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

A. W. A. K. PEIRIS and another, Appellants, *and*
K. D. DAVID PERERA, Respondent

Election Petition Appeal No. 2 of 1968—Bandarayama (Electoral District No. 27)

Parliamentary election—Disqualification of one of the candidates—Fact of disqualification well known to the entire electorate—Dispute or uncertainty in the minds of the voters as to the disqualifying legal effect of the fact grounding the disqualification—Votes given to the disqualified candidate—Whether they can be regarded as cast away—Applicability of English law on the subject—Claim of seat for the candidate who was placed second at the poll—Whether all the other candidates should be made respondents to the election petition—Whether there should be a scrutiny of votes—Purpose of scrutiny of votes—Right of unseated candidate to file recriminatory objections against the candidate for whom the seat is claimed—Abandonment or waiver thereof—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 48, 58 (1) (d), 80, 81, 82C (2) (b). 82D (2) (a), 82D (2) (b) (ii), 85, 86 (2)—Election Petition Rules 7, 8, 10, 15.

The respondent had contested a seat in a Parliamentary election earlier and, in consequence of a report sent by the Supreme Court to the Governor-General under section 82 C (2) (b) of the Parliamentary Elections Order in Council, he became disqualified for a period of seven years for being elected a Member of Parliament. Nevertheless he contested the same seat again at the bye-election held on 23rd September 1967.

At the bye-election, the decision of the Supreme Court resulting in the disqualification of the respondent was made known to the whole electorate and was a matter of public notoriety in the constituency, but it was claimed on the respondent's behalf before the electorate that the decision was constitutionally invalid in law in view of a previous seemingly conflicting decision of the Supreme Court in a different election petition appeal, viz. *Thambiayah v. Kulasingham* (50 N. L. R. 25).

There were, apart from the respondent, two other candidates at the bye-election. The respondent secured the largest number of votes and was declared duly elected. In an election petition filed against him, his election was declared void. The appeal filed by him against the decision of the Election Judge was dismissed—*vide* page 217 *et seq.* (*supra*). In the election petition the petitioners had also asked for a determination that the candidate who secured the second highest number of votes was duly elected and ought to be returned. When their claim was dismissed by the Election Judge, they lodged the present appeal.

Held, by H. N. G. FERNANDO, C.J. and WEERAMANTRY, J. (SIRIMANE, J. dissenting), that, in a Parliamentary election, a vote cast by a voter with knowledge of the facts constituting a candidate's disqualification for election is a vote thrown away and should be treated as not cast. Therefore, inasmuch as the disqualification of the respondent was definite and certain and was known to the whole electorate prior to the date of the election, all the votes which were cast in favour of the respondent were wasted votes and the seat must be awarded, as claimed, to the candidate who was placed second at the poll. In such a case ignorance of the law does not excuse, and the existence

of any uncertainty in the minds of voters in regard to the disqualifying legal effect of the known facts grounding the disqualification is not a ground for not awarding the seat to the candidate next at the poll. The English law on this subject is applicable in Ceylon by virtue of section 86 (2), read with sections 80, 81 and 85 (1)(*f*), of the Parliamentary Elections Order in Council.

Held further, (i) by H. N. G. FERNANDO, C.J., and WEERAMANTRY, J., that the power of an Election Judge to determine that a candidate, other than the Member returned, was duly elected, may be exercised without resort to a scrutiny of votes in a case where there was either public notice to *all* the electors of the disqualification of the Member returned or where the disqualification or the facts causing it were notorious to *all* the electors. Accordingly, in the present case, where the fact of the disqualification of the Member who was returned was known not to some only of the voters but to all the voters, it was not necessary that the scrutiny of votes contemplated in sections 80 (*d*) and 85 (1) (*f*) of the Parliamentary Elections Order in Council should be actually held and that the invalid ballot papers should be physically rejected before the seat is awarded to the second candidate.

Peiris v. Samaraweera (71 N. L. R. 250) overruled in so far as it conflicts with the judgment in the present case.

(ii) by the whole Court, that it was not necessary that the third candidate should have been named as a respondent to the present election petition. Our law does not require that an election petition which claims a seat for some candidate who was not declared to be returned at the election must name as a respondent not only the Member whose return is challenged but also every other candidate who unsuccessfully contested the election.

(iii) by the whole Court, that, in view of the time limit of six days prescribed in Election Petition Rule 8, the respondent could not be given an opportunity to file belated recriminatory objections against the candidate for whom the seat was claimed.

APPEAL from a judgment of an Election Judge reported in (*1968*) *71 N. L. R. 481.* The facts are set out in the judgment of Weeramantry, J.

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-appellants.

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

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

Cur. adv. vult.

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

The judgment prepared by my brother Weeramantry in this appeal contains a full and (if I may so say with respect) admirable discussion of the principal question which arose for our decision. I can add nothing to the reasons which he has stated for the conclusion that the law in England, as decided in the cases of *Drinkwater*, *Lady Sandhurst*, and *Stansgate*, is that a vote cast by a voter with knowledge of the facts constituting a candidate's disqualification for election is a vote thrown away. If then the law in Ceylon is the same, all the votes which were cast in favour of the respondent were wasted votes, and the seat must be awarded, as claimed, to the candidate who was placed second at the poll. I need only to state some grounds for my agreement with my brother that our law on this subject is the same as that which according to his conclusions is the English law as stated in certain texts and judgments to which he refers.

Section 80 of the Parliamentary Elections Order entitles a petitioner to claim in an election petition "a declaration that any candidate was duly elected and ought to have been returned". This is the particular relief claimed by the petitioners in the present case. Section 81 provides that the Election Judge "shall determine whether the Member whose return or election is complained of, *or any other or what person, was duly returned or elected*". The words which have just been italicized confer the jurisdiction on the Judge to grant the relief of a declaration that a candidate, other than the Member returned at the poll, was duly elected. The use of the word "shall" in s. 85 requires the Judge to grant such declaration, but in of course a proper case. The Elections Order however contains no provision as to the circumstances in which the jurisdiction may or should be exercised. In the absence of express provision for this matter, I am in full agreement with my brother's opinion that s. 86 (2) compels resort to the English Law.

That consideration apart, I find much evidence in s. 85 of our Elections Order of an intention to adopt for Ceylon the principle that where there has been notoriety of positive and definite facts establishing a disqualification, a fair inference will arise of the wilful perversity of all those who voted for the disqualified candidate.

I refer in this connection to the statement in Parker (6th Edition p. 156) that the former Election Committees had held two opposing opinions: the one, that the existence of any dispute or uncertainty as to the question whether a disqualification arises in law upon known facts will be a ground for not awarding a seat to an unsuccessful candidate; the other, that despite any such dispute or uncertainty, voters who vote for a candidate with knowledge of the facts causing his disqualification will be presumed to have known the law and thus to have "thrown away" their votes. I will for convenience refer to the former as "the Tewkesbury opinion" and to the latter as "the opinion of Brett L.J.".

My brother Weeramantry's citations show quite clearly that the text of *Parker* and of the *third edition of Halsbury* state the law in terms of the Tewkesbury opinion, while *Rogers, Frazer, Schofield* and the *1st and 2nd editions of Halsbury* state the law to be as expressed in the opinion of *Brett L. J.* It thus suffices for me to consider only the statement in Frazer (2nd Edition p. 226), that a vote will be considered as lost or thrown away when it is given for a disqualified candidate —

(1) after sufficient notice of a disqualification ;

(2) knowing that the candidate is disqualified ;

(3) knowing the facts by reason of which he is disqualified ; or

(4) when the fact of the disqualification or the facts by which it is caused are notorious.

A comparison of Frazer's text with s. 82 (*f*) of the Ceylon (State Council) Elections Order of 1931 shows that the Ceylon section was in terms identical with Frazer's text, with alterations only in the order in which the 4 different grounds for striking off votes were arranged. Paragraph (*f*) of s. 85 of our present Parliamentary Elections Order is a straight copy of the former s. 82 (*f*). In these circumstances, it is reasonable to assume that, when it became necessary to enact in statutory form for Ceylon the law on this subject, resort was had to the text in Frazer, the intention being to adopt for Ceylon the law as stated in that text. Such resort was justified by the fact that the law had been similarly stated in *Rogers, Schofield* and the edition of *Halsbury* extant in 1931. In a parallel situation, it has long been accepted that the Indian Evidence Act, as also our own, was in many respects an enactment of the English Law as set out in the text of Stephen's Digest of the Law of Evidence. It thus appears that so far as we are concerned it does not matter that the opinion of *Brett L.J.* may even be wrong. That opinion, or rather *Frazer's* precise statement of it, whether right or wrong, was adopted in our Statute Law in 1931 and again in s. 85 of the present Elections Order.

I will now set out paragraph (*f*) of s. 85 :—

> " Votes given for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious."

The first ground here mentioned for striking off the vote of a voter is his *knowing that the candidate was disqualified.* Here proof is required of two matters, for a voter cannot know that a candidate is disqualified, unless he knows (*a*) some fact concerning the candidate and (*b*) that the law renders that fact a cause of disqualification. But the second ground is his " *knowing the facts causing the disqualification* " ; in this case, proof is necessary of knowledge *only* of some fact concerning the candidate, but not of knowledge of any relevant law. In any other view, the

statement in the section of the second ground is not merely tautologous, but is incorrect and positively misleading in that it wrongly omits mention of the need for proof of the voter's knowledge of the law.

The same distinction is drawn in the statement in the two last lines of paragraph (*f*). A vote for a disqualified candidate will be struck off *when the disqualification was notorious* OR *when the facts causing the disqualification were notorious.* In the second case here contemplated, notoriety of the *facts* causing disqualification is by itself a ground for striking off votes, without the need for notoriety as to the *law* imposing the disqualification. Notoriety of the *law* would be required only if a petitioner relies on the first of the grounds for striking off which are stated in the last two lines of paragraph (*f*).

It thus becomes clear that our law relating to the striking off of votes at a scrutiny leaves no room for reliance on the *Tewkesbury* opinion that the maxim *ignorantia juris neminem excusat* has no application in election cases.

I shall be deciding later in this judgment that s. 85 does not directly apply in the present case, because a scrutiny is not here required. But the point of importance is that when a scrutiny is held, paragraph (*f*) of s. 85 requires that a vote given for a disqualified candidate *shall be struck off* if there is established any one of the grounds upon which, according to *Frazer's* text, the vote must be regarded as having been " thrown away ". Since there has been in s. 85 a clear adoption of the opinion of Brett L.J. for a case where a scrutiny is actually necessary, it is unreasonable to imply any intention in our Elections Order to exclude the application of that opinion in a case where (as I shall show later) invalid votes can be identified and rejected without resort to a scrutiny.

Once it is established that votes have been cast for a disqualified candidate with knowledge of the facts causing the disqualification, the question whether the votes are to be regarded as thrown away arises immediately for decision by the Election Judge; and it would be illogical that the proper decision should depend on whether the further step of a scrutiny is or is not necessary to make a decision effective. Thus the express provision in s. 85 (*f*) carries the necessary implication that the question whether votes cast for a disqualified candidate were thrown away must in all cases be answered in accordance with the opinion of Brett L.J. The admissions in the respondent's affidavit establish beyond doubt the notoriety of the facts which caused his disqualification, and upon those facts I must hold in accordance with that opinion that the claim of the seat for the second candidate has been established.

Learned Counsel for the respondent has argued that the election petition filed in this case is defective in respect of the claim for a declaration that the candidate, who received the second largest number of votes, was duly elected ; the defect alleged is that the third candidate was not named as a respondent to the petition. Counsel referred in this

connection to Rule 8 of the Election Petition Rules which are set out in the Third Schedule to the Elections Order in Council (L. E. 1956, vol. xi, p. 822), which runs as follows :

> " The respondent in a petition complaining of an undue return and claiming the seat for some person may lead evidence to prove that the election of such person was undue, and in such case such respondent shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely, and the Registrar shall allow inspection of office copies of such lists to all parties concerned ; and no evidence shall be given by a respondent of any objection to the election not specified in the list, except by leave of the Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

This Rule clearly contemplates that, in a case like the present one, the respondent to a petition has an opportunity of showing that, even if his own election is void on some ground, the Judge must not declare to be duly elected some other person for whom the seat is claimed in the petition, because the election of that person is (in the words of Rule 8) " undue ".

Despite an argument of long duration, Counsel for the respondent did not (nor did we on the Bench) consider what is meant by the expression " election was undue " which occurs in Rule 8 and in s. 80 of the Order in Council. But I can assume for present purposes that Rule 8 permits the respondent in a case like the present one to prove that the person for whom the seat is claimed was himself disqualified for election to Parliament, or that he himself or an agent of his had been guilty of a corrupt or illegal practice at the election, or to prove against such a person any other matter which can render an election void. And I agree that if any such matter is proved by the respondent, the election Judge will not declare such person to be elected. Counsel's point is that, where there have been three or more candidates at an election, all the candidates should have the opportunity to prove any such matter as against a person for whom the seat is claimed in an election petition, and that this opportunity has in law to be afforded by the joinder of all such candidates as respondents to the petition.

Counsel urged some relevant considerations in support of this argument. Where there have been three or more candidates at an election, each of the unsuccessful candidates may be interested to oppose the claim of the seat for a candidate other than the one who received a majority of votes at the poll, and may be able to establish valid grounds of objection to the claim being allowed. But such objections can be made under Rule 8 only by " the respondent ". Therefore, it was argued, Rule 8 must be construed to mean that, in the case of a petition to which the Rule applies, every candidate must be joined as a respondent.

While conceding that provision in the Elections Order or the Rules for such joinder would have been perfectly reasonable and appropriate, I am constrained to the conclusion that the law as it stands does not require such joinder. Neither the Elections Order nor the Rules contain express provision as to the persons who should or may be made respondents to an election petition. But examination of those Rules which refer to "the respondent" throws some light on the matter of joinder.

Rule 10 provides that *any person returned as a Member* may, after he is returned, leave at the office of the Registrar a writing, appointing a Proctor to act as his agent *in case a petition is filed against him*, or stating his intention to act for himself in such a petition, and giving the address (of the agent or of himself) at which notices relating to such a petition may be left. The Rule continues to provide that if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the Registrar's office.

Rule 15 provides for the service of an election petition by the petitioner on *the respondent*, the manner of service being—

(*a*) by delivery of the notice to the agent appointed under Rule 10 ; or

(*b*) by posting the notice in a registered letter to the address given under Rule 10 ; or

(*c*) if no agent has been appointed nor address given under Rule 10, by publication in the Gazette of a notice stating that the petition has been presented and that a copy of it is available at the office of the Registrar.

It will be seen, when these two Rules are read together, that they require notice to be given only *to the Member against whom a petition is filed*. The object of Rule 10 is to enable a petitioner to ascertain the person to whom (i.e., the agent) and the address at which notice of his petition (and subsequent notices) may be served. But it is only the identity of the agent *of the Member returned*, and the address of such agent, that is thus ascertainable ; and if no writing and address are left at the Registrar's office, the alternative of leaving the notice at the Registrar's office will operate as service *on the Member*. The clear implication is that "the respondent" referred to in Rule 15 is the Member against whom a petition is filed. Ordinarily therefore, there would only be that one Member as respondent to a petition, although there may be an exceptional case in relation to an election for a multiple-member constituency. In that case each person who is returned as a member may file the writing under Rule 10, and if a petition challenges the election of two or three such Members, then the rule of construction that the singular includes the plural will require that notice must be served on both or all such Members, as respondents. But even in such a case, the writing left by a Member is intended to be operative in relation to a petition *against him* ; he need not be a respondent to a petition which only challenges the return of some other person who was

returned at the same election. Indeed the researches of the respondent's Counsel in the present case have brought support for my statement in the preceding sentence. In the case of *Line v. Warren*[1] it was held that in a petition challenging the election of 3 Members, where 4 had been returned, it was not necessary to join the Member whose election was not being challenged.

Rules 10 and 15 deal with a matter of vital importance, equivalent to the matter of the service of summons on the defendant in a civil action, and default of due service of notice of a petition will result in dismissal of the petition. The Rules themselves strongly evidence the intention that it is the Member whose return is challenged, and no other person, who must necessarily be the respondent named in an election petition. That being so, the decision of a Court, requiring that the third candidate should have been made a respondent to the present petition, would amount not to the application or construction of the law, but to the making of law. Since neither the Order in Council nor the Rules, as actually enacted, impose such a requirement either expressly or by implication, it would be unjust for this Court to reject the present petitioner's claim for the seat on the ground that such a requirement, however reasonable, must be read into the law.

The relevant Rules in India expressly provided at one time that all persons who had been candidates must be joined as respondents to an election petition, and the Rules were later amended to require that such candidates must be so joined only in a petition which claims the seat. The existence in India of express statutory provision imposing such a requirement confirms my opinion that it is for the Legislature, and not for the Courts, to determine whether or not all unsuccessful candidates must be named respondents in such a petition.

Counsel for the respondent in this case was unable to cite any decision of an English Court in support of his objection on this ground of non-joinder. The English Petition Rules are substantially the same as the Rules applicable in Ceylon. That being so, resort to s. 86 (2) of our Elections Order is of no avail to the respondent in connection with the argument now under consideration.

I hold for these reasons that our law does not require that an election petition, which claims a seat for some candidate who was not declared to be returned at the election, must name as respondent every other candidate who unsuccessfully contested the election.

[1] *14 Q. B. D. 73.*

The arguments presented in this case have shown the need for Parliament to consider whether or not it is expedient to amend the existing law as construed in this judgment. Upon such consideration Parliament may decide—

(1) that the law as now construed needs no amendment ; or

(2) that every election petition which claims a seat for one unsuccessful candidate must name as respondent every other unsuccessful candidate ; or

(3) that in the case of any such petition any unsuccessful candidate has a right to be joined as a respondent if he seeks to intervene.

I express the opinion, for what it may be worth, that the third of these alternative decisions would be the most satisfactory. I state also the opinion that, despite the absence of express provision in the Election Order, it would be open to an Election Judge to permit the intervention of an unsuccessful candidate in a petition which claims a seat for another unsuccessful candidate.

The prayer in the petition filed in this case asked for a determination—

(*c*) that the petitioners are entitled to a scrutiny in order to strike off all votes in favour of the respondent ; and

(*d*) that the said Mr. George Kotalawala (i.e. the candidate who secured the second highest number of votes) was duly elected and ought to be returned.

It was argued on behalf of the respondent that a scrutiny is a condition precedent to a declaration by an Election Judge that any person, other than the Member actually returned at the poll, was duly elected. The argument is based on a construction of s. 80 of the Elections Order which declares (*inter alia*) that the following reliefs may be claimed in an election petition :—

" (*c*) a declaration that any candidate was duly elected and ought to have been returned ;

(*d*) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny."

Paragraph (*d*), it was argued, applies in every case where a seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, and peremptorily requires that a scrutiny must be held before a seat can be awarded on this ground. Counsel in this connection relied also on Rule 7 of the Election Petition Rules :

" When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioners and respondent, as the case may be, a

list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Registrar shall allow inspection and office copies of such lists to all parties concerned ; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

It was urged that this Rule applies in every case where a seat is claimed on the ground under consideration ; that therefore the petitioners in the present case should have furnished a list of the votes to which they intended to object ; that such objections could only be determined and disposed of at a scrutiny ; and that since the petitioners failed to furnish the list of objections required by this Rule the seat cannot be awarded to the candidate for whom they claimed it.

I note firstly that although paragraph (*d*) of s. 80 refers to a scrutiny as a relief which may be claimed in a petition, the substantial relief which can be awarded, even after a scrutiny, is specified in paragraph (*c*), namely " a declaration that any person was duly elected and ought to have been returned ". Similarly the reliefs which may be ultimately granted by the determination of the Election Judge under s. 81 are those specified in paragraphs (*a*), (*b*) and (*c*) of s. 80, and the ultimate determination will say nothing about a scrutiny. Section 85 contains a list specifying which votes shall be struck off at a scrutiny. Let me first set out paragraphs (*a*) to (*e*) of s. 85 :—

(*a*) the vote of any person whose name was not on the register of electors assigned to the polling station at which the vote was recorded or who has not been authorized to vote at such station under Section 39 ;

(*b*) the vote of any person whose vote was procured by bribery, treating, or undue influence ;

(*c*) the vote of any person who committed or procured the commission of personation at the election ;

(*d*) where the election was a general election, the vote of any person proved to have voted at such general election in more than one electoral district ;

(*e*) the vote of any person, who, by reason of a conviction of a corrupt or illegal practice or by reason of the report of an Election Judge, or by reason of his conviction of an offence under section 52 or section 53 of this Order, or by reason of the operation of section 4A (or section 5 B) of this Order, was incapable of voting at the election.

In each of these cases, a party has first to prove that a particular person voted at the election, and secondly to prove some ground affecting that person which renders his vote invalid, i.e., that his name was not on

the register, that his vote was procured by bribery, that he committed personation at the election, that he was disqualified to vote, that he voted twice at the same General Election. What has to be emphasised in the present context is that the invalidity of the vote of a particular voter must be established *before* an Election Judge orders a scrutiny. Thereafter, the scrutiny is held only in order to trace the ballot paper, and then to strike off that paper. At this stage those present at the conduct of the scrutiny can become aware of how the particular voter had voted. But this breach of the secrecy of the ballot is allowed, as I have just stated, only because the invalidity of the vote has been antecedently established.

I pass now to paragraph (*f*) of s. 85 which provides for the striking off at a scrutiny of votes given for a disqualified candidate by a voter—

(i) knowing that the candidate was disqualified ; or

(ii) knowing the facts causing the disqualification ; or

(iii) after sufficient public notice of the disqualification ; or

(iv) when the disqualification or the facts causing it were notorious.

In cases (i) and (ii), it is quite clear that there has first to be proof of a particular voter's knowledge, followed by a decision by the Election Judge that his vote was invalid. A scrutiny must thereafter be held in order to trace his ballot paper and then to strike it off.

An examination of paragraphs (*a*) to (*e*) of s. 85, and of the first part of paragraph (*f*), thus reveals the precise purpose of holding a scrutiny which is simply to trace and strike off the votes cast by persons whose votes have previously been held to be invalid. It is reasonable to think therefore that in a case falling within the second part of paragraph (*f*) as well, a scrutiny will be ordered only if it has been antecedently established that the votes cast *by some voters* in favour of a disqualified candidate were invalid on one of the grounds which I have set out at (iii) and (iv) above, and that the object of the scrutiny is to trace the ballot papers *of those voters* in order to strike off their votes.

The argument now under consideration is that, even in a case where *all the votes cast in favour of a disqualified candidate* are held invalid because of the notoriety to all the electors of the fact of disqualification, the seat cannot be awarded to the second candidate unless a scrutiny is actually held and unless the invalid ballot papers are physically rejected.

Let me for the moment assume that a scrutiny had been held in the present case, and let me consider what would have been done at the scrutiny. As already pointed out, the order for a scrutiny would be preceded by a decision that certain votes were invalid, and the votes affected would be *all the votes cast in favour of the disqualified candidate.* Hence the scrutiny would have involved inspection of all the 42,423

ballot papers which are known to have been cast at the election, and the separation of all those found on such inspection to have been cast in favour of the respondent. These separated ballot papers would then have been struck off, and a declaration made that the candidate having the majority of the remaining votes was duly elected. In brief then the scrutiny would have consisted of a count of the total number of votes which were cast in favour of the respondent, in order to strike all of them off, and thereafter of a count of the number of votes cast in favour of the other two candidates. But such a count had already been made after the poll as required by s. 48. The scrutiny would therefore have served merely to establish figures the correctness of which had already been established. I cannot assign to the Legislature an intention to require that so needless a proceeding should have taken place. On the contrary, I much prefer to assign to the Legislature an intention that a scrutiny must if possible be avoided, in order that any risk of a breach of the secrecy of the ballot be also avoided.

Let me also consider the applicability of Rule 7 in the present context. If compliance with that Rule be necessary, the petitioners in this case should have furnished a " list of the votes intended to be objected to, and of the heads of objection to each such vote ". No difficulty would have arisen with respect to the " heads of objection ", for the ground taken against all the challenged votes would be the notoriety of the fact of disqualification. But how could the petitioners have drawn up a list of the " votes intended to be objected to "? Their objection would be to all the votes cast in favour of the respondent, but they could not have, and indeed should not have, knowledge as to how any voters had in fact voted. Thus they would not be able to furnish a list of votes in compliance with Rule 7. The maxim *lex non cogit ad impossibilia* therefore supports the construction that Rule 7 does not apply in a case where the objection is to all the votes cast in favour of the Member returned on the ground that the facts causing his disqualification were notorious.

I have already stated that an order for a scrutiny will only be made if the invalidity of some vote or votes is first established. The list which Rule 7 requires is intended to give notice to a respondent of the votes which the petitioner intends to challenge as invalid. It will be seen therefore that the Rule always applies in cases in which a petitioner's ultimate purpose is to have votes struck off on a scrutiny. Thus the construction I have reached, that Rule 7 does not apply in the present context, shows at least indirectly that no scrutiny is necessary in this context.

I must not be understood to mean that a scrutiny need never be held in a case where the matters stated in paragraphs (iii) or (iv) of my explanation of s. 85 (*f*) are established. My brother Weeramantry refers to the case of *Gosling v. Veley* [1] where notice of a disqualification was given only after some voters had voted. There was also envisaged during the

[1] *7 Q. B. 406.*

argument the possibility that notice of a disqualification is given, or a disqualification is notorious, only to voters in some part of an electorate. In such cases, there would be a decision by an Election Judge declaring that some only, but not all, of the votes cast in favour of a disqualified candidate are invalid, and defining with some measure of precision the means of ascertaining which particular ballot papers are to be struck off as invalid. In such cases, a scrutiny will be necessary in order to ascertain definitely what are the invalid ballot papers, and thereafter to strike them out and to re-assess the result of the poll. Thus the construction, that a scrutiny is not necessary in the instant case, does not imply that the provisions of paragraph (*f*) of s. 85 are partly nugatory.

Counsel's contention on this matter was quite independent of the fact that there were three candidates in this case. His contention is that a scrutiny is necessary even when there are only two candidates and there has been public notice or notoriety of the disqualification of the one who was returned at the poll. That contention is negatived in the *Lady Sandhurst case*[1] and the *Standgate case*[2], both of which are sufficiently discussed in the judgment of my brother Weeramantry, and in each of which the seat was awarded without a scrutiny to the one and only unsuccessful candidate.

I hold for these reasons that the power of an Election Judge to determine that a candidate, other than the Member returned, was duly elected, may be exercised without resort to a scrutiny in a case where there was either public notice to all the electors of the disqualification of the Member returned or where the disqualification or the facts causing it were notorious to all the electors.

My conclusion, that a scrutiny is not necessary in a case like the present one has been reached mainly by the consideration of our Elections Order. I need only to state in addition that it is supported by statements to the same effect by text-writers in England (14, Halsbury, p. 305 ; Parker, 1959, p. 157).

The learned Election Judge who tried the second Welimada Petition (*E. S. Peiris & another v. W. P. Sumeraweera*[3]) has held in a judgment delivered on 6th October 1967 that under our law a scrutiny must be held before a seat can be awarded to an unsuccessful candidate. That conclusion was reached after full consideration of s. 85 and was based largely on the opinion that this section alone authorises the striking off of votes. I agree with that opinion. But the judgment does not examine the question why a scrutiny is held ; nor naturally does it take into account the answer to that question, which as I have tried to show is to trace and reject ballot papers which an Election Judge has previously held to be invalid. Had the purpose of making a scrutiny been considered, it may have become apparent that in that case also there may have been no need to identify and reject ballot papers, because the Court already knew

[1] *23 Q. B. D. 79.* [2] *(1961) 3 A. E. R. 354.*

[3] *(1967) 71 N. L. R. 250.*

that all the votes cast for the disqualified candidate had been thrown away. The decision in that case must be regarded as overruled in so far as it conflicts with the present judgment.

Counsel for the respondent urged that in the event of this appeal being decided against him, the respondent should now have an opportunity to file recriminatory objections against the candidate for whom the seat has been claimed in this petition. Rule 8 of the Election Petition Rules provides that such objections should be filed six days before the day appointed for the trial of the petition, but the respondent failed to file any such objections even on the day of trial. I do not find in the record of the proceedings any justification for the explanation now given that there was any understanding between Counsel or on the part of the trial Judge that the filing of these objections may be delayed until the Judge had decided the question whether the petitioners were in law entitled to claim the seat for the unsuccessful candidate. The Judge on 21st February 1968 stated that the necessity *to lead evidence* against the unsuccessful candidate would arise only if this question is answered in favour of the petitioner. Had any suggestion been made in Court of the possibility of filing recriminatory objections after the time fixed in Rule 8, I am very nearly certain that the learned Judge would have rejected it because he had no power to approve such a suggestion. Nor is it reasonable to impute to the petitioners' Counsel any agreement to allow to the respondent unlimited time to file the objections. The petitioners' Counsel had nothing to gain by an agreement so detrimental to the interests of his clients. I see no reason for granting the opportunity now sought.

For the reasons which have been stated by my brother Weeramantry and in this judgment, the finding of the learned Election Judge that the seat cannot be claimed in this case for an unsuccessful candidate has to be set aside, and the appeal of the petitioners has to be allowed.

The judgment of this Court delivered this day in Election Appeal No. 3 of 1968 affirms the determination of the learned Election Judge that the election of the respondent to the present appeal was void.

It is now further determined that Mr. George Kotelawala, the candidate who received the second largest number of votes cast at the Election was duly elected the member for Electoral District No. 27—Bandaragama, at the Election held on 23rd September 1967.

The order of the learned Election Judge that each party to the Election petition will bear his own costs is set aside. The petitioners should, according to our conclusions, have succeeded on both the claims made in their petitions, and they will accordingly be entitled to the costs of trial before the Election Judge. But each party will bear his own costs of the present appeal.

SIRIMANE, J.—

[His Lordship's dissenting judgment in this appeal, beginning with the words " In the second appeal ", appears at pp. 225 *et seq.* (*supra*).]

WEERAMANTRY, J.—

A bye-election was held on 23rd September 1967 in respect of the Bandaragama seat in the House of Representatives. At this bye-election there were three candidates—the respondent to this appeal, one George Kotelawala and one Eustace Bandara. The respondent secured the largest number of votes and was declared the duly elected Member for Bandaragama.

The respondent had earlier contested the same seat and had been unseated upon an election petition presented against him alleging *inter alia* that he or his agent or other persons acting on his behalf or with his knowledge and consent had published false statements of fact in relation to the personal character or conduct of a candidate at that election and as such was guilty of a corrupt practice under section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council. The Election Judge who heard that petition dismissed it, but an appeal lodged against that decision to the Supreme Court was successful and the three Judges hearing the appeal held the election of the respondent to be void on the ground of corrupt practice committed by the respondent's agent, one Jayatileke. The same three Judges after giving Jayatileke an opportunity to show cause why he should not be reported to his Excellency, issued a report to the Governor-General under section 82 C (2) (*b*). This report was published in Government Gazette No. 14,755/2 of 2nd July 1967 in terms of Section 82 D (2) (*a*).

The consequence of the report and its publication in the Gazette was that the respondent became, in terms of section 82D (2) (*b*) (ii), subject to the incapacities prescribed for those convicted of corrupt practice and the respondent consequently became incapable for a period of seven years of being registered as an elector or of voting at an election or of being elected or appointed a Member of Parliament.

It was after his disqualification that the respondent contested the Bandaragama seat at the bye-election held on 23rd September 1967. His right to be declared elected was challenged by the petitioners-appellants on the ground that by reason of the report as aforesaid to His Excellency, the respondent had become incapable of being elected a member of Parliament and that by reason of his offering himself as a candidate, the electors were prevented from electing a candidate qualified to be elected.

In the same petition the petitioners claimed that George Kotelawala, the candidate placed second at the election, had the largest number of lawful votes and as such was duly elected and ought to have been returned.

The respondent's position was that the provision in the Parliamentary Elections (Amendment) Act No. 19 of 1948 relating to a report by the Supreme Court upon an appeal, so far as it related to a finding that a

corrupt or illegal practice had been committed, was not duly passed by Parliament. This position was taken up in reliance on certain observations of Wijeyewardene, A.C.J. in *Thambiayah v. Kulasingham.*[1]

The learned Election Judge in a most comprehensive judgment has rejected this contention on the ground that the observations of Wijeyewardene, A.C.J. were made obiter and the provision referred to was valid. The election of the respondent to this seat was therefore declared void. The learned Election Judge refused however to accede to the petitioners' claim that the seat should be awarded to the candidate placed second at the poll.

There has been an appeal to this Court by the respondent against the determination by the Election Judge that the election was void. That appeal, Election Appeal No. 3 of 1968, has been decided against the respondent. In that appeal I have signified my agreement with the learned trial judge's findings and with the view of my Lord the Chief Justice and my brother Sirimane that the appeal should be dismissed.

The appeal we are now considering, Appeal No. 2 of 1968, is an appeal by the petitioners against the second conclusion of the learned Election Judge, namely, that the seat ought not to be awarded to the unsuccessful candidate.

Before I proceed to consider the main question to be decided by us on this appeal and to set out my reasons for agreeing with my Lord the Chief Justice that this appeal should be allowed, I wish also to signify my agreement with the views of my Lord in regard to certain preliminary matters raised by the respondent—the contentions that the claim of a seat for the unsuccessful candidate must in every case be associated with a request for a scrutiny and that a claim on behalf of the unsuccessful candidate cannot be maintained without a joinder of the third candidate as a respondent to the petition of the petitioner, so as to enable such other candidate to object to such a claim. Associated with this latter contention was the submission that the proceedings before the learned Election Judge took a course in which the respondent was released from the requirement of filing a recriminatory petition six days prior to the day appointed for trial. It was submitted therefore that any award of the seat to the second candidate should, despite the respondent's failure to file a recriminatory petition, be made only after the respondent is given an opportunity to file objections to such election and lead evidence in support of such objections.

I do not need to deal in detail with these submissions except to observe that on the question of scrutiny, it seems clear upon a reading of section 80, that the provisions of section 80 (*d*) do not afford a relief in themselves, but only a means towards obtaining relief, for a scrutiny by itself, without

[1] *(1918) 50 N. L. R. 25.*

more, gives no redress at all. The eventual relief sought in such a case must therefore be found in one of the other sub-heads of section 80, and the sub-head under which such relief most readily finds a place is section 80 (*c*). It follows therefore that a claim to have the seat for an unsuccessful candidate is not necessarily bound up with the requirement of a scrutiny, and that a scrutiny is not a pre-requisite to every claim for a seat. Section 85 (1) itemises the votes that may be struck off upon a scrutiny but it does not follow from this provision that it is only upon a scrutiny that votes may be regarded as thrown away. With much respect I therefore find myself unable to subscribe to the view expressed in *Peiris v. Samaraweera* [1] that scrutiny is in all cases a necessary pre-requisite to a claim that the seat be awarded to the unsuccessful candidate. It has been stated in that judgment, as a necessary corollary to the view therein expressed regarding scrutiny, that our law does not recognise the concept of votes given to a disqualified candidate being considered cast away. I would respectfully dissent from this view as well, for the reason that it follows upon the incorrect premise to which I have already referred.

On the question of joinder of the third candidate, there is no rule of our law that other candidates should be joined, although in certain other jurisdictions, as for example in India, there would appear to be such a requirement when the seat is claimed for an unsuccessful candidate. In the absence of any express provision to such effect under our law it would not, for the reason stated by My Lord, be correct to dismiss a claim for the seat on account of such non-joinder, having regard in particular to the possibility always open to such other candidate to apply that he be made a party to the proceedings.

It suffices to observe on the question of an abandonment or waiver of the imperative requirement that a recriminatory petition should be filed six days before the day appointed for trial, that at the preliminary proceedings held some weeks anterior to the trial there was no necessity for the respondent to seek exemption from this requirement, for at that stage ample time was still available to him for compliance. At the commencement of the trial on the other hand, the non-compliance with this imperative provision of statute law having already occurred and the attendant consequences having already ensued in law, it was not within the competence of the Court to grant relief against these consequences nor was there any expression by counsel for the appellant of any willingness on his part to abandon the advantage accruing to him from the respondent's failure to comply with the statute.

Having said so much in regard to these preliminary matters, I now pass on to the main question with which we are concerned in this appeal, namely the question of the claim that the seat be awarded to the unsuccessful candidate.

[1] *(1967) 71 N. L. R. 259.*

Our law, following the English Law on this matter, provides that the seat may be awarded to the candidate next at the poll in cases where the votes cast for the successful candidate are regarded as having been thrown away. It is clear that where a vote is cast by a voter with knowledge of a disqualification which is definite and certain at the time, that vote must be regarded as thrown away so that it will be treated as not cast, and that upon the elimination of such votes the seat will be awarded to the candidate next at the poll.

In order that a disqualification be regarded as definite and certain, it must in the first place be based on facts which are definite and certain. If the facts grounding the disqualification are not definite then the vote cannot be regarded as thrown away. For instance, if there is an allegation of facts at the time of the election which become definite and certain only at a later point of time inasmuch as those facts have not been adjudicated upon at the date of the election, they remain, so far as the voter is concerned, mere unproved allegations. In such cases, although the candidate may be declared disqualified and the election avoided, the seat cannot be awarded to the next candidate, for there is not that definiteness about the facts grounding the disqualification, which would be essential if the votes are to be treated as thrown away. As Coleridge, C.J. observed of such votes in *Drinkwater v. Deakin*[1], a case of alleged acts of bribery, "Invalid, upon proof of his bribery, for the purpose of seating him, they are; thrown away, for the purpose of seating his opponent, they are not."

The principle underlying such a rule is self-evident and needs no elaboration, for a vote cannot be treated as thrown away merely because there was an allegation of fact about the candidate for whom they were cast which at the time of voting may have been true or untrue and which the voter could not be expected, and would not in most cases be able, to verify.

If however the facts grounding the disqualification are definite and certain at the time of the election, two alternative positions require consideration. There is in the first place the case where the law applicable to those facts is itself definite and certain in the mind of the voter, and there is, secondly, the possibility that although the facts are definite and certain the voter is not certain that disqualification results in law from those definite and certain facts.

In the first of these alternative cases the disqualification would clearly be a definite and certain disqualification and a vote cast with knowledge of that definite and certain disqualification would be a vote thrown away. It is the second alternative which needs closer examination in the context of this case for, as will presently appear, the instant case is one where the facts grounding the disqualification were definite and certain but it is alleged that there was some uncertainty in the minds of voters in regard to

[1] *(1874) 9 L. R. C. P. 626 at 637.*

their legal effect. In such cases the question arises whether a vote cast with knowledge of these facts, but with uncertainty as to their legal result, is thrown away if disqualification is the true legal effect of these facts. Must the voter, as in other areas of the law, be presumed to know the true state of the law, or, in the sphere of election law, is there to be an exception to this rule ?

It is common ground in this case that at the time of the election the facts grounding the disqualification were definite and certain and that the voters had notice or knowledge of these facts. Two views had however been expressed to the voters regarding the disqualifying effect in law of these facts.

The definite and certain facts which the voter knew or had notice of were the facts of the report to the Governor-General and the publication thereof in the Gazette. It was regarding the legal effect of these facts that two views were presented to the voter.

I should at this stage refer to the averments of fact on the basis of which the legal question which I have outlined will have to be considered.

The petition of the appellants states that the incapacity of the respondent was brought to the notice of persons entitled to vote in the following ways :

(1) About 50,000 notices in Sinhala issued by the supporters of the defeated candidate were distributed all over the electorate. This notice, which has been reproduced in the petition, informed them of the report of the three Judges to His Excellency the Governor-General and indeed reproduced this report. This notice also informed the electors of the fact of publication of this report in the Government Gazette and reproduced the relevant extract from the Gazette.

(2) In the course of speeches made by the defeated candidate and other speakers at several election meetings held in the electorate in support of the candidature of the defeated candidate, the disqualification was brought to the notice of the electors.

(3) By reason of the wide publicity given to this disqualification the matter was widely discussed at election meetings of the respondent by several speakers.

(4) The respondent's ineligibility and incapacity for election were brought to the notice of the Returning Officer in the course of an objection on the date of nomination.

The petition goes on to aver that the respondent's incapacity and disqualification were matters of notoriety in the constituency at the time of the election and were well known to all persons entitled to vote and that the persons who voted for the respondent knew well at the time of

voting, of this incapacity and disqualification. The votes given to the respondent are hence claimed to have been thrown away and to be null and void. No evidence was led at the trial but in support of the averments in this petition the petitioners filed the affidavit marked P1. The respondent likewise set out his position on matters of fact in an affidavit marked R1.

The affidavit of the petitioners states that in view of the disqualification of the respondent, objection was taken to his nomination before the Returning Officer and that the Returning Officer disallowed the objection. According to the affidavit sufficient notice to the effect that the respondent was a person disqualified from being elected by reason of the circumstances referred to was given to the voters of the constituency by distribution of leaflets and by speeches made at political meetings held in support of the candidature of George Kotelawala and the said alleged disqualification and the facts constituting the same were a matter of public notoriety in the constituency. The respondent in an affidavit of the same date admitted all the averments in the affidavit of the petitioners and we thus have on this important question of fact the concurrence of both sides in the position that the facts grounding the disqualification had been brought to the notice of voters and were also a matter of public notoriety in the constituency. It will thus be seen that the report of the Judges to His Excellency and the due publication thereof were facts which at the date of the election were not mere allegations but were existing and established and which, as distinguished from the legal consequences following therefrom, admitted of no uncertainty.

Having made these admissions the respondent goes on in paragraph 2 of his affidavit to explain that he, his lawyers, supporters and agents gave sufficient notice to the voters of the electorate by the distribution of leaflets and also by speeches made at political meetings, of certain matters in reply to the allegation that he was disqualified. He states that he explained to the satisfaction of his supporters in the electorate that the Supreme Court had held in the case of *Thambiayah v. Kulasingham* [1] that the provision in the Parliamentary Elections (Amendment) Act No. 19 of 1948 relating to a report of the Supreme Court, so far as it embodies a finding that a corrupt or an illegal practice has been committed, was not duly passed by the Ceylon Parliament. These provisions were stated, in view of this decision, to be *ultra vires*.

It is significant also to note that the petitioners in their affidavit admit the averments in paragraph 2 of the respondent's affidavit; and we are thus left in the position that while the respondent admits that the petitioners gave due notice to the electorate of the facts constituting the disqualification, and indeed that these facts were matters of public notoriety, the petitioners admit wide notice to the electorate by and on behalf of the respondent that the circumstances relied on by the petitioners did not in law constitute a valid disqualification.

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

I proceed therefore on the basis that there was knowledge on the part of the electors of the certain and established facts of the Election Judge's report and the publication thereof in the Government Gazette but that there was also material before them on which they were invited to doubt that legal incapacity flowed from those facts.

As much has been said concerning the uncertainty in the mind of the voter arising from the view taken by Wijeyewardene, A.C.J., it becomes pertinent, though of course this circumstance does not conclude the matter before us, to examine the relative weight of the opposing matters presented to the voter.

The submission for the respondent is that the opinion expressed by Wijeyewardene, A.C.J. is the judgment of three Judges of this Court and though the report to His Excellency is also a report of three Judges of this Court, the voter was entitled to act on the basis of the judgment, which, to the average voter at least, was sufficient to create a doubt in his mind.

It has been shown in the connected appeal, in the judgment of my Lord the Chief Justice with which my brother Sirimane and I agree—and indeed that was the view strongly expressed by the learned Election Judge himself—that Wijeyewardene, A.C.J.'s view in regard to the invalidity of the report was not essential to the judgment in that case but was a view expressed purely *obiter*, and also that that view was incorrect in law.

Moreover, what must be weighed against the decision of Wijeyewardene, A.C.J. is not the fact that three Judges have acted in terms of the impugned section in sending their report, but rather that there is in existence an express provision of statute law empowering the Judges to send such a report and annexing to such report a statutory disqualification. The dictum of Wijeyewardene, A.C.J. is not *in pari materia* with an express provision of statute law; and where the voter is given due notice of an express provision of statute law which he disregards on the basis of an obiter dictum, he must be taken to disregard such provision of statute law at his risk. Although the view presented to the voter on behalf of the respondent was thus not on a level of parity with that presented against him, I shall nevertheless examine the principles of law applicable as though there was such parity and as though legal questions of doubt and intricacy arose in consequence.

This then is the background against which we must consider the legal question which I have already outlined. Upon such a state of facts we must determine whether in the operation of the principle that every citizen is presumed to know the law, an exception should be made in the sphere of election law, in cases involving the application of law which is uncertain or difficult to facts which are known. Associated with this problem is the question whether there must be wilful perverseness on the part of voters voting for a disqualified candidate in order that their votes should be regarded as having been thrown away.

No section of the Parliamentary Elections Order-in-Council affords us any guidance on this matter unless indeed one invokes the analogy of section 85, the provision dealing with votes that may be struck off upon a scrutiny. These rules, as will appear later on in this judgment, seem to set out correctly the provisions of English law on the question when votes will be regarded as having been thrown away. There is also the provision in section 86 that on any matter of procedure or practice not provided for by the Order or by the rules or by Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with the Order or rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect. Furthermore, throughout the history of our election law, our Courts have always acted on the assumption that guidance is to be found in the English law on matters of difficulty, as for example Akbar, J. did in *Cooray v. de Zoysa* [1], another case in our reports discussing the concept of votes being thrown away. It would not be inappropriate to add also that the argument in this case has proceeded on the assumption on both sides that a proper source for deriving guidance on this matter is the English law—a system which, in matters of Parliamentary elections, embodies the wisdom of several centuries of experience.

In this judgment it thus becomes necessary to examine the English law as set out in the principal text books on the subject, the earlier English decisions referred to in these texts and the law as finally stated and settled in two decisions which are of compelling authority. I shall also refer briefly to the law as understood and applied in Ireland, where too the same questions have arisen which we are now considering, and to the only other Ceylon case where these principles have been discussed. I shall finally examine section 85 (1) (*f*) of the Ceylon (Parliamentary Elections) Order-in-Council. This section, though limited only to claims for a scrutiny, would appear to state the law in a manner confirming the views I shall express.

The English cases reach back to the days when the disqualification of a candidate was exclusively within the purview of Parliament, which adjudicated upon such matters through Parliamentary committees appointed specially for the purpose. This function was later vested in the Courts and we thus have for our guidance the decisions of Parliamentary committees and in later times the judgments of Courts of law. As Coleridge, C.J. observed in *Drinkwater v. Deakin* [2] the law as to the disqualification of candidates and notice of such disqualification to voters is to be collected from the decisions of Courts of law and of Parliamentary election committees which latter, if not binding upon Courts, are yet to be treated with respect as an exposition of the law of Parliament which is part of the Common Law itself.

These decisions have been collected in the various text books on the subject and these texts afford a convenient point of commencement for a study of the decisions relating to the award of a seat to the unsuccessful

[1] *(1936) 41 N. L. R. 121 at 140.* [2] *(1874) 9 L. R. C. P. at 633.*

candidate upon the unseating of the successful candidate. Difficulty arises, however, owing to the somewhat different presentation in the various texts, of certain points of law with which we are particularly concerned in this case. The difficulty centres principally around the questions whether knowledge of the facts from which disqualification arises is sufficient without actual knowledge that disqualification results in law from these facts, and whether wilful perverseness on the part of voters is required as a condition precedent to their votes being treated as votes thrown away. On this matter we have on the one hand the law as stated by Rogers, Schofield, Fraser and the earlier editions of Halsbury and on the other the law as stated in the third edition of Halsbury and in Parker, and it is on these latter authorities that the respondent relies.

It will be apparent from the ensuing discussion that this latter view, held by only a minority of the text writers, is not only unsupported by authority but contrary to the law as now settled by decisions of binding authority in England.

Rogers on Elections states the law in these terms :—

" votes may be lost or thrown away, 1st by voting for a candidate who is disqualified either—

(*a*) after notice of his disqualification ; or

(*b*) with knowledge of the disqualification or of the facts creating it. 2nd....." [1].

The principle underlying this rule is that votes given for a disqualified candidate in the circumstances stated are to be considered in the same way as if such votes had not been given at all.

According to Fraser a vote will be regarded as lost or thrown away when it is given for a disqualified candidate—

(1) after a sufficient notice of the disqualification,

(2) knowing that the candidate is disqualified,

(3) knowing the facts by reason of which the candidate is disqualified, or

(4) when the fact of the disqualification or the facts by which it is caused are notorious [2].

Schofield observes that the rule of law in elections generally is that where a voter receives due notice that a particular candidate is disqualified before he votes, and yet persists in voting for that candidate, he must be taken as having voluntarily abstained from exercising his franchise, and, therefore, however strongly he may in fact dissent, and in however strong terms he may dissent, he must be taken to assent to the election of the opposing candidate [3].

[1] *20th ed. vol. II p. 80.* [2] *2nd ed. p. 226.*

[3] *Parliamentary Elections, 2nd ed. p. 321.*

So also the first and second editions of Halsbury formulate the law in the terms that in the absence of a notice of disqualification a new election ought to be held *unless* either the person whose votes are sought to be treated as thrown away can be shown in fact to have been aware of the disqualification or the disqualification is of a sort whereof notice is to be presumed [1]. In a footnote to this portion of the text these two editions of Halsbury go on to explain the practice of the Parliamentary committees in terms of the decision in the *2nd Clitheroe* case [2], as being that it will in all cases be inferred that when the voter is aware of the facts he is aware of the legal deduction from those facts however intricate and doubtful such deduction may be.

The third edition of Halsbury states however that the disqualification must be founded on some positive and definite facts 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 [3]. The reference to wilful perverseness, it may be observed, finds no place in the first or second editions of this work. The third edition (though not the first or the second) goes on also to state the proposition that if the disqualification is not notorious and depends on legal argument or upon complicated facts and legal inferences it would appear that even though the candidate may be unseated by reason of his disqualification, the votes given for him will not be thrown away so as to award the seat to the candidate with the next highest number of votes [4]. Inconsistently however with these observations, the same edition proceeds to observe that in order that votes given for a candidate may be considered thrown away, voters must before voting either have had or be deemed to have had notice *of the facts* creating the candidate's disqualification and that it is not necessary to show that the elector was aware of the *legal result* that such a fact entailed disqualification. The same edition omits altogether the quotation from the *2nd Clitheroe* case contained in the earlier editions.

The law as so stated in the earlier part of the section cited from the third edition of Halsbury finds support also in Parker where it is stated that in order that votes given for a candidate should be regarded as having been thrown away, 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 [5]. The same author also submits that a disqualification depending on 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 thrown away so as to seat the next candidate [6].

[1] *2nd ed. Vol. XII pp. 285–6 ; 1st ed. Vol. XII. p. 306.*
[2] *Clitheroe — Borough 2nd case, (1853) 2 Pow. R & D 276 at 285.*
[3] *3rd. ed. Vol. XIV p. 305 s. 549.*
[4] *Ibid.*
[5] *Election Agent and Returning Officer, 5th ed. p. 152.*
[6] *Ibid.*

These latter authorities are relied on by the respondent in support of his contentions (1) that wilful perverseness on the part of the electors is essential to such votes being regarded as thrown away, and (2) that votes are not thrown away where there is uncertainty or difficulty in the application of the law to facts which are known.

For reasons which I shall set out later in this judgment, it seems clear that the law is now settled in the sense opposite to what would appear from a perusal of Parker and the latest edition of Halsbury, for the cases of *Beresford-Hope v. Lady Sandhurst* [1] and *Bristol South-East* [2] have categorically stated the law in the opposite sense and by these decisions, if English law is to be any guide, we should feel bound.

The views of the two authorities cited being thus in conflict not only with the law as stated by Rogers, Schofield, Fraser and the earlier editions of Halsbury, but also with the sense in which the law is now settled in England, it becomes necessary to examine in greater detail the cases referred to in Parker and the third edition of Halsbury with a view to ascertaining whether in fact the authorities cited bear out the proposition they enunciate. It will appear from this examination that the cases cited do not support these propositions but indeed lend support to the views of the other text writers (including the earlier editions of Halsbury) and in fact indicate that even the weight of early authority preponderated in favour of the opposite view.

Instances where votes cast for a disqualified candidate have been considered thrown away and the seat awarded to the candidate next on the poll date back as far as I have been able to trace from the reports available to me, to the very commencement of the 18th century, the principle having been acted upon in the *Queen v. Boscaween* [3] in the thirteenth year of Queen Anne. Many cases occur in the early reports arising out of the failure of candidates to have previously taken the sacrament as required by a statute of Charles II [4]. In one of these cases—*R v. Hawkins* [5]—Lord Eldon observed that votes cast knowingly for a disqualified candidate were as though they had been cast "for a dead man"; and in *Reg v. Coaks* [6] Lord Campbell, C.J. observed that "it is the law, both Common Law and the Parliamentary Law; and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existing person, as it has been said, as if he gave his vote for the man in the moon."

The question whether a distinction should be drawn between cases where the disqualification was clear and those where it was doubtful and depended on argument and decision as to the effect of complicated facts and legal inferences, was thrown up quite early before the election committees and on this matter we find early decisions on both sides of the

[1] *(1889) 23 Q. B. D. 79, C.A.*
[2] *(1964) 2 Q. B. D. 257.*
[3] *Easter. 13, Anne.*
[4] *See R. v. Hawkins 2 Dow. 124, 148; 103 E.R. 755.*
[5] *Ibid.*
[6] *(1854) 23 L. J. Q. B. 133.*

line. Both lines of decision are conveniently collected in Parker's work [1], and it is significant that even at that early stage in the decisions on one side of the line, the principle *ignorantia juris non excusat*, so firmly established in other departments of the law, was applied.

The learned editor of the third edition of Halsbury cites four cases in support of his statement regarding wilful perverseness—*Clitheroe (Borough) No. 2, The Launceston case (Drinkwater v. Deakin), Gosling v. Veley* and *Claridge v. Evelyn*. The only authority cited by Parker on this question is the *2nd Clitheroe* case, with a note that it was approved in *Drinkwater v. Deakin*.

In support of the principle relating to uncertain or difficult law the third edition of Halsbury cites *Cox v. Ambrose, Etherington v. Wilson, Abingdon, Penryn, 2nd Clitheroe* and *2nd Cheltenham*. The same footnote in which these cases appear contains as cases to the contrary—*Wakefield, Belfast, Cork, Tavistock, 2nd Horsham* and *Leominster*. The cases cited by Parker in support of the view that such votes are cast away are *Wakefield, Belfast, Cork County, Tavistock, 2nd Horsham* and *Leominster* while the cases cited in support of the opposing view are *Abingdon, Penryn, 2nd Clitheroe* and *2nd Cheltenham*. In favouring the latter view Parker cites also the case of *Cox v. Ambrose*. The same author relies also on the fact that in the case of *Drinkwater v. Deakin* the Lord Chief Justice seems to have doubted whether votes are thrown away when the disqualification depends on an uncertain or obscure legal question.

An examination of these cases is perhaps best begun by examining the *2nd Clitheroe* case [2] which is cited both in the third edition of Halsbury and in Parker and was much stressed by both counsel at the argument before us.

In this case the successful candidate had been the unsuccessful candidate at an election the previous year. There had been a petition against the successful candidate at the first election and the committee hearing that petition had resolved "that extensive and systematic treating together with other corrupt and illegal practices, prevailed at that election." In view of this finding upon the first petition it was alleged in the second petition that the successful candidate at the second election had been guilty of corrupt practices at the first election, and that he was thereby rendered incapacitated and ineligible from sitting or being chosen to sit. This second petition was, it is important to note, confined to a charge of corrupt practice against the candidate and there was an allegation that agents, friends or others on behalf of that candidate had been guilty of corrupt practices at the first election.

It was the case for the petitioner that notice of this incapacity had been duly given to the candidate and to the electors at the second election and that votes given for the candidate were thrown away. It was urged

[1] *Election Agent and Returning Officer, 6th ed. p. 156.*

[2] *(1853) 2 P. R. & D. 276.*

further at the hearing that the resolution of the first committee was admissible as evidence of notoriety as regards treating by the candidate at the earlier election and also that it amounted to an adjudication of his disqualification.

The committee hearing this second petition held against these latter contentions and ruled that the resolution of the first committee was inadmissible, a decision easy enough to understand in view of the generality of the earlier findings and in view of the restriction of the second petition to charges of corrupt practice against the candidate. In that case therefore the alleged acts of bribery and corrupt treating by the candidate at the first election were at the date of the second election facts which yet remained unproved and were but mere allegations. The voter at the second election could not therefore have been fixed with knowledge of the truth or falsehood of these allegations.

It was hence argued in support of the votes cast for the successful candidate that it would be unfair to the voter if his vote might be lost by a disqualification "arising from facts, of the truth of which he could form no opinion and which might upon inquiry by a competent tribunal turn out to be unfounded." The Committee, while accepting this contention, observed that "by the common law the principle seems to be firmly established, that where a candidate is in point of fact disqualified at the time of an election, all votes given for him with knowledge of the fact upon which such disqualification is founded, must be considered as thrown away. This knowledge may be established either by distinct notice or by notoriety, and it will in all cases be inferred, that *where the voter is aware of the facts, he is aware of the legal deduction from those facts, however intricate and doubtful such deductions may be.*" However they drew attention to the hardship which may arise in certain cases where the fact of such disqualification is only subsequently established and as far as the voter is concerned there is only a mere assertion by the opposing party that a disqualification exists, *the truth or falsehood* of which he may have no means of ascertaining. The voter would then run the risk of having his vote thrown away if on subsequent investigation that disqualification should be established.

The Committee therefore held that the disqualification "must be founded on some positive and definite fact, existing and established at the time of the polling, so as to lead to a fair inference of wilful perverseness on the part of the electors."

The reference by the Committee to wilful perverseness is not in the form that it is a requisite that must be proved, for the requisite stated consists of positive and definite *facts* existing and established at the time of polling. Upon proof of such facts, in disregard of which the voter nevertheless votes for the candidate concerned, there would be a fair *inference* of wilful perverseness, but the latter is an inference or presumption following from the requisite of positive and definite facts

and is not itself a requisite of proof. Indeed, as will presently be pointed out, proof of actual perverseness would involve a burden which in a case involving thousands of votes, would be impossible to discharge.

The view of the committee having been thus expressed in a case where the *facts* were not existing and established at the time of polling, it cannot be viewed as authority for the proposition that where the *law* is uncertain or difficult, the vote is saved. Indeed the committee set out as firmly established and settled law the proposition that where the voter is aware of the facts, he is aware of the legal deduction therefrom "however intricate and doubtful"; and nowhere does this case envisage any special departure in the sphere of election law from the ordinary fixed and settled maxim that ignorance of the law does not excuse. Moreover, wilful perverseness as an inference or presumption resulting from an ignorant or incorrect view of the *law* applicable to known *facts* was not referred to or contemplated.

I next refer to the case of *Drinkwater v. Deakin* [1], the second decision cited by Halsbury, and relied on also by Parker as supporting the *Clitheroe* case on the question of perverseness. One of the candidates contesting a Parliamentary election was in that case found guilty of corrupt practice in that on the day of nomination he gave leave to his tenants to kill rabbits on his estate for the purpose of influencing their votes at the election. On the morning of polling day, before the polling, the agent of the rival candidate gave notice to the electors that he believed the candidate had been guilty of this corrupt practice and that the candidate being thus disqualified, all votes given for him would be thrown away. The petitioner also claimed the seat on the ground that the votes given to the successful candidate had been thrown away with knowledge of the disqualification. It was held that although bribery by a candidate at an election renders his election void if he is found guilty of it on petition, no disqualification arose until after the candidate had been found guilty of bribery on petition and consequently that the petitioner was not entitled to the seat. Lord Coleridge, C.J. and Brett, J. (with the latter of whom Denman J. agreed) were at one on the question that though bribery at an election is an offence which renders that election void, it does not render the candidate incapable of being a candidate at that election. However the judgments of Lord Coleridge, C.J. and Brett, J. exhibit a difference of opinion in regard to the question whether votes are to be considered as having been thrown away when the disqualification is one which results from the application of uncertain legal principles to known facts. Lord Coleridge, C.J. seems not to have departed from a view which he expressed in the course of the argument in that case that voting for a man obviously and notoriously disqualified is a very different thing from voting for a man who proves to be disqualified after much doubt and argument upon the effect of complicated facts or legal inferences. Brett, J. however said, in a passage cited with approval by Akbar, J. in *Cooray v. de Zoysa* [2],

[1] *In re Launceston (1874) 20 L. T. 823* [2] *(1936) 41 N. L. R. 121 at 140.*

"I accept that which seems to me to have been always admitted to be the law before the case of *Reg. v. Mayor of Tewkesbury*, viz. the proposition which I have expressed, as generally applicable to all cases where notice of the law as affecting any subject-matter is material, that is to say, where by the law, if certain facts exist incapacity exists, and where by the law, if the law were known to the elector, his vote would be thrown away if he persisted in voting for the disqualified candidate, *he cannot, if the facts exist to his knowledge, or if he have notice of the facts equivalent to knowledge, which by law produce incapacity for election in the candidate, render his vote valid by asserting that he did not know that the facts by law produced such incapacity, or that his vote would be thrown away if he voted for such candidate.*"

The view of Brett, J. must be considered to be the view of the Court in this case, for his view had the approval of Denman, J., thus making it the view of the majority of the Court. The case is thus strong authority that a voter knowing the facts must be taken to know the law applicable to those facts and hence sharply negatives any requirement that perverseness should be proved.

Cosling v. Veley [1], the third case cited in the third edition of Halsbury, held that "where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet does nothing but tenders his vote for him, he must be taken voluntarily to abstain from exercising his franchise ; and therefore however strongly he may dissent and in however strong terms he may express his dissent, he must be taken to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it would be resisted, that is to help in the election of some other person."

This case went on to hold that if the disqualification depended upon a fact which may be unknown to the elector, he is entitled to notice and that if the disqualification be of the sort where notice is to be presumed none need be given, and contains no suggestion of a requirement of wilful perverseness. This case was approved of not only by Lord Coleridge, C.J. and Brett, J., despite their apparent difference of views in *Drinkwater v. Deakin*, but also more authoritatively in *Beresford-Hope v. Lady Sandhurst* to which I shall presently refer.

The fourth and last of this group of cases cited by Halsbury, *Claridge v. Evelyn* [2], was one holding that an infant cannot be appointed to the office of Clerk of a Court of Requests and holding votes given to him to have been thrown away. There is no suggestion in that case either of any requirement of wilful perverseness. As the first and second editions of Halsbury observe [3] this case falls within the principle of *Gosling v. Veley* which is cited in that work as authority for the proposition that votes would be considered thrown away if the disqualification is of a sort whereof notice is to be presumed.

[1] *(1847) 7 Q. B. 406.* [2] *(1821) 5B. & Ald. 81; 106 E. R. 1123.*
[3] *1st ed. Vol. XII p. 306 note (i) ; 2nd ed. Vol. XII p. 286 note (o).*

It is thus evident that the cases cited are no authority for the proposition that perverseness is a *sine qua non* for votes to be considered thrown away ; and as between the different views set out in the third edition of Halsbury, as opposed to the first and second, the views set out in the first and second editions are certainly more in consonance with authority. Furthermore, as already pointed out, there are in the third edition itself statements apparently contradictory of the view therein expressed.

I move on now to the authorities cited in the two texts under examination, on the second proposition, that regarding the application of uncertain law to known facts. Of these I have already dealt with the *Clitheroe* case and *Drinkwater v. Deakin* and it remains to consider *Abingdon*, *Penryn* and *2nd Cheltenham*. These cases are respectively of the years 1775, 1819 and 1848. Ranged against these are the cases, cited by both Parker and the editor of the third edition of Halsbury, of *Wakefield* [1], *Belfast* [2], *Cork* [3], *Tavistock* [4], *2nd Horsham* [5] and *Leominster* [6]. It is scarcely necessary to refer in detail to each one of these cases ; suffice it to observe that the latter group of authorities is not only more numerous but also taken by and large more recent, all six authorities in the latter group being subsequent to 1825, as against one only in the former group. A special reference should also be made to the *Leominster* case where as in the present case conflicting views on the law were placed before the voters, in that a counter-notice was circulated containing the opinion of two barristers that the candidate was not disqualified. It was nevertheless held that votes given to him were thrown away and the candidate next on the poll was declared duly elected.

As an assessment of these competing lines of authority I cannot do better than refer to Brett J.'s statement in *Drinkwater v. Deakin* that the view admitted to be law in England, and with which *R. v. Mayor of Tewkesbury* was out of harmony, was that an assertion by the voter of ignorance of the legal effect of known facts is of no avail.

I now pass on to the case of *Cox v. Ambrose* relied on in both Parker and the third edition of Halsbury, which is the next decision calling for examination. In that case the respondent was a member of a firm interested in certain continuing contracts with a corporation of a borough, which contracts were unexpired at the time of a municipal election in that borough. Before offering himself as a candidate at the election he dissolved partnership and assigned all the interest in these contracts to the other partner, remaining liable however on bonds securing the due performance of the contracts. The respondent's candidature was objected to on the ground that his connection with these contracts was a matter of notoriety in the ward for which he was a candidate. It was held that the respondent was not qualified to be elected within the meaning of section 12 of the Municipal Corporations Act 1882 and that votes given to him were votes thrown away. There is a considerable

[1] *(1842) B. & Aust. 317.*
[2] *(1838) Falc. & F. 601.*
[3] *(1835) K. & O. 406.*
[4] *(1853) 2 P.R. & D. 5.*
[5] *(1848) 1 P. R. & D. 258.*
[6] *(1827) Rog. 1202.*

difference between the reporting of the judgment in this case in the Law Journal and the Times Law Reports. In the Law Journal Reports [1] Mathew, J. is reported as having accepted as a complete statement of the law governing the matter before him, the view expressed by Brett, J. in *Drinkwater v. Deakin* that all that is necessary for considering votes as thrown away is that the facts should be known to the voters, on the basis of which the law determines that the candidate was incapacitated. The report in the Times Law Reports [2] however omits all reference to *Drinkwater v. Deakin*, and quotes Mathew J., as saying "I can suppose a case of reasonable difficulty when a disqualification of a candidate, though known, might not make a man's vote void . . . The test may be whether there is a reasonable difficulty as to the facts or as to the law" These statements are completely absent from the Law Journal Report of the judgment, which accepts Brett, J.'s views and goes on to state that in the particular case which Mathew, J. was considering there was no reasonable doubt about the law. As between the two versions of the judgment, the version contained in the Law Journal would perhaps be more authoritative, but even if one were to take both versions, one sees a strong adoption of the principle that a knowledge of the facts rather than of the legal result of these facts, is what is requisite; and that having considered it "not necessary to go beyond the expressions made use of " by Brett, J. in *Drinkwater v. Deakin*, Mathew, J. goes on to express a passing opinion, not necessary to the decision he was making, that there may be cases of difficulty where a known disqualification may not render a vote void. The result then is that this decision would appear to reinforce the general principle stated by Brett, J. in *Drinkwater v. Deakin*, while the suggestion that a possible exception may arise where there is reasonable difficulty on the law is at best a view expressed obiter.

It is necessary now to deal with the case of the *Queen v. Mayor of Tewkesbury* [3] to which reference has already been made. One of the candidates at an election of Town Councillors was the Mayor, who was incapable of being elected by reason of his being Mayor and having acted as Returning Officer. Blackburn, J. and Lush, J. took the view that it was not enough to show that the voter knew the fact that the candidate was Mayor and Returning Officer but that there must be knowledge that he was disqualified in point of law as a candidate. Consequently, votes given for this candidate were held not to have been thrown away so as to make the election fall on the next candidate. There were undoubtedly in this case strong expressions of opinion by the Judges that those who voted for the disqualified candidate would not be treated as voting for a person not *in esse* unless there was an actual knowledge of his disqualification in law. Blackburn, J. stated that the earlier cases showed that in order to make the vote a nullity there must be wilful persistence against actual knowledge. He went on to observe that it had been plain to him to be inconsistent with either justice or common

[1] *(1891) 60 L. J. Q. B. 114 at 117.* [2] *7 T. L. R. 59 at 60.*
[3] *(1868) 3 L. R. Q. B. 629.*

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.

It is no doubt quite clear that the *Queen v. Mayor of Tewkesbury* is authority in favour of the contention of the respondent but it seems equally clear that the subsequent cases in England, as for instance *Drinkwater v. Deakin*, repeatedly mention the *Tewkesbury case* as being out of line with the law on the point as it had been understood hitherto ; and later cases as well represent a clear departure from the law as therein stated.

In *Etherington v. Wilson* [1], the disqualification in question was plain. Under a scheme sanctioned by the Court for a charity entitling a parish to select children for Christ's Hospital, it was provided that no child was eligible unless born in the parish or unless he or his parents had been parishioners of the parish. It was held that the word "parishioner" could not be applied to a person taking a small house in the parish temporarily for the mere purpose of obtaining a qualification. Malins, V.C. had no hesitation in concluding that the whole transaction was colourable and unfair and that the parent of the child was not a parishioner. On the question whether a re-election should be ordered, it was held that where an unqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away and the opposing candidate though having only a minority of votes was duly elected. Malins, V.C. referred to the *Tipperary* case as well as *Reg. v. Mayor of Tewkesbury* and distinguished the latter case by observing that the disqualification there was not as plain as in the case before him and that there the candidate was disqualified on a point of law which the electors might not have been supposed capable of appreciating. *Etherington v. Wilson* was thus not a case of a disqualification involving complicated or uncertain law, and was in fact a case where votes were considered thrown away and the candidate with a minority of votes awarded the seat, in consequence of a disqualification which was plain.

Hobbs v. Morey [2] is the last remaining case, cited on behalf of the respondent, which must be examined. In that case both at the time of his nomination and of his election the candidate was disqualified by reason of his interest in a contract with the Council. However the disqualification was not apparent on the face of the nomination paper and no notice was alleged to the electorate of this disqualification. It was therefore held that the votes given for him could not be regarded as thrown away and that the petitioner could not claim the seat. It will be seen that this case turns simply on the absence of notice to the electors in a case where the disqualification was not manifest.

It thus becomes apparent again upon a close examination of this body of case law that it affords little support for the contention that where the facts grounding the disqualification are definite and established, the

[1] *(1875) L. R. 20 Eq. 606.* [2] *(1904) 1 K. B. 74.*

votes cast for a disqualified candidate are saved by the sole circumstance that the law applicable to such facts is difficult or uncertain. On this question, as on that of perverseness, the views stated by the majority of the text writers would appear to be preferable—a conclusion in which I am strengthened by the fact that their view is confirmed by the authoritative decisions in *Lady Sandhurst's* case and in the case of *Lord Stansgate*, to which I shall presently refer.

Before I leave this topic it may also be pertinent to observe, with the greatest respect, that another proposition contained in the third edition of Halsbury though not in the earlier editions, in regard to the disqualification of a Peer to take his seat in the House of Commons, was proved in *Lord Stansgate's* case to be incorrect. Here too there has been a departure in the third edition from the text of the earlier edition and the departure has been authoritatively pronounced to be incorrect. This observation is not in any way meant however to detract from the very great authority which undoubtedly attaches to Halsbury's exposition of the law of England in all editions, but with much respect I prefer, for the reasons I have stated, to be guided on the matter with which we are concerned by the first and second rather than by the third edition. Moreover, the difference in the statement of the law on this topic in the third edition was not effected in consequence of any development of the law between the second and third editions but rather in consequence of a re-arrangement of the work by the learned editor of the third edition. On this topic there were no decisions of significance between these two editions, and the case of *Lord Stansgate* was in fact decided after the third edition. There is therefore no reason for considering that the law on this topic as stated in the second edition had in any way been altered by the date of the third edition.

Having said so much in regard to the text writers and the earlier cases, I pass now to the two later decisions by virtue of which the principles governing cases such as the present have now become in the English law the subject of settled authority. These cases are *Beresford-Hope v. Lady Sandhurst* [1] and *In re the Parliamentary Election for Bristol South-East.*[2]

The decision of six Judges of the Court of Appeal in the first of these cases is now treated as the leading authority on the question of the circumstances in which votes given to a disqualified candidate will be considered as having been thrown away, and was unhesitatingly accepted as binding in the second, which is in fact the most recent English decision, subsequent even to the third edition of Halsbury.

Learned Counsel appearing for the respondent has sought to distinguish these two cases on the basis that in the case of *Lady Sandhurst* as well as in the case of *Bristol South-East*, the disqualifications were apparent and were based on matters of fact. In the former case the disqualification arose from the fact that the candidate was a woman and in the latter case

[1] *(1889) 23 Q. B. D. 79, C. A.*

[2] *(1964) 2 Q. B. D. 257.*

from the fact that the candidate was a peer. It was submitted therefore that votes cast for candidates who were so obviously disqualified could appropriately be considered to be votes thrown away and that these two decisions are inapplicable to the present case inasmuch as the present case involves not merely a question of fact but an application of legal principles to a question of fact. The question of fact in the present case is the report of the three Judges to His Excellency but it is said that this fact cannot, so to speak, be disentangled from the legal question of the validity of the report of the three Judges, and differs in this respect from such obvious disqualifications as those stemming from sex or nobility. This argument is connected with the view that there is a requirement of wilful perverseness in the elector and it is said that when the law is doubtful or difficult no perverseness exists. It is said further that the concept of wilful perverseness is inextricably interwoven with the attitude of a Court in deciding whether to seat a defeated candidate.

It will however be seen presently that the two cases of *Lady Sandhurst* and *Bristol South-East* were not cases where the law applicable to the facts was plain and free from doubt. In both these cases the disqualifications though arising from status resulted not merely from a known question of fact namely that the one candidate was a woman and the other a peer, but from the application to that known state of facts of difficult considerations of law, the decision upon which was well beyond the capacity of the average lay voter.

I shall deal first with the case of *Lady Sandhurst*.

Lady Sandhurst offered herself as a candidate at an election of members of a County Council under the Local Government Act of 1888. She was duly elected but was unseated on a petition on the ground that being a woman she was disqualified. The law relating to the question whether women were disqualified from being councillors was discussed at length by Stephen, J., the Election Judge. This discussion involved *inter alia* the construction of several Acts among which were the Local Government Act of 1888, The Municipal Corporations Act of 1882, The Municipal Corporations Act of 1835, Act 32 and 33 Victoria ch. 55, 5 and 6 Wm 4, ch. 76. Lady Sandhurst's disqualification was therefore not such as would have been manifest and apparent to all the electors although it was from a manifest fact that it arose. Indeed the application of the law to this known fact was a matter of considerable difficulty, and one gathers from the observations of Stephen J. that far from the legal disqualification being apparent and obvious, the question whether she was indeed incapacitated was one of much discussion at the time. As Stephen, J. observed, "the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification."

Lord Coleridge observed that if the fact exists which creates an incapacity, and it is known and must be known to the person voting for the incapacitated candidate, he had no hesitation in deciding that votes

so given were thrown away. Lord Esher M.R. thought that the case was absolutely determined by the expression of both Judges in *Drinkwater v. Deakin*. Lindley L. J. observed that once the facts were told to the elector of the incapacity of being elected or where he must be taken to know them and really does know them, *the question as to whether he really knows the law on the subject or not is another thing*. Lopes L. J. thought that the case was well within the decision in *Drinkwater v. Deakin*. Cotton L.J. and Fry L.J. stated that they had nothing to add on this point.

More than one judgment examines the statutory provisions referred to and the questions of interpretation involved. We thus see that a bench comprising judges of the highest authority considered that the question whether votes were thrown away was concluded by the circumstance that the voters were aware of the facts from which the disqualification resulted, quite apart from the question of their knowledge of the law applicable to those facts.

Coming now to the case of *Bristol South-East*, this matter arose upon the attempt of a member of Parliament who succeeded to the peerage upon his father's death to contest an election to the House of Commons. The election was rendered necessary because the House had taken the view that the member had ceased to be a member and was disqualified from membership by reason of his automatic succession to the peerage.

In this case as well, considerable legal argument was involved. The position of the candidate. Lord Stansgate, was that there was no automatic disqualification in this case, his contention being that the disqualification arose only upon receipt of a writ of summons to attend the House of Lords. He had refrained from applying for such a writ and contended that he was entitled to renounce his peerage. These contentions of the candidate called for a careful and detailed examination of his disability in the light of numerous historical and legal considerations, including also the difficult question of the right of a peer to renounce his peerage. The judgment as reported in the Law Reports shows that a consideration of these legal and historical questions required around fifteen pages of discussion in the judgment and that since much could have been said in support of either view, the answer was certainly not so obvious as to render it manifest to all electors.

It is also significant that as in the present case, support for the candidate's contention that he was qualified was based on high authority, for Lord Stansgate's claim was based *inter alia* upon a statement in the third edition of Halsbury's Laws of England. In this edition, though not, as the judgment points out, in the earlier edition, it is stated that a peer of Parliament is legally incapable of voting at a Parliamentary election even though his name may have been placed upon the register without objection, and that the writ of summons to the House of Lords must be issued before the disqualification attached.

It will be seen then that the question raised by Lord Stansgate was not without legal difficulty although the fact of his being entitled to the peerage was plain and known to all. In that case therefore, as in the case of Lady Sandhurst, we meet the situation which we meet in the present case, of the application of uncertain legal principles to a known or notified state of facts, and despite the circumstance that the candidate's legal contention was, to say the least, arguable, the Court treated the votes given to the candidate whose qualification was in doubt, as votes thrown away.

This then being the state of the English law according to its latest exposition and application in that country, I do not see room for any departure therefrom in our law, based as it is on the same principles. Indeed it is significant to note that in *Bristol South-East* the Court having, after the elaborate discussion already referred to, found against Lord Stansgate in regard to his right to sit, and having satisfied itself that notice of the alleged disqualification had been given to the electors, proceeded without further question to declare that the votes cast for Lord Stansgate were thrown away and that the other candidate was duly elected. The Court expressly stated that it was bound by the decision in *Beresford-Hope v. Lady Sandhurst* and that it *had no option* but to make the declarations referred to.

On the basis of the law as examined by me this Court too has no option but to make the declaration which is sought.

Some light is thrown on the matter under discussion by certain Irish decisions to which I shall now refer. In the *Tipperary case* [1] a person convicted of treason and felony contested a seat. This candidate had been sentenced to 14 years' transportation and was alleged to have become thereafter a naturalised American subject and to be an alien. There were strong observations in that case by Mr. Justice Lawson to the effect that ". . . we have decided in the case of *Trench v. Nolan* [2] acting on all the authorities, that votes given to a candidate who is disqualified after notice of that disqualification had been given, are thrown away, and I must say if a case were wanted to show the soundness and propriety of that decision it would be the present case; because if such were not the law, persons who were disposed to set the law at defiance might select candidate after candidate from a list of disqualified persons, disqualified either by alienage or conviction for felony, and the properly qualified candidate although in a minority, could not be seated, but there should be a new election. Therefore according to the decision in *Trench v. Nolan* the electors having had notice of the disqualification, the necessary result must follow in this which followed in that case, namely that the properly qualified candidate should be declared to be duly elected. . . . Both on the authority of *Trench v. Nolan* and of *Drinkwater v. Deakin*, when once we arrive at the

[1] *3 O'Malley and Hardcastle, p. 19.* [2] *Irish Reports 6 Common Law, 464.*

conclusion that there were these two disqualifications and notice to the electors, it necessarily follows that the other candidate must be declared duly elected." [1]

In the *Fermanagh and South Tyrone case* [2] the petition was brought on the ground that the candidate was incapable of being elected a member of Parliament under the terms of the Forfeiture Act of 1870 and the seat was claimed by the unsuccessful candidate on the ground that votes cast with knowledge of the disqualification were votes thrown away and that the unsuccessful candidate was entitled to the seat. Lords Justices Black and Sheil of the High Court of Northern Ireland held that it was sufficient to prove only that the elector had notice of the fact of disqualification and that *it was not necessary to show that the elector was aware of the legal result which such disqualification entailed.* In that case the Court held that the disqualification was in any event a matter of notoriety, the successful candidate being still under a ten year sentence for treason-felony (see also the Irish case referred to in 1955 L. Jo 482). It is of interest to refer to a comment in the Law Journal on the *Fermanagh case* [3] where it is observed that the supporters of the disqualified candidate had determined to nominate the same candidate again and that he would possibly be elected once more, so that the same issue may therefore arise all over again *ad infinitum* with farcical results. This observation focuses attention on the damage which would result to the processes of Parliamentary election were any other view of the law to be entertained. With special reference to the facts of the present case there is nothing in theory to prevent the occurrence of the same situation, for the dictum of Wijeyewardene, A.C.J. could repeatedly be invoked as the view of three Judges which casts a doubt on the legal validity of the report of three other Judges despite any decision of three Judges to the contrary.

The Irish cases serve to underline the considerations of public policy underlying this rule and also to show the adoption by that system as well of the principle that knowledge of the facts giving rise to the disqualification without the necessity for knowledge of the legal consequences flowing from those facts, is all that is required for votes to be treated as thrown away, and for the seat to be awarded to the unsuccessful candidate.

I pass now to an examination of section 85 (1) (*f*) which sets out the circumstances in which votes are to be struck off upon a scrutiny. For the reason stated by My Lord the Chief Justice, with which I respectfully agree, the relief of claiming the seat for an unsuccessful candidate is not necessarily sought through the means of a scrutiny and a scrutiny may well be totally unnecessary in cases such as the present, where the votes sought to be struck out are not individual votes but a whole class of votes. It is clear however that in drafting section 85 (1) (*f*) the draftsman was attempting to follow the English law in regard to votes which would

[1] *O'Malley and Hardcastle, p. 44.*
[2] *(1955) L. J. 482.*
[3] *(1955) L. J. 594.*

be struck off. It is necessary therefore to examine section 85 (1) (*f*) if only for the reason that it is based upon the English law as understood by the draftsman and seems to reproduce accurately the English law on the question of the votes which will be considered as having been thrown away, where the seat is sought for the second candidate.

Section 85 (1) (*f*) may be analysed as dealing with five distinct cases of votes given for a disqualified candidate by a voter, namely—

(*a*) knowing that the candidate was disqualified ; or
(*b*) knowing the facts causing the disqualification ; or
(*c*) after sufficient public notice of the disqualification ; or
(*d*) when the disqualification was notorious ; or
(*e*) when the facts causing the disqualification were notorious.

Certain circumstances become apparent upon this analysis, which are of assistance in this matter.

It will be seen in the first place that the sub-section draws a distinction between the disqualification and the facts causing the disqualification, for at two points within the sub-section the distinction is drawn between the disqualification and the facts causing it. Applying to this phraseology the facts of the present case, the fact causing the disqualification was the report of the three Judges and the publication thereof in the Government Gazette. The disqualification was the result of the application of the law contained in section 82D to these facts. All that is required, for the throwing away of votes to ensue, is knowledge of the facts grounding the disqualification without the necessity for a knowledge of the application of the law to those facts. Hence, if one were considering a case under section 85(1) (*f*) the fact that difficult or uncertain principles of law had to be applied to the facts would be no ground for refusing to strike off a vote.

A second comment upon this section is that, apart from cases where there is actual knowledge, knowledge would appear to be presumed from sufficient public notice or from notoriety. It follows therefore that even where there is no notoriety of the facts, as where they are not manifest and apparent to all, the absence of such notoriety is made good by sufficient public notice and when the latter is given the case is elevated to a level of parity with circumstances of notoriety such as those arising from status.

Yet another circumstance which emerges from the section is that it is totally lacking in any requirement of wilful perverseness on the part of the voters as a pre-requisite to votes being considered thrown away—a conclusion which once more accords with the conclusions I have reached in regard to the English law on this matter.

Finally, this judgment would be incomplete without a reference to the only other case decided in Ceylon which has considered the English decisions relating to the award of a seat to an unsuccessful candidate.

This was the case of *Cooray v. de Zoysa* [1] where Akbar, J. analysed section 82 (1) (*f*) of the Ceylon (State Council Elections) Order-in-Council which corresponds to section 85 (1) (*f*) of the Parliamentary Elections Order-in-Council. In this case objection was taken to the election of a candidate on the ground that he enjoyed a contract made with the Principal of the Ceylon University College for or on account of public service within the meaning of section 9 (*d*) of the Ceylon (State Council) Order-in-Council of 1931. The petitioner also claimed the seat under section 77 (*d*) of the Ceylon (State Council Elections) Order-in-Council. It was held by Akbar, J. that the petitioner was bound to prove common knowledge on the part of the voters of the fact of the contract with the Government and not merely knowledge of the fact that the respondent was a lecturer at the University College, and that the required knowledge was not proved. He however referred to *Drinkwater v. Deakin* and *Beresford-Hope v. Lady Sandhurst* as the leading English cases on the subject and cited *in extenso* the dissent of Brett, J. in *Drinkwater v. Deakin* from the view expressed in *Queen v. Mayor of Tewkesbury*. Akbar, J. concentrated however on the question whether the disqualification was based on a known incapacity, for in the case before him the petitioner had failed to prove common knowledge on the part of the voters of the fact that the respondent had a contract with the Government. It was this fact alone from which disqualification resulted, and a mere knowledge of the fact that the respondent was a lecturer of the University College was insufficient.

It was not necessary therefore for Akbar, J. to give his mind to the specific questions we are now considering namely whether perverseness was required on the part of the voters, or whether knowledge was required of the legal consequences as distinct from the facts giving rise to these legal consequences. He did however draw attention to the law as stated in Rogers according to which knowledge either of the disqualification or of the facts creating the disqualification is stated to result in the voter throwing away his vote; and he referred also to the fact that Article 82 (1) (*f*) of the State Council Elections Order-in-Council dealt with five different types of cases, as outlined by me in regard to section 85 (1) (*f*) of the Parliamentary Elections Order-in-Council.

In the result then, in the only other matter in which our Courts reviewed the principles governing the grant of a seat to an unsuccessful candidate, the general principles applicable have been stated in the sense in which I have set them out in this judgment, but no further guidance can be derived from it as there was no special consideration of the particular matters which concern us here.

It is evident from the foregoing discussion that under the law as it now stands this Court has no alternative but to allow this appeal and award the seat to the unsuccessful candidate. The weight of opinion on the part of eminent text writers, the preponderance of earlier English authority, the conclusiveness of the most recent decisions, the identical law as

[1] (*1936*) *41 N. L. R. 121.*

applied in Ireland and an analysis of section 85 (1) (*f*) are all lines of approach converging towards this one result. Moreover this conclusion is fully in accord with the respect which must be shown to Parliament and to the processes by which it is constituted.

The duty devolves in a special way upon the Courts of ensuring, through an insistence thereon in the matters that come before them, that election procedure be kept inviolate and its sanctity preserved ; and it is their duty whenever possible, zealously to safeguard the sovereignty of Parliament and all that is incidental thereto. Essential to this result is the proper conduct of elections, and essential to the proper conduct of elections is the requirement that only candidates qualified in law to be Members of Parliament should offer themselves to the electorate. Those who already labour under a disqualification which by law prevents them from taking their seat in Parliament go to the polls at their peril and those who vote for them with knowledge of the facts grounding such a disqualification record their votes in vain. This is a principle now ingrained in the law relating to elections and ingrained for the very good reason that the dignity and decorum which must attend the Parliamentary process are at all costs to be preserved. A candidate labouring under a disqualification resulting from known facts may else, as was observed in the *Tipperary case*, offer himself repeatedly for election to an electorate which accepts him again and again, only to be declared disqualified on each occasion by the Courts. The Parliamentary process cannot thus be permitted to be brought into disrepute or exposed to ridicule, nor can the Courts countenance the possibility, inherent in such a situation, of a constituency being thus kept indefinitely without proper representation in Parliament at the will of persons inclined for reasons of their own to resort to such conduct. Such possibilities should not be permitted to mar the procedures essential to the proper constitution of Parliament; nor does a candidate so offering himself or a voter so exercising his franchise display that respect properly due and owing to the sovereign legislature.

Moreover, once a doubt cast upon the legal effect of known facts is permitted to constitute a field of exemption to the principle that votes are thrown away, where does one draw the line between the degrees of doubt which will and will not produce this result ? Will the standard by which this is determined be purely objective or should it not be subjective, depending on the state of mind of the individual voter ? What may raise a reasonable doubt in the mind of an unintelligent or uneducated voter may raise none at all in the mind of one of intelligence or education ; or, conversely, what seems unreasonable to an unintelligent or uneducated voter may well carry conviction to a mind more alert or cultivated. So also a doubt which seems unreasonable to a Court of law may well trouble the mind of an average voter, while that which leaves the latter's mind unruffled may well produce serious agitation in the

mind of a Court. A Court conducting an investigation into this matter may thus be obliged to pursue an interminable series of individual inquiries.

All these difficulties are stirred up by an abandonment of the principle which holds sway in so many other spheres of the law, that ignorance of the law does not excuse. There is no ground of precedent or principle which renders this maxim less applicable in this sphere of the law, than in any other. We enter upon troubled waters indeed if we admit of varying standards of certainty and varying degrees of doubt in the application of so simple a principle and one which has through the experience of ages earned so high a place among the maxims of the law.

It will thus be seen that the law leaves no course open to us but to conclude that votes cast for the disqualified candidate, cast as they were with knowledge of the existing, certain and established facts on which that disqualification was based, must be regarded as thrown away ; and that the seat must be awarded to the qualified candidate who has polled the largest number of lawful votes.

I agree therefore with my Lord the Chief Justice that this appeal should be allowed, and with the order as to costs which he has proposed.

Appeal allowed.