussion of the issue before us. This appears to be a feeble rejoinder. The main part of the case dealing with the privilege of the Legislature had been hotly contested and it seems to me that neither the judge nor the respondent had any doubts or misgivings about the 2nd respondent's culpability.

Next I turn to an English authority *R. v. Border Television Ltd.* (25). In this case the respondents, a television company and a provincial newspaper, were separately charged with contempt of court for publishing information about a criminal trial during its progress, which information was capable of revealing to the jury that the accused had committed other offences. Out of 20 counts the accused had pleaded to four charges on the first day of trial and the trial was continuing on the other charges. The report of the proceedings contained this fact. The Attorney-General moved in the matter and brought this publication to the notice of court as an instance of contempt.

It was argued that a fair, accurate and contemporaneous report of judicial proceedings is privileged and that in the conflict between the public interest in free reporting of judicial proceedings with the private right of the accused, the public interest outweighs the private interest. The Lord Chief Justice said:

> "If it were true that the conflict arising in this case is a conflict between public interest and private interest,then there is ample authority to justify what Mr.Gray had said. Those authorities are very numerous and exceedingly well known. But what is said

> against Mr. Gray's contention is that this is not a conflict between two interests, one of which is public and the other of which is private. In truth this is a conflict in so far as it is a conflict at all, between two public interests and therefore has to be approached as Lord Reid approached a similar problem in what is generally nowadays called the *Thalidomide case*(54) ....."

The Lord Chief Justice concluded:

> "It seems to me they are both public interests and they can both perfectly well be allowed to live together by simply recognising that any action which would be contempt of court is not protected by the fair, accurate and contemporaneous exemption. By that approach the two public interests can be fully served."

The question of contempt of court in relation to the publication of judicial proceedings and also in relation to the privileges of Parliament arose in the famous Colonel "B" episode. The facts are these: Several journalists were charged under the Official Secrets Acts 1911 and 1920. During the committal proceedings, an officer of the Security Services was allowed by the Magistrate to give his evidence anonymously as Colonel "B". Despite this court ruling, three newpapers disclosed the Colonel's name gathered from material produced in court. Proceedings for contempt of court were initiated by the Attorney-General against those newspapers. Before hearings took place,the matter however was the subject of discussion in Parliament. Four members of Parliament referred to Colonel "B" by his correct name in the course of questions on the business of the House. Neither the Speaker nor any member was then aware that the matter was subjudice and therefore no action was taken at that time. The

Speaker, however, later in a statement to the House admitted that the actions of the members were contrary to the subjudice rule. This was also the opinion of the Committee of Privileges which later inquired into this matter.

Some journalists then realised the importance of the members' actions in naming Colonel "B". They wrote to the Director of Public Prosecutions and asked for guidance with regard to the reporting of the day's parliamentary proceedings.They wanted to know whether this would constitute a contempt of court. The Director of Public Prosecutions issued the following statement:

> "The legality of revealing the identity of Colonel "B" is the subject matter of pending proceedings for contempt of court.It is not accepted, despite the naming of the Colonel on the floor of the House of Commons, that the publication of his name would not be a contempt of court even if it was a part of a report of proceedings in the House" (Vide H. C. Debates, Vol. 948 col. 812).

Since this statement dealt with a publication of Parliamentary proceedings some members of the House thought that the Director of Public Prosecutions has sought to interfere with a matter concerning Parliament.Accordingly,a member raised a question of Privilege in Parliament. After various motions were tabled on this matter, the Leader of the House on May 2, 1978, moved "that the matter of publication of the Proceedings of the House, other than by order of the House, in so far as the Privileges of the House are concerned, and the matter of the application of the subjudice rule.....should be referred to a Committee of Privileges." This was agreed upon and the Committee of Privileges made an initial report. It held that

the statement of the Director of Public Prosecutions did not violate the privileges of Parliament.

The contempt proceedings initiated by the Attorney-General in the Colonel "B" matter against the newspapers and journals ended in a conviction.An appeal was however taken to the House of Lords.Vide *Attorney-General v. Leveller Magazine* (26).The House of Lords allowed the appeal because the circumstances showed that whatever ruling the court had given to conceal the identity of Colonel "B" had later been impliedly abandoned and therefore the publication of his identity would not amount to an interference with the administration of justice.

Lord Diplock in an illuminating judgment set out the basic principles that should apply to a case such as that.His judgment includes all types of contempt and the words "comment or information that has a tendency to pervert the course of justice.....by deterring other people from having recourse to courts of justice in the future for the vindication of their lawful rights", are meant to include the contempt of scandalising the court by imputing dishonesty or partiality to a court.What this decision clearly holds is that a fair and impartial report of a proceeding of court does not necessarily give complete immunity but is subject to the principles of contempt of court.That is the principle contended for by Mr. Nadesan and denied by the respondents. The following excerpts from the judgment bear out this position:-

Lord Edmund-Davies stated the law as follows at page 362:

> ".....The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here

concerned.....The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice .....It is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamantal supremacy of the law which is challenged (*Johnson v. Grant*, (27), per Lord President Clyde,at p.790).When contempt is alleged the Courts have for generations found themselves called upon to tread a judicial tightrope, for, as Phillimore J. put it in *Blumenfeld* (28) at p. 311: 'The court had to reconcile two things namely, the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried. The only way in which the court could save both was to refuse an unlimited extension of either right.It became, then, a question of degree.' This dilemma most frequently arises in relation to Press and other reports of court proceedings, for the public interest inherent in their being fairly and accurately reported is of great constitutional importance and should never lead to punitive action unless, despite their factual accuracy, they nevertheless threaten or prejudice the due administration of justice."

Lord Scarman said in his succinct manner at page 370:

"My Lords, when an application is made to commit for contempt of court a journalist or editor for the publication of information relating to the proceedings of a court, freedom of speech and the public nature of justice are at once put at risk. The general rule of our law is clear. No one shall be punished for publishing such information

unless it can be established to the satisfaction of the Court to whom the application is made that the publication constitutes an interference with the administration of justice either in the particular case to which the publication relates or generally....."

I now come to consider the views of text writers. Gatley, on Libel and Slander at page 317, states:

"735. The administration of justice:- 'The due administration of justice is undoubtedly a matter of public interest, and therefore fair matter for public comment. Not only the proceedings at the trial, but also the conduct and decision of the judge, and the verdict of the jury, are matters of public interest and may be lawfully commented on as soon as the trial is over....."

As a footnote to the above (footnote 78) he observes:

"It is of the utmost importance to distinguish three separate questions. The first is: what comments on the administration of justice are fair comments on a matter of public interest, so as to fall within the defence of fair comment in a defamation action? The second is: what reports or comments may be made on the administration of justice without committing a contempt of court? The third, which is dealt with in secs. 592 et seq.is: what proceedings are such that fair and accurate reports of them are privileged ?

While the questions are separate, it may

be of importance to consider whether a publication is a contempt in deciding whether it is privileged or a fair comment. There appears to be no direct authority as to whether a publication which is a contempt of court can be a fair comment on a matter of public interest. In a case in which the publication complained of is a contempt, because of the possible prejudice to the person defamed it is difficult to see how the comment can be fair in relation to him though it might be in relation to another. However *Woodgate v.Ridout*,(29),where Cockburn, C.J., seems to have suggested that a publication might be a fair comment even if the writer was taking on himself to dictate what the judgment of the court should be, which is at least close to contempt. Where a comment is on proceedings, which it would be a contempt of court or contrary to a statutory prohibition to report it, it is submitted that such proceedings are not a matter of public interest for this purpose, though the decision of a court to restrict publication must be a matter on which it is legitimate to comment. See Sec.596 n.28 for contempt and privilege."

These observations had been made before the decision in *R. v. Border Television Ltd.* (supra) This decision now substantiates those observations.

The law of libel itself contains certain limitations in the exercise of this privilege. These are most significant and are set out in Gatley at page 253:

"596. Limits of privilege:- It is obvious that, as the (common law) privilege is founded upon grounds of public policy, and of benefit and advantage to the community, it does not extend to protecting any report, however fair

and accurate, which is blasphemous, seditious or immoral,or prohibited by statute or by any rule or order having statutory force,or by order of the court or a judge prohibiting a report of the proceedings in any case where the publication of such report would interfere with the course of justice. "

Footnote 28 to this passage contains the following:-

"..... .See also *Bognuda v. Bawkes Bay Newspapers*,(30), where the defendants proved that an order restricting publication of the matter complained of was made without jurisdiction, so that the publication was privileged. It is submitted that there can be no privilege for a report, the publication of which is a contempt of court: see sec. 735, n. 78. This was conceded in *Lucas & Son v. O' Brien*, (31), though an exception was said to be possible."

Halsbury's Laws of England, Vol.28, (4th Edn) Para.119, page 61, virtually echoes the statements contained in Gatley referred to above. Halsbury states:

"119.Reports of judicial, parliamentary and other proceedings. The publication of a fair and accurate report of judicial proceedings taking place before a properly constituted judicial tribunal sitting in open court is privileged, and no action lies at common law in respect of the publication in the report unless malice is established. This common law privilege is not confined to judicial reports but extends to reports of proceedings in Parliament and of other public proceedings where the publication is for the common

convenience and welfare of society,that is in the public interest. The privilege is not confined to reports published in a newspaper or to reports published contemporaneously; every person has the protection of the privilege if he publishes the report merely to inform the public.

Being directed to the public interest, the common law privilege will not protect any report that is blasphemous, seditious or obscene,or which is prohibited by statute or by the order of a court or of a judge. Since the ground of the common law privilege is that the public is entitled to be present at the proceedings and therefore to be informed of what took place, the privilege does not extend to reports of proceedings at which the public is not entitled to be present, such as proceedings at common law in certain domestic tribunals or arbitrations. The publication of reports of pleadings or evidence while proceedings are pending may constitute a contempt of court, as also will the publication of a report of proceedings before any court sitting in private concerned with the exercise of its jurisdiction over infants or mentally disordered persons,or where the information reported relates to a secret process,discovery or invitation in issue in the proceedings.

Note 9:-Publication when prohibited by court order constitutes a contempt of court: *R. v. Clement*(32).Where such an order is made by a court in relation to proceedings held in private, breach of the order will be a contempt of court: see the Administration of Justice Act 1960, s.12(1)(c).See also *A.G. v. Leveller Magazine* (supra).

There are two other references which are

valuable. The first is an article by Patricia M. Leopold, entitled "Freedom of Speech in Parliament on 1981 Public Law". At page 45, after referring to *Wason v. Walter*, (supra) she says:

> "This means garbled or partial reports will not be entitled to claim qualified privilege nor will those which are blasphemous, seditious, amounting to a contempt of court or are otherwise prohibited be law."

In footnote 69 appearing on the same page relating to the item of contempt of court, she says:

> "See *R. v. Border Television ex p Att-Gen.* (supra), where the Divisional Court held that a fair and accurate report of a court proceeding could still amount to a contempt of court."

The other reference is to the famous Colonel "B" affair.

If we are to have regard to those limitations, then it seems to me that not only has the unfettered right claimed by the respondents to publish judicial proceedings and particularly Parliamentary proceedings not been substantiated, but even on the analogy of slander and defamation cases such an immunity cannot be conceded. But on the other hand, both principle and authority seem to indicate that the offence of contempt of court can be committed in respect of the publication of judicial or parliamentary proceedings.

These citations, it would be seen, are supported by case law set out in the footnote. Mr.Mark Fernando sought to distinguish some of the cases. No doubt some of them are based on statutory provisions, yet others clearly lay down that qualified privilege would not be granted in cases

where the publication is of any matter which the law has prohibited; or if the publication of the proceedings would be incompatible with or would frustrate those very proceedings. This must surely include the case of contempt of court. In the light of what I have been saying, I do not think Mr. Fernando has succeeded in showing that those decisions and the views of text writers are in any way unsound or invalid.

Mr. Nadesan has been able to secure for us a copy of the judgment in the New Zealand case, *Lucas & Son (Nelson Mail) Ltd. v. O'Brien*,(supra), mentioned in the footnote No.28 at Gately,pages 253-254, after the arguments were concluded. This case appears to support the observation made by the learned author, that a publication amounting to contempt is not entitled to immunity.

In this case, O'Brien, a member of the Social Credit Political League, resigned and became the leader of the New Democrat Party. The League commenced an action against O'Brien for misuse of its assets. The Nelson Mail published an article which was in substance the repetition of the statement of claim filed in the Supreme Court Registry. O'Brien sued the Nelson Mail for defamation. The League was also joined as a defendant on the ground that it was the League which had furnished the copy of the statement of claim to the newspaper for publication.The defendants pleaded qualified privilege on four grounds, which included the following :-

> (a) There was a social and moral duty to communicate or publish the subject-matter to the general public by reason of the corresponding interest in the public to receive it.

(b) That the publication was a fair and accurate report of the proceedings and of the record of court.

Under the procedures obtaining in New Zealand, the court had an inherent jurisdiction to strike out pleadings which were frivolous or vexatious. On the application of O'Brien the Supreme Court struck out all four pleas of qualified privilege that the defendants had raised.The defendants appealed to the Court of Appeal. The Court of Appeal allowed the appeal on only one ground, namely, that the defendants should not be deprived of having issue (a) above decided at the trial. The court dismissed the other grounds of appeal. The Supreme Court had erroneously thought the considerations of public interest could not justify the grant of qualified privilege unless the publication of the contents of the statement also attracted privilege as a fair and accurate report of a judical proceeding. The Court of Appeal took the view that there was no such relationship between the two and that the two defences were entitled to stand independently of each other.

Although this was said, the Court gives an indication that if the statements published amount to a contempt of court, then different consideration would apply. The relevant passage in the judgment is as follows:-

"Another matter referred to by Ongley, J., was the possibility that the publication of the contents of the statement of claim amounted to a contempt of court. The judge referred to the case of *Re Evening Star* (33). In that case Williams, J., held that the publication of the contents of a statement of claim amounted to a contempt of court in the particular

circumstances there disclosed. After citing a passage from the judgment in that case, Ongley, J., observed -

'It would be surprising if statements that might amount to contempt for the reasons outlined by William, J. could at the same time be privileged for reasons of public policy in an action of defamation.'

However the judge did not go so far as to hold that the publication of the statement of claim in the present case actually amounted to a contempt of court. In argument before us Mr. Eichelbaum conceded that if it did then its publication could not be the subject of qualified privilege on the basis of a moral or social duty as claimed. It is possible that a situation could arise in which it would be necessary for the court to balance the ordinary interests of a litigant to a fair trial against some other consideration of general public interest and to decide where the overall public interest lay. However in view of the concession made by Mr. Eichelbaum there is no need to discuss that question any further. I do not understand Williams, J. to have decided in the *Evening Star Case* that the publication of a statement of claim must necessarily amount to a contempt of court."

Although the facts of this case deal more with procedural matters, the brief discussion of a plea of qualified privilege in relation to contempt of court, though inconclusive because of the concession, helps to throw some light on the problem. There is much to be said for the reasoning of the New Zealand Supreme Court on this issue. To take an example, if a court expressly prohibits the publication of certain proceedings of court, a publication in violation of this order would amount to a contempt of court. If the publication also contains defamatory matter concerning some individual, that would prima facie give rise to a

claim for damages. In a libel action brought by the defamed person, would it be reasonable to permit a defence of public interest to the publisher who has broken the law? Would it be in the public interest to shield a person who has defied a court order? Surely the answers must be "No". Would it not be in the wider interest of the community to ensure the proper functioning of the courts rather than condone an illegality? How could the publication of matter reflecting adversely on the administration of justice and amounting to a contempt of court be said to be in the public interest and be entitled to the benefit of the defence of privilege ? Both the courts and text writers have approached the matter on these lines.

Gatley has stated that a person would be disentitled to such protection when the report is a garbled one or is partial or of detached parts of proceedings. This is another aspect of the matter. It has been submitted that in the present case what was given publicity was a mere motion which was to be moved in Parliament for the setting up of a Select Committee which would at some future date inquire into some allegations.

In *De Buse v. McCarthy*',(34),the defendant, a clerk, set out a notice convening a meeting of the defendant borough council to consider inter alia,the report of a committee of the council regarding a loss of petrol from a council's depot. A long agenda of business was attached to the notice and copy of the report of the committee. The notice was not only affixed to the door of the town hall,but as directed by the council and in accordance with established practice, copies were also sent to each of the public libraries in the borough. Four employees who claimed that the report was defamatory brought the action.The defendant pleaded that the notices were sent to the libraries under the implied power given by a statute and in discharge of the duty imposed

on them. Alternatively they pleaded that they and the rate payers had a common interest in the subject-matter and it was the duty of the council and it was reasonably necessary and proper for it in the course of its business to publish the words to the rate payers. Lord Greene, M.R., said:

> "I cannot see that it can possibly be said that the council was under any duty to make that communication to the rate payers. At that stage the matter was, in a sense, subjudice, because the committee's report by itself could have no practical value unless and until it has been considered by the council and the council had come to some decision on it. That decision might have been that the report be adopted, or that the report be not adopted or that the report be referred back to the committee .The appointment of committees of this kind is part of the internal management and administration of a body of this description and, whatever the duty or the interest of the council might have been after it had dealt with the report and come to some decision on it, I cannot see that at that stage in the operation of the machinery of the borough's administration that there was any duty whatsoever to tell the rate payers how the wheels were going round. There may well have been a duty or if not a duty at any rate an interest of the council to inform the rate payers of the result of its own deliberations."

Du Parq, L.J., distinguished *Rex v. Rich* (35) where the defendant, honestly believing in his statement, made a complaint to his member of Parliament with the object of acquainting the Home Secretary. Lord Du Parq said:

> "To find an analogy to the present case one

would have to assume, if such an assumption might be made without any reflection on members of Parliament, that a member of Parliament who received such information from a constituent were to say: 'It is to my interest to show how vigilant I am in all that concerns my constituency' and to further that interest were to read out to a meeting of electors the highly defamatory statements which had been handed to him for transmission to the Secretary of State. I cannot imagine any court holding in such a case that a legitimate interest was being furthered or protected by the member of Parliament."

These cases to some extent support Mr. Nadesan's submission in regard to the averments in the respondents' affidavit.

Before I proceed to the last point, there are a few miscellaneous matters to be disposed of. The first is a caution and the need to remember that the law of libel in the U.K. is to some extent governed by Statute Law. These statutory provisions are the Libel Amendment Act 1888 and the Defamation Act 1952. These provisions must undoubtedly affect the thinking of the courts even in the case of a libel arising from a publication of a parliamentary debate or report. The libel cases therefore have to be read with that reservation.

The next matter relates to the submission made by Mr. Nadesan to the effect that the basic principle behind the libel case decisions is not applicable in the case of contempt of court. In *Webb v. Times Publishing Co.* (36), which was a libel case, Pearson, J., had given five reasons for recognising the public interest involved in the publication. They are:

(1) The fact that court proceedings are open to the public.

(2) The administration of justice is a matter of public concern.
(3) The necessity for the education of the public on such matters.
(4) The desirability of having fair and accurate reports rather than go by rumours.
(5) "Most important, there is called the balancing operation, balancing the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed."

Mr. Nadesan contended that at least one of those items, namely (5) above, would not hold good if we were to consider the publication of proceedings of a court of justice amounting to contempt of court or to any prohibited matters which deal not with private rights but with the larger public interest.

The texts are very clear that the privilege will not extend, however fair and accurate, to the matters which are blasphemous, seditious, immoral, etc. These are essentially public matters and the publication of such matters, far from being for the public interest, would be against the public welfare. I think the distinction made by Mr. Nadesan is a valid one and the reasoning in the libel cases which deal with harm to an individual cannot hold good when we are confronted with the case of a larger public interest as in a matter of contempt. The principles set out in the cases cited by the respondents therefore do not in themselves solve or throw any real light on the present problem.

There is also one other matter. We were given the benefit of Mr.Mark Fernando's researches when he referred us to an interesting monograph in 24 L.Q.R.184 - The History of Contempt of Court by Sir John Fox - and sought to argue that because of

a common origin, these two topics should be treated identically by the court.It does not appear to me that this scholarly article proves that libel and contempt of court are identical, although there may be some similarity between criminal libel and contempt, since they are both of a criminal nature and originated from the incipient criminal law. What the article does show is how the courts began to assume a power to proceed in a summary mode by way of attachment for contempt committed out of court, which they did not originally possess. The foundation of this jurisdiction is Wilmot, J's judgment in *Almon's case* (37), whatever be the historical origins.

Borrie and Lowe - The Law of Contempt , 255 - dealing with Fox's article. makes the following comment:

> "In reaching the conclusion that the summary process was applicable in cases of constructive contempt, Wilmot , J. relied not upon specific authority but upon the general point that the jurisdiction to proceed summarily 'stands upon the very same foundation and basis as trial by jury do - immemorial usage and practice.' Although this historical assessment has never been challenged in subsequent English decisions, a fine piece of scholarly research by Sir John Fox has seriously challenged the historical validity of Wilmot , J's opinion and it now seems to be accepted that Wilmot,J. was wrong in saying that constructive contempts had always been tried summarily. However in view of the fact the practice, which has been repeatedly followed over the last 200 years is now too firmly established to be overruled judicially, masterly though Sir John Fox's research may have been, it can now only be a

matter of academic interest. As Mr. Justice Frankfurter commented in an American decision-

'the fact that scholarly research has shown that historical assumptions regarding the procedure for punishment of contempts were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumption.'

Such a comment seems to be particularly appropriate with regard to the position in England." (Vide also *Wede v. Robinson* (38)).

The present basis on which the law of contempt is operated is undoubtedly *Almon's case* (supra) and in disposing of Mr.Mark Fernando's argument we have also to conclude that the law of contempt has now reached the stage when it has to be regarded as a separate branch of law carrying with it its own principles and procedures.

While there could be some analogy between cases of contempt of court and breaches of privileges of Parliament, it would be difficult and incorrect to equate cases of contempt of court to cases of defamation or slander. Although some common features are noticeable, they are basically rooted in different principles and constitute different branches of law .While defamation is a matter of private rights and private law, contempt is an offence of a public nature. More particularly defamation belongs to the branch of law known as torts and is governed by the Roman-Dutch law. It involves a transgression of a private right giving rise to a claim for damages. Criminal contempt was orginally a misdemeanour and contains a strong public policy element. The applicable law in this country in the case of contempt is the English law. Libel actions also admit of well recognised

defences such as justification, truth, fair comment, etc. But in the case of contempt by scandalising the court, the authorities indicate that no such defences are permitted. The offence of scandalising the court seems to be in the nature of an absolute offence involving strict liability.

From the foregoing it must be accepted that there is a difference in kind and forms of action between contempt of court and an ordinary libel action. It would be sufficient for the present if we regard a libel action as one relating to private rights as against the offence of contempt which relates to a public matter, namely, the administration of justice.

I now turn to the last ground urged by the respondents. The particular branch of the law of contempt we are now concerned with is called "scandalising the court". Its object is to protect the administration of justice and to preserve public confidence in the system of justice. There are many different ways in which this offence can be committed. Wilmot, J., in the celebrated *Almon's* case, (supra), observed of this type of contempt:

> 'It excited in the minds of the people a general dissatisfaction with all judicial determinations,and indisposes their minds to obey them and whenever men's allegiance to the law is fundamentally shaken, it is the most fatal and most dangerous obstruction of justice and in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; nor for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people.To be impartial,and to be universally thought so, are both absolutely necessary."

Lord Denning more recently has said in "The Road to Justice (1955)":

> "The judges must of course be impartial; but it is equally important that they should be known by all people to be impartial. If they should be labelled by traducers, so that people lost faith in them, the whole administration of justice would suffer. It is for this reason that scandalising a judge is held to be a great contempt and punishable by fine and imprisonment."

Again, referring to the contempt of scandalising the court, Barrie and Lowe in "The Law of Contempt" states that-

> "The necessity for this brand of contempt lies in the idea that without well regulated laws a civilized community cannot survive. It is therefore most important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined, and the law itself would fall into disrepute."

These same ideas have been given expression to by Sir James Martin, C.J., in *Re The Evening News Newspaper*, (39), as follows :-

"What are such courts but the embodied force of the community whose rights they are appointed to protect? They are not associations of a few individuals claiming on their own personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this whatever may be thought of the separate members comprising it is the accepted and recognised

tribunal for the maintenance of the collective authority of the entire community..... it derives its force from the knowledge that it has the whole powers of the community at its back. This is a power unseen but it is efficacious and irresistible and on its maintenance depends the security of the public."

But for an accurate legal definition of the offence, we could rely on the oft quoted statement of Lord Russel of Kilowen in *R v. Gray* (40):

> Any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority is a contempt of court."

At one time it was thought that the prosecution for the contempt of scandalising the court was obsolete. In *McLeod v. St. Aubyn* (41), Lord Morris said:

> "It is a summary process and should be used only from a sense of duty and under pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of court by scandalising the court itself have become obsolete in this country.Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of respect for the court."

Lord Morris' statement about the offence of scandalising the court being obsolete in England

was disproved in the following year in *R v. Gray* (supra), when the editor of the Birmingham Daily Argus was found guilty and punished for publishing an article which was described in the court as "personal scurrilous abuse of a judge as a judge."

It has been contended by the respondents that judges and their work are open to fair criticism and since the news item concerned does not go beyond those bounds and relates to a matter of public interest and concern, no contempt had been committed by its publication. I shall now proceed to examine the authorities cited by counsel, starting with the English cases, to ascertain whether or not the impugned news item does not amount to a contempt according to the principles laid down in these cases.

In *Re Vidal* ,(42),the respondent, dissatisfied with a judgment of the President of the Probates Division and Admiralty Division, paraded before the court house carrying a sandwich board bearing the words: "Is Judge Sir Henry Duke afraid to prosecute me ? I accuse him to be a traitor to his duty and of defrauding the course of justice for the benefit of the Kissing Doctor". This was described as "scurrilous abuse of the worst description" and the offender was found guilty of contempt. In *R. v. Freeman* (43),the respondent was found guilty of scandalising the court for sending an abusive letter to the judge. In the *New Statesman, ex parte, D.P.P.* (44), the famous Dr. Marie Stopes, an early advocate of birth control, was sued for libel by the editor of the Morning Post and damages were awarded against her. The New Statesman thereafter published an article suggesting that Justice Avory who heard the case had allowed his religious convictions as a Roman Catholic to prejudice his summing-up. The article concluded with the statement: "The serious point in this case however is that an individual owning to

such views as those of Dr.Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory - and there are so many Avorys". This was held to be a contempt. In *R. v. Wilkinson* (45), the editor of the magazine "Truth" was found guilty of contempt for publishing the following:-

> "Lord Justice Slesser who can hardly be altogether unbiased about legislation of this type maintained that really it was a very nice provisional order or as good as one can be expected in this 'vale of tears'."

The imputation made was that Slesser, L.J., when he was Solicitor General, had steered the relevant legislation through Parliament.

The following cases from the Dominions also show that the offence of contempt by scandalising the court is very much alive and far from obsolete in those countries. In *R. v. United Fisherman and Allied Workers' Union* ,(46),the Court of Appeal of Columbia upheld convictions for contempt on a trade union and its officers for publicly initiating a vote as to whether the union should comply with a court order. Again in In *R. v. Murphy* , (47), an article in a newspaper run by students at the University of New Brunswick contained an attack on the judge in a particular case and also contained a general accusation worded as follows:-

> "The courts in New Brunswick are simply the instruments of the corporate elite. Their duty is not so much to make just decisions as to make right decisions (i.e. decisions that will further perpetuate the elite which controls and rewards them.)Court appointments are political appointments. Only the naive would reject the notion that an individual becomes a justice or judge after he proves his worth to the establishment."

This was held to amount to a contempt of court. In *Re Borowaki*, (48), the Canadian Minister of Transport of Manitoba was found guilty for imputing political bias to a Magistrate. He had also used language about the Magistrate which the Court held to be "unbelievably outrageous".

In *A.G. v. Blundell*, (49), where the President of the New Zealand Labour Party said that "he had never known the Supreme Court to give a decision in favour of the workers where it could possibly avoid it",. Myres, C.J., held that this was a contempt. In *R. v. Western Printing and Publishing Ltd.*, (50), a newspaper contained the following passage:-

> "The stern warning intoned earlier in the week by the Chief Justice and his colleagues taking the St.John's press and radio to task for publicising the *Valdamanus' case*, has a faint tinge of the iron curtain to it. It is intimidation of the most blatant variety (the shut up-or-else type, that is). After reading the article to which the eminent jurists objected,the finding them in my opinion quite innocent of anything that might tend to prejudice a fair trial,I can only assume the admonition was another move in the "jump-on-the press" campaign. The next step will be the seizure and shut down of all the island's papers (except one) a la Juan Peron."

Walsh, C.J. held that this article amounted to contempt.

In *Rex v. Wiseman*, (51), allegations were made in writing by a solicitor that during a previous case certain judges had been guilty of forgery,fabricating evidence and showing partiality. This was held to be contempt. In *A.G. v. Re Goodwin*, (52), in an action for malicious

prosecution the respondent was criticised by the trial judge. Thereupon the respondent wrote to the Attorney-General and a number of Registrars of the local district courts, questioning whether the judge was a suitable person to be a judge, and imputing ulterior motives to him. This was held to be a contempt.

It is now necessary to consider some of the recent developments in the U.K. relating to contempt of court.The Phillimore Committee Report 1974 noted that a change of attitude had quietly taken place in regard to the offence of scandalising the court and once again a more liberal attitude to such contempts was in evidence. The Committee said:

> "Criticism has become more forthright in recent years especially since the creation of the National Industrial Relations Court. Things have been said and published about the Court and its President which could undoubtedly have been made the subject of proceedings for contempt. For example,in one publication it was stated as a fact that the judge had conferred in private with one party to proceedings with a view to advising them about the next step to take. Although this was untrue and a gross contempt, no proceedings were instituted.
>
> Most attacks of this kind are best ignored. They usually come from disappointed litigants or their friends.To take proceedings in respect of them would merely give them greater publicity and a platform from which the persons concerned could air their views further. Moreover the climate of opinion nowadays is more free. Authority including the courts is questioned and scrutinised more than it used to be. The Lord Chief Justice

said in his evidence to us:

> 'Judges' backs have got to be a good deal broader than they were thought to be years ago.'

It is no doubt because of this and in pursuance of the spirit of Lord Atkin's direction that practice has reverted to what it was before the turn of the century when it was said that -

> 'Courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous to them.'

We feel that the time has come to bring the law into line with this practice."

Here we see the oscillation of the law from one extreme to another. For a period of over 75 years in the recent past, judges have shown a marked sensitivity to public criticism; but today they are inclined to a more liberal attitude.

Even the Phillimore Committee did not recommend the doing away of this class of contempt which was thought at the turn of the century to be obsolete in the U.K. The Committee recommended that this branch of the law of contempt should be replaced by a new and strictly defined criminal offence triable on indictment as in the case of ordinary offences.

In *Regina v. Commissioner of Police, ex parte Blackburn* (53), Quintin Hogg,, Q.C., M.P., published an article in "Punch" in which he vigorously criticised the Court of Appeal and incorrectly attributed to the Court of Appeal decisions which were in fact decisions of the Queen's Bench Division. He had written inter alia

that the Gaming Act was "rendered virtually unworkable by the unrealistic contradictory and in the leading case,erroneous decisions of the courts including the Court of Appeal." He also ridiculed the court by suggesting that the court should apologise for the expense and trouble to which the court had put the police and criticised the strictures passed by the court on lawyers, Parliament, and Police, when the mistakes were on the part of the court itself.The Court of Appeal in a restrained and dignified judgment held that this does not amount to contempt of court. In fairness to Mr Hogg, it may be said that the article did not contain any imputation of partiality or corruption to the court.Probably in a less permissive era, this article may have run a grave risk of being on the wrong side of the law. Lord Denning said:

> "It is the right of every man, in Parliament, or out of it in the Press or over the broadcast to make fair comment, even outspoken comment on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken and our decisions erroneous whether they are subject to appeal or not."

Lord Salmon said:

> "It follows that no criticism of a judgment, however vigorous can amount to contempt of court provided it keeps within the limits of reasonable courtesy and good faith."

Both Mr Choksy and the Attorney-General relied on the *Thalidomide cases* (54). They arose from a campaign conducted by the Times Newspaper against Distillers, the manufacturers of a drug marketed by them called Thalidomide, which resulted in

producing serious deformities in babies. The campaign was designed to pressurise Distillers into giving the children, on whose behalf actions had been instituted, more generous compensation than the suggested terms of settlement. Times Newspapers had published one such article on which no action for contempt had been taken. They intended publishing another which was more detailed and having a direct bearing on the issues involved in the case and notice of this was given to the Attorney-General. There had also been general public discussion of the plight of these children on the raido, T.V., and in a debate in the House of Commons. One further fact that was considered material was that those cases had been dragging on for a number of years. The Attorney-General of England went into court and obtained an injunction prohibiting the publication of the proposed article in the Times. On appeal, the Court of Appeal removed the injunction.

Mr Choksy relied on Lord Denning's judgment, where he was of the view that the law authorised fair comment by the newspapers in a matter of this nature.It should be noted however that this was not a case of contempt by scandalising the court; it was a case of contempt by prejudging pending proceedings. Lord Denning said that in the unique circumstances of a profound national tragedy, it was in the public interest that those issues should be publicly discussed. It was also found that the only extant legal proceedings had been dormant for years and the injunctions were themselves a move towards achieving a settlement. In those circumstances the court held that the law of contempt which restrained comment on matters subjudice did not apply. Denning, C.J., said:

> ".... in my opinion the public interest in having it discussed outweighs the prejudice which might thereby be occasioned to a party

> to a dispute. At any rate, the High Court of Parliament has allowed it to be discussed. So why should not we in these Courts also permit it. There is no possible reason why Parliament shall permit it and we refuse it."

In the case of contempt of court by prejudicing pending proceedings, considerations other than those relevant in the case of contempt by scandalising the court come into play. The stress in the Court of Appeal judgments is on the possible harm that may be done to the private interests of the parties as against the public interest in the freedom of the public to be informed of these matters. This is also made clear in an earlier passage where Denning, L. J., says:

> ".....it must always be remembered that besides the interest of the parties in a fair trial or a fair settlement of the case there is another important interest to be considered. It is the interest of the public in matters of national concern and the freedom of the press to make fair comment on such matters.The one interest must be balanced against the other. There may be cases where the subject matter is such that the public interest counter balances the private interest of the parties.In such cases the public interest prevails. Fair comment is to be allowed."

On the other hand,when we consider the cases of contempt of court by scandalising the court, by reason of a newspaper publication, both the competing interests are of a public nature.

There had been a debate in Parliament, mainly on the moral liability of the Distillers. Lord Justice Denning in this context refers to Parliament as the High Court of Parliament. Mr Nadesan submitted that that expression could not be used with reference to

the Parliament of this country and to that extent, this case could have no application to our case. Be that as it may, the Attorney-General relied on the following passage from Denning, L.J's judgment in support of his submissions :-

> "It is desirable that the convention of Parliament as to matters of subjudice should so far as possible be the same as the law administered in the courts. The object of such is the same-to prevent prejudice to pending litigation and the parties to it - and the rules for achieving it should be the same, and for this very good reason: as soon as matters are discussed in Parliament they can be and are reported at large in the newspapers. The publication in the newspapers is protected by law. Whatever comments are made in Parliament they can be reported in the newspapers without any fear of action for libel or proceedings for contempt of court. If it is no contempt for a newspaper to publish the comments made in Parliament, it should be no contempt to publish the selfsame comments made outside Parliament."

The import of this passage is that a newspaper commits no libel or a contempt of court by publishing the comments made in Parliament, meaning the spoken debates. As I have shown earlier, there is a distinction between the publication of the spoken debate and the publication of parliamentary papers. The two are governed by different provisions of law. Strictly speaking, this case would not accordingly apply to a case of the publication of a parliamentary paper as in the present case.

Apart from that, Denning, L.J's statement was clearly obiter and can also be distinguished on more substantial grounds. Leaving aside contempt for the moment, let us see whether his statement that a

person does not commit a libel by the publication of a parliamentary debate is a correct statement of law.This statement is undoubtedly too general and unprecise and does not reflect the correct legal position with any accuracy. I have already set out the passages in Erskine May and Gatley which show that a newspaper publisher enjoys only a qualified privilege in this regard and a publication which is not for the public benefit or which is accompanied by malice would render the publisher liable for libel. There are also many other limitations on this privilege to which reference has already been made. Denning, L.J., makes no references to those; so his obiter has to be accepted if at all with reservations.

On the other hand we find Scarman, L.J's expression of opinion reflecting more accurately the real state of the Law :

> "It is clear that the House was not inhibited from discussing the sort of questions that 'The Sunday Times' would raise in the article if published. It is also clear that the Commons took the view that their debate did not transgress their own subjudice rule.The Courts, subject only to the legislative power of Parliament, determine what constitutes contempt of court and have a discretion as to remedy and punishment."

In fact, the above goes directly against the argument the Attorney-General has submitted to us.

The following observations of P.M. Leopold on this matter in her "Freedom of Speech in Parliament" are again relevant. She says at page 45:

> "Since court reports are privileged because of the superior benefit of publicity, there

> are certain restrictions on such publications. Cockburn C.J. (*Wason v. Walter* (supra)), expressly stated that the restrictions which applied to the reporting of court proceedings should also apply to the reporting of parliamentary proceedings. This means garbled or partial reports will not be entitled to claim qualified privilege, nor will those which are blasphemous, seditious, amounting to a contempt of court or otherwise prohibited by law. The only suggestion to the contrary is an obiter dictum by Lord Denning, M.R., in *A.G. v. Times Newspapers Ltd.*., (supra), where he suggests that newspaper accounts of parliamentary proceedings have a greater protection than that indicated above.The case concerned contempt of court and Lord Denning suggested that whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court. The other members of the Court of Appeal did not comment on this matter nor did any member of the House of Lords when it later considered the case. It is submitted that Lord Denning's remarks do not alter the legal position."

The author says in footnote 72 on page 46 with reference to Lord Denning's dictum:

> "The only mention of the matter was a passing reference by the Attorney-General in his address to the House of Lords where he stated (at p. 280) ..... the fact that what was said in Parliament about Distillers was widely reported does not mean that there is no check on what may be published of them outside."

The subsequent developments arising from this case are interesting and were brought to our notice by counsel. There was an appeal to the House of Lords from this decision and the House allowed the appeal. The House held that it was a contempt of court to publish an article expressing an opinion on the merits of a specific issue which was for determination by the court in circumstances such that the article gave rise to a real risk that it will prejudice a fair trial. Regarding the citizens' right to a discussion of public matters in relation to contempt of court, Lord Reid putting the matter in a broader framework than the Court of Appeal said:

> "The law on this subject must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary. For that purpose public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

In the view of the Court of Appeal, the two interests involved were a public interest as against a private interest. The House of Lords however decided the case on the basis of two competing public interests though of two different kinds. It would also be noted that once the broader concept of public interest entered into the picture in the House of Lords, the decision of the Court of Appeal had necessarily to be reversed.

In a later passage appearing at page 81, Lord Simon made it quite clear that the paramount public interest is that the legal proceedings should progress without interference. Then Lord Simon goes on to say:

> "But once the proceedings are concluded, the remit is withdrawn and the balance of public interest shifts. It is true that the pan holding the administration of justice is not entirely cleared. The Judge must go on to try other cases, so the court must not be scandalised. Further, jurors must be empanelled, so the departing jurors must not be threatened. Witnesses in future cases must be able to give honest and fearless testimony, so witnesses in past cases must not be victimised. But these things conceded, the paramount interest of the public view is that it should be fully apprised of what has happened (even being informed if appropriate, of relevant evidence that could lawfully not be adduced at the trial) and hear unhampered debate on whether the law, procedure and institutions which it had ordering have operated satisfactorily or call for its modification."

This passage also helps to dispose of another point raised by Mr.Choksy and also referred to in the texts, namely that a case can be given over to public comment once the trial is over. The principle is subject to the exception of scandalising the court and in the present case we have not a discussion of the case but the attribution of impartiality and corruption to the judges who heard the case. It is also quite clear that in a case of contempt by scandalising the court, on a balancing of two public interests involved, the public interest in the due administration of justice must be conceded to be prior to the other public interest.

Then, as regards the references to the Debates in Parliament in the judgments of the Court of Appeal, and sought to be made much of by counsel, I find that they too add up to nothing.There is singularly little reference made to them in the House of Lords that can be considered worthwile. In fact Lord Reid said:

> "Some reference was made to the debate in the House of Commons.It was not extensively referred to in argument. But so far as I have noticed there was little said in the House which could not have been said outside, if my view of the law is right."

The only other reference I could find to this debate was in the opinion of Lord Cross, who said:

> "The discussion in Parliament in which much stress is laid on the judgments in the Court of Appeal concentrated so far as I can see almost entirely on the moral obligations of Distillers.There is therefore no need to consider whether, if members of Parliament had taken it on themselves to discuss the legal issues in the case, that fact ought to have affected the attitude of the courts to similar discussion in the press."

As far as U.K. decisions are concerned, this pronouncement of the House of Lords is the highest authority and binding on English courts. Whichever way the matter is looked at, the *Thalidomide case* (supra) does not in the end support either the contention of Mr Choksy or the Attorney-General.

Mr Choksy also brought to our notice two further developments regarding this case. The Times Newspaper took the matter to the European Court of

Human Rights claiming that the House of Lords' judgment amounted to a violation of certain provisions of the European Convention on Human Rights, which were binding on the U.K. Government. In the meantime the Phillimore Committee Report to which particular reference has been made by the European Court was published. The report discussed the various judgments in the House of Lords and was critical of the prejudging test laid down by the House of Lords. The Committee recommended a different test based on the formula adopted by the Court of Appeal(Phillimore,L.J., was himself one of the judges who gave the Court of Appeal judgment), namely whether the words complained of created a serious risk that the course of justice may be interfered with.

The European Court, split 11 - 9, held that the restriction imposed on the Sunday Times by the House of Lords was not necessary in a democratic society for maintaining the authority and impartiality of the judiciary. The decision turns on an interpretation of Article 10 (1) and (2) of the European Convention on Human Rights. Though Article 10 bears superficial resemblance to Articles 14 and 15 of our Constitution, they differ a great deal when closely examined in their appropriate contexts. The majority and minority differed as to the extent to which it was proper for the European Court to review a decision of the national courts. Hitherto the law and practice of the European Court had been to refrain from interference with the decision of a national court on a question affecting the fundamental freedoms, leaving to such local court "a margin of appreciation". In this case however,the majority distinguished between a restriction of a domestic court decision, protecting morals where a wide "margin of appreciation" was allowed and a restriction designed to maintain the interest of and impartiality of the judiciary where the "margin of appreciation" should be narrower. They admitted

that their approach could not be same as that of the House of Lords which sought to maintain a balance between freedom of speech and the due administration of justice, but had to be of a tribunal interpreting an international convention which laid down a general right of freedom of speech, subject to a number of exceptions which must be narrowly interpreted. In this process of interpretation the European Court placed the greatest emphasis on the words "as are prescribed by law and are necessary in a democratic society," in Article 10 (2). The Court held that the word "necesary" in this Article implied the existence of a "pressing social need" and accordingly held that the injunction imposed on the Sunday Times was not such a "pressing social need" and not proportionate to the legitimate aim pursued. This approach of the European Court is radically different from the way the English Courts have looked at the matter.

There was a further sequel to this judgment of the European Court. In the U.K., statutory provision was made by the Contempt of Court Act 1981, both to give effect to the Phillimore Committee recommendations and to try and make the law in England conform to these developments. The courts too in a subsequent decision, *Attorney-General v. B.B.C.*, (55), have taken note of the international obligations undertaken by the U.K. Government and the need to give effect to them as far as possible. Thus, Lord Scarman said:

> "I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make on the international obligations assumed by the United Kingdom under the European Convention. If the issue should ultimately be..... a question of legal policy, we must have regard to the country's obligations to observe the

European Convention as interpreted by the European Court of Human Rights .....".

The Court however pointed out that the European Court would necessarily have to approach such matters differently from an English Court, having regard to the provisions of the Convention. The European Court would not be concerned with deciding an issue between two conflicting interests, but would be applying a single principle, freedom of speech, subject to a number of exceptions which must be variously interpreted. It is therefore inevitable that the decisions of the U.K. courts and the European courts would differ and will not be the same. If this later case has any bearing on the present case, it is to show that as a decision of the highest domestic court in the U.K., the House of Lords' decision in the *Times case* must remain as the final pronouncement on the subject.

We have seen the different views expresed by the English courts at different times. The present liberal views prevailing there no doubt reflect the state of the permissive and open society that is now prevalent in the West. We on the other hand fortunately or unfortunately depending on how one looks at it are still wedded to conservative and traditional values. To that extent there would be different approaches to this problem between us and the U.K. But except for a few isolated instances, even in the U.K., an attack on the core of the judicial process, namely the honesty and impartiality of the judiciary, has always been held to be a contempt.We have seen that the Phillimore Committee, in spite of the prevailing liberal attitudes in the U.K., recommended the retention of contempt in respect of scandalising the court, and only suggested that it be made an indictable offence.

However, in an Australian case, *Nicholls* (56), Griffiths, C.J., said:

> "I am not prepared to accede to the proposition that an imputation of partiality is necessarily a contempt of court. On the contrary, I think that if any judge of this court or of any other court were to make a public utterance of such a character, as to be likely to impair the confidence of the public or of suitors or any class of suitors in the impartiality of the court, in any matter likely to be before it, any public comment on such utterance, if it were fair comment, would, so far from being a contempt of court, be for the public benefit and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel."

This is undoubtedly in the nature of an exception and could be justified in cases where the judge by his own conduct - of which there should be no dispute, it being apparent - impairs public confidence in the administration of justice. In this case it was the judge himself who made a public statement compromising the judiciary. In such rare cases it is understandable that the court should allow fair comment on such self evident and proven misconduct.

Turning to the legal position in this country, we find that our courts have been enabled to adopt a more conservative attitude than that prevailing in the U.K. It will be recalled that in *McLeod's case* (supra), Lord Morris expressed the view that, while the offence of contempt by scandalising the court had become obsolete in the U.K., in the colonies the enforcement of committal

for contempt for attacks on the court was absolutely necessary to preserve in such community the dignity of and respect for the court.

The distinction Lord Morris drew between the U.K. and "small colonies consisting principally of coloured populations" is couched in the language of a bygone age, but the distinction he drew could be supported on more reasonable grounds. It would appear that Lord Morris' statement was not a stray statement made in passing, but one that had been made after due deliberation. In *Ambard v. The Attorney General of Trinidad and Tobago*,(57), Lord Atkin in his classic judgment quoted those words of Lord Morris and added:

> "And that in applying the law the Board will not lose sight of local conditions is made clear in the judgment in *Mc Leod v. St. Aubyn.*"(41)

As late as 1943 in *Debi Prasad v. King Emperor* Lord Atkin had occasion to revert to this matter once again. He said :

> "In 1899 the Board pronounced proceedings, for this species of contempt to be obsolete in this country though surviving in other parts of the Empire."

The British colonial empire was a far flung one stretching East and West, North and South. It embraced a variety of peoples and races and religions, each with its own social and cultural traditions. The application of a uniform law to suit the widely different local conditions was not practicable. We must particularly guard ourselves against the temptation of the indiscriminate use of decisions of Western countries which have their own

social milieu and reflect the permissive values of their societies as a substitute for our own thinking. In fact, even the case law from some of the dominions show that they have been as eager as we have been to preserve this branch of the law of contempt in its vigor, notwithstanding the doubts entertained on the matter in the U.K. One of the earliest cases found in our law reports dealing with this type of contempt is the Rule on *P.A. Capper*(59). In this case the Supreme Court held that an article by a newspaper editor making derogatory references to the members of the jury in a criminal trial was calculated to insult the jury and scandalise the court. The article in question written in sarcastic vein set out the views of the "Sapient Jury" and suggested that their "names should be struck off the English speaking list - were such a course feasible - as being incompetent to try a person who may claim them as his 'peers.'"

In the matter of a Rule on *Armand de Souza*,(60), the Supreme Court held that the deliberate and wilful publication in a newspaper of false and fabricated material concerning a trial calculated to hold the court or the judge to odium or ridicule amounts to a contempt of court. In another case concerning the same respondent, *Armand de Souza*(61), the respondent as the Editor of the Ceylon Morning Leader, had written that the Police Magistrate, Nuwara Eliya, was partial to the police view and is often open to assistance or suggestion from the police and that they would not receive "this tremendous advantage" but for the fact that he improperly conducts part of his business in chambers. The respondent also alleged that the Magistrate defers far too much to planters and that his mind is very difficult of access to conviction hostile to the interests of a European planter. The court held that evidence to prove the truth of the allegations of fact and truth of his own interpretation of his language was irrelevant.

The court held that the law of contempt by scandalising the court was still in force in Ceylon. Wood Renton, C.J., after referring to the English cases said:

> "There is, as I have said, no kind of doubt as to the right of any member of the public to criticise, and to criticise strongly, judicial decisions or judicial work, and to bring to the notice of the proper authorities any charge whatever of alleged misconduct on the part of the Judge. But it is a very different matter to claim that irresponsible persons, upon ex parte statements, are to be at liberty to invite themselves into the judgment seat, and to scatter broadcast imputations such as those with which we have here to do. The law of contempt, as has often been pointed out both in England and in this Colony, exists in the interests, not of the Judges, but of the community. The Supreme Court would be false to its duty if it permitted attacks of this kind to go unpunished."

In another case, the *Rule on Hulugalle* ,(62), the respondent who was the Editor of the Ceylon Daily News was charged with contempt in respect of certain passages appearing in a leading article headed "Justice on Holiday". The court held that the article imputed a serious breach of duty to the judges of the Supreme Court in taking an unauthorised holiday during August for the purpose of attending a race meeting - whereas in fact the August vacation was authorised by statute - and contained a further imputation of dishonesty to the judges in attributing the arrears of work to lack of staff when it was really due to their addiction to sport instead of conscientious devotion to duty. The court held that this was a serious contempt, but added:

> "It would be thoroughly undesirable that the press should be inhibited from criticising honestly and in good faith the administration of justice as freely as any other institution. But it is equally undesirable that such criticism should be unbounded....."

An application to the Privy Council for Special Leave was refused in this case.

In *Veerasamy v. Stewart*,(63), the editor of a newspaper published editorials, letters and report of a speech pending a non-summary inquiry of such a character as to create an atmosphere of prejudice against the accused. It was held that this amounted to contempt of court, and that it was not essential to establish that the respondents intended to prejudice the fair trial of the petitioner.

In *Perera v. The King*,(64), the appellant who was a member of Parliament, as was customary, paid a visit to the Remand Prisons, Colombo.A complaint made to him, that some prisoners had not been present in court when their appeals had been heard, was recorded by him in the Prison Visitors' Book. The material portion of the entry was:

> ".....The present practice of appeals of remand prisoners being heard in their absence is not healthy. When represented by Counsel or otherwise the prisoner should be present at proceedings....."

The practice referred to was a practice that had originated in an order of a previous Chief Justice relating to unstamped petitions which were dealt in chambers by a single judge of the Supreme Court. It did not involve a differentiation between prisoners who were and who were not defended,nor did it involve a hearing. The complaint made to the

appellant was made on a misapprehension of the correct position, which was not known to the appellant. A rule was issued on him and he was convicted by the Supreme Court. In appeal to the Privy Council, Their Lordships held that the conviction cannot be sustained. They said:

> "They have given the matter the anxious scrutiny that is due to any suggestion that something has been done which might impede the due administration of justice in Ceylon. And it is proper that the Courts there should be vigilant to correct any misapprehension in the public that would lead to the belief that accused persons or prisoners are denied a right that ought to be theirs. But Mr.Perera too has rights that must be respected, and Their Lordships are unable to find anything in his conduct that comes within the definition of Contempt of Court. That phrase has not lacked authoritative interpretations. There must be invloved some 'act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority' or something 'calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts': see *Reg. v. Gray*,(supra).
>
> What has been done here is not at all that kind of thing. Mr.Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the Legislature. His information was inaccurate, but he made no public use of it, contenting himself with entering his comment in the appropriate instrument, the Visitors' Book, and writing to the responsible Minister. The words that he used made no direct reference to the Court, or to any judge of the Court, or indeed to the course of justice, or to the process of the

Courts. What he thought that he was protesting against was a prison regulation, and it was not until some time later that he learnt that, in so far as a petitioner had his petition dealt with in his absence, it was the procedure of the Court, not the rules of the prison authorities, that brought this about. Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attended the action complained of, there cannot be Contempt of Court."

In the case of *in re Wickramasinghe*, (65), the respondent who in the course of a speech at a public meeting criticised the judiciary in such a manner that no person who may have been persuaded by his speech could continue to have confidence in the jury was held to have committed a contempt of court.

In *Vidyasagara v. The Queen*, (66), the respondent, an advocate appearing for a union before the Industrial Court, read out the following statement from a typewritten document:-

".....In the circumstances, the Union having felt that this court by its order had indicated that an impartial inquiry could not be had before it, has appealed to the Minister to intervene in the matter. The Union is therefore compelled to withdraw from these proceedings and will not consider itself bound by any Order made ex parte which the Union submits would be contrary to the letter and spirit of the Industrial Disputes Act....."

Section 40A(1) of the Industrial Disputes Act states that a person who without reason publishes

any statement or does any act that brings the Industrial Court into disrepute during the progress or after the conclusion of an inquiry, commits an offence of contempt against or in disrespect of such Court.

The Privy Council held that the allegation of partiality was an imputation of prejudice to the court, which was contempt. It was also argued that it would not be contempt for a counsel to allege partiality of a court as this would restrict unduly, counsel's arguments on a hearing in certiorari proceedings. The Privy Council said that "different considerations apply when an attack is made in a court of review on the impartiality of a lower court. It may be necessary in certain cases for counsel in compliance with his duty to his client to allege partiality of the lower court."

Another case strongly relied on by the respondents was the Privy Council decision in *Perera vs. Pieris*,(67). This was an action for defamation and did not deal with contempt of court. The defendant who was the printer and owner of the newspaper had published an extract from the published report of a Commissioner appointed under statutory powers to inquire into allegations of bribery against members of the Legislature. The plaintiff alleged that this was defamatory of him. The Commissioner had sent the Report to the Governor who had it printed as a Sessional Paper. It was released to the public simultaneously with a Gazette Extraordinary which published the text of a Bill enabling the State Council to expel a member for accepting a bribe. In accordance with the prevailing practice the Press was sent a copy free of charge. Practically the whole of the Report was published in the newspapers.

Their Lordships did not enter into an inquiry as to whether the proceedings before the Commissioner was

a judicial or quasi-judicial proceeding or a parliamentary proceeding as contended for by the defendant. It therefore deals with a situation which is sui generis. The Privy Council sought to abstract from the defence of privilege which was a defence to an action for defamation, its wide underlying principle. This Their Lordships found was the "Common convenience and welfare of society" or " the general interest of society" or the "balance of public benefit from publicity".

In the Roman-Dutch law which was applicable, *animus injurandi* was an essential element of the delict of defamation. If a publication can be shown to be made in the public interest, it would be privileged and this would be sufficient to rebut *animus injurandi*. In the case of the publication of judicial and parliamentary proceedings, the court will, having regard to the nature of the activities of those two institutions, treat the publication "as conclusively establishing that the public interest is forwarded". But this statement should be understood in that context, namely of a publication amounting to a libel. As shown earlier, this case along with *Wason v. Walter* (1) and other cases relating to libel stand in a class apart from cases of contempt of court.

It is clear that the Privy Council was dealing here with the defence of public interest avilable in an action for defamation to rebut *animus injurandi*. It was not even dealing as such with the problem of balancing a private interest against a public interest much less with the balancing of two public interests which arise in cases of contempt. It is also not clear from the language whether Their Lordships were thinking of the reporting of Parliamentary debates, meaning the spoken debate as against the publication of Parliamentary papers which, as I have shown, would be governed by a different set of principles.

Coming back to the case before us, it would be seen not only from the local cases but also those from other jurisdictions that the allegations contained in the publication constitute a contempt of court. Even judges with the most liberal views have not countenanced allegations of partiality and dishonesty against judges. I have no difficulty whatsoever in coming to the conclusion that the respondents by their publication had committed a contempt of court.

I should not conclude without referring to certain additional factual matters which Mr.Choksy brought to our notice in his reply. The first concerns an earlier motion in Parliament reflecting indirectly on the conduct of a judge which had been published by a newspaper, but no action had been taken on it. The second referred to the report of a speech made by the Chief Justice to the Bar Association where he advocated an increase in the salaries of the judges and said that under the present salary structure, corruption was beginning to infiltrate into the judiciary. It was generally known that the services of one or two minor court judges had been terminated on suspicion of corruption.

Assuming that the publication of that motion or report of the speech to the Bar Association could be regarded as constituting a contempt of court - and this is debatable - no conclusion could be drawn from the fact that there had been inaction on the part of authorities or the courts on those two occasions. Both in the U.K. and even here, there have been occasions when, for some reason or other, matters in which action could or should have been taken have not been pursued. For example, the Phillimore Committee mentioned that things have been said and published about the National Industrial Relations Court which clearly amounted to contempt, but no action was instituted in those

cases. Shetreet in his work "Judges on Trial" gives numerous instances where judges and the judiciary have found themselves helpless in the face of adverse circumstances. The state of public opinion widely prevalent is undoubtedly a relevant factor in deciding as to whether or not a court should take action for behaviour suggesting a contempt of court, for Miller in his work "Contempt of Court" has aptly observed:

> "Comment may well be named as relatively innocuous in one jurisdiction and as scandalising the court in another. Equally within the same jurisdiction, it may be seen as likely to destroy confidence in the courts at one period of history and as unworthy of attention at another. By the same token a different response may well be warranted according to whether the comment relates to a contemporary case or to a case beginning to recede into history."

Although the Constitution does not specifically refer to the Press, the provisions guaranteeing the fundamental right of speech and expression to every citizen are adequate to ensure the freedom of the Press in this country. The Press of course does not have any special privilege and it enjoys no greater rights than any member of the public. This does not mean that we wish to devalue and minimise the importance of the Press and the great service it performs in our society. The fourth estate is now considered essential for the proper functioning of democracy which is founded on the premise that an informed public will have the right of unfettered discussion of the affairs of government to enable them to come to correct decisions. Hence two elements are invloved, the freedom to express one's views and its corollary, the right to receive information, for public debate

cannot take place without one being properly informed. No private citizen today can for this purpose garner all the news and information by himself. The Press fills this need and comes to the assistance of the public and constitutes one of the principal vehicles for this purpose. The public no doubt owes a great debt to the media for this service.

While we greatly appreciate and value the role of the Press for its contribution to the existence of an open society and are prepared to allow as much latitude as is reasonably necessary for the performance of that service, the courts however are compelled to sit up and take note when the acts of the Press go beyond accepted bounds. Fortunately such instances are infrequent, more rare are cases where the offence is committed calculatedly and with deliberation. Such is not the case here.

Our courts derive their authority from the Constitution which our People have adopted and given unto themselves. That authority is a sacred one and held in trust for the welfare and security of the People. The power we judges are called upon to exercise is nothing less than that part of the Sovereignty of the People which had been delegated to the courts as their chosen instrument for this purpose. Contempt against the judiciary is therefore an insult offered to the authority of the People and their Constitution. The law of contempt does not exist for the personal benefit of the judges. As Lord Denning said, let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. It is therefore the duty of the courts to come to the defence of the Constitution and uphold the dignity of the courts whenever an affront has been offered to them.

Chief Justice Hidayatullah in his judgment in

Cooper v. Union of India.,(68), has expressed in memorable words what is broadly the attitude of the courts in these matters:

> "There is no doubt that the Court like any other institution does not enjoy immunity from their criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others ..... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism."

While I hold that the respondents are guilty of a contempt of court, I am prepared to accept their statement that they did not have a deliberate

intention of interfering with the administration of justice, though their publication has that effect. In meting punishment we have to consider the totality of the circumstances relating to this matter. The fact that a parliamentary motion impliedly reflecting on the conduct of a judge had previously been published without attracting thereto the laws of contempt of court and the uncertainty of the legal position in view of the recent constitutional changes, which may have misled even the legal advisers, are mitigating factors which will take into consideration. It is therefore possible for a merciful view to be taken of the conduct of the respondents. But, having regard to the proposed order of the majority, it is unnecessary to pursue the question of punishment any further.

This court, by its majority decision, therefore, confirms the Rule issued on the respondents but, in view of the mitigatory circumstances, imposes no punishment. They are accordingly discharged.

VICTOR PERERA, J.

In this case, a Rule was issued by this Court after a perusal of the petition and affidavit filed by the petitioner and after hearing Mr.S.Nadesan Q.C., who appeared for him. The petitioner alleged that the 1st respondent was the Editor of the "Daily News" of which the 2nd respondent was the owner, printer and publisher. The petitioner averred that in the issue of "Daily News" of the 7th of March 1983 there appeared a news item prominently displayed under the heading "Select Committee Probe of Mr.K.C.E. de Alwis' representations". He alleged that the news item taken as a whole and in its parts seeks to cast a doubt on the impartiality and integrity of the Judges of the Supreme Court and thus to weaken

public confidence in the administration of justice and that this publication scandalised the Judges of the Supreme Court and was calculated to lower the prestige of the Court.

This petition was filed on the 14th March,1983 but no reference was made to the fact that this news item actually reproduced a motion which had been printed on 5th March,1983 by Parliament to be on the Order Paper of the 8th of March, 1983. This fact was not disclosed to the Court and there was a subtle attempt by the petitioner to impute a motive for the publication by the 1st respondent by pleading that the 1st respondent was a nephew of Mr.K.C.E.de Alwis, a former Judge of the Court of Appeal and a member of the Special Presidential Commission.

On the material placed before this Court and on the submissions made by Counsel for the petitioner there appeared to be a prima facie contempt and this Court issued a Rule.

The respondents appeared in Court and pleaded not guilty to the charge. The 1st respondent filed a comprehensive affidavit setting out the facts antecedent to the publication of the news item and setting out his defence. He specifically denied that by the publication he intended the result alleged by the petitioner. The 2nd respondent filed several documents to prove that several other newspapers had published the same news item on the 7th March,1983 as a matter of public interest and relied on the defence pleaded by the 1st respondent.

At the hearing of this matter after the Rule was served, Mr.Nadesan, Q.C., specifically stated that he was not relying on the allegation made by the petitioner about the alleged relationship of the 1st respondent to Mr.K.C.E.de Alwis and

apologised for this irrelevant averment finding a place in the petition and affidavit of his client, the petitioner. He categorically stated that no malice was alleged or relied on by the petitioner.

The contention of the respondents was that the news item published was a factual and correct reproduction of the contents of the Order Paper of Parliament which was to be set down for consideration under the heading "Public Business" for the 8th March,1983.

The contention on behalf of the petitioner at the hearing was that the contents of the motion as appearing in the copy of the Order Paper to be included in the business for the 8th March, 1983 constituted a contempt of the Supreme Court and its Judges solely because the matters to be probed as stated in the Order Paper related to the Supreme Court and referred to the conduct of two of its Judges.

I propose to deal first with the affidavit of the 1st respondent and the documents annexed to the affidavit. In the affidavit the 1st respondent refers to the fact that by warrant dated 29th July, 1978 His Excellency the President had established a Special Presidential Commission of Inquiry comprising Justice J.G.T.Weeraratne, Justice S.Sharvananda and Justice K.C.E.de Alwis and that the Commission had been functioning since that date and that Parliament had acted on the reports made by the Commission from time to time. In July 1982,Felix Dias Bandaranaike, a person against whom the Commission had made an adverse finding petitioned the Supreme Court for a Writ of Quo Warranto and prohibition against Mr.de Alwis. The appointment and the proceedings of the Special Presidential Commission had been given due publicity in the press and other media. The allegations made by Felix Dias Bandaranaike were given much publicity in the Press. The document

R1(1) was produced as this news item dated 10th July, 1982. Every single step taken in the Supreme Court in connection with this application was given full coverage by the news media as is evidenced by the documents R1(2) to R1(51) from July 1982 up to the 29th Ocotober, 1982. The contents of each separate judgment of the three Judges too were published and the majority of the two judges directed that the Writ of Quo Warranto do issue. However, Mr. de Alwis still continued as a member of the Special Presidential Commission as His Excellency had not removed him. Mr. de Alwis as a member of the Commission thereafter appears to have made certain representations to His Excellency the President under whose warrant he was still a member.

This fact and also the fact that various steps were being contemplated to investigate these representations were also given considerable publicity in the Press. The documents R1(52) to R1(58), being news items from 29th December, 1982 to the 6th March, 1983 show that the Press had informed the public of all these developments and that the Sri Lanka Bar Association too had got itself interested. There could be no doubt that the People were interested in all these matters and were entitled to know the outcome of them all.

It was in the background of this publicity that the news items in the "Sun" paper and the "Daily News" paper of the 3rd March, 1983 announced details of Cabinet Decisions and intimated to the public that the Cabinet had decided on 2nd March, 1983 to appoint a Select Committee of Parliament to inquire into the representations made by Mr. de Alwis. Parliament thereafter proceeded to prepare the questions to be probed by the Select Committee to be appointed. The draft motions and the specific questions that were to be raised were formulated at the Office of the Leader of the House of Parliament

and communicated to the Secretary General of Parliament before the impugned news item appeared. In support of their contention the respondents produced a letter dated 4th March,1983,R1(2) signed by the Secretary of the Leader of the House of Parliament addressed to the Secretary General of Parliament to which was attached the draft of the motion under the name of the Minister of Justice. This motion had then been forwarded to the Government Printer to be included in the printed Order Paper for the 8th March,1983. The Order Paper so printed had been sent in due course to the Delivery Section of the Central Mail Exchange (1R5) by the Secretary General of Parliament and according to (1R6) the printed copies of the Order Paper for the 8th,March 1983 had been delivered to Members of Parliament and the news media including the "Daily News" on the 5th March,1983. There can be no doubt that the publication of this Order Paper was not specifically prohibited or specifically authorised by Parliament but rather Parliament had in the ordinary course of business provided special facilities to the news media to see that they received Order Papers of Parliament well in advance of the date on which matters in the Order Paper were actually taken up for the purpose of giving information to the reading public. The Order Paper forms part of the parliamentary proceedings referable to Parliament and not attributable to any one outside Parliament.

The preamble to the motion reads as follows:-

"Whereas Mr. K.C.E. de Alwis former Judge of the Court of Appeal and a member of the Special Presidential Commission has made representations to His Excellency the President of the Democratic Socialist Republic of Sri Lanka regarding the conduct of the proceedings relating to application No. 1 of 1982 and other matters relating thereto, this Parliament is of opinion that a Select Committee be

> appointed to inquire and report to Parliament etc. on the various matters enumerated under items (a) to (f).

Thus it is clear that the respondents were not made aware of the specific representations made by Mr.de Alwis and that the respondents did not purport to publish such representations. It had been established in these proceedings that the Cabinet of Ministers had on 2nd March,1983 decided to appoint a Select Committee of Parliament (R1(54)) to inquire into the said representations and Parliament thereafter proceeded to formulate the questions to be probed. The motion and the specific questions to be probed were formulated at the Office of the Leader of the House of Parliament and communicated to the Secretary General of Parliament. This was the starting point of the parliamentary process by which the matter ultimately reached Parliament for consideration and debate. The standing orders of Parliament were produced by the respondents in Court. According to Standing Order 9 (4) the preparation of the Order Book showing the business of a particular day is one of the duties of the Secretary General. Standing Order 78 provided as follows:-

> "78. The conduct of the President or acting President, members of Parliament, Judges or other persons engaged in the administration of justice shall not be raised except upon a substantive motion and in any amendment, question to a Minister or remark in a debate on a motion dealing with any other subject, reference to the conduct of such persons aforesaid shall be out of order."

Therefore, this Parliamentary process was initiated in terms of the Standing Orders. Under the heading

'Independnce of the Judiciary' in the Constitution, Article 107(1) and (2) provides not only for the appointment of Judges but also for removal of Judges on the ground of 'proved misbehaviour or incapacity' after an address presented in Parliament. No doubt this motion was not an address in terms of Article 107(2) but was a motion dealing with the conduct of some Judges of the Supreme Court. Article 107(3) provides as follows:-

> "3.Parliament shall *by law* or by *Standing Orders* provide for all matters relating to the presentation of such an address, including procedure for the passing of such address *the investigation and proof of alleged misbehaviour and incapacity etc.*"

While Article 107(2) provided for an address on the ground of proved misconduct or incapacity, the Constitution in Art. 107 (3) gives Parliament the right to make provision by law or by Standing Orders for the investigation and proof of alleged misbehaviour or incapacity which of necessity must precede any action under Article 107(2).

Taking into consideration all these facts could it be said, that the contents of the motion on the Order Paper, the printed copy of which was sent to the respondents on the 5th March 1983 before it was actually taken up for consideration on the 8th March 1983, was a publication by the respondents calculated to bring the Supreme Court or any of its Judges into contempt? In my view the publication of this news item must be considered in its proper context, but not as something apart as Mr.Nadesan, Q.C., invited us to do, merely because there is a reference to the Supreme Court and to some Judges.

There is no criticism of or comment made on

the Supreme Court or any of its Judges even by the person who was to introduce the motion. The 1st respondent himself had not personally mad any comment, allegation or criticism of what happened at the hearing of the application made against Mr.K.C.E.de Alwis or made any criticism of the judgments or orders of the Judges. He has not even reproduced the contents of the represe tations made by Mr.de Alwis to His Excellency the Pre ident. The 1st respondent had reproduced the entirety of the text of the motion of the Order Paper which had been prepared for consideration by Parliament, on the 8th March 1983 under the heading 'Public Business'. No doubt there was an editorial giving prominence to some questions to be probed but without comment.

I have endeavoured to enumerate the facts as set out by the respondents as in my view without a proper appreciation thereof a discussion of the law applicable would be an academic exercise. Mr.K.C.E.de Alwis rightly or wrongly appeared to think that he had a legitimate grievance and he was undoubtedly entitled to protest about it. It was not done publicly but by a representation communicated to the Head of the State who appointed him as a member of the Commission and under whose warrant he had still the authority to function as such member of the Commission. This was the authorised channel available to him to make his representations. Thereafter the steps taken by the Executive through Parliament which exercises the powers granted to it under the Constitution were not his actions nor the acts of the respondents.

Learned Counsel for the respondents submitted that on the basis of all these facts the respondents had merely published a fai and accurate report of parliamentary proceedings that resulted from such representations and that therefore there was no contempt of Court. Learned

Attorney General who appeared before us as *amicus curiae* too submitted that under the circumstances in this case there was no contempt. The law of contempt applicable to criticism of or comments on Courts or Judges had no application in this case and all the authorities dealing with scandalising of a Court or a Judge were of no relevance.

There is a principle that a fair and accurate report of proceedings in courts of justice is protected. It is the same principle in regard to a fair and accurate report of a proceeding in Parliament. In both cases the advantage to the public outweighs any disadvantage to individuals unless malice is proved. This principle was clearly enumerated in the case of ***Wason v. Walter*** (1). It is of great consequence that the public should know what takes place in a court as the proceedings are public and are under the control of the Judges. The same reasons apply to reports of proceedings in Parliament which are under the control of Parliament.

In the Privy Council case of *Perera v. Peiris*(67)(at page 159) this question was considered fully and stated as follows:-

> "The wide general principle was stated by their Lordships in ***Macintosh v. Dun*** (69) to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in ***Stuart v. Bell*** (70) and in earlier cases, most of which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary - viewed as isolated facts - but that in the public interest that

all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to ***Rex v. Wright*** (supra)(17) where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public", and to Davison v Duncan (22) where the phrase used is "the balance of public benefit from publicity"; while in ***Wason v. Walter*** (1) the privilege accorded to fair reports of Parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings - the requirements of the public interest".

The Supreme Court of the Republic of Sri Lanka is the highest Superior Court. Article 105(2) of the Constitution has given it the power to punish for contempt of itself whether committed in Court or elsewhere. Article 14(1)(a) declares that every person is entitled to the freedom of speech and expression including publication and there could be no doubt that the freedom of the Press has been secured. Article 15 (2) however, provides that the exercise and operation of this fundamental right shall be subject to such restrictions as may be prescribed by law in relation to parliamentary privileges, contempt etc. It was conceded by all parties that no restrictions had been prescribed by law in relation to contempt of court and that in terms of Article 15 the existing written law and unwritten law continued to be in force. On that basis the law of contempt in England and the law of contempt as were in force in Sri Lanka at the date of the Constitution are applicable.Considering all the authorities cited there is not a single case which justifies the conclusion that the fair and accurate report of a parliamentary proceeding such

as the one we are considering can be regarded as a contempt of Court. At common law, a fair and accurate report of judicial proceedings taking place before a properly constituted tribunal sitting in open court is privileged. This privilege extends to proceedings in parliament. It also extends to other public proceedings where publication is for the common convenience and welfare of society, that is, in the public interest. According to Halsbury's Laws of England 4th Edn. Vol.28, page 61, this privilege is not confined to reports published in a newspaper or to reports published contemporaneously; every person has the protection of this privilege if he publishes the report merely to inform the public. The grounds of this common law privilege is that the public is entitled to be present at the proceedings unless prohibited by the Court, by Parliament or by the body holding the proceedings and therefore the public is entitled to be informed of what was taking place. There is thus an immunity attaching to the report or publication.

But the publication of comments or criticism of a Court or a Judge stand on a different footing. The law of contempt imposes a significant limitation on the freedom of speech and expresson by prohibiting such publications as would prejudice a fair trial in a pendng case thereby interfering with the administration of justice and also by further restricting comment on or criticism of courts or Judges where such publication scandalises the Courts or Judges.

According to our Constitution, sovereignty is in the People and the legislative power of the People is exercised by Parliament, the judicial power of the People is exercised by Parliament through Courts and tribunals created, established or recognised by the Constitution and the Executive power of the People is exercised by a President

elected by the People. The concept of these republican principles of Representative Democracy is enshrined in the Constitution and referred to in the preamble to the Constitution. In that context it is of paramount and public interest that the people are allowed to know and are correctly informed of what transpires in Parliament. As stated in the case of *Cook v. Alexander* (23) there is a conclusive presumption that what is said or done in Parliament even in England, is of public interest. The Press of this country has a public duty to bring relevant facts to light and the fact that Parliament is probing matters connected with the judiciary with responsibility is a matter of interest to the people and cannot be regarded as a contempt of court or of the judiciary. Parliament was within its rights if it had in fact prohibited the publication of this fact, but the Courts cannot be called upon to do what Parliament had not done directly or indirectly. Our Supreme Court has from earliest times even where it had punished writers and publishers for contempt of Court, in instances where there were actual criticism of the Judges or Courts calculated to bring a Court or a Judge into contempt and lower its authority, observed a consistent principle.Wood Renton J.in 1908 in the case of *Kandoluwe Sumangala v. Mapitigama Dharmarakitta* (71), referred to the law of contempt in these terms:-

> "It is extremely difficult to bring home to minds of some people and yet it is of vital moment that every one should know, that the law of contempt of Court does not exist for the glorification of the Bench. It exists - and exists solely - for the protection of the public".

In regard to the freedom of the Press, Soertsz J. *in Veerasamy v. Stewart* (63) said this:-

" No one desires to fetter unduly the freedom of the Press, least of all Courts of Law, for the Press can be, and has often been a powerful ally in the administration of justice".

The importance of the freedom of the Press cannot be ignored when under a Constitution such as ours, the People are supreme and have a right to change the persons who exercise the sovereignty of the People in terms of Article 4.

I have had the advantage of reading the judgment of Wanasundera,J. He has considered all the submissions made by the Counsel for the petitioner and by Counsel for the respondents and by the Attorney General. He has exhaustively analysed the decided cases cited before us in great detail and also referred to the views of textbook writers. Practically all the cases, particularly the Indian authorities, dealt with criticism resulting in undermining the dignity of Courts and the course of justice. I have taken the view that in this case there is complete absence of criticism of or comment on Courts or Judges by the respondents and with respect and with regret I have to disagree with the conclusion he has arrived at on the basis of the authorities cited.

I have come to the conclusion that the publication in this case of a news item reproducing the text of a motion set down in the Order Paper of Parliament does not constitute a contempt of Court as the public interest in this country demands that the proceedings in Parliament be known to the public and that the public must be made aware that allegations, however serious made against even the highest Court, are being inquired into with a due sense of responsibility.

I accordingly order that the Rule on the respondents be discharged.

RANASINGHE, J.

I have had the opportunity of reading, in draft, the judgment of Wanasundera, J., and, as the view I take, in regard to a principal defence urged on behalf of the Respondents, is different, I have set down my reasons in this judgment.

On Monday March 7th, 1983 the "Ceylon Daily News", which is an English daily newspaper and which is said to have the largest circulation in the Island, owned and published by the 2nd Respondent and edited by the 1st Respondent, published prominently in its front page, and continued on page 11, a news item relating to a resolution to be moved on the following day by the Justice Minister in Parliament, for the appointment of a parliamentary select commitee to probe certain representations made by Mr.K.C.E.de Alwis - a former Judge of the Court of Appeal and also a member of the Special Presidential Commission, whose continuance on the said Commission had been successfully challenged before the Supreme Court by Mr. Felix Dias Bandaranaike, who had himself been a Minister of Justice in a previous Government - against, inter alia, two of the three Supreme Court judges who had heard the said application made by the said Mr.Bandaranaike against the said Mr.de Alwis.

The said article contained the following headlines -:

" Select committee probe of
Mr. K.C.E.de Alwis' representations
FDB's pleadings
prepared in judge's chambers "

The letters of the second headline were larger and thicker than those of the first. A copy of the said news item, as it appeared on the front page and on page 11 of the said newspaper on 7.3.83, is annexed, marked 'A', to the Petitioner's affidavit filed in these proceedings.

The news item, in its first five paragraphs, makes reference : to the resolution to be moved by the Minister of Justice for the appointment of a select committee to probe Mr. de . Alwis' representations: to three of the questions which such select committee will have to probe. Thereafter it proceeds to reproduce the entirety of the text of the said resolution. Paragraph (b) of the said resolution is said to be: whether there were any circumstances which rendered it improper for the two judges (who are named) to have agreed to hear and determine the application (S.C. Ref. No.1 of 1982) filed by Mr. Felix Dias Bandaranaike and whether the decision of either of them was influenced by any improper considerations ; and paragraph (c) to be : whether any pleading filed by or on behalf of the petitioner the said Felix Bandaranaike in the said proceedings were prepared in the chambers of the judge (who is named) who heard the said application, and, if so, the circumstances in which it came to be so prepared.

The Petitioner, who is an attorney-at-law, practising in this Island, has complained to this Court: that the said news item, taken as a whole and in its parts, seeks to cast doubt on the impartiality and integrity of the judges of this court, who heard the aforesaid application, and thus weaken public confidence in the administration of justice: that the said publication scandalises Judges of this Court and is calculated to lower the prestige of this Court : that the said publication has also the necessary tendency to interfere with the due administration of justice : that the 1st

and 2nd Respondents have thus committed a grave contempt of this Court, and should be punished for the said offence of contempt.

After hearing learned Queen's Counsel in support of the Petitioner, this Court, issued a Rule on both the 1st and 2nd Respondents. Annexed to the said Rule, and marked 'X' was a copy of the news item.

It will be convenient at this stage to refer to the provisions of several Articles in the Constitution promulgated in 1978. Article 105 (3) vests this Court with the power to punish for contempt of itself, whether committed in the Court itself or elsewhere. Article 168(1) provides for the continuance in force of all laws, written laws and unwritten laws, which were in force immediately before the commencement of the Constitution, except where provision to the contrary is expressly made in the Constitution itself. Article 14 (2) provides that the exercise and operation of the fundamental right declared and recognized by Article 14 (1) (a) - viz : the freedom of speech and expression including publication shall be subject to such restrictions as may be prescribed by law, inter alia, in relation to contempt of court. No such restrictions have, however, been yet prescribed by law. Article 16 (1) states that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provision of the said Chapter, viz Chapter III which deals with Fundamental Rights. The resulting position then is that the law relating to contempt of court, which was in force and in operation in this Island at the time the Constitution came into operation on the 7th September, 1978, would continue to be operative even thereafter.

The substantive law of contempt applicable in

this Island is the English law. That it is so was accepted by all learned Counsel who appeared before this Court at this inquiry ; and it is also made quite clear by the judgments cited to us at the hearing - vide : *In re Cappers* ,(59), and also *In the matter of Armand de Souza* , (61) , *In the matter of a Rule on H.A.J.Hulugalle* , (62); *Weerasamy v. Stewart* (63); *In re Jayatilaka* (72).

The right of a court of law to punish persons for the commission of acts in contempt of its authority has been firmly recognized and accepted in many jurisdictions. Originating as an offence against the King, who was considered the ultimate source of all judicial authority and the fountain-head of justice, this power has been exercised by the Courts in England for several centuries and has been said to be as old as the law itself. The power which so existed in the courts of law to punish summarily for the offence of contempt found categorical and authoritative expression as far back as 1765 in an "undelivered judgment" of Mr.Justice Wilmot in the case of The *King v. Almon*,(37) which was however published only in the year 1802, in the following terms :

> "The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution ; it is a necessary incident to every Court of Justice whether of record or not to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the Common Law ; it is as much the lex terrae, and within the exception of Magna Carta as the issuing of any other legal process

whatsoever.I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any part of the Common Law;there is no priority or posteriority to be discovered about it and, therefore. it cannot be said to invade the Common Law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by juries, yet truth compels me to say that the mode of proceedings by attachment stands on the very same foundation and basis as trial by juries do - immemorial usage and practice....."

Blackstone, who was a contemporary of Wilmot, J. has also given expression to a similar view when in his Commentaries iv 286 he stated :

"The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves.For laws,without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power therefore in the Supreme Courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal."

It was contended by learned Counsel for the 2nd respondent that the opinion of Wilmot,J. has been subjected to criticism by several judges and jurists,amongst which the article by Sir John Fox in the 24th and 25th Volumes (1905 and 1909

respectively) of the Law Quarterly Review stands out pre-eminent,and that, therefore,it should no longer be treated as laying down the law on this subject. Mr.Justice Wilmot's opinion has since been received with approval in so many subsequent cases (vide: The Law of Contempt of Court and Legislature by Tex Chand and H.L. Sarin, 1949, 2nd edition at page 12 for a list of such cases) that "it must now be taken to have been practically determined that the summary process for committal for contempt whether in or out of Court, existed from the earliest times" - Oswald on Contempt Committal and Attachment (3 edt) p 3. Whatever be its historical basis and however sound be its reasoning, it is now too late for the call made by Sir John Fox in his aforementioned article for the correction of, what he submits is, the error in the opinion of Wilmot, J. to be responded to. In the year 1963, the High Court of Australia has, in the case of *James vs. Robinson* (73), after observing that Sir John Fox had himself not only stated in the course of the said article that " *R. vs. Almon* has been referred to with approval in a line of decided cases extending to the present day" (i.e. up to the time of the said article in 1908 - 1909) but had also concluded his article by stating that "the law as it stands is so firmly established that Parliament alone can effect an alteration, if alteration be necessary", and that Sir William Holdsworth, in his book A History of English Law, Vol.3 p.393 , has also expressed the view that *R. vs. Almon* (supra) "was accepted as correct and it forms the basis of the modern law on this subject", concluded that it would "be the sheerest futility to seek to ascertain whether the present law rests upon a sound historical basis or not.....", and that "in the half century which has followed the publication of these articles the principle (laid down by Wilmot,J.) has, if possible, become more firmly established.

The jurisdiction which the courts have to deal with the contempt of its authority was referred to by Lord Russell C.J. in the case of *R. Vs. Gray* (40) at p 40 in this way:

> "This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction the history the purpose and extent of which are admirably treated in the opinion of Wilmot C.J., then Wilmot J., in his Opinions and Judgments.It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt....."

In the year 1970 in the case of *Morris Vs. The Crown Office* (9), Lord Denning M.R. at page 1081 observed :

> "The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society";

and at page 1087 Salmon L.J. said :

> "The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented."

In the more recent case of *A.G. Vs. Times Newspapers Ltd.*, (12), which evoked considerable public interest in England and ultimately reached the European Court of Human Rights, in the House

of Lords, Lord Reid stated at page 303 that :

> " The law on this subject (ie. contempt of Court) is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed when there would be real prejudice to the administration of justice";

and at page 310 Lord Morris stated :

> ".....the phrase contempt of court is one which is compendious to include not only disobedience to orders of court but also certain types of behaviour or varieties of publications in reference to proceedings before courts of law which overstep the bounds which liberty permits. In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interest of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibility of administering justice are concerned for their own dignity : it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted

that their authority wanes and are supplanted. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing the decision, will often depend whether one aspect of the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding and assessing whether there has been contempt of court....."

and at page 316, Lord Diplock observed :

"'Contempt of Court' is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of disputes. Contempt of Court may thus take many forms ";

and further at page 318 :

"Contempt of Court is punishable because it undermines the confidence of not only the parties to a particular litigation but also of the public as potential suitors in the due administration of justice by the established courts of law";

and at page 323, Lord Simon stated :

"The law of Contempt of Court is a body of rules which exists to safeguard another,

quite different institution of civilised society. It is the means by which the law vindicates the public interest in due administration of justice - that is in the resolution of disputes, not by force or by private or public influence, but by independent adjudication in courts of law according to an objective code; "

and at page 329, Lord Cross stated:

"'Contempt of Court' means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court.....Yet the due administration of justice is something which all citizens whether on the left or the right or in the centre, should be anxious to safeguard. When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal problems, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend that we should be careful to see that the rules as to 'Contempt' do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with."

Contempt of Court could be constituted by conduct of varying kinds. One of the earliest classifications of contempt has been by Lord Hardwicke in the year 1742, who in the case of *Read and Huggonson* (74), stated:

"There are three different sorts of contempt. One kind of contempt is, scandalising the

court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in cases here. There may be also a contempt of this court in prejudicing mankind against persons before the case is heard."

Tek Chand and H.L.Sarin in the book entitled "The Law of Contempt of Court and of Legislature" (2nd edt) (Supra) at page 249 enunciate the principles underlying the law of contempt qua press publications under the following heads :

1."It is a Contempt of Court to scandalise the Court or offend against the dignity of a Judge by attributing to him dishonesty or impropriety or incompetence, regardless of the fact whether the case with reference to which the offending remarks were made is pending in the Court or has been decided.

2 .....

3 .....

4.General criticism of the conduct of a Judge not calculated to obstruct or interfere with the administration of justice, or the administration of the law in any particular case, even though libellous, does not constitute a contempt of court ....."

That the contempt alleged to have been committed by the respondents in this case falls into the category known as "Scandalizing the Court or Judge" is clear ; and there is no dispute in regard to such classification.

Although Lord Morris did, in the case of *McLeod Vs. St. Aubyn* (41), decided at the end of the nineteenth century, express the view that this class of contempt - scandalizing the Court or Judge - had become obsolete in England, yet his view

was shown to be incorrect by the case of *R. Vs. Gray* (40), decided by Lord Russell, C.J. in the very next year and by several subsequent cases : *R. Vs. New Statesman ex p. D.P.P.* (75), *Ambard Vs. A.G. for Trinidad and Tobago* (57), *R. vs. Metropolitan Police ex p Blackburn* (53), *Badry vs. D.P.P. of Mauritius* (76). That this branch of the law of contempt is in force in this Island does not admit of any doubt in view of the local decisions in the cases of : *In re Armand de Souza* (supra). *In re H.A.J.Hulugalle* (62), *In re Jayatilaka* (72).

A lucid authoritative description of the class of contempt known as "scandalizing a Court or a Judge" is to be found in the judgment of Lord Russell C.J. in *R. vs. Gray*(40)at page 62 when he said:

> "Any act done or writing published calculated to bring a court or a Judge of the court into contempt, or to lower his authority,is a Contempt of Court. That is one class of Contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a Contempt of Court. The former class belongs to the category which Lord Hardwike L.C. characterised as "scandalising a court or Judge (*In re Read and Huggonson* (74)).That description of that class of contempt is to be taken subject to one and an important qualification.Judges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no court could or would treat that as contempt of court. The law ought not to be astute is such cases as to criticise adversely what under such

circumstances and with such an object is published ; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

The qualification stressed by Lord Russell was re-echoed and emphasised three decades later by Lord Atkin in a famous passage in the advice given by the Board in the case of *Ambard vs. A.G. for Trinidad and Tobago* (57) at p 709:

"But whether the authority and position of an individual or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not cloistered virtue : she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

That any member of the public is entitled to criticise, even strongly, judicial decisions or judicial work done in a Court of Justice once a case is over has been readily conceded by the Courts, and is a principle which is now firmly established. Laid down almost eighty years ago by Lord Morris in McLeod's case (supra), reiterated by Lord Atkin in Ambard's case (supra) and most

eloquently upheld by Lord Denning in the case of *R. vs. Commissioner of the Metropolis ex p.Blackburn* (supra)) at p.320. This principle has been placed in its proper setting by the House of Lords recently in the much publicised *Times case* (supra), where Lord Simon stated at page 327 and 328 that, once the proceedings are concluded, the remit is withdrawn and the balance of public interest shifts: that the litigation having been concluded the public interest in freedom of discussion becomes paramount subject to the restrictions that the Court must not be scandalised, and any pending litigation should not be interfered with. This right has also been recognised in this Island in the cases of : *In re Armand de Souza* (supra),and *In re H.A.J. Hulugalle* (supra).The High Court of Australia too has accepted this principle : *The King vs. Fletcher , ex p. Kisch* ,(77).That fair criticism is not contempt and that the judiciary is not immune from such fair criticism, has been recognised in India too. vide *In re Mulgaokar*(78). The Indian decision, in the case of *In re Subramanian* (79), also laid down that where a publication amounts to contempt of court it is no defence that it is only a quotation from another source. That, before a decision whether any act does amount to contempt of court or not is arrived at, it is necessary to consider all the surrounding circumstances is a principle elucidated in the case of *Sambu Nath Jha vs. Kadar Prasad Sinha* (80).

The principle underlying punishment for contempt of court is that it is inflicted for attacks on Judges not with a view to protecting the individual judge or the court as a whole from a repetition of such attacks, but in order to maintain the authority of the judge or court and prevent a loss of public confidence and a risk of any interference with the administration of justice.Any libel on a judge, which has no reference to his judicial functions, or any

personal abuse or slanderous criticism of a judge as an individual and not in his judicial capacity does not amount to contempt of court - *In re Bahama Islands* (81).

In considering the said article "A" (or "X") the court has to consider how it will be understood by those who read it. In doing so, the court has to put itself in the place of the average reader of the newspaper, which carries the said article, and decide, as best as it could, what impression it would have created in the minds of such reader. In dealing with this matter, Wood Renton, C.J. observed at page 38, in the case of *In re Armand de Souza* (supra), which said approach was approved of by Abrahams, C.J. at page 303 in the case of *In re H.A.J. Hulugalle* (62), that such reader

> " would read the article as such articles are read every day by ordinary people, who have no time, even where they have the capacity to carry out such a process of balancing, and who would be guided in the long run by the general impression which the article left in their minds."

A consideration of the impunged article marked "A" by the Petitioner and "X" by the Respondents shows that :the first paragraph sets out, in the form of a question, the contents of clause (c) of the resolution which the Minister of Justice would move and the full text of which said resolution is set out later at paragraph seven thereof ; the second paragraph states that what is so set out earlier in the first paragraph is one of the questions which a parliamentary select committee will be called upon to probe under the terms of a resolution to be moved on the following day by the Justice Minister ; the third paragraph

states that the Justice Minister will move for the appointment of a select committee to probe the representations - without setting out expressly what the representations are - made by Mr.K.C.E. de Alwis; the fourth, fifth and sixth paragraphs highlight clauses (a) and (b) of the resolution which is set out in full later at paragraph seven ; the seventh paragraph then sets out in full- consisting of the preamble and five clauses numbered (a) to (e) - the text of the said resolution which the Justice Minister, it is reported, would move on the following day. The said clause (b) of paragraph seven is : "whether there was any circumstance which rendered it improper for (the two judges are named) to have agreed to hear and determine the application (S.C. Ref. No.1 of 1982) filed by Mr. Felix R.D. Bandaranaike and whether the decision of either of them was influenced by any improper consideration"; and the said clause (c) of the said seventh paragraph is: "whether any pleading filed by or on behalf of the petitioner the said Felix R.D.Bandaranaike in the said proceedings were prepared in the chambers of ..... (the judge is named) ..... one of the judges who heard the said application and if so the circumstances in which it came to be so prepared."

In regard to the two headlines which the said article carries, learned Queen's Counsel for the Petitioner stated that, if the body of the said article "A" (or "X") does not constitute a contempt of court, then the headlines by themselves would not make it so, and that, if the text of the article itself amounts to contempt of court, then the form and contents of the headlines would operate to aggravate such contempt.

In almost every one of the cases cited to us at the hearing, what was alleged to constitute the contempt was a direct attack - either oral or written by the very person who was himself brought

before court to answer to the charge of contempt of court. In this case, however, neither of the Respondents is the person who is himself responsible for originating - either orally or in writing - that which is charged as amounting to contempt. As set out earlier, the Indian case of *In re Subramanian* (supra) denies a person, who merely repeats or reproduces anything uttered or written by another which amounts to contempt of court, the defence that he himself has merely repeated or reproduced that which another uttered or wrote. Although impugning the impartiality of a judge and the imputation of improper motives to a judge in the discharge of his judicial function had been held to amount to contempt - as in *Ambard's case* (57) at p 335, in *R. v . New Statesman (Editor ex parte D.P.P.* (44) and in *R. vs. Colsey* (82), yet the view has been expressed that such an allegation may not necessarily be a contempt of court. Griffith, C.J., delivering the judgment of the High Court of Australia in the case of *The King vs. Nicholls* (56) observed :

> "...and I am not prepared to accede to the proposition that an imputation of want of impartiality to a judge is necessarily a contempt of court. On the contrary I think that, if any judge of this court or of any other court were to make a public utterence of such a character as to be likely to impair the confidence of the public, or of the suitors or any class of suitors in the impartiality of the court in any matter to be brought before it, any public comment on such an utterence, if it be a fair comment would, so far from being a contempt of court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel."

Borrie and Lowe : on The Law of Contempt at p 162, having stated that the decision in *R. vs. Colsey* (82) has been much criticised and may be open to question, refers to a criticism of it by Professor Goodhart.

I have considered the principles relating to the offence of 'scandalising of a judge or court' at length because they would also be very helpful in the consideration of the other defences urged on behalf of the Respondents. Although, on a consideration of the principles relevant to this head of contempt of court, as set out above, it would seem difficult for a publisher to escape liability in respect of the contents of clauses (b) and (c) of paragraph seven of the said article, yet, several arguments to the contrary, worthy of serious consideration, have been advanced. It is, however, unnecessary for me to express a definite finding upon this question in view of the opinion I have formed, as will be set out later in this judgment, in regard to the defence put forward by the Respondents based upon the plea of privilege. That being so it would also be necessary for me to consider the further contention put forward on behalf of the Respondents that mens rea is also a necessary element in the offence of contempt of court. Even so, in view of the fact that there has been considerable discussion of this matter, I would merely give an indication of what seems to be the position, in law, in regard to this matter. Having regard to the various decisions - from the English, Indian, Australian and also our own courts - and also the discussions of the several learned authors of text books, it seems to me : that the mental element required to be established is merely an intention to publish the impugned, objectionable matter ; that an intention, to bring the judge or the court into hatred, ridicule, contempt and interfere with the due administration of justice on the part of the offender is not a required ingredient of the offence of contempt of court.

The principle defence put forward on behalf of the Respondents - apart from the contention that the contents of the impugned article "X" (or "A") cannot be considered as constituting an offence of contempt - is that the said article, which is only a publication of the contents of an Order Paper of Parliament (a certified copy of which has been marked R 3), is a fair and true report of proceedings in Parliament, and is, therefore privileged.

It was submitted, on behalf of the Respondents, at the hearing before this court that the question which arises for consideration in these proceedings - viz : whether a fair and accurate report of Parliamentary proceedings published in a newspaper without any malice and with the sole object of furnishing information to the public is protected by a plea of a qualified privilege, even though such report contains material which amounts to contempt of court - is res integra and comes up for consideration by this court for the first time. It is one that is said to be not covered by any previous judicial authority - either in England or any other country where the parliamentary system of goverment prevails.

The first matter, which has to be decided in this connection, is whether an Order Paper of Parliament comes within the term "parliamentary proceedings". A consideration of Standing Orders nos. 20, 23, 46, 47, of the Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka prepared and adopted in terms of Article 74 of the 1978 Constitution makes it clear that the Order Paper constitutes, as it were, the agenda for a meeting of Parliament. It contains the Orders for the Day and the motions and questions, notices of which have been duly given and which have not been ruled out by the Speaker and which are to come for consideration at such meeting. Its contents

constitute "Public Business". Ordinarily no motion, resolution or bill could be moved, without it having been first placed on the Order Paper for that particular day. Nor could a question be asked if it had not been previously placed in the Order Paper for the day. The moving of motions and resolutions and the asking of questions on the floor of the House when the House is in session, is initiated by a Member by having notices of such acts included previously in the Order Paper for that particular day. Inclusion in the Order Paper is but the beginning of the process which would entitle the member to ask such questions or move such resolutions or motions at a later stage on a specified date on the floor of the House when the House is in session. It is but the first step in a transaction which would be concluded subsequently.

Erskine May's Parliamentary Practice (17 edt) discusses, at page 62, the meaning of the term "proceedings in Parliament." The primary meaning given to this term, as a technical parliamentary term, is "some formal action, usually a decision, taken by the House in its collective capacity." It has been extended "to the forms of business in which the House takes action and the whole process, the principal part of which is debate, by which it reaches a decision". It is further stated that "an individual Member takes part in a proceeding usually by speech, but also by various recognised kinds of formal action, such as voting, giving notice of a motion, etc., or presenting a petition or a report from a Committee, most of such actions being time-saving substitutes for speaking. At page 62 is also a reference to the Report of the Select Committee on the Official Secrets Act in session 1938-39 which states that the said term (proceedings in Parliament) covers "both the asking of a question and the giving of written notice of such question, and included everything said or done by a Member in the exercise of his functions as a

member in a committee of either House as well as everything said or done in either House in the transaction of Parliamentary business". The judgment of the American court referred to by Erskine May, also at page 62, shows that "speech" was not confined to the mere "uttering of a speech or haranguing in debate" but was extended to "every other act resulting from the nature and in the execution of the office."

Halsbury : Laws of England (4 edt) at paragraph 1486 states : "An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in Committees. It covers both the asking of a question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business. " Sec. 3 of the Parliament (Powers and Privilages) Act No.21 of 1953 referred to the freedom "of speech, debate and proceedings". The term "proceeding" there would seem to cover spheres of activity not covered by "speech" and "debate".

The term "proceedings in Parliament" should not be confined to utterances made on the floor of the House ,but should be extended to include all that is said and done within the House by a Member in the exercise of his essential functions as a Member of the House. Viewed from this standpoint, it is clear that R3, which is the Order Paper for the sittings of Parliament on 8.3.83, is covered by the term "proceedings in Parliament".

That a fair and accurate report of any proceedings in Parliament published without malice

in a newspaper, is, under the common law, privileged is a principle of law which is now clearly and firmly established - vide *Gately : Libel and Slander* (8 edt) para. 635. The question whether a faithful report in a newspaper of a debate in either House of Parliament which contains matter defamatory of an individual, as having been spoken in the course of a debate on the floor of the house, is actionable at the instance of such an individual came up for consideration in England for the first time in the year 1868 in the case of *Wason vs. Walter* (1) and Cockburn,C.J., delivering the judgment of the Court of Queen's Bench, held that it is not so actionable.

As the aforementioned case *Wason vs. Walter* (1) is the case in which this principle was laid down for the first time it would be helpful to consider it in some depth in order to understand the basis for the formulation of that principle. A petition was presented to the House of Lords charging a high judicial officer, who had, after a very successful career at the Bar, been recently appointed, with having, several years prior to such appointment made a false statement in order to deceive a committee of the House of Commons, and praying for an inquiry and the removal of the officer. At a debate which ensued in the House of Lords the charges were refuted. The newspaper, Times, thereupon published a faithful report of the proceedings which contained certain matters disparaging of the person, who had presented the petition spoken in the course of the debate. The petitioner then instituted an action of libel founded upon the said newspaper report. Having considered several earlier cases which had been cited, Cockburn,C.J. took the view that, as those decided cases did not provide the authority upon which to proceed, recourse would have to be had to principle in order to arrive at a decision of the question so before the court. In the quest for

principle the Chief Justice accepted 'as well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidently suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible'. The principle upon which such publications are privileged was said to be that "the advantage of publicity to the community at large outweighs any private injury resulting from the publication." Thereafter, having considered the principles upon which privilege so attaches to publications of court proceedings, it was decided that those principles should be extended to apply also to reports of proceedings in parliament, and that, as the analogy between the cases of reports of proceedings of these two institutions being complete, all the limitations placed on the one to prevent injustice to individuals must necessarily attach to the other. The argument, that publication of parliamentary proceedings is illegal as being in contravention of the standing orders of both Houses of Parliament, was disposed of in this way : that practically speaking it is idle to say that the publication of parliamentary proceedings is prohibited by parliament : that the standing orders which prohibit such publications are obviously maintained only to give each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded ; that, independently of the orders of the Houses, there is nothing unlawful in publishing reports of parliamentary proceedings ; that, practically, such publication is sanctioned by parliament ; that it is essential to the working of the parliamentary system and to the welfare of the nation ; that any argument founded on its alleged illegality must therefore entirely fail. The judgment ends by concluding that such publications must be treated as being in every respect lawful, and that, where it is done honestly

and faithfully, the publisher is free from legal responsibility, even though the character of individuals may incidently be injuriously affected.

This decision had thereafter been accepted, as settling the legal principle upon this subject, for well over a century. It has been cited with approval in the Queen's Bench Division in the case of *Webb vs. Times Publishing Co. Ltd.*,(36) and in the Court of Appeal recently, in the year 1973, by Lord Denning in the case of *Cook vs. Alexander*,(23); and by the Privy Council in 1948 in the case of *M.G. Perera vs. A.V. Peiris*,(67) which was an appeal from the Supreme Court of this Island.

It was contended on behalf of the Petitioner : that, although such plea of privilege covers claims for libel by individuals who may have been defamed by such publications yet, such plea is not available where such publications contain blasphemous or seditious matter ; that just as blasphemous and seditious matter is not protected, matter that amounts to contempt of court is also not protected. This contention is founded upon what appears in paragraph 596 of *Gatley: Libel and Slander*(supra), under the heading "Limits of Privilege", wherein the author states : "It is obvious that as the (common law) privilege is founded upon grounds of public policy, and of benefit and advantage to the community, it does not extend to protecting any report; however fair and accurate, which is blasphemous, seditious or immoral, or prohibited by statute or by any rule or order having statutory force, or by order of the court or a judge prohibiting a report of the proceedings in any case where the publication of such report would interfere with the course of justice". In this statement no express reference has been made to contempt of court. That which would amount to contempt of court is not spe-

cifically mentioned as also a matter which would preclude the claim of privilege. Nor is contempt of court a matter that would be brought under any one of the heads expressly mentioned in this paragraph. Based upon this statement, it was strongly contended that if blasphemous, seditious and immoral matter could exclude privilege, why not contempt of court?

The authority relied on for the proposition so put forward - in so far as blasphemous, seditious and immoral matters are concerned - is the case of *Steele vs. Brannan* (83) which followed an earlier decision in the case of *R. vs. Mary Carlile* (84). On a careful perusal of the judgment in *Steele's case* which founds itself upon the earlier decision in *Carlile's case* (supra) and a passage from Starkie on Slander and Libel, 3rd edt at page 215, it seems to me that neither the judgment of Bovill, C.J. or for that matter neither of the judgments pronounced by the two judges, Keating, J. and Garvin, J., could be said to justify the formulation of such a general principle as is sought to be relied upon on behalf of the Petitioner. The facts and circumstances upon which the decision in *Steel's case* (supra) was based are : the appellant Steele, kept in his shop for sale pamphlets which were considered obscene; this pamphlet was a substantially correct report of the trial of one G.M. on an indictment for a misdemeanour in selling a certain obscene work called the "Confessional Unmasked"; the contents of that book were set out in full in this pamphlet, although, at the trial, it was taken as read and only passages in it were referred to; on an order made by a Magistrate the pamphlets which were for sale in Steele's shop were seized, and Steele was asked to show cause why they should not be destroyed ; upon the Magistrate making an order for the destruction of the said pamphlet on the ground that it was obscene, Steele appealed against the said Order to the Court of Common Pleas. One of the defences raised was that the said

publication was privileged as a fair report of proceedings (the trial of G.M. referred to earlier) in a court of competent jurisdiction. Bovill, C.J., having referred to the passage from Starkie On Slander and Libel, referred to earlier, and also to the judgment of Bayley, J., in *Carlile's case* (supra), concluded that ;

> "It is clear that in general the publication of fair reports of proceedings in courts of justice, like free discussion of matters of public importance, being considered for the public benefit, is privileged; but it is equally clear that discussion offensive to public decency and of a depraving tendency are not privileged."

Keating, J. in the course of his judgment observed :

> "The freedom of the press with relation to proceedings of courts of justice is, doubtless of the highest importance, and the law does its utmost to protect such freedom, but the law would be self-contradictory if it made the publication of an indecent work an indictable offence and yet sanctioned the republication of such a work under cover of its being part of the proceedings in a court of justice."

Grove, J. expressed himself thus :

> "If it were permissible to publish the report of a trial, in which the question was whether certain matter was obscene and the publication of it a misdemeanour, and to produce the whole of such disgusting matter under the cover of such report, the rule would be that the person publishing an ob-

scene work would only have to be brought before a court of justice for such publication, in order to entitle him to republish the same matter with perfect impunity. His trial would frustrate the very purpose which it had in view, viz: the putting of a stop to the publication of such matter. This consideration appears to me to reduce the appellant's contention to an absurdity."

A careful consideration of the facts and circumstances in *Steel's case* (supra),and the judgment delivered in that case, it is clear that the claim of privilege just could not have been accepted in such a situation as arose in that case. Had such a claim been upheld, not only would the law have been rendered self contradictory, but the court would also have been stultifying itself ; for, whilst it, on the one hand, took steps to prevent the publication of an article, it would, on the other, have given its blessings to the publication of the very matter so impugned. The decision in *Steele's case* (supra) may have been applicable if a newspaper published what learned Counsel in the case of *Vidyasagars vs. The Queen*,(66) stated to court, even though such report was fair and accurate and the publication bona fide. The decision in *Steele's case* (supra) does not lend itself to support a proposition that there are proceedings in Parliament, which though they constitute acts and deeds of Members themselves cannot, nevertheless, be reported by a newspaper however fair and accurate such report be, and even though such publication has not been expressly prohibited by the House.

The case of *Surendra Mohanty Vs. Nabakrishna Choudhury and others* (24) was also cited on behalf of the Petitioners. In that case a newspaper published a speech, made in the State Legislature

by a Member of that Legislature, which amounted to contempt of the High Court. Upon the Member concerned, and the editor, the printer and the publisher of the newspaper being asked to show cause why they should not be committed for contempt, the editor, the printer and the publisher tendered an unqualified apology. The Rule issued against the Member was discharged on the ground that the High Court had no jurisdiction to take action against a Member of the Legislature for his speech in the Legislature, even if it amounts to contempt. The decision in that case, in so far as it affected the publishers, is of little or no assistance in this case where the Respondents have denied liability and a consideration of the relevant principles of law has become necessary.

Great reliance was also placed on behalf of the Petitioner, in support on this contention, upon a statement made by Gatley (Supra) in the course of footnote no. 28 appearing at page 596, wherein the author submits that "there can be no privilege for a report the publication of which is contempt of court", and then proceeds to state that" this was conceded in *Lucas and Son vs. O'Brien* (31), though an exception was said to be possible." Although the law report, in which the said judgment is reported, itself is not available, photostat copies of it have, since judgment was reserved in this case, been submitted to us by learned Queen's Counsel appearing for the Petitioner. A perusal of the said copy shows that : O'Brien who had been a member of a political League in New Zealand had in 1969 resigned from that League and founded another political party ; on 21st November 1972 the League instituted legal proceedings against O'Brien and several others alleging that assets belonging to the League had been transferred to the new party in order to assist O'Brien in the 1972 New Zealand general election ; On 22.11.72 Lucas and Sons (Nelson Mail) Ltd., published an article in its

newspaper which was in effect a repetition of the statement of claim filed in Court against O'Brien ; O'Brien then commenced an action against the newspaper and the League for damages on the basis that the said article was defamatory ; both defendants raised, inter alia, the defence of qualified privilege, at common law, on the basis that they had a moral or social duty to communicate the contents of the claim made against O'Brien to the general public, and that the article was a fair and accurate report of proceedings of Court ; these two defences were, on the application of the plaintiff, O'Brien, struck out by the trial judge ; the defendants thereupon appealed to the Court of Appeal. In appeal the Court allowed the defendants to put forward the defence of qualified privilege based on a social or moral duty to communicate. It was in discussing this plea, that the appellate court considered the trial judge's reference to the possibility that the publication of the contents of the statement of claim filed by the League against O'Brien amounted to a contempt of court ; and having observed that "It would be surprising if statements that might amount to contempt.....could at the same time be privileged for reasons of public policy in an action for defamation", the appellate court proceeded to observe that : the trial judge, however, did not in fact go so far as to hold that the publication of the said statement of claim actually amounted to a contempt of court : that, before it (the appellate court), learned Counsel did concede that, if such publication had in fact amounted to contempt, then such publication could not be the subject of qualified privilege on the basis of a moral and social duty. It is here important to note that the statement, that anything which amounts to contempt of court would not be covered by privilege, was not a conclusion arrived at by court and which formed the basis of the court's decision, but that it represents only an admission made by Counsel on a question of law.

What is even more important to note is that the plea of qualified privilege which was accepted as being not available is a plea of qualified privilege put forward on the basis of "a moral or social duty", and that it makes no reference to a plea put forward on the basis of a publication being a fair and accurate report of parliamentary proceedings made without malice. In any event the court further observed that "it is possible that a situation could arise in which it would be necessary for the court to balance the ordinary interest of a litigant in a fair trial against some other consideration of general public interest and to decide where the public interest lay". This evidently is the observation which made Gatley state, as set out earlier, that "an exception was said to be possible".

There is, however, an expression of opinion by a judge of the Court of Appeal in England that the protection granted to a fair and accurate report of parliamentary proceedings covers not only that which would otherwise have been actionable on the basis of libel, but also that which would amount to contempt of court. Lord Denning did, in the Court of Appeal in the case of A.G. vs. Times Newspapers Ltd.(12) state:

> "as soon as matters are discussed in Parliament they can be, and are, reported at large in the newspaper. The publication in the newspapers is protected by the law. Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court. If it is no contempt for a newspaper to publish the comments made in Parliament, it should be no contempt to publish the selfsame comments made outside Parliament."

No earlier authority has been referred to by Lord Denning in support of the principle that such proceedings can be published without running the risk of being brought up for contempt of court. Yet, if previous authority is necessary, then the expression of opinion by Chief Justice Cockburn, in *Wason's case*(1), in setting out the illustration brought out at page 90, could be relied on. The illustration so set out is a good example of 'scandalising a judge', and if the public could be informed of what passes in debate in regard to such a matter then it is a clear instance of the aforesaid principle so set out by Lord Denning in the Court of Appeal. An expression of opinion on a question of law by so eminent a judge is by itself high authority. It was submitted that, in any event, as the House of Lords has subsequently reversed the decision of the Court of Appeal Lord Denning's judgment would be of no avail. The House of Lords did undoubtedly set aside the decision of the Court of Appeal to discharge the injunction, but not on the basis that the principle so set out by Lord Denning in the Court of Appeal is wrong in law. The mere fact that the appeal to the House of Lords was allowed would not in any way detract from the force and authority of any principle of law formulated and set down in the judgment of the Court of Appeal. It would have lost its authority only if the House of Lords did deal with it pointedly, and did expressly state that such principle is not good law. In passing, it may be noted that the European Court of Human Rights - *1979 Vol. 2 European Court of Human Rights Report p.245* did not agree with the view of the House of Lords.

It was further contended that the view expressed by Lord Denning should be confined to England because Parliament in England was earlier the High Court of Parliament vested with judicial powers, and also because of the lex et consuetudo

Parliamenti which was peculiar to that Parliament; and certain statements, appearing in *Kielly vs. Carson*, (85) to the effect that the power possessed by the House of Commons to deal with for contempt was as a Court of Judicature and as part of the High Court of Parliament. It transpired that the statements appearing at pages 66 - 75 were only submissions of Counsel, and that the judgment in the case commenced at page 83. In the judgment itself it is stated, at page 89, that the power to deal with for contempt possessed by the House of Commons is so possessed not because it is a representative body with legislative functions, but "by virtue of ancient usage and prescription", that the lex et consuetudo parliamenti forms part of the Common Law of the land, that, according to that law and custom, High Court of Parliament before its division, and the House of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. These principels relating to the powers of the House of Commons to deal with for contempt of its own authority do not, in any way, render the aforementioned principle of law set out in the judgment of Lord Denning inapplicable to the facts and circumstances of a case such as the one now before this court where the question is whether a court of law is in any way precluded from dealing with a person who has published an article which contains matter that amounts to a contempt of such court. In any event, it must also be noted that, under Article 4(c) of the Constitution, whilst the judicial power of the People is now exercisable by Parliament through the courts and the other institutions specified therein, Parliament can exercise directly the judicial power of the People in respect of the matters spelt out in the said sub-Article.

That the same reasoning, which applies in cases where a party seeks to restrain the

publication of a libel, be made applicable also to contempt of court is a view that has been again expressed by Lord Denning - although on that occasion it was in respect of a civil action and the publication was only a programme proposed to be broadcast by the British Broadcasting Corporation - in 1979, in the case of *A.G. vs. B.B.C.* (55) at 318.

In administering the law of contempt of court, the courts have been called upon to consider two important principles relating to two aspects of public interest, each of which is of paramount importance in any parliamentary system of government, and which are also now enshrined in the Constitution : the public interest in the administration of justice. The approach which the European Court of Human Rights adopted in the *'Times case* (supra), viz : that the Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted, cannot, however, be considered in this Island as no restrictions have yet been prescribed by law in relation to contempt of court under the provisions of sub-article (2) of Article 15 of the Constitution. We have, therefore, to continue to walk the tight-rope, performing the balancing act prescribed by the House of Lords in the Times case (supra) and referred to earlier. Contempt of Court is punished, as has been set out earlier, not because those who are charged with the responsibility of administering justice are concerned about their own dignity but because it undermines the confidence of the public - not only of the parties to a particular suit but also all potential litigants in the due administration of justice by the courts of law established by law. The administration of justice, as has already been stated, is a matter of tremendous importance and of utmost concern to the public. The freedom of speech has always been of paramount importance to the

public; for, it is one of the fundamental features of parliamentary system of government without which parliamentary democracy would be a mockery. The law of contempt of court constitutes a direct interference with the freedom of speech; and, in the delicate exercise of assessing the claim of these two competing interests both of which are equally indispensable, they have both to be carefully weighed and finely balanced. Whilst, on the one hand, the freedom of speech, should not be limited more than is really and truly necessary, on the other it cannot be permitted in a situation where there is a real likelihood of causing prejudice to or interfering with the administration of justice.

Article 14 (1) (a) of the Constitution guarantees to every citizen the freedom of speech and expression including publication. The law relating to contempt of court is a restriction on the said freedom of speech; but as set out earlier the combined force of the provisions of Articles 168 (1) and of 16 (1) render such restriction valid and operative. At an early stage of the proceedings before this court it was contended, on behalf of the Respondents, that the Constitution promulgated in 1978 'advanced the rights of the Press' and that the law relating to contempt of court dealing with publications in the Press, which was in force in this Island at the time the Constitution came into operation, requires to be reviewed. The Constitution has not granted any specific rights to the Press of this Island. No special or exclusive right, which has not been granted to a citizen of the Republic, has been granted to the Press. No right, over and above the rights granted to a citizen of the Republic, has been granted to the Press of the Republic. The rights, which the Press enjoys, constitute only an amalgamation, if at all, of the rights of the individual citizens of the Republic. The Constitution has not vested in the

Press any right which it did not enjoy earlier under the common law; nor any right which a citizen of the Republic is not granted under the Constitution. The fundamental rights enjoyed by the Press under the Constitution are nothing more and nothing less than the rights which even the humblest citizen of the Republic is entitled to.

Article 3 of the Constitution provides : that sovereignty is in the People and is inalienable ; that sovereignty includes the powers of the government, fundamental rights and the franchise. Article 4 of the Constitution which sets out the manner in which the sovereignty so vested in the People should be enjoyed and exercised, provides, inter alia: in sub-article (a) that the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ; in sub-article (b) how the executive power of the People should be exercised ; in sub - article (c) how the judicial power of the people should be exercised. Under the Constitution the three main powers of government viz: the legislative, the executive and the judicial, are, even though they are to be exercised by Parliament, the President of the Republic and the courts respectively, all nevertheless vested in the People. The People of this Island have therefore an inalienable and unquestionable right to know and take an interest in all that takes place, inter alia, both in Parliament and in the administration of justice. The administration of justice has always been, in a parliamentary system of government, a matter of both great and profound public interest, and public concern. It has now become even more so under the Constitution now in operation. Parliament not only exercises the legislative power vested in the People, but also consists of the elected representatives of the People. That being so, what such elected representatives say and do in Parliament,

and what takes place in Parliament is of tremendous importance to the People and the People must know and have access to information of all such matters, subject only to any restrictions imposed by the law of the land. The necessity for and the importance of informing the people of all proceedings in parliament have been very aptly and forcefully set out by Chief Justice Cockburn well over hundred years ago, in the case of *Wason vs. Walter*,(1) referred to earlier; and in view of its great relevancy I take leave to quote at length, commencing from page 89 -:

> "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed, where would be our attachment to the Constitution if the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communication between the representatives of the people and their Constitutions, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern

> times to what passes in parliament is essential to the maintenance of the relation subsisting between the government, the legislature and the country at large?"

Dealing with the argument that, even so, debates in which the character of individuals is brought into question should not receive publicity, the Chief Justice proceeded to state at page 90 :

> " .....there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state, no subject of parliamentary discussion which requires to be made known than any inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel whose qualification for the judicial bench had been abundantly tested by a long career of forensic medicine, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honour is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate?"

The Chief Justice then proceeds to discuss, at page 94, why it is so very desirable that all public

functionaries, including judges, should be open to criticism :

> "Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges, and other public functionaries are now made every day which half a century ago would have been the subject of actions or ex office information, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and though public men often have to smart under the keen sense of wrong inflicted by hostile criticism the nation profits by public opinion being thus freely brought to bear on the discharge of public duties."

These statements were made well over a century ago; but how true they sound even today, how apposite they are even now.It has been submitted that, though such observations may apply to other functionaries, yet, limitations should be placed upon them in so far as they relate to judges lest the independence of the judiciary be undermined. The only limitation would be that the limits of fair criticism be not exceeded and the field of contempt of court not be entered into. Subject to this salutary restriction - and the reminder which will be referred to later on in this judgment - a judge too stands, at the conclusion of a case, open to criticism, however cumbustious it be.

That proceedings in Parliament are presumed conclusively to be of public interest, and that the nature of the activities of Parliament (and of the courts) are such that they are treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings is also a principle which has

been accepted - in the 19th century in *Wason's case* (1), and in the 20th century in *Webb's case* (36) in 1973,and in 1948 by the Privy Council in *M.G. Perera's case* (67). The Privy Council was also of view that reports of judicial and parliamentary proceedings stand in a class apart from reports of proceedings of other bodies, in regard to which their status alone was not to be conclusive, but the subject matter dealt with in the particular report had also to be considered. So that, as far as Parliamentary proceedings are concerned, no distinction is to be made on the basis of the subject-matter dealt with, or the nature and the character of such subject-matter. A newspaper, which, therefore, publishes, without malice and with the sole subject of conveying information to the public, a fair and accurate report of "a proceeding in Parliament", publishes something which the law presumes "conclusively to be of public interest", and which the law also treats as "conclusively establishing that the public interest is forwarded by (its) publication."

During the last three or four decades there seems to have been considerable interest evinced in England in regard to an examination of the state of the law of contempt of court ; and several committees, chaired by experienced and distinguished judges of the superior courts, have, from time to time, examined the legal position relating to contempt of court and have recommended several changes and reforms to be brought about in this particular branch of the law : a committee chaired by Lord Shawcross in 1959 ; a committee chaired by Lord Salmon in 1969 ; a committee chaired by Lord Justice Phillimore in 1974. The opinions expressed and the recommendations made by these several committees - even though they have not all been given legal effect to - serve to indicate the modern approach to a branch of the law which is very ancient in origin and which is of the utmost

importance in the field of administration of justice.

The Report of the Committee on Contempt of Court chaired by Rt. Hon. Lord Justice Phillimore, which was presented to Parliament in England, states, at page 69, in regard to the offence of scandalising that : "most attacks of this kind are best ignored. They usually come from disappointed litigants or their friends. To take proceedings in respect of them would merely give them greater publicity and a platform from which the person concerned could air his view further. Moreover the climate of opinion nowadays is more free. Authority including the Courts, is questioned and scrutinised more than it used to be. The Lord Chief Justice said in his evidence to us :"Judges" backs have got to be a good deal broader than they were thought to be thirty years ago". It is no doubt because of this, and in pursuance of the spirit of Lord Atkin's dictum that practice has reverted to what it was before the turn of the century when it was said that:

> 'Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.'

The Phillimore committee was of opinion that the time has come to bring the law into line with such practice, and recommended that the branch of the law, known as 'scandalising a judge or court' be done away with and be replaced by a new strictly defined criminal offence to be triable on indictment and in respect of which the defence that the allegations were true and that the publication was for the public benefit be available to the defence. This recommendation has, however, not yet been implemented, although the Law of Contempt of Court Act was enacted in 1981.

In their report The Inter-departmental Committee on the Law of Contempt as it affects Tribunals of Inquiry chaired by Lord Justice Salmon, in the year 1969, had this to say in regard to the making of allegations of impropriety against judges, (and which appears at page 190 of the book entitled *Judges on Trial by Shimon Shetreet - and edited by Gordon J. Borrie*-1976) :

> "In the most unlikely event, however, there being just cause for challenging the integrity of a judge, it could not be contempt of court to do so. Indeed it would be a public duty to bring the relevant facts to light."

A committee chaired by Lord Shawcross - as set out at p.191 in Judges on Trial (supra) - which had also considered the question of contempt of court had recommended that there should be the opportunity of making bona fide charges of partiality or corruption against a judge and that the appropriate means for this purpose was not the Press but a letter to the Lord Chancellor or the complainant's Member of Parliament. In this case now before us, the document "A" does not represent a complaint made by Mr. de Alwis to the Respondents' newspaper. It is only a publication of a fair and accurate - no question has been raised about its fairness or accuracy - report of something done in Parliament.

The last successful prosecution for 'scandalising a judge' in England has been over half a century ago - 1931 in the case of *R vs. Colsey* (supra) when an allegation of partiality was alleged against Lord Justice Slesser, who had, earlier, as Solicitor - General, steered the relevant legislation which came up for consideration before him in this case, by the editor of the magazine *Truth*, and the editor was fined. This

decision has, as earlier stated, come in for much criticism, and, according to *Borrie and Lowe* (supra) - p 162) 'may be open to question'. The only subsequent attempt, according to the reported decisions, to have a person dealt with under this head of contempt was in 1968 when Quintin Hogg,Q.C. was brought up before the Court of Appeal which was incidentally the very first occasion, according to Lord Denning that the Court of Appeal in England was called upon to deal with a case of contempt against itself - in respect of an article written by him in the magazine called "Punch": It was in the course of the judgment in this case that Lord Denning used with reference to the court's power to deal with for contempt, the now well known words :

> "It is a jurisdiction which undoubtedly belongs to us, but which we will use most sparingly : more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must vest on surer foundations. Nor will we use it to supress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man in Parliament or out of it in the Press or over the broadcast to make fair comment even outspoken comment on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office we cannot reply to their criticism.We cannot enter into public controversy. Still less into

political controversy. We must rely on our conduct itself to be its own vindication."

It may, however, be very difficult to draw the line between strongly expressed criticism and scurrilous abuse.

If such conduct as was considered in the case of *The King vs. Nicholls* (56) could be made the subject of public comment, then public knowledge of the consideration of an allegation of conduct, which is not so apparent to the public, by the highest Legislature of the country cannot be said to cause more damage to the person or the institution concerned.

Although, amongst the authorities cited to us at the hearing of this matter, several of them are instances in which the offenders have been dealt with, yet, in quite a few, the defences have been upheld. After a review of the judicial decisions relating to this particular head of contempt, Arlidge and Eady in their book on the Law of Contempt of Court (1982) state at page 163 : "Overall it is difficult to escape the feeling that even in the few cases where matter has been held to be scandalous, no great harm would have been done to the administration of justice if the particular publication had been passed over unnoticed. If, as suggested, the correct test is whether there is a risk of serious interference with the administration of justice, it may be that there will be few cases where this contempt will be established."

The modern approach in regard to this category of contempt of court seems to be heavily in favour of the courts being content "to leave to public opinion attacks or comments derogatory or scandalous to them", and "to rely on (their) conduct itself to be (their) own vindication."

Wason's case (1) set out the grounds upon which publicity to Court proceedings are given though inconvenience may be caused to individuals by much publications, and proceeded to accord to reports of the proceedings of Parliament a similar protection in law. Pearson,J. did in *Webb's case* (supra) set out five reasons, which had been collected from the earlier authorities, why privilege has been accorded to judicial proceedings : that court proceedings are open to the public, and therefore reports of such proceedings should be freely permitted; that the administration of justice concerns everyone, and that it is well that the conduct of Judges should if necessary be brought before the bar of public opinion like all other matters of public concern; that the education of the public as to the details of the administration of justice ; that the parties affected may be well be better off with a fair and accurate report than with rumours circulating ; in balancing the advantages to the public by the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed; the general advantages to the country in having proceedings published more than counterbalances the inconvenience to private persons, whose conduct may be the subject of such proceedings.

Shetreet : Judges on Trial 1976, edited by Gordon J. Borrie refers, at page 98, to a letter, dated 9.2.1921, written by the then Lord Chancellor, Lord Birkenchead, to the then Prime Minister of England, Mr.Lloyd George strongly opposing a proposed appointment to a high judicial office. In that letter the Lord Chancellor had, quoting the terms of the Act of Settlement of 1701, stated that the Judges " be removable only for the most serious judicial misbehaviour and then in the most public and open manner". Shetreet at page 150, also refers to an

incident which had taken place in England in the year 1973 in which two highly placed Judges of the land had figured prominently in public with reference to a matter arising from the criticism, by trade unionists and members of Parliament, of the conduct of a judge in his judicial capacity : the President of the Industrial Relations Court (Sir John Donaldson) made an order of sequestration against the 'political fund' of a large trade union ; the trade union concerned refused to obey the said Order ; a campaign of criticism was then undertaken by the trade unionists and the Labour backbenchers against Sir John Donaldson ; a motion, signed by 187 Labour Members of Parliament was also put down in Parliament, calling for the removal of Sir John Donaldson on the ground of "political prejudice and partiality" ; Sir John Donaldson then defended the decision of his Court in public in order to set the record straight ; Lord Hailsham the then Lord Chancellor, did himself, in a public speech made as the head of the judiciary, call upon the public to note the identity and the party of the signatories to the said motion, and to strike a blow for the integrity and independance of the judges of England. Learned Counsel appearing for the Respondents, did also draw the attention of this Court to several instances even in this Island in which publicity had been given in the local Press to matters pertaining to the judiciary and the administration of justice, which could have come well within the ambit of 'scandalising a judge or Court'. Such publicity has not been shown to have brought about any loss of public confidence in the judiciary of this Island or to have resulted in any risk of serious interference with the administration of justice in this Island. The submission was made that any complaint against a judge qua judge should be directed to the authority, which under the law has the power to

take steps against such judge, and that no publicity should be given to such complaint or to the steps taken upon it until a final decision is made and that the public should be made aware of such complaint and the proceedings only after the final decision is made in regard to such complaint. The advantages, if any, of such a 'closed' procedure, are, in my opinion, outweighed by the beneficial advantages of a procedure which is "most public and open". It is in the best interests of the very person against whom such an allegation has been made that it be not fully concealed from the public and that no occasion be provided for the circulation of rumours which in practice has often been found to cause immense suffering to the helpless individual. The innocent need not fear such openness. A person whose conscience is clear need not and will not fight shy of an 'open' procedure. The damage that would and could be caused both to the individual and to the institution where access to information is completely barred need hardly be stressed. Any pain of mind that would be caused, and any stigma that would be attached to one, who is innocent, as a result of the public being informed of any such complaint, and of the steps being taken in that behalf by those in authority, would be only temporary; for, once the innocence of the party complained against is vindicated, and he is exonerated, the same degree of publicity could and would be given to such decision. A responsible Press - and other media with an equal sense of responsibility - could be relied on to do whatever is in their power to see that the fair name of the officer concerned, which might have been dimmed even in some small measure by their own act, is restored to its original lustre. Such information given to the public, regarding the complaint and the steps that are to be taken by the country's highest legislature to have such complaint inquired into by the appropriate authority, would,

far from shaking the confidence the public has in the institution or in the individual, operate to assure to the public that the stream of justice continues, and would continue to flow with all its traditional and pristine purity. The administration of justice would stand to lose more than it would gain if the judges and the Courts were to be shielded from public scrutiny.

It is legitimate to proceed on the basis that all proceedings in Parliament are conducted with a very high sense of responsibility, and always in the best interests of the People, whose elected representatives the Members of Parliament are and in whom also the Constitution of the Island has vested the sovereignty. That the House is deeply conscious of the importance of, and the special place that should be accorded to the administration of justice, and also of the solemn and responsible manner in which it must proceed in all matters connected with it is evident from the Standing Order No: 78, wherein it is provided that the conduct of Judges or other persons engaged in the administration of justice shall not be raised except upon a substantive motion. As earlier stated, before such a motion could be moved on the floor of the House, certain procedural steps, required by the Standing Orders of the House, and which are also subject to the orders of the Speaker, have to be complied with. Furthermore, all proceedings on the floor of the House are subject to the direction and control of the Speaker. The House has the power to prohibit the publication of any of its proceedings. The House also observes a well established procedure in regard to matters that are sub judice. It has been stated that whatever salutory precautionary measures there be, they will be open to abuse. Then, as has been said, anything of value is liable to be abused. That, however, does not justify an approach that the Members will act in a

manner that is not compatible with the sense of responsibility that the People who elected them have a right to expect, and do in fact expect of them.

Lord Denning did, in the course of the judgment in the *Times case* (supra) refer to the desirability of the conventions of Parliament being the same as the law administered in the Courts in matters affecting the Courts in order to prevent any interference with the administration of justice. A similar expression of opinion was made by Lord Phillimore in the course of his judgment in the same case; and the third judge Lord Scarman, suggested that, although the courts, subject only to the legislative power of Parliament, can determine what constitutes contempt of court, yet, in an area which enjoys the attention of both Parliament and the courts and where discretion is a major element in the process of decision it is the duty of the courts to note the practice of the House of Parliament and to act in harmony with it, so far as the law allows.

No allegation of malice has been made against either of the Respondents by the Petitioner in his affidavit; and learned Queen's Counsel did also, in the course of his submissions, state that no such allegation is being made. There is no reason why the 1st Respondent's assertion that his was an act done bona fide and solely for the purpose of supplying information to the public should not be accepted.

There is another aspect of this matter to be considered - whether a publication such as "A" could be said in any way to have an impact on another well known principle of parliamentary democracy, viz: the independance of the judiciary. This principle has been variously described as "a cornerstone of democracy", "pillar of democracy",

"the last bastion of freedom," the "bulwark of individual freedom". Whatever the description, the characteristics of this particular feature, which is one of the hallmarks of parliamentary democracy, are well- known and need no elaboration. Having been originated and developed in England it has been readily accepted and adopted as an inherent and indispensable characteristic of parliamentary democracy. With us, in this Island, this principle is now enshrined in the Constitution itself. It is referred to in the Preamble as one of the assurances granted to the people and is embodied in the chapter relating to the Judiciary. The relevant provisions are Article 107 to Article 117. Article 107 (2) makes provision for the removal of judges: by an order of the President, who, in terms of Article 4 (b), alone exercises the executive power of the people, upon an address of Parliament, which, in terms of Article 4 exercises, apart from the People themselves at a Referendum the legislative power of the People. The proviso to sub-article (2) of Article 107 sets out the circumstances in which a resolution for the presentation of such an address shall be entertained by the Speaker. Sub-article (3) of Article 107 states that Parliament shall either by law or by Standing Order provide for all matters relating to the presentation of such an address, and for certain specified steps relevant to such a resolution. No Standing Orders made in terms of Article 107 (3) have been brought to the notice of this Court. Nor is there anything to show that such Standing Orders have in truth and in fact been made. The resolution relevant to these proceedings set down in the Order Paper, R 3, is, it seems to be clear, only the beginning of the process which would, if it is so warranted, culminate in the resolution referred to in the proviso to sub-article (3) of Article 107. The public interest in proceedings specified in sub-

article (2) (3) of Article 107 is unquestionable. The publication "A" cannot be said to violate any of the aforesaid provisions of the Constitution relating to the independence of the judiciary.

A consideration of the question, which arises upon the plea put forward on behalf of the Respondents, as set out above, leaves me to the view that the protection granted by the common law to a fair and accurate report of proceedings of Parliament published without malice and solely for the information of the public though it contains defamatory matter also protects a fair and accurate report of a proceeding of Parliament, such as 'A', published without malice and solely for the information of the public and the publication of which has not been prohibited by Parliament, even though such report contains matter which would otherwise have rendered the publisher liable to be dealt with under that branch of the law of contempt known as 'scandalising a judge or Court'.

There are just two other matters I would like to refer to before I conclude this judgment.

The Press undoubtedly has a very important and responsible part to play in regard to the administration of justice. As has been set out by *Shetreet* (supra) at p 179, Lord Denning has had this to say in regard to the role of the Press in this field : "In every court in England you will, I believe, find a newspaper reporter ....He notes all that goes on and makes a fair and accurate report of it.....He is, I verily believe, the watch-dog of justice. ....The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify

themselves at the bar of public opinion":"Justice has no place in darkness and secrecy. When a judge sits on a case, he himself is on trial.....If there is any misconduct on (his) part any bias or prejudice, there is a reporter to keep an eye on him". Lord Shawcross, in the report of the committee chaired by him in 1965 on the 'Law and the Press', referred to by Shetreet (supra) at page 180 has observed :"a large measure of responsibility rests upon the Press to keep a constant watch on the proceedings in the courts at all levels to make such criticism as appears necessary in the interest of justice".The Salmon Committee in 1969 (supra) has observed : "the right to criticise judges.....may be one of the safeguards which helps to ensure their high standards of performance and also that the same meticulous care which has always been taken in appointing them in the past will continue to be taken in the future". This "watch-dog" - an equally familiar and equally alert figure in our own courts - has an extremely responsible and vital role to play in the sphere of administration of justice. It behoves this "watch-dog", therefore, not to "break loose and have to be punished for misbehaviour", but to discharge the trust placed in it with a deep sense of responsibility and with dignity and decorum, always remembering that, in the words of Lord Denning, all that the judges ask of all those who criticise them is:

> ".....remember that from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

It need hardly be stressed that the aforementioned decision operates to protect

reports - as are expressly referred to, and are published in the manner and with the object specifically set out therein - only of proceedings of Parliament, and also, of course, of courts. It does not protect scurrilous outbursts against judges, qua judges, and courts by, for instance, "ill-informed, slap-dash news-writers and pamphleteers", who, if and when found answerable, will be severely dealt with.

The Rule issued on the 1st and 2nd Respondents should, accordingly be discharged.

ABDUL CADER, J.

The facts are set down in the Judgment of Wanasundera, J. The news item which is the subject matter of the charge has the heading:
"Select Committee Probe of Mr.K.C.E.de Alwis' Representations".
"F.D.B.'s pleadings prepared in the Judge's Chambers ?"

Thereafter, two items in the motion are singled out for special mention conspicuously and then the entire motion before Parliament is reproduced. Mr.Nadesan agreed that neither the headline nor the spotlighting of certain parts of the resolution will constitute contempt by itself, when there is a reproduction of the entire text of the resolution in that news item, but that they would aggravate the contempt only if the news item amounts to contempt. In fact, in the proceedings before us, there are no inaccuracies to complain about, except that some parts of the resolution have been highlighted. (Vide *Cook v. Alexander* (23))

We are concerned in these proceedings only with the aspect of contempt dealing with scanda-

lising the Court and I shall now deal with some cases reported in Borrie and Lowe on the Law of Contempt on this aspect of the law where convictions had been entered in respect of newspaper publications.

In *Rex vs. Gray* (40)

> "The terrors of Mr.Justice Darling will not trouble the..... reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr.Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and emptyheadedness, who admonished the press yesterday."

In *Rex v. New Statesman* (75)

> "We cannot help regarding the verdict given this week in the libel action brought by the Editor of the Morning Post against Dr.Marie Stopes as a substantial miscarriage of justice. We are not at all in sympathy with Dr.Stopes' work or aims, but prejudice against those aims ought not to be allowed to influence a Court of Justice in the manner in which they appeared to influence Mr.Justice Avory in his summing up.... The serious point in this case, however,is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr.Justice Avory and there are so many Avory's."

In *Rex v. Colsey* (82)

> "Lord Justice Slesser who can hardly be altogether unbiassed about legislation of this

type maintained that really it was a very nice provisional order or as good as one can be expected in this vale of tears."

In the Evening News (39) :

"His Honour the Judge Windeyer has had another opportunity to show his utter want of judicial impartiality and from the bench he has delivered once more a bitter and one-sided adovcate's speech."

I now proceed to consider the news item which is the subject matter of the charge.The very headline which the editor thought important to highlight suggests gross impropriety to a judge. What can be more partial than to permit a party to prepare the pleadings in the chamber of the judge who heard the case ? The question mark makes no difference. Nice distinctions that there was no allegation that the judge had a hand in it are of no substance as the information carries a sufficient innuendo. If not, why investigate it at all?

Yet another 'question' that brings the court into disrepute is that two Judges were influenced by improper considerations.

Taking the entire article as a whole, one is left with no uncertainty as regards the effect that this item would have had on the public and it is that what matters,not the respondent's intention.

Borrie and Lowe in "The Law of Contempt"

"Allegations of partiality are probably the most common way in which the court has been held to be "scandalised".The courts are particularly sensitive about such allegations

and there seems to be a clear distinction between an allegation of partiality and an allegation of incompetence. This sensitivity is attributable to the fact that the very basic function of a judge is to make an impartial judgment. Indeed the law goes on to some lengths to ensure that a judge has no personal interest in the case, his decision being considered void and of no effect if bias is proved; *nemo judex in sua causa*. Allegations of partiality are treated very seriously indeed because they tend to undermine confidence in the basic function of a judge."

In *Veerasamy v. Stewart* (88) Soertsz, J. states as follows :-

"As Harris, C.J. said in the case of *Superintendent of Legal Affairs, Bihar v. Murali Manohar* (86).

"It has been frequently laid down that no intent to interfere with the due course of justice, or to prejudice the public need be established if the effect of the article or articles complained of is to create prejudice, or is to interfere with the due course of justice."

In regard to the precise meaning of the words 'if the effect is to create prejudice or to interfere', numerous judgments have established the rule that -

"the question in every case is not whether the publication in fact interferes, but whether it tends to interfere with the due course of justice", (e.g., vide *Metropolitan Music Hall v. Lake* ; (87) *In re Carnish, Staff v. Gill*) (88).

Therefore, in view of my finding that the respondents did not intend to interfere with the course of justice, it is sufficient for me to address myself to the question whether these publications tend to prejudice the petitioner and the other accused, by interfering with their right to a fair and impartial trial."

In the English case of *Rex v. Davies*, (11) at p. 40, which was quoted with approval in *Attorney-General v. Baker and Others* we find words to the following effect :

"The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone.....such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon Judges,..... ..excite in the minds of people a general dissatisfaction with all judicial determination .....and, whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people.To be impartial and to be universally thought so are both absolutely necessary for giving justice that free, open and unimpaired current which it has for many ages found all over this kingdom".

Hidaytullah, C.J., observed in *Cooper v. Union of India* (68) :

"There is no doubt that the Court like any other institution does not enjoy immunity from

fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others..... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed, for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism."

Beg C.J. said in *R. v. Mulgokar* (78) as follows :

"In judging whether it constitutes a contempt of court or not we are concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done."

In *Sarath Chandra Biswal v. Surendra Mohanty* (89),

it was urged that where a particular action or speech of a judge is the basis for contempt, alleged either by way of criticism or otherwise, then if the facts stated are true, an allegation that such words or acts create a lack of confidence or faith in the administration of justice will remain within the limits of the exercise of the normal right of freedom of speech. This contention was held untenable.

Even the often quoted opinion of Lord Atkin in *Ambard v. Attorney General of Trinidad* (57) has its reservations.

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men."

This judgment contains "a list of qualifications to the right of criticism of judicial actions detracting considerably from the force of a doctrine of free speech in legal matters. Amidst the euphoric praise normally surrounding reference to *Ambard's case* these qualifications are overlooked"; this judgment guarantees only "the ordinary right of criticism "

which is done " temperately and fairly" and which refrains from imputing improper motives.

The fact that the respondent merely reproduced a resolution in parliament has no application to the issue under consideration as I am concerned, at this point, only with the question whether the words in the news item *per se* bring the court into disrepute and scandalises the court and I have no hesitation in holding that they do .

I now come to the question whether the respondents can avoid liability on the ground of qualified privilege. Notwithstanding the many cases cited to us, there is none directly in point. There are, however, a few cases that provide assistance to decide the issue before us, which I shall consider at some length.

In *De Buse and Others v. McCarthy and Another* (34), the court held that the statute on which the defendant relied did not permit the defendants to send notice to the public library of the borough containing a report of the committee which was defamatory of the plaintiff in that case. The defendants then took up the plea that the council had a common interest with the ratepayers in the subject matter of the words complained of and that it was the duty of the council and /or it was reasonably necessary and proper for the council,for the conduct of its business, to publish the words complained of by all reasonable and convenient means to the ratepayers.
Lord Greene, M.R.quoted the words of Lord Atkinson:-

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is

made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

These words are very similar to the defence put forward by the respondents in these proceedings that the respondents have a duty to inform the public and the public have a right to receive information of what is taking place in Parliament. Lord Greene went on to say :

"I cannot see that it can possibly be said that the council was under any duty to make that communication to ratepayers. At that stage the matter was, in a sense, sub judice, because the committee's report by itself could have no practical value unless and until it had been considered by the council and the council had come to some decision on it. That decision might have been that the report be adopted, or that the report be not adopted, or that the report be referred back to the committee. The appointment of committees of this kind is part of the internal management and administration of a body of this description, and, whatever the duty or the interest of the council might have been after it had dealt with the report and come to some decision on it, I cannot see that at that stage in the operation of the machinery of the borough's administration there was any duty whatsoever to tell the ratepayers how the wheels were going round. There may well have been a duty, or if not a duty at any rate an interest, of the council to inform the ratepayers of the result of its own deliberation."

As regards the interest of the ratepayers to receive information, His Lordship went on to say :

> "It is obvious that ratepayers are interested in the proper administration and safeguarding of their property and in the way in which their council conducts its business, but what I may call the internal working of the administrative machine and all the details of its domestic deliberations in a case of this kind, are things which I should have thought ratepayers are not in general interested in unless and until they emerge in the shape of some practical action or practical resolution."

In the proceedings before us, the resolution was before the House and, if I may use the words of Lord Greene, it was a "domestic deliberation" in Parliament, and of "no practical value unless and until it had been considered by Parliament (Council)" and the Parliament (Council) had come to some decision."
In *Buse case* (supra) at page 167,
The judgment of Goddard, L.J. is more interesting. He said:

> "The statute does not, in my opinion, justify the council in doing or oblige the council to do anything approaching that which they did. If it had justified them in publishing, or obliged them to publish this report on the door of the town hall, the fact that a little extra publicity was given to it by sending it to the public libraries might merely result in the plaintiffs being entitled to nominal, or something approaching nominal, damages, but the statute does nothing of the sort."

Obviously, these words are intended to mean that the defendants were guilty even if the statute had permitted the publication of defamatory matter.

If a notice sent by the Council was considered an offence, the position of the respondents cannot be any better. I am conscious that the respondents published a resolution before Parliament and not the proceedings of a County Council and Parliament has immunity unlike the Council. The distinction would apply if Parliament had published or authorised the publication, but in this case, there was no such authority. It is further to be noted that in these proceedings, it is not the defamation of an individual that is in issue, but the very institution of justice.

This decision of mine will decide the subject matter of the charge before us; nevertheless, it is necessary to consider whether speeches made in Parliament can be reported if they affect judges and the administration of justice.

In *Surendra Mohanty v. Nabakrishna Choudhoury* (24), *Narasingham, C.J.* held that the words of the Chief Minister in Parliament that "in many instances, the immaturity of the High Court is apparent" contains an aspersion regarding the competency of the Judges of this Court."

He went on to say further that the words of the Chief Minister that "in many instances the judgments of the High Court were corrected by the Supreme Court and that "in many instances the Supreme Court held that the High Court has abused the powers given to it "tend to lower the authority of the High Court to a considerable extent and bring the Judges into contempt." He said that the use of the word "abused" conveyed the idea that the High Court had abused its powers and "is indeed objectionable and contains an imputation to the effect that the powers were used improperly." Having discussed the merits on the facts in the speech of the Minister, the Lord Chief Justice stated as follows :-

"In my opinion, therefore, the Chief Minister had no justification for saying that 'in many instances the Supreme Court has held that the High Court has abused its powers.' I have no doubt that the aforesaid speech in the passage of Sri Nabakrishna Choudhury (to put it mildly) was somewhat hasty and uninformed and would clearly amount to contempt of this Court.(emphasis is mine) (p. 172)

Then, he went on to discuss at length the immunity that members of Parliament enjoy and acquitted the Chief Minister.

However, the pressmen who reported the speech of the Chief Minister were not so fortunate.If the Chief Minister's speech in Parliament "clearly amounts to contempt of Court", the Press could fare no better and they could not claim immunity to avoid convictions. The learned Judge said of them:

"So far as the Editor, and the Printer and Publisher of *Matrubhumi* are concerned, I have no doubt that they have committed contempt of Court by publishing the speech of the Chief Minister in their daily.The slight discrepancy between the extract of the speech as given in the daily, and as given in the official report is immaterial. They cannot claim immunity under clause (2) of Art. 194 because their daily is not an authorised publication. In view of their unconditional apology, I do not wish to pass any sentence on them, but I would direct them to pay Rs. 100/- (one hundred only) as costs to the petitioner." (p.177, para 22)

In *Perera v. Peiris*, (67), we find the following:-

"Reports of judicial and parliamentary proceedings and,it may be, of some bodies

which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of these bodies taken alone is not conclusive and it is necessary to consider the subject matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purpose of Roman Dutch Law as being in truth directed to serving that interest. Animus injuriandi is negatived.

"On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public. The Report dealt with a grave matter affecting the public at large, viz., the integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner to have improperly accepted gratifications. It contained the reasoned conclusions of a Commissioner who acting under statutory authority, had held an enquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a Sessional Paper and made available to the public by the Governor, contemporaneously with a Bill which was based on the Report and which was to be considered by the Executive Council. The due

> administration of the affairs of Ceylon required that this Report in the light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity."

This case would not support the respondents for the reason that what was published was the finding against a Member of Parliament. If the conduct of a judicial officer had been investigated and a finding made against him so as to remove him from the sphere of administration of justice, the publication of the finding, the charges, reasons etc., the speeches made or the resolution to remove him are very much in the public interest. This case will be an authority only in these circumstances. But the same thing cannot be said of a pending inquiry, the charges made and the speeches made on that occasion. To adopt Lord Greene M.R.'s words:

> The internal working of the administrative machine and all the details of its domestic deliberations.....
> are things which I should have thought ratepayers are not in general interested."

When pending resolutions, the charges and speeches made on that occasion are published, it cannot be said that the public interest is "forwarded" for the reason that the judge has a mental bar to act independently without fear or favour and the suitors have no confidence in the judge, as justice should not only be done but appear to be done, too. It is best under the circumstances to await the final outcome to release the proceedings to the public. Even assuming that these are of public interest, we are then confronted with the further problem of a clash of two interests, the right of the public to receive and the press to publish information of public

interest and the need to safeguard the dignity of the Courts against scandalisation. As I hold the scales evenly between these two interests, the scale weighs heavily in favour of the latter; for it is in the interests of the public that the dignity of the Courts is maintained untainted as has been stated in the various quotations I have given earlier. "It is a wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone." On a deeper consideration, in fact, there is no conflict between these two interests because in protecting the dignity of the Courts, it is the public interest that is served.

I am certain that the vast mass of the citizens of this country would prefer that the independence and good name of the judiciary be protected even at the expense of their right to know what is happening in Parliament in respect of Judges and the Judiciary. The failure of the press to publish matters of this nature will not prejudice that section of the public who wish to keep themselves acquainted with Parliamentary proceedings. To them, the Order Paper, the Hansard and other such official publications authorized by the Parliament are available. It is the mass publicity in newspapers that reach the common man that can cause harm to the proper administration of justice.

There are two other decisions that are relevant. I have nothing further to add to the observations of and distinction made by Wanasundera, J. in respect of the Judgment of Lord Denning in *Cook v. Alexander* (23).

In *Sambhu Nath Jah v. Kedar Prasad Sinha*(80) the Legislature passed a resolution to hold an inquiry into certain matters pending before Courts. That decision to appoint a Commission of Inquiry was

published in the Gazette. A Minister gave a copy of that notification to a pressman who published it. They were both found guilty of contempt on the ground that there was no provision that "allegations of the nature contained in the offending matter must be printed in the Official Gazette or in the public press." In appeal this judgment was reversed as there was, in fact, statutory provision for publication in the Gazette. That judgment did not go into the question whether the press had a right to publish that resolution. Since the Gazette is the official organ for public information, it may well be that the Court took the view that it necessarily follows that the press was entitled to publish that resolution after it had been published in the Gazette. It may, however, be noted that what was published was the resolution after it had been passed. Secondly, there was statutory provision for giving information of that resolution to the public by publishing in the Gazette.

The question does arise what is the need for protecting the judiciary when there are ample safeguards provided by the Standing Order of Parliament. In the *Orissa case* referred to (24), Standing Order 189 of Parliament is as follows:

"A member while speaking shall not:

(1) refer to any matter or fact on which a judicial decision is pending.
(2) .....
(3) .....
(4) reflect upon the conduct of ..... any Court of Law in the exercise of its judicial functions;"

In seeking to punish the Chief Minister for his speech, "It was urged that under the modern democratic set-up Governments are parties in innumerable cases in the High Court, that if they lose some cases they are inclined to develop 'litigant's mentality and to abuse the Judges in the State Assembly taking advantage of the immunity conferred by Cl.(2) of Art. 194. Irresponsible statements may then be made by members of the Government on the floor of the Assembly which, after due publication in the official reports, would cause irreparable harm to the prestige of the High Court and thereby affect its independence." It was also urged that in many instances the opposition may not be effective in checking such misuse of the right of freedom of speech and that the Speaker of the Legislature also may not be vigilant enough to call any member to order if he exceeds the limit.

"Under the modern democratic system a contingency of this type may have to be faced, especially when both the Opposition and the Speaker are not vigilant enough to see that no member of the Assembly abuses his right of freedom of speech on the floor of the House." *Surendra Mohanty v. Nabakrishna Choudhury* (24).

While it is clear that our Legislature, too, enjoys the right to discuss all matters concerning the judiciary subject to our own Standing Orders safeguarding the judiciary, there is no reason whatsoever to extend the immunity to the press whose right to publish 'stand in no better and no worse position than any other person or body in Ceylon.' *Perera v. Peiris* (supra)

Parliament is a responsible body and can well be expected to preserve and foster the dignity of the Courts in the interest of the public. But an equal duty rests on the Courts to safeguard that

same dignity.

There are the various safeguards in the Standing Orders. But there may come an occasion when Parliament may deem it necessary, for instance, to discuss a pending case or to question the integrity of one or more judicial officers and the question will then arise whether a newspaper report of proceedings would be in the public interest. If Parliament publishes to the public or authorises the publication of the proceedings, it would be for the reason that parliament has decided that it serves the public interest. But if Parliament gives no such authority and leaves the matter open to the discretion of the publisher, Courts will be the best authority to decide whether such report serves the public interest, not only from the point of view of keeping the public informed, but also from the point of view of preventing scandalising of Court or diminishing its authority. The publisher is not prevented from publishing such proceedings, but he would do so at his risk.

I find the respondents guilty.

As regards punishment, this news item contained a matter which was much in the public view as newspapers had been carrying news of the decisions made against Mr. K.C.E. de Alwis and the subsequent turn of events, of the complaint to the Hon. President, the decision to appoint a Commission and the protest by the Bar Association. In the past, too, newspapers had carried proceedings in Parliament as, for instance, the resolution against a former Chief Justice who went to the Airport to send off a Prime Minister against whom there was an election petition pending before him. The proceedings before the Presidential Commission had been carried extensively where the conduct of certain judges had been discussed much to their disfavour. When the respondents published

this particular item, it would have never been in their mind to be on guard against a charge of contempt in view of the fact that such previous reports had never been the subject of any form of action. Even these proceedings were not initiated by this Court, but by a citizen, the petitioner.

Veerasamy v. Stewart (63), Soertsz J. said as follows at page 486 :

> "No one desires to fetter unduly the freedom of the Press, least of all Courts of Law, for the Press can be, and has often been a powerful ally in the administration of justice, but it is essential that judicial tribunals should be able to do their work free from bias or partiality and that the right of accused persons to a fair trial should be absolutely unimpaired."

Khanna, J. stated in *Sambhu Nath Jah v. Kedar Prasad Sinha* (80):

> "It would follow from the above that the Courts have power to take action against a person who does an act or publishes a writing which is calculated to bring a Court or Judge into contempt or to lower his authority or to obstruct the due course of justice or due administration of law. As intention of the contemner to cause those consequences is not a necessary ingredient of contempt of Court and it is enough to show that his act was calculated to obstruct or interfere with the due course of justice and administration of law, there would be quite a number of cases wherein the contempt alleged would be of a technical nature. In such cases, the Court would exercise circumspection and judicial restraint in the matter of taking action for contempt of Court. The Court has to take into

account the surrounding circumstances and the material facts of the case and on conspectus of them to come to a conclusion whether because of some contumacious conduct or other sufficient reason the person proceeded against should be punished for contempt of Court."

Gajendragadkar, C.J. was quoted in the *Mulgaokar case* (78) referred to at page 743:

"We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or, status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct."

Krishnar Iyer, J. stated as follows:

"The cornerstone of the contempt law is the accommodation of two constitutional values-the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel."

Having stated these principles, the order he made against the respondent was as follows :-

"Many values like free press, fair trial,

> judicial fearlessness and community confidence must generously enter the verdict..... These diverse indicators, carefully considered, have persuaded me to go no further, by a unilateral decision of the bench. This closure ..... puts the lid on the proceedings without pronouncing on the guilt or otherwise of the opposite parties."

In these proceedings the respondents, it is agreed, had no malice but merely reproduced a motion on the order paper of Parliament which was sent to them as it was sent to other media. It had been a practice to publish such proceedings of Parliament where the Judges have been criticised and no action had been taken before against such publications. They have affirmed that they had no intention whatsoever of slandering the Court or bringing the Court or the judges into disrepute.

Under all these circumstances, I am of the opinion that appropriate order would be to affirm the Rule and to discharge the respondents, without punishment.

RODRIGO, J.,.

I have had the advantage of reading in draft the leading judgment proposed by my brother Wanasundera, J. and I cannot help but admire his industrious discussion of a vast array of cases, decisions, monographs and text writers cited to us by the three Counsel appearing for the petitioner and the two respondents and the Attorney-General himself appearing as amicus reflecting industry and painstaking research behind their submissions in the absence of any direct authority on the point. We are unanimously agreed that the Rule should not be pursued further and I desire to express my line of thinking which differs from that of my brother Wanasundera, J. only in emphasis. I shall accordingly

be brief and avoid repetitious references to cases, decisions and material of a like nature.

"The law on this subject (that is contempt of Court) is and must be founded entirely on public policy" - Per Lord Reid in *A.G. v. Times Newspaper Ltd.*(12). Such policy is naturally informed by the judicial outlook of the time and age.What is looked at with stern disapproval at one time to rein in social indiscipline may be regarded with an indulgent eye at a more relaxed time.Indigeneous traditions and culture , colour , outlook and attitudes. Deep respect for elders, teachers, clergy, judicial institutions and authority are acknowledged facts of our prevailing culture notwithstanding inroads by permissive activity, both political and social; administration of justice must not permit it to deteriorate by becoming permissive itself.

"There is an abundance of empirical decisions upon particular instances of conduct which has been held to constitute contempt of Court. There is a dearth of rational explanation or analysis of a general concept of contempt of Court which is common to the cases where it has been found to exist." Per Lord Diplock in the *Sunday Times case* (12).That is because each individual Judge took his own view of the public policy to be followed in each case no doubt derived from clear implications from the constitution and judicial decisions.We must therefore consider the appropriate public policy or the policy of the law to be applied in this matter. But let me first examine the genesis of this issue.

Representations have been made by no less a person than a Judge himself. The representations have been made not in a haphazard or irresponsible manner. They have been made to His Excellency himself. His Excellency thereupon had referred the

matter to the Parliament which under the Constitution is the body empowered to investigate and, if the allegations are proved, to present an address for removal in the Parliament, in the manner specified in the Constitution. To this end the Parliament took the initial step of introducing a resolution to appoint a Select Committee to investigate. It was this resolution that appeared in the Order Paper of the Parliament for 8 March 1983 and it was this Order Paper that was published in the Daily News the day before with the full text of the resolutions appearing therein giving the names of the Judges concerned as they appeared in the text.

The Daily News it must be observed published this merely as a news item of interest to the public in its ordinary course of business. Nobody alleges any ulterior motive to it. That it is also a parliamentary proceeding is, in my view, wide of the question. That the matter arose in the Parliament is an isolated fact in this context or just one circumstance in the whole business.

It is ironical, but nevertheless true, that this resolution had it been confined to the precincts of the Parliament would not be a scandal of the Court within its authoritative definition - See *Rex v. Gray* (40) Per Lord Russell, C.J. at page 62 and *Ambard v. A/G for Trinidad Tobago*. (57) at page 709, but the moment it is allowed to seek publicity, in the media in particular, outside the Parliament, it falls within the definition of "scandalising the Court". Such is the implication of judicial decisions. The Court here is not faced with a choice between two conflicting principles, as was argued, between freedom of expression and public interest in the administration of justice. It is self-evident that no reader of the resolution in the "Daily News" is going to have that cathartic confidence in the rightness and integrity of a

decision handed down by the Judges concerned. Let us look at it this way. There is no provision for the interdiction of the Judges pending the Select Committee investigation and they must continue to hear and decide cases in the meantime. It must be a traumatic experience for the litigants to have to submit to a case being heard by these Judges in the circumstances. How did this result come about ? It is the publication. Freedom to communicate and receive information can be destructive of both the communicator and the recipient at times. It can create violence among the community at a time when communal passions have been aroused.Under Emergency Regulations proclaimed during such disturbances freedom to publish news having a tendency to inflame passions or otherwise to create disturbances is curtailed or censored altogether. No person having the public interest at heart at times like that will dispute the need for such curtailment. Likewise when the authority of the highest judicial institution is threatened by a publication which has the potential to create unrest among the public, does it not create the need for a degree of censorship ? If it is right for the political authority to clamp a censorship at an executive level at a time of serious communal unrest, why is it not right for judicial authority to clamp a censorship on publications of the nature referred to in the field of administration of justice ? The judicial device to achieve this result is the law of contempt of Court.This law is sui generis. It has its own dictates. It is a law born of an inherant jurisdiction to protect the judicial machinery against attacks from any quarter not at the dignity of Judges but at judicial authority in the interests of law and order in which a country must be concerned as devoutly as with any other of its important affairs. So that the law of contempt is in a class apart from any other branch of law like qualified privilege in

reporting Parliamentary proceedings or proceedings of a Court of Law. The law of contempt vests the Courts with an unfettered authority where a contempt has been committed against it within its authoritative definition to decide on any course of action, it thinks fit in pursuit of its policy. So that as Lord Diplock has said, the decision on matters of contempt has to be empirical and based on public policy founded on the need to maintain public confidence in the integrity of Courts and the judiciary.

Great stress was laid on the immunity aspect of this issue but hardly any on its public policy aspect. This being a publication of a report of a Parliamentary proceeding, it was argued at length, attracted qualified privilege just as much, if not more, as a report of a judicial proceeding. Qualified privilege, it appears, has five reasons to support it in so far as it relates to reports of judicial proceedings.Two of the reasons namely, the one founded on the Court being open to the public is not applicable to parliamentary proceedings as the Parliament is not open to the public in the way the Courts are, and the other, that the publication of judicial proceedings enables the public to obtain a knowledge of the law by which their dealings and conduct are regulated, also does not apply to reports of parliamentary proceedings. But it is clear that originally and in principle, there are not many different kinds of privilege but rather for all privilege there is the same foundation of public interest. The term "public interest" has also several meanings. What is the meaning to be ascribed to the public interest alleged to exist in the publication in question ? It is in the public interest to maintain public confidence in judicial institutions. Is this public interest advanced by the resolution being published at this stage? In defamation cases reports of Parliamentary

proceedings are protected as the legitimate concern of the public with the proceedings of Parliament outweighs the concern of the individual with the loss of his reputation in which the public by and large may not be interested.But not so with public confidence in the administration of justice, in which every member of the public is concerned.A threat to judicial authority can shake the social order to its foundations.So that the public interest behind qualified privilege is of a different category altogether.

Two judicial pronouncements, namely, that "reports of judicial and parliamentary proceedings .....stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings" - per Lord Uthwatt in *Perera v. Peiris* (67) and that "the object (of the Act of Settlement) was to secure that the Judges should hold office independently of any political or other influence and should be removed only for the most serious judicial misbehaviour and then in the most public and open manner", - per Lord Birkenhead - Lord Chancellor, Shetreet, Judges on Trial, - lend strong support on the face of them in favour of immunity argued for the respondents. But when we examine the cases where public interest attaching to reports of findings against the integrity of public functionaries is discussed, it appears that the public interest has been said to be served by the publication only where the investigation has been completed and a considered verdict arrived at - *Allbutt v. General Council of Medical Education and Registration* (90) and *Perera v. Peiris* (supra). In the former case the headnote reads : "Held also that the publication of the minutes of the Council, containing a report of their proceedings comprising a statement that the name of a specified medical practitioner has been removed from the Register

on the ground that in the opinion of the Council he has been guilty of infamous conduct in a professional respect, is, if the report be accurate and published bona fide and without malice, privileged, and the medical practitioner cannot maintain an action of libel against the Council in respect of the publication." In the second case mentioned, the Privy Council states "On a review of the facts Their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the report should be widely communicated to the public. The report dealt with a grave matter affecting the public at large, viz: integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a Commissioner who, acting under statutory authority, had held an inquiry and based his conclusions on evidence which he had searched for and sifted."

The statement of the Privy Council quoted above that "reports of parliamentary proceedings stand in a class apart by reason that the nature of their activities is treated as conclusively establishing....." is not meant in my view to be a proposition of law of a "blanket" character, applicable even outside the common law of defamation. It is not meant to be an eternal truth. In the field of common law of defamation the statement is true as the interests of the public in the proceeding of Parliament, as I have said, stands out as against the infinitessimally small chance of injury to private character and the equally small interest of the public in it. But this is not so in the case of blasphemous, seditious or obscene proceedings in parliament. If I am right in this, I am also right in saying that the proposition mentioned is not true in

relation to a report of a parliamentary proceeding containing a scandal of the Court. Such a report, in my view, cannot advance the public interest involved, that is, in maintaining the public confidence in the authority of the judiciary. The public interest in information relating to proceedings of Parliament per se is wholly disproportionate to the injury to the public interest in maintenance of judicial authority, caused by a publication of a scandal to it.

I, therefore, think that this publication attracts contempt of Court but, as far as the Daily News is concerned, I hold that the Rule should not be pursued further. The Press should voluntarily observe as the voice of the community silence when confronted with matters of this nature the publication of which, it is self-evident, is not productive of any public benefit but on the contrary destructive beyond remedy of an almost religious faith that the community holds in the integrity of this institution and its capacity to grant relief. It is this faith that averts civil disorder and resort to extra-judicial remedies.

Rule confirmed but not pursued further and Repondents discharged.