

1931

Present: Macdonell C.J.

TILLEKEWARDENE v. OBEYESEKERE.

IN THE MATTER OF AN ELECTION PETITION FOR THE
AVISSAWELLA ELECTION.

Election petition—Charge of illegal practice—Hiring of cars—Candidate's warning to agent—Agent acting outside the authority—Liability of candidate—Meaning of word 'knowingly'—Ceylon (State Council Elections) Order in Council, 1931, s. 64 (2).

Where a candidate for election instructed an agent to borrow cars from friends and relatives, informing him at the same time that he did not intend to spend money on the hiring of cars as the law did not allow him to do so,—

Held, that the act of the agent in hiring cars and providing them with petrol was outside the authority given him and that the candidate was not responsible for the illegal practice committed by the agent.

Where an agent pays or contracts for payment for the hiring of cars for the conveyance of voters to and from the poll for the purpose of promoting or procuring the election of a candidate,—

Held, that he was guilty of an illegal practice, even though he was unaware that he was breaking the law.

THIS was an election petition presented against the return of the respondent as member for the Avissawella constituency at the election held on June 20, 1931. The petition alleged that the respondent himself or through his agent had been guilty of the corrupt practices of bribery, treating, and of the illegal practice of contracting for payment for motor cars for the conveyance of voters to and from the poll.

R. L. Pereira, K.C. (with him *Deraniyagala* and *Seneviratne*), for respondent.—Decisions of case law on master and servant are not applicable in their entirety to election law. The implication of the phrase must be sought in the decisions in election cases themselves. Section 64 of the Order in Council lays down what is an illegal practice. "Knowingly" implies a knowledge of the law and not merely of the facts (*East Cork Case*¹).

Where agency is limited a principal is not liable for acts of his agent outside the scope of that limitation (*Bodmin Case*², *The Harwich Case*³, *The Westbury Case*⁴, *Salmon on Torts* 102).

B. F. de Silva (with him *E. B. Wickramanayake*), for petitioner, cited section 74, sub-section (b), of the Order in Council.

[*MACDONELL C.J.*—Does not that refer to such acts as the failure of the returning officer to make a return, or the insufficient number of polling booths and things of that kind?]

Not necessarily. It would take in a violation of section 64. Registration expenses must be included in the return (*Penryn Case*⁵).

A candidate is responsible when an act is done by his agent even without his knowledge or consent. Agency is a question of fact. It may be created by acquiescence (*Rambukwella v. Silva*⁶). As a matter

¹ 6 O'M. & H. at pp. 350-352.

² 1 O'M. & H. 117 at p. 119.

³ 3 O'M. & H. 69.

⁴ 3 O'M. & H. 78.

⁵ 1 O'M. & H. 131.

⁶ 26 N. L. R. 231 at p. 246.

of fact, Alwis and Bandaranaike were both agents. Agency is defined in *The Great Yarmouth Case*¹. A candidate cannot be allowed to retain the benefits of an agent's illegal practice. See *Aylesbury Case*², *East Kerry Case*³, *The Harwich Case*⁴. What is sufficient evidence of agency is laid down in the *Wakefield Case*⁵, *Taunton Case*⁶. Even an agent's agent can bind the candidate by his acts (*Barnstaple Case*⁷). A candidate is liable even for the acts of a volunteer agent (*Bolton Case*⁸). Those who are active on polling day are agents for whose acts the candidate is liable (*Tewkesbury Case*⁹). The Roman-Dutch law has also adopted the wider view of the liability of a master for the torts of a servant. It is now identical with the English law (*Estate Vander Byl v. Swampool*¹⁰). See also *Mkize v. Martens*¹¹.

October 30, 1931. MACDONELL C.J.—

The petition in this case was presented by Senadirage Don David Tilekewardene, a duly registered voter for the Avissawella Election District, against the return of Forester Augustus Obeyesekere, respondent to this petition, as member for the Avissawella constituency as the result of the election held on June 20, 1931. The petition alleges that the respondent himself or through agents has been guilty of the corrupt practices of bribery and of treating, and of the illegal practice of making payments or contracts for payment for the conveyance of voters to and from the poll, and asks that the election be declared void.

There were interlocutory proceedings on this petition before Driberg J. at the instance of the respondent in one of which he asked for the petition to be dismissed on the ground of inadequacy of security, this application being dismissed with costs to be paid at the conclusion of the inquiry, and in the other of which petitioner was required to furnish further particulars with regard to the charge of payment for conveyance of voters, costs in this to be in the cause.

The petitioner's counsel commenced by leading evidence as to the illegal practice, hiring, alleged against the respondent and later led evidence as to the corrupt practices alleged, namely, bribery and treating, but in his particulars, as also in the arguments for each side, the corrupt practices alleged, namely, bribery and treating, were dealt with first and the illegal practice alleged, the hiring, was dealt with last. It will be convenient in discussing the charges to adopt this order, bribery, treating, hiring, the more as it is the charge of hiring which arises the chief difficulty in this inquiry and requires fullest treatment.

Before discussing the charges in detail it is necessary to make a few observations on the witnesses generally called in support of them. Some of them had been previously convicted of crimes, which previous convictions they had to admit. In estimating the credibility of any particular witness I am influenced very little by the fact of his having been previously

¹ 5 O'M. & H. 175 at p. 178.

² 4 O'M. & H. 59.

³ 6 O'M. & H. at p. 68.

⁴ O'M. & H. 61 at p. 70.

⁵ 2 O'M. & H. 100 at p. 102.

⁶ 2 O'M. & H. 73.

⁷ 2 O'M. & H. 105.

⁸ 2 O'M. & H. 138 at p. 141.

⁹ 3 O'M. & H. at p. 99.

¹⁰ (1927) S. A. L. R. (A.D.) at p. 145.

¹¹ (1914) S. A. L. R. (A.D.) 382.

convicted. A man may break the criminal law, and more than once, without showing that he is really a man of such character as to make one doubtful of his credibility. Far more important than previous convictions in estimating the credibility of a witness is his general record with regard to what he has done and what his manner of life has been. If a witness is on his own admission a man of no fixed occupation, who has gone from one means of livelihood to another and confesses himself not to be in regular or steady work, that is a factor in the problem of his credibility which I take into account, as every one must, who has to estimate whether sworn testimony is to be accepted or not. But previous convictions have only a very slight weight with me since the crimes they involve may have been temporary slips from virtue.

It was argued for the petitioner that it is impossible to produce as witnesses on a charge of corrupt practices in an election petition persons of a high character. This is perfectly true, and one does not expect of such witnesses a high moral or social level, but one does expect of them, as of witnesses in any other kind of inquiry, that they shall give the impression that they are honestly trying to speak the truth and that they shall produce a story which convinces one's reason as being probably a true one. I am bound to say, at the outset, that very few of the petitioner's witnesses satisfied this necessary test, but if one is sceptical of that evidence it is not by reason of any deficiency morally or socially in the witnesses but because the stories they told were not in themselves convincing. I will now go into the charges in detail. [His Lordship after discussing the charges of bribery and treating dismissed them.]

These observations dispose of the corrupt practices alleged, namely, bribery and treating. I have expressed a strong opinion as to the character of the evidence produced in support of these charges because I am perfectly satisfied that that evidence, with the exception of that of the witness L. A. Perera, who after all does not say very much, is false and perjured. The witnesses impressed me very unfavourably. Neither their manner nor their matter was calculated to carry conviction—indeed, one could go a great deal further and say that the matter impressed one as an impudent invention throughout.

I now have to consider the third charge, that, namely, which alleges the illegal practice of paying or contracting to pay for vehicles to convey voters to the poll, what shortly is known as "hiring". To make this charge intelligible, it will be necessary to tell the story first of all from the respondent's side since the evidence upon it from the petitioner's side gives a very fragmentary idea of what happened. The respondent says that he announced publicly at a meeting that he was not going to spend any money on the provision of vehicles to carry voters to the poll, the law would not allow it, and he said further that he relied on his numerous friends and relations lending him their vehicles for that purpose. Early in June he met Mr. Alwis, a near connection by marriage, and told him the same thing, namely, that he was relying on friends and relations for the lend of vehicles on polling day. Mr. Alwis who was engaged in working for Dr. Paul, a candidate for the South Colombo Division, said that he could manage this. He himself was getting the lend of vehicles from his friends and relations for Dr. Paul for the South Colombo election

on June 18 and was certain that he could get from them a similar obligation for the Avissawella election day, June 20, and further that he would be responsible for collecting on that day the cars of the respondent's friends and relations for the conveyance of voters. Dr. Paul was unsuccessful for the South Colombo Division and Mr. Alwis found that, in his own words "people were getting tired of lending cars." The election day was close; he felt, he said, that he must not fail in his promise to the respondent to bring the number of cars necessary on June 20, and, as he could not get them from friends, he decided to disobey the respondent's instructions and, unknown to him, to hire such number of cars as he thought needful. He says that he did so from two persons, Nonis Fernando and Fonseka. From Nonis he got 45 cars and from Fonseka 20 buses. He says that the agreement was that he was to pay Rs. 25 for each vehicle and to provide petrol for them. A friend of his, a Mr. de Livera, a proctor, recommended him to get the petrol necessary from a depôt in Cotta Road and from a man by name Usoof. (Usoof's actual relations to this depôt will be stated later.) Mr. Alwis and Mr. de Livera went to this depôt on June 18 when Mr. Alwis ordered of Usoof 1,000 gallons of petrol and paid a deposit of Rs. 700, his own money he says, though actually handed over to Usoof by Mr. de Livera. On June 19 many cars and buses, lent and hired, assembled at night in the garden of the respondent's house in Cotta Road, and apparently in the large portion of open ground to the side of the house where there is a tennis court and a good deal of open ground round the tennis court. Mr. Alwis sat at a table in the garden some distance from the house and gave out orders for petrol on Usoof's depôt which is less than a quarter of a mile from the respondent's house. Car drivers took these chits to the depôt received petrol, about 8 gallons each, drove off that night to the constituency and next day carried voters to and from the poll. During the polling day several of the buses ran out of petrol and Mr. Alwis being informed of this went to a petrol depôt in Welampitiya kept by one Sivalingam, and said that he wanted petrol but had no money to pay for it at the moment but that he was Mr. H. P. Dias Bandaranaike's nephew. Sivalingam told him to call again in half an hour, he did so, and Sivalingam then said that he had inquired, and was satisfied, and would honour any orders for petrol which Mr. Alwis might send. So Mr. Alwis did send these orders during the day to the amount of 113 gallons and he says that he paid the price asked, namely, Rs. 152.55, on June 24.

This is the story as told from the respondent's side, and the petitioner's witnesses tell what purports to be their side of the story. Two witnesses were called from the Cotta Road depôt, Usoof himself and Buhari. It would appear that the business really belongs to Usoof's wife but that he is in a position to take orders and give directions with regard to it. Buhari is the wife's nephew and seems to have been the clerk actually in charge. Usoof says that on June 18 Mr. de Livera and Mr. Alwis came and ordered 1,000 gallons of petrol, de Livera making a deposit of Rs. 700 in part payment but saying that it was Alwis's money. The two men went away without taking a receipt, and the clerk, that is Buhari, made out the receipt in the name of the respondent, and entered in his book the Rs. 700 as cash received from Mr. F. A. Obeyesekere.

Shortly afterwards Mr. de Livera returned with the receipt, protested that it must not be made out in the respondent's name and tore out the counterfoil from the receipt book. He also crossed through the entry in the book for cash received. The erasure, I may add, is a very effective one and the name is almost obliterated. Mr. de Livera said that the entry must be either in his own name or in that of Usoof, and Usoof said that the entry had best be in his name since neither Mr. de Livera nor Mr. Alwis had an account with the firm. A further entry therefore was made in lieu of the one crossed out "By cash from Usoof Rs. 700". Later on Mr. de Livera even took away the receipt book and Usoof says he has never got it back. At some time or other, the witness does not say when, Mr. de Livera paid the balance and the entry in the books for that amount is also said to be in Usoof's name. Usoof says further that on the night of June 19 a large number of cars came to the respondent's garden, and later to the depôt where they were supplied with petrol. The particulars given of this charge were that the money was received from the respondent, but Usoof says that it is quite incorrect to say that he either went to the respondent's house or that he was paid by him. He is definite that the money was paid to him by Mr. de Livera. Buhari supplements this story. He says that he received Rs. 700 from Usoof who told him on the phone that it was in connection with Mr. Obeyesekere's election, that thereupon he made out a receipt in Mr. Obeyesekere's name, that shortly after Mr. de Livera brought it back protesting against its being so made out, and struck out the entry in the cash received book, and he also says that Mr. de Livera has the counterfoil book and that it has not been returned. He says that he wrote Usoof's name in the cash received book at Usoof's request but that he does not know why Usoof so requested him. Mr. Alwis gave evidence on this matter and admits that he went to the depôt with Mr. de Livera on the latter's suggestion, and that he ordered the petrol and gave Mr. de Livera the Rs. 700 which the latter paid to Usoof in his presence. They went away to the Orient Club and it was only then that they remembered that they had received no receipt. Mr. de Livera then sent his chauffeur back to the depôt to fetch it. It was argued that this part of the story was not true because Buhari says that Usoof had mentioned to him earlier on the phone to give the receipt to Mr. de Livera's chauffeur, therefore it cannot be correct that they forgot about the receipt and then sent the chauffeur for it, they must have mentioned it at the time and said that they would send the chauffeur for it later. This might be a point damaging to Mr. Alwis's credibility if Usoof had been asked about it, but he was not. Buhari struck me as a timid and reluctant witness. He made a great pothor about admitting having ever seen Usoof on June 18 and it was only with great difficulty that he was got to admit, what must have been the case, that he did see Usoof on that day, and before I can use such a contradiction of Mr. Alwis's testimony as damaging thereto, it would be necessary for the point to have been far more fully investigated in evidence than it was. It was argued that the time given by the witness Buhari would not allow for Mr. Alwis and Mr. de Livera to return to the Orient Club, discover that they had not got the receipt and send the chauffeur back again, but that the time indication given by Buhari would have

been ample to enable them to have gone to the respondent's bungalow and for the receipt to have been taken there. This is possibly true, but only if one assumes Buhari to have been absolutely accurate in the time indications he gave, and there were so many uncertainties in his evidence that I am not prepared on this question as to the time—at best an uncertain piece of evidence—to say first of all that Mr. Alwis's story about overlooking the receipt is untrue, and then to infer from it something for which there is no evidence, namely, that they were in communication with the respondent himself at that time. I would point out that Mr. de Livera was not called. It is stated that he cannot be found. The failure to call him is unsatisfactory but I do not know that that failure would justify me in throwing doubt on the evidence of Mr. Alwis or in inferring, for that was the whole point, that the respondent was privy to this arrangement about the petrol. Mr. Alwis has admitted his share in the story with what seemed to me perfect frankness and I do not know that Mr. de Livera's evidence would carry it very much further. As affecting the illegality that Mr. Alwis himself was confessedly committing it certainly would not carry that story any further.

The important point about this story is, of course, did the respondent know anything about the matter or did he not? And one naturally asks the question, how did the receipt come to be made out in his name in the first instance and why was the Rs. 700 entered as cash received from him? Now, it is rather curious that for both these things each of the witnesses, Usoof and Buhari, lays the blame on the other, not on anything said or done either by Mr. Alwis or by Mr. de Livera. Usoof twice says "The clerk (*i.e.*, Buhari) made out the receipt in Mr. Obeyesekere's name." Buhari says three times that he had been told on the phone by Usoof that there was petrol wanted in connection with Mr. Obeyesekere's election, and that that was why he made out the receipt in respondent's name. One can leave these contradictions as they stand. It would be quite contrary to this evidence to infer from it that the receipt was made out in the respondent's name in consequence of anything said or done by Mr. Alwis or Mr. de Livera.

There is yet another point that must be dealt with in regard to this matter. When Mr. Alwis had ordered the petrol, he received from Usoof a serial order book and was told by him that any orders for petrol issued by him, Mr. Alwis, out of that book, would be honoured at the depôt. Accordingly on the night of the 19th when sitting in respondent's garden he got the men from whom he had hired, Nonis Fernando and Fonseka, to bring up the drivers in batches and gave to each driver an order containing the distinctive number of his car or bus and the number of gallons to be supplied him. He did not, however, sign any one of these orders. When they were produced in Court it was found that at the place where the signature should have been, there was in each case a circle and dot made in pencil, and it was suggested that this was part of a design on the part of Mr. Alwis to keep his name out of the matter. Sixty of these chits were put in. I have examined them all and I am quite satisfied that the circle and dot were made by a different hand from that which wrote in the number of gallons and the car number. To this there are two exceptions, the first and second of the chits produced. On these the

writer had omitted to give in figures the number of gallons required and the same hand which put the circle and dot in the signature place, has written in the figure "6" against the word gallons and has put a circle round it unmistakably similar to that of the circle in the signature place. That the circle and dot were not made by the hand that wrote the number of the car and the number of gallons required is perfectly plain, because in several of the car numbers a nought occurs, and wherever it does, it is a circle quite differently made from the circle at the bottom of the chit. Moreover the circle and dot were not made by the same pencil as that which wrote in the car numbers and gallons. Usoof says that the circle and dot were on the chits when he received them. I doubt much importance attaches to the matter, but in any case I am satisfied that the circle and dot were not made by the person who wrote on the chits the gallons and the numbers of the cars.

There is one other thing in connection with these two witnesses which ought to be mentioned as showing anyway that Usoof was a very willing petitioner's witness. He was served with a subpoena the first day of the hearing, only a few minutes before he went into the witness box. He explained that he had come into to see someone in the Attorney-General's department, that this got known, and that he was promptly served with a subpoena and told to wait. When requested he produced from his pocket the order chits which I have just been discussing. He was asked how he got them, and he said that he got them from Buhari who was then waiting outside the Court on a subpoena served on him some days before. Next day Buhari was himself examined as a witness and asked to produce his subpoena. This ordered him to bring with him certain documents but not the order chits, and he denied positively that he had brought them in the day before or given them to Usoof. I conclude that Usoof in coming in on the first day knew he was going to be summoned and obligingly brought the chits with him. It is of importance only as showing that if the witness Usoof inclines to one side rather than the other it is to the petitioner's side.

One can now proceed to examine the evidence of the drivers who were called to support this charge of hiring. The first charge of hiring alleged that the persons contracted with or paid were one Matthias Baas and the drivers of 23 vehicles, but only one of these drivers was called and Matthias Baas was not called at all. The one driver called was Hendrick Fernando, the driver of car O 160, which curiously enough is a car licensed for private use, and the explanation of how he came, when hired by someone, to be driving this private car that day, was not very satisfactory. He says that on the afternoon of June 19 he and the 31 cars engaged with him were all lined up in McCallum Road where a list of them was made by one Eddie Iya who was not called as a witness, and that Mr. Alwis was present in a car; that later, towards evening, they went to the respondent's garden where Mr. Alwis gave car chits for petrol and that they went to Usoof's depôt and got it there. The hire he says was Rs. 25 which Matthias Baas paid him subsequently. About 7 or 8 P.M. he and the other cars drove off to Megoda. They had dinner that night at the house of the father of Mr. Bernard Jayasuriya, the election agent,

who had a bag of money from which he handed to Matthias Baas Re. 1 for each driver which was deducted from the amount of his pay for hiring. He does not say when this occurred but as the only time according to him when Matthias Baas was present was in the afternoon and evening of the 19th, then this handing out of money by the election agent must have been in the evening of that day. Now Mr. Jayasuriya denies this story *in toto* and says he was elsewhere at the time. He was in a car with the witness Mr. Jayewardene at Megoda, drove in with him to the respondent's house and was there doing election business with the respondent till about 2 A.M. Mr. Jayewardene was waiting for him all that time and confirms this story. If so, he cannot have been at his father's house paying out from a bag of rupees to Matthias Baas. I will have to deal with this evidence as to Mr. Jayasuriya's movements at greater length later on. It is sufficient for the present to say that I accept it and discredit the story of Hendrick Fernando accordingly. Mr. Alwis denies that he ever ordered any cars to be lined up in McCallum Road or that he knows Matthias Baas at all. He gives the names of the people from whom he ordered cars and Matthias Baas is not one. I do not profess to have got to the bottom of this story about the cars being lined up in McCallum Road, save that it was not at the instance of any agent of the respondent that they were brought there, and in any case if it was to be established as against the respondent Matthias Baas should have been called.

The second charge of hiring gives the name of William Singho as the person hired from, and mentions the drivers of 36 cars of whom, however, only two were called, the witnesses Karthelis Appu and Francis Fernando. The person through whom they were alleged to have been hired, William Singho, was not called. Karthelis Appu says that he is the driver of C 7689, his stand being usually at the Fort, that he was engaged by William Singho and told to go to McCallum Road, like the last witness, where he found a large number of cars lined up. He says that afterwards the cars dispersed and that he himself returned to the Fort but that at 7 o'clock he went to the respondent's bungalow as ordered. From there he was sent to a petrol depôt kept by one Ratnayake in Prince of Wales Avenue near Victoria Bridge where he got petrol, that Mr. Bernard Jayasuriya led him and the other cars, in a car of his own, and that at the depôt Mr. Jayasuriya and another person unknown to him agreed to pay for the petrol which Ratnayake was to supply. Having got his petrol he went off to Megoda and worked next day carrying voters to and fro. At the end of the day Walter Perera gave him a chit, P 12, to the effect that car C 7689 worked most satisfactorily and diligently. Mr. Walter Perera states that he gave this chit to a fair tall stout driver—Karthelis was dark—because that driver said that he had been working for the respondent all day but that without a chit he would get nothing for his labours, and that he asked for the chit saying he would go to the respondent and get some money. Mr. Perera's impression was that the car was a lent one. The other witness Francis Fernando is the driver of C 5715 and says he was engaged with 60 others by William Singho, that they lined up in McCallum Road and that they went to the respondent's house at 7 P.M. He said that the list was made by Mr. de Livera while Karthelis Appu had said that the list was made by one Harry Fernando

and it will be remembered that Hendrick Fernando said that the list was made by yet a third person. He says nothing about any cars dispersing previous to going to the respondent's house, a fact which surely would have struck his attention had it occurred. He says that they went to Prince of Wales Avenue and got petrol there and that he saw Karthelis there. He then says that at 1 A.M. they left for Horotota and that Karthelis went with him. But later on he says that Karthelis did not go with him, and Karthelis says definitely he went to Megoda which is a sufficient distance from Horotota. I think the contradictions between these two witnesses can be left to adjust themselves. The story, however, of the petrol supply from the depôt in Prince of Wales Avenue needs further discussion because the depôt keeper, Ratnayake, was called and stated that on June 19, rather before midnight—this had been opened as occurring at 2 A.M.—he supplied 32 cars with 139 gallons of petrol on the order of Mr. Bernard Jayasuriya then present who paid him the price Rs. 187.55 in cash on the spot, and he produced the carbon of the receipt for this sum upon which, however, no name appeared. It will be remembered that Karthelis says that Mr. Jayasuriya undertook to pay, not that he paid. He confirmed himself as to the time by pointing to several entries subsequent to it but before the entries for June 20 began, *i.e.*, before midnight of the 19th. He says he remembers the incident because of the bigness of the sale and he denies that he was aware of there being any other elections that day. He volunteered further that Mr. H. P. Dias Bandaranaike had, on the day before he gave evidence, offered him Rs. 200 not to say that Mr. Jayasuriya was there. Mr. Bandaranaike says that this is an absolutely false story and that he has never seen him, and I think I can accept Mr. Bandaranaike's denial. The story of the Rs. 200 not to say that Mr. Jayasuriya was there was something volunteered on the spur of the moment. Now Mr. Jayasuriya says, as has been mentioned, that during the late afternoon of the 19th he was at Megoda in Mr. Jayewardene's car and that the latter drove him back to the respondent's house which they reached at about 8.30 or 9 P.M. and that he remained there working with the respondent until 2 A.M. Mr. Jayewardene confirms this story, namely, that he was with Mr. Jayasuriya on that evening, and that they never went near Prince of Wales Avenue at all. It is not disputed that it would have been quite out of their way to go anywhere near that thoroughfare. Now Mr. Jayewardene admits that during that evening at the respondent's house he sometimes did not see Mr. Jayasuriya for half an hour or twenty minutes. It is therefore just possible for Mr. Jayasuriya to have gone to Prince of Wales Avenue and back without Mr. Jayewardene's being aware of it, but it is very improbable that he did so. The whole story is that he was extremely busy with the respondent re-arranging who were to be the polling agents next day and at what booths, and besides there is nothing else in the evidence suggesting that he had anything to do with the transport, that being a matter left exclusively in Mr. Alwis's hands. I have mentioned the contradictions between the evidence of Karthelis Appu and Francis Fernando, and the witness Ratnayake struck me as equally unsatisfactory. His story that he served a large number of cars that night and that he

was paid for that service is quite possibly a true one but it was not on Mr. Bernard Jayasuriya's orders nor was it from him he received a payment of Rs. 187.55.

Two other driver witnesses were called, W. D. Hendrick and Alfred Boteju, who can conveniently be taken together. Hendrick says that he was a driver of the Ford bus 617, that he was engaged two weeks before the election by Mr. Jayasuriya, who picked him and his bus out from a number of other buses then standing together at Maradana, and that on the 19th he went to respondent's house, got petrol from a depôt near by, and then went that evening to Salawa estate from which place he worked next day transporting voters, and he says that when he was short of petrol on the 20th he received some from a Pontiac car which carried yellow colours and was labelled "petrol". This story had best be dealt with at this point. The respondent does possess a Pontiac, an oldish car of a rather dingy blue which was used on the day of the election mainly for the purpose of bringing from Colombo the lunch for the polling agents. But he denies emphatically that it was labelled "petrol" or that any petrol was given out from it. Hendrick and Boteju when asked to describe the Pontiac were unable to give its distinctive symbol, the red Indian's head; one of them said it was ash colour which curiously enough was the colours of a rival candidate Mr. Goonewardene, and the other said it was green. Mr. Rambukwella, a Sub-Inspector of Police, says that on June 20 he did see a car carrying petrol and that he thinks,—though he cannot remember—that it had a yellow flag with a placard "petrol" on it but that he did not see it giving out petrol. He was just passing in a car so that that was all he noticed. If this evidence as to a Pontiac with a yellow flag giving out petrol were otherwise confirmed by trustworthy evidence, it might be of some weight against the respondent but as I do not trust the evidence of the witnesses W. D. Hendrick and Alfred Boteju—I will say why later—Mr. Rambukwella's evidence does not carry the matter very far. I think the story of the Pontiac with a yellow flag giving out petrol can be dismissed.

To return to these two drivers. The other one, Alfred Boteju, was the driver of the bus S 536 and says that he too was engaged by Mr. Jayasuriya and that on the 19th he arrived at Salawa estate at 8.30 p.m. from where next day he took voters to Waga, and that Hendrick was there also. He says that at the end of the day Mr. Wijeyesekere, the superintendent of the estate, paid him Rs. 10 and Mr. Jayasuriya another Rs. 10, and that as well as getting petrol from the Pontiac he got a supply from the estate bungalow. There is a good deal of evidence in reply to the story of these two men. First of all Mr. Jayasuriya says that it is quite untrue that he hired their buses and points out, reasonably enough, that if he had been out to hire buses he would not have hired two only, nor would he have hired Hendrick's Ford which admittedly was too small a bus to be of much use. Mr. Wijeyesekera denies the whole story, the buses coming, the payment and the supply of petrol from the bungalow, adding that there was none at the bungalow to supply. He also gives this detail, that he had a number of voters on the estate who were still waiting

there at 8.30 A.M. on June 20 for a conveyance to take them to the poll, and that he had to send a message to Hanwella in answer to which two buses, a Graham and a Dodge, arrived at about 9 A.M. Obviously if the buses of Hendrick and Boteju had been at Salawa estate, as those witnesses say they were, it would not have been necessary for Mr. Wijeyesekere to send to Hanwella for transport. But the answer to these witnesses does not end here. The witness Timothy Almeida knows Hendrick and says that Hendrick engaged through him two buses for June 20 in the interests of the candidate Mr. Goonewardene, and further that bus 617 which Hendrick said he was driving that day had been incapacitated several days before and was incapacitated on the polling day. The witness W. R. Dep confirms this. He was the owner of this very bus 617 up till July 2 when he sold it to Edwin, Hendrick's brother, since which date Hendrick does drive bus 617, but he adds that Hendrick never drove it while it was in his own ownership which would be until well after June 20, and that on that day it was incapacitated and could not be driven at all. These two are perfectly independent witnesses and they show conclusively that Hendrick's story is an invention. As to Boteju, the respondent says that a man came to him after the election with a bill asking for Rs. 100 for the following reasons: "To people who worked on Sunday, the 21st, on a pleasure journey", and the paper gives the numbers of three cars and two buses, one of which was S536 which is the number of the witness Boteju's bus. Respondent says that when the man brought him this paper he told him that he knew nothing about it and refused to pay, whereupon the man went away disappointed. But before doing so the respondent asked the bearer of the paper what his name was and wrote down on it the name as given by the bearer, namely, J. W. A. Boteju, which is the name of this witness. This document was produced in Court and is in Sinhalese but with the name J. W. A. Boteju written in Roman characters at the bottom, and it was not challenged that this was respondent's writing. Now Boteju denies all knowledge of this paper. In so denying it I am quite satisfied that he speaks falsely, and this is sufficient to justify me in saying that this story is just as much an invention as that of W. D. Hendrick.

One further witness remains to be dealt with as to the hiring. It will be remembered that on the day of the election certain buses ran out of petrol and that Mr. Alwis obtained them a further supply from a depôt in Welampitiya managed by one Sivalingam. He was called as a witness and says that on June 18 Mr. H. P. Dias Bandaranaike and Mr. Alwis ordered a large quantity of petrol, amount unspecified; and in consequence of this he sent a letter to Delmege, Forsyth & Co. asking for a 1,000 gallons of petrol to be supplied on the 20th early "for the election supply". His letter was put in, and it certainly does not suggest that he had received any specific order for petrol but that he was simply doing what a wise business man would do, obtaining a supply for a day when much would be wanted. He says that on June 20 he supplied 113 gallons to cars sent him by Mr. Alwis and that on the 24th Mr. H. B. Dias Bandaranaike paid him in full Rs. 152.55 but that the latter took away the carbon copies out of the order book on the ground that some of his receipts were missing. It may be here stated that Mr. Bandaranaike

denies paying him anything at all. Both he and Mr. Alwis deny having ever gone there on the 18th, though, as has been stated, Mr. Alwis did on the 20th get a supply of petrol from Sivalingam mentioning Mr. Bandaranaike's name as a guarantee. Mr. Bandaranaike says that he did see Sivalingam that day, who told him that Mr. Alwis wanted petrol, to which he replied that the money would be quite safe, and he adds "Sivalingam had already given the petrol before he spoke to me". A curious thing about Sivalingam's story is that in the particulars it is stated that the petrol was obtained from him by Mr. S. W. R. Dias Bandaranaike and by Mr. H. B. Dias Bandaranaike, while Mr. Alwis's name is not mentioned at all. Sivalingam denies ever having said that Mr. S. W. R. Dias Bandaranaike came, and he is quite positive that he mentioned Mr. Alwis's name when giving the information that led to his being called as a witness. That information he gave to some man unknown and did so, he says, because the man came with a chit from his partners telling him to "give information to bearer". Not the least extraordinary thing about Sivalingam's evidence, although it went unnoticed in argument, is this, that there is nothing in his story to suggest that he saw either Mr. H. B. Dias Bandaranaike or Mr. Alwis on the 20th at all. The implication from what he does say is that he saw neither of them that day. Now it was said in argument that Mr. Alwis is only candid where matter in evidence that he cannot deny compels him to be. Here at any rate is an incident to the contrary. There is no written evidence to connect him with this incident for the letter to Delmege, Forsyth & Co., Ltd., does not do so, and the receipts Sivalingam says he had given to Mr. Bandaranaike, both originals and carbon duplicates. The discrepancies between the particulars, which could only have been got from Sivalingam, and the evidence given by him at this inquiry, would have justified Mr. Alwis, had he been a dishonest witness, in denying that he had ever seen Sivalingam at all. Save for Sivalingam's own entry in his books that it was Mr. Bandaranaike who paid him, the latter also could have taken the risk of denying that he had ever seen Sivalingam either. I was invited to say further that Mr. Bandaranaike contradicted Mr. Alwis where he says "Sivalingam had already given the petrol before he spoke to me". Now Mr. Bandaranaike could only have got this information from Sivalingam since it is nowhere suggested that he met Mr. Alwis that day. If so, then this goes to the credibility of Sivalingam but not to that of anyone else. Besides there is no contradiction. Mr. Alwis says that he returned to Sivalingam's—he had been told to wait while inquiries were being made—and that the latter said, not that he had seen Mr. Bandaranaike, but that he had found out who he, Mr. Alwis, was, and that he would honour his orders for petrol.

I would wish shortly to summarize the petitioner's evidence on this charge of hiring. That of Usoof and Buhari is correct in the main as to the ordering and supply of petrol and I accept that of Sivalingam so far as it is confirmed by the evidence of Mr. Bandaranaike and of Mr. Alwis, and no further. The evidence of Hendrick Fernando leaves me doubtful. A car O 160 got petrol that night but I am in doubt whether it was driven by Hendrick Fernando. The evidence of Karthelis Appu equally leaves

me doubtful. Car C 7689 undoubtedly worked for the respondent on the day of the election. Whether it was driven by Karthelis Appu is another story, and the contradictions of Francis Fernando as to whether he was or was not with Karthelis leaves his story in grave doubt likewise. With regard to the remaining three witnesses I can be more positive. I am satisfied that Ratnayake was fixing an incident which affected somebody else upon Mr. Jayasuriya and was saying in that connection what was false. The witnesses W. D. Hendrick and Alfred Boteju have, I am quite satisfied, put up a false and invented story.

It has been said that the whole conduct of the respondent, of the election agent, Mr. Jayasuriya and of Mr. Alwis on June 19, shows that the respondent must have known that cars were being hired, but one must ascertain what the position of affairs was before pronouncing on this argument. As to the position generally, I see no reason to doubt the story told by the respondent and his witnesses, namely, that the election agent himself being occupied fully with other things took no part in the matter of transport, that the respondent had warned Mr. Alwis not to spend anything on hiring but to get cars from friends and relations, that Mr. Alwis had tried to do so and failed and that then, so as not to break his promise to the respondent, he made arrangements to hire, concealing from the respondent that he was doing so. It has been urged, quite rightly, that it would have been better had Nonis and Fonseka been called. True, but that evidence could not have added anything towards proving the illegality which Mr. Alwis confesses he had committed, and that their evidence would have implicated the respondent himself there is nothing to show. Then I am not prepared to say that their absence casts suspicion on that story which is a pretty frank confession of wrong doing. The position, then, on the evening of the 19th was this. The respondent says he was busy all that evening rearranging who were to be polling agents next day at what booths. In any case he would be bound to be busy on something. Cars were coming into his garden in great number. Many, perhaps the majority, were cars hired by Mr. Alwis who sat out in the garden giving them orders. He had concealed the hiring from the respondent but had assured him that he would get friends and relations to send, and the respondent seeing cars arriving would naturally think that Mr. Alwis's efforts had been successful. The respondent's action in remaining working at his house and in not going to the garden to see what Mr. Alwis was doing is, at the least, equally consistent with a belief that these were lent cars arriving and with a knowledge that they were hired cars. If these facts are equally consistent with knowledge by the respondent of the illegality that Mr. Alwis was committing and with ignorance thereof, then there is at the very least a doubt of which the respondent must have the benefit. It was asked, would he not go up to Mr. Alwis and ascertain what he was doing? No, because he would think that Mr. Alwis was busy with cars, and those lent ones; why interrupt a busy man? Besides, he was kept busy that night himself from 9 P.M. to 2 A.M. or thereabouts, working with his election agent as to the persons to be sent to the several polling booths. But would not the election agent have gone to Mr. Alwis to inquire? One would say no, and for similar reasons. He was doing his own proper job or at least

that part which required attention at the moment. Then it was said, how unnatural for Mr. Alwis never to go near the respondent that night. There is the same answer and for the same reasons. Mr. Alwis was busy, and when he interrupted his work to go into the house for a hasty meal, why would he then go and talk to the respondent? He would guess him to be busy, even if he did not know this fact, and the moment he had finished his refreshment he would himself have to be back at work again. The conduct of these three several persons as testified to by them seems to me reasonable enough, having regard to the circumstances of the moment. Then I cannot infer that either the respondent or his election agent knew or must have known that the vehicles Mr. Alwis was busy with were, many of them, hired vehicles and not lent ones at all. The respondent stated in evidence that on polling days many vehicles including buses which were normally hired vehicles, were lent by their owners to carry voters, so there would be nothing startling in some of the vehicles Mr. Alwis was busy with being buses; he would be giving orders to them as well as to the cars.

What struck me during the hearing as of more importance was what respondent must have seen in the constituency on polling day itself. The evidence as to this is of the shortest. The respondent said in chief "At 6.30 A.M. I got into my Daimler and went with my family from polling booth to polling booth", and he then went on to answer the charge about the Pontiac supplying petrol. The only thing in cross-examination which shows he was asked about polling day is the one passage "On the 20th I was dropped at 7 P.M. at the Club. I woke up at 10 P.M. and was summoned to the Kachcheri to hear the result", and in re-examination he stated that about buses ordinarily used for hiring being lent for the polling day, which I have mentioned above. At night it would not be easy to distinguish hired from private vehicles, but those he would have seen driving round the constituency on polling day would, many of them, be vehicles whose marks would show them to be ones licensed to ply for hire and so not private vehicles. Should not this have aroused his suspicions and even have affected him with knowledge that he was getting the services of hired vehicles? As confessedly he did not stop these vehicles from being used on his behalf, could he not be held to have accepted their services and so made himself a party to the illegality? Well, the respondent was not asked about this matter and it was not, I think, referred to in argument. It may be that his suspicions were aroused, or again it may be that knowing some hiring cars and buses had been lent he would not be struck by their large number or conclude that some of them must have been not lent but actually hired. To affect him with knowledge that vehicles had been or must have been hired for his candidature that day, there would have to be evidence much more definite than that actually before me. It is my duty to draw proper inferences from the evidence led but not myself to supplement that evidence and then to draw inferences from the evidence so supplemented. I conclude, as I am bound to, that the evidence is wholly insufficient to affect respondent with knowledge that the vehicles working for him on polling day were hired.

As to the respondent's evidence generally, I may say that I accept it and that he impressed me throughout as giving a full and straightforward account of everything within his knowledge. In particular I accept entirely his statement that he said publicly, and to Mr. Alwis, that he would not spend any money whatever on hiring vehicles, and that he meant it, also that he was quite ignorant of Mr. Alwis having hired vehicles or bought petrol on his behalf.

I think I am justified in saying the same of the evidence of the election agent, Mr. Bernard Jayasuriya. He impressed me as giving his evidence with entire frankness and without concealment of anything. He seems to have given his services to the respondent for nothing, refusing any fee. There was one thing, however, in his evidence in chief which did, at one time, cause me some doubt. My own note reads thus "Saw Alwis in the garden. Was told he was getting petrol from some depôt or other. Knew getting petrol not allowable to the agent or the candidate. Not investigate the matter—the information was given me later not that day." I was at first inclined to think that this was an admission of having known at the time that Mr. Alwis was giving out petrol, and that his saying that the information was given him later, and not that day, was an attempt to take back that admission. But I do not think I would be justified in so holding in view of the very favourable impression this witness made on me generally for candour and straightforwardness. Moreover, the learned counsel for the petitioner did not himself take it as such an admission. He cross-examined at some length as to whether witness did not know what Mr. Alwis was doing that night in the garden, but nowhere suggested that the witness had by the words quoted admitted that he knew; nor did he suggest this in argument. I must not try to be wiser, and I conclude that Mr. Bernard Jayasuriya misunderstood the question put to him and was speaking the truth when he said that the information was only given him later.

I also accept the evidence of the remaining principal witness for the respondent, Mr. Alwis. I am satisfied that he was told, as he says, to get the lend of cars from friends and relations and that he did this until he found them remiss, that he then decided to hire cars and buses so as not to fail the respondent in what he had promised, that the respondent did not know nor was he privy to this, and that Mr. Alwis himself did not know that it was an illegal practice for the supporter of a candidate to hire vehicles. I thought him a perfectly straightforward witness. It was argued that he was only straightforward on matters where the evidence for the petitioner compelled him to be. I have given one case, that of Sivalingam, which seems to me to point in a contrary direction. But one can go further. I doubt he need ever, if he had been a dishonest witness, have admitted hiring vehicles at all. That he did hire, from Nonis and Fonseka, is something known to us only from his own admission. It has not perhaps been sufficiently remarked how very little evidence there is on petitioner's side to connect Mr. Alwis with the hiring at all. His name is mentioned once in the particulars, on charge 2, the hiring from William Singho. On this charge the witnesses were Karthelis Appu and Francis Fernando with Ratnayake to bear them out. Not one of

the three mentions Mr. Alwis's name anywhere in his evidence, nor do either W. D. Hendrick or Alfred Boteju, the two bus drivers who say they worked from Salawa estate. In actual fact one witness and one only connects him with the hiring and that in a very uncertain way, Hendrick Fernando. He says that when Matthias Baas was engaging them and lining them up in McCallum Road, Mr. Alwis was there in a car. But he does not say that he did anything. Later, of course, the witness received his petrol chit for the Cotta Road depôt from Mr. Alwis—for the use of what? Of O 160 which is not a hiring car at all but a private one. Now remembering that the evidence of the petitioner ended on a Friday afternoon and that the evidence for the respondent only began on the following Monday morning, what could a dishonest witness have done? He would have had to admit the purchase of petrol since the evidence of Usoof and Buhari would have made it impossible for him to deny that purchase, but there is nothing save an uncorroborated and ambiguous sentence in the evidence of one witness to connect him with any hiring at all. He would, if dishonest, have been safe in denying the hiring altogether, and he could have minimized the illegal act he had to admit having committed, the buying of petrol, by saying that it was for the use of private cars, O 160 among them, and there would have been no evidence that I can discover to contradict him. But he volunteered the information that he had hired on a wide scale and this seems to me strong evidence of his honesty as a witness.

Mr. Alwis admits, then, that he did what the law prohibits, namely, that he hired vehicles for the benefit of a candidate and bought petrol supplies for them. It was argued for the respondent that as he did this in ignorance that he was thereby breaking the law he was not guilty of an illegal practice in so hiring. The law on the subject is to be found in section 64 of the Ceylon (State Council Elections) Order in Council, 1931, as follows:—

“ 64. (1) No payment or contract for payment shall, for the purpose of promoting or procuring the election of a candidate at any election, be made—

(a) On account of the conveyance of voters to or from the poll, whether for the hiring of vehicles or animals of transport of any kind whatsoever, or for railway fares, or otherwise.

(2) Subject to such exception as may be allowed in pursuance of this Order, if any payment or contract for payment is knowingly made in contravention of this Article either before, during, or after an election, the person making such payment or contract shall be guilty of an illegal practice, and any person receiving such payment or being a party to any such contract, knowing the same to be in contravention of this Article, shall also be guilty of an illegal practice. ”

Sub-section (2) is almost identical in wording with section 7 (2) of the English Act of 1883, and the difference is immaterial to the matter before me. What is the meaning of the word “ knowingly ” in this sub-section, what must be the knowledge possessed by the person paying or contracting to pay? I think what is meant by the word “ knowingly ” is that the

person paying or contracting to pay must know that he is paying or contracting for payment for the hiring of vehicles on account of the conveyance of voters to and from the poll and for the purpose of promoting or securing the election of a candidate. If he has that degree of knowledge, then he is guilty of an illegal practice even though he may be ignorant that thereby he is breaking the law; *per* Wright J. in *Southampton*¹. Here the sole purpose of the hiring was to convey voters to the poll to promote the election of the respondent, this is confessed. Then Mr. Alwis in hiring was guilty of an illegal practice in contravention of section 64.

It remains to consider how the respondent is affected by this illegal practice on the part of Mr. Alwis. If what Mr. Alwis did was done within the scope of the authority given him by the respondent, then the respondent would be responsible even though the manner in which Mr. Alwis did it was in direct disobedience to the respondent's orders. If what he did was not within the scope of that authority, then the respondent would not be responsible. Now the evidence, which as I have said I accept, is that the respondent instructed Mr. Alwis to borrow cars from friends and relations and get them to lend the same, at the same time informing him that he (respondent) did not intend to spend a cent on the hiring of cars, since the law did not allow him to do so. There is abundant evidence to this effect, and it is confirmed by the circular letter, R 14 dated June 5, 1931, which Mr. Alwis sent to his friends with the respondent's approval asking them to lend cars for the election. Unless one rejects this evidence or regards it as a blind, and I see no reason to do either of these things, then Mr. Alwis was the agent of the respondent to borrow vehicles and was within the scope of his authority or agency or within his mandate—whatever expression we prefer—in doing so, but he had been told that the respondent would not spend any money on hiring and had been impliedly if not expressly forbidden himself to hire. Likewise, as the greater includes the less, he had been at least impliedly forbidden to buy petrol for the working of cars hired. Then I can only conclude that in hiring these vehicles and paying for petrol for them, he was not acting as the agent of the respondent. It is not the case of his doing what he had been authorized to do though in a manner forbidden, but the case of his doing something he had not been authorized to do at all.

There are reported election decisions which deal with this point. In *Westbury*², Lush J. says as follows:—"I had occasion last week, in the Harwich case, to consider and define how agency may be constituted, and how the extent of authority may be measured. I repeat what I said on that occasion, that an agent is a person employed by another to act for him, and on his behalf, either generally, or in some particular transaction. The authority may be actual, or it may be implied from circumstances. It is not necessary, in order to prove agency, to show that the person was actually appointed by the candidate If agent, the next question is, what is he appointed to do; or if not appointed, what kind of service does he profess to do which is accepted by the principal. If a person were appointed or accepted as agent for

¹ (1895) 5 O.M. & H. 25.

² 3 O.M. & H. at p. 79.

canvassing generally, and he were to bribe a voter, the candidate would thereby forfeit his seat. But if he was appointed or accepted to canvass a particular class, as if a master were asked to canvass his workmen and he were to go out of his way, and bribe a person who was not his workman, the candidate would not be responsible. In the one case the agent would be acting within the scope of his authority, though it may be in abuse of it; in the other he would be acting beyond his authority, and would be no more to the candidate than a stranger."

This is the principle of the matter. I would also quote from *East Dorset*¹, since the facts there are close to those of the present case. There a friend of the candidate had hired, as well as lent or procured the loan of cars, and it was argued that the authority he had received from the candidate was wide enough to cover both. In this connection Pickford J. said as follows:—" Now I think that if a candidate says to another person, ' Get me cars, get me as many cars as you can ', and that person hires some cars, that would be in all probability sufficient to make the candidate responsible. On the other hand, if the candidate says, ' Will you lend me some cars? ' and the person to whom he said it says ' Yes, I will, and my friends will lend you some too ', and the candidate then says, ' Well, send them up ', I am not at all sure that that would make him responsible for the hiring by that person to whom he was speaking

These cases are sufficient authority on the matter. As what Mr. Alwis did was outside the authority given him and outside the agency entrusted him, respondent cannot be held responsible for the illegal practice which Mr. Alwis admits having committed.

The petition against the respondent fails, therefore, on all points.

As to costs. The evidence on the hiring shows that the agent of the respondent was guilty of an illegal practice. There was therefore on this part of the petition a case for inquiry, and if this charge of an illegal practice stood alone, I might well have to leave each side to pay its own costs. But it does not stand alone. It must have been known to the petitioner very soon after the election that he had on the hiring a strong *primâ facie* case. He was not, however, content with this case but fortified it with charges of bribery and treating which were false charges, and I cannot help thinking that to make to the petitioner any concession in regard to costs after this, would simply be an encouragement of false accusations. Elections must be kept as pure as possible and election petitions are one means of keeping them so. But then those petitions must be clean themselves and not reinforced with idle falsehoods. The matter does not end here. Even on the hiring charge, the illegal practice, where, I repeat, petitioner had a good *primâ facie* case if he had but been content with that, false charges had to be introduced and some of them at any rate of that particularly sinister type where the facts are true—and so impervious to cross-examination—in every point save one, the person of whom they are alleged. If the petitioner chooses to introduce accusations of this nature into a charge where he has sufficient clean

¹ 6 O'M & H. 48.

evidence, if he chooses to run crooked where he could run straight, there is nothing to prevent him doing so but he must not expect favourable treatment in the matter of costs. I see no reason, then, the petition having failed, to depart in this matter from the ordinary rule.

For the foregoing reasons I am of opinion that this petition must be dismissed and that the costs of the same, except those ordered by Driberg J. to be paid by respondent, must follow the event.

Dismissed.

