1948 *Present :* **Dias J.**

P. SARAVANAMUTTU, Petitioner, *and* R. A. DE MEL, Respondent.

IN THE MATTER OF THE TRIAL OF ELECTION PETITION NO. 13 OF 1947 (ELECTION FOR COLOMBO SOUTH ELECTORAL DISTRICT).

Election Petition—Fundamental rights of the citizen involved in inquiry—Onus of proof—Abetment of personation—Until recently unknown to our law—Corrupt practice—Ingredient of corrupt intention—Sealed packets—When they may be opened—Election cards—Their uses and abuses—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 and 48 (10).

An election petition enquiry is not merely a contest between two litigants. It is a matter in which the whole electorate has a vital interest.

A charge of impersonation or bribery must be proved beyond all reasonable doubt. Where, however, a disqualifying contract is alleged the burden of proof on the petitioner is to prove his case by a preponderance of probability or on the balance of evidence.

Abetment of impersonation is an election offence introduced for the first time in Ceylon by section 58 (1) (*a*) of the Parliamentary Elections Order in Council, 1946.

It is irregular for the Registrar-General to break open any sealed packets without special authorisation from the Supreme Court under section 48 (10) of the Order in Council.

Quaere, whether an act cannot be held to be a corrupt practice within the meaning of section 58 of the Parliamentary Elections Order in Council, 1946, unless done with a corrupt mind.

Per DIAS J.—" It is a question meriting the attention of Parliament whether the printing, manufacture or distribution of election cards, badges, &c., should not be prohibited by law and their use made a ground for avoiding an election".

Evidence—Letter written by convicted impersonator to the respondent from gaol—Failure of the respondent to produce that letter—Secondary evidence—Inferences which arise from the respondent's failure to reply—Evidence Ordinance, s. 8—Circumstantial evidence—Quantum of proof—Taking statements from opponent's witnesses—Not proper—Accomplice—Corroborative evidence.

The translation of a vernacular document, although it cannot be used as secondary evidence of the original, can, however, be used by the translator to refresh his memory when giving secondary evidence of the contents of the original.

In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegations contained in that letter.

It is not proper that persons who have been, or are likely to be, *subpoenaed* by one side should be got by the other side to make statements or to sign prepared statements.

Corroboration of the evidence of an accomplice need not extend as regards the whole story told by him. It will suffice if the accomplice is corroborated on one or more material particulars as regards the person he implicates.

Ceylon (Constitution) Order in Council, 1946—Scope of section 13 (3) (c)—Disqualifying contracts—Is the Crown bound by Defence Regulations ?—Inchoate contract.

Shortly before the election of the respondent as a Member of Parliament, a contract was entered into between a certain Company and the Director of Food Supplies acting for and on behalf of the Government of Ceylon. Clause 1 of the contract provided that " in consideration of the payment of remuneration at such rates as made from time to time be mutually agreed upon between the Director and the Company " the Company undertook to perform and carry out for the Government, *inter alia*, the carriage and haulage in the port of Colombo from the ship's side to shore of goods and cargoes imported, purchased or otherwise acquired by or on behalf of the Government and to deliver the same into the Customs premises, &c. Clause 2 provided that the Company " shall undertake to carry out the services specified in Article 1 in respect of such food or other cargoes as may be allocated to them for carriage, warehousing and delivery by the Director in writing ". The Company further undertook to commence work within three hours of the receipt of such notice of allocation. The contract was signed on behalf of the Company by the respondent's wife in her capacity as a director of the Company, and for the Crown by the Director of Food Supplies.

There was evidence to show that the Company, when it entered into the contract, was acting as the secret agent or nominee of the respondent and that under the contract, the respondent indirectly enjoyed rights and benefits denied to the other shareholders.

Held, (i) that section 13 (3) (c) of the Constitution Order in Council, while it imposes a disqualification on a person holding or enjoying a right or benefit under a particular kind of contract, does not make the contract itself invalid.

(ii) that the contract between the Company and the Director of Food Supplies was not rendered invalid by reason of the existence of Defence Regulation 43A which permits only the Port Controller to allocate work amongst the various lighterage companies. The Crown is not bound by any statute or statutory regulation except by express reference or necessary implication.

(iii) that there was not merely an agreement to enter into future contracts ; on the contrary, a valid contract was created from which rights and benefits flowed to both contracting parties.

(iv) that, under section 13 (3) (c) of the Constitution Order in Council, the respondent was disqualified for being elected as a Member of Parliament.

Before election day the respondent had made an offer regarding a disqualifying contract. After the date of election he withdrew the offer before it had been accepted :—

Held, that there was no contract in existence at the time of respondent's election.

At the date of election respondent was under a legal obligation to pay certain money to the Imperial Government through the Ceylon Government in respect of a claim for damages which had been made against the respondent by the Imperial Government :—

Held, that such an obligation was not within the ambit of section 13 (3) (c) of the Constitution Order in Council.

THIS was an election petition challenging the return of the respondent as Member of Parliament for Colombo South Electoral District. The petitioner claimed that the election was void on the following grounds :—

(*a*) that the respondent or his agents named in the particulars, or some other person or persons with his knowledge or consent committed a " corrupt practice " in connection with the election by abetting the commission of the offence of personation.

(*b*) that " the corrupt practice " of bribery was committed in connection with the election by the respondent, or with his knowledge or consent, or by his agents named in the particulars.

(*c*) . . . . . .

(*d*) that the respondent was at the time of his election disqualified for election in so far as he directly or indirectly by himself or any person or persons on his behalf or for his use or benefit, held or enjoyed rights or benefits under a contract or contracts made by or on behalf of the Crown in respect of the Island for the furnishing or providing of services to be used or employed in the service of the Crown as contemplated by section 13 (3) (*c*) of the Ceylon (Constitution) Order in Council, 1946.

C. S. Barr Kumarakulasinghe, with *A. I. Rajasingham* and *Sam. Wijesinha*, for the petitioner.

E. G. Wikramanayake, with *D. S. Jayewickreme*, *E. A. G. de Silva*, *G. T. Samarawickreme*, *Cecil de S. Wijeyeratne*, and *G. Perera*, for the respondent.

Alan Rose, *K.C.*, *Attorney-General*, with *M. Tiruchelvam*, *Crown Counsel*, as *amicus curiae*.

Cur. adv. vult.

August 23, 1948. DIAS J.—

The respondent, Reginald Abraham de Mel, was at the General Election held on September 20, 1947, returned as a member for the House of Representatives for the Colombo Electoral District No. 3, known as Colombo South Electoral District. The results were declared on September 22, 1947, and were as follows : —

Mr. R. A. de Mel (the respondent)	symbol	The Key	..	6,452	votes
Mr. P. Saravanamuttu (petitioner)	,,	Flower	..	5,812	,,
Mr. Bernard de Zoysa	,,	Chair	..	3,774	,,
Mr. M. G. Mendis	,,	Hand	..	1,936	,,
Mr. V. J. Soysa	,,	Cup	..	95	,,
				18,069	,,

The respondent's majority over the pettioner was 640. The electorate is said to number about 32,000 voters.

On October 10, 1947, the petitioner filed a petition alleging that the respondent was not duly elected and returned, and claimed that the election was void on the following grounds :—

(*a*) that the respondent or his agents named in the particulars, or some person or persons with his knowledge or consent committed " a corrupt practice " in connection with the election by abetting the commission of the offence of personation.

(*b*) that " the corrupt practice " of bribery was committed in connection with the election by the respondent, or with his knowledge or consent, or by his agents named in the particulars.

(*c*) that by reason of general treating the majority of the electors were or may have been prevented from electing the candidate whom they preferred ; and

(*d*) that the respondent was at the time of his election disqualified for election in so far as he directly or indirectly by himself or any person or persons on his behalf or for his use or benefit held or enjoyed rights or benefits under a contract or contracts made by or on behalf of the Crown in respect of the Government of the Island for the furnishing or providing of services to be used or employed in the service of the Crown as contemplated by s. 13 (3) (*c*) of the Ceylon (Constitution) Order in Council, 1946.

The petitioner further claimed that he was duly elected and ought to have been returned. This claim as well as the charge of general treating were abandoned by the petitioner; and the case went to trial on the charges (*a*), (*b*) and (*d*). The recriminatory objections filed by the respondent were in consequence abandoned.

The trial of this case took 67 working days, in the course of which 149 witnesses were called by the petitioner and 42 by the respondent.

In a proceeding such as this certain fundamental rights of the citizen are involved. Therefore, an election petition enquiry is not merely a contest between two litigants. It is a matter in which the whole electorate, not to say the whole country, has a vital interest. As Bertram C.J. indicated in *Rambukwelle v. Silva* [1], in the trial of an election petition the public interest has also to be regarded. It is not an investigation in which the petitioner and sitting member alone are concerned. The voters also have rights as well as the candidates. The electorate is entitled to have the result of the election declared according to law. In such enquiries two great principles are always sought to be maintained—firstly, that the election should be free; and secondly that the character of the candidate should be pure in regard to the election—*Saravanamuttu v. Joseph de Silva* [2].

An election petition enquiry, however, is not a civil proceeding, but in certain ways possesses the character of a criminal trial in which the petitioner is the prosecutor and the respondent is the accused—*Peiris v. Saravanamuttu* [3]. Therefore, the Court, particularly in dealing with the charges of impersonation and bribery, must deal with the charges as if they are made in a criminal trial. The respondent must at every stage of the case be presumed to be innocent of all offence, while it is the duty of the petitioner to prove his charges beyond all reasonable doubt by evidence which is clear and reliable—*Saravanamuttu v. Joseph de Silva* [4]. All reasonable doubts must be resolved in favour of the respondent. Respecting the last charge in regard to the alleged disqualifying contracts, I agree with the learned Attorney-General, who assisted the Court as *amicus curiae*, that the burden of proof on the petitioner in regard to that charge would be to prove his case by a preponderance of probability or on the balance of evidence.

[1] *(1924) 26 N. L. R. at pp. 253–254.*

[2] *(1941) 43 N. L. R. at p. 316 and see Don Alexender v. Leo Fernando (1948) 49 N. L. R. at p. 203.*

[3] *(1931) 33 N. L. R. at p. 230.*

[4] *(1941) 43 N. L. R. at p. 318.*

The Charge of Abetment of Impersonation : Originally this species of election offence was unknown in Ceylon. In *Rambukwelle v. Silva* [1] Bertram C.J. said : " The charges of personation could not be proceeded with, owing to a defect in the Order in Council which does not make a candidate responsible for *personation* which he or his agent *may have abetted* ". The law has now been altered. Section 54 of the Ceylon (Parliamentary Elections) Order in Council, 1946, (hereafter referred to as the Order in Council) provides :—

> " Every person who at an election applies for a ballot paper in the name of some other person . . . . or who having voted once at any such election, applies at the same election for a ballot paper in his own name, shall be guilty of the offence of personation. "

This section penalises the principal offender, namely the person who commits the impersonation. This offence is committed when the impersonator applies for a ballot paper. It is not necessary that a ballot paper should be actually handed to the impersonator. The offence is complete when the impersonator asks for a ballot paper in the name of some other person, or when the offender having voted once at the election applies at the same election for a ballot paper in his own name. The abetment of impersonation is penalised by section 58 (1) (*a*) of the Order in Council. Every person who aids, abets, counsels, or procures the commission of the offence of personation is made guilty of " a corrupt practice ".

In passing, reference should be made so the case of *Perera v. Jayewardene* [2] where it was held that it is an essential ingredient of the offences enumerated in section 58 of the Order in Council that the offender should do the criminal act " with a corrupt mind ". It was held following the *Stephney Election Case* [3] that where a statute does not unequivocally provide that a corrupt mind is not an essential ingredient for an offence, an act cannot be held to be " a corrupt practice " unless done with a corrupt mind. I may be permitted to point out that this decision does not take into account the Four-Judge decision in *Weerakoon v. Ranhamy* [4] which authoritatively dealt with the general principle regarding the necessity to prove *mens rea* in statutory offences which do not specifically enact that *mens rea* is an ingredient of the offence created. The Full Bench pointed out that offences in which no specific state of mind forms an essential ingredient of the offence in the definition fall into two classes : (*a*) Prohibitions which are absolute and unqualified, whatever the motive for doing them may be, and (*b*) Offences in which, although no special state of mind is defined as being a necessary ingredient for criminal liability, the absence of *mens rea* is, nevertheless, a good excuse. In the former class of case the offender does the prohibited act at his peril. The nature of his motives, intentions or his *mens rea* are immaterial when once the *actus reus* has been proved. In the latter class of offences the plea that there was no *mens rea* is really one in justification. Once the prosecution has established the ingredients required by the statute, it is for the accused to prove the absence of *mens rea*. Where a statute

[1] *(1924) 26 N. L. R. at p. 233.*
[2] *(1948) 49 N. L. R. 241.*
[3] *O'M. & H. 34.*
[4] *(1921) 23 N. L. R. 33.*

creates an offence without making *mens rea* a necessary ingredient, it is often difficult to decide into which category such a case falls. The Supreme Court pointed out that this was to be determined by an examination, not only of the words of the enactment, but of its purpose and subject-matter. The intention of the statute to ignore or exclude the element of *mens rea* in respect of certain of its provisions and to make it an absolute prohibition may be gathered (*a*) from the fact that the public interest was intended to be paramount, and that any individual inconvenience should give way to it; and (*b*) from the fact that *mens rea* is expressly required in respect of breaches of other provisions in the same statute—see *Casie Chetty v. Ahamadu* [1] and *Rex v. Wegodapola* [2]. It is, however, unnecessary to consider this matter further, because even if the facts of the present case are held to be governed by *Perera v. Jayewardene* (*supra*) there can be no question but that the alleged abettors must have acted with a corrupt mind provided the alleged facts are established. However, as this question may come up for decision in future cases, I think it right to draw attention to these matters which merit further consideration. The recent English case of *Harding v. Price* [3] will also have to be considered.

Section 77 of the Order in Council provides that the election of a candidate as a member shall be declared to be void on an election petition on any of the grounds specified in that section, which may be proved to the satisfaction of the Election Judge. Section 77 (*c*) indicates one such ground, namely " That a corrupt practice or illegal practice was committed in connection with the election by the candidate, or with his knowledge or consent or by any agent of the candidate ".

Therefore, under the charge of abetment of personation, the burden of proof rests heavily on the petitioner to establish beyond reasonable doubt to my satifaction that " a corrupt practice" was committed in connection with this election by the respondent, or with his knowledge or consent, or by any agent of the respondent. In other words, it is for the petitioner to establish to my satisfaction :—

(*a*) that some person committed the offence of personation within the meaning of section 54 ;

(*b*) that such person was abetted, aided, counselled, or was procured to commit that offence—

(i) either by the respondent himself ; or

(ii) by some person or persons with the knowledge or consent of the respondent ; or

(iii) by any agent of the respondent, whether with or without the knowledge or consent of the respondent.

[1] *(1915) 18 N. L. R. 184.*

[2] *(1941) 42 N. L. R. at p. 464. In this case the question whether* mens rea *was a necessary ingredient of the offence of abduction was considered by the Court of Criminal Appeal.*

[3] *(1948) A. E. R. 383. See also* Weerakoone *v.* Ranhamy *(1921) 23 N. L. R. 33.* Horan *v.* Arumugam *(1916) 2 CWR. 177.* Wickremasinghe *v.* Ferdinandus *(1915) 5 B. N. C. 17.* Sheikaly *v.* Lisa Hamy *(1911) 14 N. L. R. 349.* Perumal *v.* Arumugam *(1939) 40 N. L. R. 532, and* Fonseka *v.* Fernando *(1934) 36 N. L. R. 16.*

Both sides are agreed that in regard to (*b*) (iii) the petitioner's case must be confined to the particulars furnished to the respondent.

Before porceeding to consider the specific cases under this charge, it is necessary first to consider certain matters which appear to be generally relevant to the charge. Democracy in this Island is still in its early stages. The Courts in Ceylon have on more than one occasion referred to the ignorance and peculiar mentality of those to whom the suffrage has been granted. In the year 1930 in *Fernando v. Cooray*[1] it was observed that the education of the ordinary voter as to the proper use of the vote had hitherto been almost non-existent, and that they have had no opportunity until very recently of looking at matters with any idea of public spirit. " It will doubtless take many years to instil any such idea into large sections of the less educated voters. If such is the frame of mind of so many of the voters, all the greater the responsibility resting on the candidates for election and their agents ". In the light of the evidence given in this case it is open to question whether the education of the ignorant and ill-educated voter has made much progress since 1930. So recently as 1941 in *Saravanamuttu v. Joseph de Silva*[2] the Court was constrained to point out that the electorate in Ceylon still consisted largely of ignorant and illiterate persons.

The respondent, who has fought several elections previously, began his campaign in July, 1947. He, therefore, had nearly three months in order to court the suffrage of the electors. He was his own election agent. Mr. Andrew de Silva, Proctor, was his friend and legal adviser before, during and subsequent to the election. The evidence clearly proves that the respondent was well alive to the dangers which beset the path of a candidate. He himself is a lawyer. The letter R 18 dated July 3, 1947, to his printer clearly shows that the respondent had carefully studied the provisions of the law and was giving instructions to the printer that no orders for printing were to be executed on his behalf without the respondent's special authority. It is also clearly established that the respondent, who is a business man on a very large scale, had doubts as to whether the New Landing and Shipping Company, of which he was the proprietor and which was entering into contracts with the Crown in regard to the landing of goods from ships in the harbour to the warehouses on shore, might not disqualify him. It is admitted that, foreseeing this danger, he was careful to take competent legal advice as to the best manner in which such a disqualification might lawfully be avoided. These facts clearly indicate that the respondent not only had a large experience of political elections but also that he was well alive as to what he should or should not do. His commodious house, D'eyn Court, in Kollupitiya, on the Galle Road, were his headquarters. He employed a large election staff. His election expenses show thirty workers including several ladies. The evidence, however, indicates that his staff was in fact much larger. He obtained a number of copies of the Electoral Register P 1. Six copies of each section of the relevant electorate were typed in his office, and a band of workers armed with such lists went from house to house canvassing for votes and checking up whether the voters were resident in the houses named in the official register. These canvassers made notes on their lists of persons

[1] *32 N. L. R. at p. 141.* [2] *(1941) 43 N. L. R. at 312.*

who either were dead or who were absent or who no longer resided at the addresses given in the official register. The respondent caused his printer to supply him with 45,000 copies of election cards, like the exhibit P 11. If the electorate only numbered about 32,000 persons, it is difficult to understand why 45,000 cards were required. The respondent's explanation is that his agent, Felix Boteju, gave that order without his instructions. This, however, is not borne out by his letter R 18 to the printer which clearly indicated that the latter was to execute no order except on the respondent's express instructions. It is to be observed that the explanation given by the respondent was not put to the printer when he gave evidence.

The respondent caused a card to be written out and filled in for each elector in the electoral register. The canvassers then made a subsequent visitation taking with them their checked lists and the relevant cards. A further check was thus made as to whether the electors were residing at their addresses, and cards were handed to those who were in residence. Naturally, after the work was completed, each canvasser had left in his possession a certain number of undelivered cards in regard to persons who were dead, or who had left their residences, or who were not contacted by the canvassers. These balance cards, instead of being destroyed, were brought back and retained by the respondent. These facts have not only been clearly established but are not contested. It is not in dispute that the checked lists and the undelivered cards were bundled together and kept in a trunk or box not in the respondent's office at D'eyn Court—a building which is about 50 yards distant from the main house—but, for greater safety, in the main building itself.

The reason why the respondent preserved these useless cards has not been satisfactorily explained. The witness Mr. George R. de Silva and the respondent, who admits that the former was his mentor and model, both say that in their election campaigns they were in the habit of preserving these useless cards ; but neither of them has given satisfactory explanation for adopting such a procedure. Mr. Bernard de Zoysa, who contested the respondent in this election, has stated that he destroyed the balance of the election cards which his canvassers brought back. The petitioner stated that he did not write out election cards for dead and missing people, *i.e.*, his election cards were only written out after his canvassers had checked the voters. Learned Counsel for the respondent was constrained to admit that while the preservation of these useless election cards may indicate negligence on the part of his client, yet it did not prove anything worse. On the other hand, Counsel for the petitioner submits that the preservation of these cards amounts in the circumstances to abnormal conduct, *i.e.*, conduct which an honest and prudent candidate would not adopt in the course of an election. Counsel for the petitioner submits that where a person acts abnormally and there is no satisfactory reason for the deviation from normal conduct, there must be some motive underlying such conduct. The case for the petitioner is that these cards were deliberately preserved and utilized by the respondent or by his agents, or by persons with the knowledge or consent of the respondent, in order to facilitate impersonation at the election. The case for the petitioner is that persons were brought into the Colombo South Electoral

District from outside that area on polling day, that they were given these cards, and that they were abetted, counselled or procured to impersonate the persons shown in those cards.

As I have observed before, the respondent is a lawyer, and in proctor Andre de Silva he had another lawyer to advise him right through the campaign. They should have been aware of the observations of de Kretser J. in *Saravanamuttu v. Joseph de Silva* [1] where the danger of these " election cards " was pointed out : " . . . . Much, if not all, of the trouble would have been avoided if there had not existed . . . . cards indicating which side the voters were supporting. . . . . The cards serve another purpose for those who desire to impersonate are furnished with an easy means of knowing and bearing in mind the names of those whom they are to impersonate . . . It seems to me that the practice of using these cards *is a gross violation of the secrecy of the ballot which the law provides for*, and that ignorant voters, instead of being protected, are led to disclosing their choice, not merely by coming in the cars of the respective candidates but right up to the time when they are given their ballot papers . . . In my opinion, rules should be framed prohibiting the distribution of . . . . . cards and regulating entry to the polling station ". I entirely agree with these views of a very experienced Judge. In Britain the use of bands of music, torches flags, banners, cockades, ribbons and other marks of distinction are expressly forbidden [2]. It is a question meriting the attention of Parliament whether the printing, manufacture or distribution of election cards, badges, &c., should not be prohibited by law and their use made a ground for avoiding an election. Had such a law been in force, the respondent might not have found himself in his present predicament.

The case for the petitioner is that on the night of September 19, 1947, *i.e.*, on election eve, the respondent caused persons to be brought into the Colombo South Electoral District from outside that area, and that such persons were congregated at certain centres, particularly at No. 246, Havelock Road, an old house belonging to the respondent's wife but over which the respondent exercised control by paying taxes, &c. It is further the case for the petitioner that the election cards of deceased and missing, persons, who had not been contacted by the canvassers, were brought from D'eyn Court to No. 246, Havelock Road, from which impersonators armed with such cards were taken or conveyed to various polling booths and either voted or attempted to vote for the respondent. It is alleged that such impersonators were brought from places like Slave Island, Angulana, Moratuwa, Green Street, Grandpass, and so on—all places outside the Colombo South area. It is further alleged that a building called the New Respect Club, off the main Colombo-Galle Road, was a " sub-impersonation factory ", while other centres for impersonation were probably established elsewhere. The case for the petitioner is that these impersonators were procured by the respondent and his agents, and that the alleged impersonations were abetted either by the respondent, or by persons unknown to the pertitioner with the knowledge or consent of the respondent, or by the agents of the respondent. This, in short, is

[1] *(1941) 43 N. L. R. at pp. 312–314.*

[2] *Rogers on Elections (20th Edition). p. 375.*

the case for the petitioner on this charge. The question is whether the petitioner has succeeded in establishing to my satisfaction, beyond reasonable doubt, the ingredients necessary to be proved in order to unseat the respondent.

This charge comprises 15 specific cases of alleged impersonations. It may be premised that if the petitioner succeeds in establishing any one of these charges beyond reasonable doubt, the respondent must be held guilty of a corrupt practice.

[His Lordship then dealt with the cases of B. Hendrick, Luvinahamy and Mrs. M. M. I. L. Rodrigo (Erin Brenda Perera) and, after holding without hesitation that these three persons were guilty of the offence of impersonation and that they were abetted in the commission of that offence by certain agents of the respondent, continued :—]

The Case of R. A. Roslin Nona.

H. Sopyhamy was registered voter No. 0717. It is beyond all dispute that at about noon on election day R. A. Roslin Nona, calling herself H. Sopyhamy, appeared at the Kanatte Car Park polling station and claimed to vote. When she did so Mr. David de Silva, the petitioner's agent in the female section of that polling station, challenged her. He says that thereupon Nissanka Piyasili, who was the respondent's polling agent in the female section, protested and complained that Mr. David de Silva was harassing voters unnecessarily. The presiding officer, Mr. C. H. Holmes, has no independent recollection of this incident. He recollects that several persons had been challenged, and he remembers that a woman calling herself Sopyhamy was referred to and that he handed five or six males and females to the Police. The presiding officer's journal P 151 is a meagre document. This is the entry in the journal :—

> " The agents objected to about four female voters as impersonators. Their declarations were taken and they were handed to the Police for investigation. Some of the objections were frivolous. During the poll there were signals by means of whistles and calls from private houses and lanes that certain persons were impersonating. I warned the agents that if they were in communication with people outside for purposes of creating disturbances within and retarding work or with the intention of annoying voters, I would turn such persons out of the polling station ".

Nissanka Piyasili characterises David de Silva's evidence as false. According to him he was in the male section while the respondent's agent in the female section was Edwin Fernando. This was not put to David de Silva in cross-examination nor has Edwin Fernando been called. According to Nissanka Piyasili, he was in the male section near the entrance and he had nothing to do with the female section. The defence witness, Sam Silva, has stated that Nissanka Piyasili is a person who will do anothing for money. The letter P 349 dated July 30, 1946, addressed to the petitioner by Nissanka Piyasili, states that he is intending to print in the September copy of his magazine an article on Mr. Saravanamuttu and invites him to send a block of his portrait. He also asks for " generous

contribution to meet the printing bill and also of making the block ". Nissanka Piyasili admits that he has been to see the petitioner and that the petitioner had replied to him. The exhibit P 350, dated August 12, 1946, written by Nissanka Piyasili to the petitioner, requests the latter to send him his contribution as promised. The suggestion is that the witness is displeased with the petitioner who gave him only Rs. 25 and did not give him a more generous contribution. The cheque P 196 dated April 15, 1947, issued by the respondent for a sum of Rs. 200 to cash or bearer contains Nissanka Piyasili's endorsement showing that he received that money. The witness admits that comparatively speaking the respondent is of a more generous nature than the petitioner and that he has a kinder heart and a kinder smile than the petitioner. Then there is the cheque P 263 of April 28, 1947, issued by the respondent for a sum of Rs. 50 to cash or bearer which bears the endorsement of Nissanka Piyasili. The witness admits that he has been in the habit of getting sums of money from the respondent. He says they are loans—a fact which is open to doubt. In support of this statement Nissanka Piyasili produced his cheque R 57 of April 30, 1947, for the sum of Rs. 200 payable to cash or bearer, but which still remains in his possession. The counterfoil of the cheque is not produced and this cheque might have been written on the day he gave evidence. This document proves nothing. The witness does not explain why this cheque is in his possession and has not passed through the bank. The witness contradicts Oliver and the other witnesses as to the circumstances under which Oliver spoke at the meeting in support of the respondent at Wanathamulla. The witness has stated that he associates with great men and that " there is a perfect understanding between the respondent and himself ". He admits that during a municipal election, in one issue of his magazine he extolled the virtues of the witness Sam Silva and within 15 days of publishing that article he extolled a person called Grero as a more suitable person. In fact, Nissanka Piyasili is a person whose evidence I am unable to accept on any disputed question of fact. Therefore, I have no hesitation in accepting the evidence of Mr. David de Silva as being the truth and that when he challenged R. A. Roslin Nona, Nissanka Piyasili protested.

Roslin Nona was allowed to vote and, following the usual practice, the election card which she brought was destroyed by the register clerk.

Roslin's statement to the Police is the exhibit P 144. As she has retracted that statement in this Court, it is not substantive evidence to prove any fact. Its sole effect is to discredit Roslin's credit as a witness. This is what she said :—

" Today at about 1 p.m. one L. K. Caroline Nona of Thimbirigasyaya brought me to Kanatte Road . . . and she instructed me to go and vote for Mr. R. A. de Mel. She asked me to give my name as Hettiaratchige Sopihamy and apply for a voting paper. I went and gave my name as Hettiaratchige Sopihamy and applied for a ballot paper. I was challenged. I signed a declaration form and voted. My correct name is Ranasinghe Aratchige Rosalin Nona. I produce my rice ration book (which contains her real name) at the request of the Police."

In her evidence before this Court she has sworn that she did not make that statement. Her present testimony is that she admits she impersonated. A woman in her garden called Carolina gave her three rupees and one of the petitioner's cards, not one of the respondent's cards. She says she was asked to vote for Mr. Saravanamuttu and for the " malla " and that she voted for the flower. Subsequently, she was not sure whether she voted for the flower or for the respondent. Carolina has been called and she totally denies the allegations made by Roslin Nona. In cross-examination Carolina stated that on election day she was not living in Thimbirigasyaya but at Mariakaday. The other evidence proves that Roslin Nona together with Catherina Perera, the mother of a man called Ekmon Seneviratne, were seen on election day in a truck displaying the respondent's emblems conveying female voters to the poll. This is the evidence of Edward Singho. There is also the evidence of Amarasena who positively identifies Roslin Nona as a woman he saw hanging about D'eyn Court after this election petition was filed. He also says that he saw the respondent speaking to her. She is alleged to have told the respondent " We have gone there " and the respondent asked her " Is the matter finished ? ", to which Roslin Nona replied " I want a job ", to which the respondent said " We will see to it later ". Amarasena also says that he saw Marcus Dias and the woman getting into a car and go somewhere, and that after 15 or 20 minutes they returned with some papers; and that it was then that the above conversation took place. I express no opinion as to the truth or otherwise of Amarasena's evidence which I will deal with presently. I wish to say, however, that the respondent characterises Amarasena's evidence on this and on every other fact to which he testifies as being absolutely false, and I will have to consider the question whether Amarasena is a person on whose credit the Court can at all rely. I therefore consider Roslin Nona's case independently of Amarasena's evidence.

The presiding officer's journal P 141 shows that the respondent visited the Kanatte Car Park polling station three times on election day, namely, between 9.10 and 9.15 A.M., at 11.30 A.M., and again between 4.25 and 4.35 P.M. Therefore, if Roslin Nona was there about noon she would have probably seen the respondent visiting that polling station. The respondent, however, denies that he saw her and this is probably true. The relevancy of this evidence will become manifest presently.

Roslin Nona's bailsman in the Borella Police Station is Sam. Silva, the witness. The defence contends that Sam. Silva was discovered as a bailsman by Roslin's brother-in-law, U. D. Paulis, at 4 P.M. This is contradicted by the defence witness Police Sergeant Amerasekera who says that it was Roslin Nona herself who gave him the name of Sam.Silva, and as he was anxious to have this young girl liberated on bail he made search for Sam. Silva and ran him to earth at the Borella junction. Sam. Silva corroborates Amarasekera. The importance of this point is that Sam. Silva, who is an agent of the respondent, was discovered not through the agency of U. D. Paulis but from what Roslin Nona herself told the Police. It will be seen presently that Roslin Nona had reason to believe that the respondent knew all about Sam. Silva.

Roslin Nona was charged in the Magistrate's Court. She was convicted on her own plea and sentenced to undergo three months' rigorous imprisonment. She served the sentence in Welikade Jail until the amnesty on Dominion Day led to her release. She says : " I pleaded guilty as nobody came." What that mean is she had no alternative but to plead guilty because the persons from whom she expected support in her necessity did not come to her assistance.

From Welikade Jail Roslin Nona wrote a letter to the respondent in January, 1948, that is to say three months after this election petition had been filed. The respondent admits the receipt of this letter, but it is not forthcoming because he says the letter has been destroyed. Therefore, the petitioner had to prove the letter by means of secondary evidence.

All letters written by prisoners are censored. If the letter is in the vernacular a translation is made and preserved in the files. The Supreme Court has held that the translation of a vernacular document cannot be used as secondary evidence of the original. The translation, however, could be used by the translator to refresh his memory when giving secondary evidence of the contents of the original. That translation is the exhibit P 146.

The secondary evidence which has been led is that Roslin Nona wrote to Mr. R. A. de Mel at his Colombo address stating that she was suffering in jail because she voted for Mr. de Mel by impersonating another. She also told the respondent that before she went to the Magistrate's Court she had called at the respondent's house and handed to him the summons in her case. She further said that the Magistrate ordered her bail and that it was Sam. Silva who bailed her out—implying thereby that Sam. Silva was a person whose name would be familiar to the respondent. She further stated in her letter that she was detected at the Kanatte polling booth and she asked Mr. de Mel whether he too had not seen her there. She appealed to Mr. de Mel on the ground that not only she but her child were suffering and that she had never been to prison before. She further added that some relatives of hers had been to see her in jail and had told her that Mr. de Mel would come to see her. She therefore made an *ad misericordiam* appeal to Mr. de Mel to come and see her and ameliorate her life in jail.

The receipt of this letter having been admitted by Mr. de Mel, two questions arise. Did he read the letter or did he not read the letter ? I find it difficult to accept the respondent's evidence that because he does not understand Sinhalese, and as he is pestered with such letters, he consigns them to the waste paper basket unread. The respondent is a public man who has been twice Mayor of Colombo. It is quite inconceivable that, even if he did not know to read Sinhalese, he would not have got the letter translated by one of his many dependants residing in his house. It is admitted by learned Counsel for the respondent that had this letter been read it demanded a reply. What Roslin Nona wrote to the respondent is either true or it is false. If it is false, one would expect a man in the position of the respondent, over whose head a serious charge of abetment of impersonation was then hanging, to at once have replied characterising the allegations in that letter as being

utterly false and disclaiming all knowledge of the statements of fact made in that letter. The inference which flows from not replying to letters has been pointed out on more than one occasion by the Supreme Court. In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is addressed must reply if he does not agree with or means to dispute the assertions—*The Colombo Electric Tramways and Lighting Co., Ltd., v. Pereira*[1] and *Wijewardene v. Don John*[2]. Of course there are exceptions to this rule. For example, failure to reply to mere begging letters when the circumstances show that there was no necessity for the recipient of the letter to reply can give rise to no adverse inference against the recipient. I cannot class Roslin Nona's letter as being one which did not call for a reply from the respondent, particularly having regard to the fact that at the time he received the letter this charge was hanging over his head. Explanation 2 to section 8 of the Evidence Ordinance says :—

> " When the conduct of any person is relevant, any statement made to him or in his presence and hearing which affects such conduct is relevant."

Illustration (*f*) to that section says :—

> " The question is whether A robbed B. The fact that after B was robbed C said in his presence ' The Police are coming to look for the man who robbed B ' and that immediately afterwards A ran away are relevant."

In this case it is as if Roslin Nona told de Mel : " I impersonated another on your behalf. Unfortunately I was detected. I brought the summons to your house and handed it over to you. I am now suffering for what I did for your benefit. Please come and do something for me ", and the respondent made no reply and did not deny the allegation. The inference I draw is that there was no reply to this letter because there was no reply which could be sent. In my opinion, the silence of the respondent is an admission of the truth of the allegations contained in that letter. I reject the suggestion made on behalf of the respondent that Roslin Nona, having been induced to impersonate by some agent of Saravanamuttu, wrote the letter to de Mel and not to Saravanamuttu because de Mel was elected and not Saravanamuttu. I think this suggestion is fantastic. The petitioner has pointed out that the conduct of the respondent in not replying to Roslin's letter is all the more significant in view of the statements he broadcast to the electorate in his manifesto, P 362, where he calls himself " The friend in need of the poor and helpless and a person dedicated to the service of the people ".

When the petitioner supplied particulars of the alleged acts of impersonation, Roslin Nona's case was held over because adequate particulars of this case had not been given. These were subsequently given. Therefore, when the petitioner's Counsel opened his case he abstained from making any reference to the facts relating to Roslin's case. When

[1] *(1922) 25 N. L. R. 193.* [2] *(1910) 25 N. L. R. 196.*

the enquiry began Roslin was absent. On May 5, 1948, the Court ordered a warrant to issue on her. On the same day a warrant was also asked for in regard to the man called Ekmon Seneviratne. This application the Court refused holding that there had been no proper attempt to serve summons on him.

Roslin Nona was arrested and produced in Court on May 12, 1948—one week after the warrant had issued for her arrest. On the same day Ekmon Seneviratne appeared in Court. Roslin was partly examined on May 12, 1948, and her cross-examinaton was put off for the next day. She was ordered to furnish bail and was directed to go with a fiscal's officer to her home and point out a certain person.

The petitioner alleges that between May 5, 1948, and May 12, Roslin Nona had been kept concealed by Ekmon Seneviratne in Ekmon's house. The petitioner's submission is that the respondent and his legal advisers at that period were under the belief that secondary evidence of Roslin's letter to the respondent could only be proved by calling Roslin herself and that her concealment was therefore due to this fact. The evidence clearly indicates that the petitioner's allegation is true, namely, that Ekmon Seneviratne kept this woman under concealment and that she was accidentally discovered by the police or the fiscal's officers when she was returning to Ekmon's house after a bath. In this connection it is also relevant to note that the petitioner took out a summons on the respondent to produce the letter which Roslin wrote to him from jail. It is alleged that this process could not be served on the respondent. Therefore, the petitioner resorted to a stratagem. He lured the respondent to the house of one Colonne while the petitioner's agents and the fical's officer lay in wait to serve the process on him when he left Colonne's house. It is alleged that the respondent having been warned at Colonne's house turned his car round and drove off at a rapid rate chased by the petitioner's car containing the fiscal's officer. The chase proceeded all down the length of Bullers Road, but when the respondent's car tried to negotiate the righthand turn at the junction between Bullers Road and the Galle Road near the Mejestic Theatre, the respondent's car stopped, whereupon the fiscal's process server succeeded in serving the process. The respondent denies that he fled to avoid service of process, but the evidence of quite disinterested witnesses, like the process server and the police constable on point duty at the junction makes it quite plain that the petitioner's car followed the respondent's car and that service of process was effected at that junction.

As I have pointed out, Roslin's examination was not concluded on May 12. It is alleged that something rather serious happened that night, and the allegation has been made that Roslin Nona was taken by night from her house in the respondent's car No. CE 5801 for the purpose of tampering with her evidence. The allegation is strenuously denied by the defence.

Certain facts are beyond all possibility of dispute. We find that at 9.35 P.M., on May 12, the petitioner telephoned to Superintendent of Police, Mr. Robins, and made a certain complaint. In consequence of that complaint Mr. Robins issued certain orders to the Naharanpitiya police station *via* the Cinnamon Gardens police station as the telephone

at the former station was out of order. In consequence of these directions. Police Constable Scharenguivel was sent out on what is called an ambush patrol. He swears that he saw a car bearing the number 5801 coming along, but owing to its speed he could not distinguish the two letters. He admits that this car slowed down and that when the driver saw him he accelerated and disappeared. That car was closely followed by car No. Z. 4351 which is the petitioner's car. This car stopped and the driver spoke to Scharenguivel. The suggestion is that car No. 5801 contained Roslin Nona, and its driver finding that the police were on the look out, he drove off. The respondent in his evidence says that his car No. CE. 5801 was in that vicinity on that night as it was conveying an asthmatic to his house. Why the respondent should give his car in the dead of night to an asthmatic in order to convey him home is somewhat difficult to understand. Even more curious is the fact that this asthmatic has not been called, and although this being a matter specially within the knowledge of the respondent and a fact of some importance to his case, this witness has not appeared. It is further stated that the respondent's car was at the house of his senior Counsel where he had gone to attend a consultation. It is to be noted, however, that the respondent owns two other cars. There is another fact. We find that at 3.10 A.M., on May 13, 1948, the witness Podiappu Hamy went to the Naharanpitiya police station. There he made the following statement :—

> " This evening at about 9 or 9.30 P.M. Mr. P. Saravanamuttu asked me to go near the house of Mr. R. A. de Mel and keep a watch. After about 10 minutes of my arrival near the bungalow, I saw Mr. R. A. de Mel's car No. CE. 5801 come from Bagatelle Road and go into his bungalow. I was in car Z. 4351. After about 15 minutes the car came out and went towards Bambalapitiya. I followed. It turned towards Bullers Road heading towards Naharanpitiya. At Jawatte I saw two police constables. I did not stop there but followed on. Near Bolamesawatte the car slowed down but saw two policemen there and drove on without stopping. I stopped my car and spoke to the two police constables and told them that it was Mr. R. A. de Mel's car and followed on. This car went to Kanatte Road, turned to Cotta Road and after that it turned back and came on to Bullers Road and then turned towards Wellawatta on Galle Road. Went up to Lunawa following the car. I turned back, came near N. E's work-shop and lay in ambush. Then I saw the car. I again followed. The car came back to Mr. de Mel's bungalow. I saw Nissanka (Nissanka Piyasili) and Marcus Dias along with the driver in the car. I came to make this entry on instructions from Mr. Saravanmuttu."

This statement is one recorded under Section 121 of the Criminal Procedure Code, and being a first information can be used for any legitimate purpose, *e.g.*, to corroborate the maker of that statement.

It is clear from these facts that something happened on the night of May 12, and that there were two incidents. The petitioner says that when Roslin Nona left the courts after giving evidence, he decided to have the woman shadowed. He therefore directed the witness K. H

Perera to shadow Roslin. Perera says he saw Roslin and another at about 7 P.M. getting into the car CE. 5801 and drive off towards Havelock Town. He then went to the Naharanpitiya police station but they refused to take any action saying " Can't a woman go in a car ?". Perera therefore went back to Saravanamuttu's house by bus and reported what had happened. It was then that Mr. Saravanamuttu contacted Superintendent Robins. K. H. Perera was directed to go back to Naharanpitiya police station, and this time his statement was recorded. This statement is the exhibit P 148 which reads as follows :—

> " Roslin Nona a witness in the election petition . . . . came to Bolamesawatte about 8.30 P.M. Car No. CE 5801 was at Torrington Avenue junction. Roslin Nona also went off towards Havelock Road."

Roslin Nona denies all this, but as I have already pointed out, her testimony unless independently corroborated is of no value at all. The second incident is concerned with Poddiappu Hamy, the driver of Mr. Saravanamuttu's car who made the statement P 210. His evidence is that he was directed to take Mr. Saravanamuttu's car somewhere between 9.30 P.M. and 10 P.M. and to keep watch at the respondent's gate. His evidence is in line with the statement he made in P 210 and need not be repeated. He says that when the car finally came back after going to Lunawa it stopped at de Mel's gate and Marcus Dias and Nissanka Piyasili got out of that car and came towards Poddiappu Hamy's car while de Mel's car turned into D'eyn Court. Witness then thought that discretion was the better part of valour and he retreated, particularly as Marcus Dias has the reputation of being a rowdy. It was then that Poddiappu Hamy made the statement P 210.

All this evidence has been characterised as being a fabrication. Having regard to all the facts and circumstances I cannot so hold. I am of opinion that some attempt was made to contact Roslin Nona that night before her examination continued on the following day. The conclusion I reach in regard to Roslin Nona's case is that she has committed the offence of impersonation and that she was abetted to commit this offence by Ekmon Seneviratne in whose house she sought sanctuary when the warrant was out against her.

Is Ekmon Seneviratne an agent of the respondent ?

Witness de Jonk, who until about the middle of September was on the respondent's election staff at D'eyn Court, swears that Ekmon Seneviratne used to come to D'eyn Court practically every night. Witness Edward Singho states that in the Torrington Avenue area Ekmon was de Mel's chief worker, and that he has seen Ekmon accompanying de Mel when the latter went out canvassing in that area. He says he has seen Ekmon independently going from house to house canvassing for votes on behalf of the respondent. He further says that he saw Justin Boteju and Sam. Silva going about on the respondent's business in Ekmon's car. He has seen Ekmon's mother, Catherina Hamy, on pollong day transporting female voters, and he saw Ekmon himself transporting voters on election day. The witness, Samaraweera, gives similar evidence. Piyasena, the printer, has sworn that Ekmon came as messenger on behalf of the

respondent, and the exhibit P 190 B shows the entry against respondent altered to the name of Ekmon Seneviratne. On the day the results of the election were declared (September 22) we find the impersonator, Hendrick, from Market Passage, Slave Island, going to see Ekmon Seneviratne in the Jawatta area. Hendrik's explanation is that he had given Ekmon Seneviratne a ride in his rickshaw on credit and he went all that way to collect the fare. To anyone having experience of the Colombo rickshaw-pullers it seems incredible that any rickshaw-puller would convey passengers on credit and then walk several miles on a subsequent day to collect his fare. Hendrick, having transacted his business with Ekmon Seneviratne, got into a lorry belonging to the respondent, which happened to be passing quite by chance in which amongst a crowd of the respondent's supporters was the woman Millie Nona, also from Market Passage, Slave Island. The suggestion for the petitioner is that Hendrick not only impersonated people at the Holy Family Convent but elsewhere, and that he had gone to see Ekmon to collect the consideration due to him. There is no evidence whatever to support this suggestion although the reason given by Hendrick for going to see Ekmon will not bear examination. The respondent's evidence with regard to Ekmon Seneviratne is unsatisfactory. He does not admit whether Ekmon worked for him or not. He first said he did no work for him. He then said he did hardly any work for him, and at another time he said that Ekmon did not do much work for him. I am of opinion that Ekmon was one of the respondent's cheif agents in the Jawatta area during this election. I therefore find that Roslin Nona was abetted in the offence she committed by one of the respondent's agents.

[His Lordship then dealt with eleven other cases of impersonation, namely, of M. Abraham Gunewardene, Norman of Angulana, Cecilia Perera of Green Street, H. Dona Veronica Peris of Grandpass, Gimarahamy of Market Passage, Slave Island, U. Justin, Kusumawathie, Ransohamy, E. A. Jane Nona, Caroline Perera and D. Roslin and continued :—]

This body of evidence involves fifteen independent cases of alleged impersonation. I have given reasons for finding that in each of these cases the alleged principal offender has been proved to have committed the offence of impersonation beyond all rasonable doubt. The evidence also leaves no room for doubt that there existed a preconcerted scheme or conspiracy on the part of a person or a body of persons to procure persons and to abet them to impersonate voters in order to secure extra votes for the respondent. These fifteen independent chains of circumstantial evidence are so strong and cogent that it is impossible to regard these impersonations as being due to mere chance or coincidence. A body of circumstances by undersigned coincidence is sometimes capable of proving a proposition with the certainty of mathematics. The cumulative effect of all this evidence when regarded as one whole gives rise to such decisive conclusions which are beyond the power of any advocate, however able, to explain away on the basis of mere chance, accident, or coincidence.

Counsel for the respondent in the course of the inquiry put qusetions to some of the witnesses suggesting that these fifteen cases represent a

trap which had been set by supporters of the petitioner by procuring impersonators and a supply of the respondent's election cards, in order to ensnare the respondent and to unseat him if he was successful at the election. In his closing address, however, Counsel abandoned this suggestion. He conceded, for purposes of argument, that it was clear that there must have existed a scheme to abet impersonators to vote for the respondent. Counsel argued that it would be sufficient to secure the acquittal of the respondent on the first charge if he could advance a reasonable hypothesis consistent with his client's innocence, provided it covered all the incriminating circumstances. He submits that the evidence may establish the existence of a scheme to abet impersonation by these fifteen persons, and that the evidence may even create a strong suspicion against the respondent. According to him, there are four possibilities. These persons may have been abetted (*a*) by the respondent himself, or (*b*) by agents of the respondent named in the particulars, or (*c*) by persons with the knowledge or consent of the respondent; or (*d*) they may have been abetted by persons acting in the interests of the respondent in order to secure his election, *but without his knowlegde or consent*. Learned Counsel pressed this fourth alternative as being a probable and possible view which covered all the facts, and would create reasonable doubts in favour of the respondent. According to this submission, there existed a body of misguided supporters of the respondent, who *unknown to him, and without his consent or approval*, set about to procure impersonators, paid them money, supplied them with the respondent's cards, taught them what to do and say, and sent them on election day to vote for the respondent by impersonating genuine voters.

It is a sound proposition of law that in a case of circumstantial evidence, in order to convict a person, the Court must be satisfied beyond all reasonable doubt that the evidence is only consistent with the guilt of the accused, and that it is totally inconsistent with any reasonable hypothesis of his innocence. It is quite insufficient for the accuser merely to establish a strong case of suspicion against the person accused. A " reasonable doubt ", however, does not mean a fantastic or fanciful doubt. A reasonable doubt is one which creates sensible or sound doubts based on common sense and good grounds.

In the light of these principles let us examine the submission of learned Counsel, that while there was a conspiracy on the part of a body of the supporters of the respondent to secure his election by means of impersonation, nevertheless, reasonable grounds exist for doubting that what was done was by himself, or by his agents, or with his knowledge or approval. If this submission has been proved, or even if it only creates a reasonable doubt as to the truth of the case for the petitioner, then, undoubtedly this charge fails, and the respondent is entitled to be absolved from it.

There are 11 men and 4 women involved in these impersonations. Three men and five women were detected at the Jawatta polling station. Three women were arrested at the Colts' pavilion. One man and one woman were detected at the Holy Family Convent. One woman was detected at the Campbell Place polling station and another

at the Kanatte Car Park. The majority of these fifteen persons come from widely distant places outside the Colombo South District, like Slave Island, Kotte, Angulana, Panchikawatta, Wellampitiya, Green Street, Grandpass, and Angoda. They were all supplied with election cards of the respondent, relating to genuine voters who either are missing or did not care to vote. All of them, with the exception of one, admit that they impersonated. They make this admission although, in regard to some of them, charges are still hanging over their heads in the Courts. The majority of them when arrested told the Police that they had been asked to vote for "de Mel", while at this inquiry they try to show that the police by some defect of hearing recorded "de Mel" when what they actually said was "Malla" (the Flower). It is incredible that so many police officers should be hard of hearing. Rather it shows that a determined attempt had been made to induce these persons to vary their stories. It is incredible that these persons, coming from places so widely separated, would have allowed themselves to be accosted in broad daylight in the open streets, and consent, without fee or reward first obtained, to leave their business and agree to commit what they well knew was a serious offence. It is also highly improbable that a band of persons would have boldly set out on election day in broad daylight to waylay and accost likely persons, and run the grave risk of selecting an incorruptible person and being detected either by the police or the rival candidates, or being handed over to the police by one of the persons they accosted. It is far more probable that these persons had been contacted some time before election day, brought to some safe place where they could be rewarded and taught what to do and say without fear of detection. I find it difficult to believe that these fifteen persons, at the mere request of strangers and without having first been liberally rewarded, would have left their lawful business and set out to impersonate and run the risk of being detected and gaoled.

According to the submission of Counsel for the respondent, these misguided supporters of the respondent must have contacted the impersonators on some day before the election. According to him, once the polling was over, they lost all further interest in the impersonators who were left to fend for themselves. Their interest, however, revived when a large number of these impersonators was arrested, and there arose the risk of the conspirators being detected. That is why, it is submitted, that while the impersonators had difficulty in finding bail, this was found for them, after which they were tampered with and made to change the stories they told the police, and a proctor found to defend them. In other words, there were two separate conspiracies. The first was to abet these persons to impersonate. The second, which was independent of the first, was to take such measures as would protect the conspirators from exposure. I am unable to agree with learned Counsel. I agree that the evidence clearly proves that a conspiracy existed; but it was one conspiracy and not two. The abettors, whoever they may be, conspired not only to get the respondent elected, but also once he was elected, to see that he was not unseated, and to take all measures by finding bail and legal aid for the impersonators, and even tampering with their evidence, to see that their object was not frustrated.

If the submission made for the defence is correct, what follows ? The conspiracy must have been hatched some days before election day. The conspirators, unknown to the respondent, had to contact the impersonators. This could not be done on the election day itself. They had to obtain a supply of the respondent's undelivered cards without his knowledge, including the cards found in the possession of the impersonators, and the seventy-two cards, P 31, found in the New Respect Club as well as the exhibits P 18 to P 30. They had to collect the impersonators at some safe place, arrange the reward which was to be given, pay them that reward, distribute the cards, and teach each impersonator what his or her new identity was and what he or she would have to say to the officers at the polling stations. I cannot believe that these conspirators were so short-sighted that they did not foresee the possibility that some of these impersonators might be detected and arrested.

Who is the man who is lucky to have such a body of friends and supporters who, unasked, would engage in a criminal conspiracy of this kind, spend their money lavishly, and run the risk of being detected and punished ? Why should Felix Boteju who, according to the respondent, had left his services on September 9 in a huff, join these unknown friends of the respondent on election day by voluntarily coming forward to bail four persons who committed impersonations to benefit the respondent against whom he had a grudge. According to the respondent this is a " mystery ". According to the petitioner there is no mystery about it at all. Felix Boteju was the respondent's chief agent on election day, and was engaged in the respondent's business when he stood bail for these persons. According to the petitioner, even on September 22 when the results were announced, Felix Boteju was still the respondent's chief agent, and in a transport of joy, he embraced the man whom his efforts had enabled to win this contest. Why did Mrs. Rodrigo telephone to D'eyn Court on the day before her case in the Magistrate's Court, and why in Mr. Nicholas' hearing did she refer to " our case "? Why did Mrs. Rodrigo before going to Court interview Mr. Andrew de Silva, the proctor for the respondent, and why did she, from the Court, go straight to the respondent's house and from there go to the house of Oliver ? Why did R. A. Rosaline Nona from gaol write to the respondent soliciting his aid in the trouble she had become involved through helping the respondent ? Why did the respondent having received that letter not at once write to Rosaline Nona denying or repudiating the statements of fact contained in that letter ? What inference flows from the incident in the garage in the sea-side house in which Cecilia Perera was involved? What is the explanation of the visits of Gimara Hamy and Cecilia Perera to the respondent's house ? What is the inference to be drawn from the incident on the night of May 12, 1948, when R. A. Rosaline Nona was seen to enter the respondent's car in the dead of night ? Can these facts be explained away on any hypothesis consistent with the view that the respondent was unaware of or did not approve of the conspiracy hatched by his misguided friends ? Felix Boteju is a person who could give material evidence for the respondent on this question whether what was done had his knowledge or approval. The petitioner has left no stone unturned to secure his arrest. The respondent has done nothing

in the matter. The conclusion is irresistible that not only was there a conspiracy to abet impersonation, but also that this was hatched with the knowledge and approval of the respondent. In the case of Cecilia Perera, the evidence when fairly viewed leaves no room for doubt that the respondent abetted her by rendering intentional aid to her when she was challenged at the polling station. The subsequent incident in the garage and her visit to D'eyn Court support this view.

According to the respondent, he was all along quite sanguine regarding his chances of success at the election. The circumstances point to a different conclusion, namely, that on election eve (September 19), he was by no means sure of his chances, and was in consequence anxious and restless. There were several candidates in the field. One of them was a well-known public servant who had retired from the service specially to contest this seat. If the respondent was so sure of his success, why did he preserve the useless undelivered cards together with the checked lists in a trunk in his bungalow ? Were they not preserved for the purpose of impersonation should the necessity for so doing arise ? Could those cards leave his house without the knowledge of the respondent or the members of his household ? A candidate, who has conscientiously nursed his electorate for several months, would normally on the eve of the election relax, so that he might be at his best on the following day. The evidence, however, makes it clear that on the night of September 19, far from relaxing, the respondent was anxious and restless. There is no reason to doubt the evidence called for the respondent that from about 8 P.M. he was going about the electorate and, finally, got home about 2.30 or 3 A.M. on election morning. I do not believe that the respondent was continuously away from his home from 8 P.M. until 3 A.M. I believe he did return to D'eyn Court and went out again, and he could easily have done this without attracting the attention of his other workers in his office which is far from the main bungalow. Those workers were engrossed in their work. The fact that he was restless and went about from place to place is clearly proved. In my opinion, that is not the conduct of a man who, having done all that legitimately could be done, was confidently awaiting the verdict of the electors on the following day. It is rather the conduct of a man who was uncertain of the result. If the submission of respondent's Counsel is correct, it also follows that while his misguided friends were engaged in a conspiracy to secure votes for him by illegal means without his knowledge or consent, the respondent himself was wandering about the electorate in the dead of night. What was he doing ? The evidence of witnesses like Messrs. Robert Senanayake, Oriel de Mel, and Annesley de Mel that they last saw the respondent at about 8 P.M. on September 19 is perfectly true. It may also well be that Benjamin de Silva, the respondent's chief clerk, is speaking the truth when he says that he last saw the respondent at about 8 P.M. and he next saw him alighting from his car at about 4 A.M. Some of these witnesses did not stay at D'eyn Court all night. Those who did, had duties allotted to them, and they were working in the office or in the grounds. It is quite possible for the respondent to have gone out, returned to the bungalow, and then gone out again without any of these witnesses becoming aware of the fact. According to the witness K. Don

David, who has earned the name of the " Torch-bearer " (*pandan-karaya*) of a certain political party, the respondent was with him from 9 or 9.30 P.M. until 11.30 P.M. The credit of this witness has been attacked. He says that his nick-name is derived from the fact that he is an " enlightener of the ignorant ". According to him, as he is in touch with certain great personages, or as he put it, because he was " within the inner circle ", people come to him to obtain favours. Unfortunately, he had cut a sorry figure in a Village Committee election in his own village, so that in the present election he gave that village " a wide berth ". According to him, on the night of September 19 he divided his favours. He " worked " for a certain candidate in the Colombo Central area from about 7 P.M. to 8.30 P.M. and then " worked " for the respondent in the Colombo South area from about 9.30 P.M. up to 12.30 A.M. The witness, of course, was not working to a time-table, and his times are approximate only. It is possible that the respondent on this night did meet this witness, but I cannot place reliance on the times given. The persons who could corroborate the respondent's evidence regarding his movements are his motor car driver and the other man who were with him in his car. Those persons have not been called. The witness Sam de Silva says that after he had retired to bed and was asleep the respondent came to his house and awoke him merely to inquire whether a certain tent had been erected. The witness is unable to fix the time of this visit. It was a purposeless journey for the respondent to make to Borella. As to what the respondent was doing until 2.30 or 3 A.M. there is no satisfactory evidence. According to the respondent he visited K. L. Perera, the Wesley College, Kalumahatmaya, Podi Wilbert, William Singho " and other places ". What was his object in doing this ? The petitioner's suggestion is that the respondent during this period was engaged with his co-conspirators in arranging for the abetments of impersonators on the next day.

For what purpose was No. 246, Havelock Road, used on election day ? The case for the respondent is that he used these premises as his head-quarters for issuing petrol chits to the cars which his friends had sent him. Most of these cars, however, came with their tanks full. What was the necessity to have a special headquarters for the issue of petrol chits when that work might just as easily have been done at D'eyn Court ? The case for the petitioner is that these premises were the place where the majority of the impersonators were collected, abetted, taught what to say, given the election cards, and sent to impersonate. The evidence of witnesses like Mrs. Paul, Kaimon, and Proctor Goonatilleke prove that some more than usual activity was taking place in those premises from an early hour on election day. I do not believe that the premises were used as the headquarters for the issue of petrol chits. Mrs. Paul, Kaimon, and Proctor Goonetilleke say nothing about this, and the question was not squarely put to them under cross-examination. Why was there not a single placard or election poster displayed at these premises to show that it was a place where work was being done for the respondent ? The respondent visited the Colts' Pavilion polling station hard by on no less than three occasions on election day. Why did he not drop in at least on one of these occasions at No. 246, Havelock Road,

to see how things were progressing there, or at least to cheer his supporters with a word of encouragement ? These circumstances suggest that the respondent deliberately kept away from those premises because something improper was happening there and he consequently gave the place a wide berth.

Why did the respondent's agents and supporters furnish bail for these impersonators at the police station? Manatunga, the professional bailsman, and Costa, the other bailsman, impressed me as truthful witnesses. They have no motive or reason for stating what is false. I reject the suggestion that because Mr. Andrew de Silva's clerk does not utilise the service of Manatunga as a bailsman, therefore Manatunga and Costa are giving false evidence to implicate the respondent. Manatunga swears that he stood bail for these impersonators at the request of Andrew de Silva who paid him his fees. When the amount of his security was exhausted, Andrew de Silva agreed that Costa, another professional bailsman, should stand surety for the other impersonators. I accept this evidence as the truth. I believe Andrew de Silva engaged the services of these two bailsmen at the request of the respondent who paid their fees. It is because the respondent was privy to the conspiracy which was carried out for his benefit and he was under a moral obligation to assist these impersonators that he acted in this way.

Who engaged Proctor Jayanayake to defend the impersonators without any previous consultation with his clients ? Who paid the Proctor's fees ? Proctor Jayanayake has not been called. There would have been no breach of professional privilege for that gentelman to state that his fees were not paid by the respondent, if that was the fact'. It is to be noted that Proctor Jayanayake was one of the respondent's polling agents at one of the polling stations.

So far I have dealt with the case as if it were one based exclusively on circumstantial evidence. The petitioner, however, relied on a certain body of direct evidence.

H. S. Fernando (Baila Henry) and M. C. Fernando have already been dealt with. I have given reasons why I am unable to accept their testimony. There is one observation, however, which I desire to make in regard to the taking of the affidavit R 5 from M. C. Cooray on March 14, 1948. Assuming that the respondent's version is true, *i.e.*, that M. C. Cooray voluntarily and uninvited came to see the respondent, and was not made intoxicated and brought by Felix Boteju to D'eyn Court as alleged by the witness at the inquiry—nevertheless the respondent and Mr. Andrew de Silva, well knowing that M. C. Cooray had already given a statement to the petitioner, took from the witness the affidavit R 5. Such conduct has been held to be improper both in Britain and in Ceylon. In the case of *Rambukwella v. Silva*[1] Bertram C.J. said : " I think it well to draw attention to the principle laid down in the *Wigan Borough Case*[2] and the *Montgomery Boroughs Case*[3] cited in the article on " Elections " in Lord Halsbury's Laws of England on page 449 that it is not proper that persons who have been, or are likely to be, *subpoenaed* by one side should be got by the other side to make statements

[1] *(1924) 26 N. L. R. at pp. 254–255.* [2] *(1881) O'M. & H. 1.*
[3] *(1892) Day 150.*

or to sign prepared statements. The breach of this principle which took place was, no doubt, due to ignorance of the principle that has been thus laid down. In spite of all temptations to the contrary, and in spite of apprehensions that the witness may have been suborned to give false evidence, it is always best that this rule should be duly observed ". The respondent and his Proctor, who are lawyers, should have been aware of this principle laid down by Bertram C.J.

Another witness the petitioner relied on to give direct evidence is Hapuarachchi, from whom the petitioner appears to have obtained a statement. Hapuarachchi, like Felix Boteju, has disappeared. Although he is a Government pensioner, he has not drawn his pension or, according to Hapuarahchci's wife, had any communication with her since he mysteriously disappeared.

The man Victor is another witness on whom the petitioner relied to give material evidence. It is clearly established that Victor was a supporter of the respondent who, with Marcus Dias, were seen by several witnesses canvassing for votes with the respondent's files and lists like the exhibits P 6 to P 8 in their hands. Mr. Bernard de Soysa is one of the witnesses who directly testified to this fact. The respondent, however, says that he only came to know of Victor after this inquiry began. Yet on the respondent's list of witnesses filed on April 17, 1948, this man's name appears as a witness for the defence. The respondent admits that he may have seen Victor's name in the particulars furnished to him by the petitioner, but he made no efforts to ascertain what this so-called agent of his was alleged to have done to furnish evidence for the petitioner. I have no doubt that Victor was one of the respondent's agents in the area. I find it clearly proved that Victor contacted the proctor for the petitioner and that he made a statement, P 37, which I have not read, to petitioner's proctor and counsel, and handed to them P 6 to P 8 which are some of the respondent's election files containing the lists of voters for the area. Victor came into the witness box and flatly denied that he ever made a statement to the legal advisers of the petitioner or that he handed the files P 6 to P 8 to the petitioner's proctor. Learned Counsel for the petitioner and his Proctor have given evidence. I have no hesitation in holding that Victor committed perjury at this inquiry, and that he did make the statement P 37 (which is not admissible evidence) and actually handed over the files P 6 to P 8 to the petitioner's lawyers. Obviously, the witness has been got at, in the same manner in which other witnesses have been tampered with.

Finally, we have the important witness Amarasena. In dealing with the cases of the impersonators, I have had occasion to mention the name of this witness. It is now necessary to consider the story he tells and to assess the amount of credit, if any, which attaches to his testimony.

Amarasena is a young man who volunteered for service abroad during the war. He belonged to the Army Service Corps and saw active service in the Allied Army from El Alamain to Italy. He admits that a Court Martial sentenced him to a term of imprisonment for assaulting an officer. Such an offence committed in the field during war would, one imagine, carry with it a death sentence. He was sentenced to imprisonment

which the authority who reviewed the sentence reduced to eighteen months. He denies that he was convicted of any other offence. He explains that he assaulted his superior officer because the latter called him a " Black b . . d ".

Amarasena says that he made the acquaintance of one David who gave Amarasena a letter introducing the latter to Benjamin de Silva, one of the respondent's trusted clerks. Amarasena says that he interviewed the respondent towards the end of August, 1947. The respondent spoke to Amarasena and then called Felix Boteju and told him to employ Amarasena as one of his workers. Felix Boteju took Amarasena to his office at D'eyn Court and, having taken down his name and address, told Amarasena that he should report for duty on September 1.

Accordingly, on that day Amarasena began to work for the respondent under the immediate supervision and control of Felix Boteju. Amarasena says that he went about the electorate canvassing for the respondent. When he was free, he was at D'eyn Court and supervised the election staff in the office. Thereafter, he was placed at the head of a team of men whose duty it was to go with the respondent's lists from house to house in certain areas checking whether the voters were resident at their registered addresses, and to note who were missing or who had died, &c. This work Amarasena did and, when the work was completed, he handed the checked lists to Felix Boteju.

Amarasena and his team were subsequently sent out again with the lists and the respondent's election cards. His instructions were to revisit the houses, to deliver the cards to the registered voters, and to make a final check of the typed lists. Amarasena says that when this work was completed, there was left over a number of the cards which could not be delivered because the voters either had left their addresses, or were dead, or could not be contacted. These undelivered cards and the checked lists were brought back to Felix Boteju. Amarasena says that this took place about a week before election day.

When Amarasena brought back the lists and the undelivered cards, Boteju directed Amarasena to take both to the main bungalow and hand them over to the son-in-law of the respondent. That gentleman bundled the undelivered cards and the lists together and wrote on a piece of paper to which polling station those documents referred, and put them into a bag or trunk under the table. The witness de Jonk stated that after these election cards had been written out, they were tied up and put into a trunk together with the lists from which they were entered up. It will be remembered that the respondent admits that these undelivered cards and the checked lists were so preserved. Amarasena says that he asked Felix Boteju what necessity there was to take the cards of persons who were shown in the lists as having left their addresses or who were dead. Felix Boteju then replied " Deliver the cards and bring back the balance ".

On the night of September 19, 1947 (the night before the election) Amarasena says that he was working at D'eyn Court. At 11 or 11.30 P.M., Boteju told him that the respondent wanted to see them both in the main bungalow. Amarasena says that the respondent in the course of conversation, placing his hand on Amarasena's shoulder, said " We

are in a dead heat. We must win this election at all costs. We must do some impersonation. Go with Boteju ". Thereafter, Boteju and Amarasena took one of the cars and went to a place in Slave Island near the Nippon Hotel. There Boteju contacted Millie Nona *alias* Aslin. This woman produced some persons of both sexes who were transported in the car to No. 246, Havelock Road. Boteju and those persons alighted at that place. According to Amarasena, thereafter right through the night he and one Munasinghe transported men and women from Slave Island to No. 246, Havelock Road. Amarasena says that he must have transported about eighty or ninety persons that night in batches of five or six per trip. Amarasena swears that Felix Boteju was in charge of No. 246, Havelock Road. Amarasena also says that about 5 A.M. on election morning a lorry came to that house with thirty or forty persons. He estimates that there must have been about two-hundred or three-hundred men and women at No. 246, Havelock Road, by the time the polls opened.

I have already discussed the evidence relating to the *alibi* sought to be established on behalf of the respondent in order to show that he was not at D'eyn Court on the night of September 19, 1947, at the time Amarasena says the respondent spoke to him regarding the impersonations. In my opinion, this *alibi*, when weighed in the scale against the petitioner's evidence, by no means establishes that it was not possible for the respondent to have been at D'eyn Court at the time Amarasena refers to and yet not be seen by the other workers of the respondent in the premises. The inspection of D'eyn Court shows that the grounds are spacious, the office is at the back, and the main house itself is a very large house where a member of the household may be in the house without being seen or known to be present by the other members of the household. In my opinion, the *alibi* fails.

In the morning, Amarasena says that Boteju sent him to D'eyn Court with a chit. The respondent then called to Leslie Boteju who gave Amarasena the bag containing the cards and the lists. This bag Amarasena took to 246, Havelock Road, and handed it to Felix Boteju.

After that, Amarasena was ordered to take voters to the polls, and he swears that the persons who had been brought to 246, Havelock Road, were conveyed to the polling stations. Many of these persons asked Amarasena to refresh their memories regarding the names in the election cards they had in their possession, and the voter's number. On one occasion when Amarasena returned to 246, Havelock Road, at about 10 or 10.30 A.M., he saw the respondent inside those premises engaged in conversation with Felix Boteju.

The times given by Amarasena are approximate only. The respondent has endeavoured to establish another *alibi* in order to show that at the time referred to by Amarasena he was touring the electorate in the company of the witness Mr. M. F. Ghany, a member of the Colombo Municipal Council and who was under obligations to the respondent. According to Mr. Ghany, he went to D'eyn Court on election day between 7.45 and 8 A.M. in order to " assist " the respondent. This assistance took the form of the respondent getting into Mr. Ghany's car and visiting fifteen or sixteen polling stations. I have no doubt that the respondent

did so. Mr. Ghany, however, is uncertain as to the time when he finally left the respondent. Before the luncheon interval Mr. Ghany said that the respondent left him at about 12 noon. After the luncheon interval Mr. Ghany was of opinion that the respondent left him either at 11 or 11.15 A.M. or 10 or 10.15 A.M. According to the respondent, he parted with Mr. Ghany between 11 A.M. and noon. Mr. Ghany admits that while the respondent got out of the car and entered various polling stations he did not accompany him. The witness is positive that the respondent did not visit 246, Havelock Road. As I have pointed out, the Colts' Pavilion polling station is in close proximity to No. 246, Havelock Road. The journal of the presiding officer at the Colts' Pavilion shows that the respondent visited the Colts' Pavilion on three occasions—at 8.43 A.M., at 11.15 A.M., and again at 3.50 P.M. There is something wrong because the journal of the presiding officer at the Jawatta polling station has also recorded that the respondent visited that polling station at 11.15 A.M. It is, of course, impossible for the respondent to have been at two different polling stations at the same time. It was on this second visit to the Colts' Pavilion that the respondent interfered when the impersonator Cecilia Perera was challenged. The presiding officer's journal fixes that time as being 11.20 A.M. According to Amarasena, he saw the respondent engaged in conversation with Felix Boteju at 246, Havelock Road, at about 10 or 10.30 A.M. If, as Mr. Ghany stated, the respondent left him between 10 or 10.15 A.M., it was possible for the respondent to have gone to No. 246, Havelock Road, between 10 and 10.30 A.M. and have gone to the Colts' Pavilion at 11.15 A.M. The *alibi* therefore is not water-tight.

I am, however, unable to place reliance on the evidence of Mr. Ghany. This witness is under obligations to the respondent. He admits, that during the Municipal elections in November, 1946, the respondent gave him a present of four thousand rupees. He denies that this was a bribe given to him by the respondent to vote for the latter as Mayor. He admits that he collected a sum of twenty-thousand rupees from members of the Municipal Council. He says he wanted this money because his rival had spent about a lakh of rupees. He says this money was required in order to be given "to various workers because there was thuggery on the other side". He also added "I paid thugs not to get thugged from the other side". The respondent admits that on February 24, 1948, he gave Mr. Ghany a loan of one thousand rupees. This was during the pendency of this case. The respondent says that Mr. Ghany's sister was to be married and a dowry had been promised and Ghany "came running to my house and told me that he was short of one thousand rupees and asked me to accommodate him". In my opinion Mr. Ghany is a person on whose word no Court can rely. I am satisfied that Amarasena is speaking the truth when he says that he saw the respondent at 246, Havelock Road.

Amarasena says that until about 11.30 A.M. he was engaged in transporting these persons to the polls. He made one trip to the Museum polling station, and two trips to the Jawatta polling station. On his return after the third trip, he observed that there was confusion and consternation at No. 246, Havelock Road. He heard Felix Boteju telling people

"Go out and come back later". Amarasena questioned Boteju as to what this meant. Boteju told him "Things have become bad. You also had better go and stay at the C Booth and come later." Amarasena did so, and when he returned some hours later, he found normal conditions prevailing at 246, Havelock Road. It will be remembered that the police raid on the New Respect Club took place about this time.

According to Amarasena, on election day he did seven or eight trips in all, taking impersonators to the polls involving about sixty or seventy persons. The others engaged in transporting impersonators were Munasinghe, Leslie Boteju and others.

After the poll closed, Boteju and Amarasena took a woman worker by car to an address at Avondale Road and then returned to D'eyn Court. There an angry scene was being enacted. Immediately Felix Boteju appeared, some persons surrounded him shouting "Where are our people? They are in police custody. We want our men"—referring to those impersonators who had been detected and were under arrest. Amarasena went in search of the respondent. In the bungalow he found Mr. de Mel confronting three or four men who were angrily throwing money on a table saying "We were promised Rs. 5 for each vote. I voted seven times and should get Rs. 35 and this is what I got". The respondent was replying "I don't know! I don't know!" Felix Boteju then came on the scene and reported that persons had been locked up and that their friends were demanding their liberation on bail. The respondent told Boteju "Try and bail them out".

Boteju and Amarasena with S. H. Fernando and M. C. Cooray then went to Bambalapitiya police station but the police refused to accept bail. Boteju and Amarasena therefore returned to D'eyn Court. S. H. Fernando and M. C. Cooray say that they were two of the persons who were insisting that the persons they had brought from Angulana should be set free—particularly M. Abraham Gunawardene and Norman. M. C. Cooray says he went back to Angulana to inform Gunewardene's wife, while S. H. Fernando returned with Boteju and Amarasena. According to S. H. Fernando, he was determined not to lose sight of Boteju until his friends were set free.

Amarasena says that he had been promised a certain fee and a bonus if the respondent was successful. As this did not appear to be an opportune time for him to make this demand from the respondent, he went home. On September 23 and for several consecutive days, Amarasena says he tried to get payment from the respondent, who put him off on various pretexts. On his last visit Amarasena says the respondent asked his wife to give him Rs. 25, whereas he had to receive Rs. 100 as balance pay and Rs. 100 as a bonus. Amarasena says that he remonstrated with the respondent and finally left in anger.

Amarasena candidly admits that had the respondent kept faith with him, he would not have given him away. Having been treated in this manner, Amarasena decided to avenge himself on the respondent by exposing him. He spoke to several people and finally contacted Mr. Saravanamuttu, the petitioner, about three weeks after the election.

Amarasena had with him the typed list P 14 belonging to the respondent which he had used on polling day. This he handed to the petitioner and told him his story.

This election petition was filed on October 10, 1947. On January 29, 1948, this Court ordered the petitioner to furnish particulars to the respondent. By this time it is suggested that Amerasena's treachery must have reached the ears of the respondent. Amerasena swears that on Saturday, February 28, 1948, Felix Boteju and Marcus Dias came in a car to Amerasena's house and induced him to accompany them to the Maliban Hotel, Borella, where arrack was consumed. After that the suggestion was made that Amerasena should go to D'eyn Court and see the respondent. Amerasena flatly refused to do so. So he was taken back to his own house, where Felix Boteju alighted ; while Marcus Dias went in the car to fetch the respondent to Amarasena's house. By this time, Amarasena says he was drunk. Mr. de Mel, Marcus Dias and Colonne came to Amarasena's house. Amarasena says that the respondent tried hard to persuade him not to give evidence in this case. He said amongst other things "You are a Sinhalese, I am a Sinhalese. Why should you give evidence for a Tamil ? " and used similar arguments. Amarasena says that he refused to retract. Finally he was persuaded to go to D'eyn Court with the respondent in his car. There a paper was produced and Amarasena was requested to sign it. On his refusing to do so, de Mel said " You are drunk. Go home and think about it and come tomorrow. I'll send you the car ". If M. C. Cooray's and H. S. Fernando's evidence can be believed the procedure adopted in inducing them not to give evidence was similar.

On the following day—Sunday, February 29, 1948, the respondent's car came to Amarasena's house, and he was taken to D'eyn Court. There were present at this interview, the respondent, his prospective son-in-law, his son, his daughter and Proctor Jayanayake. Amerasena says that great pressure was brought to bear on him to sign the statement and also to get at the petitioner's witnesses, and a reward was promised. Amarasena, however, remained unresponsive.

Thereafter, the respondent took Amarasena in his car for a drive, and in the Fort the respondent got a cheque cashed at a boutique in Baillie Street. In the car the respondent again offered money to Amarasena who refused to accept it. Finally he was dropped at Havelock Road, the respondent promising to send his car for Amarasena in the evening.

Amarasena then met Samaraweera and told him what had transpired. He was then directed to the petitioner, and Amarasena repeated his story to Mr. Saravanamuttu, who told Amarasena to go and see the respondent, and that he would arrange to have a photograph taken of the respondent's car when it called to take him to the respondent's house. Mr. Saravanamuttu says that his inability to obtain films on a Sunday frustrated this object.

At about 4 P.M. that afternoon the respondent's car took Amarasena to D'eyn Court for the last time. In the car was Colonne besides the driver. At D'eyn Court there were present the respondent, his Proctor Andrew de Silva, and Felix Boteju. Amarasena swears that he observed

R. A. Rosaline Nona hanging about the compound. The statement was again produced and Amarasena was offered sums ranging from Rs. 300 to Rs. 1,000 to sign it as well as a job in the respondent's business which he described as " My Landing and Shipping Company ". Amarasena says that Andrew de Silva finding that all attempts to make Amarasena sign the statement were useless observed to the respondent " That b . . .will not sign ". The respondent, however, did not give up. He requested Colonne to take Amarasena into the main bungalow where whisky and biscuits were offered him. The respondent asked Amarasena what he was going to say in Court, and Amarasena retorted " Come to the Court and find out ". The respondent then warned him that if he admitted he took bribes he would be convicted. Amarasena says that the respondent also showed him a box containing a number of cheque books, and he also showed him the counterfoil of a cheque for Rs. 100 which he had given Colonne. All efforts to tamper with the witness having failed, he was sent home in the respondent's car. On March 1, 1948, Amarasena says that the petitioner took him to the C. I. D. where his statement was recorded.

The case for the respondent is that the whole story told by Amarasena is a tissue of falsehood from beginning to end. It is denied that the respondent ever set eyes on this witness until he entered the witness box, and that he never employed him. I agree that Amarasena on his own showing is a treacherous witness and his evidence, even if he is not an accomplice of the worst type, must be accepted with the greatest caution. But before his evidence can be rejected, it is my duty to consider it and test it.

Assume that Amarasena is a false witness who has been procured by the petitioner and coached to give false evidence about things which never happened. If so, the persons who coached the witness had a fairly accurate knowledge of the routine in the respondent's office and house. Amarasena stated that in the office there was a kind of partition effected by placing almirahs. The defence witness Jayawickreme supports Amarasena about this partition. Amarasena described the position of the telephone. This was observed when the Court inspected the premises. How did Amarasena or the petitioner obtain possession of the respondent's list P 14 ? Amarasena's description of how the voters were checked and the cards were distributed is not different from what the respondent himself stated. The alleged team mates who accompanied Amarasena when he went his rounds should be available to deny that what Amarasena is saying is true. The accredited supporters and agents of the respondent in the places where Amarasena says he canvassed should be available to come forward and state that Amarasena never came there. Amarasena stated that Felix Boteju had warned him that Sama Samajists pretending to be de Mel's supporters would come and take money on the pretext of supporting de Mel. The respondent's evidence is that Mr. Goonesinha had warned him about such a thing. How did the persons who coached Amarasena know that fact? How did any stranger know that the undelivered cards were kept in a box or trunk ? If Amarasena's evidence is false, it should have been possible to obtain some evidence to show where Amarasena was on

September 19 and 20. Amarasena refers to Munasinghe and Leslie Boteju. Neither of them has been called to contradict Amarasena's evidence. The defence is that it was Benjamin de Silva who was in charge of the petrol work at 246, Havelock Road, on election day, and that Felix Boteju was not there. It was not put to Amarasena that it was Benjamin de Silva and not Boteju who was at 246, Havelock Road, on election day. Persons at the Maliban Hotel, Borella, should be available to contradict Amarasena's evidence.

Furthermore, Amarasena, although he is an unscrupulous person, gave his evidence well. He was a better witness than either the respondent or Mr. Andrew de Silva.

Amarasena on his own showing is an accomplice of a despicable type. If he can be believed, he was admitted into the inner councils of the respondent, and he now treacherously implicates his master out of revenge because the latter had not kept faith with him. As a judge of facts I, therefore, have kept prominently before my mind the cardinal principle that it is unsafe to convict any person on the uncorroborated evidence of an accomplice. I have, therefore, considered the case apart from the evidence of Amarasena, and have reached my conclusions quite independently of the evidence of this tainted witness.

Is Amarasena's story corroborated ? In other words, is there independent evidence, direct or circumstantial, which affects the respon dent and the accomplice by connecting them or tending to connect them on some material point or points in which the accomplice incriminates the respondent ? In other words, is there any independent evidence, direct or circumstantial, which implicates the respondent and confirms in some material particular, the story of the accomplice, not only that the offence of abetment of personation was committed but also that it was committed either by the respondent, or by his agents, or by persons with the knowledge or consent of the respondent. Putting it in another way, corroboration is direct or circumstantial evidence, independent of the accomplice which affects the respondent by connecting him or tending to connect him with the abetment of personation as defined by the Order in Council. This corroboration need not extend as regards the whole story told by Amarasena, for in that case there would be no need for his evidence at all. It will suffice if Amarasena is corroborated on one or more material particulars as regards the person he implicates.

In my opinion Amarasena has been so corroborated on material particulars :—

(1) He is corroborated by the witness de Jonk who says that the cards and the lists were bundled and put into a box.

(2) Amarasena says that he saw R. A. Rosaline Nona hanging about the compound at D'eyn Court. That a connexion existed between this impersonator and the respondent is proved by her letter to the respondent, and by the incidents of the night of May 12, 1948.

(3) Amarasena says that the electors' lists were subjected to a double check. The documents P 20 and P 22 found at the New Respect Club show that there was such a double check as already pointed out by me.

(4) The witness Weerasinghe corroborates Amarasena in regard to de Mel's visit to Amarasena's house on the night of February 28, 1948. Marcus Dias and Colonne were available to state that no such thing happened, and they have not been called.

(5) Amarasena says that the respondent showed him the counterfoil of a cheque for Rs. 100 issued to Colonne. That counterfoil has been produced from the respondent's custody and is the exhibit P 197 dated February 29, 1948.

(6) Amarasena says that on February 29, the respondent cashed a cheque in Baillie Street. That cheque has been produced—P 198. The respondent says that his counterfoil book containing that cheque is lost. I disbelieve the witness Ghouse that the cheque P 198 was cashed at Chatham Street on Monday. This money changer has a desk outside the Chartered Bank, and when the bank closes that desk by arrangement with the Bank officials is kept inside the Bank. Ghouse admits that his firm has authority from the Labour Department to work on Sundays. When there are ships in harbour on a Sunday, provided they can get their desk out of the Bank, they can ply their trade. The witness admits that though Banks are closed for business on Sundays, it often happens that the Bank officials work. The gates must, therefore, be opened. When this is done, the money changer's desk can be handed out by the gate-keeper. The cheque P 198 thus could have been cashed on Sunday, but would only be entered in the money changer's books on the following day. The person who cashed the cheque is the respondent's driver. He has not been called. I cannot accept the suggestion that the petitioner having surreptitiously obtained information from the bank clerks about cheque P 197 and P 198, then fabricated the corroborative evidence of Amarasena. In my opinion, these two documents afford strong corroboration of one part of Amarasena's story.

(7) Gimarahamy, in an unguarded moment, admitted that she was taken in a car on the night of September 19. This supports Amarasena.

(8) The conduct of Milli Nona *alias* Aslin in going to the police station and the Magistrate's Court to liberate the impersonators on bail supports Amarasena's story that it was she who supplied the impersonators who came from 246, Havelock Road.

(9) Amarasena's possession of P 14, an admittedly genuine document, corroborates his story.

(10) Felix Boteju's complaint to the Colpetty Police against Marcus Dias on the night of September 9 corroborates Amarasena.

I have considered the first charge against the respondent quite independently of the evidence of Amarasena. I find that evidence without the evidence of this witness proves that charge beyond all reasonable doubt. The evidence of this accomplice corroborated as it is on material particulars, supports the findings I have independently reached.

To sum up my findings—

After carefully weighing the evidence, oral, circumstantial and documentary, and the probabilities and arguments advanced on both sides, I reach the conclusion that the following facts have been established to my satisfaction beyond all reasonable doubt :—

(*a*) The fifteen persons referred to above committed the offence of personation on September 20, 1947 ;

(*b*) that these persons committed these offences for the benefit of the respondent ;

(*c*) that there existed a consipiracy by a body of persons to abet these fifteen persons to commit the offence of personation for the benefit of the respondent.

(*d*) that the respondent was privy to this conspiracy, and that it was done with his knowledge or consent.

(*e*) I further find that such abetments were committed—

(i) In the case of Cecilia Perera by the respondent, at the Colts' Pavilion Polling Station. She was also abetted at 246, Havelock Road, by the agents of the respondent who were there including Felix Boteju and Amarasena ;

(ii) Hendrick and Luvinahamy were abetted by the respondent's agent Ebert *alias* Wilson Peris and also probably by Albert. Abetment of the impersonator Luvinahamy also took place at 246, Havelock Road, by Felix Boteju and Amarasena.

(iii) Mrs. Rodrigo was abetted by the respondent's agent, Oliver.

(iv) Gimarahamy was abetted at 246, Havelock Road, by the agents of the respondent, including Felix Boteju and Amarasena.

(v) U. Justin was abetted by the respondent's agent, Ekmon Seneviratne.

(vi) Kusumawathie and D. Rosalin were abetted at 246, Havelock Road, by the respondent's agents including Felix Boteju and Amarasena.

(vii) R. A. Rosaline Nona was abetted by the respondent's agent, Ekman Seneviratne.

(viii) The impersonators H. Dona Veronica Peris, M. Abraham Gunewardene, Norman, Caroline Perera, E. A. Jane Nona and Ranso Hamy were each abetted by unidentified persons. I find that these abetments took place in pursuance of the conspiracy aforesaid which was carried out with the knowledge or consent of the respondent.

(*f*) I also find that Milli Nona *alias* Aslin of Market Passage, Slave Island, participated in the abetment in procuring impersonators including Luvinahamy, Gimarahamy and Hendrick.

On these findings, I find the respondent guilty of the first charge.

The Charge of Bribery.

Paragraph 3 (*d*) of the petition charges the respondent with committing a corrupt practice, to wit, bribery in connexion with this election by himself, by his agents, or by persons with the knowledge or consent of the respondent.

Section 57 of the Order in Council defines what " bribery " is. Section 58 (1) (*b*) makes the commission of the offence of bribery a " corrupt practice ". Section 77 (*c*) enacts that the election of a candidate shall be declared void on an election petition if it is proved to the satisfaction of the Election Judge that a " corrupt practice " was committed in connexion with the election by the candidate, or with his knowledge or consent, or by any agent of the candidate.

There were thirteen speific charges of bribery alleged in the particulars. All these have now been abandoned with the exception of seven which are said to have been committed on September 19, 1947, at a place called Wanatamulla.

These charges, unlike the first charge, depend entirely on direct evidence. It is alleged that the respondent having on September 17, cashed the cheque P 200 for Rs. 6,000 sent his agents Mr. Swithin de Mel and Hapuarachchi with a bag of money to distribute largess to the poor electors of Wanatamulla on September 19, in order to secure their votes on the following day.

The respondent says that he cashed this cheque " for emergencies ". He has explained how he spent that money. I am unable to hold that this explanation is false or improbable. It is in the highest degree improbable that *in broad dayloght* the respondent would send two agents *from morning till evening* to go from house to house like Santa Claus distributing money in the manner alleged. The supporters of the rival candidates would become aware of such activities, and the fraud would easily have been detected and the culprits caught in the act. In any event, far better evidence should, if this charge is true, have been forthcoming. Having regard to the careful manner in which the impersonations referred to in the first charge had been planned and carried out, I cannot imagine that the respondent or his agents would have been so foolish as to attempt bribery on such a large scale by day.

The witnesses who were called to support this charge did not impress me. Were it not for the fact that Mr. Swithin de Mel, in a panic that his presence might be secured by means of a warrant kept out of the way by going to the Southern Province and then crossing over to India without even telling his daughter who kept house for him, where he was going, there is nothing in this charge. The disappearance of Hapuarachchi is partly attributable to the same cause.

The evidence of the witnesses who gave direct evidence is unsatisfactory and does not justify the Court in basing an adverse finding against the respondent on testimony which has neither the ring of truth, nor bears the stamp of probability.

I find that this charge has not been established, and I, therefore, hold that the respondent is entitled to be absolved therefrom.

The Contracts which are alleged to disqualify the Respondent from election.

The particulars specify four such contracts. One of these charges was abandoned at the commencement of the inquiry. Evidence was led in regard to the other three which may be described as :—

(*a*) The contract between The New Landing and Shipping Co., Ltd., and the Crown ;

(*b*) The plumbago contract ; and

(*c*) The respondent's agreement to pay a debt by instalments.

(*a*) *The Contract between the New Landing and Shipping Company, Limited, and the Crown.*

The question for decision is whether the contract P 156 dated June 28, 1947, admittedly entered into between the Company known as the New Landing and Shipping Co., Ltd., and the Crown in regard to the landing of certain property of the Crown from ships in the harbour to the Customs warehouses on shore, is one which is caught up within the provisions of section 13 (3) (*c*) of the Ceylon (Constitution) Order in Council, 1946, so as to disqualify this respondent from being elected as a member of the House of Representatives.

There had existed a business known as The Landing and Shipping Agency which was wound up and ceased to function in 1941. In 1942 the respondent purchased this business, added to it and registered it in his own name as sole proprietor calling it The New Landing and Shipping Company. This was not a limited liability company.

The Government of Ceylon, having no lighterage facilities of its own, has to engage the services of private companies whenever goods belonging to the Crown have to be transported from ships in the harbour to the shore. During the war, and particularly during the food crisis, this work assumed large proportions. It was also found that goods were being pilfered in transit, and it was extremely difficult to fix the responsibility for such losses on any particular person or firm. It is in evidence that various departments of the Crown were in the habit of utilising the services of the New Landing and Shipping Company in this transportation work. The Director of Food Supplies, in particular, engaged the services of this company to land the large shipments of food which were arriving at the port of Colombo.

When the Order in Council became law, and the respondent decided to contest the Colombo South seat, he realized that the work which his lighterage company was doing for the Crown might possibly lead to his disqualification under section 13 (3) (*c*) of the Order in Council. He, therefore, took legal advice and decided to transfer his business to a new private company which was to be formed, namely, The New Landing and Shipping Co., Ltd., (hereafter referred to as "the Company").

The company was incorporated on May 16, 1947. The capital of the company was Rs. 1,000,000 divided into 10,000 shares at Rs. 100 per share.

Previous to the incorporation of the company, that is to say at the time when the respondent was the sole proprietor of the old company, the Director of Food Supplies had been in correspondence with the respondent and other landing companies with the object of entering into contracts in regard to this transportation work. With his letter P 232, dated April 8, 1947, the Director of Food Supplies forwarded to the respondent a draft agreement approved by the Attorney-General. This letter bears out the respondent's evidence that he had intimated to the Director that he intended to float a company under the Companies Ordinance, because the Director asks the respondent to let him know the registered name and address of the new company and also the Ordinance or statute under which it was incorporated " to enable me to prepare final copies for signature ".

Mr. Alvapillai, the Director of Food Supplies, states that a few days before June 28, the respondent saw him and said that he would get the contracts signed by his wife who was a Director. The respondent did not reply to P 232 until after the company had been incorporated. On the following day, May 17, 1947, the respondent wrote the letter P 233 to the Director stating that the name of the new company was the New Landing and Shipping Co., Ltd., and gave its address. He added that the company had been incorporated under the Companies Ordinance, No. 51 of 1938. Mr. Alvapillai, the Director of Food Supplies, states that a few days before June 28, the respondent saw him and said that he would get the contracts signed by his wife who was a director.

On June 28, 1947—that is to say about three months before the election—the contract P 156 was entered into between the company and the Director of Food Supplies acting for and on behalf of the Government of Ceylon. Clause 1 of the contract provides that " in consideration of the payment of remuneration at such rates as may from time to time be mutually agreed upon between the Director and the Company " the Company undertakes to perform and carry out for the Government, *inter alia*, the carriage and haulage in the port of Colombo, from the ship's side to shore of goods and cargoes imported, purchased, or otherwise acquired by or on behalf of the Government and to deliver the same into the Customs premises, &c. Clause 2 provided that the Company " shall undertake and carry out the services specified in Article 1 in respect of such food or other cargoes as may be allocated to them for carriage, warehousing and delivery by the Director in writing ". The company further undertook to commence work within three hours of the receipt of such notice of allocation which was to be in writing signed by the Director or any other officer authorized by the Director to make such allocation. This contract was signed on behalf of the Company by the respondent's wife in her capacity as a director of the Company and for the Crown by Mr. Alvapillai, the Director of Food Supplies. The petitioner alleges that this contract disqualifies the respondent from election.

The relevant words of section 13 of the Order in Council are as follows :—

" 13. (3) A person shall be disqualified for being elected or appointed as . . . . a member of the House of Representatives or from sitting or voting . . . . in the House of Representatives—

(*a*) . . . .

(*b*) . . . .

(*c*) if he, directly, or indirectly, by himself or by any person on his behalf, or for his use or benefit holds, or enjoys any right or benefit under any contract made by or on behalf of the Crown in respect of the Government of the Island, for the furnishing or providing of money to be remitted abroad, or of goods or services to be used or employed in the service of the Crown in the Island."

There are certain provisions in sub-section (4) which qualify the provisions of sub-section (3) (*c*), but they are not relevant to the questions which arise for decision here.

It is to be observed that what section 13 (3) (*c*) does is to disqualify a person who holds or enjoys a right or benefit under a certain class of contracts. The Order in Council does not make the contract itself invalid.

It has been argued for the respondent that the contract P 156 is of no force or avail by reason of the existence of Defence Regulation 43A which permits only the Port Controller to allocate work amongst the various lighterage companies. It is submitted that the terms of this contract conflict with this Defence Regulation, and that so long as the Defence Regulation remains in force, the contract is inchoate and incapable of performance and remains so until the Defence Regulation is either repealed or modified. The argument is that even if this is a contract which falls within the provisions of section 13 (3) (*c*) there are no rights or benefits which can flow from this inchoate agreement.

The answer to this contention is that the Crown is not bound by any statute or statutory regulation except by express reference or necessary implication—see section 3 of the Interpretation Ordinance (Chapter 2). In the case of *The Province of Bombay v. The Municipal Corporation of Bombay*[1], the Privy Council laid down the test which should be applied in such cases for ascertaining whether the Crown was to be held bound by a statute. It was laid down that the Crown is not bound by a statute unless this was expressly provided, or was to be inferred by necessary implication. Their Lordships pointed out that the argument that when a statute is enacted for the public good, the Crown though not expressly named, must be held to be bound by its provisions, cannot now be regarded as sound except in a strictly limited sense. If it can be affirmed that at the time the statute was passed and received the Royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the

[1] (*1947*) *App. Cas. 58.*

Crown has agreed to be bound. In the present case I cannot see how such an inference can arise. The Chairman of the Port Commission in his letter R 19 appeared to take the view that the provisions of this contract infringed his powers under the Defence Regulations and protested to the Director of Food Supplies. The latter by his letter P 237 stated what, in my opinion, is the correct legal position. The Chairman of the Port Commission acquiesced with that view and gave way. A compromise was effected, and a Priority Committee was formed in which lighterage companies had a representative, and the allocation of cargoes amongst the lighterage companies was done by the Port Controller as the agent of the Director of Food Supplies. There was no protest from the New Landing and Shipping Co., Ltd. It is the respondent who raises the question for the first time at this inquiry. There is ample scope for the provisions of the Defence Regulations to apply as between private consignors and consignees, even though the Crown may not be bound by the Defence Regulations.

The case of *George v. Mitchell* [1] shows that a contract may be good and valid in spite of the existence of a Defence Regulation. A workman employed as foreman in an engineering works to which the Essential Work Order applied, was replaced by another man. The displaced workman was offered other work by the same firm but at a lower wage. He refused to agree and was in consequence dismissed. He sued his employers who argued that the plaintiff's cause of action was suspended by the Essential Work Order. The Court of Appeal held that this contention was unsound.

Counsel for the respondent further argued that P 156 was not a contract but only an agreement to enter into future contracts. He stressed such words as " May from time to time ", and " If and when " in P 156 as supporting his contention. He also points out that the amounts to be paid and the dates on which the services are to be rendered have not been specified. He says that under P 156 the Crown is not bound to give the company any work at all. He, therefore, submits that P156 does not create any contract from which rights or benefits—either direct or indirect—could flow.

In my opinion P 156 does create a contractual obligation between the Crown and the Company. The principle applicable is thus stated in the quotation from *Beal's Cardinal Rules of Legal Interpretation, page 142 :* " I think I may safely say as a general rule that where there is a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the contruction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances ". The parties to P 156 could not say when cargoes needing clearance would arrive. The cost of clearance may vary from time to time according to the cost of living index, the availability of labour, strikes, &c. Therefore, by mutual agreement these matters

[1] *(1943) 1 A. E. R. 233.*

had to be left open. What the parties say in effect is "If the Director or his agent gives the Company notice of allocation in writing, the Company undertakes to clear the goods within three hours of the receipt of that notice. The fees and rates of pay we deliberately leave open because these may vary according to circumstances. These matters we shall agree upon from time to time". In my opinion not only does P 156 create a valid contract, but it is a contract from which rights and benefits flow to both contracting parties.

The real question which emerges for decision is whether the Company when it entered into the contract P 156 was acting as the agent or nominee of the respondent. If that question is answered in the affirmative, the disqualification created by section 13 (3) (*c*) arises. If the answer is in the negative, no such disqualification can arise.

There is nothing in the contract P 156 to show that the respondent enjoys any special position, right, or benefit in this contract as distinct from the other shareholders of the Company. Furthermore there is no evidence of any collateral agreement between the Company and the respondent that he was to enjoy any special rights or benefits under this contract. It is not for the respondent to give explanations. It is for the petitioner to satisfy the Court by a preponderance of probability or on the balance of evidence that the Company when it entered into this contract did so as the agent or nominee of the respondent.

Both sides have referred to the case of *Salomon v. Salomon* [1]. The House of Lords held that upon incorporation a limited liability company forthwith became a legal *persona*, as distinct from the members or shareholders—see *Palmer's Company Law* (*1942 edition*), pages 45-46. The Company has been formed and duly incorporated in accordance with the provisions of the Companies Ordinance. Once the certificate of incorporation is issued, section 16 of that Ordinance makes that certificate conclusive evidence of its existence as a legal *persona* separate from and independent of its shareholders. Therefore, the Company and the respondent are two distinct legal persons. The fact that he as a shareholder may ultimately benefit by this contract by the dividends he may receive, is too remote a benefit to disqualify him under section 13 (3) (*c*) of the Order in Council. No fraud has either been alleged or proved in regard to the incorporation of the Company. On the contrary, the evidence makes it clear that the respondent took legal advice and spoke about the formation of the Company to Mr. Alvapillai. The motive of the respondent in having this Company incorporated is irrelevant. The fact that a person does a lawful act with the express object of avoiding a disqualification does not render unlawful that which is a lawful act. Thus it is not unlawful for a rich business man to turn his business into private limited liability company in order to avoid taxation or to escape estate duty. If a way of carrying out a transaction without incurring a liability, penalty or disability can be found (*i.e.*, *lawfully* found), a person is justified in adopting it—*Commissioner of Inland Revenue v. Angus* [2]. I am, therefore, of opinion that there was nothing illegal or improper in

[1] (*1897*) *App. Cas. 23*.

[2] (*1889*) *23 Q. B. D. at p. 593.*

the formation and incorporation of the company ; and that on incorporation the company became a legal person distinct from and independent of the respondent and the other shareholders. I further find that at the date of his election the respondent did not " directly . . . . for his use or benefit hold or enjoy any right or benefit " under the contract P 156.

Did the respondent at the date of his election " *indirectly* by himself or by any person on his behalf or for his use or benefit hold or enjoy any right or benefit " under the contract P 156 ? Putting it in another way, has the petitioner satisfied the Court that the Company when it entered into this contract was acting as the secret agent or nominee of the respondent ? It is nor for the respondent to prove that the Company was not his agent or nominee. This must be established by the petitioner by a preponderance of probability or on the balance of evidence. In deciding this question the Court must examine the surrounding circumstances including the subsequent conduct of the respondent and the Company. One relevant matter would be whether there has been any confusion between the money of the company and the funds of the respondent, and whether there is evidence to show that the respondent enjoyed benefits which were not available to the other shareholders.

It has been established that on three occasions the respondent referred to the Company as " My business ". Amarasena stated that in February, 1948, when the respondent was persuading him not to give evidence at this inquiry, he referred to the Company as " my business ", and promised him work in the Company. In 1944 when the respondent was the sole proprietor of The New Landing and Shipping Company, the Rubber Commissioner gave him work. The respondent requested the Rubber Commissioner to give credit facilities to one Nelson de Silva, whom the respondent described as his kinsman, and agreed to be Nelson de Silva's surety. Credit was given to Nelson de Silva who defaulted. Legal action was taken against him, but Nelson de Silva was evading service of summons. In June or July, 1947, the Rubber Commissioner's Department brought pressure to bear by giving no work to The New Landing and Shipping Co., Ltd. The respondent, however, who as a mere shareholder had no concern with what work was given to the Company or not, telephoned that department and referred to the Company as " my business " and enquired why they had been treated in this way. What is more, the respondent who by then had been elected to the House of Representatives threatened to report Mr. Casinader, the head of the department, to the Minister. When giving evidence in this Court the respondent said this :—

Q.—Is your Company a genuine Company or is it a camouflage ?—I cannot say it is a camouflage.

Q.—Are the shares given to Mr. Andrew de Silva and Mr. David Peiris legal shares ?—Yes. *I gave* Andrew de Silva one lakh rupees worth of shares, that is a one-tenth share. It is a genuine share.

Q.—You genuinely intended giving Andrew de Silva one lakh rupees worth of shares in consideration of services rendered ?—Yes.

Mr. S. C. Banker, the Manager of Messrs. Narottam and Pereira, a firm of landing agents, says that there is an association of the lighterage companies working in Colombo, and that on August 15, 1946, the respondent who was then the proprietor of The New Landing and Shipping Company was elected chairman of the association and has continued since. His qualification for election was that he represented The New Landing and Shipping Company. No notification was ever made to the association that The New Landing and Shipping Company had become defunct, and that Company is still a member of the association while the limited liability Company is not. The respondent still remains a member of the association although he has not attended meetings. He never sent a notification that he had ceased to possess the qualifications of a member. Notifications of the meetings of the association are still sent to him. Mr. W. H. D. Perera, the Port Controller, says the respondent once came to see him with J. Alfred Fernando in connection with some landing work in February, 1948.

One of the directors —I believe the managing director—of the Company is the respondent's wife, who is described as being an invalid. The other director is a servant of the respondent. The suggestion is that they are dummies and that the respondent is the person who manages and works this Company. There is also the admitted fact that the cheque books of the Company are often kept at the respondent's residence in his safe, and not at the registered office of the Company. Amarasena says the respondent showed these cheque books to him when he promised to give Amarasena work " in his Company ".

Mr. G. St. Elmo Nathanielsz, a clerk in the Eastern Bank, swore that Mrs. de Mel and the Secretary of the new Company authorized the bank by letter that the bank could honour cheques drawn by the respondent. He stated that that letter was in the bank and he had not brought it as he had not been noticed to produce it. The witness was then directed to produce that letter. Mr. Ross, the Manager of the Eastern Bank, thereafter produced the document P 284 dated May 27, 1947. This is not the document referred to by the bank clerk, which was a letter written by Mrs. de Mel and the Secretary of the new Company, whereas P 284 is a document written by the respondent. Mr. Ross was then told that the clerk had sworn that the director and Secretary of the Company had authorized the bank to honour the signature of the respondent on account of the Company. The witness' answer was, not that there was no such letter, but that he had not that information. He was asked to produce that letter, but nothing further has been heard about the matter, and, therefore, nothing flows from it. Bank clerks as a class generally are *precise* witnesses. It is curious, therefore, that Mr. Nathanielsz should have made a mistake on a matter like this.

Mr. Thirunathan of the Bank of Ceylon has produced certain cheques issued by the Director of Food Supplies both before and after the Company was incorporated. These are P 268 of April 11, 1947, for Rs. 845·98 in

favour of The New Landing and Shipping Company. This has been endorsed by the respondent as the proprietor of that Company. P 269 of April 11, 1947, for Rs. 644 in favour of the same firm and endorsed by the respondent as proprietor. P 270 dated April 11, 1947, for Rs. 848·50 in favour of the same firm and endorsed by the respondent as proprietor. The new Company was incorporated on May 16, 1947. P 271 dated May 19, 1947, for Rs. 195·96 in favour of The New Landing and Shipping Company and endorsed by the respondent as proprietor. Also P 272 dated May 24, 1947, for Rs. 1,016·03 in favour of The New Landing and Shipping Company endorsed by the respondent as proprietor, P 273 dated May 26, 1947. for Rs. 31,108·78 in favour of The New Landing and Shipping Company endorsed by the respondent as proprietor and P 272 dated June 5, 1947, for Rs. 21,985·78 in favour of the New Landing and Shipping Company also endorsed by the respondent as proprietor and also the further endorsement " To the credit of our account, New Landing and Shipping Co., Ltd.", signed by the respondent's wife as Director. P 275 dated July 2, 1947, is for Rs. 16,058·91 in favour of the New Landing and Shipping Company. This has been endorsed "To the credit of our account for and on behalf of The New Landing and Shipping Co., Ltd.", and has been signed by Mrs. de Mel and the Secretary, and the endorsement has been guaranteed by the bank. P 276 dated July 11, 1947, is for Rs. 33,138·24 in favour of The New Landing and Shipping Company. The endorsement is "The New Landing and Shipping Company" signed by the respondent as proprietor. This cheque was negotiated with the money changer Ghany & Co., and eventually was placed to the credit of the account of Ghany & Co.

Therefore after the Company was incorporated the respondent had endorsed cheques belonging to the new Company for sums aggregating Rs. 65,459·01 which sum came into his possesssion and not to the Company. Out of this sum Rs. 33,138·24 was taken by the respondent after the contract P 156 was entered into. It is to be noted that the respondent might have caused the books of the Company to be produced to show that this money was credited to the Company. There is no such evidence.

Then there is the cheque P 371 dated September 13, 1947, for Rs. 10,000 drawn by the respondent in favour of J. Alfred Fernando, the Secretary of the Company. The respondent explains that this was a loan by him to the Company which was short of cash to pay the workmen. If so, why was that cheque not drawn by the respondent in favour of the Company, so that should any question arise hereafter, the fact that the money was paid to the Company could be proved? The respondent is a lawyer. His explanation is that he gave the cheque in a hurry and did not therefore think of the legal implications. There is also the circumstance that cheque counterfoils which have been called for are said to be missing, making it difficult to ascertain for what purpose certain cheques had been issued by the respondent. In other cases, the counterfoils are blank. The respondent has been unable to give a satisfactory explanation of these things. Even certain cashed cheques which should be in the bank vaults are missing.

The return P 226 shows that the number of shares allotted for a consideration *other than cash* by the Company amounts to 7,990. These allottees are :—

Allottee.	Shares.	Value. Rs.
The respondent	5,000 ..	500,000
Andrew de Silva, Proctor	1,000 ..	100,000
J. Alfred Fernando	990+10 ..	100,000
David Pieris	500 ..	50,000
Merrill Fernando	500 ..	50,000

What were the services which the last four persons rendered to the Company for which they were rewarded by such munificent donations? Mr. Andrew de Silva was the proctor who prepared the requisite papers for the incorporation of the Company, and who put the matter through. Is a proctor who helps to incorporate a Company paid a fee of Rs. 100,000? What were the services rendered by J. Alfred Fernando for which he was donated shares worth Rs. 100,000 ? Why was Mrs. de Mel one of the directors only given 10 shares for which she presumably had to pay cash? In *Topham's Company Law* (*10th Edition*) at pages 79–80 there is this passage :—

> " Shares are often allotted as fully paid in consideration of services performed by the promoters before the incorporation of the Company. If these services have enhanced the value of any property sold to the Company, the allotment is really part of the consideration for the sale of the property, and is valid. If no property sold to the Company has benefited by the services, it is difficult to see what is the consideration for the allotment, for past services are in law no consideration, unless rendered at request ; and the company could not make such a request before it was incorporated, or ratify it afterwards. Such consideration is, therefore, probably illusory ".

In the light of all the facts and circumstances, it seems that the shares given to Mr. Andrew de Silva and J. Alfred Fernando are for an illusory consideration.

After careful consideration I reach the conclusion that the contract P 156 was entered into by the Company as the secret agent or nominee of the respondent who all along was, and still is, the real proprietor of that business. I hold that on the day of his election the respondent was disqualified from being elected by reason of the fact that he indirectly by a person on his behalf, namely The New Landing and Shipping Company, Limited, and for his use and benefit, held or enjoyed rights and benefits denied to the other shareholders under the contract P 156 made by or on behalf of the Crown in respect of the Government of the Island for the furnishing or providing services to be used or employed in the service of the Crown in the Island.

(*b*) *The Plumbago Contract.*

In April, 1947, the Director of Commerce and Industry issued the circular P 291 to plumbago dealers in the Island calling for offers. On April 29, 1947, that is to say before election day, the respondent made

an offer by his letter R 25. By letter P 293 dated August 13, 1947, the respondent extended his offer until September, 1947. At the date of his election on September 22, 1947, that offer, however, had not been accepted. On October 2, 1947, the respondent withdrew his offer. It is, therefore, clear that no contract was in existence at the time of his election. This charge therefore fails.

No doubt the respondent adopted the expedient of putting forward J. Alfred Fernando who " does not own a teaspoon of plumbago " to make an offer and for which Fernando was paid Rs. 123,705·45, and although it is said that Fernando in fact only retained Rs. 1,000 on this deal, I cannot hold that Fernando acted as the agent of the respondent, because Mrs. de Mel is also a dealer in plumbago ; and it is possible that the rest of that money or the greater portion of it went to Mrs. de Mel.

This charge, which was not pressed, therefore, fails.

(c) *The respondent's agreement to pay a debt by instalments.*

The respondent during the war having supplied to the Imperial Government plumbago which was not up to sample, in August, 1946, he admitted liability in a sum of Rs. 345,742·83—see P 290. This liability he was allowed to discharge by instalments for which the Ceylon Government, as the agent for the Imperial Government, accepted post-dated cheques. The Attorney-General holds the power of attorney of the proper authority representing the Imperial Government. At the date of his election admittedly a sum of Rs. 84,000 was still due from the respondent to the Imperial Government.

Even assuming that such an obligation is " a contract " within the meaning of section 13 (3) (c) of the Order in Council, it is not within the ambit of that sub-section because it was not made "on behalf of the Crown *in respect of the Government of the Island* ". It is also doubtful whether an obligation of this kind can be said to be a " contract " within the meaning of that sub-section but I do not decide that point.

I hold that this charge fails.

It is necessary to draw attention to an irregularity which was brought to light in the course of these proceedings. The Order in Council provides elaborate precautions for the preservation of the secrecy of the ballot after the poll has closed. Section 47 provides that the presiding officer after the close of the poll in the presence of the candidates and their polling agents as attend, shall seal certain documents and the ballot boxes. Thereafter it is the duty of the presiding officer to despatch such sealed packets and the ballot boxes in safe custody to the Returning Officer.

The Returning Officer after the votes have been counted is required by section 48 (6) to seal the tendered voted in separate packets. Section 48 (9) provides that on the completion of the counting and after the result has been declared by him, " the Returning Officer shall seal up the ballot papers *and all other documents* relating to the election . . . and shall, subject to the provisions of the next succeeding sub-section, retain the same for a period of six months, and thereafter shall cause them to be destroyed unless otherwise ordered by the Commissioner ".

Therefore, all documents relating to the election which had not hitherto been sealed have to be secured and sealed by the Returning Officer. This would include such documents like the declarations made by voters, the presiding officer's journals, &c.

Once these documents have been sealed, it is only a Judge of the Supreme Court under section 48 (10) who may make an order " that any ballot paper or *other document* relating to an election which has been sealed as required by this Order be inspected, copied, or produced ". The Judge may not make such an order unless he is satisfied that such inspection, copy or production is required for the purpose of instituting or maintaining a prosecution regarding an election petition. " *Save as aforesaid no person shall be allowed to inspect any such ballot paper or document after it has been sealed up in pursuance of sub-section (9)* ".

What happened was this. A party to this enquiry moved for a summons on the Registrar-General to produce or cause to be produced certain declarations made by the impersonators. The Court allowed the application, that is to say, it allowed a summons to issue on the Registrar-General to produce or cause to be produced these documents. Under the law the witness, unless he claims privilege, must produce the documents if they are in his possession or power. This order did not authorize him to break open any sealed packets without a special authorization from this Court under section 48 (10). What the Registrar-General did was, without consulting the Election Judge or the Attorney-General, construed the summons to produce as an authorization from this Court under section 48 (10) to open the sealed packets. This is irregular. I am satisfied that this was done *bona fide*, and no harm has been done. The observations of Bertram C.J., in *Rambukwella v. Silva* [1] and of de Kretser J. in *Saravanamuttu v. de Silva* [2] should be noted in this connection.

In terms of section 81 of the Ceylon (Parliamentary Elections) Order in Council, 1946, I determine that the election of Mr. Reginald Abraham de Mel as member of the House of Representatives for the Colombo South seat is void. I further determine that at the date of his election the said Mr. Reginald Abraham de Mel was disqualified from being elected under section 13 (3) (*c*) of the Ceylon (Constitution) Order in Council, 1946.

I shall, therefore, in terms of section 82 of the Ceylon (Parliamentary Elections) Order in Council, 1946, report to His Excellency the Governor-General that the said Mr. Reginald Abraham de Mel has been proved to have committed the " corrupt practice " of the abetment of personation as defined by section 58 (1) (*a*) of the said Order in Council by himself, by his agents and by unknown persons with the knowledge and consent of the said Reginald Abraham de Mel as fully set out in this judgment, and will, in consequence, be subject to the incapacities referred to in section 82 (3).

With regard to the costs of this protracted enquiry, counsel on both sides agreed that they would each submit a statement of their expenses to me, and that after considering the matter I should make an appropriate order which both sides agreed to accept. The statement submitted by the petitioner amounts to Rs. 51,791·50 as being his actual out-of-

[1] *(1924) 26 N. L. R. at p. 252.* [2] *(1941) 43 N. L. R. 77.*

pocket expenses. This enquiry lasted sixty-seven working days, and necessarily, therefore, the expenditure involved in working up the case, the fees of learned counsel and the proctor, the batta of the witnesses and the obtaining of certified copies and other documents must be considerable. I, therefore, fix the costs payable by the respondent to the petitioner at Rs. 30,000.

I also desire to place on record my deep appreciation of the manner in which learned counsel on both sides assisted the Court in this difficult case. I specially desire to express my thanks to the learned Attorney-General who attended Court in person to assist the Court as *amicus curiae* on certain questions of law.

Election declared void.