1967 *Present :* **H. N. G. Fernando, C.J., Tambiah, J., and Siva Supramaniam, J.**

L. EDRICK DE SILVA, Petitioner, *and* L. CHANDRADASA DE SILVA, Respondent

ELECTION PETITION APPEAL NO. 16 OF 1966

Election Petition No. 4 of 1965—Balapitiya (Electoral District No. 55)

*Election petition—Status of petitioner to present petition—Standard of proof required—Same as in a civil action—Burden of proof—*Factum probandum*—Petitioner's evidence thereon uncontradicted—Duty of Court to take that circumstance into account—Criminal Procedure Code, ss. 162, 191, 234 (1)—Civil Procedure Code, ss. 147, 163—Evidence Ordinance, s. 3—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.*

In an election petition, where the only question to be determined was whether in terms of section 79 of the Ceylon (Parliamentary Elections) Order in Council the person who presented the petition had a right to vote at the election to which the petition related, or in other words whether the name of that person was entered on the register of electors for Electoral District No. 55 in operation under the Order in Council at the time of the holding of the General Election in March 1965—

Held : When it is necessary to adduce proof of the status of a petitioner in an election petition, the standard of proof is the same as that required under our law in civil actions. Principles of the criminal law as to proof of guilt, which are reinforced by provisions such as sections 162, 191 and 234 (1) of the Criminal Procedure Code, are not applicable.

A petitioner need not adduce proof of status unless and until such proof is demanded by objection taken by the respondent. Such proof may be demanded before the close, or at the close, of the petitioner's case.

The objection as to proof of status constitutes a formal submission to the Court that there has not been evidence to prove the petitioner's qualification as such, plus a motion that the petition be dismissed if such proof is not adduced. But where there is evidence on record which, if believed, is ample proof of the petitioner's qualification to present the election petition, the burden would shift to the respondent if he challenges the evidence of status.

Where the petitioner has led evidence sufficient in law to prove his status, i.e., a *factum probandum*, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional " matter before the Court ", which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely, that the evidence led by the petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law.

The petitioner's name in the caption of his petition was given as " Luwisdura Edrick de Silva ". The petition purported to be signed by the petitioner, but the signature was written as " L. Adrich de Silva ". The evidence of certain witnesses called for the petitioner showed that the person whose signature

1*——H 10826—4,000 (1/68)

appeared in the petition was the person named in the caption, and that that person was " Luwisdura Edrick de Silva " who was registered in the Electoral List as a voter. The evidence of those witnesses was not contradicted. After the close of the petitioner's case, Counsel for the respondent raised an objection to the continuance of the hearing of the petition on the ground that the petitioner had not proved his status to maintain the petition. The Election Judge upheld the objection and dismissed the petition.

Held, that the failure of the Election Judge to take account of the uncontradicted evidence of the aforementioned witnesses was a non-direction amounting to a misdirection in law which vitiated the conclusion of fact reached ultimately by the Judge.

Obiter : " Section 147 of the Civil Procedure Code permits an issue of law to be disposed of as a preliminary issue, but it does not permit the same issue to be decided more than once. Hence, even if it was permissible for respondent's Counsel in this case to request a determination on the matter of status at the stage when he made it, that request disentitles him from leading any further evidence to disprove the status."

ELECTION Petition Appeal No. 16 of 1966—Balapitiya (Electoral District No. 55).

C. Thiagalingam, Q.C., with *M. L. de Silva* and *R. D. C. de Silva*, for the Petitioner-Appellant.

Colvin R. de Silva, with *K. Shinya, Nimal Senanayake, Mrs. Sarath Muthetuwegama, Hannan Ismail* and *Nihal Jayawickrema*, for the Respondent.

Cur. adv. vult.

13th September, 1967. H. N. G. FERNANDO, C.J.—

The election of the respondent as member for Electoral District No. 55 Balapitiya at the General Election held in March 1965 was challenged in this petition on various grounds set out therein. After the close of the petitioner's case, Counsel for the respondent raised an objection to the continuance of the hearing of the petition on the ground that the petitioner had not proved his status to maintain the petition. After hearing argument the learned Election Judge made order dismissing the petition on that ground. This appeal was against the order of dismissal. The appeal was allowed by order made on 25th August 1967 and I now state my reasons.

The question whether the petitioner had a status to maintain the petition is referable to Section 79 of the Ceylon (Parliamentary Elections) Order in Council. For the purposes of the present case the only question to be determined is whether in terms of Section 79 the person who presented the election petition had a right to vote at the Election to which the petition related, or in other words whether the name of that

person was entered on the register of electors for Electoral District No. 55 in operation under the Order in Council at the time of the holding of the General Election in March 1965. That register has been produced marked P54.

There were a number of matters in evidence upon which the petitioner relied as being in law sufficient to prove that the name of the person who presented the petition in this case was entered in the entry P54A in the register P54. The argument for the petitioner in the appeal has been substantially that the conclusion reached by the trial Judge on the available evidence must be reversed on grounds of law.

Counsel appearing for the respondent in appeal argued at one stage that in election law the requirement of proof beyond reasonable doubt, which applies in respect of charges made in a petition, applies equally for the purposes of proving the qualification of a person to be the petitioner in such a petition. The unsoundness of this argument is easily demonstrated.

Rogers (Vol. 2, p. 215) refers to the *Walsall* case decided in 1892, the report of which is unfortunately not available to us, and states that the burden of proving that a petitioner does not possess the requisite qualification is on the respondent. This statement was considered in *Abeywardena v. Dharmapala* [1], by Swan J., who rejected the contention that there is " a presumption that a person who files an election petition is qualified so to do, and if his status is challenged it is for the respondent to prove that he is disqualified." Swan J. added the following observations :-

> " There may be occasions where the burden might shift to the respondent to prove that the petitioner is disqualified. If, for instance, the petitioner gave evidence and said that he had voted and pointed to the fact that his name appeared on the Electoral Register as a duly qualified voter, and the respondent challenged his status, or contended that he was disqualified, or that he was not the person who was duly registered although his name appeared on the Electoral Register but that the person registered was somebody else residing in the same village and bearing the same name, then the burden would be on the respondent to prove the facts he alleges."

I agree entirely with the views which Swan J. expressed. But I note that, in the case which he decided, Counsel for the respondent referred to the matter of the absence of proof of the petitioner's status *at the close of the petitioner's case* (cf. the first line of the order at p. 138). This means that reference to this matter of status was made after Counsel for the petitioner had formally closed his case; nevertheless Swan J. both at the stage when the reference was made and at the stage when he made his order, called upon the petitioner's Counsel to lead evidence as to the petitioner's status (cf. the last sentence in the order). Swan J. first rejected the contention that an objection (as to the absence of proof of

[1] *(1953) 55 N. L. R. 138.*

status) must be taken at the commencement of the trial, and also the contention that the motion need be in writing. I cite again from his order :—

> " I do not think, as Mr. Nadarasa argued, that a substantive motion must necessarily be a motion in writing. In my opinion a substantive motion is one of real importance. I am unable to agree with Mr. Nadarasa that it must be taken *in limine* before the trial and if not so taken must be deemed to have been waived. In *East Cork* 6 O'M. & H. 361 the objection that the petitioner's status had not been proved was taken at the close of the whole case so that the petitioner had no opportunity to meet it. It was therefore properly over-ruled. I consider the application of Mr. Wikramanayake made at the close of the petitioner's case to have the petition dismissed unless evidence was led to prove the petitioner's qualification to file the petition to be a substantive motion and that it has not been made so late as to entitle me to reject it."

Thus the order (1) affirmed the correctness of the *East Cork* decision that an objection, that the petitioner's status has not been proved, must be over-ruled if taken only at the end of the whole case ; and (2) held that, if the objection is taken before the close, or at the close, of the petitioner's case, the petitioner can then lead evidence in proof of status. In the situation at (1) above, there is in fact no proof at all of the petitioner's status ; but this fact will not entitle the respondent to ask for dismissal on that ground. The situation at (2) is less extreme : here there is no such proof on record at the close of the petitioner's case, but if objection is then taken on that ground, the petitioner can then adduce the proof.

I respectfully adopt and confirm the conclusion of law which is manifest from Swan J.'s order ; namely that a petitioner need not adduce proof of status unless and until such proof is demanded by the respondent, and that such proof may be adduced even after the close of the petitioner's case if the demand is only made at that stage. This conclusion, reached in Ceylon 14 years ago, indicates that the election law attaches no great importance to the matter of proof of status ; the status is assumed if no objection to lack of proof is taken at the close of the petitioner's case, even though there is no proof on record. If the need for proof of a matter can be waived by mere silence on the part of the respondent, how can it be said that the proof when demanded must be proof of the standard required in criminal cases. There can be no waiver in criminal cases, by Counsel's word or silence, of the prosecution's burden to prove every ingredient of a charge beyond reasonable doubt ; juries are daily directed in our Courts that an accused and his Counsel may sit tight-lipped throughout a trial, but that nevertheless the accused must be acquitted unless the prosecution proves by evidence, and beyond a reasonable doubt, every fact necessary to establish the commission of the offence. But in relation to the matter of proof of the status of the petitioner in an election petition, it would be absurd for an election Judge

to direct himself in the same manner ; for the election law is that the status is regarded as proved if both sides maintain silence with regard to the matter.

I therefore reach the conclusion that, when it is necessary to adduce proof of the status of a petitioner in an election petition, the standard of proof is the same as that required under our law in Civil actions.

This discussion of the objection as to proof of status has enabled me to understand its true nature. The objection constitutes a formal submission to the Court that there has not been evidence to prove the petitioner's qualification as such, plus a motion that the petition be dismissed if such proof is not adduced. An " objection ", as thus understood, could not be taken in the instant case ; for here there was evidence on record, which if believed, was ample proof of the petitioner's qualification. The first passage which I have cited from Swan J.'s order applies in such circumstances, and declares that the burden would shift to the respondent if he challenges the........evidence of status. Swan J. refers in that passage to evidence of status *given by the petitioner himself*, but only as an " instance ". He did not think, nor did the learned Judge who tried the present case think, that the status cannot be proved by other evidence.

The learned trial Judge did not in his judgment direct himself on the question of the standard of proof required to establish the status of the petitioner. But it is significant that he made the following observations :—

> " An analogy may appropriately be drawn regarding this matter from a trial in a criminal or civil case. In a criminal trial a *prima facie* case which the defence has to meet can be said to be established only if the prosecution has succeeded in proving to the satisfaction of the Court by reliable evidence, despite attacks made upon it, that the accused committed the offence complained of. If the evidence for the prosecution, though literally available, is such that there is reasonable doubt as to its truthfulness at the end of the case for the prosecution, there is no *prima facie* case which the defence has to meet and the court will not in that state of the evidence call upon the defence. In a civil trial too, where the standard of proof required is lower, if a court does not consider the evidence of the plaintiff and his witnesses, after they have been cross-examined, to be worthy of credit the Court will not proceed to hear the evidence of the defendant, as it has already made up its mind that the plaintiff's case cannot be maintained."

In so far as the Judge thus invoked the principles of the criminal law as to proof of guilt, which are reinforced by provisions such as Sections 162, 191 and 254 (1) of the Criminal Procedure Code, he misdirected himself in law, for those principles do not apply in regard to the proof of the status of a petitioner in an election petition.

Counsel for the appellant before us confidently submitted that never in his experience had evidence adduced for the plaintiff in a civil action been rejected as untrue by a trial Judge without calling for a defence. The

long experience of my two brothers, the one as practitioner and the other as Judge in the original Courts, has been the same. Even Counsel appearing for the respondent conceded that such a rejection is " not normal ", and he was not able to cite any instances of such rejection of uncontradicted evidence. Section 163 of the Civil Procedure Code certainly appears to controvert the opinion expressed by the election Judge in the instant case, for it provides that after the party beginning has adduced his evidence, then " the opposing party...... shall...... adduce his evidence ". Moreover, there is no provision in that Code in any way resembling ss. 162, 191 and 234 (1) of the Criminal Procedure Code. Section 163 of course does not have the effect that the opposing party must actually lead evidence, and that judgment against him will follow if he does not. For instance, his Counsel can in appropriate circumstances be content to submit that the facts proved by the plaintiff do not establish the pleaded cause of action or do not entitle the plaintiff to the remedy he seeks, or that the plaintiff must fail on some ground of law.

But where the plaintiff has in a civil case led evidence sufficient in law to prove a *factum probandum*, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional " matter before the Court ", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted.

When respondent's Counsel in the instant case called upon the Election Judge to decide the matter of the petitioner's status upon a consideration of the evidence on record at the close of the case for the petitioner, he did so without himself calling any evidence in disproof of the status. In other words, the evidence on record remained uncontradicted. But nowhere in the judgment did the learned Election Judge refer to this circumstance as " a matter before the Court ", and it is evident that he took no account of this circumstance in reaching his conclusion. The failure to take account of this circumstance was a non-direction amounting to a misdirection in law which vitiates the conclusion of fact which the Judge ultimately reached. That is a sufficient ground on which to set aside the order dismissing the petition.

I must disgress here to point out that our procedure and practice in civil actions does not permit a party to harass the Court or his opponent by requiring the same question to be determined more than once on different material. Section 147 of the Civil Procedure Code permits an issue of law to be disposed of as a preliminary issue, but it does not permit the same issue to be decided more than once. Hence, even if it was permissible for respondent's Counsel in this case to request a determination on the matter of status at the stage when he made it, that request disentitles him from leading any further evidence to disprove the status.

The petition in this case names in its caption as the petitioner "Luwisdura Edrick de Silva of No. 11, Subadraramaya Road, Balapitiya ". The petition purports to be signed by the petitioner, and it was common ground at the trial that the signature is written as " L. Adrich de Silva ". I will now refer to some of the evidence upon which the petitioner relied as proof of the fact that the person whose signature appears in the petition is the person named in the caption, and that that person is " Luwisdura Edrick de Silva " who is registered in the Electoral List P54A as a voter of this electorate. For convenience I shall in so doing refer to the pages in the brief typed for the Court of Appeal. The evidence will be better understood if I state at once that, according to the judgment of the learned trial Judge, during many of the days of trial a particular person was seen to be seated just behind the Counsel and Proctor appearing for the petitioner.

(1) During *the cross-examination* of one Mr. Loos who had been the Counting Officer at this particular election, the respondent's Counsel put to the witness the following question :—

Q. You know this gentleman who is seated here in Court now (shows), he is the petitioner in this case—can you remember whether he was a counting agent of some other candidate ?

A. I cannot recollect. (page 989).

(2) During *the cross-examination* of A. M. Amerasekera (p. 1316) the witness stated that he met the petitioner about one or two weeks after the General Election and on that occasion told the petitioner that some persons had at an election meeting spoken in derogatory terms about one of the candidates who contested the present respondent, and the petitioner then inquired from the witness whether he could give evidence. He said " there was a village talk that Edrick de Silva was submitting an Election Petition. Hence, My Lord, I informed Edrick de Silva such a thing took place at Walagedara ". Thereafter the witness stated in answer to a leading question by respondent's Counsel that he later received a letter from the Proctor for the petitioner, and further stated that he made a statement to that Proctor.

When this witness was re-examined (p. 1346) he stated that the name of the petitioner is "Lewis Dure Edrick de Silva", that he lived along Subaddrama Road, that he was the Chairman of the Town Council, and that he was still a member of the Council, and had worked for Mr. Lakshman de Silva, an unsuccessful candidate at this election.

(3) The next witness was one Ariyadasa. During his cross-examination (p. 1383) the witness said that after a particular election meeting he had met " the Chairman Mr. L. A. de Silva " and

then gave him some information about speeches made at the meeting. He too received a letter from the petitioner's Proctor. (p. 1388).

In re-examination the witness said that the person whom he had met was the petitioner, that his name was Luwisduia Edrick de Silva who had worked for Mr. Lakshman de Silva and had been Chairman immediately prior to the 1965 Elections.

(4) The Grama Sevaka gave the following evidence-in-chief :—(p. 1799)

"Q. Subadhraramaya Road comes within your jurisdiction ?

A. Yes.

Q. You know the Petitioner in this case ?

A. Yes.

Q. He is Luwis Edrick de Silva ?

A. Yes.

Q. He lives at No. 11, Subadhraramaya Road, Balapitiya ?

A. Yes.

Q. He is a registered voter No. 689 in the Voters Register for the Balapitiya Electoral District ?

A. Yes."

In cross-examination the Grama Sevaka stated that he was aware that about August or September 1965 the petitioner had left his former address and taken up residence in another house. His recollection was assisted by the fact that he himself had at one time thought of taking on the petitioner's former residence ; a while later (p. 1801) the witness explained that after the Chairman left the house a Surveyor went into occupation. I now reproduce some further evidence of the Grama Sevaka :—(pp.1801 -1802).

Cross-examined :

" Q. The person whom you referred to as Luwis Edrick de Silva resided at 11, Subadhrarama Road. Is he present in Court here today ?

A. Yes.

Court : Q. Where is he living now ?

A. Luwis Edrick de Silva is now residing in a house adjoining the house of the late Robert de Soyza which is in my division.

Re-examined :

Q. You know the petitioner personally ?

Mr. Shinya : It would be 'Do you know the person who is seated in Court '.

Court : Is there any dispute ?

Mr. Shinya : I am challenging him to prove that he has any status.

Re-examination continued :

Q. Do you know the person who is seated in this court ?

A. Yes, I know him well.

Q. You know he is Luwis Edrick de Silva ?

A. Yes.

Q. You know that he lived at the time of the Elections at No. 11, Subadhraramaya Road ?

A. Yes.

Q. You were the Grama Sevaka in May, 1963 ?

A. Yes.

Q. You know the Register on which the General Elections of 1965 were fought ?

A. Yes.

A. Yes, in fact it was I who prepared the Voters list in respect of the Ward No. 5 of the Balapitiya Town Council.

Q. (Shown Electoral Register).

Mr. Shinya : I object, then he is reading the Electoral Register.

Court : Q. Can you give any voters number ?

A. The Chairman's family were living at 11, Subadhraramaya Road which is at the commencement of the road ".

At the end of the petitioner's examination the following is the record of the end of the Grama Sevaka's examination : (p. 1804)

" Q. Does the petitioner live within your division ?

Mr. Shinya : Not petitioner, My Lord, he may be referred to as Luwisdura Edrick de Silva.

To Court : Q. Does this man who is seated behind Counsel live in your area ?

A. Yes, he is within my division and in fact he has been successively elected Member for Ward No. 5 of the Balapitiya Town Council."

Let me now attempt to sum up the effect of this evidence. The Grama Sevaka professed to know Luwis Edrick de Silva well and knew his former place of residence. In answer to a question phrased according to the wishes of Counsel for the respondent, the witness stated that " he knew well the person who is seated in Court " (who obviously was pointed to in Court), and he then identified him as Lewisdura Edrick de Silva living at No. 11, Subadhraramaya Road, the registered voter named in P54A. That entry reads as follows :—

" *SUBHADRARAMAYA ROAD*

H. L. No.	*Name*	*Sex*	*Serial No.*
11	Luwisdura Edrick de Silva	M	689 "

It will be seen that the petitioner's Counsel desired then to show the Electoral Register to the Grama Sevaka, but this was objected to. That objection I now find was due to ignorance of the law. Section 7 of the Local Authorities Elections Ordinance, Cap. 262, provides that the basic qualification for a local authority election is that a person's name is entered in the current parliamentary register. A person who has his name on that register is by s. 7 entitled to have his name entered in the Electoral List of the Ward of the Local Authority in which he resides. It is thus clear (see also s. 15 of Cap. 262) that the current Parliamentary Register is utilised for the purpose of preparing electoral lists under the Ordinance. There was a high probability therefore of the truth of the Grama Sevaka's evidence that he knew the register on which the Parliamentary Elections of 1965 was held, and these circumstances strongly supported the correctness of his personal identification of the person seated in Court as the registered voter " Lewisdura Edrick de Silva".

Although during the examination of the Grama Sevaka, respondent's Counsel resiled from his former concession (p. 989) that the person seated in Court was the petitioner, there was already the evidence of Amerasekera and Ariyadasa identifying the petitioner as Luwisdura Edrick de Silva living at the address shown in P54A, and identifying the same person as the Chairman or the ex-Chairman. There was from both these witnesses convincing circumstantial evidence that this person was the petitioner : he told the witnesses that he was the petitioner, and he acted as a petitioner would because he put the witnesses into contact with the Proctor on record. Moreover, Luwisdura Edrick de Silva, the ex-Chairman, was shown beyond any doubt to have been seated in Court just behind the petitioner's lawyers, and he acquiesced when on several occasions he was pointed out in Court to various witnesses as the petitioner. None of the witnesses to whom I have so far referred was cross-examined to suggest in any way that the person seated in Court was not the ex-Chairman or not the petitioner.

Respondent's Counsel's mere statement during the Grama Sevaka's evidence " I am challenging him to prove that he has any status " can in no way detract from the evidence adduced in proof of that status. Respondent's Counsel in appeal did not even attempt to point to any question in cross-examination designed to cast doubt on the truth of the Grama Sevaka's evidence that Luwisdura Edrick de Silva, the person seated in Court, was indeed a registered voter.

This although the Grama Sevaka was called solely for the purpose of proving the status of the petitioner. The learned trial Judge does not examine this evidence in the judgment. He refers to it only to remark that, because he rejects the evidence of another witness, Lakshman de Silva, on the matter of status, he cannot act on other evidence on the same matter. Now one factor taken into account against Lakshman de Silva was that (being an unsuccessful candidate) he was an interested witness ; thus the assumption on which the Judge acted was that when the evidence of an interested witness fails the test of credibility the Court may exclude from consideration the evidence of a disinterested witness (in this case the Grama Sevaka). This assumption is unlawful, because it led to the exclusion of relevant evidence, a matter which, in the judgment of Gadjendragadkar J. (1959 A. I. R., S. C. 362) which has often been applied in our Courts, is a ground of law upon which a conclusion of fact may be impugned. The fact that the evidence thus excluded was uncontradicted, and uncontested in cross-examination save by an armchair challenge, enhances the gravity of the ground of law. The assumption is also illogical ; it pre-supposes that the safe course for a plaintiff or prosecutor is to call only one witness to prove any particular fact ; to call more than one witness is to run the risk that the witness on whom he relies most heavily will be disbelieved arbitrarily on the ground that his least reliable witness might fail the test of credibility.

I hold that the learned trial Judge had a duty to consider the evidence of the Grama Sevaka and the other evidence which I have summarized. I hold also that because that evidence was uncontradicted, and because the truth of the evidence was not contested or doubted in the course of cross-examination, the petitioner succeeded in proving :—

(*a*) on the evidence referred to at (1), (2) and (3) above, that the petitioner named in the caption of the petition is Luwisdura Edrick de Silva, who had been Chairman of Town Council and who in 1965 was a member of the Council ;

(*b*) on the evidence of the Grama Sevaka, that the person pointed out in Court is the same Luwisdura Edrick de Silva, and was a voter registered in P54.

Respondent's Counsel had at no stage during the hearing informed the Court that he would be disputing the signature on the proxy and the

election petition as being that of the petitioner named therein. Nevertheless the learned Election Judge considered this submission which was made after the close of the petitioner's case. As stated earlier in this judgment the signature reads as " L. Adrich de Silva ".

Had the learned Judge reached the conclusion, which I have already held he should have reached, that the person named in the petition was proved to be a registered voter, and thus qualified to file a petition in terms of s. 79, he would have realized that the only remaining matter in dispute was whether the named petitioner actually signed the election petition. I much doubt whether the Judge did realize that he was dealing with a submission unique in my experience and his own—a submission that a known identified individual named as plaintiff in a plaint had not signed the proxy filed with the plaint. In the present context of an election petition filed with a deposit of Rs. 5,000, where any one of the 16,519 registered voters who voted in favour of the unsuccessful candidate Lakshman de Silva was competent to file the petition, where was the need or temptation to " borrow " the ex-Chairman's name and pretend that he was the petitioner, and further to have some unknown person forge a signature on the petition ? Why run *in limine* the risk that the forgery might be noticed and the petition dismissed on that score ? If indeed the respondent's Counsel had instructions that the signature on the proxy was not that of Luwisdura Edrick de Silva, the ex Chairman, why did he not take the simple course of marking even one Town Council document bearing the genuine signature of the ex-Chairman ? If Counsel had any faith in his own challenge, why did *he* run the risk of calling for a decision of fact upon uncontradicted evidence adduced by the opposing party ? Why should the ex-Chairman sit in Court in a place naturally occupied by a person who had filed a petition, and why should he acquiesce when the signature on the proxy was identified as his signature in his very presence (p. 2028) ? In these circumstances, Counsel's " challenge " was in my opinion unworthy of consideration by a Court.

Nevertheless, because the learned Election Judge did consider Counsel's submission, and because we have held in our order of 25th August 1967 that the status of the petitioner was proved, it is desirable that I do discuss the evidence and the Judge's reasons for rejecting it.

The learned Judge rightly states that the only witness who identified the signature on the proxy as being that of L. Edrick de Silva, the former Chairman, was Lakshman de Silva one of the unsuccessful candidates at this election. This witness had been a Member of Parliament from 1960 till 1965. The learned Judge has disbelieved his evidence, particularly his identification of the signature " L. Adrich de Silva " as being that of the former Chairman, and I will presently discuss the principal reasons for that rejection. In examination-in-chief he, like the other witnesses, said that the petitioner had put him into contact with the Proctor on record, that he had often travelled with the petitioner to Colombo to see the Proctor, that the petitioner had been present in

Court, that the petitioner had been Chairman of the Council, and afterwards a member. He stated that he had known the petitioner for 25 years and was familiar with the petitioner's signature and he identified the signature on the proxy as being that of the petitioner. His capacity to identify the signature is rendered highly probable by the fact that he was the Member of Parliament for Balapitiya during the petitioner's tenure of office as Chairman of the Town Council.

In cross-examination Lakshman de Silva readily agreed that he was related to the ex-Chairman in a manner outlined by respondent's Counsel and he said that he called the ex-Chairman " L. A. Uncle ".

It is relevant now to reproduce the following Questions and Answers in the cross-examination of Lakshman de Silva :—

" Q. When you say that you have seen his signature, what you mean is that you have seen the ex-Chairman signing ?

A. I have seen him signing.

Q. What you say is the signature appearing on this document is the same as that of that ex-Chairman ?

A. Yes.

X | Q. Is it not the fact that the ex-Chairman is L. A. de Silva and not L. E. de Silva ?

X | A. He is referred to as Edrick as well as Adrick.

Q. When I asked you as I started my cross-examination to tell His Lordship clearly what is the name of the person whom you call as the petitioner, you said it was Luwisdura Edrick de Silva ?

A. Yes."

Here is the comment made in the judgment on this evidence :—

" Confronted with the question whether the ex-Chairman was not in fact L. A. de Silva, *a brother of the person in Court*, whose name was later admitted by this witness to be L. Aris de Silva his reply was that the ex-Chairman was called both Edrick and Adrick and did not answer to Counsel's questions directly. Counsel thereupon produced certain Gazette notifications. . . . ." (The italics above are mine).

The reference in this comment to the reply of the witness, to his not answering the question directly, and to Counsel thereafter producing Gazette notifications, makes it evident that the trial Judge made the comment with reference to the third question which I have sidelined X in the above extract from the evidence. This question appears at p. 2070 of the brief. There is nothing in that question suggesting that the ex-Chairman was a brother of the person in Court. Indeed, up to that stage, not one word had been mentioned in Court about a brother of

Edrick de Silva named L. A. de Silva. It was most unfortunate for the witness Lakshman de Silva, that the Judge when he came to write his judgment decided that the witness had 'dodged' a suggestion in the question now under reference, that the ex-Chairman had been a person named 'L. Aris de Silva '.

The name 'Aris de Silva' transpired only in subsequent evidence (p. 2072), in an unimportant answer to Court. The Gazette of 24th December 1964 contains a notice published by the Commissioner of Elections (Local Bodies) under the Local Authorities Elections Ordinance of which this Court can take judicial notice. It is a list of the names of the members elected to the Balapitiya Town Council, showing the member for Ward No. 5 as 'Luwisdura Edric de Silva '. No other person in that list bears the name Luwisdura, nor is there any "Aris" in the list. The respondent's Counsel could not conceivably have been instructed to suggest, nor did he in fact suggest, that anyone other than Edric de Silva had been the Chairman or a Member of the Council. I must say therefore with the greatest respect that the comment of the learned Judge with regard to the evidence now under reference was based on a complete misconception both of the evidence and of Counsel's suggestion. The Judge's subsequent statement in his judgment that "the ex-Chairman of the Town Council may well have been the brother L. Aris de Silva" shows how much he was influenced by this misconception.

Another reason for the Judge's rejection of the identification of the ex-Chairman's signature arises from certain Gazette notifications which purport to reproduce in print the signature of the Chairman, Town Council, Balapitiya. In these notifications the signature is printed in English as 'L. A. de Silva' (and in Sinhalese as ඇල්. ඒ. ද සිල්වා). The assumption on which the Judge relied in this connection was that if, as Lakshman de Silva said, the Chairman signed as "L. Adrich de Silva", that signature would have been reproduced *in full* in the Gazette notices, whereas in fact the English notices have the printed signature 'L. A. de Silva '. With respect, in the absence of the originals of these notices or of any evidence from the Government Printer's Office, this assumption was purely conjectural. The Appeal file of this case convincingly demonstrates the fallibility of such conjecture. For although the petitions of appeal, filed in triplicate, bear the signatures "L. Adrich de Silva", the typed copies of the petition in our briefs have the signature " L. E. de Silva ".

The trial Judge was also probably influenced by the fact that in the Gazette notices of the Town Council published in Sinhala the Chairman's name is printed as ඇල්. ඒ. ද සිල්වා. This circumstance is apparently inconsistent with the evidence of Lakshman de Silva that (so far as he knows) the ex-Chairman only signed in English. But I have in this connection pointed out in Court that, although I myself sign Orders under the Courts Ordinance only in English, my signature is printed in Sinhala in Gazette notifications of my orders.

At another stage of the judgment, there occurs a criticism that the witness would not have called the Chairman " L. A. Uncle " if as the witness had himself said the Chairman's name was Edrick. Here again there is a simple explanation to be found in the Gazette notice. If the Chairman insisted on signing himself ' L. A. ' although his name is sometimes spelt with an " E ", there is nothing suspicious in the evidence of the witness that he called the Chairman " L. A. Uncle ".

The learned Judge unfortunately failed to realise that these very Gazette notifications of the Town Council corroborate Lakshman de Silva's evidence that the Chairman had used an alias ; although his name Edrick is spelt with an " E ", he signs (according to the witness) as ' Adrich '. The Gazette notices which have the printed signatures 'L. A. de Silva' show that the Chairman did use an 'A' and not an 'E' in signing his name.

The last of the substantial matters referred to in the judgment which relates directly to the credibility of Lakshman de Silva is contained in this passage from the judgment :— (p. 443).

> " Thus, during an ostensibly gentle but devastatingly effective piece of skilful cross-examination by Mr. Shinya, this witness was compelled to admit that he was not personally aware whether the person who was seated in Court and referred to as the petitioner was in fact the petitioner."

The only evidence to which this passage is referable is evidence at page 2068, and Counsel for the respondent in appeal has not suggested that it refers to anything else. The following is the relevant evidence :—

" Q. How long after that did you go and have discussions or consultations regarding this petition with the ex-Chairman ?

A. I believe about 1 week or 10 days of the petition being filed the petitioner and I came to Colombo to discuss matters with the petitioner's Proctor.

Q. The reason for you to say that gentleman—the ex-Chairman—is the petitioner is because he told you so. As a result of what he told you ?

A. Yes."

It is quite correct that in these answers the witness did say that he knew that the ex-Chairman is the petitioner because the ex-Chairman had told him so. But I can see here no admission under compulsion, but merely a truthful answer to a leading question. Indeed I quite fail to understand what respondent's Counsel thought he could gain from this question. The witness had never claimed in his earlier evidence that his information as to the identity of the petitioner was based otherwise than

on the ex-Chairman's own statement and conduct; so that there was nothing in this particular answer which contradicted or modified any previous evidence, and nothing to justify the Judge's impression that the witness contradicted himself or admitted anything under compulsion.

The witness had earlier stated that he was not interested in filing an election petition because he was not in a happy mood after his defeat. Then he came to know that the ex-Chairman was interested in filing a petition. He was told by the ex-Chairman that he had filed one, and he then associated himself by going with the petitioner to see the Proctor. The questions which were put related to a period shortly after the election and the answer truly states how first the witness became aware as to who had filed the petition. In fact I cannot see how else the witness could have become aware of the matter. At that stage the most reliable source from which to obtain information about the filing of the petition was from the petitioner himself. It is quite unreasonable to expect that Lakshman de Silva should have tried to verify the truth of what the ex-Chairman told him by going to Colombo and inspecting (if the Registrar would permit him) the original petition of appeal in the Supreme Court. Plaintiffs in civil actions are identified numerous times every day by witnesses who have not watched them signing proxies.

Examination of the evidence of Lakshman de Silva, and of the treatment of that evidence in the judgment, shows that on all or nearly all of the matters which influenced his rejection of the evidence, the Judge either misconceived the effect of the evidence and of suggestions in cross-examination, or acted upon inferences which were not rationally possible. On this ground, and on the grounds of misdirection stated earlier in this judgment, we allowed this appeal and directed that the hearing of the petition must continue before the Election Judge.

I do not propose to examine much of the remaining part of the judgment, in which the learned Election Judge refers to matters unconnected with the evidence given by Lakshman de Silva. But one of the matters discussed in the judgment, namely, the absence of the petitioner from Court on the last day of hearing, arose from a misconception of what had taken place in Court. According to the record (p. 2083 of the brief) Mr. M. L. de Silva, Junior Counsel for the petitioner, is recorded as having made the following statement before the Court adjourned on 17th September 1966 :—

"I am sorry, My Lord, that the petitioner is not here. He is very seriously ill and is in the hospital. I close the case for the petitioner."

On the next day of hearing (19th September 1966), *Counsel for the respondent*, in asking for corrections moved for the following correction :–

"Finally on the last page Mr. Mahinda de Silva said: 'I am sorry, My Lord, that the petitioner is not here. *His son* is seriously ill and is in the hospital'."

Despite this correction which was made by Counsel for the respondent, the learned Election Judge in his judgment states in caustic terms that the petitioner " happened to fall seriously ill and was said to be in hospital........" " The alleged serious illness of the person seated behind Counsel........ is open to the gravest suspicion."...... " Did this illness result from being an eye witness on the previous day to the inextricable position in which Lakshman de Silva found himself......" " Did he suddenly take ill in the thought that, if he came to Court that day, the Judge might of his own motion call him into the witness box...."

These comments were made adversely to the petitioner, and it is most unfortunate that they were based upon a complete misconception as to the stated reason for the absence of the petitioner from court. That absence was a factor which influenced the decision of the learned Judge, because it is referred to among the reasons for the decision.

I have shown that the learned Judge wrongly disbelieved certain witnesses, particularly Lakshman de Silva. But I have no doubt that such former disbelief will not influence the mind of the learned Judge in his consideration of the further matters which will now arise for decision.

TAMBIAH, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.