

1948

Present: Windham J.

PERERA, Petitioner, and J. R. JAYEWARDENE,
Respondent.

IN THE MATTER OF THE ELECTION FOR THE KELANIYA ELECTORAL
DISTRICT.

Election Petition No. 18 of 1947.

Election petition—Corrupt practice—Printing and publishing—Names and addresses on pamphlets—Corrupt intention—Act of agent—Intention to betray candidate—Parliamentary Elections Order in Council, 1946—Section 58 (1) (c).

A candidate is not responsible for the acts of an agent who does a corrupt act with a view to betray him.

Where the printer and publisher of a pamphlet are the same person there should be something on the pamphlet to indicate it. Otherwise the printer and publisher would be guilty of a failure to comply with section 58 (1) (c) of the Parliamentary Elections Order in Council, 1946.

Where a statute does not unequivocally provide that a corrupt mind is not an essential ingredient of an offence, an act cannot be held to be a corrupt practice unless done with a corrupt mind. A corrupt intention is therefore an essential ingredient of the offences enumerated in section 58.

THIS was an election petition presented against the return of the respondent as member for the Kelaniya Electoral District at an election held on September 18, 1947.

The grounds alleged for avoiding the election were—(1) that during the election campaign the respondent and his agents made and published false statements of fact concerning the opposing candidate, in election speeches and by the distribution of certain pamphlets.; (2) that certain pamphlets were caused to be printed, published and distributed which did not bear upon them the names and addresses of their printers and publishers; (3) undue influence by the respondent's agents by infliction or threats of injury.

Nihal Gunasekera and E. G. Wikramanayake, with B. H. Aluwihare and S. E. J. Fernando, for the petitioner.

E. F. N. Gratiaen, K.C., with D. S. Jayawickreme, C. S. Barr Kumarakulasingham, C. C. Rasa Ratnam, H. W. Jayawardene and G. T. Samarawickreme, for the respondent.

Cur. adv. vult.

March 19, 1948. WINDHAM J.—

This is a petition to declare void the return of the respondent, the Honourable Mr. Junius Richard Jayewardene, as member for the Kelaniya Electoral District, at an election held on September 18, 1947. The respondent, who is now Minister of Finance, was returned in a straight fight by a majority of 7,040 votes over his opponent, Mr. Bodhipala Waidyasekera. The petitioner was a voter in the electorate, and a supporter of Mr. Waidyasekera.

The grounds for avoiding the election are three. First, it is alleged that during the election campaign the respondent and his agents made and published false statements of fact concerning the opposing candidate, in election speeches and by the distribution of certain pamphlets. Secondly, it is alleged that they caused to be printed, published and distributed certain pamphlets (including those already referred to) which did not bear upon them the names and addresses of their printers and publishers. Thirdly, there are charges of undue influence by the respondent's agents by infliction or threats of injury.

The false statements of fact concerning the opposing candidate are contained in three pamphlets, said to have been distributed in the constituency during the election campaign, and produced as exhibits P1, P3 and P4. The statements are the following—(I set them out as they appear in the particulars):—“ That Bodhipala Waidyasekera was (a) imprisoned for six months for stabbing 2 women ; (b) dismissed by Wijeyewardenes from “ Lake House ” for theft and rowdyism ; (c) was driven away from Kiriella for an indecent assault on a woman ; (d) was a Police Spy when N. M. Perera and Colvin R. de Silva were evading arrest ; (e) for harassing 2 women was expelled from the Sama Samaj Party ; and (f) bound over for stabbing 2 Sinhalese women ”. The pamphlets P1, P3, and P4 do in fact contain respectively the following of the false statements above set out. P1, a far shorter pamphlet than the other two, contains statement “ (e) ”, and a statement which is a combination of “ (a) ” and “ (e) ” namely, that Bodhipala Waidyasekera had undergone six months imprisonment for harassing two Sinhalese women. P3 contains statements “ (a) ”, “ (b) ”, “ (c) ” and “ (d) ”. P4 contains statements “ (b) ”, “ (c) ”, “ (d) ” and “ (f) ”. With the exception of the statement “ (d) ”, it has not been suggested for the respondent that any of the above allegations are other than false ; and that they were published for the purpose of affecting the return of the candidate attacked would be presumed from the circumstances of their publication during the election campaign. Each of the three pamphlets, therefore, contains at least one false statement published for that purpose. It remains, however, to see whether they have been proved to have been published on any of the occasions alleged in the particulars, and if so, whether the publication was by any agent of the respondent, or with his knowledge or consent. It is not alleged that any of the false statements were uttered, or that the pamphlets containing them were distributed, by the respondent personally.

Before considering the evidence called for the petitioner in proof of the various occasions on which these false statements are alleged to have been published, I will examine the defence of the respondent with regard to how the pamphlets P1, P3 and P4 came into existence. Of the origin of P1 he states that he has no knowledge at all. With regard to P3 and P4 his evidence is as follows. The respondent denies that he had any knowledge of them before the election results were declared. Two days after that, namely, on September 20, he states that he met a man whom he had first got to know some years before, one B. M. Cooray from Colombo, who told him “ I have done what I could for you, and I am very glad you have been returned ”. On the election petition being

subsequently filed, the respondent came to know of the existence of the pamphlet P4, the offending article in which bore the signature "B. M. Cooray". He remembered his old acquaintance of that name, and sent for him. Cooray then told the respondent that he, Cooray, had got P3 and P4 published entirely on his own initiative, since he hated the Sama Samaj party and wished to do what he could to prevent Bodhipala Waidyasekera, the Sama Samaj candidate, from getting in. B. M. Cooray, a resident of Colombo, has himself given evidence in corroboration of this, and he tells us that P3 and P4 originated in the following manner. On September 10, he read in the newspaper "Jatika Nidahasa" of that date (which was produced in evidence) an article strongly deploring the coming forward of Mr. Bodhipala Waidyasekera to contest the Kelaniya seat and making derogatory allegation against him. Cooray had this article reprinted in the form of a pamphlet by the Swastika Press (the publishers of the newspaper), with the addition of a political cartoon from a weekly magazine published by the same press in 1939. He ordered 3,000 copies. His order was dated September 12. The copies were duly printed, as the pamphlet P3. He then had an almost identical pamphlet (without the cartoon) printed by the Sadu press, sending his order for the latter (which was produced in evidence) on September 15. The order was again for 3,000 copies, and these were delivered to him in three instalments, on September 16, 17 and 18 (the day of the election). He went round the Kelaniya electorate on those three days, in a motor van, distributing copies of P3 and P4 to the electors, at the same time telling them to vote for the respondent. All this he did on his own initiative, and not at the instance or on the instructions of the respondent, whom he did not even meet during the campaign.

The above evidence was further corroborated by the manager of the Sadu press, and by the production of relevant receipts, manuscript and printer's proof of P4. Upon considering all this evidence I find no reason to disbelieve it, and I accept it as true. All three witnesses were unshaken in cross-examination. I am satisfied that Cooray possessed the means to enable him to spend the Rs. 1,000 which he states that he spent in publishing not only these two pamphlets against the Sama Samaj candidate in the Kelaniya electorate, but also (as he states) other election literature directed against the Sama Samajists in other constituencies. Two important facts emerge. First, that the pamphlets P3 and P4 were not printed or published by the respondent, or with his knowledge or consent, or by his agent; whether they were distributed by any of his agents will be considered later. Secondly, P3 could not have been distributed by anybody before September 13, nor P4 before September 16.

I would say at this stage that the respondent impressed me as a truth telling witness throughout his evidence, and as one who endeavoured during his campaign to keep it free from the dissemination of all false statements concerning his opponent. On this point he was corroborated by the witness Wijekoon, his admitted agent but one whom I considered to be reliable. Counsel for the petitioner has sought to discredit the respondent on two grounds. First, he was cross-examined with a view

to showing that the election expenses allowed to him by law had been exceeded. This, however, was not one of the charges against him, and although he did admit under cross-examination that a wealthy agent of his had probably expended money on his behalf which would bring the total expenditure to a sum somewhat exceeding the maximum allowed to him under section 62 of the Ceylon (Parliamentary Elections) Order in Council, 1946, I am satisfied that he did not deliberately falsify his election returns, and his frankness under cross-examination on this subject revealed him rather as a truth telling witness than as one who would, by reason of any laxness on his part in keeping a check on the election expenditure of his agents, be likely to tell lies in his evidence concerning the charges which the petitioner did frame against him. Secondly, he admitted to having, after taking the advice of his counsel, made use of certain confidential communications in the personal file of one of the main witnesses for the petitioner, one H. J. Peiris, which had come into his possession in his capacity as Minister of Finance, in order to check up on the record of that witness with a view to discrediting him should it prove unsatisfactory. Whether this was a proper thing to do is irrelevant save in so far as it may touch on the respondent's credibility. And again I do not consider that it reflects adversely on his credibility as a witness. That the respondent should not scruple to go to such a length in order to discover whether one of the chief witnesses called to unseat him was a liar (or, as he put it, "in the interests of justice") is no indication that he himself was a liar or likely to be one; it is consistent rather with his being a seeker after the truth.

I turn, then, to the particular occasions on which it is alleged that false statements concerning his opponent were published with the knowledge or consent of the respondent or by his agents. The first occasion was at a meeting held at Gonawela on September 6, which the respondent admittedly attended. No evidence was adduced that any libellous pamphlet was distributed at this meeting; but two witnesses who attended the meeting were called to testify that one Hemachandra Jayawardene (no relation of the respondent), who admittedly made a speech at it, uttered some of the libellous statements against Bodhipala Waidyasekera of which particulars have been given. These witnesses were W. P. W. Siriwardene and A. E. H. Perera. Siriwardene stated that Hemachandra Jayawardene in his speech said that Waidyasekera had molested two women and was sent to jail, that he had been sent away from Kiriella for molesting a woman, and that he had been driven away from Lake House for thieving. Perera, who only attended the meeting for five minutes, said of Hemachandra's speech that in it he stated that "the other contestant in the field had been bound over. He also said something about his connection with women. He said that a woman had cut the opponent of Mr. Jayawardene with a knife".

Such was the evidence called for the petitioner. Both the respondent and Hemachandra Jayawardene denied in evidence that the latter had uttered the false statements alleged. So too did the witness Wijekoon who, as I have already stated in another connection, impressed me as a trustworthy witness. I prefer to accept their evidence. Certainly Siriwardene did not impress me so favourably that I can accept

his testimony beyond a reasonable doubt. In the box, while stating the contents of Hemachandra's speech, he gave his evidence as if reciting a passage which he had learnt by heart, which was not at all convincing. Moreover, with regard to the actual libels said to have been uttered by Hemachandra, he was by no means corroborated by A. E. H. Perera, as will be seen from the relevant passages in their evidence to which I have referred. Again, the particulars with regard to what false statements were uttered at this meeting do not include an allegation that Waidyasekera was bound over for six months, but that he was imprisoned for six months. Perera said that Hemachandra had stated that Waidyasekera was bound over for six months. This discrepancy may at first sight seem to be a small one; but it is interesting to note that the pamphlet P3 speaks of imprisonment for six months, while in P4, the witness B. M. Cooray tells us (and I believe him), that he had those words altered to "bound over", because between the printing of P3 and P4 he had satisfied himself that Waidyasekera had not been imprisoned but bound over. Neither P3 nor P4, it will be recalled, was yet in existence on September 6, the date of the Gonawela meeting, and one is left with more than a suspicion that the contents of P3 and/or P4 were put into the mouth of Hemachandra Jayawardene by these witnesses, who had since read them, in order to bring them home to the respondent, who attended that meeting, and whose agent Hemachandra was alleged to be. For all these reasons I cannot treat the evidence of Siriwardene and A. E. H. Perera as reliable.

But there is another reason why I reject it, namely, that I accept the evidence of the respondent and Hemachandra Jayawardene as to what the latter did say about Waidyasekera at that meeting, and how he came to say it. Their evidence, in brief, is as follows. They state that they first met each other at a funeral on September 1, 1947. Before this, Hemachandra had read in Waidyasekers' election manifesto (Exhibit D7) claims by the latter to have been a friend of his (Hemachandra's) late father, Jayaramdas Jayawardene, who had himself been a friend of the late Mahatma Gandhi and had started an Ashram at Wellampitiya. Hemachandra had a very poor opinion of Waidyasekera, and wished to refute that suggestion that he had been a friend of his father's, and also to point out to the electors certain things which he knew to his discredit. This he accordingly did in a pamphlet which he printed at his own press on August 29, 1947. On September 1, when he first met the respondent, he showed him this pamphlet (produced as exhibit 'X'), and asked if he might repeat from the platform at meetings held on his (the respondent's) behalf, the statements concerning Waidyasekera which were contained in the pamphlet 'X'. The respondent, after satisfying himself that these statements, though derogatory, were not false ones, allowed him to do so. Hemachandra accordingly did so, both at the Gonawela meeting which we are now considering, and also at a meeting held on the following day, September 7, at Enderamulla. None of the statements against Waidyasekera contained in the pamphlet 'X', however, which statements Hemachandra reiterated in his speeches at those two meetings, were statements particulars of which are set out in the petition as being the false statements

uttered by him at those meetings. Both the respondent and Hemachandra deny that the latter made any of the statements so set out. I accept their denial.

The charge relating to the Gonawela meeting accordingly fails. Before, however, passing on to consider the similar false statements said to have been uttered and published at the Enderamulla meeting, I will first deal briefly with the evidence adduced to show that Hamachandra was an agent of the respondent throughout his campaign. Both of them deny this, save to the limited extent to which I have already referred. The petitioner's witnesses, H. J. Pieris and T. Wilfred Perera, whose evidence I will consider further at a later stage, testified that they had seen the respondent and Hemachandra Jayawardene travelling together on a number of occasions during and before the campaign, in the respondent's station wagon. I reject this evidence as worthless. The respondent proved conclusively that he only bought the station wagon in July, 1947, whereas Pieris stated that he had seen the two together in it some six months before nomination day, which was in August.

There was also evidence that at a meeting of Bodhipala Waidyasekera held at Sapugaskande on September 7, at 10.30 a.m., Hemachandra Jayawardene, accompanied by one or two supporters of the respondent, drove up in a car and distributed a pamphlet signed by himself. No charge was framed in respect of this incident, but the evidence was led to show the likelihood that Hemachandra Jayawardene was the respondent's agent. The petitioner's witnesses to the incident were T. Wilfred Perera, H. J. Pieris and P. S. Perera, corroborated to some extent by Waidyasekera himself and R. C. Perera. They state that it occurred during the course of a speech by Waidyasekera, and that some of the people immediately moved towards the car to receive the pamphlets. None of these witnesses impressed me very favourably. Hemachandra denied the incident and was not cross-examined on his denial. And Police Sergeant Wijendra, who was present at the meeting, and whose impartiality I have no reason to doubt, stated that he would have noticed such an incident had it occurred, that he does not think it occurred, and that there was certainly no interruption during Waidyasekera's speech. In view of this conflicting evidence I cannot hold the distribution by Hemachandra to have been proved, and accordingly no further evidence of the latter's being the respondent's agent is afforded. I accept, as I have said, the evidence of the respondent and Hemachandra themselves regarding the relationship between them.

I turn now to the charge that, at an election meeting held at Enderamulla on September 7, which the respondent admittedly attended, Hemachandra Jayawardene in his speech made the same false statements against Waidyasekera as he was alleged to have made at the Gonawela meeting on the previous day, and that he also distributed at the meeting the pamphlet P4. The petitioner's witnesses to this incident were D. M. Weerasinghe and H. D. Albert. Here again the witnesses did not carry conviction. Weerasinghe was a tired and feeble old man whose memory appeared weak. His testimony that P4 was distributed at this meeting on September 7 can in any event not be accepted, in view of my earlier finding that P4 only came into existence on September 16.

This taints the whole of his evidence ; particularly, since he admitted in cross-examination—" I cannot be quite definite whether the statement that he had stabbed two women and was sentenced to six months imprisonment was contained in Mr. (Hemachandra) Jayawardene's speech or in the pamphlet ". Albert said nothing about the distribution of P4, but spoke only to the false statements uttered by Hemachandra Jayawardene. His evidence was also unsatisfactory, and it conflicted materially with that of Weerasinghe with regard to the circumstances in which each of them had made a statement to the petitioner's proctor in February, 1948. Against the evidence of these two, there stand the denials of the respondent and Hemachandra Jayawardene ; and their version of what took place at the Gonawela meeting on the previous day, which I have already considered and accepted, applies equally to this Enderamulla meeting. I accept their evidence. The charge in respect of this meeting accordingly likewise fails.

The remaining incidents testified to in support of the charge of publishing false statements concern the distribution of the pamphlets P1, P3 or P4 by persons alleged to be the agents of the respondent. Taking them chronologically, the next incident is the alleged distribution at Kadawatta, at about 4.30 p.m., on September 16, of the pamphlets P3 and P4 by one Muhandiram Ratnasekere. The respondent has admitted that Ratnasekere was his agent, and accordingly if it can be shown beyond a reasonable doubt that he distributed those pamphlets, the charge must succeed. The petitioner's main witness to this incident was D. W. Jayasuriya. He states that supporters of the respondent came to this meeting at Kadawatta in a procession, with elephants and lorries. Upon considering all the evidence with regard to this incident I have no hesitation in concluding that such a procession did come to the meeting. The witness also states that in the procession was a decorated lorry belonging to Muhandiram Ratnasekere. I accept his evidence on that point also. Thus far he is corroborated by the witness Girigoris. He further states that almost immediately before the respondent (who was not in the procession) arrived at the " Friday Fair " where the meeting was held, Ratnasekere came up to the lorry and distributed the pamphlets P3 and P4, while the lorry was by the side of the road opposite the Fair. This vital piece of evidence was not corroborated by any other witness. At the same time, it was not denied. For the witnesses called for the respondent, including two Police Officers and the respondent himself, only arrived on the scene after the alleged distribution by Ratnasekere, that is to say, they only arrived in time for the meeting, and could do no more than testify that no pamphlets were distributed after their arrival. I have accordingly had to consider the uncorroborated but uncontradicted evidence of Jayasuriya very carefully. The distribution of P3 and P4 by Ratnasekere on the afternoon of September 16, was not an impossibility, since both pamphlets were, as I have already found, being distributed by B. M. Cooray himself on that day. At the same time the very fact that Cooray himself was personally and independently distributing these pamphlets throughout the electorate on that day makes it less likely that Ratnasekere (who had no connection with Cooray) was also doing so ; there is nothing to

indicate how Ratnasekere could have got hold of the pamphlets in such a case. A doubt at least is raised. Secondly, there was something suspicious in the circumstances in which Jayasuriya stated in cross-examination that he had come to hand over to the petitioner (who was then collecting evidence) the copies of P3 and P4 which he says he had preserved in a drawer. Jayasuriya stated that while some 8 to 10 election pamphlets came into his hands in connection with the Kelaniya election, he preserved only these two. He does not say why. He says the petitioner, after asking him to give evidence about this Kadawatta meeting, "first showed me the two pamphlets (P3 and P4) and asked me whether I had seen or received pamphlets of that sort. It was then that I noticed the two pamphlets". There is, as I say, something a little suspicious about the two pamphlets concerning which the petitioner questioned him turning out, so luckily, to be (as he says) the only two pamphlets which he had preserved, out of the 8 to 10 which had come into his hands. I have not omitted to take into consideration the fact that the respondent did not call Ratnasekere himself to deny the allegation against him, and his non-calling is a factor which goes to corroborate Jayasuriya's story. At the same time, it is significant that, save in the early stages of the trial and then in connection with a particular application only, the petitioner himself did not elect to give evidence in this case, which might have enabled further light to be thrown on the manner in which Jayasuriya's evidence (and indeed that of various other witnesses to other charges in this case) came to be given. In all the circumstances I am unable to say that I am left with no reasonable doubt regarding the truth of Jayasuriya's evidence that Ratnasekere distributed the pamphlets P3 and P4. That being so, I cannot hold the charge to be proved with that degree of certainty that the law requires. The charge accordingly fails.

The next allegation that a libellous pamphlet was distributed is that one T. William Perera, said to be an agent of the respondent, distributed the pamphlet P1 to voters at Makola on September 16 or 17. The only witness who testified to the distribution was H. J. Pieris; the witness T. Wilfred Perera, brother of the T. William Perera against whom the allegation is made, corroborated him not with regard to the distribution but with regard to his brother's being an agent of the respondent. I found both these witnesses entirely unreliable, and the former grossly prejudiced in addition, I have already rejected their evidence with regard to other incidents. I reject it likewise as worthless with regard to T. William Perera's having distributed P1 and having been the respondent's agent. The respondent denies that the latter was his agent, or that he even knew him. I accept his denial.

I pass next to an allegation that on the morning of September 17, at Dalugangoda, copies of the pamphlet P 1 were thrown out of a car to persons who picked them up, by one M. D. J. Jayawardene, alleged to be an agent (though no relation) of the respondent. The witness to this incident was one R. C. Perera, to whose evidence in another connection I have already made a passing reference. His evidence of the incident is uncorroborated, for the evidence of two other witnesses,

B. K. H. Perera and J. R. Jayamanne, showed no more than that M. D. J. Jayawardene was a supporter of the respondent. It is a little difficult to accept beyond a reasonable doubt the evidence of a witness who states, as R. C. Perera did, that he kept his copy of P1, a paper measuring only six inches by four, in case he should require it to wrap up articles in his boutique, and that he was in the habit of using papers of even half that size for this purpose. That is not the kind of uncorroborated evidence upon which a Court is justified in unseating a member upon an election petition, even if it were proved that M. D. J. Jayawardene was a general agent of the respondent, which the latter denies, although he admits that he transported voters to the poll on his behalf. Counsel for the petitioner stated in his closing address that he did not press this particular charge strongly. And indeed there is another fact which is fatal to it, namely, that (owing, I am quite prepared to accept, to an honest error) the electoral number given in the particulars as that of M. D. J. Jayawardene was not the number of the M. D. J. Jayawardene concerning whom the evidence was tendered, but was shown, by a reliable witness called for the petitioner himself, to be that of another M. D. J. Jayawardene, who in fact died some three or four weeks before the alleged incident. There was accordingly no evidence in support of the charge as framed.

The last incident in which there was a publication of false statements against the opposing candidate was one fully testified to by a reliable police witness, Inspector Liyanage. At 4 P.M., on polling day, close to the polling station at Wedamulla, when nearly all voters had already cast their votes, a car drove past the station distributing pamphlets. Inspector Liyanage was at the station, with two other constables in uniform, but he did not see the car until it had passed, when his attention was drawn to it by a bystander. Its occupants, the Inspector states, must have seen him as they went past. It was already 25 yards past him when his attention was drawn to it, and it could easily have got away. Somebody in the car then threw pamphlets out of it. And although he did not try to stop it, or blow his whistle, it stopped. It had ceased distributing the pamphlets when he came up to it. There were five occupants. The driver, who gave his name as H. J. F. Fonseka, was subsequently prosecuted for and pleaded guilty to the offence of distributing the pamphlets from a moving car. The pamphlets were copies of P1.

The circumstances of this incident—in particular the throwing out of the offending pamphlets in full view of three uniformed policemen and the stopping of the car although it was not challenged—by themselves raise more than a suspicion that Fonseka was deliberately asking to be apprehended by the police for distributing from a moving car. But they do not stand alone. Another police witness, Deputy Inspector-General Pippet, gave evidence to the effect that on that same afternoon, about half an hour before the Wedamulla incident, a car had distributed copies of P1 on the road a few miles from Wedamulla, had thrown out copies of P1 while passing him and a constable on the road, and had returned again in about half an hour's time and been stopped by him. Although Deputy Inspector-General Pippet was not able to say in the witness box whether this was the same car as was concerned in the

Wedamulla incident, I think the circumstances indicate that it probably was. And this evidence goes to strengthen the suspicion concerning the Wedamulla incident, namely, that it was a put up job, and that the man Fonseka was doing his best to ensure that he should be arrested by the police, thereby furnishing incontrovertible evidence, for use against the respondent in the event of an election petition, that he was distributing a libellous pamphlet, P1, attacking the respondent's opponent.

There was evidence that Fonseka was on polling day driving a car for which the respondent had obtained petrol (as he had obtained it for a large number of other cars) for the purpose of conducting persons to the poll; and the respondent admits that Fonseka was his agent on that day for that limited purpose only. But he denies that his agency was wider than that; and it was for the petitioner to prove that the agency was of a wider nature, in order to bring the distribution of libellous pamphlets home to the respondent. This the petitioner failed to do. In any event the circumstances of the distribution of P1 by Fonseka, on which I have commented, are such as to raise more than a suspicion that Fonseka—even assuming his agency to have been of such a general nature as would *prima facie* saddle the respondent with responsibility for the distribution of P1,—was seeking to be arrested in order to furnish evidence which might be led against the respondent (as indeed it was) in the event of an election petition—in brief, was distributing P1 in order to betray him. And it has been laid down in the *Stafford* case, 1 O'M & H, 230 (*vide* Rogers on Elections, 20th Ed., Vol. 2, at page 406) that a candidate is not responsible for the acts of an agent who does a corrupt act with a view to betray him. I do not say that I am satisfied on the evidence beyond a reasonable doubt that Fonseka distributed P1 with a view to betraying the respondent. But I do say that the circumstances of its distribution give rise to such a suspicion that this was his object, that it would be quite unsafe and improper to allow the petition to succeed on this ground.

That concludes the charges with regard to the publication of false statements against the opposing candidate, all of which fail. I turn now to the charge that a large number of election pamphlets, P1, and P3 to P9 inclusive, were printed by the respondent, or with his knowledge or consent, or by his agents, which did not bear upon the face of them the names and addresses of their printers and publishers, which act is made a "corrupt practice" under section 58 (1) (c) of the Ceylon (Parliamentary Elections) Order in Council, 1946. With regard to the pamphlets P1, P3 and P4, this charge cannot succeed, for I have already held that neither the respondent nor his agents have been proved to have been responsible for them. It remains, however, to consider this charge in relation to the pamphlets P5 to P9 inclusive. Not one of these pamphlets contains any false statement concerning the opposing candidate. Each purports to be written by "a group of voters" or a similar sobriquet for anonymous authors. And at the foot of each of them are printed the words:—"Swastika Press, Colombo". The respondent has admitted that he paid the Swastika Press for the printing of P6 and P9, and we need therefore consider only the legal position with regard to these two, for an offence with respect to any one of the five

pamphlets would be sufficient to establish the charge, and there are no other features or circumstances differentiating these two from the remaining three.

Now in view of the respondent's admission, there are only two questions to consider, and each of them is mainly a legal one. First, do the words "Swastika Press, Colombo" printed at the foot of these pamphlets constitute a sufficient compliance with the requirement of section 58 (1) (c) that the names and addresses of both printer *and* publisher shall be given? And secondly, even if they do not constitute a compliance, can the manager of the Swastika Press (the respondent's admitted agent) be held to have committed the "corrupt practice" of which a non-complier is stated by the section to be guilty, in the absence of any proof of corrupt intention on his part, or on the part of the respondent? I will deal with these questions in that order.

The first question resolves itself into this, namely, whether the Swastika Press can be deemed to be the name not only of the printer (which is admitted) but also of the publisher? There appears to be no reported decision directly on the point in Ceylon, or in the English authorities. One thing I think is clear, namely, that the printer of a pamphlet is not necessarily its publisher, though he may be. But where he is, should it be so indicated on the pamphlet, by the insertion (for instance) of such words as—"Printed and published by X"? This appears to be the manner in which newspapers in this country comply with the requirement of section 6 of the Newspapers Ordinance (Cap. 138) that the name of the printer and publisher should be indicated. And I think the same course ought to be followed in the case of election pamphlets, if it is intended to indicate that the printer is also the publisher. In view of the requirement of section 58 (1) (c) that the "names and addresses" (plural) of printer and publisher should be given, I do not consider that the insertion of such ambiguous words as "Swastika Press, Colombo" is a sufficient compliance. Moreover, in the case of an election pamphlet, it would be wrong to assume that the printer is the publisher. The act of publishing has been defined as the act of "sending forth for sale or for general distribution". A printer of a pamphlet is generally paid only for printing it, and there his interest ceases. He is not usually concerned with bringing it to the public. And in the present case it would seem, from the relevant receipt given by the Swastika Press to the respondent for his payment "on account of printing of election work", that the interest of Swastika Press likewise ended with the printing. Nor does the respondent himself allege that they were in any way concerned with bringing these pamphlets before the public. It is instructive to note the words of Madden J. in his judgment in the *North Louth* Case 6 O'Malley and Hardcastle, at page 165, commenting upon the similar requirement of section 18 of the Corrupt and Illegal Practices Prevention Act, 1883, that the "names and addresses of the printer and publisher" should appear on the face of the document. "Section 18" he says "requires under severe penalties that every bill, placard or poster having reference to an election should bear upon its face the name of the printer and publisher of it, thus insuring information not only as to the actual printer, but as to the person by whose authority the document was circulated in the constituency". It is not suggested

in the present case that P1 was circulated in the constituency by the authority of the Swastika Press ; but even if it had been, the Swastika Press should, as I have said, have been indicated expressly as being both the printer and the publisher. For these reasons I hold that, subject to what I shall have to say on the question of corrupt intent, there was a non-compliance with section 58 (1) (c) on the part of the Swastika Press, the admitted agents of the respondent, in respect of the pamphlets P6 and P9.

That brings us to the second question of law, namely, whether the Swastika Press can be held guilty of a " corrupt practice " under section 58 (1) (c) by reason of this technical non-compliance, in the absence of any proof of their having committed the act of omission with a corrupt mind. It is admitted by counsel for the petitioner that neither the manager of the Swastika Press nor the respondent himself had any kind of " mens rea " in the matter ; and indeed they no doubt considered (as the respondent stated in evidence that he, considered) that they were duly complying with the section by inserting the words " Swastika Press, Colombo " at the foot of these pamphlets. In fact, as I have shown, the exact requirements of section 58 (1) (c) have until this day not been made clear, and I myself have come to a decision on the point not without some hesitation.

Now the offence created by section 58 (1) (c) while in England it is merely an illegal practice, for which relief is normally given, has in Ceylon been made a corrupt practice, entailing far more serious consequences, and for which no relief can be given. But can an act be held to be a corrupt practice if there is no proof that it was in fact done corruptly, giving to that word the meaning which has been clearly laid down in a long line of decisions both in England and in this country ? The argument that the offence created by section 58 (1) (c) is an offence *per se* even in the absence of corrupt intention is based on the fact that the section states that whoever prints, &c., a handbill not containing the prescribed particulars shall be guilty of a corrupt practice, and does not state that whoever *Corruptly* prints, &c., shall be guilty of a corrupt practice. Now the legislature could undoubtedly make into a " corrupt practice " an act which is not in fact corrupt ; that is to say, it could enact that such an act is to be deemed to be a corrupt practice. For the legislature, as has been said, can do anything except " make a man a woman or a woman a man ", and it can certainly make its own dictionary. But before this Court would feel itself constrained to do such violence to logic the intention of the legislature would, in my view, have to be expressed in more unambiguous terms than in section 58 (1), as, for example, by enacting that the act in question should be deemed to be a corrupt practice notwithstanding that it was committed without corrupt intention. In such a case, of course, this Court would have to give effect to such an unequivocal provision. But the terms of section 58 (1) are not unequivocal.

An examination of the various offences set out in section 58 (1) as being corrupt practices discloses that in only two cases, namely the offence under paragraph (c) now under consideration and the offence of personation under paragraph (a), is the act made a corrupt practice without the addition of some words requiring a " mens rea " or wrongful intention.

Treating, undue influence and bribery, set out in paragraph (b), are acts which are defined in sections 55, 56 and 57 respectively, wherein they are required to have been done either corruptly (section 55), or in order to compel persons to vote or refrain from voting (sections 56 and 57), or to induce a person to procure the return of another as member, or as a reward to a person for having so done (section 57). The acts set out in paragraphs (d) and (e) of section 58 (1) are required to have been done for the purpose of affecting the return of any candidate. And the offence of making false declarations of election expenses, set out in paragraph (f) is required to be done knowingly. There remain only personation, and the offence now under consideration; for the definition of "personation" in section 54 does not require that act to have been done corruptly.

It is at this point that the judgment in the case of *Stepney Division of the Borough of Tower Hamlets*, reported in 4 O'Malley and Harcastle, 34, may be profitably cited. That judgment dealt, among other things, with the exact point which is now under consideration, but in respect of personation. Personation is defined in section 3 of the Corrupt and Illegal Practices Prevention Act, 1883, by reference to the definition in section 24 of the Ballot Act, 1872, wherein it is defined in terms almost exactly similar to those of section 54 of our Order in Council; and the definition there, just as in our section 54, does not include any requirement that the act shall be done corruptly, but merely defines the act without reference to any state of mind or intention. Section 3 of the Act of 1883 provides that personation, as so defined, shall be a "corrupt practice". Section 36 of the same Act then goes on to provide that a person guilty of a corrupt practice shall be prohibited from voting. In this *Stepney* case, decided in 1886, the Court had found a voter guilty of the defined ingredients of personation, but found that he had committed the act without any corrupt intention. The Court, on these facts, having the provisions of the Act of 1883 before it, held that he was not guilty of a corrupt practice. In the following passage from the judgment of Field J., at page 48, the very argument was considered which I have been considering in connection with the offence under section 58 (1) (c) of our Order in Council. The passage reads as follows:—
"There might indeed in this case, but for the principle, have been a difficulty arising from the mode in which the offence of personation is defined in the Act of 1883, and for this reason, that the language used by the legislature is this, that a person shall be guilty of the offence of personation if he in fact does a certain thing—that is the language, without putting in the words 'corruptly or wilfully', or 'corruptly or knowingly'. Therefore, no doubt, upon that it might be contended very plausibly that the Legislature, having a great horror of personation very properly determined to strike at the fact, and omitted all questions of corrupt mind and intention. And we know that that is the case in a great many statutes, where it is the fact that is struck at, and where the question of mind does not interfere. Therefore it was that I entertained some doubt if a man did an act which the latter part of the section says is personation, whether you should not in point of fact find all the consequences, and therefore declare him guilty of personation. But I am

quite satisfied that it would be a very wrong construction, if we were so to construe this statute, because, though I do not agree wholly with the view that I must look at the consequences in order to construe the statute, it is not for me to say that the Legislature has not said what it has said, but if the Legislature has not used the word in a particular place, which has the effect of this, and the consequences of the act are two years' hard labour and a deprivation of political rights for seven years, and incapacity to fill any office of any kind for the same period, then I must come to the conclusion that the Legislature could not have intended, in using the language in that section, to say that the mere fact of doing a thing of this kind was a criminal offence which was followed by such serious consequences".

The above interpretation, which has been followed in 1910 in the *East Kerry Case*, 6 O'M and H, 58, at page 90, and with which I respectfully concur, entirely supports the construction which I have placed upon section 58 (1) (c). It makes no difference that the Offence was personation in that case, and the printing of pamphlets not bearing the name of the publisher in the present one. The point is that the act in each case cannot be held to be a corrupt practice (carrying severe penal consequences) since it was not done with a corrupt mind, and the statute did not unequivocally provide that a corrupt mind was not an essential ingredient of the offence. For these reasons the charge under section 58 (1) (c) must fail.

There remains only one further charge, namely, that of undue influence by intimidation. Evidence was called in support of only one incident under this head, namely, the intimidation of two voters by one K. A. Carolis, an alleged agent of the respondent. The evidence led was wholly inadequate to support the charge, and in particular there was no evidence to prove that Carolis was an agent of the respondent (an allegation which the respondent denied). Mr. Wikramanayake, in his closing address for the petitioner, very properly intimated that he could not seriously press this charge, and I need not therefore consider the evidence in any further detail. The charge fails.

All the charges in this petition having thus failed, I declare that the respondent, Mr. J. R. Jayawardene, was duly elected as a member for the Kelaniya Electoral District. The petition is dismissed with costs, which I fix at the sum of Rs. 8,000.

Petition dismissed.
