1966 *Present :* **H. N. G. Fernando, S.P.J., Tambiah, J., and Abeyesundere, J.**

S. M. T. B. SUBASINGHE, Appellant, *and*
D. G. JAYALATH, Respondent

Election Petition Appeal No. 8 of 1966—Katugampola (Electoral District No. 105)

Election petition—Appeal from order of Election Judge—" Point of law "—Position when Election Judge makes wrong inference on facts—Corrupt practice—Making false statements about personal character of a candidate—Evidence—Police reports of election meetings—Admissibility—Judge's power to put questions—Evidence Ordinance, ss.35,157,159 (1),161, 165—Undue influence—Requisite intention—Requirement, in election offences, of proof beyond reasonable doubt—Register of electors—Effect of appearance of a person's name on it—" Elector "—Residence qualification of an elector—Incapacity of Election Judge to question it—" Disqualification for election as a Member "—Distinction in Constitution between circumstances of disqualification and circumstances of qualification—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 3, 12, 13, 14 (1) (a) (b), 24—Ceylon (Parliamentary Elections) Order in Council, 1946 (Cap. 381), ss. 4 (1) (a) (c), 4A, 16, 18, 19, 20, 38, 56, 58 (1) (d), 77 (e), 85 (2).

(i) When a conclusion drawn by an Election Judge from the relevant facts is not supported by legal evidence or is not rationally possible, it is liable to be set aside in appeal. Wrongful inference on facts is a question of law that can be canvassed in an election petition appeal.

It was alleged that the corrupt practice of making a false statement of fact in relation to the personal character or conduct of the opposing candidate had been committed by an agent of the appellant at an election meeting held on 18th March 1965. The only witness on whose evidence the petitioner relied was a Police Constable who had attended the meeting and made certain notes of the speech in question. The Constable was unable to give evidence from memory and, in terms of section 159 (1) of the Evidence Ordinance, was permitted by the Election Judge to refresh his memory from a report P1 which had been submitted by him to the Inspector in charge of his station. The report was a compilation from the notes made at the election meeting of 18th March and was permitted to be used in evidence because the Election Judge wrongly inferred that it had been prepared by the Constable on or before 19th March. The evidence, however, showed that it was highly probable that the report P1 was prepared unusually late, a day or two before the 29th March.

Held, that the finding of the Election Judge as to the date of the preparation of the report P1 was not based on legal evidence and should, therefore, be set aside. Inasmuch as the report was not made " at the time of the transaction ", it was not admissible in evidence under either section 159 (1) or section 157 of the Evidence Ordinance. Nor was it admissible under section 35 of the Evidence Ordinance.

(ii) In order to constitute the offence of undue influence under section 56 of the Parliamentary Elections Order in Council, the use or the threat of force or violence must have been made with the requisite intention set out in the Section. Where the relevant evidence does not establish beyond reasonable

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doubt the existence of such an intention, an adverse finding of the Election Judge will be set aside in appeal if the conclusion drawn by him from the relevant facts was not rationally possible. In this context, if the conclusion is to be drawn from circumstantial evidence, the ordinary principles relating to circumstantial evidence must apply.

(iii) Section 12 of the Constitution Order in Council, read with the definition of the term " elector " in section 3, would read thus : " Subject to the provisions of this Order, a person who is qualified to be a person entitled to vote at an election shall be qualified to be elected or appointed to either Chamber."

The provision in section 77 (*e*) of the Parliamentary Elections Order in Council that the election of a candidate as a Member of Parliament shall be declared to be void on an election petition if the candidate was at the time of his election a person disqualified for election as a Member does not permit the Election Judge to inquire whether the candidate, despite the fact that his name was on the register of electors, possessed the residence qualification set out in section 4 (1) (*c*). Once the name of a person is on the register for any electoral district for the time being in operation he has an indisputable right to vote at any election which may be held during that time of a Member for that electoral district, subject only to one exception which is in the proviso to section 38. Section 77 (*e*) of the Parliamentary Elections Order in Council, while it confers jurisdiction on an Election Judge to determine that a candidate was disqualified for election on the ground that he was so disqualified by section 13 of the Constitution, does not authorise an Election Judge to decide a question of qualification dependent upon section 12 of the Constitution.

ELECTION Petition Appeal No. 8 of 1966—Katugampola (Electoral District No. 105).*

S. Nadesan, Q.C., with *E. R. S. R. Coomaraswamy, Desmond Fernando* and *Suriya Wickremasinghe*, for the Respondent-Appellant.

Izzadeen Mohamed, with *S. C. Crossette-Thambiah* and *M. Somasunderam*, for the Petitioner-Respondent.

Cur. adv. vult.

October 14, 1966. H. N. G. FERNANDO, S.P.J.—

The Appellant was elected the Member of Parliament for the Electoral District of Katugampola at the General Election held in March 1965 as a candidate of the Sri Lanka Freedom Party. In an Election

* The following order was made on September 22, 1966, when a preliminary objection was taken by Counsel for the petitioner-respondent in regard to the constitution of the Appeal Court :—

" Counsel for the Respondent in this appeal has informed us that his client does not desire Justice Abeyesundere to be a member of the Bench hearing this appeal. The ground is that Justice Abeyesundere's brother was formerly married to the sister, now deceased without issue, of the Appellant in this case. Justice Abeyesundere remains satisfied that he is not personally interested in the appeal, and he has informed the Chief Justice accordingly. We will hear the appeal."

Petition filed by the Respondent, the Election Judge determined that the election was void on three grounds :—

(1) that the corrupt practice of making a false statement of fact in relation to the personal character or conduct of the opposing candidate had been committed by an Agent of the Appellant ;

(2) that corrupt practices of undue influence had been committed by five persons who were Agents of the Appellant ;

(3) that the Appellant was at the time of his election a person disqualified for election as a Member.

The false statement of fact involved in ground (1) set out above was alleged to have been made at an Election meeting held on 18th March 1965. The only evidence led by the petitioner at the trial as to the content of the alleged statement was the evidence of Police Constable Wijeratne, who had in the course of duty attended the meeting in pursuance of instructions that he should make notes *inter alia* of any statements affecting the character or conduct of a candidate at an election. The Constable stated at the trial that he had made notes of events at the meeting on 18th March 1965 and that it had been his practice after attending such a meeting to prepare a report compiled from the notes made at the meeting and to submit the report made in duplicate to the Inspector in charge of his station. This report, he said, would ordinarily be prepared on the day on which the particular meeting was held or on the next day. At this stage of the trial one of the duplicate copies of a report purporting to have been made by the Constable Wijeratne was in the hands of the trial Judge who himself, despite objection by appellant's counsel, caused the Constable formally to produce the report which was then marked P1.

Upon being further questioned by the petitioner's counsel, Constable Wijeratne made it plain that he was either unwilling or else unable to give evidence from memory as to the content of the statement alleged to have been made at the meeting of 18th March by an Agent of the appellant ; and it was only after he had read his report P1, which apparently he had read aloud in Court, that Wijeratne stated his ability to recollect the content of the alleged statement. It is perfectly clear from the proceedings and from the judgment of the Election Judge that P1 was in terms of Section 159 (1) of the Evidence Ordinance used at the trial to refresh Wijeratne's memory and that the Judge ordered its production in pursuance of Section 161 of the Evidence Ordinance. In that part of the judgment which gives consideration to the report P1, Section 159 (1) is reproduced with underlining as follows :—

> " A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. "

The trial Judge then proceeded to hold that the report P1 had been prepared by Wijeratne on 19th March 1965, at the latest, thus making it quite clear that a report prepared on 19th March relating to a speech alleged to have been made on the 18th was a writing made so soon after the time of the transaction that the Court considered it likely that the transaction was then fresh in the memory of the witness. Accordingly the question whether the report had in fact been prepared by Wijeratne on or before 19th March was one of prime importance and affects the correctness of the course followed at the trial of permitting the witness to read the report before giving direct testimony as to the contents of the speech. I have indicated already Constable Wijeratne's inability or unwillingness to give that testimony without refreshing his memory.

Constable Wijeratne had not dated the report P1. The report itself bears an endorsement made by the Inspector in charge of the station forwarding the report to A.S.P., Kuliapitiya. This endorsement is dated 29th March and a note made in the latter's office shows that it was received there on 30th March. In this connection it is convenient to set out certain questions which were put to Constable Wijeratne by the Court, with the answers thereto :—

Court : " Q. When did you make this report ?

A. My Lord, as a practice I always write the date under my signature anywhere, but in this instance, the date is not written by me and it had happened probably due to an oversight."

Court : " Q. *Did you prepare that report on the 18th or soon thereafter ?*

A. After preparation of the report I put the signature but on this there is no date written by me.

Q. *You told us earlier you can't say whether you prepared it on the 18th itself or on the 19th ?*

A. I am unable to say.

Q. You already told us you prepared it either on that day if you have time or the first thing the next day ?

A. Yes."

It will be seen that Wijeratne did not answer the Court's first question and twice deliberately declined to answer the Court's questions whether he prepared the report on the 18th or on the 19th of March. It was not Wijeratne's case that he prepared P1 on 19th March at the latest. It was therefore only an inference which led the Judge so to hold. This inference was drawn presumably from Wijeratne's evidence that it was his practice to prepare a report either on the day of a meeting or on the next day, and the Judge apparently presumed that the practice had been followed in the case of P1.

There were produced also four other reports of election meetings which had been prepared by Constable Wijeratne. All these reports had been duly dated by him and in each case it was established that he

had prepared his report either on the first or second day after the meeting in question. It was also further established that each of these reports had been forwarded by the Inspector within a day or two of his receiving the report from the Constable. In consequence each of those reports reached the Special Branch of the C.I.D. within four or five days after the particular meeting.

It will be seen that the circumstances affecting the report P1 differ from those affecting the other four reports in two respects, namely that the report bore no date and that it left the hand of the Inspector only on the 29th March, one week after the General Election.

Prima facie the date of the endorsement by the Inspector would raise the reasonable inference that the Inspector had received P1 shortly before that date. (I have shown above that it was apparently the Inspector's practice to forward the reports to the C.I.D. soon after he received them from Constable Wijeratne.) The date of the endorsement of P1 rendered it highly probable that P1 must have been prepared a day or two before 29th March. At the lowest, it cast doubt on the theory that P1 had been prepared on 19th March, and unless that doubt was resolved, the petitioner was not entitled to a finding that the report had in fact been prepared on the 19th. There was in fact nothing in the evidence to resolve that doubt.

Although the Inspector in charge of the station was called at the trial by the petitioner, he was not questioned for the purpose of eliciting any explanation as to the date on which he received the report P1. His evidence therefore did not in any way support the theory that the report must have been prepared on the 19th March, nor did the petitioner elicit from him any explanation of the unusual circumstance that this particular report was forwarded by him only fifteen days after the particular meeting, and not as in the other established instances, within four or five days after a meeting. The judgment of the learned Judge does not advert to this unusual circumstance or to the lack of any explanation concerning it.

I am compelled to the conclusion that the finding of the Election Judge as to the date of the preparation of P1 was not based on legal evidence. Constable Wijeratne did not state that he had prepared it on that date, and the inference properly arising from the date of the endorsement, namely that the report had in fact been prepared shortly before 29th March, was not rebutted by relevant evidence. The report was in fact admitted and used to refresh Wijeratne's memory because of that finding; the finding being erroneous in law, it follows that Section 159 (1) did not apply, and that in law the report was improperly admitted and used at the trial. But for this, Constable Wijeratne could not have refreshed his memory and then given direct testimony as to the statement alleged to have been made on 18th March by an agent of the appellant. That direct testimony itself was therefore improperly admitted, and was not legal evidence upon which to base a finding that an agent of the appellant

did make the false statement attributed to him. I am conscious that our jurisdiction in this appeal is limited by the fact that the appellant has a right of appeal to this Court only on a question of law. The scope of the powers of the Court in dealing with such an appeal has been considered in two recent judgments on a cognate matter, namely in cases stated on questions of law under the Income Tax Ordinance. Both judgments cite with eulogy the analysis of Gajendragadkar, J., in a case in the Supreme Court of India (Cf. *Mahawithana's Case*[1] and *Ram Iswara v. Commissioner of Inland Revenue*[2]). For present purposes it is sufficient for me to cite only a few sentences from the judgments :—

> " It may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence ; or that the impugned conclusion drawn from the relevant facts is not rationally possible ; and if such a plea is established the Court may consider whether the conclusion in question is not perverse and should not therefore be set aside."

The matters to which I have already referred should suffice to explain my reasons for the opinion that we should set aside the finding that a false statement was made by an agent of the appellant at the meeting held on 18th March 1965.

I pass now to the second ground upon which the election of the appellant was held to be void. The five instances of undue influence which the learned Election Judge held to be established consisted of the making use of or the threat to make use of force or violence by agents of the candidate. The learned Judge rightly directed himself that in order to constitute the offence of undue influence under Section 56 of the Parliamentary Elections Order in Council the use or the threat of force or violence must have been made with a particular intention ; namely " in order to induce or compel a person to vote or refrain from voting ". and he held in each case that the evidence established such an intention. This latter finding has been challenged in appeal on the ground that the relevant evidence in each case does not establish the existence of such an intention in the mind of the person using or threatening the use of force or violence. In considering this challenge, it is best to reproduce here the evidence available :—

(*a*) One Ukkuwa testified that he was a supporter of the United National Party. He stated that on the night of the 19th March at road junction some people were having a music party on the verandah of a closed boutique. The witness had gone there with one Puncha to search for a car required to take Puncha's child to the hospital. One Adhikari (alleged to be the appellant's agent) flashed his torch, saw Ukkuwa and said " Ukkuwa I want to meet you all ", so saying he assaulted

[1] *(1962) 64 N. L. R. 217 at 222.* [2] *(1962) 65 N. L. R. 393 at 395.*

Ukkuwa four or five times with hands. Ukkuwa then said to Adhikari that he had come in search of a car and Adhikari retorted " you U. N. P. followers have no cars here don't come in search of cars here if you come in search of cars we will kill you ".

(*b*) One Manelhamy testified that he was organising a U. N. P. meeting to be held on 12th March 1965 on the land of one James Appuhamy. While preparation was being made for the meeting, one Kiribanda Appuhamy (alleged to be an agent of the appellant) came there and said " that he would not allow us to hold the meeting and that he would stone the place ". He also used indecent language. As a consequence people who had come to the meeting left the place.

It is not clear from the evidence whether or not the meeting was abandoned in consequence of the alleged incident.

(*c*) One Shelton Abeysekera, a dealer in Motor spare-parts, carried on his business in a building belonging to a relation of the appellant. On 16th March one Victor came to Abeysekera and told him that Jayatileke (an alleged agent of the Appellant) wanted to see him. He accompanied Victor and met Jayatileke who told him that he wanted to buy some bulbs for a car. Jayatileke then accompanied him to the shop. There Jayatileke told him " being under the roof of Mr. Subasinghe are you working for the U. N. P." Abeysekera then asked " did you get me down for the purpose of putting this question or to get some bulbs ". Then Jayatileke dealt a blow on his back and he fell down and struck a plank.

(*d*) One Gunesekera stated that while a S. L. F. P. meeting was taking place near his home he heard the noise of a car and some disturbance. When he went up he saw a car stopped and some people attacking the car. The Police then arrived at the scene and Gunesekera turned back to return to his home. At that stage one Podiratne and others (alleged to be the agents of the appellant) assaulted Gunesekera with hands saying "you are the U.N.P. dogs it is your car that knocked down our child".

(*e*) One J. A. Gunasena stated that he too was assaulted on the same occasion by Podiratne and another. Before assaulting him Podiratne said " I have been wanting to meet you ".

It will be seen that the evidence relative to each of these instances does not include any testimony that force or violence, or the threat thereof, was accompanied by any words calculated to induce or compel the subject by the force violence or threat to vote in favour of a candidate or to refrain from voting in favour of a candidate ; so that the findings of the Election Judge, that the necessary element of intention was present, was only an inference he drew from conduct and from statements

accompanying the conduct. When an inference is to be drawn in that way as to the presence of an intention which needs to be proved beyond a reasonable doubt the ordinary principles relating to circumstantial evidence must apply. So that in this context, the inference may only be drawn if it is an irresistible inference arising upon the evidence and if no other reasonable inference is possible. Let me consider from this aspect the evidence relative to the five alleged instances of undue influence.

Instance (*a*) :—In the case of the alleged threat and assault by one Adhikari on Ukkuwa, the complainants themselves had stated in their complaints to the Police that they thought that the assaults and threats took place because they were supporters of the U. N. P. The person assaulted was apparently known to be a person who worked for the U. N. P., and the assault could be reasonably referable to that fact. But was it in any way reasonable to impute to the assailant an intention that the assaults and threats on his part could have the effect of inducing or compelling a known U. N. P. worker even to refrain from voting for the U. N. P. candidate ?

Ukkuwa himself did not claim to have had any impression that the assault on him was designed to prevent him from voting for the U. N. P. candidate. The threat directly made was that he would not be allowed to find a car at the place at which he had come to search for one.

Instance (*b*) :—Manelhamy's evidence of a threat that the U. N. P. supporters would not be allowed to hold a meeting and that the place would be stoned, establishes no more than that on that occasion Kiribanda Appuhamy used threats to prevent a meeting being held. A threat of such a kind is not within the ambit of Section 56. Appuhamy clearly had an intention to prevent the meeting being held and that intention clearly arose from the words used in the threats. Manelhamy did not himself claim that he was deterred from voting in consequence or even that he thought the threat had been made with that object.

Instance (*c*) :—In this case the assault on Abeysekera was quite clearly connected with the fact that Abeysekera worked for the U. N. P. despite his occupation of a building owned by a relation of the appellant. If there was any clear inference to be drawn in this case it was in the stated circumstances that Jayatileke desired to prevent Abeyasekera from continuing to work for the U. N. P.; else there was the lesser inference that Jayatileke was angered by the fact that Abeysekera was working for the U. N. P. There was nothing upon which to base the graver inference that Jayatileke desired or even thought that he could prevent Abeysekera from exercising his vote freely.

Instances (d) and (e) :—Those two cases best illustrate the failure of the trial Judge to direct himself correctly in regard to this question of intention. It is manifest that these two assaults took place because the appellant's supporters were angered by the fact that a vehicle thought to have been used for the U. N. P. side had knocked down a child. The assaults were of course unjustifiable, and it may even have been that advantage was taken of the accident to give vent to feelings roused by election rivalry. But the inference that the assaults were in actual or pretended retaliation for the accident to the child is unusually strong. The failure of the trial Judge to draw that inference shows that, because of some misconception or inadvertence, he failed to apply the relevant rules governing circumstantial evidence in considering whether the requisite intention to induce or compel persons to vote or refrain from voting has been established in these five cases.

The judgment of the Election Judge contains no indication that he gave thought to the inference which (as I have shown) *prima facie* and reasonably arose from the proved facts in each of these cases, or to the need to consider and reject such inferences on proper grounds before deciding to draw his inference that the intention to interfere with free voting had been proved. Counsel who appeared for the petitioner-respondent at the trial and the appeal could not refer to any fact or consideration which might justify the decision of the trial Judge, and I am satisfied that (in terms of the dictum of Gajendragadkar, J., already cited) " the conclusion drawn by the Election Judge from the relevant facts was not rationally possible ".

I here rely also on opinions expressed in the House of Lords in a case stated on a question of law on an income tax appeal (*Edwards v. Bairstow* [1]) :—

Lord Simonds :—" For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn : not only do they not justify it but they lead irresistibly

[1] *(1956) A. C. 14.*

to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

Lord Radcliffe :—" But without any such misconception entering *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It had no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there had been error in point of law."

For these reasons, I am compelled to set aside the finding that the five instances of violence and threats did constitute offences of undue influence defined in Section 56.

The third ground of avoidance—disqualification of the appellant is the only ground on which Mr. Izzadeen Mohamed seriously contended that the determination of the Election Judge should be affirmed. The relevant matters require some explanation.

The register of electors which was duly in operation in March 1965 was that certified under Section 20 of the Parliamentary Elections Order in Council in 1964. That register (P14) contains the name of the appellant *as* a registerd elector.

The revision which preceded the certification of P14 had to commence on or before 1st June 1963 (Section 16). Under Section 4 (1) (*a*), a person was not qualified to have his name entered or retained on that register if " he had not for a continuous period of six months preceding 1st June 1963, resided in the electoral district of " Katugampola. The learned Election Judge found on the evidence that the appellant, who held at that time the office of Ceylon's Ambassador to the U. S. S. R., had not been resident in the electoral district during the period stipulated in Section 4 (1) (*c*), and had therefore not been qualified to have his name retained in P14, although in fact the name was therein retained. The Judge on these facts determined that the appellant " was at the time of his election disqualified for election as a Member of Parliament " (Section 77 (*e*)). The reasoning upon which the determination was based will appear in my discussion of the relevant statutory provisions.

Section 12 of the Constitution states that " subject to the provisions of this Order, a person who is qualified to be an elector shall be qualified to be elected or appointed to either Chamber ". The term " elector " is defined in Section 3 of the Constitution, and when that definition is (as it must be) incorporated in Section 12, Section 12 would read thus :—

Subject to the provisions of this Order, a person who is qualified to be a person entitled to vote at an election shall be qualified to be elected or appointed to either Chamber.

In the opinion of the trial Judge Section 12 requires not only the qualification that a person is entitled to vote at an election. Had that been the only requirement, the appellant was qualified for election as a Member, for he undoubtedly was entitled to vote at the election by reason of his name being on the register P14. But Section 12, in that opinion, requires something different, namely that a person *is qualified to be entitled to vote* at an election. This requirement means that, in order to be qualified for election as a member, a person must actually possess the various qualifications set out in Section 4 of the Parliamentary Elections Order in Council. Since the appellant did not have the residence qualification required by Section 4 (1) (*c*), he did not actually possess all the requisite qualifications, and therefore he was not qualified under Section 12 of the Constitution.

If the provisions of law thus far mentioned were the only ones applicable, I would with respect go the whole way with the Election Judge. But there are other relevant provisions and considerations which can lead to the different conclusion, namely that the intention of the law was that the question which arises under Section 12 of the Constitution has to be determined by reference to the certified register, and not otherwise.

I must note firstly that when the definition of " elector " in Section 3 of the Constitution gave the word the meaning " a person who is entitled to vote at an election of a Member ", the Section left for determination by reference to some other law the question whether a person is an elector. In fact, at the time of the enactment of the Constitution Order-in-Council, 1946, i.e. on *17th May 1946*, there was not in existence a law declaring which persons are entitled to vote at an election of a Member. The relevant law, which was the Parliamentary Elections Order-in-Council, was enacted only on *26th September 1946*. It was not possible therefore for Section 3 of the Constitution to mention expressly in the definition of " elector " the particular Section of the law which was in mind when the definition referred to " persons entitled to vote ".

But in fact the Parliamentary Elections Order-in-Council does not expressly specify the qualifications which entitle persons to vote at Parliamentary elections. Section 4 of this Order-in-Council instead of providing that persons are or are not qualified *to vote*, in fact provides that " no person shall be qualified " *to have his name entered or retained in any Register of Electors* " if he does not possess certain qualifications. It is only by implication therefore that Section 4 (1) (*c*) can be regarded as a provision of law specifying the matter of residence as being a voting qualification. Consideration of Section 4 itself shows that the law which was contemplated in the Constitution's definition of " elector " was not in fact enacted in the terms which had been earlier contemplated. The point I here make is of no great significance by itself but it gains significance by matters to which I shall later refer.

Having in Section 4 and subsequently in Subsection 4A introduced in 1953 declared the qualifications for a person to have his name on a register of electors, the Elections Order proceeds to lay down somewhat elaborate machinery for the preparation and the revision of electoral registers, and I will refer only to the machinery for revision.

Revision has to commence before June each year with a notification by the Commissioner of Parliamentary Elections stating that the revision has commenced and informing every qualified person how he may ascertain " whether his name is in such register, and if not, how he may secure its insertion therein " (Section 16 (1)). For the purpose of revising the register the revising officer may make house to house or other inquiry and may call for information from householders and occupiers of land. It is an offence not to give any such information or to suppress any such information. Section 18 requires the registering officer to prepare two lists having reference to the existing register. List A will contain the names of persons in the register who are dead, or have become disqualified : List B will contain the names of persons who appear to be newly qualified. Hence the public are informed that the officer proposes to retain on the register all names other than those to be excluded through List A.

Section 19 *inter alia* (Cf. Subsection 2) enables objection to be made to the retention in the register of any name and also enables claims and objections to be made in regard either to list A or list B. Section 19 incorporates Sections 15 (B), 15 (C) and 15 (E) to render them applicable to such claims and objections, and there is thus provision not only for inquiry into claims and objections by the registering officer but also to appeals to the revising officer.

Section 20 provides for the certification of the register after completion of the revision.

The next important provision is Section 38 which provides as follows :—

> " The register of electors in operation in accordance with this Order at the time of any election of a Member to represent the electoral district to which the register relates shall be conclusive evidence for the purpose of determining whether a person is or is not entitled to vote at such election....."

It is not disputed that the purpose of the machinery for registering qualified persons as electors is to bring into operation a register which finally and conclusively determines whether or not a person is entitled to vote at the particular Parliamentary Election. Once the name of the person is on the register for any electoral district for the time being in operation he has an indisputable right to vote at any election which may be held during that time of a Member for that electoral district, subject only to one exception which is in the proviso to Section 38 : under this proviso a person is rendered incapable of voting if he has been convicted of a corrupt practice or illegal practice or has been reported by an Election Judge or has been guilty of any of certain other offences.

The learned Election Judge rightly concedes that Section 38 is conclusive of a registered elector's right to vote (subject to the exception above mentioned). But he takes the view that Section 38 has this conclusive effect only in regard to presiding officers and not in regard to Election Judges. With respect, this view is not supported by anything in the Elections Order. On the contrary Section 85 (2) expressly prohibits an Election Judge from striking off a vote at a scrutiny " by reason only of the voter not having been qualified to have his name on the register of electors ".

In considering what is the qualification required by Section 12 of the Constitution, the learned Election Judge made the following observations :—

> " If a person has not the qualifications to be a voter then he does not have the right to vote. Therefore, even if his name appears on the Register of Electors, if he was disqualified from having it so entered he has not the right to vote—has not the title to vote ."

In effect the Judge holds that the appellant (because he did not have the residence qualification) " *does not have the right to vote, has not the title to vote* ". But Section 38 quite distinctly says that the certified register is conclusive evidence that a person, whose name is retained on a certified register, *is entitled to vote.* So even if the Judge rightly thought that *entitled* connotes both a qualification and a right, Section 38 conclusively eliminates the possibility of controversy by declaring that the register " is conclusive evidence for the purpose of determining whether a person *is or is not entitled to vote* ".

It is true that the direct object of the Elections Order was to determine with finality for the purposes of any Parliamentary election the persons who are entitled to vote at that election. But that final determination is reached only after completion of a strict procedure under which the registering authorities are enabled to consider and test the question whether any particular individual is entitled to have his name retained or entered in a revised register. If, as I have earlier stated, Section 4 by implication declares which persons are *qualified to vote,* then the registering authorities, in deciding under the procedure to retain the name or insert a new name in the register, do decide whether the persons bearing those names are indeed qualified to vote. Taking the case of the appellant in this context, it is a fair presumption that his name was *duly* retained on the register which was in operation at the relevant time. Since therefore it can be presumed that the registering authorities decided under the statutory procedure that he did possess the requisite residential qualification, the question is whether the legislature intended that the matter of his qualification already considered and decided under the registration procedure can again be re-opened in an election petition.

Although the matter is not free from doubt I much prefer the view that when a statute provides machinery for the conclusive determination of a particular question, in this case the question whether the appellant was entitled to vote, then *for all purposes* the determination will be conclusive.

I pass now to what I regard as the most important considerations affecting the correctness of the finding of the Election Judge. I note that learned Crown Counsel who appeared at the trial as *Amicus Curiae* at the request of the Court relied upon these same considerations and argued that the Election Judge should not declare the appellant to be disqualified. It is unfortunate that the learned trial Judge did not discuss learned Crown Counsel's argument, and that we are thus deprived of the benefit of knowing the Judge's reason for rejecting that argument.

The jurisdiction of an Election Judge to declare an election void is contained in Section 77 of the Order and the relevant provision is paragraph (*e*) of that Section, the ground of avoidance being " that the candidate was at the time of his election a person *disqualified* for election as a Member ". Now, it is not the Elections Order, but it is the Constitution, that specifies the conditions of disqualification for Parliament, and I must now refer to them. There is firstly Section 12 of the Constitution which bears the marginal heading " *disqualification* for membership of Senate or House of Representatives ". In each of its first three Subsections Section 13 declares that persons described therein " shall be *disqualified* for being elected..... ". In regard to members of Parliament (i.e. of the House of Representatives) Section 24 provides that the seat of a member shall become vacant, *inter alia*, " if he becomes subject to any of *the disqualifications mentioned in Section 13 of this Order* ". There is also Section 14 (1) (*b*) which renders a person liable to a penalty if he sits or votes in the House of Representatives after his seat has become vacant or if *he has become disqualified.*

My reference to the above provisions of the Constitution leads to the conclusion that, when paragraph (*e*) of Section 77 of the Elections Order referred to the question of a candidate being *disqualified for election as a Member*, that paragraph had in mind all those cases in which the Constitution itself declared persons *to be disqualified.* But did that paragraph intend also to refer to cases dealt with in the Constitution, not as matters of disqualification, but as matters of *non-qualification* ? Section 12 deals with matters of the latter type and its marginal heading is not disqualification but " *qualification* " for membership. A distinction thus made in the Constitution between circumstances of disqualification and circumstances of qualification should not I think be ignored. This distinction is maintained in Section 14 (1). That Subsection contains not only the reference to disqualification in its paragraph (*b*), but also a reference in its paragraph (*a*) to the case of a person who was *not qualified* for election at the time of his election.

The argument of Crown Counsel can only be appreciated in the light of the distinction *prima facie* appearing in the Constitution between disqualification on the one hand, and qualification or lack of qualification on the other hand. The argument in brief would be that while paragraph (*e*) of Section 77 does confer on an Election Judge jurisdiction to determine that a candidate was disqualified for election on the ground that he is so disqualified by Section 13 of the Constitution, paragraph (*e*) does not confer jurisdiction to determine that a candidate was *not qualified* for other reasons. The other reason in the present case would be that the appellant was not qualified in terms of Section 12. Since Section 12 is not a disqualifying Section but only a qualifying Section, the question whether its provisions were complied with in the case of the appellant was not one determinable in the exercise of jurisdiction conferred on an Election Judge by Section 77 (*e*) of the Elections Order. Upon the considerations to which I have referred and which are based upon the terms of various provisions in the Constitution itself, I hold that paragraph (*e*) of Section 77 does not authorise an Election Judge to decide a question of qualification dependent upon Section 12 of the Constitution.

In the present case the conclusion which I reach gives no cause for alarm. When a person's name is on a certified register of electors, my conclusion only means that therefore his qualification to vote and to be a Member had been conclusively determined by the certified register. But if he happens to be *disqualified* under Section 13 of the Constitution, an Election Judge can declare his election void.

I realise, however, another possible consequence of my conclusion, namely that, even if a person's name does not appear on any electoral register, it may not be competent for an Election Judge under Section 77 (*e*) to declare his election void on the ground that the appropriate register did not contain his name. But the possibility that such a situation may in fact arise is extremely remote. And if such a possibility, which I believe has hitherto never arisen, does arise, Section 14 (1) (*a*) of the Constitution already provides a remedy. If that remedy is considered insufficient, it is for Parliament to provide a fuller remedy.

We indicated after the argument that this appeal would be allowed, and that a formal order would be made later. Having now set out my reasons, I proceed to the formal order.

The determination of the Election Judge, that the election of the appellant was void, is reversed, and it is decided by this Court that Subasinghe Mudiyanselage Tikiri Banda Subasinghe was duly elected as Member for Electoral District No. 105 Katugampola. The appellant will be entitled to costs in both Courts. The report/reports made by the Election Judge under Section 82 of the Order-in-Council will not be transmitted to the Governor-General.

TAMBIAH, J.—

I am in agreement with the views and conclusions reached by my brother H. N. G. Fernando J. In view of the importance of the points raised in appeal I would like to add my own observations.

The learned Election Judge has misdirected himself in holding that even if a person's name is found in the Parliamentary Electors' Register, certified for the year in which the election is held, he is disqualified from being a voter by reason of the fact that he does not have the necessary residential qualifications set out in section 4 (1) (c) of the Ceylon (Parliamentary Elections) Order in Council, 1946 (which is hereinafter called the Elections Order in Council). Consequently, he has taken the view that the respondent was not qualified to sit in Parliament.

The Ceylon (Constitution) Order in Council (which is hereinafter referred to as the Constitution) defines the word " elector " as a person " entitled to vote at an election of a Member" (vide section 3 of Cap. 379). The Elections Order in Council contains elaborate provisions for the preparation of registers of electors for each electoral area. Provision is made for the preparation of the first register after the Elections Order in Council came into force, the annual revision of registers and the certification of the registers for a particular year. Any person whose name appears in the register is entitled to object to the inclusion of a name in the register. A person whose name has been omitted is also entitled to make an application to have his name included or restored in the register. From the decision of the officers, who are entrusted with the preparation of registers, and who are also given the power to include or exclude a name from the register, an appeal is given to a revising officer. After this elaborate procedure has been exhausted, finality is given to the register. Once the register is certified by the proper officer, section 38 of the Elections Order in Council enacts that " the register shall be conclusive evidence for the purpose of determining whether a person is or is not entitled to vote " at the parliamentary election for any particular electoral area. The proviso to section 38, however, sets out persons who are incapable of voting at an election, although their names may appear in the register. It is clear therefore that any person, whose name is in the register and who is not incapacitated by the disabilities set out in the proviso to section 38, is qualified to vote at a parliamentary election. It may be noted that non-residence for a period of six months, which is a disqualification for a person's name to be entered on the register, is not set out as an incapacity in the proviso to section 38 to enable a person to vote once his name is in the register. The resulting position is that although a person may not have the residential qualification necessary to have his name entered in the register, yet, if his name appears in it, and he does not suffer any of the incapacities set out in the proviso to section 38 of the Elections Order in Council, he is qualified to vote at a parliamentary election.

The provisions governing the qualifications of persons who are entitled to be elected to Parliament are set out in section 12 of the Constitution which enacts : " Subject to the provisions of this Order, a person who is qualified to be an elector shall be qualified to be elected or appointed to either chamber." The disqualifications for membership of the House of Representatives are set out in section 13 of the Constitution.

Therefore once the name of a person is in the register for a particular year in which the election is held, he is qualified to be elected to Parliament provided he does not suffer any of the incapacities set out in the proviso to section 38 of the Elections Order in Council and any of the disqualifications enumerated in section 13 of the Constitution. The appellant's name is in the register for the year in which he was elected and he does not suffer any of the incapacities set out in the proviso to section 38 of the Elections Order in Council or has any of the disqualifications set out in section 13 of the Constitution. Therefore the appellant is a person qualified to sit in Parliament.

This canon of construction receives confirmation by a consideration of the provisions of section 85 of the Elections Order in Council which does not enable an Election Judge, on a scrutiny, to strike out the votes of persons who do not have the necessary qualifications to have their names entered on the register. Despite the lack of residential qualification to enable a person to be included in the register of electors for a particular year in which elections take place, an Election Judge is precluded from striking out the vote of such a person on a scrutiny. In other words an Election Judge is not given jurisdiction to set aside an election of a Member of Parliament on this ground.

Counsel for the respondent relied on the case of *Flintham v. Roxborough* (vide The Law Times Reports, Vol. LIV, p. 797) in support of the proposition that if a statute states that a person is " entitled to vote " it cannot be construed to mean that he is " qualified to vote ". The provisions of the English Municipal Corporations Act of 1882 (45 & 46 Vict. c. 50), which the Judges were called upon to construe in that case, were entirely different from the provisions of the Ceylon Constitution and the Elections Order in Council. In that case the court had to construe the relevant provisions of the Municipal Corporations Act of 1882 which does not have the elaborate provisions of the Ceylon Elections Order in Council relating to preparation, revision and certification of registers. Further the English Act contains no provisions similar to section 38 of the Order in Council which enacts that if a person's name is found in the Electoral Register of a particular year it is *conclusive evidence* that he is entitled to vote at a Parliamentary Election. Indeed, one of the submissions made by Counsel in that case was that since the English Act did not make the register conclusive evidence of a person entitled to vote, the court was free to give an interpretation to those words.

On a proper construction of the English Municipal Corporations Act of 1882, a person's name has to be on two rolls, referred to as rolls A & B. Although a person's name may be on register A still he is qualified to vote only if his name is also on register B. In coming to the conclusion that a person entitled to vote is not the same as a person qualified to vote within the meaning of the provisions of the Municipal Corporations Act of 1882, the Judges had to bear this distinction in mind and were constrained to give that construction. This clearly appears from the dictum of Mathew J. In referring to these phrases he said (vide *Flintham v. Roxborough*, The Law Times Reports, Vol. LIV, page 797 at 799) :

> "It is difficult off hand to say that they do not, generally speaking, mean the same thing. . . . . To discover the meaning of 'qualified to vote ' sections 9 and 11 of the Act must be read together. Section 9 applies to the qualifications to be put on the burgess roll ; section 11 to the qualifications to be entitled to become a town councillor ; and, apart from subsection 3 of section 11, which is taken practically from the Act of 1880 (43 Vict. c. 17), the qualification to be a councillor is a much heavier one than that which entitles a person to be a burgess merely."

Thus, it becomes clear that under the English Municipal Corporations Act a person entitled to vote is not necessarily qualified to vote.

The scheme of our statutory legislation is entirely different from the English statute. It is a cardinal rule of interpretation that in construing statutes when the meaning of the words are clear, effect must be given to them. The Elections Order in Council envisages finality to be reached when a register is prepared and certified for a particular year. After certification, if a person's name appears in the register, it is conclusive evidence that he is entitled to vote, unless he was disqualified by any of the incapacities set out in the proviso to section 38 of the Elections Order in Council.

When one fact is said to be conclusive evidence by the proof of another fact, it is clear law that on the proof of the latter fact no evidence cane be led to contradict the former fact. Therefore once it is proved that the appellant's name is in the electoral register, which was certified for the year 1965, the learned Election Judge could not have allowed any evidence to be led to show that his name should not have been included in the register of voters by reason of the fact that he had not resided in the electoral district to which the register relates, for a continuous period of six months in the eighteen months immediately prior to the first day of June in that year. In the disqualifications set out in section 13 of the Constitution, nowhere is it stated that non-residence for a continuous period of six months prior to June in that year, as required by section 4 (1) (c) of the Elections Order in Council, disentitles a person to be in Parliament. This is the main ground relied on by Counsel for the petitioner-

respondent to sustain the order of the learned Election Judge. For the reasons stated, the order of the Election Judge on this matter cannot be sustained.

On the charges of corrupt practice by the commission of the offence of undue influence, which the learned Judge thought were proved, I am in agreement with my brother H. N. G. Fernando, J. and I hold that the requisite intention set out in section 56 of the Elections Order in Council has not been proved in this case. The evidence led on these charges does not show that the petitioner-respondent has proved beyond reasonable doubt that the acts complained of were done " in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election," or the other matters set out in section 56 of the Elections Order in Council were committed.

In dealing with an election case where the facts are to be found inferentially from the circumstantial evidence the rules governing the acceptance of circumstantial evidence in criminal cases should be followed. In a criminal case if two reasonable inferences are possible, one consistent with the innocence of the accused and the other consistent with his guilt then a Judge must draw only the inference which is consistent with the innocence of the accused. This principle should apply *mutatis mutandis* in election cases where the standard of proof is the same as in criminal cases. The benefit of any reasonable doubt must be given to the person whose election is sought to be set aside. Applying these principles it cannot be said that the charges of corrupt practice of undue influence have been proved beyond reasonable doubt. Wrongful inference on facts is a question of law that can be canvassed in this court. The learned Election Judge has misdirected himself in holding that the charges of corrupt practice have been proved although the requisite intention has not been established in this case.

The learned Election Judge has also erred in admitting P1 in evidence P1 was alleged to be a report by constable Wijeratne, of a meeting held on 18th March 1965. This document contains the alleged false statement which is said to have been made by one Jayatilleke, the alleged agent of the appellant. The learned Election Judge has accepted the evidence of this constable and held that the false statement contained in P1 was made by Jayatilleke, the alleged agent of the appellant. This is one of the grounds on which the appellant has been unseated. In admitting this document the learned Election Judge has held, without an iota of evidence, that P1 was sent by the constable on the 18th or 19th of March 1965. When the Judge repeatedly asked the question as to when the report was sent, the constable gave no direct answer, but became evasive. It is curious that this document which bears no date has an endorsement by the Inspector of Police who received it on the 29th of March, 1965,

whereas the reports of other meetings sent by the same constable contain endorsements by the Inspector showing that almost a day or two after the meetings the reports reached the hands of the Inspector.

The election was held on the 25th of March, 1965 and the results were known by the 26th. It is curious that P1 is not only undated but was received by the Inspector on the 29th of March 1965, that is to say, after the results of the election were announced. Such a document could easily be fabricated. Taking all the circumstances into consideration P1 is not a document which is admissible under section 157 of the Evidence Ordinance. In order that it may become admissible under this section " the document must have been written *at or about the time the fact took place* ". Had the learned Election Judge not misdirected himself by holding that this document was sent on the 18th or 19th of March 1965, he could not have reasonably held that it is admissible under section 157 of the Evidence Ordinance. Had this document been rejected, constable Wijeratne would not have been in a position to give oral evidence since he admitted that without reference to that document he would not be in a position to give evidence of the speech made by Mr. Jayatilleke.

It was not contended either in the Election Court or in this Court that this document is admissible under section 35 of the Evidence Ordinance. Section 35 of the Evidence Ordinance enacts: " An entry in any public or official book, register, or record, stating a fact in issue or a relevant fact made by a public servant in the discharge of his official duty " is a relevant fact. In *Ilangaratne v. de Silva*[1] it was held that reports of speeches taken from notes made by police officers in the discharge of their official duties are admissible under this section. But in order that they may become admissible that report must be a record made by a public servant in the discharge of his official duties. On the facts proved in this case the petitioner has not shown that P1 was a report made by a public servant in the discharge of his duties. In my view P1 is a belated report. Taking all the surrounding circumstances no circumspect Judge can reasonably hold that it was the official record made by a public servant in the discharge of his duties. If reports of this type are admitted in evidence, any designing individual could bribe a constable and induce him to send a false report of an alleged speech which was never made and unseat a person who has been sent to Parliament by the electorate. Belated reports do not come under

[1] *(1948) 49 N. L. R. 169.*

the provisions of this section (vide *Doe v. Bray* [1]; Sarkar on Evidence, 10th Edition, p. 392).

Counsel for the petitioner respondent did not make an application to send this case for retrial on the issue as to whether a false statement alleged to contain in P1 was made by Jayatilleke, the alleged agent of the appellant. Even if such an application has been made, I do not think that it is fit case to bo sent for retrial, particularly after the pinch of the case has been ascertained. Such a course will enable gaps to be filled in by fabricated evidence. The burden was on the petitioner to prove his case beyond reasonable doubt and he has failed to do so and the benefit of the doubt should be given to the appellant. Therefore, the petitioner has failed to prove the alleged false statement contained in document P1, which is a gist of the evidence given by police constable Wijeratne.

These are the three grounds on which the learned Election Judge unseated the appellant. For the reasons given the judgment of the elarned Election Judge cannot be upheld.

Counsel for the appellant also urged that there had been no fair trial in this case. He stated that the learned Judge had put a large number of questions and showed bias or prejudice in favour of the petitioner at every stage of the proceedings. Although Counsel for the appellant prepared a document containing statistics of the number of questions put by Counsel on both sides and the learned Election Judge to each of the witnesses, he has not attempted to show that the learned Judge was biased in favour of the petitioner.

Section 165 of the Evidence Ordinance gives ample latitude to a Judge to put any questions, at any time, and in any form, whether relevant or irrelevant to a witness. He may order the production of any document or things " in order to discover or obtain proper proof of relevant facts ". The fact that he is allowed to put irrelevant questions shows that his powers are not confined to put relevant questions. Section 167 of the Evidence Ordinance enacts :

> " The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

[1] *8 B. & C. 830.*

The power of a Judge to ask questions from witnesses is circumscribed by well known rules. The limits within which a Judge may question a witness in the course of a trial are set out in various commentaries and decisions of courts. In interpreting the provisions of the Indian Evidence Act which corresponds to section 165 of the Evidence Ordinance, Sarkar in his well known commentary on the law of Evidence says : " Although the section appears to give the Judge somewhat wider latitude than similar powers of the English law, the provisions of this section are in substantial agreement with that law." The purposes for which a Judge may ask questions from a witness are set out succinctly by Denning L. J. in *Jones v. National Coal Board* [1]. He said : " The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that had been overlooked or left obscure ; to see that the advocates behaved themselves seemingly and keep the rules laid down by law ; to exclude irrelevancies and discharge repetitions ; to make by wise intervention that he follows the points that advocates are making and can assess their worth ; and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mantle of a judge and assumes the role of an advocate ; and the change does not become him well." Lord Bacon spoke right when he said : " Patience and gravity of hearing is an essential part of justice ; and an overspeaking Judge is no well tuned cymbal." Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice our keenness may outrun our sureness and we may trip and fall.

Counsel for the appellant has not shown in his submissions that the learned Election Judge had overstepped the limits of judicial discretion set out by Lord Denning and has tripped and fallen. Counsel for the appellant admitted that the learned Election Judge put various questions to the witnesses to ascertain the truth and was therefore actuated by the best of motives.

In view of the misdirections of the learned Judge in admitting P1 and acting on the evidence of Police Constable Wijeratne, his strictures on the appellant were not justified. For these reasons we allowed the appeal and I agree with the order made by my brother H. N. G. Fernando, J.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

[1] *(1957) 2 A. E. R. 159.*