CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF NORTH PERTH.

1892

*Feb. 16.

*April 4.

HUGH CAMPBELL (PETITIONER).....APPELLANT;

AND

JAMES GRIEVE (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF ROSE AND MACMAHON JJ.

Dominion Controverted Elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—49 Vic. ch. 8 secs. 88, 91 ; sec. 84 (a) (e)—Free Railway tickets.

G. a voter and supporter of the respondent holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away from home, asked for the loan of the money from W. a bar tender and a friend. W. not having the money at the time applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S. the agent, lent the money to W. who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bonâ fide* loan by S. to W. On appeal to the Supreme Court of Canada :

Held, reversing the judgment of the court below, that as the decision of the trial judges depended on the inferences drawn from the evidence, their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of sec. 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under sec. 91 of the said act.

Strong J. dissenting was of opinion that there was no evidence that the loan of $2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

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*PRESENT : Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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Patterson J. dissenting, on the ground that as the decision of the Court below depended on the credibility of the witnesses it ought not to be interfered with.

Per Strong and Patterson JJ. affirming the judgment of the court below, that, upon the evidence which is reviewed in the judgments, the Grand Trunk railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of sec. 88 of the Dominion Elections Act. *Berthier Election Case*, 9 Can. S.C.R. 102, followed.

APPEAL from the judgment of Rose and MacMahon JJ. dismissing the election petition of the appellant with costs.

The appeal was confined to the cases or group of cases dealt with by the learned judges in their judgments of the 19th December, 1891, viz.:

1. The Grand Trunk ticket case.

2. The Gowing cases, Nos. 195 *et al.*

3. The Lavelle cases, Nos. 115 and 120.

The Railway Ticket cases.

Railway tickets were furnished by the railway upon the requisition of W. T. R. Preston an agent of the respondent, the form of which is as follows:

TORONTO, March 4th, 1891.

To P. J. SLATTER, Esq.,
Grand Trunk Railway Ticket Agent,
Toronto.

Please issue to bearer one ticket from Toronto to Fergus and return, and charge to the account of
No. 626.

W. T. R. PRESTON.

These tickets were given to voters which were known to be friendly to the respondent's party, or whose views had been ascertained prior to the delivery of the tickets,

and in many of the cases the voters used the tickets in question in going to and returning from the polls.

The form of the ticket issued was as follows:

GRAND TRUNK RAILWAY.

Return Coupon—Excursion Ticket.

Good for one continuous trip from Stratford to Toronto.

Expires March 9, 1891. Series A.

First conductor must collect or exchange this coupon for

989 "z" check.

J. HICKSON,

Form Ex. I.—6. *General Manager.*

GRAND TRUNK RAILWAY.

Going Coupon—Excursion Ticket.

Good for one continuous trip from Toronto to Stratford.

Series A.

Not good if detached from contract bearing signature.

First conductor must collect or exchange this coupon for

989 "z" check.

J. HICKSON,

Form Ex. I.—6. *General Manager.*

The circumstances under which the company agreed to furnish these tickets are reviewed in the judgment of Mr. Justice Strong, hereinafter given.

2. The Gowing Case, Nos. 195, 295, 296, 303, 375, 408 and 472 in the particulars.

William Gowing was a voter who voted in Listowel, who, at the date of the election lived in Stratford. He received from Duncan Hay one of the Hanna-McPherson Grand Trunk tickets, and used it in going to and returning from the polling place at Listowel. In the different particulars it was charge that he received money for his vote or for expenses in travelling to and from the polling place, and the charge which the appellant argued had been proved is the one which

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alleged the corrupt act to have been committed by James Stock an agent of the respondent, by advancing to one Winters, a bar tender at Stratford, to whom Gowing had applied for a loan of two dollars to pay his expenses while away from home, the said two dollars, which were immediately handed over to Gowing. This charge was held by the court below to have been a *bonâ fide* loan by Stock to Winters.

The evidence relied on in support of this charge is also reviewed at length in the judgments hereinafter given.

3. The Lavelle Case, Nos. 115 and 120 in the particulars, were as follows:

John Duggan, being an agent of the respondent, corruptly gave or provided, or caused to be given or provided, to one Anthony Lavelle, on the polling day of the said election, drink and refreshment, for the purpose of corruptly influencing the said Anthony Lavelle to vote for the respondent, and to refrain from voting for the said S. R. Hesson, at the said election.

William Daly, an agent of the respondent, corruptly gave or provided, or caused to be given or provided, to one Anthony Lavelle on the polling day of the said election, drink and refreshment for the purpose of corruptly influencing the said Anthony Lavelle to vote for the respondent and to refrain from voting for the said S. R. Hesson, at the said election.

On the contradictory statements of the witnesses examined to support this charge, the trial judges dismissed the charge with costs.

Osler Q.C. and *Ferguson* Q.C. with him for appellant referred to sec. 9, ch. 110 of R.S.C.; secs. 86 and 88 of ch. 8, R.S.C., the *Bolton Case* (1); the *Lisgar Election Case* (2); the *Haldimand Election Case* (3); the *West*

(1) 2 O'M. & H. 148. (2) 4 Can. S.C.R. 494.
(3) 15 Can. S.C.R. 495.

Simcoe Case (1); the *Norwich Case* (2) and the *Cashel Case* (3).

Garrow Q.C. for respondent cited and relied; the *Montcalm Case* (4); the *Berthier Case* (5); the *Haldimand Case* (6); the *Blackburn Case* (7); the *Wigan Case* (8); the *Staleybridge Case* (9); the *Londonderry Case* (10); and Leigh and LeMarchant on Election Law (11).

Sir W. J. RITCHIE C. J.—The charge in this case was number 375, which is as follows:

James Stock, of the City of Stratford, in the County of Perth, dealer in liquors, being an agent of the respondent, wilfully, illegally and corruptly paid or caused to be paid the travelling and other expenses of Henry Gowing, of the City of Stratford, in the County of Perth, laborer, a voter who voted at said election, in going to and returning from the polling booth at polling district No. 5 to vote at the said election for the respondent.

The facts in reference to this charge can hardly be said to be in dispute, nor is there any conflict of testimony. The only witnesses examined were Gowing the voter, the witness Winters who, it is alleged lent the money to the voter, and Stock who advanced the money to enable the alleged loan to be made to the voter. The determination of the case therefore depends upon whether or not proper inferences have been drawn by the court below, and the case is therefore open to the reconsideration of the appellate court.

Baggallay J. A. in the *Glannibanta Case* (12) says:—

In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of the "Julia" (13) and the "Alice" (14) to the effect,

(1) 1 Elec. Cas. Ont. 149.
(2) 1 O'M. & H. 10.
(3) 1 O'M. & H. 286.
(4) 9 Can. S.C.R. 93.
(5) 9 Can. S.C.R. 102.
(6) 17 Can. S.C.R. 170.
(7) 1 O'M. & H. 188.
(8) 1 O'M. & H. 188.
(9) 20 L. T. N. S. 75.
(10) 21 L. T. N. S.
(11) P. 88.
(12) 1 Pro. Div. 387.
(13) 14 Moo. P. C. 210.
(14) L. R. 2 P. C. 245.

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that if in the Court of Admiralty there was conflicting evidence, and the judge of that court having had the opportunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision, except in cases of extreme and overwhelming pressure; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based.

Now, we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides.

Gowing admits he got a return ticket from one Duncan Hay to go to Listowel to vote, for which he does not pretend he paid or was expected to pay. Now as to the alleged borrowing of two dollars by Gowing I think the fair inference from Gowing's testimony is that he did not consider he was really borrowing the money when he asked for it.

Q. Did you get any money the day before the election? A. No.
Q. The day before that again? A. No.
Q. What? A. No.
Q. No money? A. Do you mean given to me?

Q. Yes, or lent? A. I had no money given to me.

* * *

Q. Any lent to you? A. I borrowed two dollars the day before the election.

Q. From whom? A. I borrowed it from a friend named Tim Winters, at least I got it from him; it was from him I got it.

Q. Where did the money come from; who did Tim get it from? A. I think he got it from Mr. Stock.

Is this the way he would have spoken of the transaction, if it had been a fair *bonâ fide* loan? When the money was applied for there was no secrecy as to what it was wanted for. Gowing is asked:

Q. How did you come to get Tim Winters to go to Stock to get you this money? A. I went to Tim as a friend—he was the only friend I knew in Stratford—and he said he was a little short, but he would get a couple for me, and I had to go up and vote.

Q. You told him you had to go up and vote? A. Yes, or I wanted to go, at least.

Q. And you went to see him to see if you could get the money to go up and vote? A. Yes, to see if he could let me have a couple of dollars.

It appears that at this time there was plenty of money in his house to enable him to go to Listowel; with reference to this he says:

Q. You had some money of your own, had you not? A. Well, no, I hadn't.

Q. Was there any money in your house? A. Yes.

Q. If you wanted to go up to Listowel to vote you had plenty of money in the house to do so, hadn't you? A. Yes.

Q. But you didn't want to pay your expenses? A. I didn't want to borrow the Missus' money to go on that business. I thought if I could get a couple of dollars it would be better.

The inference I draw from this, if he could get the money without any idea of returning it, it would be better, or in other words he did not want to spend his own or his wife's in the operation which he evidently thought should be paid for by some one more interested in the election, and this view is strongly confirmed by his reply to the next question.

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Q. Have you paid back Tim Winters or James Stock? A. No.

Q. You have not been asked for it? A. No.

But he does not give the slightest intimation that he ever expected or intended to pay it back. And again he admits he brought the biggest part home; he says:

Mr. Osler—The money and ticket got you to go? A. I didn't require very much.

Q. Still, you required a little? A. Yes, and I brought the biggest part of it home with me.

And yet not a word about returning the unexpended amount. And all this also shows that neither Stock nor Winters looked on it as a loan to be returned. And read in the light of Gowing's account of his obtaining the money which is as follows:

Q. That money was for your expenses going voting, was it not; it looked like it? A. Well, I don't know; to my knowledge it was not.

Q. You have not paid it back; you had money of your own; you wanted it for election purposes and you told it? A. This money of mine was not mine.

Q. You had earned it? A. No, it was money given to my Missus.

Q. Were you earning money at this time? A. No.

Q. But you told Tom Winters and Stock what you wanted to do was to go and vote? A. I didn't tell Stock anything about it.

Q. Did you see Stock in the matter? A. No, not until I got the money.

Q. Stock gave you the money? A. Yes. I am not sure whether Stock gave it to me or Winters handed it to me.

Q. You and Winters went to Stock's together? A. No, he came to us.

Q. Stock came to you where? A. At the bar in the Windsor Hotel.

Q. And you were talking about your vote? A. I was talking to my friend Winters.

* * *

Q. And talking about your vote? A. Yes.

Q. And you were saying how you had no money to go up and vote? A. No, I wasn't saying just that.

Q. What were you saying? A. Just in the act of asking my friend for a couple of dollars. He says, "I am a little short." And he says,

"Maybe I can borrow a couple of dollars for you," and just at that this gentleman came in.

Q. And then you told him what your trouble was about going up to vote? A. Yes.

Q. And Stock put his hand in his pocket and handed you the money? A. I am not sure whether he handed it to me or Winters.

Q. You got the money? A. I got the money.

Q. And it was the day before the election? A. Yes.

Q. And on that money you went up and spent that on your way up and down? A. No, I went up on my ticket.

Q. Had you got your ticket at this time? A. Yes.

Q. And you could not go on a dry ticket? A. I didn't like to.

Q. Were you going if you hadn't got the money? A. Yes.

Q. What did you tell Tim Winters about that, that you could not go without money? A. No, I did not. I merely said I would like to have a shilling in my pocket to go up with.

Q. This was after Stock came in? A. No.

Q. What did you say after Stock came in? A. I cannot say.

Q. Stock was a stranger to you? A. Yes.

Q. You didn't know him? A. No.

Remembering Stock was the agent of the candidate, I have been unable to raise a doubt in my mind that Stock and Winters both knew that Gowing required something in addition to the ticket to enable or induce him to go to vote, and that the object of giving these two dollars to Gowing was to secure his attendance to vote at Listowel.

Now let us see what Stock says:—

JAMES STOCK, called by respondent.

Q. Were you present on the occasion that he refers to when some money was got from some person? A. Tim Waters came to me at the Windsor Hotel, when I came in from the store, and he asked me if I would lend him two dollars to lend a man of the name I think of Gowing, to go to Listowel to vote, and I said certainly; I lent him two dollars; I lent Tim Winters two dollars.

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Q. You pulled out the two dollars and handed it to Winters? A. I gave it to Winters.

Q. For the purpose of giving it to this man? A. No, not necessarily.

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Q. That is what he asked it for? A. He said, lend me two dollars, I wish to lend this man two dollars to go to Listowel to vote.

Q. Lend me two dollars that I may lend it to this man to go to Listowel to vote. Have you got the money back since? A. Yes.

There can be no clearer admission that here an agent of the candidate knew that this money was handed over to Gowing to enable or to induce him to go to Listowel to vote. And we have this equivocating testimony as to when he got the money back. He is asked:—

Q. Since you got your subpœna? Before I got my subpœna.

Q. When? A. I don't know when it was I got it back.

Q. When? A. I got it back, it is immaterial when. Two dollars is a very small item.

Q. It is nothing at election times. When did you get it back? A. I got it back some time last week or this week. Tim told me it was about time to pay it back.

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Q. Was it not this week? A. I would not say it was this week or last week.

Q. Will you swear it was not this week? A. I would swear it was not this week or last; at least I would swear it was either this week or last week.

Q. What about yesterday? Will you swear you didn't get it yesterday? A. No.

Q. Will you swear you didn't get it this morning? A. I don't think I got it this morning.

Q. Will you swear you didn't? A. I would not swear I didn't get it this morning.

Q. I won't try you about to-morrow. Are you sure you have got it? A. Well, I got two dollars back from Tim Winters. It is immaterial when I got it. I could have got it at any time.

Q. You never asked him for it, did you? A. For the two dollars?

Q. Yes? A. It was immaterial with regard to asking him.

Q. You never asked him for it? A. I never asked him for the two dollars.

Q. Did you ask him for it? A. Yes, I did; I thought it was time to pay it back.

Q. When? A. Last week.

Q. You got it this morning or yesterday or last week, or something? A. Or this week.

I cannot read this without drawing the inference that this money would never have been returned but for the proceedings taken in this case, and that at the time it was advanced it never was intended to be repaid.

It would appear to have been a great object to secure this vote, for not only was the ticket given and two dollars advanced, but this Mr. Winters loaned Gowing his own coat and had to borrow another for himself to enable him to go to vote.

Mr. Winters is asked, "Have you been repaid the money?" He replies, "Not yet," and does not express the idea or expectation that it ever would be repaid, or that there was any intention that it should be repaid. This is the account he gives of the transaction :—

TIMOTHY WINTERS (formerly sworn). By *Mr. Garrow :*

Q. You are the bar tender at the Windsor Hotel in this place? A. Yes.

Q. And you were in the month of March last? A. Yes.

Q. Did you ever lend any money to a man called Gowing? A. I did.

Q. The witness who was in the box? A. Yes.

Q. How much was it? A. Two dollars.

Q. Just state the circumstances? A. I think it was the evening before the election he came in, and he said that he had been sick for sometime, and he asked me if I would lend him two dollars. I told him I hadn't it on me just at the time, but said I will borrow it for you, and borrowed it from Mr. Stock, who appears to have arrived very opportunely, just in the nick of time, and gave it to him. I also lent him my overcoat to go to Listowel.

Q. Was anything said between you and Stock, as to what the money was wanted for? A I don't know whether there was or not. I would not be positive whether there was anything said or not.

Q. You borrowed the money? A. Yes. It would not have made any difference anyway. I would have lent him the money, for I have lent him money before, in Listowel.

Q. You both came together from Listowel? A. Yes.

Q. Have you been repaid the money? A. Not yet.

Q. Have you paid the money back? A. I have.

Q. To Mr. Stock? A. I did.

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Q. When did you pay it back? A. Not very long ago, either the latter part of last week or the beginning of this.

Cross-examination:

Q. Since you were subpœnaed in this case, you paid the money back? A. No, I was subpœnaed since I paid the money back.

Q. Since the last sitting of this court? A. Yes.

Q. And the voter has not paid you back? A. No.

Q. You knew he was going to Listowel to vote? A. I did.

Q. And he could not go without an overcoat, and without money? A. Well, I suppose he could have gone on without money, for he told me he had his ticket, but I knew that he had always voted Liberal, and his father had always voted Liberal.

Q. And you thought it would be a nice thing to hand him two dollars to pay his way up? A. I didn't give it to him for that at all.

Q. It was the same occasion that he got the overcoat? A. Yes.

Q. And the overcoat was got to go to vote? A. I guess it was.

As to the witness Winters loaning Gowing money, it seemed to resolve itself pretty much to this:

Q. When he was down at heel, you would give him a quarter? A. Yes.

Q. How long ago? A. At different times; I suppose 3 or 4 years ago, 5 years ago.

Q. You didn't have any money dealings with him for months and months? A. No.

Q. Might we say years? A. No, not years.

Q. Inside 2 years? A. Probably 2 years.

After giving the case every consideration of which I am capable, and examining the evidence with the greatest care, I am unable to escape the conclusion that this alleged loan was nothing more nor less than a mere colourable transaction; that the only fair inferences to draw from the evidence are that the admitted agent of the candidate knew the object of the supposed loan; that the money was not returned by Winters to Stock until after the commencement of these proceedings; that it was only then done in consequence of these proceedings and to disguise the transaction; that Stock advanced the money for the purpose for which it was applied for, namely, to secure Gowing's attendance at the polls; that there was no

loan to the voter; that the money never was returned by the voter, and it never was contemplated by Stock or Winters, that it should ever be returned or repaid. Under all these circumstances I think the inevitable inference is that Stock advanced the money knowing full well the purpose for which it was applied, namely, to secure the vote, and that the whole transaction was merely colourable and plainly intended to disguise the corrupt practice of which, in my opinion, the agent was guilty under section 88 of the Dominion Elections Act (37 Vic. ch. 9) which declares that, "The payment by any candidate or by any person on his behalf of the travelling or other expenses of any voter in going to or returning from any election, is an unlawful act"; and section 91 which declares that, "Any offence against any one of the seven sections of this Act next preceding are corrupt practices within the meaning of this Act."

On the whole, therefore, I do not think it can be reasonably doubted that these two dollars were given to Gowing by an agent of the candidate for the purpose of paying his travelling or other expenses in going and returning from the election at Listowel, and that such payment was, therefore, an unlawful act and consequently a corrupt practice, and having been committed by the acknowledged agent of the canditate, the election of such candidate, under section 94, is void, and should be so reported to the honourable the Speaker of the House of Commons.

STRONG J.—The first and most important case presented by this appeal is that of a charge of paying the travelling expenses of certain electors, by means of railway tickets, by Mr. Preston, the secretary of the Ontario Reform Association, who it is contended was an agent of the respondent. A similar charge was

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also made in respect of tickets furnished to voters by Mr. Macpherson, an admitted agent of the respondent at Stratford. It was decided by the learned judges who tried the petition that the tickets issued by the Grand Trunk Railway Company to Mr. Preston and Mr. Macpherson, and by them through their sub-agents given to electors were gratuitously issued by the Grand Trunk Railway Company, and that consequently the charges of paying travelling expenses by means of these tickets were not established.

In the view I take of this case it is not necessary to decide the question of Mr. Preston's agency, and I express no decided opinion as to it. I propose, however, to deal with the case upon the assumption that Mr. Preston was an agent, for whose acts the respondent is responsible.

The facts established by the evidence relating to the tickets issued to Mr. Preston may be summarily stated as follows:—

A few days before the polling day at the last general election in February and March, 1891, Mr. Ryan, a member of the Reform Club at Toronto, who is not proved to have been an agent of the respondent, had an interview with Mr. Arthur White, an officer of the Grand Trunk Railway Company stationed at Toronto, who describes his office as being that of "District General Freight Agent." At this interview Mr. Ryan stated to Mr. White (to use the words of the latter) that the Canada Pacific Railway Company were issuing free tickets to voters that had to be moved," to which Mr. White replied that he was quite confident that if the Canada Pacific Railway Company did so the Grand Trunk Company would do so likewise. Mr. White further says, in his examination as a witness at the trial, that although he could not make a bargain or agreement with Mr. Ryan, he

thinks he led Mr. Ryan to think that would be the policy of the Grand Trunk Railway Company, although he had no authority whatever for saying so. Then, in answer to the question, "Did the conversation go further than this, did it take any practical form?" The witness answers, "I think the practical form it took I suggested to him that he should give an order or get the party to give an order on our agent, and it would be honoured the same as any other large body of excursionists would have been honoured." Then, we find in Mr. White's deposition, further material evidence which I extract:

Q. What was to be done with the tickets afterwards? A. The question of settlement for tickets would be an after-consideration, and I thought the Grand Trunk would not charge for them.

Q. What did you tell him as to the settlement as to them? A. I said "the question of settlement will be an after-consideration, and I imagine the Grand Trunk will not charge you anything for them."

Q. And you told him to send in requisitions to ticket agents? A. Yes.

Q. That the question of settlement would be an after-consideration? A. Yes, but leading him at the same time to think that the Grand Trunk would not charge him.

Q. Did you tell him what authority you had for thinking so? A. I was traffic manager on the Midland division, and where I was then I had power to give free tickets, and I gave free tickets to a great many people.

Then on cross-examination the same witness states:

I did not say anything about payment. I thought the Grand Trunk would surely give them free if the Canada Pacific was doing the same thing.

Q. Then they were to have free transportation? A. That was the effect of it. I think that was the effect on Mr. Ryan's mind.

Q. That was the effect on Mr. Ryan's mind? A. I fancy Mr. Ryan had that impression.

Q. And Mr. Ryan tells us in the box he left you from these interviews with the understanding they were to have free transportation for voters? A. I think Mr. Ryan may very well have gone away with that impression. I am saying that all along.

Q. So far as that conversation at all events was concerned, there was not a word about payment in it? A. I said the question of settle-

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ment would be an after-consideration, and certainly I led Mr. Ryan to think there would be no after-settlement.

Then Mr. Ryan, in his evidence says Mr. White told him to forward these requisitions to Mr. Slatter, the Grand Trunk Railway's ticket agent at Toronto, which was done, Mr. Ryan writing out several of these requisitions himself. This witness also says referring to his interview with White:—

From what he said I had the impression we would get the privilege and requisitions were then made on Mr. Slatter for tickets and railway passes.

And on being asked—

Was there any bargain as to the price or payment, or anything of that kind? Mr. Ryan answers: "No, no bargain at all, no price, it was without money and without price."

And then the examination thus proceeds:

Q. Was anything said about that? A. Yes, I said the Reform committee was in no position to pay for anything, that they had no exchequer to draw upon. The Grand Trunk should extend to us the same privilege that the Canada Pacific were extending to the Conservative electors.

Q. What did you mean by that? A. I meant to say that we had no money to pay.

Q. The same privilege? A. Of forwarding electors to support the Conservative candidates all over the Dominion of Canada without price, free.

Q. That was the same privilege you wanted from the Grand Trunk? A. Yes.

The witness also swears that he has never been asked to pay for the tickets and never had any intention of doing so. And he adds that the understanding was "they should be conveyed for nothing, no charge whatever." Immediately after the interview with Mr. White, Mr. Ryan returned to the Reform Club, saw Mr. Preston and told him that he had made an arrangement to have the voters conveyed free of charge and that free tickets were to be procured from Mr. Slatter. Preston's own words are

Mr. Ryan, as soon as he came into the room, said we could get our free tickets. Mr. Ryan when he came back told me that Mr. White told him to tell me if I would send round to Mr. Slatter we could get tickets or transportation as we wanted.

Preston further says that he believed all the time he was using free tickets, and that he would not have used the order for a single one if he had thought they were not free. Moreover, independently of what was said to Mr. Ryan by Mr. White there was a direct communication by him to Mr. Preston which warranted the latter in believing that the tickets were to be issued gratuitously. Mr. Preston says:

When Mr. White came into my office, I think perhaps an hour or two after Ryan returned from his visit, and I said to him then, I think I commenced the conversation by saying I am very glad the Grand Trunk is giving us transportation, allowing us to get our voters out, or we would not be able. His reply was—Well, the Grand Trunk could not do less.

Acting upon what had been said by Mr. White to himself and to Mr. Ryan, Mr. Preston then saw Mr. Slatter, the ticket agent, whose account of what took place is as follows:

Q. Did you have any communication with Mr. Preston yourself? A. Yes, Mr. Preston saw me and told me he was going to draw orders on me for tickets, and I told him I would accept them.

Q. Then you did see Mr. Preston? A. Yes.

Q. Did you arrange about the price or anything? A. No.

Q. Nothing said about excursion prices? A. No.

Q. Had you any instructions from headquarters about this time about tickets? A. At the commencement I had not when Mr. Preston first drew on me, but after he had sent several orders I wired my general passenger agent and he instructed me to continue honouring the orders.

Acting upon the arrangement thus made with Mr. White and Mr. Slatter, Preston made requisitions on Slatter for, and there were issued to him, tickets amounting in the aggregate at a mileage rate of charge to $3,384.13.

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The requisition upon which these tickets were issued was addressed to Mr. Slatter and was in the following form:

Please issue to bearer ticket from . . to . . and return and charge to the account of . .

And were either signed by Preston or stamped with his name by his authority.

Apart altogether from the tickets issued to Mr. Preston under the arrangement with White and Slatter, Mr. Preston had other transactions with the Grand Trunk Railway Co. during the course of the election. These had nothing whatever to do with the election for North Perth. For certain special trains hired during the election, and for some fares from Chicago to Cayuga and from Chicago to Kingston an account was furnished to Mr. Preston by the Grand Trunk Railway Co. on the 21st March, 1891, the amount being $463.90. It was accompanied by a letter from Mr. J. F. Walker, traffic auditor, in which it was stated that a supplementary account might follow.

On the 25th March, 1891, a letter asking for payment of this account was sent to Mr. Preston by Mr. Wright, the treasurer of the Grand Trunk Company. On the 4th of May, 1891, a further account headed "Supplementary Account" amounting to $18.80 was sent to Mr. Preston by Mr. Walker for certain specified tickets furnished to Mr. Preston, none of which had any connection with this election. Both these accounts were paid by cheque in one sum. No account in respect of the tickets issued at Toronto by Slatter under the arrangement before mentioned was furnished until the 28th of August, 1891, when an account for $3,384.13 was sent by Mr. Walker to Mr. Preston. This account has never been paid and no notice of the demand for payment of it was taken by Mr. Preston. It is to be observed that Mr. White did not communicate to Mr.

Ryan or to Mr. Preston his want of authority to enter into an arrangement to have free tickets issued. And although nothing was said as to it by Mr. White, the question not having been asked by counsel on either side, I think from the circumstances that it is a reasonable inference that Mr. White saw Slatter the ticket agent and gave him instructions, or at least informed him of what had passed between himself and Mr. Ryan before any tickets were issued. Further, Mr. Ryan did not inform Mr. Preston that Mr. White had made any allusion to any subsequent settlement or that any question as to it would be considered; on the contrary he told him that the tickets would be absolutely free.

Upon this state of facts the learned judges who tried the petition came to the conclusion that the tickets were issued as free tickets, and that at all events Mr. Preston so believed and had reasonable grounds for that belief. In this conclusion I entirely agree. It is, in my opinion, the only just inference from the facts in evidence. It cannot be presumed that Mr. Ryan knew that Mr. White had no authority to make the arrangement he did, and when Slatter acted upon the arrangement, Mr. Preston, even if he had had the whole conversation communicated to him would have been justified in assuming that Mr. White either had power to issue passes or tickets free of charge, or that he had before communicating with Slatter, obtained authority to do so. Again, it is to be remembered that Mr. Ryan distinctly told White that there were no funds to pay for these tickets, and it is out of the question to suppose that White could have thought that either Mr. Preston or Mr. Ryan were undertaking a personal responsibility to pay for them. The conclusion is inevitable that Ryan must have supposed that the tickets were to be free, as White very candidly

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says he led him to think they would be. Under these circumstances there could have been no contract either with Ryan or Preston, for the tickets being referrable to the agreement with White, no court could hold Preston liable merely on the strength of the words "charge to the account of" contained in the printed form of requisition. All the circumstances are to be considered together, and when this is done, these words are immaterial. Moreover, as I shall point out, there are other reasons why these tickets could not legally be treated as issued otherwise than gratuitously, which would have alone, irrespective altogether of any specific agreement, debarred the Grand Trunk Railway Company from recovering the price of them from Preston.

As regards the tickets issued at Stratford to Mr. Macpherson, the chief agent of the respondent there, they were undoubtedly issued free of charge. With these Mr. Preston had nothing to do. Mr. Hanna, an officer attached to the department of Mr. Wainwright, the assistant general manager of the Grand Trunk Railway Company, who was sent up from Montreal, supplied with tickets in blank, saw Mr. Macpherson, asked him what tickets he wanted and gave him such as he required, no requisition being signed for them. The facts regarding the issue of these last tickets are not only conclusive to show that these particular tickets were intended to be free, but they also reflect light upon the intention of the Grand Trunk Company's authorities with regard to the tickets issued at Toronto. They show that the Grand Trunk Company were issuing free tickets and no reason is suggested why any difference should be made between the tickets issued at Stratford and those issued at Toronto to Preston. On the whole the conclusion is, in my opinion, irresistible that all the tickets were issued with the inten-

tion that they should be free of charge, and the learned judges were perfectly right in so holding.

Then to consider the application of the law to the facts so found. The judgment appealed against decides that the tickets having been virtually railway passes, no corrupt act avoiding the election was committed in furnishing them to voters in the way in which the evidence shows them to have been dealt with. In this I also agree.

In the *Berthier Election Appeal* (1) I had occasion to consider the state of the law applying to the case in which railway passes or free tickets are furnished to voters by a candidate, or his agent. I adhere in all respects to what I there said.

By the 88th section of the Dominion Elections Act, (37 Vic. chap. 9, sec. 96) the payment of travelling expenses of a voter in going to or returning from an election is declared to be an unlawful act without regard to any condition being either expressed or implied as to whom the voter is to cast his vote for. By the 91st section of the same act (37 Vic. chap. 9, sec. 98) any wilful offence against the provision of section 88 is declared to be a corrupt act which under section 93 of the same act (37 Vic. chap. 9, sec. 101), if committed by a candidate or his agent is to avoid the election of such candidate.

In the *Bolton Case* (2) it was held that furnishing free railway passes to voters did not amount to paying travelling expenses, and this having been approved and followed in the *Berthier Case* (1), has, I consider become the law of this court, and is not now open for reconsideration. Assuming therefore, the learned judges who tried this petition were right in their finding on the facts that the tickets in question furnished to Preston were issued without charge, a finding

(1) 9 Can. S.C.R. p. 102. (2) 2 O'M. & H. 147.

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which I entirely adopt, the law is plain, and no offence has been committed against the provision contained in section 88 of the statute.

Further, even if this view of the facts should be erroneous, and even granting that the Grand Trunk Railway Company should all along have intended to exact payment for the tickets, yet Mr. Preston having procured the tickets to be issued to him, believing, and having reasonable grounds for so believing, that no payment was to be exacted for them, it cannot be said that he wilfully committed an offence prohibited by the 88th section, and therefore the condition of a wilful breach of the prohibition of section 88, which is under section 91 indispensable to the act being corrupt, is not established, and the election could not therefore be avoided for it.

Further, whatever may be the proper conclusions from the evidence, and assuming that those I have already stated are erroneous, yet by the express provision of the law, the Grand Trunk Railway Company could not recover the price of these tickets, for by the 131st section of the statute (The Dominion Elections Act) it is enacted that

> Every executory contract or promise, or undertaking in any way referring to, or arising out of, or depending upon any election under this act, even for the payment of lawful expenses or the doing of some lawful act shall be void in law.

If there had been an agreement by Mr. Preston with the Grand Trunk Railway Company, explicit in all its terms to pay for the tickets in question, they having notice they were to be used as they were in fact used, I am of opinion that this section would have applied, and would have constituted a defence to the action. The consequence of this is that even if the tickets were not in fact issued, as I think they were, upon an understanding that they were to be free, there being

by the operation of this plain, clear and express provision of the law no liability to pay for them, the result must be the same as if they were issued as free tickets.

In the judgment I delivered in the *Berthier Case* (1), it is pointed out that even though railway tickets or passes are not paid for but are issued gratuitously, yet such a use may be made of them as to constitute an offence within section 84, subsec. (*a*) of the statute. And such a use is made of a ticket of this kind if it is given to a voter upon the understanding, express or implied, that he is to vote for a particular candidate. In that case the offence of bribery is committed. The analogy between the use of free railway passes and a candidate or agent taking a voter to the poll in his own carriage seems to be perfect. As regards this last case, the law is thus summarized in a Treatise on Election Law of approved authority, Leigh and Le Marchand (2). The authors say:

> There is still no objection to a candidate or his friends taking voters to the poll in their own carriages provided no money is paid on account of such conveyance. On the other hand an offer to convey a voter to the poll even in a private carriage on condition of his voting for a particular candidate (*e. g.* I will give you a ride to the poll if you will vote for A.B.) is clearly an offer of valuable consideration and as such amounts to bribery.

In the present case, however, there is not even a suggestion that any of the tickets which passed through Mr. Preston's hands were used in this way. They appear all to have been given to persons who were well known supporters of the respondent and prepared to vote for him and for him only if they voted at all.

THE LAVELLE CASE.

The second case which is made the subject of appeal is that of Anthony Lavelle, a voter who is charged to

(1) 9 Can. S.C.R. 102. (2) Ed. 4 p. 21.

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have been treated by John Duggan and William Daly, alleged agents of the respondent. The only evidence in support of the charge is that of Lavelle himself, whose testimony was, as the trial judges have found, and as appears from his deposition itself, unsatisfactory and contradictory, so much so that the learned judges entirely discredited him. Such being their decision it must be regarded as final and conclusive and the case may be dismissed without further comment.

THE GOWING CASE.

The charge in the particulars applicable to this case is that of the payment of the travelling expenses of a voter named William Gowing, by James Stock an agent of the respondent. The evidence, however, if it could be said to establish anything against the respondent, would not be a case of payment of travelling expenses but a case of bribery by lending. Strictly speaking the evidence might have been rejected, but as the learned judges admitted the evidence and the objection as to the inaccuracy of the particulars does not seem to have been taken, it will be better to consider it on the merits, more especially as there can be no pretense of any surprise, the three persons who alone could speak as to the facts having all been very fully examined.

The agency of Stock is, I think, established by the evidence of Mr. Climie, the secretary of the North Perth Reform Association, who proves it in this way. Stock was a delegate to, and in that capacity attended, the convention by which Mr. Grieve, the respondent, was nominated as a candidate. The witness says that Mr. Grieve on accepting the nomination addressed the meeting of delegates, and urged them to work for him, saying he wanted all their assistance; and this mandate was accepted by Mr. Stock as is shown by his

having, as he himself proves, canvassed for the respondent.

The voter, William Gowing, was a bricklayer living in Stratford and having a vote at Listowel. He was a pronounced supporter of the respondent, and a free ticket had been furnished to him enabling him to go to Listowel to vote. On the day before the polling he went to Timothy Winters, who was the bar-keeper at the Windsor Hotel in Stratford, who himself came from Listowel and was an old friend and associate of Gowing's, and asked him to lend him $2, as he had no money and did not like to ask his wife for any, and yet did not want to go to Listowel without anything in his pocket. He seems to have appealed to Winters, who was also a supporter of the respondent but not an agent, not in any way as a political friend of the respondent but as an old personal friend of his own. He also asked Winters to lend him an overcoat. Winters lent him the coat but said he had not the money; just at that time, Mr. Stock, who boarded at the hotel, passed the hotel office in which Gowing and Winters were talking, and Winters appealed to him to lend him (Winters) $2, that he might lend it to Gowing to go and vote. Stock at once complied and handed over the $2 to Winters who immediately gave it to Gowing. The learned judges seem to have considered that if it was established that the loan was in truth a loan to Winters and not by Stock to Gowing, but by Winters to the latter, that the case failed. And they do find with some hesitation that the loan was not to Gowing but to Winters. I cannot, however, see that this is conclusive.

By section 84 subsection (*a*) every person who lends any money to a voter to induce him to vote is guilty of bribery. And by subsection (*e*) of the same section any person who advances money to any other person

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with the intent that such money shall be expended in bribery or corrupt practices is guilty of bribery.

Therefore if Stock, an agent of the respondent, advanced $2 to Winters who was not an agent, with the intent that Winters should expend it in bribing the voter Gowing, Stock himself upon the plain words of the act would be guilty of a corrupt practice which, Stock being an agent, would avoid the election.

Therefore the real question is whether Winters in lending the $2 to Gowing, intended it as a bribe or was merely doing a kindly act to accommodate an old friend. Winters says he was in the habit of lending Gowing money, that they were old friends and that he would have lent him the money any way irrespective altogether of the election. His own words are:—

> I would have given it to Mr. Gowing if there had been no election at all if he came and asked for it.

And again:—

> Any way I would have lent him the money for I have lent him money before in Listowel.

It is true that the money was not paid back until just before the trial and probably not until the attention of Winters was called to it by the knowledge that it was made the subject of a charge to be investigated. But on the whole, considering the old friendly relationship between Winters and Gowing, the smallness of the sum, the fact that Gowing was already a declared supporter of the respondent's, and that as he had a free ticket to take him to Listowel and back the strong presumption is that he would have gone to vote whether he got the $2 or not, I think it would not be safe to say that the evidence establishes that the loan was made by Winters to Gowing in order to induce him to vote for the respondent or that the loan by Stock to Winters was made with any corrupt object in view. This last mentioned loan, that by Stock to

Winters, may reasonably be attributed to a willingness on the part of Stock to accommodate Winters whom he seems to have known well, and whom he was probably accustomed to see several times a day at the Windsor Hotel at which he boarded, and with whom he was evidently on familiar terms of acquaintanceship. If these are correct inferences then, the learned judges having found that there were in fact two distinct loans, there is nothing in this case warranting any interference with the judgment of the Election Court. And in coming to this conclusion I place much reliance on the *Youghal Case* (1) as a strong authority in point. In that case an agent of a candidate canvassed C. an elector, who said that he could not vote for the candidate as he was under an obligation to D. (an agent or friend of the other candidate) who had a judgment against him for rent. The agent upon this said he would pay it off and went to D.'s office and tendered it on behalf of C. the voter, but D. the creditor not being at home his clerk refused to take it. It appeared, however, that the agent of the candidate who offered to pay the debt was also agent to a brewer who supplied porter to the publicans of the town and amongst them to C. the voter canvassed, and that it was customary with him to assist the publicans who dealt with him when they were pressed, by advances of money to pay off claims. Both C. the voter and the agent swore that the loan contemplated had nothing to do with the vote. It was held under these circumstances that there was not sufficient evidence of a corrupt intention. It should be remarked of this case that it is only referred to in the head-note and not in the body of the report, but it appears to have been reported by Mr. Cunningham who was himself one of the counsel in the case, and it is referred to by the reporter in his

(1) 21 L. T. N. S. 306.

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own work on corrupt practices as an authority (1). I think therefore it is a safe authority to follow, more especially as it seems to be a decision supported by a reasonable view of the law.

Then applying the principle of the *Youghal Case* (2) to the facts in evidence in the present, I think there is much more reason here for attributing the trifling loan to Gowing to the relationship of old friendship existing between the parties, and not to any corrupt intent, than there could possibly have been in the *Youghal Case*, more especially as we have the fact, which did not exist in the *Youghal Case* (2), that the voter here was not canvassed, but was already a declared supporter of the respondent, who had the means of going to vote for him and would, there is every reason to presume, have so done even if he failed in getting the sum he wanted to borrow. I must therefore hold there is no evidence of corrupt intent, and that this charge also fails.

The appeal should, in my opinion, be dismissed with costs, and a certificate sent to the Speaker that Mr. Grieve was duly elected.

TASCHEREAU J.—On the Gowing charge 375, there is, it seems to me, only one fair inference to be drawn from the evidence as a whole, and that is that the payment of the $2 by Stock was to pay Gowing's travelling expenses and to aid in procuring the vote. All leads to this. Winters had never made to this man a loan of such an amount before, he had had no dealings with him for two years, he was not a man able or likely to return a loan. The money was never returned by Gowing, never was asked for. After the beginning of the trial, some seven months after, Winters paid Stock back, but evidently only to pro-

(1) See Cunningham, Corrupt Practices, 2nd ed. p. 123.

(2) 21 L.T. N.S. 306.

tect the respondent's case. If there had been no petition against him Winters would not have returned this $2 to Stock. Do we hear of any so-called loans except in election times? Would Gowing have thought of his old friend Winters if it had not been election day? I agree with the Chief Justice upon his reasoning that the appeal should be allowed. I need not restate the facts; it has been done twice just now, and probably will be repeated twice again. That ought to be sufficient.

GWYNNE J.—In all cases of mere matters of fact, the finding upon which depends upon the credibility of witnesses or upon the due balancing of contradictory evidence, the judgment of the learned judge who hears and sees the witnesses should never, in my opinion, be reversed by an appellate court, and the more especially is this the case with the judgments rendered upon these election petitions, the trial of which takes place before two judges whose concurrent opinion is necessary to the avoiding of the election; but where the question in issue depends upon the proper inference to be drawn from undisputed facts the appellate court equally as the trial court is bound to exercise its independent judgment.

Now, the question in the present case is not whether one or another state of facts existed, but what is the proper inference to draw as to the intention of the parties to the transaction in question as to the facts of which there is no dispute—namely, was the handing of the two dollars by Stock to Winters intended as a *bonâ fide* loan from Stock to Winters, and was the handing of that same two dollars directly by Winters to Gowing, if that was the form of the transaction which is not quite clear, intended to be a *bonâ fide* loan from Winters to Gowing with which Stock had

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no concern, or on the contrary was the advance by Stock an advance made for the purpose and with the intention of Stock, who was an agent of the respondent, thus contributing to the paying of Gowing's travelling and other expenses from Stratford to the poll to vote for the respondent? And I must say that I concur with the Chief Justice in thinking that the latter was the intention of the parties is the only reasonable conclusion which the acts of the parties in evidence warrant and the only one which, having due regard to the object and intent and letter of the statute, can with propriety be drawn from those acts and the evidence. I therefore concur in the opinion that the appeal must be allowed and the election avoided upon this case.

As the majority of the court concur in thinking the election must be voided upon this case I abstain from the expression of any opinion whether the Grand Trunk Railway tickets were issued gratuitously or not, and the more especially so because it was said in evidence in the case that the Grand Trunk Railway Co. intend suing for the amount of the tickets in which case will necessarily arise the question whether they were issued gratuitously or not.

PATTERSON J.—The most important questions on this appeal arise in the cases called the Grand Trunk ticket cases.

Upon these cases we have distinct findings of fact.

Mr. Preston, who is secretary of the Reform Association, an organization which appears to exist for the purpose of promoting the interests of the political party to which the respondent belongs, is held to be an agent of the respondent. He obtained from the Grand Trunk Railway Company a large number of passenger tickets upon requisitions addressed by him to the com-

pany, and several of these tickets were given to voters to enable them to travel free of cost to themselves to and from their polling places.

The principal question of fact concerning these tickets is whether they were to be paid for by Preston to the company, or whether they were not given gratuitously by the company, the passengers being really carried free.

Much of the discussion before us, as well as at the trial, turned upon the form of the requisitions signed by Mr. Preston, and certain correspondence with and accounts kept or rendered by the company's auditor, and upon the effect of these and some other things as evidence of a personal liability of Mr. Preston for the price of the tickets.

That gentleman had, no doubt, furnished evidence that was capable of being used to establish a *primâ facie* case against him if he were sued by the company; possibly a strong *primâ facie* case, but one which might be met by other evidence, some of which is found in the record before us. The result of such a suit must at present be a matter of speculation only. The learned judges did not assume to decide it, but they agreed that the tickets were obtained by Preston under the belief that they were not to be paid for but that the railway company was to carry the voters gratuitously.

Taking that to be the fact, what is the law?

It is found in the group of sections of the Dominion Elections Act (1) beginning with section 84 and headed "Prevention of Corrupt Practices and other Illegal Acts."

Section 84 declares that "the following persons shall be guilty of bribery and shall be punishable accordingly," going on to define various acts and to enact that

(1) R. S. C. ch. 8.

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"every person so offending is guilty of a misdemeanour and shall also forfeit the sum of $200," &c. Section 85 is similar in its structure, describing other persons who are to be held guilty of bribery and punished in the same way as under section 84.

Now it is to be noted that these sections do not deal with the effect of bribery, as there defined, upon the election or upon any vote thereat. They merely prescribe the penalty upon the offender. They follow the English enactment under which the case of *Cooper* v. *Slade* (1) was decided, and which is found in the second section of The Corrupt Practices Prevention Act, 1854, (2).

That was an action for penalties, not a contest as to the validity of any vote or of any election.

Section 86 deals with corrupt treating by a candidate, imposing on the candidate a penalty of $200 in addition to any other penalty to which he may be liable under any other provision of the act, and providing for striking off one vote for every person corruptly treated. The second part of the section is not confined to candidates. It declares that giving refreshments to a voter on nomination day or polling day on account of the voter having voted or being about to vote is an illegal act and entails a penalty of $10.

Section 87 defines the offence of undue influence, making it a misdemeanour and subjecting the offender to a penalty of $200.

Section 88, to which I shall by and by refer more particularly, deals with the conveyance of voters, characterising the acts it forbids as unlawful acts, subjecting offenders to a penalty of $100, and if the offender is a voter disqualifying him from voting at the particular election.

(1) 6 E. & B. 447; 6 H. L. Cas. 746. (2) 17 & 18 Vic. ch. 102.

Section 89 defines personation, and attaches to that offence a penalty of $200, with liability to imprisonment.

Section 90 deals with subornation of personation or inducing any one to take a false oath, making the offence a misdemeanour, and further subjecting the offender to a penalty of $200.

Then section 91 declares that bribery, treating, or undue influence as defined by that 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 next preceding are corrupt practices within the meaning of the act, and by section 93 a corrupt practice committed by a candidate or his agent avoids the election.

It will be noticed that while section 91 designates by name bribery, treating, undue influence, personation, and inducing to commit personation, five of the six classes of offences dealt with in the preceding seven sections, as corrupt practices, it does not specifically name any offence against section 88, but covers offences connected with the conveyance of voters only by the general reference to any wilful offence against any of the seven sections. It may perhaps be the proper construction of section 91 that the five enumerated classes of offences, so far as they depend on this act and are not offences under any other act, do not become corrupt practices unless committed wilfully, but it is clear that no contravention of section 88 is made a corrupt practice unless it is a wilful offence. An offender against that section may, like the defendant in *Cooper* v. *Slade* (1), be liable to the penalty, no matter how innocent he may be of any intention to disobey the law, but unless he offends wilfully his act is not corrupt practice.

(1) 6 E. & B. 447; 6 H. L. Cas. 746.

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Take Mr. Preston's case. He may possibly have become legally liable to pay for the tickets by reason of the form of the transaction, or for want of written evidence of the concurrence of the railway company in the understanding on which he acted, or because no one who could bind the company in fact agreed to carry the voters free of charge, and if that should be held to be so the logical result might be that he is liable to the pecuniary penalty under the terms of section 88. But becoming liable by reason of his want of care and his neglect to have his real understanding properly expressed, yet contrary to his intention as well as to his understanding of the transaction, he could not be held guilty of a corrupt practice without striking out of section 91 the important word "wilful."

The position is very different from that in question before this court in *Young* v. *Smith* (1). The person who in that case was held by a majority of the court to have committed a corrupt practice had hired a team to bring voters to the place where the poll was to be held. What he did was exactly what he intended to do, though he had assumed that the act was not illegal except when done on polling day, while he had sent for the voters a day or two earlier.

It is unnecessary to say anything about some of the tickets which did not reach the voters through Mr. Preston.

The charges, then, are reduced to this, that the railway company, being owner of vehicles, carried voters in them to the polls or to the neighbourhood thereof. Whether that should be permitted or not, as a matter of policy, is not for the consideration of this tribunal. The owner of a carriage may lawfully drive voters to the poll. So may the owner of many carriages, like a livery stable-keeper, our law differing in this respect

(1) 4 Can. S.C.R. 494.

from the English Act of 1883 (2) which does not allow public stages or vehicles kept for hire to be used in that way. As a question of the interpretation of the statute, there is no sound reason for applying a different rule to a railway company which chooses to employ its carriages in the same way.

I believe the charges touching these railway tickets are all framed on the particulars under section 88, for paying the travelling and other expenses of voters, with the exception of the charges relating to two brothers named Ruhl. As to each of these men there is the further charge that an agent of the candidate gave or agreed or offered or promised to give money or valuable consideration to induce the voter to vote for this particular candidate, and to refrain from voting for the other. This is a charge of bribery under section 84, and the valuable consideration relied on (there being no pretense of bribery with money) is the same free ticket on which the charge under section 88 is based.

I have not been able to find a note of any remarks made by the learned judges concerning these charges, and I do not think we were referred to any such note. The charges are negatived by the dismissal of the petition, and we are now asked to characterize the handing of the railway tickets to these men as bribery on the evidence that the tickets were given to them under the circumstances thus spoken of by one of the brothers.

Q. What was the ticket given for ? A. It was given to me to come up here and vote.

Q. Who told you that ? A. The way it was, they sent a telephone down for me to come up to vote here, and I did not want to go, but then I said if they will drive me down free, down to Berlin and then if they give me a free ticket up and fetch me back here, Sebringville, and bring me back again, I go up and vote, but not no other way. I

(1) 46 & 47 V. c. 51, s. 14.

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would not have gone with my own money for I had no money to go with.

Q. They telephoned to George in the same way? A. They telephoned for both of us.

Q. What did George say about coming down? A. He did not say much at all; all he said, "if I will go, he will go too."

This appears to me the ordinary case of conveying a voter to the poll, and is not the less so by reason of the circumstance that the voter did not want to go, but would have stayed at home if he had not been carried free. That circumstance, if it has any significance, shows that the ticket was not, to a voter of this disposition, a valuable consideration in the sense of saving his money. It is a case that in my opinion has to be dealt with under section 88. To attempt by refining upon some turn of expression in the evidence, or on the meaning to which the term "valuable consideration" is capable of being extended, in order to make out an offence under the other section is to strain the language of the statute and not to give their fair effect to its purpose and intent. Bribery may, no doubt, be committed under colour of paying travelling expenses, and courts are expected to see through that or any other pretense resorted to for the purpose of disguising the real transaction; but when the real transaction is apparent we have no right to make something else of it, something unreal, by means of ingenious reasoning.

In connection with the charge now under discussion we have been referred to *Cooper* v. *Slade* (1), a case in which letters were written to electors, on behalf of a candidate, asking them to come and vote for that candidate and promising that their travelling expenses should be paid. The question, which came before the courts on a bill of exceptions, was whether there was any evidence for the jury that (within the words of

(1) 6 E. & B. 447; 6 H.L.Cas. 746.

the statute) the electors were promised money to induce them to vote. It was held in the Exchequer Chamber that there was no evidence for the jury, but that decision was reversed in the House of Lords. I may quote a few words from the opinion delivered by Lord Cranworth, partly by way of introduction to a remark which I have to make:

"Now surely," His Lordship said, "if I say to a person 'If you come to Cambridge and vote for me, I will give you money, being the amount of whatever expense you may pay for coming up to vote,' that is giving money to the voter for the purpose of inducing him to vote; it is giving money to him to indemnify him for something which, but for giving the money, he would have to pay out of his own pocket? It may be a matter for your Lordships and for the other house of Parliament, in your legislative capacity, to consider whether it would not be reasonable to alter this enactment and to say that money *bonâ fide* paid, which is no more than an equivalent for the expense of coming to vote, ought not to be considered as a bribe."

The enactment thus referred to has not been altered by any statute directly professing to do so. It is the same law which we have in section 84. But in England there was in 1883 the enactment with respect to parliamentary elections (1), and in 1884 with respect to municipal elections (2), that made any payment or contract for payment of any kind made on account of the conveyance of electors to or from the poll, whether for the hiring of horses or carriages or for railway fares or otherwise, for the purpose of promoting the election of any candidate, an illegal practice. The same acts made it illegal to let, lend, or employ, or hire, borrow or use, for the conveyance of electors, any public stage or hackney carriage or other vehicle kept for hire, though it left electors, singly or several at their joint cost, at liberty to hire carriages, &c., to convey themselves.

Some things which these statutes declare to be illegal practices might by a very literal reading of the

(1) 46 & 47 V. c. 51. (2) 47 & 48 V. c. 70.

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definition of bribery, as in our section 84, be construed to be an offence of that kind, as being payment or promise of money to some person in order to induce voters to vote, but it may be reasonably doubted whether, in the absence of actual intention to commit the graver offence, a prosecution for bribery by paying travelling expenses, the payment not being excessive, would now be sustained in any English court.

In Cunningham on Elections the author or editor (1), speaking, as I understand him, of the time before 1883, founds upon the case of *Cooper* v. *Slade* (2) the remark that the law on the subject of travelling expenses had been in a state of great uncertainty. He follows this remark by a reference to the acts of 1883 and 1884. There had been also other legislation on the subject after the cause of action in *Cooper* v. *Slade* (2) had arisen. That case was decided under the Corrupt Practices Prevention Act, 1854 (3). The election in question was very shortly after the passage of the act. It occurred in August, 1854. The trial took place in 1855, the decision of the Exchequer Chamber was given in 1856, and the appeal to the House of Lords was argued in July, 1857. In 1857 (4) it was declared to be lawful for the candidate or his agent by him appointed in writing to provide conveyance for any voter for the purpose of polling at an election and not otherwise, but not lawful to pay any money or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose; and the Representation of the People Act, 1867 (5), enacted that it should not be lawful for any candidate or any one on his behalf at any election for any borough, except five which were named, to pay any money on account of the conveyance of any voter to the poll, either to the voter him-

(1) 3rd Ed. by Giles, p. 145.
(2) 6 E. & B. 447; 6 H. L. Cas. 746.
(3) 17 & 18 V. c. 102.
(4) 20 & 21 V. c. 87.
(5) 30 & 31 V. c. 102.

self or to any other person, making such payment an illegal payment within the meaning of the Corrupt Practices Prevention Act, 1854.

Mr. Justice Williams, who dissented from the judgment of the Exchequer Chamber in *Cooper* v. *Slade* (1) holding the opinion that was afterwards affirmed by the House of Lords, said :

I am quite aware that the statute, as I have construed it, will act harshly, and apply to cases which can hardly have been in the contemplation of the legislature. But the language of the act appears to me so plain and unambiguous that these considerations afford only an argument to prove that the statute was inconsiderately passed and ought to be amended.

This suggested amendment of the law seems to have been made in England by the effect of the acts of 1857, 1867 and 1883, which, providing specially for the class of cases, modified the application to that class of the bribery clauses of the act of 1854. It left those clauses to apply to actual bribery committed under cover of paying travelling expenses, but provided a way for dealing with those payments which were not meant for bribes though perhaps capable of being brought literally within the statutory definition of bribery.

In the Dominion Elections Act we have both sets of provisions.

Section 88 of the Revised Statute follows section 96 of the Dominion Elections Act of 1874. Familiar as the provision may be, we may as well look at the exact language of section 96 :

And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters be or be not according to law, it is declared and enacted that the hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle by any candidate or by any person on his behalf to convey any voter or voters

(1) 6 E. & B. 447, 461.

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to or from the poll, or to or from the neighbourhood thereof at any election, or the payment by any candidate or by any person on his behalf of the travelling and other expenses of the voter in going to or returning from any election are and shall be unlawful acts.

Having regard to this recital as well as to the enactment to which it is introductory, and bearing in mind that in section 91, as already noticed, the word "wilful" is applied to the bribery clauses as well as to those relating to other offences, and that whatever may be the proper force of the word in relation to bribery, &c., it must be held, on ordinary principles, to have some meaning, we have sufficient reason to be cautious before finding constructive bribery in transactions specially provided for by section 88, where no intentional bribery is shown.

The cases of the brothers Ruhl may perhaps hardly require a discussion of the matters to which I have been adverting, because those men, like the other free ticket voters, received their tickets, or were supposed by the agents of the candidate to have received them, in effect, though indirectly, from the railway company.

However this may be I see no ground for finding the charges established.

There are two other cases to dispose of. One is that of a man named Lavelle who was given a glass of whiskey by a woman named Mrs. Daly in her husband's house. The charge is that the whiskey was given by Daly the husband as a bribe. The question is purely one of fact, and it has been decided against the petitioner upon evidence quite sufficient to sustain that conclusion.

The other charge is that one Henry Gowing was paid his travelling and other expenses by one James Stock, an agent.

The charge is under section 88. Stock appears to have been an agent, and if by what he did he offended

against section 88 he certainly did so wilfully. The learned judges agreed in holding that the charge was not established although the circumstances were very suspicious. Gowing had a free ticket but he wanted some money, apparently for the purpose of having it to spend while away from home. He asked one Winters for money, and Winters got from Stock $2 which was handed to Gowing.

The answer to the charge is two-fold. It is asserted that the money was merely lent to Gowing, and not given to him under colour of lending it but really by way of paying his expenses; and further that Stock neither lent nor gave the money to Gowing but lent it to Winters.

If the finding had been against these allegations no one could say that it was not justified. The question, however, is one of fact. It has been tried by two experienced judges who have had the witnesses before them and who agree in their conclusion. All the considerations that have been urged before us have been weighed by them, including the probability of the account given and the credibility of the witnesses. Mr. Justice Rose is reported as having made these observations:

> The case is full of suspicion, and there is one fact, which is also very full of suspicion, that the money was not repaid till the day before election trial began, and possibly not paid until the morning of the day upon which investigation of this case was entered upon. The only question is whether the surrounding facts and circumstances are so strong as to lead us to disregard the statement of each of the parties to the transaction, and to require us to find that they are not telling what is true, and that the transaction was not a loan from Stock to Winters and from Winters to Gowing. I do not feel justified in saying more than that it is a case full of suspicion, saying, further, that I am unable to find that a corrupt practice has been proven by the evidence.

Mr. Justice MacMahon made observations to the same effect.

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The case is thus correctly put by the learned judges as depending on the weight of evidence and the credibility of witnesses. It has been suggested that that is not a proper way to regard it, but that the court is asked merely to draw inferences, not to pronounce on the credibility of the witnesses. I confess my inability to understand the distinction. Three men swear to a certain fact. If they swear truly it was the fact. But it is said they do not swear truly, though no one swears to the contrary. There are circumstances: one man asks another to lend him money; the second man, not having any, asks number three for it; and number three supplies the money which is handed to number one who wants it for spending money at the election. These facts are all consistent with what the three men swear to, viz., that the money was merely lent. So are the other facts which throw suspicion on the reality of the alleged loan. It may be that all the story of the loan is utterly untrue. In other words it may be that the three men swore falsely. It may be very unlikely, or may seem so, that it should be only a loan. You may infer from all the circumstances that it was not a loan. That is to say, you may infer that the men swore falsely. The suspicious aspect of the transaction and the difficulty of accepting the sworn testimony as outweighing the inferences one might be otherwise inclined to draw from the circumstances do not touch the principle which would be the same if the sworn testimony and the inferences were more nearly balanced. It is to my mind a case simply of weighing probabilities against the oaths of witnesses. Is it our duty under the circumstances to do that?

There is of course no question of our jurisdiction or of our duty to hear appeals on questions of fact as well as of law. So it was in all the cases in which it has been laid down in this court that a decision de-

pending on a conflict of evidence or on the credibility of witnesses ought not to be interfered with. The rule has been acted on in election cases tried before a single judge. It should *a fortiori* apply under the present law when the trial is before two judges.

An early case in this court in which the rule was enunciated and acted on was *The Picton* (1). In one of the judgments delivered in that case a passage is quoted from the judgment of Lord Chelmsford in *Gray* v. *Turnbull* (2). I may quote another passage in which the reason of the rule is neatly expressed:

> Different minds will of course draw different conclusions from the same facts; and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested.

In the head note to the case of *Grasett* v. *Carter* (3) in this court the doctrine is very clearly stated:

> When there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

The cases of *The Picton* (1) and *Gray* v. *Turnbull* (2) are relied on in one of the judgments in *Grasett* v. *Carter* (3) as supporting that doctrine, and they are direct authority for it as a general proposition and as a rule of convenience and expediency, which I understand it to be, not in the nature of a rule of law limiting the jurisdiction of the appellate court. But the case of *Grasett* v. *Carter* (3) is capable, as it strikes me, of being understood, or perhaps misunderstood, as carrying the rule farther than that. *The Picton* (1) was a direct appeal from the court of first instance, and *Gray* v. *Turnbull* (2) was an appeal from the unanimous judgments of two courts, while in *Grasett* v. *Carter* (3) the court of intermediate appeal had reversed the finding of the primary

(1) 4 Can. S.C.R. 648. (2) L.R. 2 Sc. App. 53.
(3) 10 Can. S.C.R. 105.

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court, which finding was restored by this court; and the statement of the doctrine, being addressed to the duty of the intermediate court, seems to me to involve the proposition that if an intermediate court reverses the decision of the primary court on a question depending on conflicting evidence, its judgment is, for that reason alone, liable to be in its turn reversed. This savours of a rule of law affecting the jurisdiction of the court. I may be wrong in supposing such a rule to be in effect laid down, and I do not understand the judgment of the court to have turned upon it.

I have always thought that the proper principle on which appeals should be dealt with when the judgment directly appealed from has reversed a decision on a question of fact was stated by Lord O'Hagan in a case of *Symington* v. *Symington* (1) some five years later in date than *Gray* v. *Turnbull* (2), but found in the same volume of the reports.

> On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanour before himself, should not have his decision lightly set aside. And undoubtedly the value of *vivâ voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position and enabled us, so to speak, to see with his eyes when he states the impression produced upon him by the principal witness * * * Besides we are concerned, directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm unless we are satisfied of its error.

This is, however, somewhat aside from the immediate question of the disposal of the present appeal from a court of first instance.

For my own part I am not disposed to lay down or to acknowledge the authority or the value of rules or formulas for the decision of questions of fact. Evi-

(1) L. R. 2 Sc. App. 415, 424. (2) L. R. 2 Sc. App. 53.

dence, particularly *vivâ voce* evidence, will in general be best appreciated when looked at as an ordinary juror will look at it, with the mind free from theories and arbitrary rules, and by those who, like a jury, see and hear the witnesses. That principle is recognized by the rule under discussion, and in my opinion that rule ought to be adhered to in this case.

I think the appeal should be dismissed.

Appeal allowed with costs.

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