1968 *Present :* **Alles, J.**

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

Election Petition No. 5 of 1967—Electoral District No. 27 (Bandaragama)

Parliamentary election—Report made by the Supreme Court, in an election petition appeal, that a corrupt or illegal practice was committed by a person—Disqualification of that person for being elected as a Member of Parliament—Meaning of expression " Election Judge "—Constitutional law—Interpretation of provisions of the Constitution—Rules applicable—Form of report made by the Supreme Court—Claim of seat for an unsuccessful candidate—Allegation that the disqualification of the unseated candidate was notorious—Quantum of evidence—Ceylon (Parliamentary Elections) Order in Council, 1946 (Cap. 381), ss. 58 (1) (d), 58 (2), 72 (1), 78, 78A, 78B, 80 (d), 81, 82, 82A, 82B, 82C, 82C (2) (b), 82D, 82D (1) (b), 82D (2) (a), 72D (2) (b) (ii), 83 (2), 85 (1) (f)—Ceylon (Constitution) Order in Council, 1946, ss. 13 (3) (h), 24 (1), 29 (4).

(A) Section 82C (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council providing for a report by the Supreme Court that a corrupt or illegal practice has been committed is not repugnant to section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council and, therefore, did not require compliance with the special procedure prescribed by section 29 (4) of the Constitution when it was enacted ; the words " report of an Election Judge " in section 13 (3) (*h*) of the Constitution mean the report made by a Court dealing with an election petition, either as a court of first instance or as a court of appeal. *Obiter dictum* to the contrary in *Thambiayah v. Kulasingham* (50 N. L. R. 25) dissented from.

When considering whether an enactment is in conflict with any provision of the Ceylon (Constitution) Order in Council, the following rules of interpretation are applicable :—(1) There is a presumption in favour of validity and the Court will not rule the enactment to be *ultra vires* unless the invalidity is beyond doubt. (2) When the question arises whether a term in the Constitution should be used in a narrow sense or given a broader interpretation, the Court should be inclined to use it in the latter sense unless there is something in the context or the rest of the Constitution which militates against such a view. (3) The Constitution, being organic law, cast in broad and general terms, it has always to be borne in mind that the framers of the Constitution intended to apply it to varying conditions brought about by later developments. (4) The Courts should give due effect to the declared intention of the legislature in seeking to interpret a document such as the Constitution.

(B) When the determination of an Election Judge as a court of first instance in favour of the successful candidate is reversed by the Supreme Court on the ground that an agent of the candidate was guilty of corrupt practice, the report made by the Supreme Court under section 82C (2) (*b*) of the Parliamentary Elections Order in Council is valid so long as it contains in a clear and concise manner all the matters required by section 82.

(C) Where there are two or more candidates for a Parliamentary seat and, in consequence of an election petition, the election of the successful candidate is declared void on the ground that at the time of the election he was disqualified,

the candidate who obtained the next highest number of votes is not entitled to the seat in terms of section 80 (*d*), read with section 85 (1) (*f*), of the Parliamentary Elections Order in Council if the disqualification of the unseated candidate could not be said to have been notorious by reason of the fact that, on account of two seemingly conflicting decisions of the Supreme Court, there were two views of the law on the fact of disqualification placed before the electors and the disqualification was not founded on some positive and established fact on the date of the poll.

ELECTION Petition No. 5 of 1967—Electoral District No. 27 (Bandaragama).

A. C. Gooneratne, Q.C., with *Izzadeen Mohamed, H. D. Tambiah* and *Ranjan Gooneratne*, for the petitioners.

Colvin R. de Silva, with *Hannan Ismail* and *P. D. W. de Silva*, for the respondent.

H. L. de Silva, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

June 14, 1968. ALLES, J.—

At the Parliamentary General Elections held on 22nd March 1965, the respondent was declared elected as Member for the electoral district of Bandaragama. Two election petitions were filed against him by two registered voters of the electorate praying for declarations that his election was void on the grounds, *inter alia*, that the respondent or his agent or other persons acting on his behalf or with his knowledge and consent, published false statements of fact in relation to the personal character or conduct of Don Christopher Wijesinghe Kannangara, a candidate at the said election, and was guilty of a corrupt practice under section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order in Council (Cap. 381).

The Chief Justice, under section 78A (1) of the said Order in Council, nominated Abeyesundere, J. from the Panel of Election Judges appointed by the Governor-General under section 78 (1) as Election Judge to try the said petitions. There was a consolidated hearing of the said petitions before Abeyesundere, J. who by his judgment of 5th June 1966 dismissed the said petitions. The petitioners thereupon lodged an appeal to the Supreme Court against the judgment of the Election Judge under section 82A (1) of the Order in Council. The appeal was heard before three Judges of the Supreme Court (The Chief Justice, Tambiah and G. P. A. Silva, JJ.) who by their judgment of 12th May 1967 held that the Election Judge had misdirected himself in law on the meaning of ' agency ' in the election law and that on the totality of the proved circumstances in the

case, one Jayatileke, in promoting the election of the respondent, published defamatory statements in regard to the character of the opposing candidate and that he did so with the respondent's knowledge. It was the view of the Supreme Court that Jayetileke acted as agent of the respondent in committing the corrupt practice mentioned in section 58 (1) (*d*) and that the election of the respondent was void on the ground that the corrupt practice was committed by his agent, Jayetileke.

On 29th May 1967 Jayetileke was given an opportunity to show cause under the proviso to section 82 why he should not be reported to the Governor-General under the provisions of the Order in Council. Jayetileke was represented by Counsel and at the conclusion of the inquiry against him, the Supreme Court consisting of the same three Judges, held that cause was not shown against the making of the report and thereafter the Supreme Court issued the report under section 82C (2) (*b*) which was ultimately transmitted to the Governor-General on 5th June 1967 by the Registrar of the Supreme Court who informed him that the determination of the Election Judge on the two election petitions was reversed by the Supreme Court. Upon transmission to the Governor-General of the certificate and report, the report was published in the *Government Gazette* No. 14,755/2 of 2nd July 1967 in terms of section 82D (2) (*a*) of the Order in Council. The determination and decision of the Supreme Court took effect and a fresh election was held in terms of section 82D (1) (*b*) on 23rd September 1967. The respondent came forward as a candidate at the new election and the Returning Officer declared the votes cast for the candidates as follows :—

K. Don David Perera (the respondent) ..	23,840
George Kotalawala	18,372
Eustace Bandara	211

The petitioners to the present petition, who are registered voters of the Bandaragma electorate, claim that by reason of the report of the Supreme Court in terms of section 82D (2) (*b*) (ii), the respondent at the date of the said report, namely 5th June 1967, became incapable for a period of seven years of being registered as an elector or of being elected or appointed a Member of Parliament.

The main contention of Counsel for the petitioners was that, being disqualified from being a candidate in view of the provisions of the Elections Order in Council, the respondent was not entitled to come forward as a candidate at the said election. It was further submitted by him that the disqualification of the respondent being a matter of notoriety and one to which the widest publicity was given in the electorate, the voters who cast their votes for the disqualified candidate had thrown away their votes and consequently the majority of lawful votes being cast for the candidate who came second, George Kotalawala, the latter was entitled in law to claim the seat.

Counsel for the respondent on the other hand, maintained that the respondent was not disqualified from seeking re-election, that the report of the Supreme Court made under section 82C (2) (*b*) was void since the law providing for a report of the Supreme Court was in conflict with section 13 (3) (*h*) of the Constitution Order in Council; that the law providing for a report of the Supreme Court in effect was an amendment of the Constitution and that the procedure contemplated in section 29 (4) of the Constitution not having been followed the provisions of sections 82C (2) (*b*) and 82D (2) (*a*) of the Order in Council were *ultra vires* section 13 (3) (*h*) of the Constitution. In support of his submission Counsel further relied on the judgment of the Divisional Bench in *Thambiayah v. Kulasingham* [1], which, he argued, supported his legal contention. In any event, Counsel for the respondent submitted that it was not open to the petitioners to claim the seat on behalf of the unsuccessful candidate.

The matters raised by Counsel for the respondent are of considerable importance; the questions of law raised by him not only affect the interpretation of the Constitution but also have an important bearing on the appellate powers of the Supreme Court in election cases. In arriving at my conclusions, I have received considerable assistance from learned Counsel on both sides. My special thanks are due to Crown Counsel, who, at short notice, appeared in Court and assisted me on the complex questions of law that arise for consideration in this case.

An examination of the relevant provisions of the Constitution Order in Council of 1946 and the Parliamentary Elections Order in Council is necessary in order to appreciate the constitutional issues that have been raised in this petition.

Section 24 (1) of the Constitution provides, *inter alia*, that the seat of a Member of Parliament shall become vacant—

(*d*) if he becomes subject to any of the disqualifications mentioned in section 13 of this Order.

Section 13 (3) states that—

"A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives—

(*h*) if by reason of his conviction for a corrupt or illegal practice or *by reason of the report of an election judge in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament*, he is incapable of being registered as an elector or of being elected or appointed as a Senator or Member, as the case may be.

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

At the time section 13 of the Constitution came into force (5th July 1947) the law governing the disposal of election petitions was contained in Part V of the Ceylon (Parliamentary Elections) Order in Council of 1946. Section 78 of that Order provided as follows :—

(1) Every election petition shall be tried by the Chief Justice or by a Judge of the Supreme Court nominated by the Chief Justice for the purpose.

(2) The Chief Justice or the Judge so nominated is, in this Order, referred to as the Election Judge.

Sub-section (3) dealt with the powers of the Election Judge to summon witnesses; sub-section (4) declared that an Election Judge shall be attended at the trial of an election petition in the same manner as if he were a Judge of the Supreme Court sitting at Assizes; and under sub-section (5) all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the Supreme Court.

Section 81 provided for the determination of the Election Judge and the issue of the certificate and upon the certificate being issued, the determination of the Election Judge was declared to be final. The section also provided for the holding of a fresh election if the necessity arose.

Section 82 provided for the report of the election judge. Under the section it was incumbent on the Election Judge to report in writing whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent and the nature of such corrupt or illegal practice, if any, and also the names and descriptions of all persons who have been guilty of such practices. Like the certificate, the report of the Election Judge was final and on the publication of the report in the *Gazette* the names of the candidate or the persons against whom the report declared that corrupt or illegal practices were committed were deleted from the register of electors by the registering officer which made him incapable of voting at an election. From a consideration of the above provisions it will be seen that the concept of the 'Election Judge' was one that was recognised in the election law. Indeed this same concept was recognised in section 75 of the Ceylon (State Council) Order in Council, 1931, and even earlier in Article XXXVII of the 1923 Order in Council. Up to 1946 therefore the Election Judge was always a Judge of the Supreme Court who tried an election petition and whose report was final. It was therefore submitted by Counsel for the respondent that when the Constitution in 1947 made reference to the report of the Election Judge in accordance with the law for the time being in force, a ground for disqualification, it could only mean that the Supreme Court was acting as a court of first instance.

In 1948 and subsequently in 1959 and 1961 there were drastic changes in the election law and the Elections Order in Council for the first time provided for an appeal to three Judges of the Supreme Court from the determination and decision of an Election Judge. The Order in Council of 1946 was amended by the introduction of the new sections 81, 82, 82A, 82B, 82C, and 82D. Under sections 81 and 82, the certificate and report of the Election Judge, which had hitherto been forwarded by him direct to the Governor, was to be kept in the custody of the Registrar of the Supreme Court to be dealt with according to the directions of the Supreme Court. Section 82A provided for an appeal on a question of law to three judges of the Supreme Court from the determination and decision of the Election Judge and laid down the procedure to be followed on an appeal. Under section 82B (1), the Supreme Court in appeal had power to affirm, vary or reverse the determination or decision of the Election Judge and under section 82B (2) the Supreme Court could issue its own certificate. Under section 82B (3), the Supreme Court had power to direct that the petition to which the appeal relates 'shall be tried anew in its entirety or in regard to any matter specified by that court and give such directions in relation thereto as that court may think fit'. Section 82B (5) makes the decision of the Supreme Court in any appeal final and conclusive.

Under section 82C (1) if no appeal was filed within the prescribed time or the Supreme Court confirmed the determination of the Election Judge the court shall transmit to the Governor-General the certificate of the Election Judge under section 81 and the report of the Election Judge under section 82 which it will be remembered were in the custody of the Registrar of the Supreme Court up to that time.

Section 82C (2) is in the following terms :—

> " Where the determination of the Election Judge is reversed by the Supreme Court in appeal, the court shall transmit to the Governor-General the certificate of the decision of that court issued under section 82B, together with—
>
> (*a*) The report of the Election Judge made under section 82, if it is in the opinion of the Supreme Court not affected by the decision in the appeal ; or
>
> (*b*) if the court considers it necessary, a report in respect of the matters referred to in section 82 made by the court in accordance with the provisions of that section."

For the first time the law now contemplated a *report of the Supreme Court* and this is the report which has been forwarded to the Governor-General in this case and referred to earlier in this judgment.

The effect of the transmission of the certificate and report is mentioned in section 82D. If a report is sent by the Supreme Court declaring that a corrupt practice has been committed by an agent of the candidate, by operation of law, the candidate, would be disqualified from seeking election as a candidate for a period of seven years (vide section 82D (2) (*b*) (ii) read with section 58 (2) of the Order in Council) and his name shall be deleted from the register of electors (section 82D (3)).

There can be no doubt that sections 82C (2) and 82D contemplate a report of the Supreme Court as distinct from a report of the Election Judge. This distinction is clearly brought out in the provisions of section 82D (2) of the Order in Council.

It was not the submission of Counsel for the respondent that the legislature had not the right by a simple majority to amend the Elections Order in Council by providing for an appeal to three Judges of the Supreme Court from the determination of the Election Judge nor did he seek to argue that the Supreme Court could not issue a certificate under section 82B (2), when it varied the decision of the Election Judge, but it was his submission that when section 82C (2) (*b*) provided for a report of the Supreme Court and a transmission of such a report to the Governor-General, with the attendant consequences of disqualification on a candidate or any other person, it was unconstitutional being in conflict with section 13 (3) (*h*) of the Constitution. This new disqualification, according to Counsel, needed a constitutional amendment contemplated under the procedure specified in section 29 (4) of the Constitution. Counsel for the petitioners however maintained that when the section referred to a report of the Election Judge in accordance with the law for the time being in force it necessarily included the three Judges of the Supreme Court who under the amendment to the Elections Order in Council were vested with the power to deal with an appeal on an election matter and who therefore could be included in the term 'Election Judge'.

Apart from the historical approach which according to Counsel for the respondent, supported his submission that when the Constitution referred to an 'Election Judge' in section 13 (3) (*h*) of the Constitution, the framers of the Constitution must have had in mind a Judge of the Supreme Court acting as a court of first instance, Counsel also submitted that there were other grounds in the provisions of the Elections Order in Council which favoured this view. He submitted, firstly, that with the widening of the panel of Election Judges to include Commissioners of Assize and the senior District Judges, consequent on the amendments to the Order in Council in 1959 and 1961, it is no longer permissible to equate an Election Judge to a Judge of the Supreme Court. The effect of these amendments made it possible for the three Judges of the Supreme Court who hear an appeal from the determination and decision of an Election Judge not to have been appointed on the panel of Election

Judges under section 78 (1) of the Order in Council. While an Election Judge may be a Judge of the Supreme Court it is not all Judges of the Supreme Court who may be appointed Election Judges. The rights, powers, privileges and immunities of an Election Judge are only confined to that of a Judge of the Supreme Court sitting at assizes (section 78A (1); the salary of the Election Judge who is not a Judge of the Supreme Court is equated to the salary of a Commissioner of Assize appointed under section 22 of the Courts Ordinance—it is indeed doubtful whether a Commissioner of Assize being appointed to " hold office for such period and for such criminal session.....of the Supreme Court as shall be specified in the said Commission " can function as an Election Judge when his commission expires ; the punitive powers of the Election Judge who is also a Judge of the Supreme Court to punish a witness for perjury are no greater than those of a District Judge by virtue of section 78A (3) of the Order in Council—*In re Aslin Nona* [1]—and although it may have been appropriate for an ' Election Court ' to be called a branch of the Supreme Court in 1942 when Howard C.J. delivered his judgment in *In re Goonesinha* [2] there was no justification to use this same nomenclature after the Supreme Court was vested with appellate powers from the determination and decision of the Election Judge. It was therefore submitted by learned Counsel for the respondent that since an Election Judge was appointed in a special manner with special powers and privileges, when section 13 (3) (*h*) of the Constitution referred to the ' report of the Election Judge ' on the ordinary canons of construction, it must mean the report of the Court dealing with an election petition as a court of first instance and should not be given the wider meaning contended for by Counsel for the petitioners to a report made by a court dealing with an election petition either as a court of first instance or a court of appeal. Finally, Counsel for the respondent submitted that the amendments to the Elections Order in Council in 1948 having been introduced as a result of the decision in *Kulasingham v. Thambiayah* [3], the legislation that was passed providing for an appellate procedure did not adequately consider the impact of such legislation on section 13 (3) (*h*) of the Constitution. Indeed in Thambiayah's appeal [4], which was the first case in appeal after the amendment of the law, Wijeyewardene, A.C.J. came to the conclusion that the procedure which provided for a report of the Supreme Court was *ultra vires* the provisions of section 13 (3) (*h*) of the Constitution in that it affected an amendment to the Constitution which could only be passed in accordance with the procedure laid down in section 29 (4).

While the submissions of learned Counsel for the respondent are not without attraction, it seems to me that in the task of constitutional interpretation, special considerations have to be applied. The Constitution is not an ordinary enactment of the legislature ; in the words of Chief Justice Marshall in *M'Culloch* [5]. *The State of Maryland* [5] " we must never

[1] *(1948) 50 N. L. R. 167.*
[2] *(1942) 43 N. L. R. 337 at 341.*
[3] *(1948) 49 N. L. R. 505.*
[4] *(1948) 50 N. L. R. 25.*
[5] *U. S. Reports 4 Law Ed. 597 at 602.*

forget that it is a constitution we are expounding." The Constitution of Ceylon is contained in a written document given to the peoples of this country by Her Majesty the Queen and contains provisions which no doubt have been framed in the light of existing legislation and the constitutional development of the country as it existed in 1947. The constitution was intended not only as a document that was to be efficacious in 1947 but was intended to serve future generations of the subjects of the country under changing conditions. Law is never static and must develop with changing times and it should be the endeavour of all persons interested in the progress of the country to ensure that changing legislation is always in conformity with the provisions of the Constitution. It is for this reason that Chief Justice Marshall in *Cohens v. Virginia* [1] remarked that " a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests....." In recent times our Constitution has weathered many a storm and it is to the credit of our Courts of Law that our Judges have jealously guarded the provisions of the Constitution from any unwarranted attempts by the Executive to infringe on its provisions. For this reason it is that the Privy Council in *The Bribery Commissioner v. Ranasinghe* [2] remarked that " the Court has a duty to see that the Constitution is not infringed and to preserve it inviolate." Of course that does not mean that in an appropriate case the Courts will not pronounce on the invalidity of legislation which is in conflict with the provisions of the Constitution. Recent pronouncements of our Supreme Court and the Privy Council have amply justified the assertion that the Courts have not been slow to be watchful and vigilant against any unwarranted attempts of the Executive to violate the provisions of the Constitution—*Senadhira v. The Bribery Commissioner* [3], *Piyadasa v. The Bribery Commissioner* [4], *Ranasinghe v. The Bribery Commissioner* [5], *Walker Sons & Co. Ltd. v. Fry* [6], and *Liyanage v. The Queen.* [7]

Having regard to these general principles it will now be useful to consider the special considerations that have to be adopted in dealing with the task of constitutional interpretation.

Firstly in dealing with an enactment the constitutional validity of which is in issue, there is a presumption in favour of validity and the Court will not rule an enactment to be *ultra vires* unless the invalidity is clear beyond doubt. In *Federal Commissioner of Taxation v. Munro* [8] Isaacs, J. remarked —

[1] *U. S. Reports 6 Law Ed. 257 at 287.*
[2] *(1964) 66 N. L. R. 73 at 78.*
[3] *(1961) 63 N. L. R. 313.*
[4] *(1962) 64 N. L. R. 385.*
[5] *(1962) 64 N. L. R. 449.*
[6] *(1965) 68 N. L. R. 73.*
[7] *(1965) 68 N. L. R. 265.*
[8] *(1926) 38 C. L. R. 153 at 180.*

" It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency—as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us—the question is : Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers ? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat.* Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. "

These observations of Isaacs, J. were cited with approval in *The Queen v. Liyanage*[1].

Secondly, the Court must have regard to its special character as organic law and note that constitutional provisions are usually contained in terms of a general nature. Most constitutions deal with the framework of government. They do not contain provisions which are found in statutes passed in the normal exercise of legislative powers. Therefore when the question arises whether a term in the Constitution should be used in a narrow sense or given a broader interpretation, the Court should be inclined to use it in the latter sense unless there is something in the context or the rest of the Constitution which militates against such view.

In *Baxter v. Commissioners of Taxation (N.S.W.)*[2] Griffith, C.J. quoted with approval the observations of Story, J. in *Martin v. Hunter's Lessee :*

" The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.

[1] *(1962) 64 N. L. R. 313 at 355.*
[2] *(1907) Vol. 4 Pt. 2 C. L. R. 1087 at 1105.*

It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter ; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require. "

O'Connor, J. in *The Jimbunna Coal Mine, No Liability and another v. The Victorian Coal Miners' Association*[1] gave expression to the same views in the following words : —

" . . . where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. "

Thirdly, being organic law, cast in broad and general terms, it has always to be borne in mind that the framers of the Constitution intended to apply it to varying conditions brought about by later developments. This does not mean that the meaning of the legal expression changes but having regard to its generic form it is capable of being adapted to new situations. The rule of generic interpretation is one that is commonly used not only to ordinary enactments but also to constitutional documents.

In dealing with ' Extension to New Things ' Maxwell[2] states :

" Except in some cases where the principle of excessively strict construction has been applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it. "

This principle is supported by the decisions of the Courts relating to the extension of telegraphic and telephonic communication to existing Acts of the legislature. In *Attorney-General v. The Edison Telephone Company*

[1] *(1908) 6 C. L. R. 309 at 368.*

[2] *Interpretation of Statutes (10th Edn.), p. 79.*

of London Ltd. [1] it was held that Edison's telephone was a 'telegraph' within the meaning of the Telegraph Acts 1863 and 1869 although the telephone was not invented or contemplated in 1869; in *King v. Brislan, Ex parte Williams* [2] it was held that broadcasting was a form of wireless telephony and that the Wireless Telegraphy Act was not inconsistent with section 51 (v) of the Commonwealth Constitution which enabled Parliament to make laws for the peace, order and good government of the Commonwealth with respect to 'postal, telegraphic, telephonic and other services'. A similar view was taken by the Supreme Court of the United States in *The Pensacola Telegraph Co. v. Western Union Telegraph Co.* [3]. On this same principle I wish to quote with approval the language of Lord Wright who tendered the advice of the Privy Council in *James v. The Commonwealth of Australia* [4]:

> "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act (i.e., the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted' (*British Coal Corporation v. The King*) [5]."

Finally the Courts should give due effect to the declared intention of the legislature in seeking to interpret a document such as the Constitution. In the words of the present Chief Justice in *Ranasinghe v. The Bribery Commissioners* [6], "in examining an enactment with reference to any alleged Constitutional invalidity, a Court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible."

In the light of the general principles set out earlier and the special considerations that must be borne in mind in seeking to interpret a constitutional document, I shall now proceed to examine the correct interpretation that must be given to the words 'report of the Election Judge *in accordance with the law for the time being in force* relating to election of Senators and Members of Parliament'. As Crown Counsel submitted in the course of his able argument on the constitutional issue the words 'in accordance with the law for the time being in force' refer only to a state

[1] *(1880–1881) L. R. 6 Q. B. D. 244.*
[2] *(1935) 54 C. L. R. 262, 273, 274.*
[3] *U. S. Reports 24 Law Ed. 708 at 710.*
[4] *(1936) 55 C. L. R. 1 at 43; (1936) A. C. 578 (P. C.).*
[5] *(1935) A. C. 500 at 518.*
[6] *(1962) 64 N. L. R. 449 at 450.*

of potentiality and the state of actuality has to be found elsewhere in the relevant sections of the Elections Order in Council—58 (2), 72 (1) and 82D (2) (*b*). The very existence, extent, range and length of duration of the disqualification or incapacity under consideration depends, not on the provisions of the Constitution, but the election law for the time being in force.

If, for instance, the Elections Order in Council is amended by the repeal of the provisions attaching a disqualification to either a conviction or a finding embodied in a report, section 13 (3) (*h*) becomes a dead letter. No constitutional amendment is necessary which abolishes completely the incapacity or disqualification referred to in the section.

Secondly, the extent and range of the disqualification would vary according to the law for the time being in force which can alter the nature of the acts which constitute 'corrupt practices' or 'illegal practices'. Such changes brought about by an amendment of the law by a simple majority do not effect a constitutional amendment. Indeed the Constitution recognised that such variations can be achieved by an amendment of the ordinary law. But as Crown Counsel quite rightly submitted, the legislature cannot override the clear terms of paragraph (*h*) by seeking to impose an incapacity to acts which do not constitute corrupt or illegal practices, for instance, by declaring that an unsuccessful candidate who has lost his deposit at two successive elections should suffer such disability. Such a disqualification would be a new ground for which a constitutional amendment would be necessary.

Thirdly, the length of duration of the disqualifying period is a matter which can be altered by the Elections Order in Council without the necessity of a constitutional amendment.

It is therefore apparent that the above considerations depend on the election law for the time being in force and do not involve any conflict with the provisions of the Constitution.

If it can properly be conceded that with regard to the above matters, the disqualifications can vary and fluctuate according to the election law for the time being in force, there seems to be no reason or justification for giving the words 'Election Judge' in the section the restricted meaning contended for by Counsel for the respondent. Although at the time the Constitution was drafted the words 'Election Judge' had perforce to apply to a court of first instance, there seems to be no ground for denying its applicability to a court dealing with an election appeal, if the law for the time being in force gave such a court a right of appeal, and also empowered it to make a report consequential upon its decision in the case. In *The Bribery Commissioner v. Ranasinghe* [1] the Privy Council

[1] *(1964) 66 N. L. R. 73 at 76.*

refused to accept the argument that the words 'judicial officers' in section 55 of the Constitution only applied to judges of the courts referred to in the Courts Ordinance but also included within that concept members of a Bribery Tribunal who performed judicial duties and were appointed under the Bribery Act of 1954. Before the amendment of 1948 it was always a Judge of the Supreme Court who made the final decision on an election petition. Even today it is the Supreme Court consisting of three Judges who are the final court of appeal and in *Senanayake v. Navaratne* [1] it was held that no appeal lies to the Privy Council from a decision of the Supreme Court. There is therefore nothing repugnant to the concept of Supreme Court Judges being regarded as Election Judges. In *In re Goonesinha* [2] Howard, C.J. referred to the functions of a Judge of the Supreme Court hearing an election petition in the following terms :—

> "The Election Judge is a Judge of the Supreme Court, attended in the same manner as a Judge of the Supreme Court, interlocutory matters are decided by any Judge of the Supreme Court, election petitions are presented to the Supreme Court, election petitions are intituled 'In the Supreme Court of Ceylon', member's agents must be Proctors of the Supreme Court of Ceylon and if the Election Judge is disabled by illness, the trial can be recommenced before another Judge of the Supreme Court. In these circumstances I have no hesitation in coming to the conclusion that the Election Court is a branch of the Supreme Court....."

True it is, that when the learned Chief Justice made those observations he was dealing with a Judge of the Supreme Court whose decision on an election petition was final but there appears to be no valid ground for denying to Judges of the Supreme Court hearing an appeal from the decision of an Election Judge, the nomenclature of "Election Judges". Indeed even the Order in Council seems to indicate that it is the Supreme Court which has overall jurisdiction in all election matters. Under section 78B, even today, all interlocutory matters in connection with an election petition may be dealt with by any Judge of the Supreme Court; under section 83 (2) an election petition may be amended with the leave of a Judge of the Supreme Court within the time within which an election petition questioning the return or the election may be presented; and the observations of the learned Chief Justice are equally applicable to the functions of Election Judges today, except that the Election Judge need not necessarily be a Judge of the Supreme Court. Although today the election law does not provide for a separate election Court similar to a Court of Admiralty or the Court of Criminal Appeal there appears to be no valid reason, in view of the above observations, why a restricted meaning should be given to the words "Election Judge" in section 13 (3) (*h*)

[1] *(1954) 56 N. L. R. 5*
[2] *(1922) 43 N. L. R. 337.*

although in the Elections Order in Council they are used in a specialised sense. Crown Counsel suggested another cogent reason, which commends itself to me, as to why the restricted meaning should not be given to the words "Election Judge" in the Constitution. Broadly speaking, section 13 (3) (*h*) attaches the disqualification to a conviction for an illegal or corrupt practice or to a report made by an Election Judge. In the case of the conviction it is clear beyond doubt that the reference to a conviction includes both a conviction by a trial court as well as the court of appeal. Where there is an appeal by the accused or the Attorney-General it is the appeal court decision that prevails and on which section 13 (3) (*h*) will operate. For similar reasons, there is no reason for assuming that when the framers of the Constitution referred to ' the report made by the Election Judge ' they had in mind only the trial Court. The law for the time being in force contemplated only a court of first instance but it was open to the legislature by a simple majority to amend it to include also a court of appeal. There is no rational basis for making such a distinction between 'convictions' and 'reports' and it therefore accords with reason and common sense to give the words a wider meaning. There was no new ground of disqualification set out in the report of the Supreme Court. Section 82D merely introduced a change in the mode of ascertaining the facts to be embodied in the 'report' and therefore required no constitutional amendment. When the legislature intended to introduce a new ground of disqualification it guarded itself against doing anything unconstitutional and utilised the procedure available in section 29 (4). For instance section 29 (*a*) of the Bribery Act, No. 11 of 1954, introduced a new ground of disqualification but the Act provided and was passed in accordance with the procedure laid down in section 29 (4) of the Constitution. Similarly, when the Imposition of Civic Disabilities (Special Provisions) Act in 1965 created a ground of disqualification not covered by section 13 (3) (*k*) of the Constitution, provision was made in section 2 of the Act to ensure that it did not infringe on the provisions of the Constitution. This procedure was approved of by the Privy Council in *Kariapper v. Wijesinha* [1].

It was also submitted by Crown Counsel that the changes introduced in the election law did not conflict with the pith and substance of section 13 (3) (*h*) and that the amendment did not run counter to the spirit and intendment of the Constitution. A close examination of the relevant sections would reveal that Crown Counsel's submission is correct. When the amendment in 1948 was introduced giving appellate powers to the Supreme Court from the determination and decision of the Election Judge, Parliament provided a further safeguard to make it possible for three Judges of the Supreme Court to review the decision of a single Judge on a question of law. It was a salutary provision and enabled the aggrieved party to contest the validity or otherwise of the election before three Judges of the highest tribunal in the land. Such a course being eminently desirable, it was possible for the Supreme Court to

[1] *(1967) 70 N. L. R. 49.*

issue its own certificate and declare the election of the candidate void. If it is open to the Supreme Court to issue a certificate declaring the election void, there is no reason for denying to the Supreme Court the ancillary power to make a report to the authorities that corrupt or illegal practices were committed. Indeed it may be that the election was declared void due to the commission of corrupt or illegal practices, in which case, it would be unreal for the Supreme Court not to have the power to submit its report in such a case. It was the will of the legislature that the Supreme Court should be given the power to make its own report. So long as the report is the report of a *judicial officer*, be it the Election Judge or the three Judges of the Supreme Court sitting in appeal, there is no conflict with the Constitution. It would have been different if the report contemplated was that of an Executive Officer such as the Commissioner of Parliamentary Elections. Finally, section 78A (2) of the Elections Order in Council uses the words 'in this Order'. There is therefore no justification to warrant the application of the definition in the Elections Order in Council to the general words used in the Constitution.

I am therefore of the view that the words 'report of an Election Judge' in section 13 (3) (*h*) of the Constitution mean the report made by a Court dealing with an election petition, either as a court of first instance or as a court of appeal and that section 82 D (2) (*b*) of the Elections Order in Council is not *ultra vires* the provisions of section 13 (3) (*h*) of the Constitution.

I have dealt with the constitutional issues raised in this petition without considering the effect of the decision in *Kulasingham v. Thambiayah* which I propose to examine in detail. Before doing so, however, I wish to refer to the validity of the Supreme Court report which was challenged by Counsel for the respondent. It was his submission that, according to the terms of the report, no occasion arose for a disqualification of the respondent, since there was no finding in the report that the respondent had been guilty of a corrupt practice. It was urged by Counsel that when such serious consequences as a deprivation of civic rights for a period of seven years, without even being able to show cause, resulted from the report, it was grossly unfair that the respondent should be penalised on some inference that has to be drawn from the report. I agree with Counsel for the respondent that the penal provisions are harsh but that is a matter that has to be canvassed elsewhere. The only question that arises for my decision is whether the report issued by the Supreme Court in this case is in conformity with the provisions of the law. The report issued in this case reads as follows :—

> "In terms of section 82 C (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council, 1946 (Chapter 381), we hereby report that on appeal from the determination of the Election Judge in the trial of the Election Petitions presented by Don Edin Wijesekera and Ponsuge

Bartholis Thisera (Election Petition No. 1 of 1965) and Pathirage Arlis Perera and Balachandra Aratchige Amarapala Perera (Election Petition No. 16 of 1965) on 2nd April 1965 and 17th April 1965, respectively, complaining against the election of Kongahakankanamge Don David Perera as Member of Parliament for Electoral District No. 27—Bandaragama at the General Election holden on the 22nd day of March, 1965, a corrupt practice has been proved to have been committed by Pallage Victor Perera Jayatilleke of Damingomuwa, Milleniya, in that he, being an Agent of the Respondent, Kongahakankanamge Don David Perera, published during the said election, a false statement of fact in relation to the personal character or conduct of Don Christopher Wijesinghe Kannangara who was another candidate at the said election for the purpose of affecting the return of such candidate.

The person named Pallage Victor Perera Jayatilleke was given an opportunity of being heard by us before making this report.

Dated at Colombo, this Fifth day of June, 1967.

H. N. G. FERNANDO,
Chief Justice.

H. W. TAMBIAH,
Puisne Justice.

G. P. A. SILVA,
Puisne Justice."

Under section 82 C (2) (*b*), the report of the Supreme Court must contain " the matters referred to in section 82 made by the court in accordance with the provisions of that section ". The report under section 82 which has to be made by the Election Judge at the conclusion of the trial must set out—

(*a*) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice.

It will be noted that the report is not one made against a particular individual, be he a candidate or any other person, but a finding of fact contained in a document of the commission of corrupt or illegal practices

by persons in the course of an election. Once the report is transmitted to the Governor-General and the Governor-General causes the report to be published in the *Gazette*, the disqualifications mentioned in section 82 D (2) (*b*) (i) and (ii) take place by operation of law. It is therefore not open to Counsel for the respondent to argue that there should be reporting of the respondent for the commission of a corrupt practice. An examination of the report in this case reveals that the Supreme Court has found that—

(*a*) one Jayatilleke has been guilty of a corrupt practice ;

(*b*) Jayatilleke was an agent of the respondent, who was a candidate at the election ;

(c) the nature of the corrupt practice committed by Jayatilleke ; and

(*d*) the name and address of Jayatilleke.

Although section 82 (*b*) states that the report requires the names and descriptions of all persons, if any, who have been proved guilty of corrupt practice *at the trial*, it necessarily follows that when the Supreme Court is empowered to make its own report on its own findings, the corrupt practice is proved to have been committed by the person in the course of the trial, as a result of the reversal of the determination of the Election Judge on a question of law. In my view, the report contains in a clear and concise manner all the matters required by section 82. Counsel for the respondent relied on the case of *Grant v. Overseers of Paygham* [1] in support of his submission that the form of the report forwarded in this case was invalid. That case, however, can be distinguished on the facts. In that case, the report of the election judge stated the facts from which personal bribery and other corrupt practices could be inferred against Grant but he did not report in terms of the statute that " a corrupt practice has been proved to have been committed with the knowledge and consent of the candidate ". According to Grove, J. " the report does not find that the candidate was guilty of a corrupt practice with his own knowledge and consent. It is consistent, therefore, with his having been guilty by his agents ". It was therefore held that Grant was not found on the report to be guilty of bribery. In the present case, however, the report clearly states that Jayatilleke was an agent of the respondent and that statement is in conformity with the law.

I will now proceed to deal with the decision in *Thambiayah v. Kulasingham* [2] which was discussed and dissected in detail by all three Counsel. Being a judgment of a Divisional Bench (Wijeyewardene, A.C.J., Canekeratne and Windham, JJ.) it is clear that if the question decided by Wijeyewardene, A.C.J. in his judgment in that case, which is the same question of law that has been exhaustively argued in this petition, formed part of the *ratio decidendi* in the case, it is an authority binding on me, even if I am disposed to take a different view.

[1] *(1877) C. P. 80 at 85 and 87.* [2] *(1948) 50 N. L. R. 25.*

Learned Counsel for the respondent relied strongly on the judgment of the learned Chief Justice as stating the correct view of the law and submitted that it formed part of the *ratio decidendi*. Indeed it is on the decision in this case that the respondent maintained that he was not disqualified from being re-elected as Member of Parliament for Bandaragama. In his affidavit R1, filed in those proceedings, he states that he gave wide publicity to the voters of the electorate and mentioned that, in view of the judgment in this case, he was not disqualified from seeking re-election.

Counsel for the petitioners and Crown Counsel, on the other hand, have argued that the judgment of the learned Chief Justice on the question at issue was *obiter dicta* and that I am not bound to follow the judgment of the learned Chief Justice. They even submitted that the decision on the question presently at issue is not correct and cannot even have any persuasive value.

The case of *Thambiayah v. Kulasingham* was the first appeal to be heard by the Supreme Court after the amendments to the Elections Order in Council in 1948. It is a decision of the highest authority and delivered by three eminent Judges of the Supreme Court. The case has been referred to in "The Constitution of Ceylon" by Jennings [1] and also in Jennings' later book "Constitutional Laws of the Commonwealth" [2]. In the former book, the learned author says this in relation to the case: "The Parliamentary Elections (Amendment) Act, No. 19 of 1948, contained provisions in sections 82C and 82D which were held to be repugnant to section 13 (3) (*h*) of the Constitution, but the remainder of the Act was declared to be valid." In *Bribery Commissioner v. Ranasinghe* [3] the Privy Council approved of the dictum in *Thambiayah v. Kulasingham* that 'where invalid parts of the statute which are *ultra vires* can be severed from the rest which is *intra vires* it is they alone should be held invalid'. In *Liyanage v. The Queen* [4] Lord Pearce referred to the decision in the case when he dealt with the doctrine of severability.

It is with some degree of diffidence that I approach the question that has been posed by Counsel for the petitioners and Crown Counsel, conscious as I am that I am invited to criticise the judgment of one of our most distinguished Judges of the Supreme Court and one who ultimately rose to the eminence of Chief Justice of this country.

In *Kulasingham v. Thambiayah* [5] the Election Judge (Basnayake, J.) declared the election of Thambiayah void on the ground that being a shareholder of a Company, he enjoyed the benefit of a contract under the

[1] *Constitution of Ceylon by Jennings 178.*
[2] *Constitutional Laws of the Commonwealth 385.*
[3] *(1964) 66 N. L. R. 73 at 83.*
[4] *(1965) 68 N. L. R. 265 at 285.*
[5] *(1948) 49 N. L. R. 505.*

Crown and was therefore disqualified under section 13 (3) (c) of the Constitution. Thambiayah appealed from the determination of the Election Judge and the main issue that arose for consideration at the appeal was whether Thambiayah was disqualified under section 13 (3) (c). The respondent Kulasingham argued his case in person and raised a preliminary objection to the jurisdiction of the Court and submitted that the amendment to the Election Order in Council in 1948 providing for an appeal to the Supreme Court was invalid and *ultra vires* the Constitution, since the Amending Act was not passed in accordance with the constitutional procedure laid down in section 29 (4). In the course of his arguments the respondent submitted that a report of the Supreme Court under the Amending Act would be repugnant to section 13 (3) (*h*). The Attorney-General who appeared as *amicus curiae* and Mr. H.V. Perera, Queen's Counsel, who appeared for the appellant submitted that, in the absence of a definition of the words ' Election Judge ' in the Constitution, the words reasonably meant a Judge dealing with election matters and the Supreme Court acting in its appellate capacity would be Election Judges in that respect,—the same argument that has been advanced in this case. In view of the preliminary objection to the hearing of the appeal, Wijeyewardene, A.C.J. had to consider the effect of the preliminary objection, and after consideration held that the provisions of sections 82A and 82B which gave the Supreme Court the right to hear an appeal from the determination of the Election Judge was not in conflict with the provisions of the Constitution. After summarising the arguments of the respondent and Counsel for the appellant on the preliminary objection he stated :

> " As I am not satisfied with the soundness of this method of extracting a definition of ' Election Judge ' from section 13 (3) (*h*) itself, I do not propose to rest my decision regarding the second preliminary objection on this argument." —

The learned Chief Justice then proceeded to make these observations on which Counsel for the respondent relies :—

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

He then proceeded to consider the effect of the repugnant provisions in the Elections Order in Council of 1948 and held that there were ' offending provisions ' and ' innocent provisions ' but held that the

offending provisions were only ancillary to the 'innocent provisions and were separable. After dealing with the doctrines of severability he endorses the view he had taken earlier when he says at page 37 :

> " In the case before us *I have found that the provisions in the Parliamentary Elections (Amendment) Act, No. 19 of 1948, relating to a report by the Supreme Court, so far as it embodies a finding that a corrupt or illegal practice has been committed, was not duly passed by the Ceylon Parliament. These provisions were, therefore, ultra vires.* Those provisions, however, could be easily severed from the remaining provisions in the Act which are *intra vires.*"

The learned Chief Justice then deals with the substantial question raised in the appeal and sets aside the determination of the Election Judge on the ground that the appellant was not disqualified under section 13 (3) (*c*) of the Constitution.

It was submitted by learned Counsel for the petitioners and Crown Counsel that the *rationes decidendi* in the case were—

(*a*) the finding in the decision that a shareholder of a company having a contract with the Crown cannot be said to enjoy indirectly a benefit under a contract and is therefore not a person disqualified under section 13 (3) (*c*) of the Constitution ;

(*b*) the holding on the preliminary objection that the Court has jurisdiction to hear the appeal as sections 82A and 82B, introduced by the Amending Act of 1948, are *intra vires* the Constitution.

It can also be assumed that the learned Chief Justice's decision that sections 82A and 82B are severable from the other parts of the Amendment Act and do not conflict with the Constitution is also part of the *ratio*— this dictum has been approved of by the Privy Council in *Liyanage v. The Queen* [1].

The view expressed by the learned Chief Justice in regard to section 82D was not necessary to support the ultimate conclusion in the case that sections 82A and 82B were valid provisions and were severable from the other provisions. The learned Chief Justice himself remarked that " no question arises in this case with reference to a report by the Election Judge in respect of the commission of a corrupt or illegal practice....." and the fact that he was dealing with a hypothetical situation is evident when he says at page 35 : " A difficulty arises, however *when we proceed to consider the case that may arise* under the new sections 82C and 82D ". It appears to me therefore from a consideration of the above matters

[1] *(1965) 68 N.L.R. 265 at 285.*

that the learned Chief Justice's views on the questions at issue were only *obiter dicta* and were not necessary for the ultimate decision in the case.

I have already considered the provisions of the Elections Order in Council vis-a-vis the provisions of section 13 (3) (*h*) of the Constitution and regardless of the decision in *Thambiayah v. Kulasingham* come to the view that section 82D (2) (*b*) of the Order in Council is not in conflict with the Constitution. I do not think that the judicial declaration of the learned Chief Justice can be accepted even as having persuasive value. The special considerations necessary for the interpretation of a constitutional document were not available to the learned Chief Justice when the case was argued before him; no reason has been urged by him as to why the expression 'Election Judge' should not be made applicable to the Judges of the Supreme Court sitting in appeal; if 'this Order' in section 29 (4) of the Constitution means the Constitution Order equally the expression 'Election Judge' 'in this Order' (i.e., section 78A (2) of the Elections Order in Council) cannot mean a reference to 'Another Order' (the Constitution); and the fact that for 20 years the decision in *Thambiayah v. Kulasingham* was not dissented from is counterbalanced by the fact that there is no evidence that its correctness on this issue ever arose for consideration by the Supreme Court. In the present series of election petitions, the Supreme Court has not followed the decision in this case—vide the Bandaragama, Walapane and Katugampola election petitions.

Finally, if the view expressed by the learned Chief Justice is correct that sections 82C and 82D are in conflict with the provisions of section 29 (4), the only way in which these provisions can be validated would be by following the required constitutional procedure in section 29 (4); but the Chief Justice states exactly the opposite at page 34 when he points out that the amendment need not have been passed in accordance with the proviso to section 29 (4).

I am, therefore, inclined to agree with the submissions of learned Counsel that the decision in *Thambiayah v. Kulasingham* on the question presently at issue is not binding upon me. The contention of Counsel for the respondent therefore fails and by virtue of the report of the Supreme Court under section 82C (2) (*b*) which was transmitted to the Governor-General under section 82D (2) (*a*) of the Elections Order in Council, the respondent was disqualified from being duly elected as Member of Parliament for the electoral district of Bandaragama. I therefore determine that the election of the respondent to the Bandaragama seat at the election held on 23rd September, 1967, was void.

The second issue argued by Counsel for the petitioners raises an interesting question of law. The petitioners claimed that wide publicity was given to the disqualification of the respondent throughout the electorate by the issue of leaflets similar to P2, containing the report of the

Supreme Court, which pointedly informed the electors of the ineligibility and incapacity of the respondent to stand for election. In their prayer, the petitioners asked for a scrutiny in order to strike off the votes cast in favour of the respondent. The respondent on the other hand, through his affidavit, R2, which has not been challenged by the petitioners, while admitting that publicity has been given to the report of the Supreme Court, stated that equally wide publicity had been given to the judgment of the Divisional Court in *Thambiayah v. Kulasingham* [1] according to which he was not entitled to be disqualified from coming forward as a candidate.

The application for a scrutiny is made under section 80 (*d*) of the Elections Order in Council which entitles the petitioners to claim the seat for the unsuccessful candidate on the ground that he had a majority of the lawful votes. Section 85 (1) enumerates the votes that may be struck off at a scrutiny and section 85 (1) (*f*) contemplates five different types of cases in which votes given by a voter for a disqualified candidate may be struck off—

(*a*) votes given knowing that the candidate was disqualified ;

(*b*) votes given knowing the facts causing the disqualification ;

(*c*) votes given after sufficient notice of the disqualification ;

(*d*) votes given when the disqualification was notorious, and

(*e*) votes given when the facts causing the disqualification were notorious.

Unlike in England, the procedure on scrutiny has been given statutory effect but it is clear that the draftsman has modelled paragraph (*f*) of section 85 (1) on the English common law—*Cooray v. De Zoysa* [2]. Rogers [3], after referring to the English decisions, states :

> " The result of the above decisions is that an elector, who votes for a disqualified candidate, with knowledge either of the disqualification or of the facts creating the disqualification, throws away his vote ; and such knowledge will be presumed where the disqualification or the facts creating the disqualification are notorious."

Counsel for the petitioners claimed that the petitioners had complied with the provisions of the section when they brought to the notice of the voters, the fact of the disqualification which was notorious, but learned Counsel for the respondent submitted that the fact of the disqualification was one that was disputed. In his contention, one must consider the

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

[2] *(1936) 41 N. L. R. 121 at 139 and 142, per Akbar, J.*

[3] *Rogers on Elections Vol. II (20th Edn.), p. 83.*

totality of the facts—not only the fact of disqualification brought to the notice of the electors by the petitioners but also the fact that there was a decision of three Judges of the Supreme Court who held that the issue of a report by the Supreme Court under the provisions of the Order in Council was unconstitutional. One can appreciate, but only sympathise with, the dilemma which confronted the voters of Bandaragama—a dilemma perhaps unparalleled in the history of elections in any part of the world. On the one hand, the supporters of George Kotalawala were informing them that the respondent was disqualified from being elected as their representative to Parliament, in view of the report of three Judges of the Supreme Court, and on the other, they were being pressurised by the supporters of the respondent, by being told that the three Judges in question had no right to issue a report in view of the decision of three other eminent Judges of the same Court. What was the perplexed voter to do in these circumstances? One can hardly expect him or her to solve the intricate legal problem which presented itself for their decision, whether in the free exercise of the ballot, they could vote for the candidate of their choice—a problem which has taken eminent Counsel several days in this Court to unravel. In this difficult situation, it is incumbent on the Court to examine the legal position and arrive at a finding whether the claim of the petitioners is one that is entitled to succeed.

In *Drinkwater v. Deakin*,[1] a leading case on this aspect of the law, Lord Coleridge cited with approval the findings of the Clitheroe Committee, which were to the following effect :—

> " ... the disqualification must be founded on some positive and definite fact existing and established at the time of polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person."

In the same case, Lord Coleridge stated that the word 'disqualified' in the Parliamentary Elections Act was used in two senses at least—disqualified to be elected and disqualified to be a candidate. A candidate may be disqualified if the disqualification attaches to a status, for instance, if the candidate is a woman or an alien or a convicted felon. According to Lord Coleridge, in such cases " something is wanting in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependent on argument or decision, but which the law insists shall exist in every one who puts himself forward as a candidate". There is an absolute disqualification in such cases and it must be presumed, that when voters cast their votes for such a candidate, they act with wilful perversity and throw away their votes. Thus in *Beresford-Hope v. Lady Sandhurst*[2] Lady Sandhurst, being a woman,

[1] *(1874) 9 C. P. 626.*

[2] *(1889) 23 Q. B. D. 79.*

was absolutely disqualified from seeking election and the votes given to her were presumed to be thrown away and the unsuccessful candidate was held to have been elected, having received the majority of the lawful votes. A similar situation arose in the *Bristol South East Parliamentary Election*[1] where Viscount Stansgate, who was a peer, was disqualified from being elected to the House of Commons. His incapacity was well known to the electors even before they cast their votes for him and the Court was bound to declare such votes as having been thrown away, the voters having acted with wilful perverseness. In *Drinkwater v. Deakin* (supra) the fact of disqualification (the alleged commission of bribery by the successful candidate) was brought to the notice of the electors at the time of the poll by the publication of a notice, but in spite of the wide publicity given to Colonel Deakin's lapse, he was elected. At the trial of the petition against him, Mellor, J. found Colonel Deakin guilty of a corrupt practice and the respondent, Drinkwater, who was the unsuccessful candidate, claimed the seat. Mellor, J. thereupon stated a case for the opinion of the Court of Common Pleas and the reference case before three Judges—Lord Coleridge, Brett and Denman, JJ.—who held that Colonel Deakin was not disqualified to be a candidate on the date of the poll, because at the time there was no declaration that he had been guilty of bribery. Said Lord Coleridge at page 637 :

> "The conclusion, therefore, is, that neither apart from the statutes nor created by the statutes is there in a candidate from the moment of his bribing and after notice of the fact of his bribing any such disqualification as to prevent him thereupon from being a candidate at the then election, and to make all votes given in his favour after such notice as if they had not been given at all: *Invalid, upon proof of his bribery, for the purpose of seating him, they are ; thrown away, for the purpose of seating his opponent, in my opinion they are not.*"

Can it be said in this case that the respondent's disqualification is founded on some positive and definite fact which was established on the date of the poll ? On that date, there were two views of the law on the fact of disqualification placed before the electors. I have held that the report of the Supreme Court issued in this case disqualified the respondent, but my decision is not final, as the respondent is entitled to canvass my finding in appeal and maintain that the decision in *Thambiayah's case* is correct and binding on me. The essence of free elections is that the voter must be able to cast his vote for the candidate of his choice. There was no absolute disqualification of the respondent on the date of the poll, nor was the fact of disqualification notorious ; it depended on legal argument and it could not be urged that the 23,840 electors of Bandaragama, who cast their votes for the respondent had thrown away their votes and had acted with wilful perversity. I therefore hold that the unsuccessful candidate is not entitled to claim the seat.

[1] *(1961) 3 A. E. R. 354.*

My decision in this petition is that the election of Kongahakankanamge Don David Perera to the Bandaragama seat in the House of Representatives is void on the ground that he is disqualified under section 13 (3) (*h*) of the Constitution from being elected a Member of Parliament and that the claim of the petitioners to the seat on behalf of the unsuccessful candidate fails. Each party will bear their own costs.

Election of respondent declared void.

Claim to seat the candidate who came second dismissed.