THOMAS WALSH (PETITIONER)............APPELLANT;

AND

WALTER H. MONTAGUE (RESPONDENT)......................................RESPONDENT.

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*Oct. 3, 4, 5 & 6.

*Dec. 14.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE STREET, SITTING FOR THE TRIAL OF THE HALDIMAND CONTROVERTED ELECTION.

Scrutineer, agency of—Wilful inducing a voter to take false oath—Corrupt practice—Qualification of voters—Farmers' sons—Oath T—Secs. 90 *and* 91 *and secs.* 41 *and* 45 *of ch.* 8 *R. S. C.—Ballot papers rejected—Finding of trial judge.*

A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.

The insisting by such scrutineer of the taking of the farmer's son's oath T by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavoring to induce the voter to take a false oath so as to amount to a corrupt practice within sections 90 and 91 of ch. 8 R. S. C., and such corrupt practice will avoid the election under sec. 93. Strong and Gwynne JJ. dissenting.

Per Strong J—1. That reading section 41 in conjunction with sec. 45 ss.2, and the oath T in schedule A of ch. 8 R. S. C. an enquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shown that a larger number of unqualified farmer's sons votes than the majority were admitted the election will be void. (Taschereau J. *contra*).

2. Secrecy of the ballct is an absolute rule of public policy and it cannot be waived. Sec. 71 ch. 9 R. S. C.

On this appeal certain ballot papers being objected to

Held, that it will require a clear case to reverse the decision of the trial judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter.

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* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

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Also, that where the × is not unmistakably above or below the line separating the names of the candidates the ballot is bad.

APPEAL from the judgment of the Honorable Mr. Justice Street delivered at Cayuga upon the trial of the controverted election of Haldimand for the House of Commons whereby the election petition was dismissed with costs.

The election in question was held on the 5th and 12th days of November, 1887, when the respondent, Walter Humphreys Montague and Charles Wesley Coulter were candidates, and the said Walter Humphreys Montague was declared by the returning officer to have a majority of the votes cast at the said election.

The petition contained, in addition to the usual charges of bribery and corruption, many specific charges with reference to the reception, counting and rejection of ballots, and other charges of irregularity and unlawful practices in connection with the election which by the said petition it was sought to have declared void.

The trial began on Tuesday the 24th January, 1888, and by the direction of the presiding judge the charges of corrupt practices against the respondent and his agents were first disposed of, and afterwards certain evidence was taken as to charges in the petition of irregularities in the conduct of the said election.

On the fourth day of the trial, Friday the 27th of January, the learned judge proceeded to examine the ballots cast at the said election, and as the result of such counting of the ballots he declared a majority of ten votes to have been cast in favor of the respondent.

On the present appeal a number of ballots which on the scrutiny had been counted either for the respondent or the defeated candidate were objected to. These ballots were examined by the court and two ballots which had been allowed for the respondent by the trial judge after examination with a microscope were

disallowed, the court holding that unless the **X** is unmistakably above or below the line separating the names of two candidates so marked the ballot is bad.

The findings of the trial judge on the other objected ballots were upheld, the court holding that it would require a clear case to reverse the decision of the trial judge who had found as a question of fact as to whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter. No decision was arrived at on ballots No. 103 and No. 46.

Ballot No. 103 was cast at polling sub-division No. 4, in the township of Oneida, by one Philip S. Wintermute, and the words "Philip S. Wintermute," were written upon the ballot itself, before it was deposited in the ballot box. Charles Young, the deputy returning officer at the polling sub-division in question, was called by the respondent at the trial as a witness to support the claim to have this ballot counted. He stated that Wintermute voted as a farmer's son, that his right to vote was challenged, and that when he came back from the voting compartment and handed his ballot to the deputy returning officer to be deposited in the box one of the scrutineers for Mr. Colter suggested or urged, that a note of the objection to the vote should be made on the ballot-paper itself, and that accordingly he (the deputy returning officer) then wrote on the ballot-paper the words " Philip S. Wintermute," before depositing it in the box. This ballot was allowed for the respondent in the court below.

Ballot 46 was a ballot not initialed by the returning officer and was counted for the defeated candidate by the trial judge after evidence of its identity was given.

The appellant by his notice of appeal limited the subject of this appeal to the following special and de-

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fined questions and the rulings and decisions thereon of the learned judge at the trial, viz.:

"2. The refusal of the learned judge at the trial to count as votes for Mr. Colter 7 of the ballots cast at the said election at polling sub-division No. 2 in the township of Oneida and which, as the petitioner contends, were marked with a second cross by the deputy returning officer at the said polling station after the voter had returned the same to the officer to be deposited in the ballot box. The said 7 ballots were numbered by the county judge upon the recounting of votes after the said election as Nos. 85, 87, 88, 89, 90, 91 and 92.

"3. The charge (No. 8 in the particulars) that Frederick Harrison as agent of the respondent did induce Thomas Nixon to take a false oath at the poll and to vote at the said election though not qualified to do so.

"4. The charge (No. 20 in the particulars) that Stephen Allen, an agent of the respondent, did induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though the said Robert Dougherty was not qualified to vote at the said election.

"5. The charge that the deputy returning officer at polling sub-division No. 4, in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning officer at the said election.

"6. The charge that the deputy returning officer at polling sub-division No. 2, in the township of Oneida, improperly marked ballots received by him at the said election from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge at the trial, rejecting the evidence on behalf of the petitioner, which was tender-

ed by him at the trial in support of the said charge.

"7. The charge that many persons voted at the said election who for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to inquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the list of voters as finally revised, and certified by the revising barrister, and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election had, between the time of the final revision of the voters' lists by the revising barrister at the date of the said election, forfeited the right to vote thereat."

The evidence relating to charges 3, 4, 5, 6 and 7, upon which this appeal was decided, is reviewed in the judgments hereinafter given.

Aylesworth (*Colter* with him) for appellant.

On the Harrison–Nixon charge (Par. 3 in the notice of appeal) the learned counsel cited and relied on The Dominion Elections Act, secs. 90, 91 93 and also sec. 45, sub-sec. 2, ch. 8 R. S. C.; *Cooper* v. *Slade* (1); *North Norfolk Case* (2); *Wallingford Case* (3); *The Hereford Case* (4); *The Launceston Case* (5); *The Carrickfergus Case* (6); *The Louth Case* (7); *The Selkirk Case* (8); *The Soulanges Case* (9); and Taylor on Evidence (10).

On the Allen-Dougherty charge (Par. 4 in the notice) upon the question of agency *The Stroud Case* (11) was referred to. On this charge they referred also to the judgment of Chief Justice Moss in a case referred from the County of Elgin to the Ontario

(1) 6 H. L. C. at p. 788.
(2) 1 O'M. and H. at p. 242.
(3) 1 O'M. & H. at p. 59.
(4) 1 O'M. & H. at p. 195.
(5) 2 O'M. & H. at p. 133.
(6) 3 O'M. & H. at page 91.
(7) 3 O'M. & H. 161.
(8) 4 Cans. S. C. R. 494.
(9) 10 Can. S. C. R. 652.
(10) 8 Ed. secs. 376-7.
(11) 3 O'M. & H. at p. 11.

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Court of Appeal under the Ontario Voters Lists Acts—printed in the appendix to Hodgins' Manual on the Law affecting Voters' Lists in Ontario, 2nd Ed., as case No. 8 in *re Norman*.

The learned counsel then argued that the trial judge had erred in refusing to allow witnesses to disclose for whom they had voted in order to prove the truth of charge 6 in the notice of appeal. and contended that the statute was framed solely to leave to the voter the privilege of secrecy if he wished to assert and maintain it. Citing sec. 71 of the Dominion Elections Act and Taylor on Evidence (1): McCreary on Elections (2); *People* v. *Pease* (3); *Reg.* v. *Kinglake* (4); *Thomas* v. *Newton* (5); *King* v *Adey* (6): Cooley on Limitations (7).

Then as to right to enquire on a scrutiny into the qualification of the farmer's sons at the time of voting the learned counsel contended that sec. 41 ch. 8 R. S. C. must be read as conferring on farmers' sons the right to vote subject to the provisions contained in sec. 45, sub-sec. 2 and in support of his interpretation of the statute in this respect relied upon the judgment in *The South Wentworth Case* (8); *The Stormont Case* (9); *North Victoria Case* (10); Cooley on Limitations p. 762.

M'Carthy Q.C. for respondent.

As to the Harrison--Nixon charge he contended there was no agency. Matthison and Macaskie on Corrupt Practices (11) and cases there cited. Harrison's authority was limited as provided in sec. 36 ch. 8 R. S. C. But, admitting agency, he argued that it was impossible under the circumstances to hold: First, that Nixon took a

(1) 8th Ed. secs. 396, 438.
(2) 3rd Ed. sec 453.
(3) 27 N. Y. 45--81.
(4) 11 Cox C. C. 499.
(5) M. & M. 48 n.
(6) M. & Rob. 94.
(7) P. 762.
(8) Hodg. 531 at pp. 533--34.
(9) Hodg. 21 at p. 44.
(10) Hodg. at p. 681.
(11) P. 106.

false oath. There was no ground on which the learned judge could have held that any oath which Nixon was required to take was false in fact, or if false in fact that it was false in the sense in which it would be unlawful for him to take it, namely, knowingly false. Secondly, there was not a tittle of evidence on which the learned judge could have found that Harrison either "compelled or induced" Nixon to take the oath, or that he did so with the belief that Nixon was not in a position to take the oath, or that he did so corruptly within the meaning of the act, and he submitted that the holding and finding of the learned judge was the only possible one under the circumstances—citing the *Kingston Case* (1).

As to the Allen-Dougherty charge no agency was proved. The scrutineer had not been appointed, and moreover, the facts clearly shew that Dougherty was still a resident on his father's property and could take the oath.

The learned counsel then referred to the irregularities relied on and contended the defeated candidate had suffered no injustice.

As to charge 31. Unless a *primâ facie* case of fraud is alleged and proved there is no right to enquire how a voter voted. On the grounds of public policy the legislature determined that a ballot could not under any circumstances, for the purpose of ascertaining by whom that ballot was marked, be enquired into in a court of justice. In this respect the ballot act under the law of Canada differs from the law established in England, where under certain circumstances the court is at liberty to investigate how the ballot has been marked. Clauses 70, 71 and 72, as indeed the whole election act itself, clearly indicate that the great object which the legislature had in view was the secrecy of the ballot, and

(1) Hodg. 625.

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that under no possible circumstances could it ever be made known by any course of procedure how a man had voted; in other words that the ballot was to be absolutely and for all time secret. In Leigh & Le Marchant on Elections (1) is a statement showing how the peculiar inconsistency to be found in the English ballot is accounted for. In the Canadian law the policy as to the secrecy of the ballot was maintained and the act is consistent in itself. So that in a scrutiny, if it be determined that an elector was bribed by a candidate or his agent, it is provided that one vote should be deducted from that candidate's poll, without any enquiry or means of enquiry as to how in fact the bribed elector voted, and it may not be at all impossible that the elector may have voted under the secrecy of the ballot different from the way in which he was bribed or corrupted to vote, Nevertheless as there can be no such enquiry the law has provided as the only means of redress that one vote shall be deducted from the candidate's poll. Besides strictly speaking there can be no evidence as to how a man voted other than the production of the paper itself, nor would there be any safety if courts were to deal not upon the ballot which is the vote, but upon the statement of witnesses as to how they voted. A witness might falsely say he had voted differently from the way in which he had voted, without the slightest fear of detection, and without it being possible to establish that his evidence was wrong. The courts ought not to make any exception. Now with regard to the English mode or method of procedure, to show very clearly that the principle contended for is the right one, there, no examination can be had of the ballot until it be established to the satisfaction of the court that the person who cast that ballot was guilty

(1) P. 85 in a note.

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of an offence which *ipso facto* destroyed his vote. Then by reference to the numbers the ballot can be produced, every care being taken to prevent any other ballot being seen, and upon its being ascertained how he voted, the poll is altered accordingly, whereas the Canadian Parliament deliberately adopted the other rule as above referred to. At the trial the respondent's counsel offered in express terms to waive his objections if any evidence was given to the trial judge upon which he would say that a *primâ facie* case of fraud had been made out. And if this was such a fraud there must surely be evidence of it. It was difficult to conceive how such a fraud could have been practiced. For it must be remembered that the voter getting his ballot has an opportunity to see that at that time it is not marked. He folds it up leaving the counterfoil and number exposed, which he exhibits on his return to the polling room to the deputy returning officer. The deputy returning officer then removes the counterfoil and in the presence of the voter deposits the ballot which he has brought back to him in the box. The witness that was examined in this case said that was all done and done in the presence of two scrutineers on each side and the poll clerk, so that the offer was made by the respondent's counsel, if a *primâ facie* case of fraud was made out, to withdraw the objection and allow the petitioner full and ample enquiry. The petitioner's counsel would not avail himself of that offer, and therefore his lordship properly determined not to allow the examination to proceed.

The following authorities were cited:

The North Durham Case (1); *The Harwich Case* (2); *The Litchfield Case* (3); *The Wigtown Case* (4); Rogers on

(1) 3 O'M. & H. 1.
(2) 44 L. T. 187.
(3) 3 O'M. & H. 139.
(4) 2 O'M. & H. 220.

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Election (1); *Macartney* v. *Corry* (2).

Then the learned counsel discussed the scrutiny charges under the eighth class of scrutiny particulars that farmers' sons voted who were not entitled to vote and contended:

First, that no scrutiny is at all allowed under the act; secondly, that no scrutiny could be held because the ballot is conclusive and is the only evidence as to how a man did vote; thirdly, a man cannot be allowed to say how he voted, and could not be compelled to say how he voted; fourthly, every person whose name is on the list is entitled to vote.

With regard to the apparent conflict which is introduced by the Franchise Act—by one section of the Franchise Act and by clause 70 of ch. 8 R. S. C.—they have to be reconciled. By the Franchise Act farmers' sons are required to have what is called a continuing qualification, differing from everybody else, and Parliament has evidently for the purpose adopted the oath as the protection. The same thing is done in the Local Legislature, they have farmers' sons and owners' sons and all that class who require to have, just as in this case, a continuing qualification, but under the local act it has been held in the *Wentworth Case*, and was intimated in the recent case in Kent with the same effect by the learned judges who were there, that there could be no scrutiny upon any ground whatsoever. The oath was the protection that the law intended. For those reasons no enquiry can be made under this head of objection taken in these particulars. *Stowe* v. *Joliffe* (3).

Sir. W. J. RITCHIE C.J.—Among the particulars of corrupt practices alleged are the following:—

8. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent, did at polling station No. 6, in the township

(1) 2 vol. (15 Ed.) p. 687. (2) 7 Ir. C.L.R. 190.
(3) L.R. 9 C. P. 446.

of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at said election though not qualified to do so.

20. Stephen Allen a resident of the township of Walpole, an agent of the respondent, did on the 12th day of November, 1887, induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though said Robert Dougherty was not qualified to vote at said election.

It is provided by 49 Vic. ch. 8 sec. 90 that

Every candidate who corruptly, by himself or by or with any other person on his behalf, compels or induces or endeavors to induce any person to personate any voter, or to take any false oath in any matter wherein an oath is required under this act, is guilty of a misdemeanor, and shall, in addition to any other punishment to which he is liable for such offence, forfeit the sum of $200 to any person who sues for the same.

And by sec. 91:

The offences of bribery, treating, or undue influence, or any of such offences, as defined by this or any other act of the Parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections of this act next preceding, are corrupt practices within the meaning of this act.

We have then in this case to look to the seven preceding sections, of which 90 is one, simply to discover what wilful offences are corrupt practices within the meaning of this act, and under sec. 90 the wilful offence is the compelling or inducing or endeavoring to induce any person to take any false oath in any matter wherein an oath is required under this act, and the inquiry is not whether the candidate is guilty of a misdemeanor or not.

Then by section 93 it is provided that:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practices had been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate the election of such candidate if he has been elected shall be void.

The inquiry then in this case is confined to the question: Whether there has been a wilful offence under section 90, and if so, whether it was committed by an agent of the candidate?

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Mr. Frederick Harrison represented Dr. Montague under a written authority whereby he appointed Harrison to act in the capacity of scrutineer for him (me) at polling sub-division No. 6, in the municipality of Walpole in the said electoral district of Haldimand.

A voter named Nixon who was on the list qualified as a farmer's son, and qualified only in that capacity, offered himself to vote at this polling place as a farmer's son. William Parker, the scrutineer of the opposing candidate insisted that this voter should be sworn and this is the account he gives of what took place:—

William Parker, sworn—Examined by Mr. Aylesworth—Q. Where were you engaged on polling day? A. Sub-division 6 of Walpole. Q. What capacity? A. As agent at the polls. Q. For whom? A. For Mr. Colter. Q. Were you there when Mr. Nixon came to vote—the last witness? A. Yes. Q. What took place? A. When he came in I said to the returning officer I want this man sworn: Nixon said what is that for; he said I have voted here three or four times and you have never said anything; I said well I want you sworn; so he turned to go out and the poll clerk, and I am not sure whether others said to him—Q. The poll clerk—who do you mean? A. Andrew Falls: that is the name he didn't remember; the poll clerk said don't go out; if you do you cannot come back again; so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker, you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning officer and says I require him sworn; so the returning officer took the book to swear him, and I said oath "T," and I looked over and saw the returning officer was reading oath "T" to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmer's sons' oath. Q. Did you have a copy of the oath? A. Yes, I had a copy of the act. Q. How did you know it was oath "T?" A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district?" A. Yes, sir, that is the last.

And Nixon the voter on his examination says in reply to the question: What was the form of oath ad-

ministered to you? was it as owner or owner's son or farmer's son or which ? Answers, farmer's son.

This oath "T" is the form of oath of qualification of a person whose name is registered as a voter on the list of voters as being a farmer's son, not claiming the benefit of the provision as to occasional absence as a mariner, fisherman or student.

I, (B), solemnly swear (or if he is one of the persons permitted by law to affirm in civil cases, solemnly affirm) :

1. That I am the person named or purporting to be named, by the name of , (and if there are more persons than one of the same name on the said list, inserting also his addition or occupation) on the list of voters for polling district No. , in the electoral district (or municipality) of .

2. That I am a British subject by birth (or naturalization, as the case may be), and that I am of the full age of 21 years.

3. That I have not voted before at this election, either at this or at any other polling place.

4. That I have not received anything, nor has anything been promised me, directly or indirectly, either to induce me to vote at this election, or for loss of time, travelling expenses, hire of team, or for any other service connected therewith ;

5. That I have not, directly or indirectly, paid or promised anything to any person, either to induce him to vote or to refrain from voting at this election ;

6. That I am resident with my father, (or if his father is dead, with my mother) within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters. So help me God.

And this last clause is that which it is claimed the witness could not truthfully take and it cannot be denied that if he did take this oath he did take a false oath in a matter wherein an oath is required under the act.

This statement of Mr. Parker I must accept as strictly true, because neither the returning officer nor Harrison, the scrutineer of Mr. Montague, were called to show that oath "T" was not regularly and properly administered, or that any portion of the oath was omitted, and independent of any evidence of Parker in the absence of any evidence to the contrary it must be pre-

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sumed the returning officer did his duty. If he did not do so the sitting member should have shewn it.

It is not necessary for me to discuss or decide a question raised on the argument, viz: whether a voter registered as a farmer's son has a right to choose what oath he will take, because in this case he actually took the farmer's son's oath, and did not choose or offer to take any other. I may say, however, that if I were called on to express an opinion I should require much more than I have heard in this case to convince me that a voter so registered has any such right.

The questions then resolve themselves to these: Was Harrison the agent of Mr. Montague at this polling place, and if so, did he compel or induce, or endeavor to induce, the voter Nixon to take the false oath? There cannot be a doubt that, having been authorized to act as scrutineer at the polling place in question, he was there as the agent of the candidate appointing him. The sections of the act 36, 37 and 38 make this, in my opinion, too plain for argument, they are as follows:

36. In addition to the deputy returning officer and the poll clerk, the candidates and their agents (not exceeding two in number for each candidate in each polling station), and, in the absence of agents, two electors to represent each candidate on the request of such electors, and no others, shall be permitted to remain in the room where the votes are given, during the whole time the poll remains open;

Provided always, that any agent bearing a written authorization from the candidate, shall always be entitled to represent such candidate in preference to, and to the exclusion of any two electors, who might otherwise claim the right of representing such candidate under this section. 41 Vic. ch. 6 s. 4.

87. Any person producing to the returning officer or deputy returning officer, at any time, a written authority from the candidate to represent him at the election or at any proceeding of the election, shall be deemed an agent of such candidate within the meaning of this act. 37 Vic. ch. 9., s. 36.

38. One of the agents of each candidate, and, in the absence of such agent, one of the electors representing each candidate, if there

is such elector, on being admitted to the polling station shall take the oath to keep secret the names of the candidates for whom any of the voters has marked his ballot paper in his presence, as hereinafter required, which oath shall be in the form Q in the first schedule to this act. 37 Vic. ch. 9 s. 36, part.

If an agent, then was Harrison guilty of the corrupt practice attributed to him? The voter, it appears, having turned to go out, the poll clerk said to him "don't go out, if you do you cannot come back again," so he turned and came back and after asking Parker "what is your objection to my vote" and receiving the reply, "I don't discuss voters' qualifications here," and requiring him to be sworn; and while, Parker says, "the officer was reading oath T to him, but he still hesitated,"—(Q. Who did? A. Nixon the voter.)—Harrison the other scrutineer said: "your vote is perfectly good Tom, take the oath Tom—I will be responsible." "So he took the oath and voted." And Nixon himself says in answer to the question;

Did Harrison take any part when your vote was challenged? A. He insisted that I should take the oath. Q. What did he say? A. He said my vote was perfectly good. Q. Anything else? A. That was all; I took his word and went and voted.

If the scrutineer or agent representing the candidate chose to interfere with the voter and urge him to take an oath he could not truthfully take and, in the language of the voter himself, "he insisted that I should take the oath, he said my vote was perfectly good, I took his word and went and voted:" and, further, professed to assume the responsibility of the voter's doing so, this, in my opinion, was such a wilful inducing or endeavoring to induce the voter to take a false oath as to amount to a corrupt practice.

May it not, indeed, be fairly said that this was something more than mere inducing or endeavoring to induce this voter to take this oath which, but for the agent's interference, the hesitating voter might not, and from his own evidence, most probably never would,

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have taken, for he says, "I took his word and went and voted?" Did not this insistance that he should take the oath, and this assumption of responsibility for his so doing, if not amounting to a legal compelling very nearly approach moral compulsion or coercion? This having been done in a place and at a time when the scrutineer or agent ought not to have interfered with the voter, who should have been left to act as his own judgment and knowledge of his position prompted, and on his own responsibility, constrains me to the conclusion that what Harrison did was done corruptly and wilfully with the intention of securing the vote, at all hazards, for the party whom he was representing; for I cannot think he would have been so urgent that the oath should be taken if he had not been well assured for whom the voter intended to vote: and I am the more impressed with this conviction inasmuch as the evidence stands uncontradicted, and I cannot doubt but that Harrison would have been examined at the trial could he have contradicted the evidence of Parker, or have shewn that what he did was done under a misapprehension or mistake either of fact or law, that he honestly believed the voter was entitled to vote and could truthfully take the oath, and that what he did was not done wilfully or corruptly. As no excuse or justification has been put forward for his conduct the sitting member must take the consequence of his improper act and the election must be declared void.

STRONG J.—I have the misfortune to differ from the majority of the court in the Harrison-Nixon case.

The particulars of this charge are, as they have just been stated by the learned Chief Justice, that Frederick Harrison, who was the scrutineer for the respondent at polling place No. 6, in the township of Walpole,

induced Thomas Nixon, whose name appeared on the registry as a voter, to take a false oath and to vote, though not qualified, and thereby committed a corrupt act, as an agent, sufficient to avoid the election. It appeared that Nixon was registered as a farmer's son and that his father had died, on the 4th of April, 1886, before the final revision of the lists but that his name was left on the lists as a farmer's son; that the oath administered to him, and which he certainly could not properly take, was oath "T" which reads as follows:

I am resident with my father within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters,

and that he nevertheless took this oath.

Two witnesses were examined on this charge, the voter Nixon and Parker the scrutineer for the petitioner at the poll in question.

What is said by Nixon is as follows:—

Q. Did Harrison take any part when your vote was challenged? A. He insisted that I should take the oath. Q. What did he say? A. He said my vote was perfectly good. Q. Anything else? A, That was all; I took his word and went and voted. * * Q. The deputy returning officer I suppose, read the oath over to you before you took it? A. Yes sir. Q. That is the way it was administered? A. Yes sir. Q. Was this part of it: "That I am a resident with my father within this electoral district and have not been absent from such residence more than six months since I was placed on the list of voters? A. I do not remember that part "with my father, &c."

* * * * * * *

Q And when you went in the polling booth, as I understand, the gentleman who was there was Mr. Parker? A. Yes, sir. Q. Who was there representing Mr. Colter, required you to be sworn? A. Yes, sir.

Then Parker is called and he is examined by the counsel for the petitioner:

Q. Were you there when Mr. Nixon, the last witness came to vote? A. Yes. Q. What took place? A. When he came in I said to the returning officer, I want this man sworn; Nixon said what is that for; he said I have voted here three or four times and you have never said anything; I said, well, I want you sworn; so he turned

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to go out—the poll clerk and I am not sure whether others said to him. Q. The poll clerk—who do you mean? A. Andrew Falls; that is the name he didn't remember; the poll clerk said don't go out; if you do you cannot come back again: so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker; you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning officer and says I require him sworn; so the returning officer took the book to swear him, and I said oath "T," and I looked over and saw the returning officer was reading oath "T" to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmers' sons' oath. Q. Did you have a copy of the oath? A. Yes, I had a copy of the act. Q. How did you know it was oath "T"? A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district"? A. Yes, sir, that is the last.

On cross-examination he says:—

Q. You turned to the returning officer and said what? A. I want him sworn. Q. Now what further? A. He hesitated again and Harrison said your vote is perfectly good, Tom, and he rose partly off his feet, he says take the oath, Tom, take the oath Tom, I will be responsible. Q. What did you say to that? A. Nothing. Q. Then what did you do? A. Went to the returning officer, took the book, I said oath "T." Q. Thereby meaning? A. The farmer's sons' oath. Q. Then what did the returning officer do? A. He read the oath, read the farmer's sons' oath. Q. Did you hear him reading it? A. Yes.

Now upon this evidence the learned judge found that Nixon had a good vote and concluded his adjudication on the charge as follows:—

Now, under those circumstances, can it be found that Mr. Harrison wilfully and corruptly induced Thomas Nixon to take a false oath in order that his vote, which was perfectly good without any false oath, might be put in? I think that such a finding would not be justified by the facts, and I find therefore that Mr. Harrison did not wilfully and corruptly induce this Thomas Nixon to take the oath which he did, and I dismiss that charge also.

As regards agency I am not clear that Harrison who was a mere scrutineer, and therefore an agent with a

limited authority, was an agent for whose corrupt acts the respondent was according to the general law of elections answerable. But I will assume rather than admit that he was such an agent. We have then to consider the provisions of the law applicable to the case, and these are contained in secs. 90, 91 and 93 of the Dominion Elections Act.

Sec. 90 enacts that :

Every candidate who corruptly, by himself, or by or with any other person on his behalf, compels or induces or endeavors to induce any person to personate any voter, or to take a false oath in any matter wherein an oath is required under this act, is guilty of a misdemeanor, &c.

And sec. 91 declares that:

The offences of bribery, treating,or undue influence, or any of such offences, as defined by this or any other act of the Parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections of this act next preceding, are corrupt practices within the meaning of this act.

And sec. 93:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practice has been committed by any candidate at an election, or bv his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate if he has been elected shall be void.

Now it is apparent that these provisions do apply to make the inducing a voter to take a false oath by an agent a corrupt practice avoiding the election, provided it is done (as required by section 90) "corruptly," and (as required by sec. 91) "wilfully."

Then can it be said on the evidence that Harrison acted "corruptly" and "wilfully?"—I am of opinion that it cannot. Supposing that Harrison was aware of the father's death, it appears to me that he acted in perfect good faith when, assuming very naturally, though in point of law I admit erroneously, that Nixon, registered as a farmer's son, did not lose his vote

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because he had become the actual owner of the property on which he had resided with his father, he encouraged him to take the oath appropriate to his actual *status* as a voter. That Harrison did or said anything to induce Nixon to take oath "T" or any other particular form of oath is not proved. He is therefore to be regarded as having instigated Nixon only to take such an oath as was appropriate to his case. This I cannot hold to have been a wilful and corrupt inducement to take a false oath.

2nd. Further Nixon was originally registered as a farmer's son and at the time he was registered it was true; his father died in April, 1886, and this election took place in 1887. There is no proof that Harrison knew that Nixon's father was dead, in which case oath "T" would have been the proper oath.

I must hold, therefore, that the act was not a wilful one, was free from any corrupt intent, and I consequently agree in the conclusion of the learned judge at the trial that the charge was not proved.

There is another charge, that Allen, a scrutineer for the respondent, induced Dougherty, a voter to take a false oath. It occurred at polling place No. 3, in the township of Walpole.

This charge, in my opinion, wholly fails. The facts are that Dougherty removed from the house his father resided in into another house on the same farm, but that he occupied this last house as a caretaker or servant of his father, the possession being clearly in the father. Assuming that agency was proved, and that is a very considerable assumption for there is much doubt about it, I hold with the learned judge that the voter had a perfectly good vote and was able consistently with the truth to take the oath which was administered to him.

3rd. As to the charge that the deputy returning officer at polling place No. 4, Oneida, put into the ballot box

and counted ballots not duly received from electors and which is thus referred to in the notice of appeal:

5. The charge that the deputy returning officer at polling sub-division No. 4 in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning officer at the said election.

I am clear there is nothing in this case. It relates only to one ballot which could not affect the result of the election. Moreover the county judge on the recount made such an allowance in favor of the defeated candidate as afforded a sufficient remedy for any irregularity which the evidence establishes.

Another case is charge No. 6 in the notice of appeal, viz.:

The charge that the deputy returning officer at polling sub-division No. 2 in the township of Oneida, improperly marked ballots received by him at the said election, from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge, rejecting the evidence on behalf of the petitioner which was tendered by him at the trial in support of the said charge.

Nothing could be made of this charge without admitting the evidence of voters to show how they voted. This I hold cannot be done. To do so would, in my opinion, be a direct violation of the act which requires secrecy. Sec. 7, of the Dominion Elections Act, enacts:

No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.

It is no answer to this to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived. The whole purview of the law is different from the English act and from the Ontario act. I am of opinion, therefore, that the learned judge rightly rejected the evidence though I may not be able to agree with the grounds he put it upon.

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The next charge that is important is stated as follows in the notice of appeal :—

7. The charge that many persons voted at the said election who, for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to enquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the list of voters as finally revised, and certified by the revising barrister and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election had, between the time of the final revision of the voters' lists by the revising barrister and the date of the said election, forfeited the right to vote thereat.

This principally relates to the case of farmers' sons whose votes were impeached. It appears to me that the evidence was, if admissible in other respects, material, inasmuch as if it were shewn that bad votes were received more in number than respondent's majority that would be sufficient to avoid the election. Then, as regards the qualification of farmer's sons, I think it clear that the registry was not conclusive, though as regards qualification founded on ownership it appears to be conclusive.

I found this opinion on section 41, which is as follows :

41. Subject to the provisions hereinafter contained all persons whose names are registered on the lists of voters for polling districts in any electoral district, in force under the provisions of "The Electoral Franchise Act" or of the act passed in the session held in 48th and 49th years of Her Majesty's reign and intituled "An act respecting the Electoral Franchise" on the day of the polling at any election for such electoral district, shall be entitled to vote at any such election for such electoral district and no other persons shall be entitled to vote thereat.

read in conjunction with section 45 sub.-sec. 2 enacting that

Such elector, if required by the deputy returning officer, the poll clerk, one of the candidates or one of their agents, or by any elector present, shall, before receiving his ballot paper, take the oath of qualification in the form S, or in one of the forms T, U, V, or W, in the first schedule to this act, as the circumstance of the case require.

—which oath the deputy returning officer and poll clerk are each hereby authorized to administer."

And the last paragraph of oath "T"

That I am resident with my father within this electoral district, and that I have not been absent from such residence for more than six months since I was placed on the said list of voters.

Now I contend that the proper construction of these provisions is that no one is to vote who has not the qualification arising out of a continuous residence subsequent to registration, for I say that sec. 41 is subject to the exception afterwards contained in sec. 45, sec. 2, which, by requiring the oath of qualification, makes, in my opinion, the fact of the continuance of the qualification, stated in the last paragraph of oath "T," of residence with the father essential as a preliminary to the right to vote. It is true that it makes the oath sufficient evidence for the purpose of authorizing the reception of the vote, but it does not, in my opinion, make it conclusive evidence, and therefore on a scrutiny further enquiry is admissible, and if it is shewn that a larger number of bad votes than the majority were admitted the election ought to be set aside, though the seat could not, of course, be awarded, inasmuch as no voter can be asked how he voted. *Stowe* v. *Jolliffe* (1) does not apply. The registry there was conclusive, here it is not.

Therefore it appearing that evidence duly tendered at the trial was improperly rejected, there should be further enquiry and the witnesses whose evidence was so rejected should be examined pursuant to sec. 51 ss. 3 of the Controverted Elections Act (2), and the appeal should be ordered to stand over for that purpose.

FOURNIER J.—La pétition se plaignant de l'élection de l'intimé contient les allégations ordinaires de corruption et allègue en outre que des bulletins ont été

(1) L. R. 9 C. P. 446. (2) R. S. C. ch. 9.

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admis et rejetés illégalement ainsi que beaucoup d'autres irrégularités, et conclut à l'annulation de l'élection.

Sur les trente-neuf accusations de menées corruptrices contenues dans les particularités, l'enquête a eu lieu dans un grand nombre de cas, et a été abandonnée dans plusieurs autres. L'intimé avait donné avis qu'il procéderait à la preuve sur des accusations récriminatoires. Mais la pétition ayant été rejetée en entier, il ne s'est pas trouvé dans l'obligation de procéder sur ces charges.

Parmi les accusations rejetées par l'honorable juge Street qui a présidé au procès et au sujet desquelles il y a appel, se trouve la huitième qui est énoncée dans les termes suivants :

8o. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six. in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at the said election, although not qualified to do so.

La preuve de cette accusation faite par Thomas Nixon le voteur lui-même et par William Parker, l'agent de l'autre candidat, W. Colter, est si complète, qu'elle ne laisse aucun doute sur l'existence du fait imputé.

Nixon s'étant présenté pour voter, Parker, l'agent de Colter, le requit de prêter serment; il s'en plaignit, mais la demande ayant été réitérée, il fit quelques pas pour sortir du poll. Changeant subitement d'idée, il revint sur ses pas et se plaignit de nouveau de ce que l'agent exigeait de lui le serment de qualification. L'agent Parker ayant encore insisté, le député-officier rapporteur commença à lire la formule du serment de qualification pour les voteurs enrégistrés sur la liste des fils de fermiers. Nixon hésitait encore, lorsque Harrison, l'agent du membre siégeant se levant à demi, interrompit l'officier rapporteur en disant au voteur :

Your vote is perfectly good, Tom, take the oath, Tom, take the

oath; I will be responsible.

Immédiatement après ces paroles, Nixon fit le serment requis et vota. Les mêmes faits sont aussi prouvés par Wm. Parker, de la manière la plus positive. Dans son témoignage, Nixon dit à propos de l'intervention de Harrison, que ce dernier voyant l'objection à son vote insista à ce qu'il fit serment.

Harrison insisted that I should take the oath. He said my vote was perfectly good. That was all, I took his word and went and voted.

Le serment prêté par Nixon est celui de la formule T. concernant les fils de fermiers, se terminant par la déclaration :

That I am resident with my father within this electoral District, and that I have not been absent from such residence more than six months since I was placed on the list of voters, &c., &c.

L'agence de Harrison est prouvée. Il avait été spécialement nommé par écrit pour représenter l'intimé à ce poll. Il était de son devoir de protéger les intérêts de l'intimé en résistant à des objections non fondées qui auraient pu empêcher des voteurs de donner leurs votes en faveur de son candidat. Mais celle qui avait été prise contre Nixon était bien fondée. Porté sur la liste des voteurs comme fils de fermier, demeurant avec son père, il avait, lors de son vote perdu depuis longtemps sa qualification de voteur, par le décès de son père. Il avait aussi laissé la propriété sur laquelle il avait été qualifié lorsqu'il demeurait avec son père, pour aller demeurer avec une de ces sœurs sur une autre propriété. Il n'était enregistré comme voteur qu'en qualité de fils de fermier et en aucune autre qualité, sur aucune autre liste. C'est ainsi qu'il a voté. Le serment qu'il a prêté qu'il était résident dans le district électoral avec son père était évidemment faux et tout-à-fait contraire à la vérité. Il donne lui-même la date du décès de son père dans son témoignage comme ayant eu lieu le 4 avril 1886. Sa mère était morte depuis environ dix ans. Il n'a pas prêté le ser-

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ment sans beaucoup d'hésitation, comme on l'a vu par son propre récit. Sans l'insistance de Harrison, il est clair qu'il serait retourné sans voter. Ses hésitations sont faciles à comprendre, il lui répugnait sans doute beaucoup de faire le serment qu'il résidait avec son père mort depuis 19 mois. Mais pressé par Harrison, son voisin qui savait aussi bien que lui la mort de son père, et qui, d'après sa manière de lui adresser la parole, semble être avec lui sur un pied de familiarité intime, il a fini par se laisser persuader qu'il n'y avait pas de mal à faire ce serment; il a pu tout probablement se croire dégagé en conscience de toute responsabilité par le ton persuasif et la persistance de Harrison à lui répéter que son vote était bon et à lui dire de voter, qu'il prenait tout sur sa responsabilité. Sans l'intervention de Harrison, il eût sans doute suivi sa première pensée de s'en aller sans voter; évidemment ce vote n'est dû qu'à la pression exercée sur Nixon par Harrison. Ce dernier ne pouvait certainement pas être de bonne foi lorsqu'il agissait ainsi, il ne pouvait ignorer la mort du père de Nixon dont une des propriétés adjoignait la sienne. Dans tous les cas puisqu'il prenait sur lui d'affirmer la validité du vote, tandis qu'il était clairement illégal, sa conduite a eu l'effet de rendre l'intimé responsable des conséquences de son action. S'il ignorait la véritable position de Nixon fils, il aurait dû s'en informer avant d'en parler avec autant d'assurance qu'il l'a fait. Comme tant d'autres, il a mis plus de zèle que de discrétion dans l'exercice de ses fonctions comme agent et son principal doit malheureusement en supporter les conséquences.

Harrison s'est donc en connaissance de cause rendu coupable du fait d'induire Nixon à faire un faux serment. L'offense qu'il a ainsi commise est définie comme suit par la section 90 de l'acte des élections, déclarant:

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That every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavors to induce any person to take any false oath in any matter wherein an oath is required under the Act, is guilty of a misdemeanor.

Par la section suivante, 91me, il est déclaré que

Any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

Le fait d'avoir induit Nixon à faire un faux serment est clairement, d'après ces sections, une menée corruptrice commise par un agent de l'intimé, et a eu en conséquence l'effet d'affecter la légalité de l'élection.

Dans la section 90, le mot *corruptly* ne signifie pas d'une manière absolue que l'acte, qualifié ainsi, a été fait dans un but immoral, malhonnête ou avec malice. Ce mot y est plutôt employé pour signifier que l'acte visé par cette expression est une violation de la prohibition du statut à cet égard (1). Il n'était pas nécessaire de faire la preuve que Harrison, en agissant comme il l'a fait, avait une intention malhonnête et immorale. Toutefois il n'a pas offert son serment pour expliquer ses recommandations. Cependant l'opinion de l'honorable juge a été que la preuve de l'intention de Harrison aurait dû être faite, mais elle est contraire à l'interprétation adoptée par les autorités suivantes:

All the judges have considered that the word 'corruptly'...... means, with the object and intention of doing that thing which the statute intended to forbid. It does not mean corrupt in the sense in which you may look upon a man as being a knave or a villain.

Per Mr. Justice Blackburn in *The North Norfolk Case* (2).

And in discussing the meaning of the word in considering whether treating had or had not been done corruptly, Mr. Justice Blackburn says, "the point to be considered is, Was it given with an intent to influence the election?"

The *Wallingford Case* (3).

The word 'corruptly' means contrary to the intention of this Act, with a motive or intention by means of it to produce an effect upon the election.

(1) *Cooper* v. *Slade* 6 H. L. Cas. 746 to 788.

(2) 1 O'M. & H. 236, at page 242.

(3) 1 O'M. & H. 57, at page 59.

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Per Mr. Justice Blackburn in *The Hereford Case* (1).

This language is quoted with approval by Mr. Justice Mellor in *The Launceston Case* (2).

And by Mr. Baron Dowse in *The Carrickfergus Case* (3).

See also, on the same subject, *The Louth Case* (4).

Harrison connaissait parfaitement l'objection faite à Nixon, il avait entendu Parker demander l'administration du serment suivant la formule T. au sujet du fils de fermier; il avait été témoin des hésitations de Nixon, mais sa crainte de perdre un vote pour l'intimé le dominait tellement, qu'il a exercé toute la pression dont il était capable sur ce jeune homme pour l'engager à prêter un serment faux. Non seulement Harrison avait l'intention d'assurer un vote à son candidat, mais il y a mis de la persistance et l'a obtenu au moyen d'un serment faux. Il est inutile d'en dire davantage pour prouver que l'acte de Harrison a été fait volontairement et non par inadvertance. Il a manifesté sa volonté assez souvent et n'a dû son succès qu'à ses efforts réitérés. Quels que soient les motifs qu'on lui suppose son acte a été au moins *wilful* dans le sens d'intentionnel, tel qu'il a été interprété par cette cour dans la cause de l'élection de Selkirk, *Young* v. *Smith* (5).

Je suis en conséquence d'avis que pour ce seul fait de Harrison l'élection doit être annulée et l'appel maintenu avec dépens.

TASCHEREAU J.—I am of opinion that this election should be annulled on the Harrison-Nixon charge, at No. 6 Walpole polling division.

The facts relating to this charge are as follows:

Thomas Nixon voted at the election. His name was on the voters' list as a farmer's son and not in any other capacity. He is an unmarried man, living with

(1) 1 O'M. & H., at p. 195.
(2) 2 O'M & H., 129, at p. 133.
(3) 3 O'M. & H., at p. 91.
(4) 3 O'M. & H., 161.
(5) 4 Can. S. C. R. 494.

his sister, on the property in respect of which he voted; his mother died some years ago, his father also at the time of the election, had been dead a little more than 19 months.

Nixon's post-office is Hagersville, and he has lived on the place ever since he was born.

The respondent's agent at this polling place was Frederick Harrison, whose post-office is also Hagersville, and who appears assessed as owner of the next farm to Nixon, in the adjoining concession.

When Nixon came to vote, one of the scrutineers at the poll required that he should be sworn; Nixon expostulated, but the demand was repeated, and Nixon thereupon turned to go out, but came back and again remonstrated with the scrutineer, and was again met with the demand that he be sworn.

The deputy returning officer began to read to him the form of oath for persons registered on the list as farmers' sons, but Nixon still hesitated, when Harrison, partly rising off his feet and interrupting, said: "Your vote is perfectly good, Tom; take the oath, Tom, take the oath; I will be responsible," and thereupon Nixon took the farmers' sons' oath and voted.

Nixon states in his account of what took place, that on his vote being challenged Harrison "insisted that I should take the oath He said my vote was perfectly good. That was all; I took his word and went and voted."

On these facts the petitioner alleges that the said Harrison, an agent of the respondent, induced or endeavored to induce the said Thomas Nixon to take a false oath when tendering his vote at the polls and was thereby guilty of a corrupt practice under the Dominion Elections Act, sec. 90 which provides that every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavors to induce

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any person to take any false oath in any matter wherein an oath is required under the act, is guilty of a misdemeanor, and sec. 91 by which any wilful offence against the preceding section is made a corrupt practice within the meaning of the act. As to the facts there can hardly be any dispute.

First, as to Harrison's agency, there is no room for doubt. He was specially appointed by the respondent in writing to represent him at this poll, and it was in the course of his duty as such representative of the respondent that he interfered to have Harrison's vote taken.

2nd. The oath which Nixon took was unquestionably taken in a matter wherein the statute required an oath to be taken. One of Colter's scrutineers requiring it, Nixon could not get a ballot paper without taking the oath, and the farmers' sons' oath, he being on the list as such, was the only one that could be administered to him as was shown.

3rd. It is as conclusively established that the oath he took was a false one. He swears that he was then resident with his father within this electoral district; yet his father had been dead nearly two years.

4th. Harrison induced Nixon to take the oath. In fact, he would not have taken it, it is plain from the evidence, if Harrison had not interfered to induce him to do so. He says that Harrison insisted he should take the oath, and he said "my vote was perfectly good. I took his word and went and voted."

Now, was this act of Harrison a wilful act and one corruptly done within the meaning of the Elections Act? It is settled law that the word "corruptly" as used in sec. 90 of the Elections Act does not mean "wickedly, immorally or dishonestly," neither can it mean "consciously" or with intent to commit an offence. The word means, as per Lord Cranworth, in *Cooper* v. *Slade*

(1), "in violation of that which this statute was passed to prohibit."

Here Harrison's object and intention is manifest. He heard the objection raised to Nixon's vote; he knew the point of the objection, as the scrutineer who objected had also stated the particular form of oath which he demanded to be administered, viz:—that for a farmer's son not claiming the benefit of the provisions as to occasional absence; he had seen Nixon in the first place turn away unwilling to take the oath; he saw him then hesitating; the voter was a young man; Harrison was manifestly alarmed lest a vote should be lost to the respondent if something was not promptly done to reassure the voter and encourage him into taking the oath; he hastened to assume the responsibility of what he was urging Nixon to do; he heard the oath read containing the averment of residence with the father, but said not a word to retract or modify the urgency of his previous language; he manifestly acted with the object and intention of securing the vote at all hazards, even though it was necessary that the untrue oath should first be taken.

He could not have believed that Nixon's father was living; and the respondent did not attempt to bring him in the witness box to swear to that belief. He lives in the same place as Nixon, and is the owner of a farm next to Nixon, in the adjoining concession. He knows him intimately as is evidenced by the familiar way in which he addresses him "take the oath, Tom, take the oath?"

This with the fact of his not coming forward to swear the contrary cannot but create a strong presumption that he knew of Nixon's father's death. But even without this knowledge, the corrupt act is proved. He induced Nixon to knowingly, wilfully and corruptly take a false oath required by the act, for

(1) 6 H. L. C. 746.

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he must have known that the farmer's son's oath was the only one that Nixon could give so as to vote. This is what the act in plain terms declares to be a corrupt practice. And the *scienter* of Harrison is immaterial. If an agent assumes recklessly to induce a voter to take an oath without previously ascertaining or taking any steps to ascertain whether that oath will be true or not, and the oath turns out to be a false one, I think it clear that this agent has committed the offence created by section 90 of the statute. He has procured a vote, which, without that false oath, could not have been recorded. He has consequently acted "in violation of that which the statute was passed to prohibit." To say that Harrison's *scienter* was necessary to complete the offence, is to say that he must have been guilty of subornation of perjury. Now it is, as I read the section, something more than subornation of perjury that Parliament has legislated against, another and different offence that it has created. And I cannot see that the fact that the statute has declared this to be a misdemeanor makes any difference. No *mens rea*, no *scienter*, is necessary where a statute prohibits the very act that has been done, neither is *ignorantia juris* or *ignorantia facti* an excuse. In *R.* v. *Prince* (1) for instance, the defendant having been found guilty of abducting a girl under 16 the court held the conviction right, although the jury had found that the prisoner reasonably believed the girl to have been 18. In *R.* v. *Bishop* (2), also it was held that under a statute which prohibits the receiving of lunatics in a house not licensed, the owner of a house who had received lunatics was guilty of the offence enacted by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

These cases show that ignorance of fact is no excuse

(1) 13 Cox 138. (2) 5 Q. B. D. 259.

where the act is prohibited by the statute, and go further even than it is necessary to do in to the the present case. So under a statute imposing a penalty for having adulterated tobacco the defendant was held liable to the penalty, although he did not know that he had such tobacco in his possession. *R.* v. *Woodrow* (1). I also refer to *Atty. Gen.* v. *Lockwood* (2), *R. V. Marsh* (3).

In *Cundy* v. *Lecocq* (4) Stephen J. said:—

I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have; in old times and as applicable to the common law or to earlier statutes, the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowleage is of the essence of the offence created.

I refer also to the case of *Young* v. *Smith* (5), in this court, and to *The State* v. *Perkins* (6).

In *Mierelles* v. *Banning* (7), the word "knowingly" was in the statute as an ingredient of the offence there charged, and consequently the case has no application here. This word "knowingly" has no doubt purposely been left out of the clauses of the Elections act which declare what will be corrupt practices.

As to the offence being wilful, I need only refer to the case of *Young* v. *Smith* (5), in this court, hereinbefore cited. Harrison wilfully induced Nixon to take the oath, that oath was false; this constitutes a wilful offence in the sense of the election act. If a man wilfully does an act which the statute declares to be an offence, he is guilty of an offence against the statute. See *R* v. *Holroyd* (8), and *Hudson* v. *McCrae* (9).

I may notice that what the act declares illegal is the

(1) 15 M. & W. 404.
(2) 9 M. & W. 378, 401.
(3) 4 D. &. Ry. 261.
(4) 13 Q. B. D. 207.
(5) 4 Can.S.C.R. 494.
(6) 42 Vermont 399.
(7) 2 B. & Ad. 909.
(8) 2 M. & Rob. 339.
(9) 4 B. & S. 585.

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inducing to take a false oath. It does not say, "inducing to commit perjury." So that if the oath is a false one, whether the party taking it knew it to be so or not, the inciting to take it would appear to fall under this act. Nothing in this case, however, turns upon this.

As to the petitioner's claim for the seat, it must be dismissed.

The evidence of thirty-six voters to show that they had voted for Colter at polling division, No. 2, Oneida, was properly held not admissible by the learned judge at the trial.

Had the learned judge permitted the enquiry to have been prosecuted as the petitioner desired, it would have in effect disclosed not merely how those willing to tell had voted, but practically how every man at the poll had voted, because if out of one hundred votes fifty are found to have voted for A. and fifty for B and the fifty who voted for A. are called and expressing their willingness to tell, do tell that they voted for him, it at once becomes known who the fifty were who voted for B., although they may be most unwilling that that fact should be disclosed. It would be interfering, therefore, with the overriding principle prevailing throughout the Ballot Act, and which embodies a great public policy, had the learned judge permitted the evidence to be given.

The evidence tendered by the petitioner to prove that a certain number of farmers' sons who had voted had no right to vote was also properly declared inadmissible. The list coupled with the oath, when the oath is required, is conclusive as to their right to vote.

The other irregularities complained of on this appeal could not affect the result of the case, in the view I take of it.

The appeal should, in my opinion, be allowed with costs and the election set aside.

GWYNNE J.—The scrutiny of ballots having resulted in leaving unaffected the right of the respondent in the election petition to retain the seat the only material points upon which, in view of the judgment arrived at by the majority of the court, it is necessary for me to express any opinion, are the two charges of corrupt practices made in connection with the cases of Thomas Nixon and Robert Dougherty.

These charges were as follows:

1. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll, and to vote at said election though not qualified to do so.

2nd. Stephen Allen, a resident of the township of Walpole. an agent of the respondent, did on the 12th day of November, A.D., 1887, induce Robert Dougherty to take a false oath at polling station number three in the township of Walpole, though said Robert Dougherty was not qualified to vote at said election.

These charges are based wholly upon sections 90 and 91 of the Dominion Elections Act, 49 Vic., ch. 8. These sections are as follows (1):—

Before enquiring into the evidence adduced in support of these charges, it will be well to determine first what is the true construction of this section 90 and what is the nature of the offence therein pointed at under the words "induce any person to take a false "oath in any matter wherein an oath is required "under this act" and how it can be committed and proved.

By the Dominion Act, 49 Vic. ch. 154 of the Revised Statutes of Canada which is a consolidation of, and substitution for, the 1st, 2nd, 6th and 7th sections of

(1) See p. 513.

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the Dominion Statute 32-33 Vic. ch. 23, and the 1st sec. of 33 Vic. ch. 26 it is, among other things, enacted that

Every person who (having taken an oath, affirmation, declaration or affidavit in any case in which by any act or law in force in Canada or in any Province of Canada it is required, or authorised, that facts, matters or things be verified or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person) wilfully and corruptly upon such oath, affirmation, declaration or affidavit swears or makes any false statement as to any such fact, matter or thing, is guilty of wilful and corrupt perjury and liable to be punished accordingly.

A false oath to constitute perjury at common law must be taken in a judicial proceeding before a competent jurisdiction, but the taking a false oath before a person competent and authorized to administer it, although the oath be not in a judicial proceeding, is a misdemeanor at common law, though perjury cannot be assigned upon such an oath unless it be under the provision of some statute (1), but the above statute, ch. 154 of the Revised Statutes, does make the taking a false oath in any case which, by any act or law in force in Canada, it is required or authorized that any fact, matter or thing be verified upon oath to be perjury; so that it is clear that perjury can be assigned upon and for the taking of a false oath in any matter wherein an oath is required under the Dominion Elections Act, and the procuring or suborning any person to take any such false oath is a misdemeanor and punishable as such wholly independently of the 90th section of the said Dominion Elections Act. The punishment for such offences is provided by the above ch. 154 of the revised statutes which enacts as follows:—

Every one who commits perjury or subornation of perjury is guilty of a misdemeanor and liable to a fine in the discretion of the court and to 14 years imprisonment.

Now the 90th sec. of the Elections Act does not create

(1) *The Queen* v. *Chipman* 1 Den. C.C. 432; *Reg.* v. *Hodgkiss* L. R. 1 C. C. R. 212.

any new offence or constitute that to be a misdemeanor which was not already a misdemeanor independently of the section; what it points at is, as appears plainly by the language of the section, an act which is already recognized by law to be a misdemeanor, to which offence punishment is by law already annexed, and the object of the section is to add to such punishment, a further punishment namely—that the person who is guilty of the misdemeanor of corruptly inducing or endeavoring to induce any person to take any false oath in any matter wherein an oath is required under the act, in addition to any other punishment to which he is liable for such offence, shall forfeit the sum of $200 to any person who sues for the same; and the 91st sec. makes the wilful committal of the offence specified in the 90th sec. a corrupt practice under the provisions of the Election Act, so as not only to avoid the election of the candidate who may be guilty of the offence, but to disqualify such candidate for the period of seven years from being capable of being elected to the House of Commons and of sitting therein, or of voting at any election of a member of that House, or of holding any office in the nomination of the crown, or of the Governor General of Canada.

Before a judge sitting without a jury, as he does upon an election petition, finds any one guilty of an offence to which such extremely penal consequences are annexed, he should be, and on an appeal from his decision this court should be, well assured of the true construction of the sections of the acts under consideration, and that the offence to which such penal consequences are annexed has been clearly established by evidence no less sufficient than would be required to justify a conviction by a jury upon an indictment for the offence.

Now, as to the construction of the secs. 90 and 91, it

is expressly provided by them taken together that the offence of inducing a person to take the false oath referred to therein consists in wilfully and corruptly, (in the sense that those words are used in an indictment for subornation for perjury) inducing a person to take an oath in a matter wherein an oath is required to be taken by any act of the Dominion of Canada, false swearing in which oath is by the before herein mentioned ch. 154 of the revised statutes of Canada made a misdemeanor for which the person taking the oath might be indicted for and convicted of perjury.

Now the offence of wilfully and corruptly inducing or procuring any person to take such an oath is the misdemeanor known in law as subornation of perjury, to the complete perpetration of which offence knowledge of the falsity by the person accused is essential; and this is the law also in the case of an indictment for the misdemeanor of procuring or inducing another to take a false oath, upon which perjury could not be assigned, both misdemeanors as to the elements constituting the offence standing precisely on the same footing. Formerly it was necessary to be expressly averred in the indictment, but now if the party who is charged with having corruptly induced Nixon to take the oath which he did take was indicted for that offence, it would be sufficient to set out the substance of the offence in the manner prescribed by the 108th sec. of ch. 154 of the revised statutes, which is, verbatim, identical with the 21st sec. of the Imperial Statute 14–15 Vic. ch. 100 and enacts that:

In every indictment for subornation of perjury or contracting with any person to commit wilful and corrupt perjury or for inciting causing or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously or corruptly to take, make, sign or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient whenever such perjury or other offence aforesaid has been actually committed to allege the offence of the person who actually commit-

ted such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person to do and commit the said offence in manner and form aforesaid; and whenever such perjury or other offence aforesaid has not actually been committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

That is to say without setting forth the bill, answer, information, indictment, declaration or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Upon an indictment for subornation, since the passing of 14–15 Vic. ch. 100, it is as necessary as it was before that it should be proved—1st. that perjury had been committed by the person who took the oath and unless that be proved the defendant cannot be convicted of the subornation. Secondly, the subornation or previous inducement or procurement to commit that offence—that is to say, it must be proved that the defendant solicited or procured the person who took the oath to take it, knowing the same to be false, or that by taking it the party so doing would be committing perjury (1).

Now, that any person can be pronounced by a judge sitting upon the trial of an election petition to have been guilty of an offence of this nature upon less evidence than would be required upon the trial of an indictment for the same offence before a jury, is a proposition which neither in law or justice or common sense can, in my opinion, be entertained.

That a judge without a jury should be authorized to try a charge of an offence of this nature is a sufficiently grave departure from the ordinary rule that no

(1) Archbold's Criminal Pleading, Edit. 1886 p. 942; Roscoe's Criminal Evidence, 10th Edit. 1884 p. 864.

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one can be convicted of a criminal offence, especially one so seriously affecting his civil rights and liberty, except by a jury; we cannot, however, extend by construction the penal character of the act so as to hold that it justifies an adjudication of guilt unless it be established by as complete and sufficient evidence as would be required on a trial before a jury.

Now as to the evidence adduced in support of the charge. Nixon himself was called upon behalf of the petitioner and also a Mr. Parker, who acted as scrutineer for the candidate in whose interest the petition was filed, at the polling place where Nixon voted. The material evidence given by him and by Parker on his cross-examination which, where it differs from that as taken down upon his examination in chief, appears to me to be more reliable, in short substance is, that when Nixon came forward to get his ballot paper Mr. Parker said to him that he required him to be sworn, upon which Nixon turned towards Parker and said to him, "what is your objection to my voting, Mr. Parker, I have been here several times and you never questioned it before?" To which Parker replied that he did not discuss voters' qualifications there, and turning to the returning officer said, "I want him sworn;" at this point Harrison intervened and said, "your vote is perfectly good, Tom." Nixon swears that all that Harrison said to him was,—your vote is a good one or perfectly good, he repeated several times that this was all the insisting he did—all that he said or at least that he Nixon heard—that otherwise Harrison never spoke to him upon the subject of his vote either then or previously—that he, Nixon, had never heard that his right to vote was doubted, and that he had not any expectation that his vote would be objected to or that he would be required to be sworn.

Parker admits that he did not state what was his objec-

tion to Nixon's voting although asked by Nixon what it was, and that he knew that since the death of Nixon's father (which occurred in April, 1886, while the election took place in Nov., 1887), he Nixon was the owner of the property in respect of which he was upon the voters' list with the description added of farmer's son, and upon which he had resided all his life; he says, however, that when Harrison said to Nixon that the vote of the latter was perfectly good, he added, "take the oath, Tom, I will be responsible." Nixon swears that if Harrison said this he did not hear it, and he denies that to his knowledge Harrison did make use of this expression. Upon this contradiction, if it be material whether in point of fact Harrison did or not make use of these words, they cannot, upon a charge of this nature, be regarded as proved to have been used by him. If the words were used, as Nixon swears that he never heard them, they could not have operated upon his mind to induce him to take the oath he might be required to take or did take; and so, unless the substance of the offence charged is to be wholly disregarded, because it is alleged to have been committed at an election, and the accused is to be convicted on a mere technicality, it becomes immaterial whether the words were used or not, if the person to whom they are alleg- to have been addressed by way of inducement to get him to take a false oath never heard them. Hereupon Parker called upon the deputy returning officer to administer the oath "T"; whether Nixon heard Parker say to the returning officer that the oath "T" was the one he should administer, or that Nixon had any knowledge of the matters contained in such oath there is no evidence. No reference had been made to the contents of the oath or as to what Nixon would have to swear—an oath was administered which Parker says was the oath "T," and now we see exposed the gist of the charge

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and the point of objection to Nixon's vote becomes developed ; an objection which does not appear to have been in the mind of any one but Mr. Parker, at the election, and which he studiously suppressed.

Nixon in his father's lifetime was registered on the voters' list as a voter in the character of farmer's son. His father died in April, 1886, his mother had died 8 or 9 years previously. Upon his father's death Nixon became owner of the property upon which his father in his lifetime resided and upon which Nixon himself had resided all his life, and was still residing at the time of the election in November 1887. Nixon swears that at the time of the election, in November 1887, he did not know in what character he was entered upon the voters' list then in use, namely, whether as farmer's son or as owner. We have seen that the point was not alluded to at the election. Now the oath, T., assuming it to have been, as Mr. Parker swears it was, the oath administered, in its last paragraph contains these words—"with my father" which if they had been omitted when the oath was being administered, every syllable in the oath could have been sworn by Nixon with the most perfect truth, and laying out of consideration all question as to whether the deputy returning officer would have been justified or authorized in omitting them if he had known all the facts of the case, the oath with these words left out would have been in conformity with the circumstances and facts of the case as they in truth existed, and if they had not been omitted but Nixon had never heard them he never could be convicted of having taken a false oath, such offence involving, as of necessity it must, knowledge of the falsity and a deliberate intention to take the oath with such knowledge; so that upon this ground alone the charge against Harrison must fail. Upon this point Nixon in substance swears that to his

knowledge and belief these words "with my father" or the words—"I am residing with my father" were not in the oath that he took—that he has no remembrance of hearing anything of the kind.

With the greatest deference I must express my dissent from the doctrine that upon a charge of the grave nature of the misdemeanor charged here there is to be any presumption that the officer who presided at the election did or did not administer the right oath or did or did not omit any part of it. The charge is one of a grave misdemeanor charged against the agent and upon such a charge nothing is, in my opinion, to be presumed. The maxim *omnia præsumuntur rite esse acta* does not, in my opinion, apply to supply any defect in evidence adduced for the purpose of establishing the commission of the misdemeanor.. Everything must be clearly proved which constitutes the perfection of the offence, and neither the agent nor the candidate is called upon to prove anything. I can see no reason whatever in principle why this offence should be established on less conclusive evidence than on an indictment, and any imperfection or insufficiency in the evidence enures to the benefit of the person accused who must be acquitted of the charge if not conclusively proved. But independently of this and confining myself to the charge of corrupt inducement made by Harrison to procure Nixon to take the oath, I confess that I am unable to perceive upon what possible foundation that charge could in reason and common sense be maintained. There was no evidence offered that Harrison had any knowledge of the true facts of the case. And assuming him to have known them as they now appear to have been, but which do not seem to have been alluded to by any one at the election, it seems to me a perversion of language to attribute the epithet "corruptly" to the opinion given

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by Harrison that Nixon's vote was perfectly good, even if that opinion had been supplemented by the expression, "take the oath Tom, &c., &c.," as testified by Mr. Parker. This gentleman appears to have been of opinion, that although Nixon had a good vote while his father lived he ceased to have a vote when, by his father's death, he became absolute owner of the property upon which, in his father's life time, they had both resided. Harrison may, I think, be excused if he entertained, although it might be erroneously, a different opinion.

The point, indeed, is one upon which lawyers, much less laymen, might differ without justly subjecting those who might be of opinion that Nixon had a good vote, under the circumstances, to the imputation of corruption in expressing that opinion. In his father's life time he was upon the voters' list as a voter in the character of a farmer's son. By the Dominion Franchise Act he could have been upon the list as a farmer's son only in the event of his not being otherwise qualified to vote in the electoral district in which his father's farm is situate. 49 Vic. ch. 5 sec. 3 ss. 7. The father died on the 4th April, 1886, and although upon his death the son became absolute owner and sole occupant of the property upon which he had, in his father's lifetime, resided with his father, as the assessment takes place between the 15th February and the 30th April, the father may have been assessed for the property in that year before his death, so that the revising officer may have had no opportunity of correcting the voters' list in that year; but in 1887 the son was the sole occupant of the property and the only person who was assessable for it, and as owner and occupant. He had a right therefore to remain on the voters' list in 1887, though not as a farmer's son. His name could not have been removed from the list. He was qualified

to be upon it as owner of the property, he was in point of fact on it, though not described as owner, but he could not have been removed from the list, although the character in which he was entitled that his name should remain there was changed. Provision is made for such a case by section 16 of the Electoral Franchise Act, which enacts:—

The revising officer shall not remove the name of any person on the list of voters, from such list, on the ground that the qualification of such person is incorrectly entered thereon, if it appears that such person is entitled to be registered on the list of voters as possessed of any of the qualifications set forth in the act, but the revising officer shall retain the name of such person on the list and correct the same accordingly.

At the time of the election in Nov., 1887, Nixon's right then was to be on the voters' list in the character of owner, and if not on the list in that character that was the fault of the officials upon whom were imposed by the law the duties necessary to be discharged in order to ensure that the voters' list should be correct. Now by the act 49 Vic. ch. 8, sec. 41—all persons whose names are registered on the list of voters in force on the day of the polling at any election shall be entitled to vote at such election. The act does not say that he shall be entitled to vote only in the character in which he is described, and it may be erroneously described, on the list. By sec. 45 of this same act if his name is on the list he is entitled to demand and receive a ballot paper, and the only restraint upon the right which is imposed by the statute is that if required he shall take a vote of qualification in the form S. or in the forms T. U. V. or W. in the first schedule of the act mentioned, *as the circumstances of the case may require.*

Now, under the circumstances of Nixon's case, without expressing any opinion as to whether or not Nixon's vote was in strict law a perfectly good one, or whether or not the peculiar circumstances of the case

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were such as to entitle him to demand and receive his ballot paper upon taking the oath appropriate to be administered to an owner of property all that it is necessary to say, and upon this I express a very decided opinion, is that laymen certainly, and I think lawyers also, might without any corrupt intent whatever and indeed very conscientously entertain and express the opinion that the fault of the officials to discharge their duty had not disfranchised Nixon, and that as he was qualified to be on the list, and was in fact upon it, although erroneously described, his vote was a good vote, and as owner, that being the character which should have beeu annexed to his name upon the list, and under the peculiar circumstances of the case the appropriate oath to have been administered to him would have been the oath which should have been administered to an owner of property; and, assuming Harrison to have known all the circumstances of the case, the evidence as to what he said at the polling booth is perfectly consistent with his having entertained and conscientiously entertained this opinion, and with this being all he intended to convey. Hereafter lawyers who may be interested in an election, and who I presume cannot claim any exemption from liability upon a charge of this nature which a layman cannot have, will need to be very careful indeed that in giving advice in an election as to the right of any person to vote and as to the form of oath he may be required in law to take, he gives no opinion, however conscientious, which a court can pronounce to be erroneous, for if the court should differ from him (which unfortunately sometimes happens) he would become guilty of the misdemeanor of which Harrison has been pronounced to have been guilty and for which the respondent is made to suffer.

The case of Dougherty differs from that of Nixon in this, that in Dougherty's case the objection to his vote was stated and fully discussed at the polls. The ques-

tions raised were:—1st. One of law, namely, whether the nature of his residence upon his father's property which he described was such a residence as came within the meaning of the act? And 2nd. Whether Doherty could conscientiously take the oath that he was residing with his father?

Now, the only evidence of the charge of corrupt inducement to Dougherty to take a false oath made against Allen is that given by Dougherty himself, who said that he had several times voted upon the same qualification without objection; that previously to the election in November he had heard his right to vote questioned upon the point raised; that he had given the subject the fullest consideration and had come to the conclusion that his vote was a good one and that he could conscientiously take the prescribed oath. He also said that at the poll the returning officer had expressed the same opinion, and had added that at a recent trial of an election petition which had taken place in relation to an election in the same electoral district before the Chancellor, that learned judge had expressed the opinion that precisely such residence as that of Dougherty was sufficient, and that a person upon such evidence could well take the oath. Allen, who is now accused of having corruptly induced Dougherty to take a false oath, also expressed his opinion to be that Dougherty could conscientiously take the oath, and this expression of opinion is the sole foundation for the charge made against Allen.

All that appears to me to be necessary to say upon this charge in addition to what I have said in Nixon's case, as to the nature of the offence pointed at in section 90 of the act 49 Vic. ch. 8 is that the expression of such opinion by Allen does not appear to me to constitute any inducement made by Allen much less "corruptly" made, in order to get Dougherty to take a false oath.

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And as to both of these charges, I am of opinion that if the learned judge who tried that election petition had upon the evidence adduced adjudged either Harrison or Allen to have been guilty of the offence charged against them respectively he would have greatly erred.

Appeal allowed with costs.

Solicitor for appellants: *A. K. Goodman.*

Solicitors for respondent: *McCarthy, Osler, Hoskin & Creelman.*