1971 *Present :* H. N. G. Fernando, C.J., G. P. A. Silva, S.P.J., and Samerawickrame, J.

A. T. DURAIAPPAH, Appellant, *and* C. X. MARTYN and 3 others, Respondents

Election Petition Appeal No. 4 of 1970—Jaffna

Parliamentary election—Election petition—Ballot papers—Whether counting agents are entitled to examine them—Re-count of votes—Circumstances when Election Judge will not order such re-count—Whether Election Judge can reject ballot papers as being invalid—Postponement of trial of election petition—Considerations applicable before it can be granted—Effect of production of a medical certificate of petitioner's illness—Charges made in election petition—No evidence led on the charges—Order of dismissal of the petition—Validity—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), as amended by Act No. 9 of 1970, ss. 48 (7), 49 (1), 80C.

(A) The Parliamentary Elections Order in Council does not entitle counting agents to examine ballot papers, save in the special cases mentioned in that behalf in section 49. Counting agents, therefore, are not entitled to see the markings on all the ballot papers which are ultimately counted as valid by the Returning Officer.

An application for a re-count of votes will not be allowed by an Election Judge if the Returning Officer's evidence satisfies the Judge that the original count was virtually a proper and correct count. It would appear that there has been no case in England in which a Court ordered a re-count after two counts by a Returning Officer had shown an almost identical result.

Quaere, whether, on a re-count ordered by an Election Judge, ballot papers cannot be rejected as being invalid under sub-section (1) of section 49 of the Parliamentary Elections Order in Council.

(B) When an application is made for the postponement of the trial of an election petition, section 80 C of the Parliamentary Elections Order in Council, as amended by Act No. 9 of 1970, requires the Election Judge to make every endeavour to conclude the trial within 6 months of the presentation of the Petition. This statutory duty imposed on the Judge thus requires him to scrutinize with particular care the grounds upon which the postponement of a trial is requested.

Where the petitioner leaves Ceylon after retaining Counsel to appear for him at the trial of the election petition, and application is made some days afterwards by the Counsel on the trial date for a postponement on the ground that he has no instructions relating to all the matters in issue in the case, some explanation is necessary to rebut the inference that the petitioner's purpose in leaving Ceylon was to delay the trial. In the present case, there was nothing to show that the trial on the charge of an illegal practice could not proceed in the absence of the petitioner.

When a medical certificate is issued by a medical practitioner outside the Court's territorial jurisdiction, in regard to a person who is also outside that jurisdiction, the truth of statements in the certificate cannot be tested in the normal manner by summoning the practitioner to give evidence in Court and by ordering the "patient" to be examined by another Doctor. The absence, therefore, of an affidavit from the Doctor who issued the certificate is of special importance when the question whether a postponement may be granted on the basis of the certificate is considered.

1*——K 9340—2,255 (1/72)

(C) Where, in an election petition, no evidence is led on the charges, the petition must be dismissed, unless there is reason to suspect that the petition was abandoned collusively, dishonestly or fraudulently. The failure to adduce evidence cannot be treated as a case of an application to withdraw the petition.

ELECTION Petition Appeal No. 4 of 1970—Jaffna.

The 1st respondent was elected as a Member of Parliament at a general election. There were two other candidates, one of whom was the petitioner-appellant, who was defeated by the 1st respondent by a majority of 56 votes. After the count of the votes, a re-count was made by the Returning Officer on the application of one of the counting agents. There was a disparity of 3 votes between the original count and the re-count. The petitioner filed an Election Petition praying (1) for a re-count and a declaration that the petitioner was duly elected, (2) for a determination that the election of the 1st respondent was void on the ground that he had been guilty of an illegal practice at the Election.

The trial began on 25th November 1970, when evidence was led regarding the proceedings at the count on the Polling Day. When the trial was resumed on the following day, Counsel for the petitioner submitted a medical certificate on behalf of the petitioner and moved for a postponement, stating that, in regard to the charge of illegal practice, he had no instructions and was unable to proceed with the case in the absence of the petitioner. The medical certificate concerning the petitioner's illness was issued on 18th November 1970 by a medical practitioner at Thanjavur. The application for postponement was refused by the Election Judge, who then dismissed the election petition on the grounds (1) that the application for re-count of votes could not be granted and (2) that no evidence was placed by the petitioner in regard to the charge of illegal practice. The petitioner then filed the present appeal.

N. Satyendra, with *V. Basnayake* and *V. Jegasothy,* for the petitioner-appellant.

C. Ranganathan, Q.C., with *P. Navaratnarajah, Q.C., V. Martyn, R. Rajasingham, B. J. Fernando, Nimal Senanayake, K. N. Choksy, M. Sivarajasingham* and *Romesh de Silva,* for the 1st respondent-respondent.

Mervyn Fernando, Senior Crown Counsel, with *E. D. Wikramanayake,* Crown Counsel, for the 2nd and 3rd respondents-respondents.

C. Motilal Nehru, for the 4th respondent-respondent.

Cur. adv. vult.

July 28, 1971. H. N. G. FERNANDO, C.J.—

At the Parliamentary General Election of 1970, the choice for the voters of Electoral District No. 78—Jaffna—lay between three candidates—

(1) a retired District Judge,

(2) a Proctor and

(3) a Queen's Counsel of long standing.

After the count of the votes, a re-count was made on the application of one of the counting agents, the number of the votes as counted being as follows :—

For		*1st count*		*Re-count*
the 1st Respondent	..	8,849	..	8,848
the Petitioner	..	8,792	..	8,792
the 3rd Candidate	..	7,220	..	7,222

The 1st Respondent was accordingly declared elected Member of Parliament for the Electoral District. But the petitioner filed an Election Petition praying :—

(1) for a re-count, a determination that the 1st Respondent was not duly elected or returned, and a determination that the Petitioner was duly elected and ought to have been so returned ; and

(2) for a determination that the election of the 1st Respondent was void, the ground for this part of the prayer being that the 1st Respondent had been guilty of an illegal practice at the Election.

The Election Judge, after trial of the Petition, made order dismissing the Petition, and thereafter certified his determination and made a report in terms respectively of ss. 81 and 82 of the Elections Order in Council. This appeal was against that order and determination.

In regard to the prayer in the Petition to which we have firstly referred, the learned Election Judge declined to order a re-count, and if he was correct in so declining, the Petitioner was not entitled to the determinations which might have followed upon such a re-count. Counsel for the Petitioner however argued that one of the reasons on which the Election Judge relied for refusing a re-count was erroneous in law, the reason being that on a re-count ordered by the Court, ballot papers cannot be rejected as being invalid under sub-section (1) of s. 49 of the Order-in-Council. Counsel submitted that this same question had also been wrongly decided by Pulle J. in the case of *Kaleel v. Themis*[1]. We ourselves have not been able to reach an unanimous opinion

[1] *(1956) 58 N. L. R. 396.*

as to whether (as Pulle J. held) a re-count ordered by an Election Judge will be a purely mechanical process, and we think accordingly that the matter might be placed beyond doubt by an amendment of the Election law.

We are unable to agree, however, with Counsel for the Petitioner that in the instant case the refusal to order a re-count was influenced by the opinion of the trial Judge on the question just mentioned. *Frazer on Parliamentary Elections* (3rd Edition p. 222) states the practice in England that an application for a re-count shall be supported by affidavit showing the grounds for supposing that there has been a miscount, and states also that where the majority is a very small one the re-count is as a rule allowed almost as of course. The grounds on which the Petitioner here relied, although set out in the petition and not in an affidavit, were all considered and rejected by the trial Judge. For reasons which will presently appear, we have formed our own conclusions upon an examination of the available evidence as to the procedure followed by the returning officer and his staff. The Returning officer testified in full detail to the opening of the ballot boxes in the presence of the counting agents of the candidates, to the removal of the papers from the boxes and the sorting of the marked papers, to the setting aside in a "doubtful tray" of doubtful papers for personal examination by the Returning officer himself, to the showing of papers to counting agents before their rejection as invalid, to the separation into bundles of papers for the respective candidates, and to the counting and checking of these bundles. He testified also to a further special checking performed by himself and the assistant Returning officers, because the result appeared to be close, and to his own satisfaction with the performance of their duties by his staff.

The testimony of the Returning officer was not in any way controverted by the only witness for the Petitioner, who had been one of the counting agents. Indeed his evidence was that he was perfectly satisfied with the first count. The only matter which Counsel for the Petitioner urged in regard to the first count was that the counting agents had not been able to see the markings on all the ballot papers which were ultimately counted as valid. That in our opinion is not a complaint of substance, because the Order in Council does not entitle counting agents to examine ballot papers, save in the special cases mentioned in that behalf in s. 49. We had no hesitation in concluding that the evidence did not disclose any ground for supposing that there had been a mis-count before the results of the count were first announced. There could have been present only *the possibility* of human error, which would have existed in the case of all the counts taken during the General Election.

As to the re-count made on application therefor, the Petitioner's counting agent expressed in evidence his opinion that the counting was

done too fast. But he admitted that this did not strike him during the re-count itself, and that he did not make any complaint on this score to the Returning officer.

During the original count, the ballot papers had been sorted, checked and separated, and the papers cast for each candidate had been placed in bundles of 500 papers. At the re-count then, what had to be done was to repeat the last stage of the original count, which was to verify that a cross had been clearly marked on each paper against the symbol of the candidate whose bundles were being counted, and to verify the correctness of the original numerical counting of the bundles. The Returning officer stated that, having regard to the time taken for the re-count and the number of officers who checked and counted the papers in the bundles, about 2 seconds would have been spent on the checking and counting of each ballot paper. No Bank clerk will agree with the Petitioner's witness that the speed of this re-count was in any way comparable to the speed with which Bank clerks make counts of currency notes, for the correctness of which they accept personal financial responsibility.

As already shown, there was a disparity of 3 votes between the original count and the re-count. The evidence of the Returning officer was that each of two bundles of 500 papers cast for the third candidate was found to contain 501 papers, and that his total became thus increased by 2 votes ; and that one paper previously counted for the 1st Respondent was rejected as invalid, thus reducing his total by one vote. We are quite unable to agree with Counsel's submission that because of this disparity between the first and second counts the Election Judge should have ordered a further re-count.

This trifling disparity revealed only the presence in this case of the sort of minor error which is likely in any similar circumstances, and was no ground for the supposition that a further re-count could possibly have shown the return of the 1st Respondent to have been undue. In *Kaleel v. Themis*, Pulle J. referred to the " invaluable assistance " which a re-count made by a Returning officer might provide to an Election Judge who has to decide whether or not to order a re-count. There has been that assistance in this case, and it shows that the original count was virtually a proper and correct count. Although invited by us to do so, Counsel for the Petitioner was unable to refer us to any case in England in which a Court ordered a re-count after two counts by a Returning officer had shown an almost identical result.

As to the second prayer in the Election Petition, namely that the election of the 1st Respondent be declared void on the ground that he had committed an illegal practice, there was in fact no adjudication by the trial Judge on the question whether or not the 1st Respondent had committed the illegal practice. After the evidence relating to the

matter of the re-count had been adduced, Counsel for the Petitioner moved for a postponement and this was refused by the trial Judge. Thereupon Counsel stated that "in the absence of the Petitioner, he had no instructions and was unable to proceed with the case". Thus the order of dismissal in relation to the second prayer in the petition was made on the basis that no evidence was led on the charge relevant to this prayer. We shall consider later the arguments of Counsel with regard to the propriety of an order of dismissal in such circumstances. But in view of certain other submissions made on behalf of the petitioner as to the refusal of the postponement, it is our somewhat distasteful duty to refer to an earlier episode in this case.

On 21st August 1970 the trial of the petition was fixed for 7th November 1970. Thereafter the petitioner and three of the respondents filed their lists of witnesses, and summons were accordingly served. On 31st October 1970 the agent for the Petitioner filed a Medical Certificate and moved for the postponement of the case for another date. The contents of the Certificate are set out below :—

"Dr. S. Rajendran, B.Sc., M.B.B.S. — Trichy, 27.10.70.

This is to certify that Thiru, A. T. Durayappah of Jaffna is suffering from Gastritis (pain in the epigastium) and undergoing treatment. He is not in a fit condition to move about. Advised absolute rest and treatment for four weeks from 27.10.70 for the complete restoration of his health.

(Sgd.) S. Rajendran,
Regd. No. 15498,

Dr. S. Rajendran, B.SC., M.B.B.S., Civil Asst. Surgeon, Govt. Head Quarters Hospital, Tiruchinopolli."

This motion was taken up for inquiry on 2nd November 1970, when submissions were made by Counsel appearing for the petitioner and the 1st Respondent respectively. It is unfortunate that in the course of the discussions which then took place the learned trial Judge made the sarcastic remark "He (petitioner) has gone to India to fall sick", and that Counsel for the 1st Respondent made the following remarks :—

"My Proctor overheard a conversation three weeks ago between the petitioner and a supporter of his that the 7th November 1970 was astrologically not a good day for the petitioner. It was freely mentioned to us by one or two in the law library that the petitioner would make an application for a date".

This application for a postponement was refused by the order of the trial Judge made on 2nd November itself. This order contains a brief

statement of the reasons why the trial Judge was not prepared to act on the Medical Certificate, and the remaining paragraphs of the order are set out below :—

> " But apart from the Medical Certificate there is a situation which has arisen, which necessitates that the trial be postponed. For I understand and I am informed by the Registrar of this Court, that there is an election trial proceeding in Jaffna and suitable accommodation cannot be made for the Judge to try this petition in Jaffna on the 7th of this month. Therefore in these circumstances the election trial must be put off for another date. I would therefore re-fix this trial for the 25th of November 1970.
>
> The petitioner will pay 150 guineas to the 1st respondent, 50 guineas to the 2nd and 3rd respondents and also 50 guineas to the 4th respondent. "

It is apparent from these paragraphs that the trial Judge was aware on 2nd November that, quite independently of the petitioner's motion for a postponement, this trial had to be re-fixed for a date later than 7th November to suit the convenience of the Court, and that the trial was postponed to 25th November to suit the Court.

In these circumstances, it seems to us that there was no need whatsoever to rule upon the petitioner's postponement motion or upon the veracity or accuracy of the Medical Certificate filed therewith. If the trial Judge was aware before proceedings commenced on 2nd November, that a re-fixing of a trial date was in any event imperative, he should have so informed Counsel at the outset. But at the least he was aware of this necessity before he made his order on the petitioner's motion and there was thus no reason at all for making that order. Ultimately he made the further punitive order for the payment by the petitioner of 250 guineas as costs, presumably of the hearing of the motion for the postponement.

Be it noted that this motion was filed and taken up for inquiry, not on a trial date when Counsel would have been retained to conduct the trial ; it was instead the case that Counsel appeared for the respondents on 2nd November only to oppose the petitioner's motion for a postponement. We are quite unable to understand why it was thought fit to penalize the petitioner so heavily merely because Court and Counsel spent an hour or two in discussing the petitioner's motion.

The punitive nature of the order of costs is all the less defensible because of the necessity for the Judge, of his own motion, to re-fix the trial for the 25th November.

Having regard to this episode, Counsel for the petitioner submitted with commendable restraint that the proceedings of 2nd November showed at the least an appearance of bias against the petitioner, and

that accordingly it would be a denial of justice now to rely on findings of fact reached by the trial Judge in his ultimate order dismissing the petition. We bore that submission in mind in considering the matters relevant to the question of a re-count, and did so also in considering the correctness of the ultimate order of dismissal.

As already stated the trial was re-fixed for 25th November. The proceedings on that date commenced with the following statement made by Counsel appearing for the petitioner :—

"May I have Your Lordship's permission to place the case for the petitioner."

Counsel then proceeded to refer to the two grounds in the petition, firstly the claim for a re-count, and secondly, the commission of an illegal practice by the 1st Respondent. He then made certain submissions of law relevant to the question of a re-count, and Crown Counsel and Counsel for the 1st Respondent also made submissions relevant to the same matter. There was also some discussion between the Court and Counsel for the petitioner, after which Counsel stated that he would call one Mr. Nadarajah.

Mr. Nadarajah then gave evidence regarding the proceedings at the count on the Polling Day ; and the Returning officer also gave evidence as to the same matters, having been called by Crown Counsel. The proceedings of 25th November then terminated and the trial was resumed on the 26th. On this day Counsel appearing for the petitioner commenced with the following statement :—

"My Lord, in regard to the second charge I am unable to proceed in the absence of my client because he is not fit to attend Court.

In view of that I respectfully ask Your Lordship for a postponement of the trial. To support that I am producing a medical certificate."

The terms of the Medical Certificate were as follows :—

"Residence & Consulting Room,
"Shanthi"
Sri Sivaji Nagar,
Thanjavur-1,
Phone : 377.

Dr. M. V. Bhatt, M.S., F.I.C.S.,
Prof. of Surgery,
Thanjavur Medical College, and
Surgeon, T.M.C & R.M.
Hospitals, Thanjavur-1.
18.11.70.

This is to certify that I have examined Sri A. T. Doraiappa, Proctor, S.C., Jaffna and find that he is suffering from peptic ulcer.

He is advised immediate admission in the hospital for necessary treatment.

He may take about three weeks before he is discharged from the hospital and naturally will not be able to attend Courts during this period.

(Sgd.) M. V. Bhatt,
18.11.70.

Dr. M. V. Bhatt, M.S., F.I.C.S., Civil Surgeon, R. M. Hospital and Professor of Surgery, Tanjore Medical College, Thanjavur."

Let us now state the reasons for our firm conclusion that the application made on 26th November for a postponement was properly refused.

(*a*) Section 80 C of the Order in Council, as recently amended, requires that an Election Petition shall be tried as expeditiously as possible, and that every endeavour must be made to conclude the trial within 6 months of the presentation of the Petition. This statutory duty imposed on an Election Judge to ensure an expeditious trial is a consideration which does not apply in ordinary civil litigation, where applications for postponements are considered mainly (or even entirely) with reference only to the interests of the parties. In civil litigation, a postponement could be allowed almost as of course if all parties consent; whereas in the case of an Election Petition, consent of the parties would not be a sufficient ground for allowing a postponement. The statutory duty imposed on an Election Judge by S. 80 C thus requires him to scrutinize with particular care the grounds upon which the postponement of a trial is requested.

(*b*) In this instance, the postponement was sought on November 26th on the ground that Counsel was unable to proceed without instructions from the Petitioner, who was stated to be absent in India and unable through illness to return to Ceylon.

Applications for postponements had twice previously been made to the Election Judge, with the support of medical certificates purporting to have been issued by one Dr. Rajendran of Tiruchinopolli. The first of these certificates was dated 27th October, and the agent for 1st Respondent had notice of it on 31st October, the motion for the postponement being also filed on the 31st. The second certificate was dated 14th November, and the 1st Respondent's agent had notice of it on the 15th, the motion for postponement being filed on the 16th.

On 26th November, however, the application for a postponement was made without prior notice to the 1st Respondent, although the medical certificate on which this application depended had been issued on 18th November. Having regard to the prompt transmission to the Petitioner's agent of the earlier

two medical certificates, it is reasonable to suppose that the certificate dated 18th November could have been transmitted to the Petitioner's agent with equal promptness. But the statements to Court on 26th November by Counsel for the Petitioner conclusively establish that the medical certificate dated 18th November was handed to the Petitioner's agent only on the 25th. There was no explanation before the trial Judge for this delay in communication between the Petitioner and his own agent. Indeed the Petitioner's Counsel himself apparently did not know on 25th November, when the trial commenced, that a medical certificate would be available to support an application on the next day for a postponement of the trial.

(c) The statements made on 26th November by Counsel for the Petitioner which we are content to accept, mean in substance that the Petitioner left Ceylon on 26th October 1970, having instructed his agent upon matters relevant to the prayer for a re-count, but without necessary instructions in regard to the prayer that the election be declared void. This was at the least strange conduct on the part of a Petitioner, himself a lawyer, who had filed his Election Petition in June 1970, and who was aware when he left Ceylon that his Petition was fixed for trial within about 12 days. Even in ordinary civil litigation, a Court can rightly assume that such remissness of a party is equivalent to an admission of the weakness or futility of his case.

We know of no case hitherto in which Counsel had been retained to appear *at a trial* without instructions relating to all the matters in issue in the case. If the Petitioner, who was virtually a party-plaintiff, placed his Counsel in this unique position, some explanation for his extra-ordinary conduct was surely necessary to rebut the inference that his purpose in leaving Ceylon was to delay the trial of his Petition.

In *Syadu Varusai v. Weerasekeram* [1], Sansoni J. cited and approved a long series of decisions holding that where a postponement is refused, it is Counsel's " clear duty to appear for his client and conduct the case which has been entrusted to him ". The only exception to this rule is a case in which Counsel is retained for the sole purpose of supporting a motion for a postponement.

(d) As already stated, two medical certificates purporting to have been issued by one Dr. Rajendran on 27th October 1970, and on 14th November 1970, had been filed in support of two previous applications for postponements. The application made on 26th November was supported by a medical certificate issued by a different Doctor, who issued it on 18th November.

[1] *(1956) 58 N. L. R. 89.*

Although the first two applications were refused by the trial Judge, the agent of the 1st Respondent apparently anticipated the possibility of yet another application for a postponement of this trial. As a consequence of that anticipation, the 1st Respondent was able to have produced on 26th November two medical certificates purporting to have been signed by the same Dr. Rajendran. Just as much as Counsel for the 1st Respondent did not suggest that the two certificates relied on by the petitioner had not in fact been issued by Dr. Rajendran, petitioner's Counsel too did not contend that the certificates produced on behalf of the 1st Respondent had not been so signed by Dr. Rajendran. One of these latter certificates issued by Dr. Rajendran (1 R 4) was in the following terms :—

> " Dr. S. Rajendran, Trichy,
> B.Sc., M.B.B.S. 21.11.70.
>
> This is to certify that Mr. M.D.B.L. Jayasundara, Accountant, Orienta Advertisers, Ceylon is suffering from Gastomotic Ulcer and undergoing treatment for the same. Advised rest and treatment for ten days from 21.11.70 for a complete recovery.
>
> (Sgd.) S. Rajendran,
> Regd. No. 16498.
> 21.11.70. "

Jayasundera whose name is mentioned in 1R4 testified at the trial that he was the Accountant of Orienta Advertisers, Ceylon, and that he obtained this certificate from Dr. Rajendran upon a mere statement to the Doctor that he was suffering from some stomach trouble.

This certificate (1R4) sufficiently establishes that Dr. Rajendran issued the certificate without being properly satisfied of the identity of the person to whom the certificate relates, and without a physical examination of that person. This circumstance lets in at least a possibility that the certificate dated 18th November and given by one Dr. Bhatt was equally unreliable.

(*e*) A Court will ordinarily have confidence in the truth of statements in a certificate which appears to be issued by a responsible medical practitioner. But that confidence is in ordinary cases dependent on the fact that when such a certificate is produced, the Court has a ready means to test the truth of the statements, by summoning the practitioner to give evidence in Court and by ordering the " patient " to be examined by another Doctor. But when a certificate is issued by a person outside the Court's territorial jurisdiction, in regard to a person who is also

outside that jurisdiction, the truth of statements in the certificate cannot be tested in the normal manner. In the instant case therefore, the absence of an affidavit from the Doctor who issued the certificate dated 18th November is of special importance.

(*f*) The purport of the certificate dated 18th November is that the Petitioner was advised immediate admission into Hospital for treatment for about three weeks, and that "naturally" i.e., *if the Petitioner is in Hospital,* he will not be able to attend Court during the period of his treatment in the Hospital. The certificate does not however state that the Petitioner was in fact admitted into Hospital; and if indeed the Petitioner did enter Hospital as advised, a certificate as to his admission could have been obtained and furnished to the Court. There was not even an affidavit from the Petitioner himself stating that he had entered Hospital. Thus the certificate was of no value, because there was no material whatsover to indicate that the Petitioner had in fact entered Hospital, and the certificate provided no acceptable explanation for the Petitioner's extraordinary failure to instruct his agent and his counsel on matters affecting the charge of an alleged illegal practice.

(*g*) In the present case, the 1st Respondent challenged outright the truth of the representation that the petitioner was ill and therefore unable to attend Court. This case is thus clearly distinguishable from the two English cases which counsel for the petitioner cited to us. In *Maxwell v. Keun* [1] the ground on which a postponement was requested was the fact that the party was resident in India on official duty. In *Dick v. Pillar* [2] the ground was the fact of illness. In each case the fact of absence, and the fact of illness, respectively, was admitted by the opposite side.

Moreover, in each of the English cases, the party's presence at the trial was material, since his evidence was essential for the purposes of the case. But in the present case, there was nothing to show that the trial on the charge of an illegal practice could not proceed in the absence of the petitioner. The affidavit in support of that charge had been sworn, not by the petitioner, but by one W. P. Silva. This Silva was present in Court on summons, and the fact that the petitioner had not instructed his agent or his counsel to adduce Silva's evidence is quite inexplicable.

Counsel for the Petitioner lastly submitted that even if the postponement of the trial was rightly refused, the Election Judge should not have dismissed the petition, but should instead have treated the case as being

[1] *(1928) 1 K. B. 645.* [2] *(1943) 1 A. E. R. 627.*

one in which the Petitioner desired to withdraw the petition; in his submission it was the duty of the Judge to follow the procedure prescribed in the Election Petition Rules for a case of proposed withdrawal.

In *Abraham Singho v. Gunawardena*[1] Swan J. held that the functions of an Election Judge under our Order in Council are purely judicial, and that accordingly when no evidence is led on the charges the Judge is not bound to proceed any further and must dismiss the petition. We are in agreement with the reasons stated by Swan J. for that construction of our law and for holding that certain English decisions to the contrary are not applicable in Ceylon.

It would be quite unrealistic to regard the position which arose in the instant case as being equivalent to the withdrawal of the " charge " in the petition. This petitioner, far from seeking to withdraw the charge, has exercised his right of appeal for the very purpose of securing a trial of that charge. We are satisfied that there is no reason to suspect that the petition was abandoned collusively, dishonestly or fraudulently.

Swan J. made the following observation in the case just cited :—

" If Parliament thinks it necessary or desirable to add to or amend those rules in order to meet a situation like the one that confronts me in this case, it is open to it to do so. "

Although the Election Order in Council has been amended on more than one occasion, Parliament has not taken the opportunity to provide that the failure to adduce evidence on a charge in an Election Petition should be treated as a case of an application to withdraw the petition. There is an additional reason why we thought fit to adopt the conclusion stated by Swan J.

We have now stated our reasons for our order dismissing this appeal, which was made at the conclusion of the hearing. Since the order for costs made by the trial Judge on 2nd November 1970 was in our opinion unfair to the Petitioner, we made no order as to the costs of this appeal.

SILVA, S.P.J. — I agree.

SAMERAWICKRAME, J. — I agree.

Appeal dismissed.

[1] *(1953) 54 N. L. R. 546.*