1956 *Present :* K. D. de Silva, J., and H. N. G. Fernando, J.

N. H. KEERTHIRATNE (Acting Minister of Posts and Broadcasting), Petitioner, *and* M. M. P. GUNAWARDENE *et al.*, Respondents

S. C. 587—Application in Revision in D. C. Colombo, 31,853/M

Evidence—Communication made to public officer in official confidence—Privilege—Applicability of English law—Evidence Ordinance, ss. 100, 123, 124, 125, 162 (2).

Sections 123 and 124 of the Evidence Ordinance do not correspond with the English law on the same subject, and the general principle by which the English Courts are guided is not applicable to cases falling under section 124.

When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the Court has jurisdiction under section 124, read with section 162 (2), of the Evidence Ordinance to inspect the document and admit it in evidence if it is of opinion that the communication was not made in official confidence. The expression " communication made in official confidence " would include not merely inter-official correspondence but also correspondence by members of the public with public officials. The mere mark " confidential " placed on a document by the individual who writes it does not convert the document into a communication made in official confidence.

Obiter : If a Court agrees that the communication was made in official confidence, it can determine by inspection whether the production of the communication would or would not be prejudicial to the public interest.

APPLICATION for the revision of an order of the District Court Colombo.

In this action for defamation instituted by a former officer of the Posts and Telegraph Department against two persons who had preferred a petition to the Minister of Posts and Broadcasting, the Minister, upon being summoned by Court to produce the original of the petition, took

objection to the production on the ground that the petition was a statement made to him in official confidence and that the public interest would suffer by the disclosure of its contents.

E. F. N. Gratiaen, Q.C., Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, and *J. W. Subasinghe*, Crown Counsel, for the petitioner.

Walter Jayawardene, with *Neville Wijeratne*, for the plaintiffs-respondents.

Cur. adv. vult.

August 21, 1956. H. N. G. FERNANDO, J.—

This was an application for the revision of an order of the Additional District Judge of Colombo, directing the Ministry of Posts and Broadcasting to produce the original of a petition sent to the Minister by two private individuals. The order in question was made by the learned District Judge in an action for defamation instituted by a former officer of the Posts and Telegraph Department against the two persons who had preferred the petition to the Minister. Upon being summoned to produce the document the Minister filed an affidavit averring that the petition was a statement made to the Minister in official confidence and that the public interest would suffer by the disclosure of its contents; objection to production was taken on the ground of privilege. The basis upon which this Court is now asked, in revision, to set aside the order of the District Judge is thus set out in the petition in revision:—

"(*a*) The said order is contrary to law.

(*b*) The learned Judge erred in holding that the said petition was not made in official confidence and was not a privileged document. An affidavit from a Minister of the Crown in Ceylon that a particular communication is privileged and cannot therefore be produced as evidence in a Court of Law is conclusive.

(*c*) The learned Judge has misdirected himself in holding that a communication can only be made in official confidence if it is made by one official to another.

(*d*) The Law of Ceylon on this matter is identical with English Law".

The language of paragraph (*b*) above and the argument of the learned Attorney-General make it clear that the main ground of objection is that the case is one covered by section 124 of the Evidence Ordinance:—

"No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure".

It was argued that under the prevailing English Law a claim of privilege made in the form and manner as in the present case would be upheld by the Courts without question, that the Ceylon Evidence Ordinance was intended to be a statutory incorporation of the corresponding English Law, and that in the construction of section 124 our Courts would regard it as the intention of the Legislature that documents of the nature referred to in section 124 should be privileged from production in the same manner and to the same extent as such documents would be protected in England. The Attorney-General relied on section 100 of the Evidence Ordinance, not, if I understood him aright, for the purpose of contending that with regard to the subject of State privilege there is any *casus omissus* justifying resort to English Law, but rather with a view to reinforcing the argument that sections 123, 124 and 125 of our Evidence Ordinance should be construed as representing in statutory form the corresponding English Law.

While I would respectfully concur with the view adopted by six of the seven Judges who constituted the Bench of the Court of Criminal Appeal in *The King v. James Chanderesekera* [1] to the effect that we should shut our eyes to the English Law of Evidence except in so far as a *casus omissus* renders recourse to it necessary, I do not think that those observations can be seriously opposed to the general argument presented by the Attorney-General in the present case. If it is clear that any particular provision or group of provisions in our Ordinance represent in statutory form principles which were well settled and recognised in England before the enactment of our Ordinance, then our Courts would rightly look for assistance to cases in which those principles have been applied by the English Courts. In my opinion therefore it is necessary in the present case first to consider whether the Legislature in Ceylon clearly intended to introduce the then prevailing English principles into our Ordinance. If such was their intention I should have little hesitation in relying upon English precedent.

The relevant sections of our Ordinance which provide for the exclusion of official matters from evidence, place the matters in question in three different groups :—*Firstly*, there is an absolute prohibition (section 123) against the production of *unpublished official records* relating to Affairs of State except with the permission of the appropriate executive authority. *Secondly*, a public officer has the right to withhold from evidence *communications made in official confidence* when he considers that the public interests would suffer by the disclosure (section 124). *Thirdly*, certain " law enforcement officers " have the right to withhold the *source of information as to the commission of offences* (section 125).

In England there appears to be no corresponding statutory provision, but questions of a similar kind are determined by the Common Law, under which the exclusion of evidence of the nature with which we are concerned is founded on grounds of public policy. The third group of matters to which I have referred forms a separate head under the English

[1] *(1942) 44 N. L. R. 97.*

Common Law ; but there appears not to be in England any clear distinction between matters falling respectively within the scope of our sections 123 and 124. All these matters are dealt with in the English authorities under the head of "Affairs of State". The principle as stated by Phipson [1] is that "Witnesses may not be asked, and will not be allowed, to state facts or to produce documents, the disclosure of which would be prejudicial to the public service. And this exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interests".

The procedure by which effect is given to this principle has been authoritatively determined. Once a Minister of the Crown objects to the production of a document on the ground of prejudice to the public interest the Court will not require production :—per Viscount Simon L. C. "the question, whether the production of the documents would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it". (*Duncan v. Cammel Laird and Co.* [2]) Although that decision applies directly in relation to *documents*, it would seem also that the principle will operate in the same way where the Crown desires to withhold or to prevent the admission of *oral evidence*, the admission of which is likely to prejudice the public interest. Although the English Courts have expressed strong views as to the circumstances and the manner in which the objection of Crown privilege should be taken, it apparently is now quite clear that, once the objection is taken by the proper authority and upon grounds properly stated, the Courts will necessarily uphold the objection.

The House of Lords in the *Cammel Laird Case* (supra) expressly dissented from the decision of the Privy Council in *Robinson v. State of South Australia* [3] where it was held that the Courts in Australia had the power to inspect documents in order to determine whether their production would be detrimental to public welfare. That decision was founded on a rule of Court in the following terms :—"Where on an application for an order of inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege". But although a rule in the same terms obtains for the English Supreme Court, the House of Lords considered that the rule was intended only for the protection of the litigant and had no application to a case where objection to production is taken on the ground of prejudice to the interests of the State.

The law as stated in our Ordinance does not in my opinion correspond exactly to the English Law. In the first place the Ordinance draws a distinction between "unpublished official records" and "communications made in official confidence". In the case of the former, section 123 assumes that production may be prejudicial to the public interests

[1] *Phipson, Law of Evidence, 9th Edition, p. 196.*
[2] *1942 A. C. at p. 639.*
[3] *1931 A. C. 704.*

and therefore prohibits production, except with the requisite permission, and the same prohibition applies with respect to oral evidence derived from such official records. Of course a Judge would rarely be able to decide of his own motion whether a particular official record is an "unpublished" one; accordingly I take it that the appropriate procedure in a case where there is an attempt to produce some such record or evidence derived therefrom would be the same as that which obtains in England, namely that a Minister of the Crown would certify the document to be one protected by the section. Although it is unnecessary for me to decide whether or not such a certificate would have the same conclusive effect as in England, a consideration of that aspect of the matter is helpful for the present purpose.

Sub-section (2) of section 162 of our Ordinance provides "that the Court if it sees fit may inspect the document, *unless it refers to matters of State*". The terms of this sub-section appear to indicate that in relation to "unpublished official records relating to affairs of state", that is to say in cases covered by section 123, the Courts are denied the right of inspection if objection to production is duly taken on behalf of the Crown. Indeed it would seem that in regard to such cases the view as to conclusiveness expressed by the House of Lords in the *Cammel Laird* judgment is clearly incorporated in the terms of section 162 (2).

I do not think, however, that the Ceylon law is the same with respect to the case of "communications made in official confidence". Whereas in England it may be open to a Minister to plead the objection of public policy in his discretion with respect to any matter falling within the general category of an "affair of state", and thus to withhold evidence of any communication made to a public officer, the same absolute privilege would in Ceylon extend only to unpublished official records and not necessarily to every communication made to a public officer. Matters of the latter class are dealt with in a different manner in section 124 of the Evidence Ordinance. In my opinion, if objection to production is taken *under section 124* (and *not* in the terms set out in section 123) two matters arise for determination, firstly, whether the communication was made in official confidence and secondly, whether its disclosure would place the public interest in jeopardy. In considering those matters regard must I think be had to the provisions of section 162. The only exception to the power of inspection which is conferred by those provisions is for the case of a document which refers to matters of State. Since the Legislature has made separate provision (in section 123 and 124 respectively) for two groups of matters which are covered in England by the one general principle of public policy, it is in my opinion unsafe to ignore the distinction between matters of State referred to in section 123 and other communications which are dealt with in section 124. The exception for "matters of State" provided for in section 162 (2) should therefore be restricted to cases falling under section 123 where a similar expression occurs. But where it is alleged that some communciation was made to a public officer in official confidence, there seems to be no reason why effect cannot be given to the plain terms of section 162 which confer

on the Court a right of inspection in order to determine the question of admissibility. The right of inspection so conferred would in my opinion be quite without meaning unless the Legislature also intended that the Court will have jurisdiction to decide the first question to which I have referred, namely whether the communication was made "in official confidence". In the present case the District Judge has inspected the document and found that the communication in question was not made in official confidence. The Attorney-General has conceded that the mere mark "confidential" placed on a document by the individual who writes it does not convert the document into a communication made in official confidence; and in the circumstances in which the document now in question appears to have been written and transmitted to the Minister, I cannot see how the correctness of the finding of the learned Judge can be questioned once it is held that he had the jurisdiction to reach that finding.

The second question for determination in a case alleged to fall under section 124 could only arise if a Court first agrees that the communication was made in official confidence. If and when this question has to be considered, it seems to me that the decision in the Australian case will probably have to be followed, not only because it is a decision of the highest judicial authority, but also because section 162 implies that the Court can determine by inspection whether the production of the particular communication would or would not be prejudicial to the public interest.

I have set out above my reasons for deciding that sections 123 and 124 of our Evidence Ordinance do not correspond with the English Law on the same subject, and that the general principle by which the English Courts are guided is not applicable to cases falling under section 124. But even assuming that the English Law should be applied, it is by no means clear that the general English principle would cover a case where some complaint is made by a member of the public as to the conduct of a public official. In a speech delivered in the House of Lords (a copy of which was made available to us by the learned Attorney-General) the present Lord Chancellor stated that the English Law enables Crown privilege to be claimed on two alternative grounds, the second ground being what Lord Simon described as "the proper functioning of the public service". In dealing with the class of documents for which privilege would be claimed in England on this second ground, the Lord Chancellor referred to "the need to secure freedom and candour of communication *with and within the public service* so that Government decisions can be taken on the best advice and with the fullest information". I am inclined to agree with the argument of the learned Attorney-General that the expression "communication made in official confidence" (occurring in our section 124) would include not merely inter-official correspondence but also correspondence by members of the public *with* public officials. It is not difficult to envisage cases in which public-spirited individuals may make disclosures to officials which are important in the public interest and for which protection may rightly be claimed and granted under section 124. But I do not think that any and every

complaint or criticism concerning a public official can be reasonably regarded as having been made " in order to enable Government decisions to be taken on the best advice and on the fullest information ". Phipson sets out a comprehensive list of English cases in which evidence was excluded of matters held to fall under the head of " Affairs of State ". For present purposes it is sufficient, without special reference to any of these cases, merely to observe that in very nearly all of them the documents or statements for which privilege was claimed were in the strict sense of the term " State documents ", i.e., communications between officials, and that there appears to have been no single case in England in which privilege was successfully claimed for a communication from an individual containing allegations of the nature alleged to have been made in the petition which the learned District Judge admitted in th present case.

The application must be refused with costs fixed at Rs. 262·50.

K. D. DE SILVA, J.—I agree.

Application refused.