1942 *Present :* **de Kretser J.**

In the Matter of the BY-ELECTION FOR THE COLOMBO NORTH ELECTORATE held on April 26, 1941.

DR. R. SARAVANAMUTTU, Petitioner.

v.

JOSEPH DE SILVA, Respondent.

State Council elction—Agent guilty of corrupt and illegal practice—Report to Governor—Fair warning of the charges—Opportunity to be heard—Right to call evidence—Conclusion of trial and certificate—Ceylon (State Council Elections) Orders in Council, 1931 and 1935, s. 79 (1) and (2).

Before an election Judge reports a person to the Governor under section 79 (1) (b) of the Ceylon (State Council) Order in Council he must have a fair warning of the charges and be given an opportunity of being heard.

Where an agent is reported, who has had an opportunity of defending himself at the trial, he is not entitled to call evidence but only to be heard.

Where a witness, who appeared only incidentally and against whom no direct charge had been made is reported, he must have fair warning of the charge and an opportunity of giving and calling evidence.

Whether a person had fair warning and opportunity would depend upon the facts of the particular case.

The Court would then complete the trial and certify its determination and make a report.

THIS was a notice served on A. E. Goonesinha, a witness in the above-mentioned election petition, to show cause why he should not be reported under section 79 (2) of the Ceylon (State Council Elections) Orders in Council, 1931 and 1935.

Counsel :

R. L. Pereira, K.C. (with him *C. V. Ranawake, U. A. Jayasundera,* and *V. F. Gooneratne*), for A. E. Goonesinha.

U. A. Jayasundera, for A. J. S. Perera.

Dodwell Goonewardene, for Julian Fernando.

H. H. Basnayake, C.C., for Attorney-General on notice.

C. S. Barr Kumarakulasingham, for petitioner.

March 18, 1942. DE KRETSER J.—

Upon being called upon to show cause under Article 79 (2) of the Order in Council, each of the persons noticed desired to call witnesses in order to convince me that the decision I had previously arrived at was erroneous. I had previously caused notice to be given to them that I would not allow evidence which was intended to canvass my findings in the absence of authority to the contrary. The object of this was to put them upon special inquiry. And in order to have further assistance I also invoked the help of the Attorney-General, on whose behalf Mr. Basnayake, Crown Counsel, appeared and gave valuable assistance, for which I am much indebted.

Counsel for the parties noticed relied entirely on the wording of Article 79 (2), and Mr. Pereira drew my attention to the fact that it was different from the English Statute and expressly gave the parties noticed the right to give evidence, a right which he did not propose to exercise. Crown Counsel relied on the wording of Articles 78 and 79. Nobody had been able to find any authority directly in point and I myself have found none, though I made diligent search from the time when the trial of the election petition was going on.

I will consider the matter first on the lines taken by Counsel.

Article 78 requires the judge to determine whether the election was void and to certify such determination. Article 79 (1) requires him also to report in writing to the Governor certain matters. Both Articles commence with the words " At the conclusion of the trial ". The natural conclusion is that both the judgment and the report are contemporaneous and follow immediately upon the conclusion of the trial, the trial being, as in the Civil Procedure Code, something different from the judgment. As far as I have been able to gather, this is what happens in England and Dalton J. supports that view in *Latiff v. Saravanamuttu*[1], the Colombo North Election Petition of 1931.

The next point to be noted is that the election judge determines whether the election was void and his determination is final. Now, his determination may be based purely on corrupt or illegal practices committed by an agent of the candidate. It seems to follow that his determination that an agent has committed an electoral offence is final also. It would lead to the most awkward consequences if, after a candidate had been unseated, his agents were allowed to prove that no offence had been committed.

[1] *34 N. L. R. 369.*

A candidate may be given relief, and an agent may similarly seek relief and should be given an opportunity of asking for relief. Crown Counsel contended that Article 79 (2) was intended to secure that opportunity for the party noticed and no other.

It is strange that there should be no reported case. It cannot be that Hope springs eternal only in the breast of the litigant in Ceylon, or that it has never occurred to any person in England to exploit his opportunities to the fullest possible extent. Nor can it be that the absence of cases is purely due to the fact that the common sense of lawyers in England made them realize that it was futile to expect a judge to reverse a decision which he has arrived at after anxious consideration and after the fullest possible investigation. It must be due, in my opinion, to some other reason, and Crown Counsel has given a likely one.

Article 79 (1) (*a*) affects a candidate and his agent while Article 79 (1) (*b*) affects all persons found guilty of corrupt or illegal practices. It is true that "*all* persons" may include both a candidate and his agent but a simple rule of construction indicates that Article 79 (1) (*b*) refers to persons other than candidates or their agents. A candidate and his agent are classed together for good reasons and it is scarcely necessary to go into the matter more fully. In both classes of cases the judge reports on what has been *proved*, and in Article 79 (1) (*b*) there is the further emphasis that the proof should have been "at the trial". With respect to the candidate or his agent the proof would necessarily be at the trial, so perhaps it was unnecessary to say so expressly, but in the latter case all doubt is removed in the clearest terms. A matter cannot be said to be *proved* unless both sides have been heard. I cannot conceive of any Court reporting that a matter has been proved unless it has heard the party affected by the report.

What then is the meaning of Article 79 (2) ? Mr. Pereira contends that any person who is not a party is not before the Court and has no control over the proceedings, and that the provision was intended to bring him before the Court and put him in control of his own defence. There is a germ of truth in this contention but while I agree that it is intended to secure fair play for the party affected, I do not think it is founded on the technical ground that he was not a party to the election petition. It must be remembered that election petitions are *sui generis* and that every consideration that applies to proceedings between individuals does not apply to them. Reference to various aspects of this matter will be found in the following cases :—*the Tipperary case* [1], *the Ipswich Case* [2], *the North Heath Case* [3], *the North Louth Case* [4]. Besides, Article 79 (1) (*a*) includes a candidate who may not be the petitioner.

Before the trial of an election petition the charges are set out with particularity. Where agents are charged with corrupt practices the candidate is prompted both by motives of self-interest and of loyalty to protect his agents, and agents are naturally interested not only in safeguarding their own interests but also in promoting the cause which they have espoused. They are not parties on the caption of the record but they are parties named in the record. Other persons guilty of corrupt practices may not be so vitally interested and their allegiance may be doubtful.

[1] *3 O'M & H 28.*
[2] *4 O' M & H 70.*
[3] *Ibid 186.*
[4] *6 O'M & H 112.*

In section 38 of *46 and 47 Vict.* the Court is required to cause notice to be given and, if the party noticed appears, to give him an opportunity of being heard by himself and of calling evidence. A Bench of three judges decided that the expression " being heard by himself " excluded the right of Counsel to appear (*R. v. Mansell Jones* [1]), but in spite of this decision of judges in England seem to have allowed Counsel to appear. It may be that Article 79 (2) is differently worded in order to prevent the objection that Counsel may not be heard. But, far from supporting the contention of the persons noticed, the next words, in my opinion, rather weaken it. The person noticed is allowed the opportunity of giving evidence. Now, no person who has given evidence already at the trial and who presumably has said all he had to say at that time will need to give evidence again. In the present case it was not intended to call the person noticed; such a proceeding would have been futile. Can then the law have provided for a proceeding which would be obviously futile ?

On a consideration, therefore, of the language used in the two articles, it seems to me that the position taken up by Crown Counsel is the correct one in the circumstances of this case. But at this stage, I would not limit the operation of Article 79 (2) to the claiming of relief, for circumstances may exist—such as when a respondent abandons his seat—which will require that the persons noticed should be allowed both to give evidence and to call evidence, going even further than the claiming of relief. Dalton J. said, in the case referred to, " There would appear to be no uncertainty as to the practice followed in England as set out in the cases to which the Acting Solicitor-General referred. There is no suggestion there that any further proceedings subsequent to judgment are denoted. The indications are all to the contrary . . . . One must infer that any person entitled to notice under section 38 duly received such notice before judgment. It must be noted however that the requirements of our Order in Council in respect of procedure do not go so far as section 38 ".

While not agreeing in every respect with Dalton J., I think his opinion that in that particular case (which was also one that was hotly contested) no further proceedings were necessary was right. I do not think he was right when he said that no proceedings are taken in England subsequent to judgment. *The Cheltenham Case* [2] is an illustration of proceedings being taken after judgment. So is the *East Dorset Case*, referred to by him.

Having now considered the terms of our Order in Council, I turn for a moment to seek guidance from the English law upon which our Order in Council is modelled and which is expressly invoked in Article 83 (4). In England the matter of Elections was originally within the sole jurisdiction of the House of Commons, and the present law is the result of many statutes, on which our Order in Council was modelled, not always with happy consequences. After 1770, Select Committees of the House decided upon the validity of elections. Their decisions were often followed by Election Courts, which never lost sight of the fact that they were functioning in lieu of such Committees. In the *Ipswich Case* we are told that the Committee gave no reasons for their decisions but the judges felt that

[1] *23 Q.B.D. 29.*

[2] *6 O'M & H 194.*

it was desirable to state their reasons. In 1832 statutory provisions was made for the appointment of Commissioners to inquire into corrupt practices at elections. In 1868 statutory provisions was made for the trial of election petitions by one judge. Section 11 (13) required the judge to determine whether the election was void and such determination was final. We have taken over that provision. He was also to certify *forthwith*.

Section 11 (14) required the judge to report when the petition contained charges of corrupt practices. This was to be in addition to the certificate and was to be made at the same time". These words throw light on the words "at the conclusion of the trial" in Article 79 (1). There was a further report to be made whether corrupt practices actually prevailed, or there was reason to believe prevailed, extensively.

In England the report is made to the Speaker and the House may take further proceedings thereon. For obvious reasons we have no such provision in Ceylon. Nor have we the provision in section 11 (15) for a special report, nor that in section 11 (16) for a case to be stated, nor that found in section 12 for the reservation of a case on a question of law as to the admissibility of evidence nor that in section 15 for a Commission of Enquiry.

Now, it must be noted in the first place that, while the election Judge was required to report, no provision was made for notice to be given to the persons affected. They would be persons who *at the trial* had been found guilty of corrupt practices. Section 45 provided that only a person found guilty of bribery in any proceeding after due notice could be disqualified.

Mr. Justice Blackburn seems to have reported in 1889 that two persons had been bribed in the *Bewdley Elections*. The facts are not stated but one may infer that he was reporting on a petition which made charges against the successful candidate or his agent. On a subsequent election when a scrutiny of votes was being made Counsel contended that these two persons had been found guilty in a proceeding and were disqualified but Mr. Justice Blackburn refused to entertain the objection, mainly on the ground that in a report a Judge decided incidentally and his report did not amount to a conviction. He appears to have construed the words "in any proceeding" as "in any criminal proceeding". He added that the provision for giving a person charged an opportunity was not satisfied unless he had fair warning of the charge and was called upon to meet it and therefore a witness called on the spur of the moment could not properly be dealt with. This is the *Bewdley Case*[1]. From this, one may gather that before a person is disqualified he should have fair warning of the charge and be given an opportunity of being heard. The question is what this amounts to : whether the procedure is as rigid as in a criminal case or may sometimes be purely formal.

The later Act of 1883 disqualified a person on report against him by the Election Judge. It was section 38 of that Act upon which our Article 79 (2) seems to have been based. It applied not only to an Election Court but to Election Commissioners too, who would not be acting upon charges carefully framed as in an election trial but inquiring into the report that corrupt and illegal practices extensively prevailed.

[1] *1 O'M & H 176.*

Dalton J. thought section 38 went beyond our Article 79 (2) but I am unable to gather what exactly he had in mind. Read with the provision as to the report being made at the same time as the certificate it would seem that notice under section 38 must be given before the conclusion of the trial.

Section 38 contemplates the case where the person is not before the Court. What happens if he is before the Court and has no cause to show ? Obviously no notice would then be necessary since the provision is for his benefit. Was it to prevent any quibble on this point that Article 79 (2) did not provide for a notice but left it to the Court to give the party a sufficient opportunity ?

Section 60 of the statute of 1883 required the Election Court to report whether certificates of indemnity had been granted or not to the persons reported. Certificates of indemnity are granted in order to induce persons to give truthful evidence on the petition even though it may incriminate them, and the better opinion seems to have been that such certificates may be granted only when witnesses give evidence during the trial of the petition and not on the subsequent proceedings to show cause—*vide* the *Cheltenham Case*.

Now, how did the Judges interpret the provisions of section 38 ? There is no express decision on the point but we get valuable insight into the practice which prevailed.

In *R. v. Mansell Jones* [1], section 38 came in for consideration indirectly. It was a case relating to a Municipal Election and was tried under a different Act by a Commissioner. *In the course of the hearing* notice was served on one Giles and the question that arose was the right of Giles to be heard by Counsel. They decided that he could be heard only by himself in person. In the course of his judgment, Pollock B. said—"The person charged is not a party to any issue before the Court, and whether or not he has committed corrupt practices must be determined upon the evidence of other persons who must have been closely connected with his conduct. It must first be established by the evidence of others that he is a person against whom the charge is made. Then there comes a moment of time at which the Commissioner has to determine whether or not to make a report against him. He is summoned before the Court ; and, if he appears, the Court must give him an opportunity of being heard 'by himself'". Those words may be struck out entirely if the view is adopted that he may be heard by Counsel or Solicitor. I think they mean "by himself" and nothing else. No great danger results from that construction. He is only in the position of a man against whom a bill has been found by a grand jury. He is entitled to insist that other proceedings shall be taken against him before he is made liable to the consequences which may follow if he is found to have been guilty of corrupt practices.

The question is when that moment of time comes. We do not know at what point of time in the hearing of the petition notice was issued, but we do know it was during the hearing. This man's case came up again (*23 Q.B.D. 273*), for at the conclusion of the trial the Commissioner ordered his prosecution. The question then arose as to whether the Commissioner could take that step on the evidence already recorded or should record

[1] *23 Q.B.D. 29.*

evidence afresh. Sir R. E. Webster, Q.C., A.G., argued that it was absurd to suppose it was the duty of the Court to take evidence afresh. In the course of his judgment, Manisty J. said—"The facts of this case are that the Commissioner was holding his Court, and the usual proceedings were taken to bring persons before him who were charged with corrupt practices . . . . but before making his report it was necessary that he should have evidence before him satisfying him that the parties had been guilty of the charge, that is to say, that a prima facie case had been made against them." Did the learned Judge mean to say that it was usual to issue notices during the hearing or was he merely saying that the man had had notice without paying attention to the stage at which he received it? It would seem that Giles did not give evidence, for the report alludes to his not appearing.

In the *East Dorset Case*[1], which Dalton J. has by mistake called the *East Kerry Case,*—evidence seemed to have been called for the respondent, Captain Quest, and among the witnesses was Lady Wimborne, a very active agent for him. The trial went on for eight days in Court and evidence was also taken on commission. At the end of the speech by Counsel for the respondent, who had intimated that he intended to apply for relief, a discussion took place as to the form of notice required for that purpose. On the next day, after Counsel for the petitioner had addressed the Court, lengthy judgments were given on various points in the case and the conclusion was that the election must be declared void and also that Lady Wimborne should be reported but that she was entitled to a certificate of indemnity. Mr. Justice Pickford then said—"Mr. Foote, I think it is only a formality but if we have to report anybody we have to ask if they have any cause to show". Mr. Foote reminded the Court of his application for relief and was told relief would not be granted, and Mr. Justice Pickford again said—"We have formally to ask Lady Wimborne whether she has cause to show". Mr. Foote left it to the Court to act in such manner as it thought fit. Here then we have an instance of a contested case in which after judgment the matter of showing cause was taken up and dealt with at once. The case was in 1910. The Act of 1883 applied but no formal notice was served and the whole matter was treated as a formality.

In the *Cheltenham Case*[2] the whole of the evidence for the petitioner was called and the respondent's Counsel intimated that he could not contest the seat on one point and a discussion ensued on various points. The question was whether it was worth going on with the case and Counsel said he wished to answer the charges against different persons and the Court thought that such a course was possible but not usual. Counsel thought his client owed a duty to the persons charged and a hint was thrown out that the time for that would come later. Counsel thinking of the absence of Counsel when cause was shown later pointed out that matter and Mr. Justice Bucknill remarked that the Court would never make the order *after the proceedings are over* without hearing the parties. Mr. Justice Channell said—"We shall have to hear anybody against whom there is a charge before we can report them." Then followed a discussion

[1] *6 O'M & H 32.*

[2] *6 O'M & H 194.*

on the difference between calling a witness when the petition was still alive and only when he was showing cause, the Court intimating that in the latter case the stage of granting indemnity was past.

Mr. Dickens contesting this position said—" You cannot report till you have decided the case . . . . Before he asks for his certificate something else must happen and he must be reported. You have to ask him why he should not be reported, and that raises an issue as to whether he has in fact committed an illegal act, and therefore that raises the question whether the petitioners have proved their case." The Judge agreed that that would be the case if the witnesses were not called on the petition and Mr. Dickens admitted the difficulty. Finally, the witnesses were called in spite of protest from Counsel for the petitioners who, however, assisted the Court by cross-examining the witnesses. Mr. Justice Bucknill said—" It seems to me that each particular case must be conducted according to the discretion of the Court, to see that the matter is properly got at and properly threshed out ".

After judgment a witness was called upon to show cause and eventually he was not reported on a consideration of the legal effect of the evidence. In the course of his judgment Mr. Justice Channell explained the duty of the Court and its position where the respondent abandons the seat before the case for the petitioner is completely heard and also its position after the whole case has been heard (*i.e.*, for the petitioner).

In this case too the witness did not call fresh evidence. The charge against him was a minor one and affected him individually and not the result of the election and was not specifically dealt with in the judgment. When he was called upon he successfully argued that he had not acted " corruptly ".

In quite a number of the reported cases the respondent abandons the seat at an early stage and the question is often debated as to whether the trial should proceed further. When it did it was upon the view that the trial did not affect individuals only but was of public importance or because of the duty laid upon the judges with regard to the general report. *Vide* the *Ipswich Case*[1], the *North Heath Case*[2].

Another point to remember is that in England the Director of Public Prosecutions is required to be present to be represented at the trial, but he does no more than watch the proceedings ordinarily. There is no such requirement in Ceylon. In England, therefore, when Counsel for one of the parties retired (and the Court could not compel him to remain) the Court might have some assistance from the Public Prosecutor, but often Counsel obliged the Court by continuing to take part in the inquiry and in one case upon application by the Public Prosecutor the Court assigned the petitioner's Solicitor, who was acquainted with the facts, to instruct the Public Prosecutor. In Ceylon an Election Judge would be very awkwardly placed if he had to be satisfied with the evidence of witnesses, called after the pinch of the case had been felt, about whom he was quite ignorant, and whom he could hardly cross-examine effectively or with severity without doing some violence to his office. It would be unsatisfactory to require the assistance of the Attorney-General, for he would have to work up the case in order to be of real assistance and would not then be in the

[1] *4 O'M & H 70.* [3] *2 Ibid. 186.*

detached position in which he should be when considering whether a prosecution should follow on the election Judge's report. The petitioner's Counsel might not appear to assist. In fact, Mr. Pereira intimated that he would object if Mr. Kumarakulasingham attempted to cross-examine his witnesses. Had the situation arisen the Court would probably have welcomed the assistance of Counsel for the petitioner. It would be strange if the law expected the Judge, who had heard witnesses and come to a decision, to reverse his finding on statements made *ex parte* by witnesses called subsequently. It would be stranger still in this case when I am aware that each of the persons charged was adequately represented.

Mr. Goonesinha made it plain that he was mainly responsible for the defence. For example, at page 716, he has said—"I took a good deal of interest in this case after it was filed. I had to defend myself. I was following the case carefully. I instructed *my* Proctor. Mr. Razik was not with me when I instructed my Proctor. Mr. Joseph de Silva could not do even that. Many charges were levelled against me and I had to defend myself: I was told they were out for my blood" (page 717)

Q.—You instructed *your* Proctor he was living on Dr. Saravanamuttu.

A.—That is so.

There are other passages in his evidence on the same lines.

Quite a number of witnesses were called to meet each charge. I cannot believe that the Legislature provided for futile proceedings and I believe all it desired to see was that each person was fairly treated and did have an opportunity of defending himself. The matter resolves itself into a question of fact in each case and, to repeat the words of Mr. Justice Bucknill, "Each particular case must be conducted according to the discretion of the Court, to see that the matter is properly got at and properly threshed out."[1]

When the presence of the Attorney-General was dispensed with and the words "at the trial" introduced in Article 79 (1) (*b*), did the Legislature really make a departure from the English practice in view of the different conditions here and contemplate that a Judge would report only after a trial during which the person reported would have an opportunity of defending himself, *i.e.*, did it exclude the cases where a respondent would abandon his seat at the very outset or only after the trial had proceeded to some extent? There is no obligation in Ceylon for a Judge to continue the hearing in order to report whether corrupt or illegal practices prevailed extensively; he is not acting inquisitorially. In the unlikely event of a person charged not being called by the respondent the Court would surely desire to hear what that man had to say for himself. Article 79 (2) merely brings that duty clearly before the Judge.

It seems to me that there is reason to believe that separate proceedings are not contemplated in Ceylon, and whether one looks at the sections as they stand or the commonsense of things or the practice in England the conclusion is that in the circumstances of this case no further evidence of any nature offered should be allowed.

Mr. Pereira felt doubtful about the matter but pressed me to state a case for a fuller Bench. The powers of an election Judge must be

[1] *4 O'M & H 70.* [2] *2 Ibid. 186.*

found within the Order in Council and there is no provision for stating a case. Even if there had been, I do not think I should state a case at this stage and in the circumstances of this case.

Mr. Pereira's next point was that the evidence did not disclose the offence of undue influence in either case inasmuch as both John Singho and Simon Rodrigo had not been asked not to vote but only not to work for the respondent. It is unfortunate that this argument was not raised at the trial when it was assumed that if the evidence were accepted the charges would have been made out. The witnesses gave their evidence in Sinhalese and the meaning of what they said was quite well understood by respondent's Counsel. But he may have overlooked the law in the stress of dealing with the facts. To begin with it must be borne in mind that the Legislature throughout has been anxious to preserve the purity of elections and the free exercise of the franchise. It contemplated the legitimate use of influence. When it defined Undue Influence it used the widest possible language. Both John Singho and Simon Rodrigo were voters and had members of their households or persons in the immediate neighbourhood who were likely to vote as they did. They were workers for the petitioner and one cannot conceive that they would work for him but not vote for him. Besides, the evidence is not merely that Mr. Goonesinha asked them not to work for the petitioner but that he asked them to work for the respondent. His threat was a direct result of their refusal to act as requested. It was not merely a request that they should cease to work for the petitioner as they were entitled to do but that they should transfer their allegiance and that would include transferring their votes. The undue influence was therefore intended to prevent them exercising their franchise freely and on that ground alone the offence would be complete. But it really went further for the result was that others who would naturally follow these men did not vote and this result was foreseen and intended. More, it was intended through the agency of these men to secure voters for the respondent. That other incidents intervened does not affect the position, and when in fact these other incidents are connected with Mr.Goonesinha's conduct on this occasion they should the less affect this liability. It was an abuse of influence and therefore within the purview of the law. As pointed out in the *Blackburn Case* [1]—" Whilst the strong-minded would be influenced against the intimidation, the weak-minded and earners, whether in the same employment or in others under like circumstances, would or might be deterred. That they might be deterred is sufficient . . . . If it is done with a view to affect votes, or interfere with the free exercise of the franchise, it is within the prohibition. "

In my view therefore the offences have been made out and a report will be sent accordingly.

It is desirable to summarize my conclusions. They are—(1) The Court must report all persons who have committed offences ; (2) Before a person is reported he must have a fair warning of the charges and be given an opportunity of being heard ; (3) There may be persons who appeared only incidentally and against whom no direct charge had been made in

[1] *O'M & H 198.*

the petition, which is concerned with unseating the successful candidate ; (4) A witness had everything to gain by speaking the truth for a certificate of indemnity protected him from prosecution and he was given that protection if he gave evidence at the trial of the election petition. He had everything to gain and so had the respondent by meeting the charges at the trial itself for if he disproved them there would success to the respondent and the witness would not be disqualified or run the risk of prosecution ; (5) But if he failed, the Court had still to call upon him. It did that after it had *evidence* that an offence had been committed ; (6) In fairness to him the Court would not decide and could not report until it was satisfied that he had had fair warning of the charge and an opportunity of giving evidence and of calling evidence ; (7) Whether he had had that fair warning and that opportunity would depend on the facts of each particular case. He might have had the opportunity of giving evidence and calling evidence, but not of being heard. Then he should be heard ; (8) The Court would then complete the trial and certify its determination and make a report. I have only to add that I much regret the delay that has occurred. I say no more than that it is due to causes which eluded my control.