1964 *Present :* **Basnayake, C.J., Weerasooriya, S.P.J., and T. S. Fernando, J.**

M. A. DANIEL APPUHAMY, Appellant, *and* T. B. ILLANGARATNE and 2 others, Respondents

IN THE MATTER OF AN APPEAL UNDER SECTION 82A OF CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL 1946 AS AMENDED BY CEYLON PARLIAMENTARY ELECTIONS (AMENDMENT) ACTS No. 19 OF 1948 AND No. 11 OF 1959

Election Petition Appeal No. 1 of 1963/Election Petition No. 8 of 1960 (Hewaheta)

Election petition—Charge of corrupt practice of making false statements of fact relating to the personal character or conduct of a candidate—Evidence—Police reports of speeches made at election meetings—Claim of privilege from production—" Unpublished official records "—" Affairs of State "—Appeal from order of Election Judge—Power of Court to order new trial—Scope—Evidence Ordinance, ss. 2 (2), 123, 124, 162, 167—Ceylon (Parliamentary Elections) Order in Council 1946 (as amended by s. 24 of Act No. 11 of 1959), ss. 58, 79, 82A, 82B.

Section 123 of the Evidence Ordinance reads as follows :—

" No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister."

The appellant and the 1st respondent were rival candidates for a Parliamentary seat, and the latter was declared duly elected. The appellant then filed an election petition in which one of the grounds urged for invalidating the election was that the 1st respondent was guilty of corrupt practice under section 58 of the Parliamentary Elections Order in Council. The corrupt practice alleged was that the 1st respondent, by himself or his agents, made false statements of fact in relation to the personal character or conduct of the appellant. The statements in question were said to have been made at election meetings and to have been taken down and reported to their superior officers by certain police constables who, in terms of general instructions previously issued to them, attended the meetings in plain clothes and made notes of what was said by the various speakers on specified points, one of them being anything spoken by a candidate, or on his behalf, against the rival candidate.

The appellant sought to adduce in evidence the reports of the constables containing notes of the speeches made at the meetings attended by them. But in respect of these reports a claim of privilege from production was raised

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under section 123 of the Evidence Ordinance by the officer who brought the reports to Court in obedience to summons. This claim was upheld by the Election Judge who refused permission for the production of the reports.

Held, that the Election Judge was wrong in upholding the objection to the production of the reports of the police constables. The record of a speech made in public by a candidate, or his agent, is not an unpublished official record relating to any affairs of State within the meaning of section 123 of the Evidence Ordinance. The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book does not alter its character.

The second question for consideration in the present appeal was whether the election petition should, in terms of section 82B (3) of the Parliamentary Elections Order in Council, be tried anew in regard to the charge of corrupt practice, or whether the appeal should be dismissed although the question of law arising on the appeal was decided in the appellant's favour.

Held (T. S. FERNANDO, J., dissenting), that in the circumstances of the present case the provisions of section 167 of the Evidence Ordinance were not applicable and that the charge of corrupt practice should be tried anew in accordance with certain specified directions.

APPEAL filed under the provisions of the Ceylon (Parliamentary Elections) Order in Council in respect of Election Petition No. 8 of 1960 (Hewaheta).

H. W. Jayewardene, Q.C., with *P. N. Wikramanayake* and *N. R. M. Daluwatte*, for Petitioner–Appellant.

S. Nadesan, Q.C., with *A. Mahendrarajah*, *R. R. Nalliah*, and *Rajah Bandaranaike*, for 1st Respondent-Respondent.

Cur. adv. vult.

February 17, 1964. BASNAYAKE, C.J.—

This is an appeal, under section 82A of the Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by section 24 of the Ceylon Parliamentary Elections (Amendment) Act No. 11 of 1959, by the petitioner who unsuccessfully presented a petition, under section 79 of the above-mentioned Order in Council, in which he claimed—

(*a*) a declaration that the election of the respondent Tikiri Bandara Illangaratne (hereinafter referred to as the respondent) is void,

(*b*) a declaration that the return of the respondent was undue,

(*c*) a declaration that he was duly elected and ought to have been returned, and

(*d*) a scrutiny.

The two questions that arise for decision on this appeal are—

(*a*) Whether the learned Election Judge was wrong in not permitting the production in evidence of the record of the speeches made at the election meetings of the respondent on 3rd, 6th, 8th and 16th July 1960 made by police constable Dedigama Ralalage Don Dhanapala (No. 7357), and

(*b*) if so, whether we should order the election petition to be tried anew in regard to the charge of committing the corrupt practice of making or publishing, before or during the election, for the purpose of affecting the return of the petitioner, false statements of fact in relation to the personal character or conduct of the petitioner.

In regard to the first of the above questions, the material facts are shortly as follows :—Police Constable Dhanapala was an officer attached to the Talatuoya Police Station in 1960. In July of that year he was assigned the duty of attending election meetings and making notes of the speeches that were made. He was not expected to take down the speeches verbatim. In Dhanapala's own words this is what he was required to do—

" If any speaker at a meeting spoke disparagingly of the government we were to note it down. If any person was reprimanded or if some speaker said anything against a person we were to make a note of that . . . .

. . . . I made a note of the names of the speakers and a short note of what they spoke. When the election meeting was over I went back to the station and an entry was made of the fact that we had returned. Thereafter, I prepared a report of what I had taken down. The preparation of such a report had to be done immediately we returned to station. I made my reports in five copies. Those 5 copies I would hand over to the Officer in Charge. As to what he did with those 5 copies I do not know. I was instructed to make a note of the date and time of the meetings I covered. The place of the meeting was also made a note of by me and also, roughly, the number of persons who were at the meeting. The name of the person who presided over the meetings was also noted down."

The officer in charge of the Talatuoya Police Station and the Superintendent of Police, Kandy, were summoned to produce Police Constable Dhanapala's records of the proceedings of the meetings he attended. The officer who represented the Superintendent of Police, Kandy, and who

was authorised to take the documents to Court in obedience to the summons claimed that the document was protected under section 123 of the Evidence Ordinance. Learned counsel for the respondent also objected to their production. After hearing counsel for the petitioner and the respondent and the Attorney-General who appeared as *amicus curiae* and taking into account the affidavit filed by the Inspector-General of Police, the learned Judge upheld the plea of privilege. In his affidavit the Inspector-General of Police said *inter alia*—

"3. It has been and is the practice of my Department to gather information and intelligence from various sources in the interests of the preservation of public order and security of the State. One method of collecting such information and intelligence is by requiring Police officers in plain clothes to attend meetings and to forward reports thereon to certain superior officers.

4. The documents referred to in paragraph 2 hereof are reports made by Police officers who in plain clothes attended, and thereafter reported on, certain election meetings held in Hewaheta Electorate in July, 1960.

5. I have carefully examined the contents of each of the documents referred to in paragraph 2 hereof and I have formed the opinion that it would be injurious to the public interest if these documents are to be produced because they belong to a class of documents the production of which would indicate or tend to indicate the sources of Police information given in confidence, the nature of the information gathered and the persons to whom such information is communicated.

6. The said documents are unpublished official records relating to affairs of State and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the Public Service.

7. Accordingly, I object to the production of these unpublished official records and have refused permission to the various officers mentioned in paragraph 2 hereof to produce the said documents in Court or to give any evidence derived therefrom."

I shall now turn to section 123 of the Evidence Ordinance. That section reads—

"No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister."

The above provision imposes a duty on the Court not to permit any person to produce or to give any evidence derived from "any unpublished official records relating to any affairs of State", unless the officer at the head of the department concerned gives permission to do so. Except

in the case of a document whose very name or nature indicates that it relates to affairs of State the Court would find itself unable to decide whether the document contains matter coming within the ambit of the expression " affairs of State " without examining it. It is submitted that in deciding whether the production of a document should not be permitted on the ground that it is barred by section 123, the Court is precluded by section 162 (2) of the Evidence Ordinance from inspecting the document. The material subsections of section 162 read—

> " (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.
>
> (2) The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

The difference in phraseology between section 123 and the above subsection is noteworthy. The former speaks of " unpublished official records relating to any affairs of State " while the latter speaks of " matters of State ". Quite apart from the fact that in the former the reference is to " any affairs of State " and in the latter to " matters of State " the qualification that the documents should be official records and that they should be unpublished are not in subsection (2). That subsection is an empowering provision. It empowers the Court to inspect a document or take other evidence in order to determine on its admissibility. It confers no such power when the Court has to determine whether the document is one that may not be produced. Even when the Court has to determine on the admissibility of a document, the power of inspection does not extend to documents which refer to matters of State. The question then is, may the Court inspect a document relating to " affairs of State " for the purpose of exercising the function vested in it by section 123. The wide difference in phraseology between the two sections leads me to the conclusion that section 162 (2) does not have any application to section 123. The two provisions deal with different classes of documents, and different purposes. Section 123 is concerned with preventing the production of unpublished official records relating to any affairs of State ; section 162 (2) is concerned with empowering the Court to inspect a document when it is called upon to decide whether a document is admissible or not. Apart from the fact that section 162 (2) does not forbid the Court from inspecting a document relating even to a matter of State when it is called upon to decide whether the document is one that may be produced, section 162 (2) which is a later section from its very nature and language has no application to section 123. No implied prohibition in section 162 (2) extends to section 123.

For the purpose of exercising its functions under that section the Court is untrammelled by section 162 (2) or any other section and may inspect the document which it is invited to shut out thereunder. It is an established canon of interpretation of statutes that when a power is conferred by statute all powers necessary for the effective exercise of that power are conferred by implication. Section 123 must therefore be regarded as conferring those implied powers; because the Court cannot effectively exercise its far-reaching powers without them. There is nothing in section 123 or any other section which requires the Court to proceed with eyes shut. If the intention of the Legislature was that the Court should act blindfold when determining the questions arising under section 123, it would have expressed it in no uncertain terms and not in the indirect way it is urged it has done. The language of section 162 (2) does not in my view warrant so grave an intrusion on the implied powers of the Court to examine the document before ruling it out, because clear and unmistakable words must exist in an enactment before an intention to subordinate the interests of justice to any other interest is imputed to the Legislature. Such words are not to be found anywhere in the Evidence Ordinance. To impute such an intention to the Legislature would be most unfair.

If a document is an unpublished official record relating to any affairs of State, the Court is bound not to permit its production. But the head of the department concerned has a discretionary power to grant permission to produce such a document. The question whether the public interest will suffer or not does not arise under section 123, because if the document, the production of which is sought, comes within the ambit of the section, the Court must shut it out and is not entitled to let it in on the ground that the public interest will not suffer or on any other ground. Whether the public interest will suffer or not is a consideration which the head of the department concerned may properly take into account in exercising the discretion vested in him. Whether the Court has power to overrule the head of department concerned on the ground that the public interest will not suffer by the disclosure of the contents of a document does not arise under section 123, nor is an affidavit such as the one furnished by the Inspector-General or in any other form called for in deciding whether a document falls within the ambit of section 123. Whether the document has been published or not, whether it is an official record or not, and whether it relates to any affairs of State, are questions of fact. The decision of these questions of fact will of course be preceded by a decision on the meaning of the expression "affairs of State", which is a question of interpretation and as such is a matter of law. If the Court requires evidence in order to decide the questions arising for decision, such evidence must be taken in open Court, as our law does not provide for the taking of evidence by affidavit except in certain specified cases (s. 179 Civil Procedure Code). If the head of department concerned withholds his permission, the Court cannot overrule him or query his decision. The question of public interest arises only under section 124 and there too the judge

of whether the public interest would suffer by the disclosure or communication made to him in official confidence is the public officer concerned and the Court has no power to overrule him or override his opinion.

The Court, as stated above, being under a duty to protect from production in evidence unpublished official records relating to any affairs of State, has to be vigilant when it is sought to produce any document regardless of whether immunity from production is claimed or not. It has power *ex mero motu* not to permit the production of documents which are unpublished official records relating to any affairs of State unless the head of the department concerned gives permission.

Now, as to the expression " affairs of State ", it has not been defined, though often used in relation to the business of the State, such as matters connected with international diplomacy, minutes of public servants to their colleagues or superiors regarding the business of Government, State secrets, and such like documents connected with statecraft. The class is a narrow class and does not vary with the expansion of the Government's field of activity. The expression certainly does not include every record made by a police officer in the course of duties entrusted to him. In seeking to illustrate the meaning of the expression " affairs of State ", Field in his Treatise on the Indian Evidence Act (6th Ed., p. 408) gives the following as illustrative of documents relating to affairs of State—

> " Communications between a Colonial Governor and his Attorney-General on the condition of the colony, or the conduct of its officer, or between such Governor and a military officer under his authority ; the report of a military commission of enquiry made to the Commander-in-Chief and the correspondence between an agent of the Government and a Secretary of State ; "

If the State undertakes trade or social welfare, its trading or social welfare activities do not become affairs of State though they are undertaken by the State. Our Evidence Ordinance was enacted in 1895 at a time when the activities of the State were confined to gubernatorial functions. Neither social welfare nor trade came within the ambit of the State's activities. At that time the expression " affairs of State " must have been confined to matters relating to diplomacy and statecraft and the business of government. Words such as these in a statute should be given the meaning they held at the time the statute was passed.

Although documents which are protected by section 123 are referred to as privileged documents, it is not correct to do so. When counsel or a public officer or any other person invites the Court not to permit the production of a document to which section 123 applies, he claims no privilege. His act is an invitation to the Court to obey the imperative prohibition in that section. The question of privilege arises under section 124. There a public officer enjoys the privilege of deciding whether he may disclose or not communications made to him in official confidence. The concepts of English Law have crept into our system

and when discussing section 123, both here and in India, Judges and lawyers speak of privilege. Clearly the record of a speech made in public by a candidate at an election meeting is not an unpublished record relating to any affairs of State. The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book does not alter its character.

Little assistance can be gained by reference to English Law. There the claim of privilege is one based on the common law and the usage of the Courts. The development of the English Law has been largely influenced by public policy and has undergone change over the years. Scrutton L.J. describes the practice thus—

> " . . . . It is the practice of the English Courts to accept the statement of one of His Majesty's Ministers that production of a particular document would be against the public interest, even though the Court may doubt whether any harm would be done by producing it. I have been informed on very high authority that the practice in Scotland is different ; that there the judge looks at the document and orders it to be produced if he does not agree with the Minister's reasons for considering its production to be against the public interest. No harm seems to have resulted from this practice. But that is the law in England." (*Ankin v. London and North Eastern Railway Company*, (1930) 1 K. B. 527 at 533.)

This view of the English Law was affirmed in *Duncan v. Cammell Laird & Co. Ltd.* [1] which still is regarded as the leading case on the subject. Occasionally Judges look at the document as in *Spigelman v. Hocken and another, Goldblatt v. Same*, reproduced in LI South African Law Journal (1934) where Macnaghten J. examined the document objected to and admitted it despite the claim of privilege. In Scotland the law is that the Court is entitled to look at the document in order to determine whether its contents should be protected from disclosure (*Glasgow Corporation v. Central Land Board* [2]).

A large number of English cases have been cited by both sides, but it is not necessary to refer to them for the reason above stated. In England in the last decade, the tendency has been on the ground of public policy to refuse to permit the production of even documents which disclose no state secrets. The Crown Proceedings Act 1947 (s. 28) 10 & 11 Geo. VI, c. 44, while removing the immunity of the Crown from discovery, makes no alteration in the rule as to withholding of documents in the public interest. The views of academic writers in England expressed in their contributions to learned journals indicate a dissatisfaction with the present trend, as the interests of justice are not served by the extension of the protection (*see* Article by J. E. S. Simon in 1955 Cambridge Law Journal, p. 62, on Evidence Excluded by Considerations of State Interest).

[1] *(1942) A. C. 624.*

[2] *(1956) S. L. T. (H. L.) p. 41.*

The trend of judicial opinion too is towards a more liberal approach to the problem in order to ensure that the rule does not result in a denial of justice (see *Broome v. Broome* [1], and observations of Lord Evershed in *Auten v. Rayner* [2]). In the most recent pronouncements on the subject in the case of *Merricks and another v. Nott-Bower and others* (London Times, 31st January 1964), the Court of Appeal went much further than before in confining the *Cammel Laird* case to the setting in which it had been decided. The certificate in *Merricks* case was in the following terms :—

> " I have personally examined the minutes on the official Metropolitan Police file relating to the transfer of the plaintiffs . . . and have formed the view that on the grounds of public interest the minutes ought not to be produced because they belong to a class of documents which it is necessary in the public interest for the proper functioning of the public service to withhold from production. "

and Lord Denning said—

> " . . . . The certificate used the words which Lord Simon had used in *Duncan v. Cammel Laird & Co.* (1942) A. C. 624 at p. 642 ; but those words of Lord Simon had not been necessary for the decision in the *Duncan* case, and he would not have wished them to be used as if they were the words of an Act of Parliament.
>
> The practice seemed to have grown up since that decision that all that a Secretary of State had to do was to give a certificate and put in those words as if pronouncing a spell, thereby making all documents tabu. Indeed the formula had only to be set out, it would appear, and the Court was for ever blindfold. If that were indeed the state of affairs it would be deplorable, for there was a natural temptation for people in executive positions to regard the interest of the department as paramount, without realizing that in many cases a greater interest—the interest of justice itself—had to be considered. It was not sufficient to repeat the words of Lord Simon. When a class of document was referred to, his Lordship would like to see that class described in such a way that anyone—Parliament, the public, and the Court and the litigants—could see that it was only right that those documents should be withheld from production. If there was a defect in a certificate, an opportunity might be given to deal with it ; but at the moment his Lordship did not think the Minister's certificate in this case was sufficient to claim protection and he would not on that ground strike out the cause of action in libel."

Lord Justice Salmon in his judgment was even more critical of the existing practice than Lord Denning—

> " Duncan's case had been decided in the darkest days of the war—in 1942—before the battle of Alamein. If the documents there concerned had been made public it was obvious that their publication

[1] *(1955) W. L. R. 402.*

[2] *(1958) 1 S. L. R. 1300 at 1303.*

could have been of the greatest assistance to the enemy. It followed, therefore, that when Lord Simon added to the category of documents for which a certificate might be given, 'a class of documents which it is necessary to keep secret for the proper functioning of the public service' those words were completely *obiter*, and though of very great persuasive authority, they were not binding, particularly on the House of Lords. Clearly documents passing between high officers of state shou'd be kept secret; but those words *obiter* of Lord Simon had in the last 20 years given rise to a practice that everything, however commonplace, which had ever passed between one civil servant and another behind the departmental screen should be kept secret on the special ground that the possibility of its disclosure in a legal action would impair the freedom and candour of official reports or minutes. In cases of this kind—his Lordship said this with great diffidence—it was a pity that the law of this country could not be brought into line with the law of Scotland where if Crown privilege was being claimed for a document, as, for instance, some communication between one minor civil servant and another, the Court, while accepting the view of the Minister as expressed in his certificate, was entitled to say: 'Well we must accept the view that this is regarded by the Minister as prejudicial of public interest: but in a case such as this, the administration of justice is the over-riding consideration.' Though it was a power which the Court used sparingly, it was a useful power, particularly having regard to the practice which had grown up of giving a very wide construction to the language of Lord Simon."

In 1956 the Lord Chancellor (London Times, 7th June 1956) made a statement in regard to Crown Privilege (*vide* Appendix 'A')[1] which disclosed that the Crown was narrowing the privilege hitherto claimed by it; but in practice there appears to have been no substantial change of policy. In India, where the Law of Evidence is codified as in Ceylon, the provision corresponding to our section 123 is slightly different. It reads—

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The difference between the two sections is that our section bars both documents to which it applies and oral evidence of their contents, while the Indian section does not make express mention of the production of documents. But the main question for decision remains the same under both sections, viz., "What are unpublished official records relating to any affairs of State?". The Indian Judges have, in construing the statute, allowed concepts peculiar to English Law to creep in and the result has been that matters that have no place in the statute have been allowed to influence their judgment (see *Chamarbaghwalla Parpia* [2]). In construing our Evidence Ordinance it would not be correct to approach

[1] *Page III (infra).*

[2] *(1950) A. I. R. Bombay, p. 230.*

it with preconceived notions of English Law and treat section 123 as a statutory declaration of that system of law. The proper approach to a Code has been stated long ago in the following words (*Bank of England v. Vagliano Brothers* [1], cited with approval in *Narendra Nath Sircar v. Kamalbasini Dasi* [2])—

> " . . . . . the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions . . . . "

The wise words above cited have been overlooked by many learned Judges both here and elsewhere. When construing section 123 it has been the practice to refer to and cite extensively from English decisions. The danger of such a course is that we may get lost in the contentious matters of the English system which do not exist in our law. It is not necessary to review the Indian decisions. The decision of the Supreme Court of India in *State of Punjab v. S. S. Singh* [3] was cited to us by counsel for the appellant and criticised at length by learned counsel for the respondent. The learned Judges in that case too did not seek to define the expression " affairs of State ". It was stated there, as I have done here, that whether a document falls within section 123 is a question of fact. The majority judgment stated—

> " . . . . The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court."

The learned Election Judge was, in my opinion, wrong in not permitting the production of the record made by Police Constable Dhanapala of the speeches at the meetings in question.

Before I leave this part of the judgment I should add that, although I have discussed the law with special reference to the evidence of Police Constable Dhanapala and the production of the records of speeches

[1] *(1891) A. C. 107.* [2] *23 L. R. I. A. (1895–96) p. 18 at 26.*
[3] *A. I. R. (1961) S. C. 493 at 502.*

at election meetings attended by him, what I have said above applies equally to the records of speeches made by other police officers whom the petitioner listed as witnesses whom he intended to call.

I accordingly set aside the order of 20th December 1962 upholding the claim of privilege and refusing under section 123 of the Evidence Ordinance to permit the production of certain documents. While upholding the decisions of the Election Judge as to a recount and in regard to the charge of undue influence, I set aside the order of 8th February 1963 dismissing the petition of the petitioner. As two out of the three grounds on which the learned Election Judge dismissed the Election Petition have not been canvassed in appeal, I think it is just and proper that the order for costs made by the Election Judge should not be set aside.

I now come to the second question. Inspector Piyadasa, Inspector of Police, Tangalle, who was at the material date in charge of the Talatuoya Police Station, gave evidence of statements made at the election meetings at which he was present. At the meeting held on 3rd July, 1960 which he attended, he stated that the respondent said—

> " . . . . the rival candidate was a bus magnate, and he had acquired a portion of land behind the Police Station for a housing scheme, and as the buses were taken over by the Government, and as the land was acquired by him for a housing scheme, he has come forward to fight this Election. He further said that as Chairman of the Village Committee of Talatuoya the other candidate had misappropriated funds from the Galaha Theatre and he carried on."

Piyadasa was disbelieved by the learned Election Judge. Dhanapala also attended that meeting and recorded the speeches. It does not appear from the judgment that even if the records made by Dhanapala had been produced and they corroborated Piyadasa, the learned Judge would, notwithstanding the corroboration, have disbelieved him. He states in the course of his judgment—

> " . . . . ., I am not satisfied with the evidence of Inspector Piyadasa to feel safe to hold the respondent Mr. Ilangaratne guilty of a corrupt practice of making a false statement referred to. Inspector Piyadasa is speaking from memory of an incident that took place more than $2\frac{1}{2}$ years ago. Moreover, there is evidence to show that rightly or wrongly, he has a bias against Mr. Ilangaratne because of certain allegations made by Mr. Ilangaratne during the elections that certain Police Officers were working against him at that time. Even in the course of giving evidence before me, I could not help feeling and sensing that Mr. Piyadasa suffered from a feeling of bias against Mr. Ilangaratne, which renders his evidence suspect in my eyes. As a finding of fact therefore, I also hold that I am not satisfied that the alleged statement has been proved to have been made."

It would appear from the words quoted above that the learned Judge's disinclination to act on Piyadasa's evidence was partly influenced by the fact that Piyadasa was speaking from memory of what he had heard about 2½ years ago, and partly by the fact that he had a bias against the respondent. It is not possible to state to what extent Dhanapala's record of the speech would have affected the judgment of the learned Judge. If it corroborated Piyadasa, it is not likely that he would have been entirely uninfluenced by it. The question then is what order are we to make. Before 1959, when section 82B was amended, this Court had power upon an appeal only to affirm or reverse the determination of the Election Judge. In 1959 the section was amended to read—

"82B. (1) The Supreme Court may, upon any appeal preferred under section 82A, affirm, vary or reverse determination or decision of the election judge to which the appeal relates.

(2) Where the Supreme Court reverses on appeal the determination of an election judge under section 81, that Court shall decide whether the Member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, and a certificate of such decision shall be issued by that Court.

(3) The Supreme Court may in the case of any appeal under section 82A, order that the election petition to which the appeal relates shall be tried anew in its entirety or in regard to any matter specified by that Court and give such directions in relation thereto as that Court may think fit.

(4) The Supreme Court may make any order which it may deem just as to the costs of the appeal and as to the costs of and incidental to the presentation of the election petition and of the proceedings consequent thereon, and may by such order reverse or vary any order as to costs made by the Election Judge; and the provisions of the Third Schedule to the award, taxation and recovery of costs shall *mutatis mutandis* apply in relation to the award of such costs by the Supreme Court and the taxation and recovery thereof.

(5) The decision of the Supreme Court on any appeal shall be final and conclusive."

Section 82B in its present form empowers this Court to take one of two courses in a case when it reverses the decision of the Election Judge. It may decide whether the member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, or order that the election petition shall be tried anew. In the instant case the course provided in subsection (2) cannot properly be taken and we are left with that provided in subsection (3).

Where the trial Judge has formed his conclusions of fact without hearing evidence which is material, it is necessary that there should be a trial at which the Judge should hear all the admissible evidence

that the petitioner was seeking to produce. I therefore in terms of subsection (3) order that the election petition should be tried anew. Now subsection (3) empowers this Court to order a new trial of an election petition in its entirety or in regard to any matter specified by this Court. The petitioner in his election petition asked for a recount and also that the return of the 1st respondent be declared null and void by reason of the corrupt practices of undue influence and of making false statements of fact in relation to the personal character of the petitioner. Although the learned Election Judge held against the petitioner on all the grounds which were urged at the trial, learned counsel for the appellant did not seek to canvass the decisions as to the recount and on the charge of undue influence. He confined the argument at the hearing of the appeal to the charge of making false statements. The new trial should therefore be only in respect of the charge of making false statements. Sub-section (3) also empowers this Court to give such directions in relation to the new trial as the Court may think fit.

In the circumstances of this case it seems to me reasonable that directions should be given in regard to the new trial in view of the fact that Inspector Piyadasa was the only witness called to give oral evidence of false statements affecting the character of the petitioner. It is right and proper therefore that the petitioner should not be permitted at the stage of the new trial to call those witnesses whom he was not precluded by the ruling of 20th December 1962 from calling and whom he refrained from calling at the first trial. He should be permitted at the new trial to call Inspector Piyadasa and all other witnesses called at the first trial to establish the charge of making false statements and all the witnesses he was precluded from calling by the ruling of the Election Judge on 20th December 1962. He should also be permitted to call any other witness who according to the law of Evidence should be called in order to make admissible the evidence of the witnesses whose evidence will be led in consequence of our decision in appeal. I direct that the petitioner should also be permitted to—

(*a*) lead evidence to prove the falsity of any statement in regard to the making of which evidence is adduced, or to prove that any person referred to in the particulars as having made a false statement, was an agent of the 1st respondent, provided the name of such witness appears in a list of witnesses already filed by him, and

(*b*) call any witnesses the petitioner may have to call in rebuttal where he is entitled in law to call evidence in rebuttal.

The Election Judge is also directed to exercise all powers that are ancillary or incidental to the carrying out of the above orders and directions.

I order the 1st respondent to pay to the petitioner the costs of appeal.

APPENDIX " A " *

CROWN PRIVILEGE FOR DOCUMENTS AND ORAL EVIDENCE

Lord Chancellor's Statement

A statement on Crown privilege was made in the House of Lords yesterday by the Lord Chancellor in reply to Lord Jowitt, who asked whether the Government had any statement to make on their policy in relation to the claiming of Crown privilege for documents and oral evidence.

The LORD CHANCELLOR said : " The Government has had under consideration for some time the whole problem of Crown privilege for documents and oral evidence. It is not a new problem, but has come into some prominence in recent years. This is not due to any extension of the principles on which privilege is claimed, but because since the Crown Proceedings Act, 1947, the Crown has been liable in tort or in delict and can be sued in the same way as private persons, and that has thrown into relief its privileged position with regard to the production of documents and other evidence.

With regard to documents, the Lord Chancellor continued, the law in England, as laid down in the House of Lords case of Duncan v. Cammell Laird[(1942) A.C.624] enabled Crown privilege to be claimed for a document on two alternative grounds ; first, that the disclosure of the contents of the particular document would injure the public interest, for example, by endangering public security or prejudicing diplomatic relations ; secondly, that the document fell within a class which the public interest required to be withheld from production, and Lord Simon particularized this head of public interest as " the proper functioning of the public service ". The Minister's certificate of affidavit setting out the ground of the claim must in England be accepted by the Court.

POSITION IN SCOTLAND

In Scotland Crown privilege could be claimed on either of those two grounds, but it was now clear from the decision in Glasgow Corporation v. Central Land Board that the Court in Scotland had an inherent power to override the Minister's certificate or affidavit ; but, as Lord Normand said in the Glasgow Corporation case " the power has seldom been exercised and the Courts have emphatically said that it must be used with the greatest caution and only in very special circumstances." As far as he (the Lord Chancellor) knew it had only been exercised on two occasions in the last 100 years. The position in Scotland, therefore, although substantially different in principle, might not be very different in practice.

The claiming of Crown privilege on the first ground had always been acceptable to the Courts and public opinion. Where, however, the claim had been made on the ground that the document belonged to a particular class, especially in proceedings where the Crown's position seemed very like that of an ordinary litigant, it had been criticized on the ground that the administration of justice was itself a matter of public interest and should be weighed against the other head of public interest, i.e., " the proper functioning of the public service".

The reason why the law sanctioned the claiming of Crown privilege on the " class" ground was the need to secure freedom and candour of communication with and within the public service, so that Government decisions could be taken on the best advice and with the fullest information. To secure this it was necessary that the class of documents to which privilege applied should be clearly settled, so that the person giving advice or information should know that he was doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

FOR MINISTER

It was sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a judge. This suggestion went much further than the position in Scotland, where the power of the judge was only exercisable " in very special circumstances " and did not permit any examination of the ground of the claim. This ground—namely, " the proper functioning of the public service "—must in the view of the Government be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a judge.

* Appendix " A " is referred to at page 106 (supra).

A judge assessed the importance of a particular document in the case that he was hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belonged. The result would be that the same kind of document would sometimes be protected and sometimes disclosed, and that would be destructive of the whole basis of the class claim.

Claims of Crown privilege were made in respect of all documents falling within the class, irrespective of whether their production would be favourable or unfavourable to the Crown's interests. All Crown lawyers were familiar with cases in which the Crown's interests had in fact been prejudiced by the application of the rule.

STRIKING THE BALANCE

The proper way to strike a balance between the needs of litigants and those of Government administration was to narrow the class as much as possible by excluding from it those categories of documents which appeared to be particularly relevant to litigation and for which the highest degree of confidentiality was not required in the public interest. " We have carried out an extensive survey of the field, and have certain proposals to make along these lines, " the Lord Chancellor continued.

A very large part of present-day Crown litigation consisted of actions arising out of accidents on the road or involving Government employees, or on Government premises. Where such an action was brought against a Government department the most relevant documents were the reports of the employees involved and of other eye witnesses. " In our opinion the Crown privilege ought not be to claimed for these documents, and we propose not to do so in the future."

With regard to the report of a Government inspector, such as a factory inspector, the department was not concerned as an employer or an owner of property, but was exercising governmental functions, and different considerations arose. " We think that in this case the report should be privileged, but that the inspector should be allowed to give evidence on matters of fact."

MEDICAL REPORTS

Secondly, medical reports and records had been considered. In the recent case of Ellis v. the Home Office [(1953) 2 Q.B. 135] judicial criticism was directed at a claim for privilege for reports made by a prison doctor which might have been relevant to the claim for negligence against the Crown. It was proposed, first, that ordinary medical records kept by departments in respect of the health of civilian employees should not be the subject of Crown privilege. In the case of medical reports and records in the fighting Services it was considered that privilege should still be claimed, so far as proceedings between private litigants, usually matrimonial proceedings were concerned. Service doctors owed a special duty to the commanding officer, and frank reports were essential. It was also important in the Services that a man should report readily to the medical officer, who was a doctor not of his choice but in whom he must have confidence ; this was especially so in the case of venereal disease. Some of these considerations applied to prison doctors, and their reports and records should still be privileged.

Where, however, the Crown or the doctor employed by the Crown was being sued for negligence, it was proposed that privilege should not be claimed. With regard to both proposals, there might be reports of a special confidentia lcharacter which ought still to be privileged.

It was also proposed that if medical documents, or indeed other documents, were relevant to the defence in criminal proceedings, Crown privilege should not be claimed.

In the Ellis case criticism was also made of a claim of privilege for a statement made to the police. Since that case a procedure had been established under which statements made by witnesses to the police were produced in Court on subpoena in civil cases and might be furnished earlier with the consent or at the request of the witnesses themselves. This would prevent a recurrence of what occurred in the Ellis case. The only exception, made for obvious reasons, was for statements by " informers ", i.e., persons volunteering information about the commission of crimes.

In contract cases the documents passing between parties were the most relevant and were always disclosed. Other documents which affected the legal position, e.g. an authority to an agent, were also disclosed. Moreover, reports on matters of

fact, as distinct from comment and advice, might be relevant to the issues in Government contract cases, and it was proposed that, where such a distinction could be clearly drawn, factual reports should be excluded from the privileged class.

It might be that in other fields, in addition to accident and contract proceedings, it would be possible to evolve new categories of documents of a factual nature, which, without prejudice to the public interest, would also be excluded.

DEPARTMENTAL MINUTES

" We believe," the Lord Chancellor continued, " that our proposals will eliminate many of the grounds of complaint that have arisen in the past. I am assured by those responsible for Crown litigation that they will apply to the majority of cases coming before the Courts."

As to departmental and inter-departmental minutes and memoranda containing advice and comment, and recording decisions, Crown privilege must be maintained.

" An important type of case in which documents of this kind may be relevant," the Lord Chancellor said, " is where the *vires* or legality of a Minister's decision is challenged, and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual Civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced.

" Minutes may also be relevant to proceedings because they may contain comments upon the issues in the case and the question of liability. They are not of high evidential value, although admittedly they may be used effectively in cross-examination. It can hardly be said that their non-disclosure prejudices the administration of justice and their disclosure would in our opinion prejudice government administration. For example, such actions as wrongful imprisonment, malicious prosecution or defamation may easily be concerned with events of public interest which give rise to comment in the Press and questions in Parliament. It is necessary and right that advice should be given at a high level in such cases, and that the advice should be entirely frank. It could not easily be given if it were subject to discovery in the subsequent proceedings."

ORAL EVIDENCE

As to oral evidence, it was plainly established and accepted that oral evidence of the contents of privileged documents could not be admitted. As regards evidence of oral communications, Crown privilege was claimed, much more rarely, on the same principles as in the case of written communications. It would be absurd, for example, if privilege could be claimed for a confidential minute passing from one official to another but not for a confidential conversation between them. " The proposals that we are making for reducing the scope of privilege for documents would apply to oral communications of the same kind ", the statement concluded.

LORD JOWITT, after expressing thanks for the statement, said that the problem it dealt with was not new. It caused a great deal of anxiety and worry to one of his predecessors and, he expected, to many of them. Obviously a great deal of thought had been given to the matter. It was desirable to cut down, so far as possible, in the interests of litigants, any exclusion of documents so long as that did not imperil the efficiency of the public service. Would the enforcement of the principles which the Lord Chancellor had enunciated involve legislation or the promulgation of rules, or could it be done by instructions to the Government departments concerned ?

The LORD CHANCELLOR replied that no legislation was necessary. The improvements he had mentioned would come into force from now.

LORD SILKIN asked whether the changes announced had been the subject of discussion with the Bar Council or the Law Society. Would those bodies have an opportunity of making comments on the improvements before they came into operation ?

The LORD CHANCELLOR replied he had had the advantage of the views of the bodies mentioned, but he did not pretend that his proposals met their views in total. The Bar Council were anxious for a judicial decision on the matter. Their views had been taken fully into account by all who had examined the problem before the decisions announced were come to.

(Extract from " The London Times " of 7.6.1956, p. 15.)

WEERASOORIYA, S.P.J.—

This is an appeal filed under the provisions of the Ceylon (Parliamentary Elections) Order in Council, 1946.

The appellant and the 1st respondent were rival candidates at the general election held on the 20th July, 1960, for the return of members to the House of Representatives. The contest between the appellant and the 1st respondent was in regard to the return of a member for Electoral District No. 49, Hewaheta. The 1st respondent was declared duly elected by a majority of 126 votes. The appellant then filed an election petition challenging the return of the 1st respondent on the grounds of a miscount of votes, undue influence and corrupt practices, and praying, inter alia, for a declaration that the return of the 1st respondent was undue and that the appellant was duly elected and ought to have been returned. After trial the petition was held by the Election Judge to have failed on all grounds and that the 1st respondent had been duly elected and returned. Hence this appeal.

Under section 82A of the Ceylon (Parliamentary Elections) Order in Council, 1946, an appeal lies to the Supreme Court on a question of law against the determination of an Election Judge that a member of the House of Representatives, whose return or election is complained of, was duly returned or elected. In the petition of appeal filed by the appellant he sought to have the findings of the Election Judge on the charges of undue influences as well as corrupt practices set aside on various grounds of law. But at the hearing of the appeal Mr. Jayewardene, who appeared for the appellant, did not canvass the Election Judge's findings on the charges of undue influence and he confined his submissions to the findings on the charges of corrupt practices.

The corrupt practices alleged against the 1st respondent in the election petition were that he, by himself or his agents, and for the purpose of affecting the return of the appellant, did make false statements of fact in relation to the character or conduct of the latter. There are listed in the statements of particulars furnished by the appellant, seven election meetings held on the 3rd, 6th, 8th, 12th and 16th July, 1960, in Electoral District No. 49 at which the statements in question are said to have been made.

It would appear that certain police officers were present at those meetings, and in terms of general instructions previously issued to them, they made notes of what was said by the various speakers on specified points, one of them being anything spoken by a candidate, or on his behalf, against the rival candidate or candidates. Not more than one officer made notes at any single meeting. After the meeting was over the procedure was for him to go back to the police station and prepare a report (which he was expected to do within twenty-four hours) of what

he had noted. Five copies of the report were prepared and handed over to the officer in charge of the police station, who had to forward them to the Superintendent of Police of the district.

The seven election meetings referred to were held at various places within the limits of the Talatuoya Police station, the officer in charge of which was Inspector Piyadasa (then Sub-Inspector). The officers who were present at these meetings were constable Dhanapala, Rajapakse and Ranaweera of the same police station. The petitioner had taken out summons on the officer in charge of the Talatuoya police station and on the Superintendent of Police, Kandy, to produce or cause to be produced at the trial the reports of constables Dhanapala, Rajapakse and Ranaweera containing notes of the speeches made at the meetings attended by them. But in respect of these reports a claim of privilege from production was taken under section 123 of the Evidence Ordinance by the officer who brought the reports to Court in obedience to the summons. This claim, which was also supported by an affidavit from the Inspector General of Police, was upheld by the Election judge who refused permission for the production of the reports. The first question for decision in this appeal is whether the Election Judge was right in giving this ruling.

Section 123 of the Evidence Ordinance reads as follows:—

> "No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister ".

It was common ground at the hearing of the appeal, as it was at the trial too, that where a question arises whether any unpublished official records are records relating to " any affairs of State " within the meaning of that expression in section 123, the decision of it rests with the Court. The same expression occurs in the corresponding section of the Indian Evidence Act (also section 123) and has been the subject of conflicting decisions by the Indian Courts. The Election Judge held that the expression has to be given a wide interpretation, and that " any matter which appertains to the exercise of governmental or administrative functions is an affair of State ". In so construing the expression the Election Judge purported to follow a decision of the Lahore High Court in *Nazir Ahmad v. Emperor*[1], but it has to be stated that the view expressed there was disapproved by a Full Bench of the High Court of East Punjab in *Governor-General in Council v. Peer Mohamed Khuda Bux*[2]; and that, even before the latter decision came to be given, the view was by no means one which was consistently adopted by the Lahore High Court in its earlier cases. A more restricted interpretation has been given to the expression by the Bombay High Court—see *Dinbai v. Dominion of India*[3]. But as far as the Indian Courts are concerned, the question

[1] *A. I. R. 1944 Lahore 434.* [2] *A. I. R. 1950 E P. 22 .*

[3] *A. I. R. 1951 Bombay 72.*

has since been authoritatively settled by the Supreme Court of India in the recent case of *The State of Punjab v. S. S. Singh*[1], which was not cited at the argument before the Election Judge. Four of the five Judges who heard that case rejected the interpretation of the expression "affairs of State" as co-extensive with "State or Government business", which Mr. Nadesan pressed on us to adopt, and they held that it applied to a smaller category of documents within that class. With this conclusion I would respectfully agree. They refrained, however, from attempting a definition of the expression "affairs of State" and said that the question whether any particular document or class of documents comes within it must be determined in each case "on the relevant facts and circumstances adduced before the Court".

Mr. Nadesan submitted as an alternative argument that if we do not accept the interpretation of the expression for which he contended, the documents in question, being departmental reports of a confidential nature submitted by the police officers concerned, would be documents relating to affairs of State in the narrow sense in which the expression was construed in *The State of Punjab v. S. S. Singh* (*supra*). In considering this argument I may refer to the evidence given by Constable Dhanapala when he was called as a witness for the appellant shortly before the objection to the production of the police reports was taken. He said t at when he attended a meeting he made a short note of what was spoken by each of the speakers, and after the meeting was over he went back to the Police Station and prepared a report of what he had taken down. Neither in his evidence nor in the affidavit of the Inspector-General of Police is there anything to indicate that in addition to the notes of the speeches and the names of the speakers the report contained comments or expressions of opinion by him or information relating to any other matter. It must be remembered that the speeches reported were intended for the public ear, which was in all probability reached through one or more microphones set at the loudest pitch. Even if there were no microphones, there is little doubt that the speeches were delivered quite openly and their contents were matters of common knowledge among those present. The question arises for serious consideration whether such reports can be described as "*unpublished* official records". The position seems to be no different from a case where a police officer is instructed to proceed to a place where there is a public monument and forward a report of an inscription on it. It would be absurd to contend that the report sent in compliance with these instructions is an *unpublished* official record. In my opinion, the words "unpublished official records" mean any matter or matters placed on record for an official purpose which have not been previously published. On this reasoning, the reports sought to be produced by the appellant cannot be said to come within the class of documents mentioned in section 123 of the Evidence Ordinance irrespective of whether they relate to matters of State or not.

[1] *A. I. R. 1961 S. C. 493.*

Even apart from the question whether these reports are "*unpublished* official records", I do not see how they can be described as records "relating to affairs of State". In more than one reported case the notes taken by police officers have been admitted in evidence as a proper method of proving speeches made at election meetings—see *Illangaratne v. George de Silva*[1] and *Don Philip v. Illangaratne*[2]. In each of these cases one of the parties was no other than the 1st respondent himself. The fact that the notes are contained in a confidential report submitted by the police officer concerned, does not, in my opinion, convert tde notes or the report into a record relating to affairs of State. I am far from saying, however, that in no circumstances can a police report be regarded as a document relating to affairs of State. Much would necessarily depend on the subject matter of the report and on the comments and expressions of opinion, etc., which it may contain. From what I have already stated it will be seen that these considerations do not arise in regard to the reports with which we are concerned in the present case. I hold, therefore, that the Election Judge was wrong in sustaining the claim of privilege taken in respect of these reports under section 123 of the Evidence Ordinance.

In view of this finding, the only other question which directly arises for decision is what our order should be regarding the relief claimed under head (3) of the prayer in the petition of appeal, which is as follows :

> "3. Or in the alternative to make order that the Election Petition be tried anew in regard to the allegation of making or publishing the said false statements of fact, proof of which was excluded by the learned Election Judge, in upholding the claim of privilege."

Section 82B (3) of the Ceylon (Parliamentary Elections) Order in Council empowers this Court, on an appeal under section 82A, to order that an election petition to which the appeal relates be tried anew in its entirety or in regard to any specified matter and to give such directions in relation thereto as the Court may think fit. The provision in section 82B giving power to order that an election petition be tried anew is of recent origin, having been introduced by Act No. 11 of 1959. In exercising this power the Court would be guided by the same considerations as in a case where the question is whether a new trial should be ordered by the Court in the exercise of its ordinary appellate jurisdiction.

Section 167 of the Evidence Ordinance provides, inter alia, that the improper rejection of evidence shall not be ground of itself for a new trial if it shall appear to the Court that if the rejected evidence had been received it ought not to have varied the decision. The decision of the Election Judge not to permit the production of the reports prepared by Constable Dhanapala and the other police officers containing their notes of the speeches made at the various election meetings, had the

[1] *(1948) 49 N. L. R. 169 at 173.* [2] *(1949) 51 N. L. R. 561 at 562.*

effect of rejecting all relevant evidence of the contents of those reports which the appellant could otherwise have adduced in proof of the charge of corrupt practice brought against the 1st respondent in respect of the said speeches. In view of that order, appellant's counsel at the trial stated tgat Constable Dhanapala, whose examination-in-chief as a witness for the appellant had already commenced when the order was made, would not be further questioned by him. It was, no doubt, for the same reason that counsel refrained from calling the other police officers to speak to the contents of the reports prepared by them. But he called Inspector Piyadasa, who gave evidence regarding the speech made by the 1st respondent at the meeting held at Angilipitiya (also referred to as Omugalpitiya in the particulars furnished by the appellant relating to the charge of corrupt practice by making false statements) on the 3rd July, 1960. Constable Dhanapala, who was also present at the meeting, took notes of the 1st respondent's speech, anh his report containing the notes was one of the reports the production of which was not permitted by the Election Judge. Inspector Piyadasa could only speak from recollection of what the 1st respondent said, and he purported to do so independently of the notes made by Constable Dhanapala.

According to Inspector Piyadasa, one of the statements made by the 1st respondent regarding the appellant was that as Chairman of the Talatuoya Village Committee he "had misappropriated funds from the Galaha Theatre and he carried on", and that as he (the 1st respondent) had taken action in the matter the appellant was angry with him. The Talatuoya Village Committee is also known as the Gandahaya Village Committee. The documents P2 and P3 show that on the 15th December, 1958, the appellant had been charged by the Police in case No. 10782 of the Magistrate's Court of Kandy with having, between the 15th January and the 24th August, 1958, committed criminal breach of trust in respect of a sum of Rs. 2,914/20 being entertainment tax paid by the Galaha Jothi Cinema and received by the appellant as Chairman of the Gandahaya Village Committee, and that he was acquitted of that charge on the 15th September, 1959. The document P4 shows that investigation leading to the prosecution of the appellant came to be made as a result of an official letter sent to the Assistant Commissioner of Local Government, Kandy, on the 19th August, 1959, by the 1st respondent himself.

The Election Judge held that it was not safe to act on the evidence of Inspector Piyadasa, speaking as the latter did from memory to an incident which had taken place over two and a half years previously, and that, moreover, Inspector Piyadasa appeared to have a feeling of bias against the 1st respondent. In so far as these reasons influenced the finding of the Election Judge that the charge relating to the making of false statements at the Angilipitiya meeting had not been established, I am unable to say that had Constable Dhanapala's report of the speech made by the 1st respondent at that meeting been permitted to be

produced and its contents received in evidence, it ought not to have varied the finding. If the report was accepted as a contemporaneous note of what the 1st respondent stated at the meeting, and the note was found to support the evidence of Inspector Piyadasa, the Judge may have believed him notwithstanding that he appeared to be a biassed witness. On the other hand, had the production of the report made no difference to the Judge's disbelief of Inspector Piyadasa it was yet possible for the appellant, without recourse to the Inspector's evidence, and on the strength of the report itself, coupled with such evidence as the officer making the report would have given with reference to its contents, to have established that the statements alleged to have been made at the Angilipitiya meeting were in fact made. The position would be the same in regard to the reports of the speeches made at the other meetings, provided, of course, they supported the allegations made, and were accepted by the Court as representing correctly what was said at those meetings.

In regard to the statement that the appellant "had misappropriated funds from the Galaha Theatre and he carried on", the Election Judge observed that there was not even a bare denial of the truth of it by the appellant and that in the absence of such a denial the appellant had failed to make out a prima facie case in regard to a necessary ingredient of the charge, viz., that the statement (assuming it was made) was in fact false. Mr. Nadesan rightly attached special importance to this finding, for it must be conceded that, if the finding is valid, there is revealed an inherent defect in the presentation of this part of the appellant's case which would not have been cured even if the production of Constable Dhanapala's report of what was said at Angilipitiya had been permitted by the Election Judge and the contents of it received in evidence.

Apparently the Election Judge was prepared to regard the acquittal of the appellant in M.C. Kandy Case No. 10782 as prima facie establishing the falsity of the statement, provided the statement could be said to refer to the specific misappropriation which was the subject of the charge in that case. But the Judge observed that there was "no evidence at all to show that there may not have been other misappropriations of other sums from other theatres at Galaha or even from the same place of entertainment". As for the possibility that the statement may have referred to misappropriation of funds from a different theatre in Galaha, or (if it did refer to the same theatre) to a different sum of money, from that mentioned in the charge preferred against the appellant in M. C. Kandy Case No. 10782, it would appear from the document P 4 that the 1st respondent, who was then Minister of Labour, Housing and Social Services, wanted investigation to be made into the failure of the Gandahaya South Village Committee to show accounts regarding entertainment tax collected "from the Picture Palaces at Galaha". In view of this ministerial decree, which embraced all the cinemas at Galaha, it is unlikely that any departmental investigation which followed

was merely confined to ascertaining whether entertainment tax collected from only the Jothi Cinema had been duly accounted for; and when the Police eventually decided to proceed against the appellant on the specific charge set out in their report to Court in M. C. Kandy Case No. 10782, it may be assumed, I think, that there was no evidence of " other misappropriations of other sums from other theatres at Galaha or even from the same place of entertainment ".

In holding that the appellant failed to make out a prima facie case of falsity of the statement that the appellant " had misappropriated funds from the Galaha Theatre and he carried on " the Election Judge relied on the case of *Don Philip et al. v. Illangaratne* (supra) where Nagalingam, J., considered the nature of the burden of proof which lies on the petitioner and the respondent at an election petition inquiry in regard to an allegation that the respondent or his agents made false statements of fact relating to the character or conduct of the petitioner. Nagalingam, J., said that the falsity of the statement must be prima facie established by the petitioner, but, once that is done, the burden is on the respondent, if he asserts that the statement is true, to establish beyond reasonable doubt the truth of it. The question of the burden of proof was not raised by Mr. Jayewardene or Mr. Nadesan at the hearing of this appeal. But in so far as it may be regarded as necessary for the appellant, in accordance with the view expressed by Nagalingam, J., to make out a prima facie case of falsity of the statement that he misappropriated funds from the Galaha Theatre, I would for the reasons indicated by me, record my respectful dissent from the finding of the Election Judge that the appellant had failed to do so.

It seems to me, therefore, that the limitation imposed by section 167 of the Evidence Ordinance on the power of the Court to order a new trial does not apply to the present case. It then becomes a matter within our discretion as to whether under the powers conferred by section 82B (3) of the Ceylon (Parliamentary Elections) Order in Council a new trial should be ordered or not on the charge of corrupt practice by making false statements of fact relating to the appellant's character or conduct. Mr. Nadesan submitted that, even so, a new trial should not be ordered. He drew attention to the particulars furnished by the appellant as late as on the 26th November, 1962, which purported to give the gist of each of the false statements alleged to have been made by the 1st respondent or his agents, thereby indicating that the appellant was in a position to call in proof of those statements witnesses other than the police officers who made notes of what was said at the meetings, whereas when the trial commenced it became clear that the appellant had no intention of relying on those other witnesses. Mr. Nadesan submitted that if a new trial is ordered it would not only provide the appellant with a second opportunity of calling evidence which he had omitted to call at the trial, but also

open the door to perjured testimony being adduced at the new trial. Mr. Nadesan also relied on the lapse of time which has occurred since the election was held, over three years ago.

The lapse of time—even though neither party is in any way to be blamed for it—is, no doubt, a matter which is relevant to the question whether a new trial should be ordered. But it seems to me that in the present case it is outweighed by other considerations. The reasons for the decision not to call any witnesses (with the possible exception of Inspector Piyadasa) to speak to the alleged false statements, other than the police officers who made notes of those statements, would appear from the following passage in the record of the opening speech of appellant's counsel :

> " In regard to the statements concerned it is not possible today, so many years after the elections, for people to recollect the actual words used, but it is fortunate that the police had covered certain meetings and the police reports are available. Those reports were made by the police in the course of their duties and those reports will be relied upon."

It seems to me that the decision of learned counsel was not only a proper one, but was also fully justified, especially when considered in the light of the subsequent failure of Inspector Piyadasa to convince the Election Judge that the evidence which he gave from recollection regarding the speech made by the 1st respondent at the Angilipitiya meeting could be acted upon.

It is not a case, therefore, of the appellant being given a *second* opportunity of calling evidence which he omitted to call at the trial. What he asks for, and I think he is entitled to, is to be given a *first* opportunity which, on our finding, was wrongly denied to him at the trial, of adducing in evidence the police reports, should they be relevant to the question whether the statements in question were made or not. Mr. Nadesan submitted that since the contents of the reports remain undivulged even now, there is no reason to think that they will have such relevance. No submission was, however, addressed to us by Mr. Nadesan that any doubts regarding the relevance of the reports be settled by our inspecting them even at this stage ; and we have decided against an inspection *ex mero motu*. I do not think that it is right to assume that the reports will not support the appellant's case on the issue whether the false statements in question were made or not.

I would set aside the judgment appealed from in so far as it relates to the charge of corrupt practice by making false statements of fact relating to the character or conduct of the appellant, and also the order of the Election Judge upholding the claim of privilege in respect of the police reports. I would send back the case for a new trial on that charge, on the basis of the particulars in the appellant's statement dated the 26th November, 1962, save and except the particulars in paragraph 5

thereof. I would also direct that at the new trial the appellant should not be permitted to call any witness to prove the *making* of the alleged false statements other than Inspector Piyadasa and Police Constables Dhanapala, Rajapakse and Ranaweera. This direction will not apply—

(*a*) to any witness who is called to prove the *falsity* of any statement in regard to the making of which evidence is adduced, or to prove that any person referred to in the particulars as having made a false statement, was an agent of the 1st respondent, provided the name of such witness appears in a list of witnesses already filed by the appellant ; or

(*b*) to any witness called by the appellant in rebuttal, in any case where he is entitled in law to call evidence in rebuttal.

I see no reason to interfere with the order for costs of trial already made by the Election Judge, but the appellant will be entitled to his taxed costs of appeal from the 1st respondent.

T. S. FERNANDO, J.—

At the general election held on July 20, 1960 the 1st respondent was elected as member in the House of Representatives for the electoral district of Hewaheta. The petitioner who was the other candidate for election as member for the same electoral district presented on August 18, 1960 a petition praying, inter alia, (1) that a recount of the votes be ordered before trial, and (ii) that a declaration be made by the court that the return of the 1st respondent as member at the said election was null and void on the ground of (*a*) the commission of the offence of undue influence as defined in section 56 of the Ceylon (Parliamentary Elections) Order in Council, 1946 and (*b*) the commission of a corrupt practice within the meaning of section 58 of the same Order in Council in that the 1st respondent by himself or his agents published before or during the said election false statements of fact in relation to the personal character of the petitioner for the purpose of affecting the return of the petitioner at the said election.

An order for a recount was made by the election judge and a recount in accordance with directions given therefor by the said judge took place in due course, but it is sufficient here to record that the recount also showed that the 1st respondent had a majority of the lawful votes cast at the said election. In regard to the prayer for the avoidance of the election on the ground of the commission of the offence of undue influence, although evidence was led on behalf of the petitioner in support thereof, the election judge held that ground not established to his satisfaction. The election judge held the remaining ground of the commission of a corrupt practice also not proved and dismissed the petition ordering the petitioner to pay to the 1st respondent one-third of his incurred costs not to exceed a sum of Rs. 16,000.

The petition of appeal does not seek to reagitate the question of the correctness of the count of the votes, and is confined to canvassing the legality of the findings of the trial judge in respect of the two corrupt practices above referred to. At the hearing of the appeal, the petitioner's counsel did not attempt to advance any argument in respect of the allegation of undue influence and restricted himself to arguing that the dismissal of the charge of corrupt practice of making false statements in relation to the petitioner's personal character is vitiated by an order made by the trial judge upholding an objection taken to the production of certain documents in the custody of a public officer.

It is important to bear in mind that an appeal to the Supreme Court against a determination of an election judge lies only on a question of law. Section 82A of the Order in Council as amended by Act No. 11 of 1959 now reads:

(1) An appeal to the Supreme Court shall lie on any question of law, but not otherwise, against—

(*a*) the determination of an election judge under section 81, or

(*b*) any other decision of an election judge which has the effect of finally disposing of an election petition.

The main question we are called upon to consider on this appeal and on which we listened to exhaustive argument was the correctness of the order of the trial judge upholding the objection above referred to. It is necessary now to state the circumstances in which that order came to be made.

On an application for particulars of the charge of making false statements in relation to the personal character of the petitioner, the petitioner furnished to the 1st respondent on November 9, 1962 a statement showing certain particulars of the names and addresses of persons who are said to have made the false statements and the dates and times they were made. On an application made for further particulars, and consequent to an order of the trial judge thereon, the petitioner furnished certain fuller particulars on November 26, 1962 indicating the gist of the statements alleged to have been made by the 1st respondent at five named places and by four other named persons who are alleged to have acted as agents of the 1st respondent or with his knowledge or consent.

The petitioner applied for and obtained summonses on the Deputy Inspector-General of Police, the Superintendent of Police, Kandy and the Officer-in-Charge of the Talatuoya police station to produce or cause to be produced four reports made by Police Constable No. 7357 D. A. Danapala, two reports made by Police Constable No. 6813 D. A. Rajapakse and one report made by Police Constable No. 1105 S. K. Ranaweera to their superior officers.

On December 14, 1962, when counsel for the petitioner reached the stage of leading evidence in respect of the charge of making false statements, he called into the witness-box constable Danapala who testified

that he was one of the officers detailed to cover election meetings and that he had been instructed on the points to be noted. To use his own words, " we were also to make notes of whatever that was being spoken—not everything that was said, but we were directed to make a note of particular points, the important facts. If any speaker spoke disparagingly of the government we were to note it down. If any person was reprimanded or if some speaker said anything against a person we were to make a note of that. . . . . There were various speakers at such election meetings. I made a note of the names of the speakers and a short note of what they spoke. When the election meeting was over I went back to the station and an entry was made of the fact that we had returned. Thereafter, I prepared a report of what I had taken down. I sent my report in Sinhalese. I cannot remember the places of the meetings I went. What I have heard at the meetings will be in my report." There is no record of his having said at the trial that he was unable, on the day he was called into the witness-box, to recall what was said by the speakers at the meetings held in July 1960, but the evidence I have reproduced above appears to have been understood at the trial as meaning that, independently of the records he made in the report, he was unable to recall the statements from memory. The arguments addressed to us at the hearing of the appeal also proceeded on the basis of the same understanding.

In the transcript of the proceedings in court there is a record—reproduced below—of what transpired when constable Danapala gave the evidence I have already quotde—

> " At this stage Mr. Wikramanayake (counsel for petitioner) states that he has summoned both the Officer-in-Charge of Talatuoya Police Station and the Superintendent of Police, Kandy, to produce or cause to be produced, the reports of the meetings covered by this witness on the 3rd, 6th, 8th and 16th July 1960. He has applied for certified copies but has been refused.
>
> Inspector Perera who appears on behalf of the Superintendent of Police, Kandy, who was summoned to produce the records of certain reports made by P. C. Danapala is present and states that he has summons but has been instructed to plead privilege under section 123 of the Evidence Ordinance. In view of this plea Mr. Nadesan (counsel for the 1st respondent) states that he is objecting to the production of these statements."

Argument of counsel ensued, and in the middle of that argument an affidavit was presented to the court (presumably by Inspector Perera referred to above). The affidavit was one made by the Inspector-General of Police who stated therein that he is the head of the Police Department. It was further stated in the affidavit that the reports his officers have been summoned to produce have been carefully examined by him and that he has formed the opinion that it would be injurious to the public interest if these documents are to be produced because

they belong to a class of documents the production of which would indicate or tend to indicate the sources of police information given in confidence, the nature of the information gathered and the persons to whom such information is communicated. It is stated in paragraph 6 of the affidavit that " the said documents are unpublished official records relating to affairs of state and belong to a class of documents the practice of keeping which secret is necessary for the proper functioning of the public service " ; and in paragraph 7 that " accordingly, I object to the production of these unpublished official records and have refused permission to the various officers mentioned in paragraph 2 hereof to produce the said documents in court or give any evidence derived therefrom. "

After long argument had in the election court, the learned trial judge made order on December 20, 1962, refusing permission to produce the documents in question.

When the order was delivered, Mr. Wikramanayake stated to the judge that, in view of the order, he desired the witness Danapala to stand down. He added that if the need arises he would apply for a recalling of the witness. Mr. Nadesan thereupon stated that he wished to cross-examine the witness and was permitted to do so. Certain other witnesses, described as formal, were then called. Witnesses whose evidence would have been relevant on the charge of undue influence were next called and, thereafter, Mr. Wikramanayake called in support of the case for the petitioner witness G. S. Piyadasa who was in July 1960 the officer-in-charge of Talatuoya Police Station which is said to be the station serving the area where the villages in which all the election meetings we are concerned with in this case are situated. This witness purported to speak of certain statements made by the 1st respondent at an election meeting held on July 3, 1960 at Ankelipitiya at which he said he was himself present. When the learned judge made his determination at the conclusion of the trial holding, inter alia, that the charge of committing a corrupt practice by making a false statement to character was not proved, he stated he was, " not satisfied with the evidence of Inspector Piyadasa to feel safe to hold the 1st respondent guilty of a corrupt practice of making a false statement referred to. Inspector Piyadasa is speaking from memory of an incident that took place more than 2½ years ago. Moreover, there is evidence to show that, rightly or wrongly, he has a bias against Mr. Ilangaratne because of certain allegations made by Mr. Ilangaratne during the elections that certain police officers were working against him at that time. Even in the course of giving evidence before me, I could not help feeling and sensing that Mr. Piyadasa suffered from a feeling of bias against Mr. Ilangaratne which renders his evidence suspect in my eyes. As a finding of fact, therefore, I also hold that I am not satisfied that the alleged statement has been proved to have been made ". Having reached this finding, the learned judge, as I have stated already, dismissed also the charge of committing a corrupt practice of making false statements in relation to the personal character of the petitioner.

The main question arising on this appeal, viz., the correctness of the order upholding the objection to the production in evidence of the report made by Police Constable Danapala to his superior officer involves the interpretation of section 123 of the Evidence Ordinance. That section is in the following terms :—

> " 123. No one shall be permitted to produce any unpublished official records relating to any affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister. "

(The expression " Minister " appearing in section 123 was a substitution for the expression " Governor " effected by a Proclamation, published in *Gazette Extraordinary* No. 9,773 dated 24th September 1947, issued under section 88 of the Ceylon (Constitution) Order in Council, 1946.)

As the learned trial judge preferred to accept the wide interpretation of the expression " affairs of State " appearing in the corresponding section of the Indian Evidence Act of 1872 to be found in certain judgments of the Lahore High Court rather than a restricted interpretation thereof given in decisions of other High Courts of India, notably of Bombay, and as I myself propose to accept an interpretation of that expression set out in a recent decision of the Supreme Court of India, it will be useful if the corresponding section of the Indian Evidence Act is also reproduced below :—

> " 123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The judgments of the Lahore High Court which the learned trial judge had in mind are not specified in his order, but were probably those referred to by counsel before him in the course of their arguments. The trial judge construed the words " relating to any affairs of State " in section 123 of the Evidence Ordinance as meaning any matter appertaining to an administrative act or governmental function. He went on to say that, as the head of the department has claimed that the document belongs to a class of documents which it is necessary in the interest of public security to keep secret, the claim of privilege will be upheld. The Lahore case which calls for most notice is that of *Nazir Ahmad v. Emperor*[1], in which Abdur Rahman J. stated—(see page 440) :—

> " Thus the decision of the question whether a privilege is to be claimed solely rests with the authority who is competent to claim such privilege and the Court can in those circumstances merely give effect to that decision by adding its own command to it but without verifying the correctness of the allegations or the grounds on which the privilege was claimed. "

[1] *(1944) A. I. R. (Lahore) 434.*

He did not apparently agree with the view expressed by Bhagwati J. in *Chamarbaghwalla v. Parpia*[1] also referred to by him where that learned judge stated—(see p. 232)—

> " Every communication which proceeds from one officer of the State to another officer of the State is not necessarily relating to the affairs of State. If such an argument was pushed to its logical extent, it would cover even orders for transfer of officers of Government Departments and the most unimportant matters of administrative detail which may be addressed by one officer of the State to another. That could not be within the intendment of the Act at all. "

In preferring to accept what he calls the view of the Lahore High Court to that described by him as the opposite view, taken particularly by the Bombay High Court in *Dinbai v. Dominion of India* [2], the learned trial judge was apparently not deterred by the circumstance that in yet another case cited to him, i.e., *Governor-General in Council v. Peer Mohammad* [3], described in the law reports as a Full Bench decision, three judges of that particular Court declined to accept the authority of *Nazir Ahmad v. Emperor* (supra) as sound. Khosla J. stated (see p. 232) :— " As far as I am aware this expression (affairs of State) has not been defined anywhere, but it is clear that it cannot mean any and every matter in which the State is concerned. Otherwise, the privilege contemplated by section 123 would attach to every communication made by every officer of Government upon every subject. That, however, is not the law either in England or in India as is manifest from a number of authorities on the subject. ' Affairs of State ' has always been interpreted in a somewhat narrow sense." and again at page 233 :—

> " I would define ' affairs of State ' as matters of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence, or detrimental to good diplomatic relations."

He went on to say that, having regard to section 162 of the Evidence Act,—(see page 234)—" In the case of a document relating to affairs of State the course of inspecting the document is not open to the Court, but this does not mean that the Court's right to adjudicate upon the validity of the objection is completely taken away thereby. The Court has still the right to take other evidence and determine whether the objection taken by the witness who was ordered to produce the document or the head of the department is indeed a valid objection. In other words, the Court has a right to satisfy itself that the document does in fact relate to affairs of State. "

Much argument was addressed to us by counsel for the respective parties as to the meaning of the section of the Evidence Ordinance we are called upon to construe on this appeal. On the one hand Mr. Nadesan for the 1st respondent contended that the expression

[1] *(1950) A. I. R. (Bombay) 230.* [2] *(1950) A. I. R. (East Punjab) 228.*
[3] *(1951) A. I. R. (Bombay) at 80.*

' affairs of State ' must be given what he said was its natural and ordinary meaning of ' business of the State ' or ' government business '. Mr. Jayewardene for the petitioner, on the other hand, argued that ' affairs of State ' is not synonymous with the expression ' affairs of the State ' and suggested that what has been called a restrictive interpretation should be placed in the context in which the particular expression appears. Extensive references to cases from England and other countries where common law is applied and where the question calls to be decided without reference to statute law on the one hand and to cases from several jurisdictions in India where, on the other hand, as in Ceylon, the question is governed by statute, have been made. The high authority of the Privy Council when it interpreted the relevant law of the State of South Australia in *Robinson v. State of South Australia*[1] or the respect we must attach to the pronouncements of Viscount Simon, L.C., when the House of Lords in *Duncan v. Cammell Laird & Co. Ltd.*[2] laid down the law in England appears to me less relevant on the matter we are now considering than pronouncements of the courts of India where the question is governed by a statute which on the essential points is in identical terms with the local statute which, no doubt, has itself been copied from the Indian Statute.

Our Evidence Ordinance of 1895 is described as an Ordinance to consolidate, define and amend the law of evidence. Lord Herschell, speaking of coded laws in the House of Lords while delivering judgment in *Bank of England v. Vagliano Brothers*[3], observed that, " the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." The same viewpoint was put trenchantly by Soertsz J. in *The King v. Chandrasekera*[4] where our Court of Criminal Appeal, called upon to decide a question arising in that instance too on the law of evidence, observed that we must shut our eyes to the English law of evidence except so far as a *casus omissus* renders recourse to it necessary and call to mind the provisions of our own Evidence Ordinance. It is necessary also to bear in mind that by section 2 (2) of that Ordinance all rules not contained in any written law so far as such rules are inconsistent with any of the provisions of the Evidence Ordinance were repealed.

On the question that now confronts the Court on this appeal, the learned trial judge did not have the advantage of considering a most important judgment of the Supreme Court of India in the recent case of *State of Punjab v. S. S. Singh*[5] where five judges of that Court, with the assistance of able counsel, considered the meaning of section 123

[1] *(1931) A. C. 704.*
[2] *(1942) 1 A. E. R. 587.*
[3] *(1891) A. C. at p. 145.*
[4] *(1942) 44 N. L. R. at 122*
[5] *(1961) A. I. R. (S. C.) 493.*

of the Evidence Act of India read along with section 162 of the same Act. Section 162 of the Evidence Act of India and section 162 of our Evidence Ordinance are in identical terms. The judgment of the majority of the Court refused to accept the authority of the Lahore High Court decision in *Nazir Ahmad's* case (supra) and noted that that decision had been dissented from by a Full Bench of the East Punjab High Court in *Peer Mohammad's* case (supra) and that the view taken by the Full Bench prevails in the Punjab High Court ever since. Having considered the reasoning in the judgment of the majority of the Bench that decided the case in the Supreme Court of India, I find it so convincing and of such persuasive value that I feel bound respectfully to apply it on the main question before us on the present appeal. Whether a document is an unpublished official record is easily ascertainable. Not so whether the record relates to affairs of State. The question nevertheless falls to be decided by the Court, and it is only where the Court decides that the record relates to an affair of State that it is required not to permit production or the giving of evidence derived therefrom without permission granted therefor by the head of the department. In delivering the judgment of the majority in the *State of Punjab* case (supra), Gajendragadkar J. observed that it is "necessary to remember that where the Legislature has advisedly refrained from defining the expression 'affairs of State' it would be inexpedient for judicial decisions to attempt to put the said expression into a strait jacket of a definition judicially evolved. The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court." The majority rejected the contention that the expression 'affairs of State' is synonymous with public business, but recognised a broad division of official records into two classes loosely described as innocuous and noxious respectively. Into the noxious class which alone would comprise official records relating to affairs of State would fall records coming roughly within the description attempted by Khosla J. noticed above. Arguments very similar to those addressed to us on behalf of the respective parties were addressed to the Supreme Court of India as well; and—see page 503—the Court, after observing that on the point in controversy three views were possible, stated that in deciding the question as to which of these three views correctly represents the true legal position under the Act it would be necessary to examine also section 162 of the Act, and preferred after such examination to accept the third view. That view is that the Court can determine the character of the document, and if it comes to the conclusion that the document belongs to the noxious class it must leave it to the head of the department to decide whether its production should be permitted or not for it is not the policy of section 123 that in the case of every noxious document the head of the department must always withhold permission. As the Supreme Court itself observed, that view taken about the authority and jurisdiction of the Court is based on a harmonious construction of sections 123 and 162 of the Act; it recognises the power

conferred by the Court by clause 1 of section 162, and also gives due effect to the discretion vested in the head of the department by section 123. The main conclusion reached by the majority is stated thus :—see page 505 :—

> " Thus our conclusion is that reading sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerneh to hecihe ; but the Court is competent, anh inheed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, anh that necessarily involves an enquiry into the question whether the evidence relates to an affair of State under section 123 or not. In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not . . . . . In exercising his discretion under section 123 in many cases the head of the dipartment may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that section 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing sections 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion. "

It is unnecessary to say more here than that I respectfully adopt much of the reasoning in the judgment of the majority. I have quoted extensively from that judgment and, in doing so, may appear to have eschewed the accepting of the advice implicit in the passage appearing (at page 378) in a recent authority—*Board of Trustees of Maradana Mosque v. Minister of Education*[1]—that judgments should not be burdened with " copious quotations from other men's minds ". Should I, therefore, appear to have here disregarded that advice, my excuse is that while in reaching a decision in a particular case before him a judge must of necessity make the journey alone, he yet has, as I apprehend it, the comfort of the knowledge that in interpreting a law involved in that decision there is no bar to his voyaging in company and seeking a haven in the guidance of judges before him, albeit of other jurisdictions. The tradition of borrowing from the learning of others and acknowledging that debt blesses both him that lends and him that borrows.

[1] *(1963) 65 N. L. R. at 378.*

I may add that Mr. Jayewardene questioned whether the statement in the judgment in the *State of Punjab* case (supra) that the second clause in section 162 should be construed to refer to the objections both as to the production and as to the admissibility of the documents is correct. Ordinarily one would be justified in inferring that where the legislature refers to production as well as admissibility in the first clause, but omits reference to production in the second clause, the omission was deliberate. Mr. Jayewardene suggested that logically admissibility should be considered before the question of production because if the document is held inadmissible there is no purpose in considering production. He therefore contended that there was no statutory bar to the inspection of the document by the Court for the purpose of deciding the question of production. Although the summons to produce specified the reports, argument proceeded on the basis that all that was required were the records of the speeches as made by the witnesses. No one can reasonably contend in this case that, if the reports in question contain records of statements made by the 1st respondent or his agents, such records are inadmissible. If, as I have held, the Court has to determine the character or class of the documents in question, there is, in my opinion, no difficulty in concluding in this case that the records made of speeches or utterances by a speaker at an election meeting in regard to the character of a candidate for election do not fall within the noxious class of documents referred to above. They therefore do not relate to affairs of State. For that reason I do not feel compelled in the circumstances to examine the soundness of Mr. Jayewardene's contention. I would answer the main question arising on this appeal and indicated earlier in favour of the appellant, and say that the withholding by Court of permission to produce the records of the speeches as made by Police Constable Danapala in his report was an erroneous order of the learned trial judge.

In view of the conclusion I have reached on this main question, viz., that the records sought to be produced did not relate to affairs of State, the question of obtaining the permission of the officer at the head of the department obviously does not arise. Anything that may now be said in this judgment as to whether the objection that was taken at the trial was indeed taken by the head of the department contemplated in section 123 would be in the nature of an *obiter dictum*. Accordingly, I refrain from examining the contention of Mr. Jayewardene that the objection was not taken in the trial court by the proper officer. The determination of that question may require more evidence than is now available in the record. Nor do I consider it necessary to say anything here as to whether affidavits are admissible in support of objections raised under section 123.

The next and only other question that arises on this appeal is whether the conclusion that the trial judge was in error in upholding the objection to the production of the official record or the giving of any evidence derived therefrom has the effect *ipso facto* of necessitating a retrial of

the charge of a corrupt practice in making false statements in relation to the personal character of the petitioner. Before the amendment to the Parliamentary Elections Order in Council introduced by section 25 of Act No. 11 of 1959 it was doubtful whether the Supreme Court on appeal preferred under section 82A could order a retrial. The 1959 Act, however, introduced the present sub-section (3) of section 82B which is in the following terms :—

> " The Supreme Court may, in the case of any appeal under section 82A, order that the election petition to which the appeal relates shall be tried anew in its entirety or in regard to any matter specified by that Court and give such directions in relation thereto as that Court may think fit. "

I understand the above provision as vesting in the Court a discretion to decide whether a retrial of the whole petition or a part thereof shall be ordered or not, and certainly not that on the reversal of any decision made by the trial judge the petition or a particular charge therein must be tried afresh.

In view of my conclusion that the records the production of which is sought do not relate to affairs of State within the meaning of section 123 of the Evidence Ordinance there does not appear to be any bar to our inspecting those records even at this stage for the purpose of assisting us in the exercise of the discretion vested in us in respect of a retrial. I understand, however, that both my Lord and my brother Weerasooriya do not consider that we should now inspect these records for the purpose of making our decision on the remaining question. That is a view which I respectfully share with them. The question of a retrial must, therefore, be considered without the advantage, if any, of an inspection, of those records.

The position of the petitioner in regard to the question that now remains for decision would, in my opinion, have been stronger if the petitioner had at the trial refrained, after the Court made order upholding the objection to the production of the records, from leading any further evidence on the charge of a corrupt practice of making false statements. The argument on his behalf at the appeal was that if Police Constable Danapala had at the time he gave evidence in December 1962 no recollection of what the 1st respondent said at the meetings held two and a half years before that, in July 1960, apart from his records contained in his report to his superior officer, it was unreasonable to think that either of the other two constables would himself have had any independent recollection of speeches made about the time. The omission to call the other two constables at the trial, it was argued, was due to that reason as well as to the order made in respect of the objection to production of the official records. The petitioner, it must not be overlooked, made no

attempt at the trial to call any other witnesses (save Inspector Piyadasa to whom I shall refer presently) to testify to the making of the false statements alleged. If there were any witnesses to testify as persons present at one or more of the election meetings to what was said by the 1st respondent at these meetings, they were certainly not called. Mr. Jayewardene stated in this connection that if the police constable who was called could not remember, independently of the record made, what was said at the meetings, and if the position of the other police constables was similar, it was unreasonable to think that other persons present at the meetings could after this long interval of time remember what was in fact said. He attributed the omission of the petitioner to call the other two constables and other persons present at the meetings to the reason indicated by him. This argument loses its weight when one finds that the petitioner did, long after the ruling on the law that was the main subject of controversy on this appeal was made at the trial, call into the witness-box Inspector Piyadasa who was at the time of the election meetings the officer-in-charge of the Police Station to which the three police constables were then attached. Inspector Piyadasa had taken no notes himself, but the principal matter upon which he was called to testify was this allegation of false statements made by the 1st respondent. The learned trial judge has disbelieved Inspector Piyadasa. So far as we in this Court are concerned, there is no appeal to us available on a question of fact. We have to decide the question of ordering a retrial without overlooking the circumstance that Piyadasa has been disbelieved. If we are unable to prevent Inspector Piyadasa being called to testify at a new trial—and that I understand is the view of the rest of the Bench—then, I fear, we are giving the petitioner a second chance, after a failure of the first, to see whether a trial judge will believe the evidence of Piyadasa. I do not think that in the context in which the trial judge stated in his judgment that " Inspector Piyadasa was speaking from memory about an incident that took place more than two and a half years ago " he meant necessarily to imply that he would have been inclined to believe him if his evidence had received corroboration from that of Danapala. Taking action which would amount to giving the petitioner such a second chance is a course which places the 1st respondent at an unfair disadvantage, particularly as the trial judge has described Piyadasa " as a man having a bias against the 1st respondent which rendered his evidence suspect. "

Mr. Nadesan has suggested that as the records made by the police constables were not available to the petitioner, he must have taken statements from the proposed witnesses either when he prepared his petition or furnished the particulars to the 1st respondent on the application made therefor by the latter. He submitted that the witnesses could not have forgotten everything they said to the petitioner or his lawyers. He also suggested that, if the petitioner has not so taken statements from the witnesses he relied on when he decided to come to

Court, he has made a charge without knowing whether there was evidence to support it. He stated that as the records have not been seen by either party as yet neither can say what the contents of the documents may or may not reveal. To order a retrial in the circumstances now shown, to use Counsel's own words, would be to permit the petitioner "to fish for evidence". In other words, the petitioner is attempting to establish a case on evidence the nature of which he yet does not know.

Mr. Jayewardene submitted that election petitions are not like ordinary litigation but are matters of public interest and must be considered "from the larger standpoint of the State";—vide *Don Alexander v. Leo Fernando*[1]. This submission is appropriate when one has to avoid a decision on an election petition being obtained by collusion. It can hardly be contended, much less maintained, that there is any fear of collusion in the present case.

If the charge of committing a corrupt practice by making false statements is to be tried anew, the witnesses will be called upon to testify, about four years after the event, to words uttered at meetings in July 1960. Considering the long interval of time that has elapsed—a delay not attributable in any way to the 1st respondent—I am unable to say that the discretion vested in this Court by section 82B (3) of the Order in Council requires to be exercised in favour of granting a retrial at this stage. The charge is one in the nature of a criminal charge and it seems to my mind that justice will be met in this case by our making a decision on the question of law which will serve for occasions in the future without exercising in favour of the petitioner the discretion vested in the Court in the matter of retrials. Such an order would, in my opinion, conform to the spirit of the rule embodied in the maxim *nemo debet bis vexari*, a rule to be encouraged in cases where considerable delay has already occurred. Such an order should be more readily made in a case where, as here, a citizen has already undergone successfully one trial on several allegations and what now remains is a fraction of the case on the merits of which, at least in part, a competent judge has expressed an opinion which we have no power in law to alter, and where the objection the upholding of which is now giving rise to the claim for a retrial was one taken not by the party successful at the trial but by the head of the department within the meaning of section 123. Where objection has been so taken it will be wholly unreasonable to expect a person in the position of a respondent to an election petition not to support it. Moreover, as neither the Court nor any of the parties can yet say whether there is any evidence in the official records in support of the petitioner's charge, there is substance in the argument that if the Court orders a retrial it would be doing so on a speculation that there is evidence available relevant to the charge to be now pursued.

[1] *(1948) 49 N. L. R. at 204.*

For the reasons set out above, I am of opinion that this Court should not exercise the discretion vested in it by section 82B (3) in favour of granting a new trial on the charge of committing a corrupt practice in making false statements in relation to personal character of a candidate for election. As I am not in favour of exercising the Court's discretion so as to grant a retrial, although the question of law arising on this appeal has been decided in the appellant's favour, I would make no order as to the costs of this appeal.

New trial ordered in respect of charge of corrupt practice.