1969 *Present :* H. N. G. Fernando, C.J., Sirimane, J., and Weeramantry, J.

K. D. DAVID PERERA, Appellant, *and* A. W. A. K. PEIRIS and another, Respondents

Election Petition Appeal No. 3 of 1968—Bandaragama (Electoral District No. 27)

Parliamentary election—Appeal to Supreme Court from decision of an Election Judge—Report of Supreme Court that a corrupt or illegal practice was committed by a person—Validity to disqualify that person for membership of House of Representatives—Parliament's power to amend Parliamentary Elections Order in Council—Constitutional validity of a Statute—When a Court will make a pronouncement thereon—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 82A, 82C (2) (b), 82D (2)— Ceylon (Constitution) Order in Council (Cap. 379), ss. 13 (3) (h), 29 (4).

Where, upon an appeal to the Supreme Court from the decision of an Election Judge, the Supreme Court sends a report to the Governor-General in terms of section 82C(2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council that a corrupt or illegal practice has been committed by a person, the report is effective to disqualify that person under section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council for membership of the House of Representatives.

The Parliamentary Elections Order in Council may be amended, by virtue of the section 29 (4) of the Constitution Order in Council, by an Act passed by a simple majority of the House of Representatives.

Section 82D(2) of the Parliamentary Elections Order in Council, in so far as it attaches to a person who is reported by the Supreme Court the incapacity referred to in section 13 (3) (*h*) of the Constitution Order in Council, is not *ultra vires* and void on the ground that, when it was enacted, it was tantamount to an amendment of section 13 (3)(*h*) of the Constitution requiring a two-thirds majority in Parliament in compliance with the proviso to section 29 (4) of the Constitution. The pronouncement to the contrary in *Thambiayah v. Kulasingham* (50 N. L. R. 25) was made *obiter* and *per incuriam*.

A Court will not pronounce upon the constitutional validity of a Statute unless a decision as to validity is essential for the purposes of the case actually before the Court.

APPEAL from the judgment of an Election Judge reported in (*1968*) *71 N. L. R. 481.*

Colvin R. de Silva, with *Hanan Ismail*, *Mrs. Manouri Muttetuwegama*, *P. W. D. de Silva* and *Shibly Aziz*, for the respondent-appellant.

H. W. Jayewardene, Q.C., with *A. C. Gooneratne, Q.C.*, *Izadeen Mohamed*, *H. D. Tambiah*, *Mark Fernando* and *R. C. Gooneratne*, for the petitioners-respondents.

H. L. de Silva, Crown Counsel, with *N. Sinnetamby*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

1*—J 8953—2,152 (11/69)

February 22, 1969. H. N. G. FERNANDO, C.J.—

At a bye-election held on 23rd September 1967, the candidate who is the appellant in this appeal was declared elected as Member of Parliament for the Bandaragama Seat in the House of Representatives. But at the trial of an election petition his election was determined by the Election Judge to be void on the ground that he was at the time of his election disqualified for election as a Member. This appeal is against that determination.

The appellant successfully contested the same seat at the General Election of March 1965, and, upon an election petition then filed against him, an Election Judge determined that he had been duly elected at that Election. On appeal to the Supreme Court, however, it was determined that this election of the appellant was void on the ground that a corrupt practice had been committed by an agent of the appellant. Having so determined, the Judges who heard the appeal made a Report to the Governor-General stating that a corrupt practice had been committed at the election by an agent of the appellant, and a copy of this report was published in the *Gazette* of 2nd July 1967. The judgment of the Election Judge which is under appeal in the present case holds that the appellant was disqualified at the time of the bye-election by reason of the combined operation of the said Report, of s. 82D (2) of the Ceylon Parliamentary Elections Order in Council, and of s. 13 (3) (*h*) of the Constitution.

Section 13 (3) (*h*) of the Constitution provides that a person shall be disqualified for being elected a Member of Parliament or for sitting or voting in Parliament if " by reason of his conviction for a corrupt or illegal practice or by reason of the report of *an Election Judge* in accordance with the law for the time being in force relating to the election of Senators and Members of Parliament he is incapable of being elected as a Senator or Member ". The essential fact on which Counsel appearing for the appellant has relied is that the Report published in the *Gazette* of 2nd July 1967 is not the report of an " Election Judge ", but is instead a Report of the Supreme Court. Relying upon this fact, Counsel has argued, *firstly* that the Report of the Supreme Court was not such a report as is referred to in s. 13 (3) (*h*) of the Constitution and that it therefore did not have the effect of attaching to the appellant a disqualification under that section ; and *secondly* that in so far as the provisions of s. 82 D (2) of the Parliamentary Elections Order in Council (hereinafter referred to as the " Election Law "), purported to attach to a person reported in a Report of the Supreme Court the incapacity referred to in s. 13 (3) (*h*), those provisions are *ultra vires* and therefore void.

Much the same argument was considered by this Court in the very first appeal preferred under the Elections Law from the determination of an Election Judge (*Thambiayah v. Kulasingham* [1]). I must acknowledge that a perusal of the judgment in that case had, prior to the present

[1] *(1948) 50 N. L. R. 25.*

hearing, led me to form a tentative opinion that this argument was a sound one. However, after consideration of the question at issue and of the able arguments of the Counsel in this appeal, I have reached the conclusion that the learned Election Judge in the instant case has rightly decided that question. I do not propose to set out here the various relevant provisions of the Constitution and of the Election Law because they are fully set out in the judgment under appeal.

It is important to note that when the Constitution was enacted in May 1946, the reference in s. 13 (3) (*h*) to " the law relating to the election of Senators and Members of Parliament " was not a reference to any existing law, because there was yet no law relating to that subject. But s. 13 of the Constitution did contemplate that there will be such a law, and that such a law will or may provide for the making of a report by an Election Judge as to the commission of a corrupt or illegal practice at an election, and will or may provide that by reason of such a report a person will be incapable of being elected a Senator or Member of Parliament. The language of paragraph (*h*) of sub-section (3) of s. 13, when compared to the language of other paragraphs of that sub-section, establishes that this particular disqualification was not imposed or defined in paragraph (*h*) itself. There was instead (*a*) the contemplation or expectation that an Elections Law will be enacted and will or may impose and define an incapacity for election to Parliament arising from the report of an Election Judge, *plus* (*b*) a prospective adoption of any incapacity which would be so imposed and defined.

When therefore the Parliamentary Elections Law as in fact enacted in September, 1946, did contain provision for the report of an Election Judge and for the incapacity thereby arising, *the subject of that provision* was not one which the Constitution itself regarded as a subject which may lawfully be dealt with only in an enactment amending the Constitution. On the contrary, s. 13 (3) (*h*) expressly contemplates that the authority competent to enact " the law for the time being relating to the election of Senators and Members of Parliament " has power to deal with this subject, and that authority today is the Parliament of Ceylon.

Doubts concerning the question under considerations have arisen chiefly because the Election Law in its original form was an Order of His Majesty in Council and that it provided only for the trial of an election petition, and for the determination and report of an Election Judge after such trial. The provision for appeals from an Election Judge and for determinations and reports of three Judges of the Supreme Court was made by an amending Act of Parliament No. 19 of 1948. That Act did not bear a Certificate of the Speaker under s. 29 of the Constitution that it was passed by a two-thirds majority in the House of Representatives. The principal argument in this appeal has been that the amended sections of the Election Law, when they authorise a report *by the Supreme Court* as to the commission of a corrupt or illegal practice and attach to a person thus reported the incapacity for election to Parliament, are tantamount to an amendment of s. 13 (3) (*h*) of the Constitution. Thus the

question is whether s. 13 (3) (*h*) of the Constitution intended to adopt as a disqualification only an incapacity for membership of Parliament declared by the contemplated Election Law to arise from the report of a trial Judge, but not an incapacity declared by the same Law to arise from the report of Judges exercising a jurisdiction in appeal from the determination of a trial Judge.

The 1948 decision in *Thambiayah v. Kulasingham* directly upheld the validity of the provision in the Election Law (as amended by Act No. 19 of 1948) which empowered the Supreme Court in appeal to reverse a determination of a trial Judge holding that the election of a person as a Member of Parliament was void on the ground of disqualification.

There have thereafter been numerous cases in which appellants have invoked the jurisdiction of this Court, in appeal from determinations of Election Judges, to reverse such a determination and to hold in appeal that an election is void, or as the case may be, that a person elected at a pool was duly elected. That jurisdiction in appeal has not been challenged in any of these cases, including the present case. It is thus settled law that the Constitution, when it contemplated the enactment of an Election Law, recognised the validity of provision in any prospective Election Law which would empower Judges sitting in appeal to reverse and replace determinations of trial Judges in election cases. That recognition fully involves acceptance of a common-sense principle underlying the establishment of all appellate jurisdictions, namely that the review of judicial decisions by judicial tribunals is conducive to the correction of error, or (if I may state the point colloquially) that three heads are probably better than one.

It is I think evident that the same principle is in common-sense applicable in relation to the lesser or incidental jurisdiction of an Election Judge to make a report that some person has committed a corrupt or illegal practice at a Parliamentary Election. Indeed the judgment in *Thambiayah's case* holds, by way of an *obiter dictum*, that s. 13 (3) (*h*) of Constitution does not render invalid that provision of Act No. 19 of 1948 which empowers Judges in appeal to render ineffective, and thus virtually to quash, such a report of a trial Judge in an election petition. In relation therefore to the power in appeal to reverse and replace the determination of a trial Judge, and to the power to quash the report of a trial Judge, the judgment is in accord with the principle of common-sense to which I am referring. But it seems to me, with the utmost respect, that the judgment failed to take that same principle into consideration when it pronounced that s. 13 (3) (*h*) of the Constitution did not contemplate the inclusion in the Elections Law of provision, empowering Judges in appeal to report the commission of a corrupt or illegal practice, and declaring the incapacity for election to Parliament of a person so reported.

As already stated, the Elections Law which was contemplated in s. 13 (3) (*h*) of the Constitution actually took the form of an Order in Council and that Order contained no provision for any appeal from the

determination of a trial Judge or for the making of a disqualifying report upon an appeal. Had the Order actually contained such provision, I gravely doubt whether any question of the validity of such a provision would ever have been raised. Indeed the first objection taken in *Thambiayah's case* was that the Election Order in Council is a part of the Constitution, and that therefore Act No. 19 of 1948, which conferred the challenged right of appeal from the determination of an Election Judge, was invalid on the ground that an amendment by Parliament of that Order in Council must be passed in compliance with s. 29 (4) of the Constitution. This objection was summarily rejected on the ground that s. 29 (4) made it clear beyond doubt that the Election Order in Council could be amended by an Act passed by a simple majority of the House of Representatives. Since s. 29 (4), which specifically deals with *the power of Parliament to make laws*, so clearly recognises Parliament's power to amend the Elections Order by an ordinary Act, s. 13 (3) (*h*) must be construed consistently with the existence of Parliament's power, unless such a construction is excluded either expressly or by implication. Act No. 19 of 1948, in providing for determinations and reports in election appeal, easily satisfies the " pith and substance " test approved by the Privy Council in *Attorney-General for Ontario v. Reciprocal Insurers*[1] and in *Kodakan Pillai v. Mudanayake*[2]. If the original Election Order in Council properly included provisions for the qualifications of electors, for election offences, for the trial of election petitions, for determinations as to the validity or otherwise of the election of candidates, and for incapacities arising by reason of reports of Election Judges, the pith and substance of the Order was not changed when Act No. 19 of 1948 added provision for appeals, and for determinations and disqualifying reports in appeal.

Let me now examine two statements of the Court in *Thambiayah's case*, upon which Counsel for the appellant has relied :—

" . . . I think that the provisions of the Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, are in conflict with section 13 (3) (*h*) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, in so far as those provisions make the report of the Supreme Court operate as a ground of disqualification. What is the result of that conflict ? Is the Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, invalid as it has not been passed in accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947 ? Or it is invalid only in so far as the offending provisions are concerned ? " . . .

" . . . There is another way of looking at these "offending provisions". It was possible, in accordance with my views on the first preliminary objection of the respondent, for the Legislature to have amended section 78 of the Ceylon (Parliamentary Elections) Order in Council, 1946, by inserting a new definition of "Election Judge" so as to include the body of Judges hearing an appeal under the new section 82A, and such an amendment need not have been passed in

[1] *(1924) A. C. 328.* [2] *(1953) 54 N. L. R. 433.*

accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. If that was done, the second preliminary objection could not have succeeded ". . .

The second statement means that when Act No. 19 of 1948 inserted in the Elections Order provision for a disqualifying report in appeal, that report could have been equated to the report of an Election Judge mentioned in s. 13 (3) (*h*) of the Constitution by means of some definition clause contained in the same Act. There is here a concession that Parliament had power by an ordinary Act to make provision for a disqualifying report in appeal, which is virtually a concession that the pith and substance of such a provision does not conflict with the Constitution. This concession exposes the incorrectness of the first statement which is cited above.

Such a definition clause as is contemplated in the second statement would merely express in clear terms Parliament's intention to equate the report in appeal to the report of an Election Judge. But paragraph (*b*) of s. 82 D (2), which was contained in Act No. 19 of 1948, sufficiently manifests that very intention, when it provides that each such report will involve identical incapacities.

I adopt the opinion of the trial Judge in the instant case that the first statement cited above from *Thambiayah's case* was *obiter*. I observe in this connection that the attention of the Court in that case was apparently not drawn to the principle that a Court will not pronounce upon the constitutional validity of a Statute unless a decision as to validity is essential for the purposes of the case actually before the Court. I would refer in this connection to statements in decisions of the American Supreme Court, which are cited in the judgment of this Court in *The Attorney General v. Kodeswaran* [1].

Thambiayah's case did not render necessary a pronouncement as to the validity of a report made by Judges in appeal under the Elections Law. Had the Court been aware of the principle just discussed, its judgment should have been that the provision for appeals in Act No. 19 of 1948 was valid and severable, even on the assumption that the provision for a report may have been invalid.

For these reasons, I hold that the pronouncement in *Thambiayah's case* upon which Counsel for the appellant has so strongly relied was made both *obiter* and *per incuriam*. That being so, it is not necessary to examine Counsel's further proposition that, when the Supreme Court has once declared a provision of an Act of Parliament to be *ultra vires* of Parliament's legislative power, the Court must not again review the correctness of its previous declaration. But I feel compelled to offer some general observations concerning this proposition. It is contrary to the attitude of the United States Supreme Court, which has on several occasions departed from precedent in order to uphold the validity of

[1] *(1967) 70 N. L. R. at p. 138.*

Statutes. It implies that this Court must stubbornly adhere to previous error, even if the rule of *stare decisis* does not prevent review of a former decision. If accepted, the proposition will tend to place the Judiciary in a position of obstructive opposition to the Legislature, which is not the position which the Judiciary in my understanding occupies under our Constitution. Lastly, Counsel could cite neither case law nor the opinion of any text-writer in support of it.

For these reasons I am in agreement with the conclusion of the learned Election Judge that the report of the Supreme Court published in the *Gazette* of 2nd July 1967 was valid and effective, and that by reason thereof the appellant was at the time of the bye-election held on 23rd September 1967 disqualified for election as a Member of Parliament. The determination of the learned Judge that the election of the appellant was void is accordingly affirmed, and this appeal is dismissed with costs.

SIRIMANE, J.—

The respondent-appellant in Election Appeal No. 3 of 1967 (David Perera), whom I shall refer to as the "respondent" throughout this judgment, was first elected as the Member of Parliament for Bandaragama at the election held in March, 1965. A petition challenging his election was dismissed by the Election Judge, but in appeal the Supreme Court unseated him, on the ground that he had committed a corrupt practice in that one of his agents had made a false statement concerning the character of an opposing candidate. In accordance with the procedure as set out in section 82C (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council, Chapter 381 (as amended) the Supreme Court sent a report to the Governor-General.

At the bye-election which followed, the respondent contested the seat again and won, when the present petition was filed alleging that he was disqualified from contesting the seat in view of the report.

The question that arises in the first appeal is whether the learned Election Judge was right in holding that the report was effective to disqualify the respondent under section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council, Chapter 379, which I shall refer to as the "Constitution".

Section 13 (3) (*h*) reads as follows :

"A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives—if by reason of his conviction for a corrupt or illegal practice or by reason of the report of an Election Judge in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament he is incapable of being registered as an elector or of being elected or appointed as a Senator or Member as the case may be ;"

It will be seen that the report of the Election Judge must be "*in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament.*"

At the time Section 13 (3)(*h*) was enacted, there was no appeal from an order of an Election Judge who was also a Judge of the Supreme Court. Thereafter our legislature provided for an appeal from the order of an Election Judge to a Bench of three Judges of the Supreme Court (Section 82A of Chapter 381).

I find it difficult to accept the argument that the use of the words "election judge" in Section 13 (3)(*h*) of the Constitution had the effect of preventing Parliament from passing laws which, for example, provided for an appeal, and a report by the Judges who hear the appeal—unless the Constitution was also amended. In my view the words "election judge" in the section must be construed to mean the Judge or Judges on whom the legislature reposes the responsibility of deciding an election matter, and sending a report in accordance with the law for the time being in force. The disqualification is not to be found in Section 13 (3)(*h*) but as in Section 13 (3)(*e*) (bankruptcy) and Section 13 (3)(*g*) (unsoundness of mind) has to be looked for elsewhere in the law.

In arriving at this conclusion, I have given my anxious consideration to the decision of this Court in *Thambiayah v. Kulasingham* [1]. That was the first appeal after the amendment (Act No. 19 of 1948) permitting an appeal from the decision of an Election Judge. It was the person who was unseated by the Election Judge who appealed in that case. Apart from the question whether the appellant in that case was disqualified on account of an alleged contract with the Crown, the Court had to decide whether the legislation relating to an appeal from the order of an Election Judge was *intra vires* the legislature. The question whether the Judges in appeal could send a valid report under the amended law, did not directly arise on the facts of that case. It was held, however, that the provisions of the amending Act No. 19 of 1948 in so far as they relate to a report were *ultra vires*. Wijeyewardene, A.C.J. said, in the course of his judgment, at page 35 :

> "A difficulty arises, however, when we proceed to consider the case that may arise under the new sections 82(*c*) and 82(*d*) where the decision of the Supreme Court in appeal sets aside the report of the Election Judge that a person is not guilty of corrupt or illegal practice and the Supreme Court sends its own report finding such a person guilty. As I am of opinion that the term Election Judge means the Judge who tries an election petition, I think that the provisions of the Ceylon (Parliamentary Elections) Amendment Act No. 19 of 1948 are in conflict with section 13 (3)(*h*) and Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947 in so far as those provisions make the report of the Supreme Court operate as a ground of disqualification."

[1] (1948) 50 *N. L. R.* 25.

He went on to say (page 37) :

> "In the case before us I have found that the provisions of the Parliamentary Elections (Amendment Act) No. 19 of 1948 relating to a report by the Supreme Court so far as it embodies the finding that a corrupt or an illegal practice has been committed was not duly passed by the Ceylon Parliament. Those provisions were, therefore, ultra vires"

But in an earlier passage, the learned Judge said,

> "It was possible..... for the legislature to have amended section 78 of the Ceylon (Parliamentary Elections) Order in Council, 1946, by inserting a new definition to "Election Judge" so as to include the body of Judges hearing an appeal under the new section 82 (*a*) and such amendment need not have been passed in accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947."

One gathers from this passage that the learned Judge did not consider an amendment to section 13 (3) (*h*) of the Constitution which requires a two-third majority in Parliament, to be necessary ; but merely that the language in the Parliamentary (Elections) Amendment Act was not sufficiently precise. After hearing the arguments of learned Counsel on this question, I am persuaded to take the view that the finding in *Thambiayah's Case* that a report by the appeal Judges is *ultra vires*, was unnecessary for deciding the questions which arose in that case.

The learned trial Judge has very carefully gone into this question, and I respectfully agree with his conclusion that the dicta relating to this question were *obiter*, and the respondent's appeal must, therefore be dismissed.

In the second appeal* the petitioners pray that the candidate who came second be declared elected. That candidate obtained 18,372 votes as against 23,840 cast in favour of the respondent. This application is made on the allegation in the petition that all the votes cast for the respondent "were thrown away and null and void". Section 85 of Chapter 381 provides for votes to be struck off at a scrutiny, and section 85 (1) (*f*) relied on by the petitioners reads as follows :

> 85 (1) "On a scrutiny at the trial of an election petition the following votes only shall be struck off, namely :
>
> (*f*) votes given for a disqualified candidate by a voter knowing that the candidate was disqualified or the fact causing the disqualification or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious."

* The judgments of FERNANDO, C.J., and WEERAMANTRY, J., in the "second appeal" (Election Petition Appeal No. 2 of 1968) appear at pp. 234 *et seq.* (*infra*)—Ed.

The fact that a report had been sent by the Appeal Court was published by the petitioners. So that the voters must be presumed to have been aware of that fact. But, admittedly, the respondent gave as much publicity to the judgment in *Thambiayah v. Kulasingham* referred to above. So that the voters were aware of that fact as well. The appeal Judges who sent the report were not required and did not express any view as to whether their report was an effective one. There was then section 13 (3) (*h*) of the Constitution, and the only decision of the Supreme Court on the point was *Thambiayah's case.*

The vote, now is looked upon as a very cherished right. Since the granting of Independence our voters have begun to realize its importance, and its value. They attend many meetings which are held in support of the different candidates, read and consider the statements in the manifestoes and pamphlets which are issued at election time, before they decide to cast their votes for the candidate of their choice. Unlike in the case of an opinion on a question of law expressed by a candidate or his supporters, or even by lawyers, however distinguished, a voter, as a rule, pays the highest respect to a judgment of the Supreme Court. To him, such a judgment lays down the law as authoritatively as an enactment by the legislature itself. The decision in *Thambiayah's case* was prominently placed before the voters.

It was against this background that the majority of the voters of this electorate voted for the respondent.

It is my very firm view that before a voter can be said to have cast away his vote, the Court must be convinced, that in voting for a particular candidate, he was being wilfully perverse. Halsbury (Simond's Edition) Volume 14 at page 305, says :

> "Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and for so deciding a scrutiny is not necessary. The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of *wilful perverseness* on the part of the electors voting for the disqualified person."

The facts must clearly show that the voter who had knowledge of an undoubted disqualification, acted obstinately or in wilful defiance of a warning that a reasonable person should have heeded. The knowledge may be imputed when the disqualification is published, or is notorious ; but there should be no doubt about the disqualification itself. The possibility that the law as interpreted by the Supreme Court may be dissented from, should not deter an elector from casting his vote for the candidate of his choice.

Whether a voter can be said to have cast away his vote or not, must depend on the facts of each case, and the facts here are very different from those in any other decided case.

In the old case of *Queen v. The Mayor, Tewkesubury*,[1] at an election of Town Councillors, there were four vacancies and five candidates. B., one of the four who had a majority of votes was the Mayor and acted as Returning Officer and was, therefore, incapable of being elected. It was held that mere knowledge on the part of the electors who voted for B that he was the Mayor and Returning Officer did not amount to knowledge that he was disqualified in point of law as a candidate. Blackburn, J. said :

> " Voting for a dead man or for the man in the moon are expressions showing that in order to make the vote a nullity, there must be wilful persistence against actual knowledge. But it does not seem to me consistent with either justice or common sense, or common law, to say that because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance, and that, therefore, their votes are to be considered as mere nullities. "

I am aware that this decision has not been followed by distinguished Judges in later cases ; for example, in *Drinkwater v. Deankin*. But with the utmost respect I think that the words of Blackburn, J., quoted above are applicable to the facts of this case.

In *Drinkwater v. Deakin*,[2] one of the candidates, Colonel Deakin, on the day of nomination, permitted his tenants to kill rabbits on his estate for the purpose of influencing their votes. He won the election and was unseated on a petition against him. But the seat was not given to the next candidate (Drinkwater) as the incapacity had not been ascertained at the time of the election. This case is direct authority for the proposition that bribing by a candidate at an election, though it renders his election void if he be found guilty on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with knowledge of it were thrown away. No disqualification arises in that sense of the term until after the candidate has been found guilty of bribery.

Lord Coleridge, C.J. referring to the votes cast for Colonel Deakin said :

> " Invalid upon proof of his bribery, for the purpose of seating him they are ; thrown away for the purpose of seating his opponent in my opinion, they are not. "

In the course of the argument in that case, Coleridge, C.J. also said :

> " In the *Clitheroe case* the committee made a special report on this subject, pointing out the unsatisfactory state of the law and the conflicting nature of the authorities. They elected to follow the cases which point to the conclusion that to give effect to the notice, *the*

[1] *(1867) 3 Q. B. D. 629.* [2] *(1961) 3 A. E. R. 375.*

disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person. I believe that view has ever since been followed . . . "

He also said :

" Under the same principle may be classed cases where the disqualification was infancy such as was *Claridge v. Evelyn,* a want of estate as in the Belfast case, the Tavistock case and some others. The cases of a woman, of an alien under the old law, of a convicted felon stand upon the same footing. In all these cases something is wanting in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependent on argument or decision, but which the law insists shall exist in every one who puts himself forward as a candidate. "

In *Beresford Hope v. Lady Sandhurst*[1] the voters cast their votes for a woman, and a woman was not qualified to seek election according to the law as it stood then. She was unseated and the seat given to the next candidate. Stephen J. said :

" In the first place it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shown to our satisfaction that the question whether as a woman, she was incapacitated from election was a subject of common public discussion at the time and place of her election. It was not proved specifically that notice was given to the individual voters. We think, however, that it must be taken that the fact which, if we are right, constituted the disqualification was known to all, and that the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification. The question whether in such a case the voters voted at their peril or whether there should be a new election is not altogether clear. "

He then went on to examine the case of *Gosling v. Veley,*[2] and quoted with approval, the following dicta in that case :

" But if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given; no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of Mayor or Burgess in Parliament, his vote would be thrown away : there the fact would be notorious and every man would be presumed to know the law upon that fact. "

In *Re Bristol South-East Parliamentary Elections*[3] votes cast for a peer were held to have been thrown away.

[1] *(1889) 23 Q. B. D. 84.* [2] *(1847) 7 Q. B. 406.*
[3] *(1961) 3 A. E. R. 354.*

It seems to me that in the last two cases referred to above, there was no real doubt regarding the disqualification itself, but the voters merely joined their candidate in demonstrating their disapproval of an existing state of affairs.

The question as to when votes should be looked upon as cast away must, as I said, depend on the facts of each case. Different views have sometimes been expressed on somewhat similar facts.—but I think that the law has been fairly summarized by Parker in Election Agent and Returning Officer, 6th Edition, at page 156 :

"If the alleged disqualification be disputed or denied, that circumstance has in one case (Leominster, Rog. 1202) apparently been treated as immaterial, but in another (2nd Cheltenham, 1 P.R. & D. 238) as of great importance. So, where the disqualification is not clear, but doubtful, and depends on argument and decision as to the effect of complicated facts and legal inferences, the decisions of the old election committees are conflicting. Some committees held that if the disqualification did in fact exist at the election, the decision establishing the disqualification related back to the time of election, and nullified the votes given thereat after notice of the disqualification, on the ground that every man is bound to know the law ; and, therefore, when apprised by notice of the fact creating the disqualification of the candidate for whom he voted, his vote was given at his own risk, and if he were wrong in his construction of the law, he could not plead ignorance or mistake and upon these grounds they seated the candidate next on the poll. Other committees observed the distinction, and where the alleged disqualification was disputed, and was not clear but doubtful, they, while unseating the disqualified candidate, yet declined to give the seat to the qualified candidate. The law in such cases has not yet been declared by the election judges, but it must be remembered that the words in the 2nd Clitheroe case, "that the disqualification must be founded on some positive and definite fact existing and established at the time of polling", have been approved and followed in *Drinkwater v. Deakin* ; and that the L.C.J., in that case seems to doubt whether votes are thrown away where the disqualification depends on an uncertain or obscure legal question or that in such a case a voter gives his vote at his own risk and on his own responsibility. It has also been said that to hold the contrary, is to place each individual elector in a position of hardship and difficulty, if upon the mere assertion of an opposing party that a disqualification exists, the truth or falsehood of which the voter may have no means of ascertaining, he is to exercise his franchise at the risk of his vote being thrown away, if on subsequent investigation the existence of that disqualification should be established. It is submitted,

therefore, that a disqualification depending upon a novel question, or one of doubt or difficulty, or upon legal argument and decision upon complicated facts and inferences does not cause votes to be so thrown away as to seat the opponent on a minority of votes."

To my mind a voter who casts his vote for a particular candidate, on the faith of a judgment of the Supreme Court, is in a different position from one who does so on his own interpretation of the law, or the interpretation placed upon it by his lawyers.

At the time the voters went to the poll, *Thambiayah's case* referred to above laid down the law on this point.

After much legal argument and discussion, we have taken a different view. But, in my opinion, that is not a ground for holding that the majority of the voters of Bandaragama threw away their votes and that this electorate should, therefore, be represented in Parliament, not in accordance with the will of the majority but against it. Such an unwholesome result should follow, only if it is clear that the voters have acted perversely or in a spirit of defiance, where there is no real doubt about the disqualification itself.

I would, therefore, affirm the decision of the learned trial Judge on this point as well. I agree with his conclusion that the candidate who came second is not entitled to this seat.

Before I leave this judgment there is one other matter to which I would like to refer. Learned Counsel for the respondent submitted that when the seat was claimed for the candidate who came second the other candidate who came third should also have been made a respondent to these proceedings, and that the failure to do so should result in the petitioner's claim to seat the second candidate being dismissed.

Under rule 8 in the third schedule to Chapter 381 only a respondent in a petition may lead evidence to prove that the election of such a person was undue, and in such a case he should file his list of objections six days before the trial. The best way of affording a candidate an opportunity to do this is to make him a respondent to the petition. He may perhaps make an application to be joined as a respondent, but the rules are silent on this point, and in the absence of an express provision, such an application may not be favourably considered. But that procedure may have been attempted if the third candidate in this case had really something to say, and I do not think that in the circumstances of this case the petitioner's claim to seat the second candidate should be denied on this ground alone. But I would like to state that when a seat is claimed for a candidate by an order of a Court against the will of the majority of voters as reflected in the ballot, the

conscience of the Court must be satisfied that such a candidate is himself innocent of any election offence. It is, therefore, very desirable that all the candidates should be made parties to the petition.

The respondent could have filed his list of objections, and Counsel for him urged that he be now given an opportunity of doing so, as there had been some misunderstanding at the trial.

The learned Judge and Counsel for the parties appear to have had in mind the right of the respondent to show that the second candidate was himself disqualified, but they appear to have thought that this need be done only if the Court was of the view that the second candidate was entitled to claim the seat. The proceedings show that there had been an agreement, that the two questions, whether the respondent should be unseated, and if so, whether the second candidate is entitled to claim the seat, should be decided first, on affidavits filed by parties without evidence of witnesses being led. It was only if the second candidate was held to be entitled to the seat that the question whether or not he was disqualified, was to be investigated. *After the trial had commenced*, the learned Judge had remarked to Counsel for the petitioners,

> " That is why I indicated to you earlier if, for instance, I am inclined to agree with the submissions for the petitioners with regard to the second matter, then the necessity for evidence of corrupt practice can be led by the respondent. "

And, again, thereafter,

> " I understood in view of your second submission that you are entitled to the seat, although you were the unsuccessful candidate, the other side is entitled to maintain that you are disqualified by reason of corrupt practice ".

But, the failure to file a list of objections in accordance with rule 8 is an omission by the respondent, and I suppose he must suffer the consequences of his default even if there had been some misunderstanding.

But, as I am of the view that the second candidate should not be declared entitled to the seat, it is unnecessary to discuss this matter any further.

I would affirm the decision of the learned trial Judge on both points, and as each party has succeeded in part, I would make no order as to costs.

WEERAMANTRY, J.—I agree with My Lord the Chief Justice.

Appeal dismissed.