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*May 12,13.

*June 31.

CONTROVERTED ELECTION OF THE COUNTY OF SELKIRK.

DAVID YOUNG AND ARCHIBALD WRIGHT..... .... } APPELLANTS;

AND

DONALD A. SMITH..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

The Dominion Elections Act, 1874, *secs.* 96 *and* 98—*Hiring a team to bring voter to poll a corrupt practice—"Wilful" offence —Advance of money when not made in order to induce voter to procure the return of the candidate not bribery.*

As to the case of one *J. F. G.*, the charge was that the respondent bribed him by the payment of a promissory note for $89. The evidence showed that *J. F. G.* had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue or falling due that day, when respondent asked him to canvass that day, and promised to send into town and have the note arranged for him. At the same time *J. F. G.* was negotiating for a loan on a mortgage to respondent and it was at first stipulated that the amount of this note should be

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

taken out of the mortgage money. The agent of the respondent, after the election, at the request of *J. F. G.*, paid the mortgage money in full and allowed the matter of the note to stand until *J. F. G.* could see respondent. *J. F. G.* stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it.

Held:—That the evidence did not show that the advance of money was made in order to induce *J. F. G.* to procure or to endeavor to procure the return of respondent, and was not therefore bribery within the meaning of sub-sec. 3 of sec. 92 of the Dominion Elections Act, 1874.

As to the case of one *M.*, the evidence shewed that *M's* team was hired some days before the opening of the poll by *C.*, an agent of the respondent, for the purpose of bringing two voters to the polls. *M.* went for the voters, returned the day previous to the polling day without the voters and was paid fifteen dollars.

Held:—That the term "six preceding sections" in the 98th section of "The Dominion Elections, 1874," means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by the 96th section (1), was a corrupt practice within the meaning of the 98th section (2). [*Henry*, J., dissenting.]

(1) 37 Vic., ch. 9., sec. 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 to or from the poll, or to or from the neighbourhood thereof, at any election, or the paymentby any candidate, or by any person on his behalf, of the travelling and other expenses of any voter, in going to or returning from any election, are and shall be unlawful acts; and the person so offending shall forfeit the sum of one hundred dollars to any person who shall sue for the same; and any voter hiring any horse, cab, cart, waggon, sleigh, carriage or other conveyance for any candidate, or for any agent of a candidate, for the purpose of conveying any voter or voters to or from the polling place or places, shall, *ipso facto*, be disqualifiedfrom voting at such election, and for every such offence shall forfeit the sum of one hundred dollars, to any person suing for the same."

(2) Sec. 98 :—"The offences of bribery, treating, or undue

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APPEAL from the decision of Mr. Justice *Betournay*, of the Court of Queen's Bench for the Province of *Manitoba*, dismissing the petition against the return of *Donald Alexander Smith*, as member of the House of Commons for the Electoral District of the County of *Selkirk*, in the Province of *Manitoba*.

The petition charged the respondent with bribery, treating, undue influence, hiring teams to convey voters to and from the polls, and with corrupt practices, but the appellants limited their appeal to four cases of alleged corrupt practices, viz. :—

(1). The case of *Donald Alexander Smith*, as briber, and *John F. Grant*, as bribee.

(2). The case of *James Penrose*, as briber, and *Henry King*, as bribee.

(3). The case of *Elias George Conklin*, as the person hiring teams, and *John Henry Mason*, as the person from whom *Conklin* hired the teams.

(4). The case of *Donald Alexander Smith* and *Sedley Blanchard*, bribers, and *Jean Baptiste Lapointe*, *Elzéar Lafemodière*, *Louis Deschambault*, *L. J. A. Levecque*, *J. A. Provencher*, *Alezander Begg*, and *A. F. DeGagnier* (or *Gauthier*), as bribees.

The facts and the evidence relating to these charges are reviewed in the arguments and judgments hereinafter given.

Mr. *Hector Cameron*, Q.C., for appellants :

The evidence in the *Smith-Grant* case consists only of the testimony of Mr. *Grant* and Mr. *Blanchard*, and the facts are not in controversy. *Smith* desired to get *Grant* to

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 six next preceding of this Act, shall be corrupt practices within the meaning of the provisions of this Act."

go with him to canvass the voters in a particular district, and had been advised by Mr. *Blanchard*, his solicitor and election agent, to do so. *Grant* goes to *Smith's* house on his way to town to take up an overdue note of $89. *Smith* asks him to go to canvass with him that day and, as an inducement, promises to send into town and get the note paid. In the words of *Grant*, "I suppose the consideration for the arrangement was, that I should accompany Mr. *Smith* to *Headingly*. I consented to go with him after that. He canvassed the parish and I accompanied him. I advised the voters to vote for Mr. *Smith*. Mr. *Smith* knew that I was doing this." *Grant* was at that time negotiating for a loan on mortgage from *Smith*, and it was at first stipulated that the amount of this note should be taken out of the mortgage money: but when he settled the mortgage transaction with *Blanchard*, *Smith's* agent, a week or 10 days before the election, the mortgage money was paid over in full, without deducting the amount of the note. *Grant* thus states it: "I did not tell Mr. *Blanchard* that I never would pay the note, but said I had a claim against Mr. *Smith*. The claim was for previous election services rendered 4 or 8 years ago, and I wanted to see Mr. *Smith* about it." Mr. *Blanchard* says (page 11): "He begged so hard that I gave him the whole of the mortgage money and there the thing has stood ever since."

There was here undoubtedly a loan of money, if not an entire gift of it, under the suspicious pretext of paying an old election debt of 4 or 8 years standing, for the corrupt purpose of procuring the vote and influence of a leading man in the constituency, and even if the object of the respondent was not to influence the vote of the elector, of which he may have felt secure, yet if it was to procure his influence and to reward him for exerting it in the respondent's favour, it was equally

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a corrupt practice within the statute and the law of Parliament. The procuring of influence for a consideration is a violation of the 92nd and 93rd sections of the Dominion Elections Act, 1874.

The learned Counsel referred to the judgment of Mr. Justice *Armour*, in the *North Ontario* case (before this Court in appeal) (1), and to the *Coventry* case (2); *Cashel* case (3); *Bradford* case (4).

[As to the *Penrose* case the learned counsel did not rely on it.]

The next case, on which there can be no doubt, is the *Conklin-Mason* case, that of hiring a team to bring voters to the poll, which hiring was contrary to the statute. The Judge in the Election Court disposed of this charge on the ground that while the hiring of teams was illegal, yet it was not a corrupt practice. Mr. *Conklin* was on Mr. *Smith's* committee, and I did not think from the face of the evidence the respondent could deny the fact. *Mason's* team was hired and paid for by *Conklin;* the teamster was given the name of two voters on a slip of paper. It is said that he could not get the orders. The mere fact, however, that the teamster was hired to fetch them is in itself corrupt by the statute.

The respondent endeavors to uphold the learned Judge's decision on this point by *Woodhouse* v. *O'Donohoe* (5), decided under the repealed Act of 1873. The Act of 1874 expressly altered the law; the language of the 98th section is clear and decisive on the point. Neither of my learned friends have ever doubted since the Act of 1876, that the hiring of a team, prohibited by the 96th section, is a corrupt practice. The construction which is for the first time put forward is that the

(1) See p. 430
(2) 1 O'M. & H. 98 and 101.
(3) 1 O'M. & H. 289.
(4) 1 O'M. & H, 30 and 35.
(5) 10 C. L. J. N. S. 248.

words "six next preceding sections" in section 98 apply to the sections preceding section 93, and not sections 92 to 98. The language is clear and unambiguous and must be construed in their literal sense and include the 96th section which prohibits the hiring of teams to carry voters to the polls.

The agency cannot be denied successfully, when we come to look at Mr. *Conklin's* evidence. He was on a committee which Mr. *Smith* recognized, and he canvassed.

The learned counsel then concluded his argument by shortly referring to the evidence in the *Gauthier* case.

Mr. *Robinson*, Q. C., and Mr. *Bethune* for respondent:

The first case is the *Grant* case upon which my learned friend seems to insist.

This loan was not made to *Grant* to induce him to give a general support or his vote to *Smith*, because that would have been given without the inducement. The loan was offered to *Grant* to induce him to give on a particular day, to suit the convenience of Mr. *Smith*, the assistance which he would have given without the inducement on another day. There was no corruption in the act.

It is no use arguing whether this is a case of undue influence or not. The charge is not that he canvassed on that particular day, but that *Grant* was personally bribed by respondent. Now he neither bought his influence or his vote. [The learned counsel then briefly referred to the cases of *Penrose* and *Gauthier*.]

The only case which involves a question of law is that of the hiring of *Mason* to convey voters to the poll. First of all we contend there is no evidence to show Mr. *Smith* knew Mr. *Conklin* was on the committee. There was nobody influenced at all by the transaction. *Conklin* did not know whether *Mason* had a vote, and *Mason* did not know which side *Conklin* supported.

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It was merely an ordinary case of hiring a team, and the teams actually returned before polling day without the voters.

Then as to the question of law. It is clear until this clause was put in, hiring *per se* was illegal and not corrupt. The view taken by the learned Judge who decided this case, is that the act must be corrupt. Now, the hiring took place as a teamster and not as voter, and the object of the act was to prevent the conveyance of the voters and not the sending of the cabman for the voter, and that is all that was done in this case.

The term "the six next preceding sections of this Act," referred to in sec. 98, cannot mean the secs. 92 to 97 inclusive; for the word "wilful" is insensible as applied to most of the acts there specified, which are in themselves illegal acts even at Common Law, and involve a corrupt intention and purpose as part of the offence.

It seems absurd to speak, for example, of wilfully giving money, or agreeing to obtain an office for a vote, or corruptly doing so as a reward for having voted; of wilfully paying money with the intent that it shall be spent in bribery; of wilfully receiving money for votes; of wilfully treating for the purpose of corruptly influencing voters; of wilfully threatening or inflicting violence, or using fraud, to compel voters to vote or abstain from voting; or of wilfully inducing any one to personate a voter or take a false oath. The word "wilful" cannot have been used here in the sense either of doing these acts intentionally, or of doing them knowing that they were illegal.

Then what do these words mean? We say that the word "preceding" means preceding the definition of *bribery*, *personation*, *treating* and *undue influence* in this Act; and that the clause may be so read. It seems probable that the clause has been transposed in framing

the statute, or that sections 93 to 98 inclusive were originally framed as sub-sections of section 92. The word "wilful," in the sense of knowing it to be an offence, would have a reasonable application to the acts prohibited in the then six next preceding sections, (secs. 86 to 91) many of which are acts which are in themselves innocent, and might well be supposed to be so by any one not aware of the statute, or conversant with the special law of elections. It is further to be observed that the effect of section 98, if applied to sections 92 to 97, is first to declare bribery, &c., to be a corrupt practice without disqualification, and then to make it so only if done wilfully. As to the effect of the word "wilfully," see *Regina* v. *Prince* (1), *Abbott's* Law Dictionary (2), *United States* v. *Three Railroad Cars* (3), *Bishop's* Crim. Law (4), *Lewis* v. *Great West. Railway* (5), the *Brockville* case (6), the *Bolton* case (7), *Cunningham* on Elections (8), *Rogers* on Elections (9), *Meirelles* v. *Banning* (10).

Mr. *Hector Cameron*, Q.C., in reply.

RITCHIE, C. J.:

Four charges were pressed before us in this case. First the payment of a tavern bill incurred by the respondent and a few friends during the canvass. The agent did not pay the bill till after the election, and although the charges appeared to him very high, he said he paid the amount rather than have a dispute. Moreover I have no means of discovering from the evidence what it would have been reasonable to pay under the circumstances, nor what are the usual charges in that part of the country. I can see nothing corrupt in this.

(1) L. R. 2 C. C. R. 154.
(2) Vol. 2. p. 654.
(3) 1 Abb. U. S. 196.
(4) Sec. 428.
(5) L. R. 3 Q. B. D. 195.
(6) 32 U. C. Q. B. 138.
(7) 2 O'M. & H. 142.
(8) P. 128.
(9) P. 350.
(10) 2 B. & Ad. 909.

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There is another charge as to the payment of a note. Mr. *Smith* called on one of his supporters (Mr. *Grant*) to canvass with him on a certain day, and the supporter said he could not, because he was then going into *Winnipeg* to settle a promissory note which had fallen due. Mr. *Smith* said: "Oh, my agent is going in and he can attend to that." The respondent then instructed his agent to pay the note and charge it against the mortgage money he was lending *Grant*. I do not think there was any loan or gift of money. I think it was only natural for Mr. *Smith* to say in such a case, if you will go with me I will have your note attended to. There was no corrupt object in lending the money, as *Grant* was and had been always a strong supporter and canvasser of the respondent, and certainly there was actually no loan in the general acceptance of the word.

As to the *Penrose* case I am not prepared to say the Judge was wrong.

But then we come to the *Conklin* case. In this case I think there has been a corrupt act done by the agent which must avoid the election. The charge is: "that *Donald Alexander Smith*, by his agent, hired and promised to pay and paid for divers horses, teams, carriages and other vehicles to convey divers voters to and from the poll, and to and from the neighbourhood thereof." The particulars of this charge are as follows: "Name of person hiring, *Elias George Conklin*; name of person from whom hired, *John Henry Mason*; sum promised to be paid, fifteen dollars a day, by *Elias George Conklin* to *John Henry Mason*; sum paid, fifteen dollars per day, by *Elias George Conklin* to *John Henry Mason*." Now what are the facts? *Conklin* hired a teamster to fetch two electors a few days before the polling. The teamster went into the country for them and returned the day before polling, but without the two men.

The learned Judge has certainly misapprehended the

law in this case. He was under the impression that the 96th section only disqualified the voter and exposed him to penalties. [The Chief Justice then read the 96th section.] But he seems to have entirely overlooked and been unaware of the 98th section, and held that the act complained of, though unlawful, was not a corrupt act.

Mr. *Bethune* argued very ingeniously that it should not apply to the "six next preceding sections," but to the sections preceding the 97th section. I do not think we can enter into such a refined process of reasoning. If this clause has been put in its wrong place, the error must be rectified by Parliament and not by us.

Then was this a "wilful" offence or not?

If this statute had simply declared that whosoever shall wilfully pay a voter to bring voters to the polls shall be guilty of a misdemeanor, can it be doubted that on an indictment on proof of the act done, it would be no defence to set up ignorance of the law? It is too clear for argument that ignorance of the law does not excuse.

Here the illegal act was done without any legal excuse, and without any ignorance or mistake in fact, and consequently it was a wilful breach of the law, and consequently a corrupt act.

It seems to me impossible to suppose that the intention of the legislature could have been to make the corrupt act depend upon the knowledge of the doer of the act of the law. When he engaged in that election and undertook to do acts in connection therewith, he was bound to know the law and to take care that he did no illegal act. If he had stated to the person: I do not know the law, I do not intend to break the law, but if it is lawful to pay you for bringing the voter to the poll, I will do so, but never does pay, and so never promises to do an illegal act and never does it, he would be within the principle of the *Wheler* v. *Gibbs* case, just decided, and as I understand the law in such a case,

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there would be no corrupt act. But that is not this case. Here the unquestionably unlawful act was done, and his only justification or excuse to denude it of its wilful character is, I did not know it was illegal. But it is very clear, in my opinion, that such a pretence will not deprive the act of its wilful character. If a man voluntarily breaks the law, this, in the eye of the law, is a wilful act, because the act done is a wrongful act without just cause or excuse. To deprive an unlawful act of wilfulness, there must be an ignorance or mistake of fact, not ignorance or error in point of law.

All the cases turn on ignorance of fact, not ignorance of law :—

Ignorance or mistake is not the defect of will when a man intending to do a lawful act does that which is unlawful, for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. *But this must be an ignorance or mistake of fact,* and not an error in point of law. As if a man intending to kill a thief or house breaker in his own house, by mistake kills one of his own family, this is no criminal action, but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him and does so, this is wilful murder (1).

In this case the maxim "*Actus non facit reum nisi mens sit rea*" does not apply.

In a very late case also—*Reg.* v. *Prince* (2)—this doctrine was clearly laid down. In that case, a man was charged with having abducted a girl under age; and all the judges agreed in saying that mistake in law is not a defence.

The respondent in this case, however, had, according to the evidence, no knowledge whatever of the transaction.

The appeal is allowed, with costs, and the House of Commons will be notified that the election is void.

FOURNIER, J. :—

I will not enter my dissent in this case, although I

(1) Black Com. by Stephen, 2 Ed. book 6 of Crimes, p. 98 and 105.
(2) 13 Cox C. C. 138.

confess it is hard to unseat the respondent because there has been an unintentional violation of the law.

Conklin said that he was under the impression that he could send for voters before the polling day, so long as he did not send for them on the actual polling day. However, against the weight of authorities, I must admit the respondent's agent was bound to know the law, and, therefore, the appeal must be allowed.

HENRY, J. :—

There were four cases of alleged corrupt practices argued before us in this case:

1. For alleged bribery by the respondent for corruptly lending or advancing money to one *John F. Grant.*

2. The case of alleged bribery by the offer of one *James Penrose* to bribe *Henry King* to vote for the respondent

3. The alleged bribery by respondent and his agent, *Sedley Blanchard*, of *Lapointe* and six others named, by the payment after the election by *Blanchard* of about $30 to one *Gauthier* for the hire of committee rooms, for fire and light, and for board and the feeding of horses, including the boarding of five parties and the keeping of their horses.

4. The hiring of *Mason's* team by one *Conklin* to convey voters to the poll.

I will deal with these charges in their order. As to the first, I have carefully read over and considered the evidence applicable to it. It amounts to this: That *Grant*, some months previous to the election, without any reference being made to it, obtained from *Blanchard*, the respondent's solicitor, subsequently his agent for the election, the promise to advance him six or eight hundred dollars on a mortgage security on his real estate. The respondent, before the election, set out to canvass an outlying dis-

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trict and was recommended by *Blanchard* to get *Grant* to go with him. Before reaching *Grant's* house, he met him on his way to *Winnipeg*, and requested him to return with him. Grant had been previously a pronounced supporter of the respondent and had been canvassing for him, but at first declined to accompany the respondent because he had a note for about $89 due that day in a bank and said he must go to *Winnipeg* to have it taken up, upon which the respondent said he would send in and have that done in the meantime. *Grant* thereupon went with the respondent, and the latter sent and had the note paid and retired by *Blanchard*, who charged the amount of it to *Grant* as a part of the sum he had agreed, on the part of the respondent, to advance upon the mortgage. After the election, the mortgage was executed by *Grant* and the balance offered to him by *Blanchard*. *Grant*, however, objected to allow the amount of the note to be deducted from the amount of the mortgage, as he had a bill against the respondent for a previous election, and because he required the whole amount of the loan to pay off the demand for which he wanted it. Under the circumstances, *Blanchard* paid it to him, upon a promise from *Grant*, that he would repay the amount of the note to him, if the respondent did not allow the account against him. Under such facts I cannot understand anything corrupt. If a candidate wanted the presence with him of his warm supporter, and to obtain it it was necessary to substitute some other means of having done what alone could secure that presence, I think that under the circumstances it would be adding to the rigour of the statute to decide that there was anything corrupt in the transaction; which, from the evidence, we have every reason to consider *bona fide*.

As to the second case: The evidence is so conflicting that I do not feel at all at liberty to question the finding

of the learned judge who tried the petition; besides, there is no sufficient evidence of the agency of *Penrose* to make the respondent liable for the serious consequences of his acts. He says he at first thought he was on one of respondent's committee, but that the day before the election he found he was not; he, however, thinks he attended one or two committee meetings afterwards. Attendance at committee meetings is not confined to persons composing them, and there is nothing to show what he calls committee meetings were called with the knowledge or sanction of the respondent. Frequently the friends of a candidate form themselves into committees and clubs without his knowledge, and it would be unwarrantable to hold him personally answerable for their acts, so as to bring them within the laws which make candidates answerable for the acts of their agents.

The third charge is not at all sustained. It was for the payment by *Blanchard*, the respondent's agent, after the election, of a bill for which the respondent is in no way liable. The agency terminated with the election. No arrangement or agreement was made with *Gauthier*, before he supplied to the persons named the board and feed for their horses, by the respondent, or any one on his behalf, that the bill would be paid. He appears to have furnished what he charged for without orders from any one, and after the election was over made up a pretty high bill as many others do against candidates in such cases, and more especially against successful ones. I can speak from a long personal experience of such cases.

The fourth and last charge remains for consideration. It is founded on sections 96 and 98 of the Election Act of 1874.

Section 96, after reciting that doubts might arise as to whether the hiring of teams and vehicles to convey

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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 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 any voter in going to or returning from any election, are, and shall be unlawful acts, and the person so offending shall forfeit the sum of one hundred dollars to any person who shall sue for the same.

Section 98 provides that

Any *wilful* offence against any of the six next preceding sections of this Act shall be corrupt practices within the meaning of the provisions of this Act.

Although it would, in my opinion, be difficult to point out six *next* preceding sections to section 98, as provided by it, we must assume that the legislature intended it to apply to the next preceding six sections, and therefore to refer to and include section 96, and thereby provides for another and more serious offence. Section 96 creates an offence against a candidate, and also against another person for doing any of the acts prohibited by it, including as well the person who hires as the person who lets to hire a horse, team, &c., and subjects them to the penalties provided by the section, no matter how innocently done. Section 98, however, which is much more penal, requires that when a charge is made under it there must be evidence that it was done *wilfully*. The evidence under it should show that the act was done in such a way, and in such circumstances, that a jury would be justified in finding it to have been done wilfully. That it was done negligently, though sufficient under section 96, would not be so under 98, for the legislature has clearly provided for something more when consequences much

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more important and severe are to be the result. By a comparison and consideration of the two sections, no other conclusion can be arrived at. That every one must be presumed to know the law is a judicial maxim well known and long established, but, like every general maxim and rule, there are limitations of it in the construction of statutes, and authorities are found to shew that in cases similar to that now under consideration, the maxim is not always fully applicable.

The case cited on the argument by Mr. *Robinson*, *Meirelles* v. *Banning* (1), establishes that view. In giving judgment in that case Lord *Tenterden*, C. J., said :

The words "wittingly," "willingly" and "knowingly," in this penal clause must have been introduced with some view. If we suppose them to have no particular meaning, it would have been sufficient without adding more, to impose the penalty on any person opening or detaining letters, or suffering them to be opened or detained. Then, if these words have a meaning, we must look for the explanation of them, first to the preamble clause in question; and that recites that *abuses* may be committed by wilfully opening, embezzeling and detaining letters. The enacting part states what shall be the consequences of so doing, namely, that the person so *offending*, or *who shall embezzle any letter*, shall for every such offence forfeit £20 to be recovered by a *qui tam* action; and, over and above such penalty shall be forever incapable of exercising any office, trust or employment in, or relating to the post office. Now, in the interpretation of the act so highly penal on the party *offending*, we must be careful to adopt such a construction as will strictly answer to the intention expressed by the legislature: and so construing the clauses in question it seems to me that the words 'wittingly," "willingly" and "knowingly" must be taken to denote acts done with a conscious mind that the party is doing wrong.

Parke, J., said:

In an action for penalties and where a judgment against the defendant would be attended with such serious consequences, the law must be strictly construed: and I think we must consider the fortieth section of this Act as applying to cases where the officer knowingly and willingly does what is wrong * * *

(1) 2B. & Ad. 909.

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And cites *Wright* v. *Smith* (1), wherein it was decided by the Court of Exchequer: that a holding of the premises by a tenant without fraud, and a fair claim of right, was not a *wilful* holding over within the statute.

Patterson, J., added:

The statement in this case being that the delivery of the letters was *bonâ fide*, I think it cannot be said that the defendant acted "wittingly, willingly and knowingly," against the statute.

See also *Lewis* v. *Great Western Railway Co.* (2), in which the same doctrine is held. In that case *Brett*, L. J., says:

In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing he is doing is wrong (3).

Bramwell, L. J., says:

There is such a mass of authorities to shew what "*wilful* misconduct" is, that we should hardly be justified as a Court of Appeal in departing from them even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party. Something opposed to accident or negligence; the *mis*-conduct not the conduct, must be wilful (4).

I have made the foregoing extracts from the judgments in the two cases mentioned for the purpose of applying them, as I will now briefly do, to this case, after another brief reference to the statute and the evidence. We have only to refer to section 96 to find the legislative declaration that up to the passage of that Act doubts existed as to the law bearing on the question now under consideration, and the enactment was considered necessary to remove them. The offence by the section is

(1) 5 Esp. N. P. C. 203.
(2) L. R. 3 Q. B. D. 195.
(3) Ibid. p. 210.
(4) Ibid. p. 206.

stated to be for conveying voters to or from the polls, or the neighborhood thereof. The evidence in this case shows that the hiring of *Mason* and his team was not to bring the voters sent for to the polls or the neighborhood of it on polling day but some days previous. The party hired went for them and returned before polling day without them. *Conklin* swears that he understood the prohibition only to apply to polling day, and therefore thought, in hiring *Mason* to go and return before polling day, he was doing what the law permitted. If, therefore, he *bonâ fide* and honestly believed he was within the law and doing what it permitted, and I see no reason to doubt the fact, then I cannot conclude he was wilfully guilty of misconduct within the principles and doctrines held in the judgments which I have just referred to. By the authority of these cases, in the words of *Bramwell*, L. J., it is not the conduct that is to be wilful, but the misconduct. If *Conklin* believed he was not doing an illegal act, there was no *wilful* misconduct on his part. If he violated the provision of the section, it is not at all to be wondered at, for the construction he put upon it is that which most people would be likely to do, and although I will not say it is the right one, still I have little doubt professional men could be found who would agree with him, and it is certainly the one an unprofessional man would be most likely to adopt. The section being capable of two constructions, is a man to be found guilty of a wilful breach of it who is unconscious that he is violating it. A man unaccustomed to criticise acts of parliament might reasonably assume that as no polling booths had been erected or polls open, he might, previous to polling day, hire teams to bring voters from greater distances than would be practicable on polling day. Such being the case, we can the more readily give credence to the statement of *Conklin*, that he con-

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sidered the law would permit his doing legally what he is charged with and acknowledges having done.

It will be seen that there is no difference between the case of *Conklin* and the postmaster who was the defendant in *Meirelles* v. *Banning*, before cited. In the latter there was but the one offence created by the statute, and the court drew its conclusions solely from the words of the section "wittingly," "willingly" and "knowingly." In this case two offences are created with different penalties, the second only providing that the offence should be committed "wilfully." The two must therefore be differently construed, and I feel bound to conclude, the legislature intended that before the more serious penalties attached, there must be evidence that the "misconduct" and not the "conduct," was wilful. Proof of the prohibited act might be itself sufficient *prima facie* evidence to sustain the charge of wilful misconduct, but if so, that is in my opinion sufficiently rebutted by the sworn statement of *Conklin* as to his view of the law. As the result of this case he is a disinterested witness—the consequences of the decision will not immediately affect him, but the respondent and his constituency generally. The Judges in *England* are unwilling to avoid an election, which to do, is there considered a serious matter, but in this case, if our decision is against the respondent, the election will be avoided, not because of any wilful misconduct, but because an agent of the respondent took what may be held to be a mistaken view of a statutory provision, but one not at all to be wondered at. I cannot bring myself to think a construction producing such a result is at all necessary to secure the fredom or purity of elections, or that it would be in accordance with the letter or spirit of the statute. I am of opinion for the reasons I have given, that the appeal should be dismissed and the original judgment affirmed with costs.

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TASCHEREAU, J.:—

Ignorantia juris non excusat, and he who wilfully commits an act which the law declares illegal, wilfully commits an offence against that law. The word "knowingly" is not in the statute, and *wilfully* here cannot mean "knowingly."

GWYNNE, J.:—

I see no reason for objecting to the finding of the learned Judge before whom this Election Petition was tried, to the effect that the advance made by the respondent to take up the note of Mr. *Grant*, then about falling, or fallen, due, was not made *in order to induce* Mr. *Grant* to procure, or to endeavor to procure, the return of the respondent to serve in the House of Commons. The *purpose for which* any gift, loan, offer or promise is made is the essence of the offence. It is that which makes it bribery within the 3rd sub-sec. of the 92nd section of the Dominion Elections Act of 1874, and upon that point I concur in the judgment of the learned Judge, that no such purpose or intent was established by the evidence.

Upon the other point, namely, the hiring of a team or vehicle by *Conklin* to convey voters to the polls, I am of opinion that the term "six next preceding sections," as used in sec. 98, must mean the six sections next preceding the 98th, and not, as was contended, the six next preceding the 92nd sec.

The 98th sec. is certainly not very felicitously expressed, for the 92nd and 93rd cover "bribery," the 94th covers "treating," the 95th "undue influence," and the 97th "the inducing a person to commit personation"; all of which are expressly mentioned in the 98th sec., before the words "or any wilful offence against any one of the six next preceding sections of this Act." So that under these latter words there is only "the hiring

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of teams, &c." which is prohibited by the 96th section, to apply; however, no such strained construction can be entertained as that the "six next preceding sections" should be referred back to the sections preceding the 92nd, or to any other sections than the six preceding the 98th. And as to the words "wilful offence" in the latter section, the meaning of the Act, I think, must be held to be that, whereas the 96th sec. declared the act, there pointed to, to be an unlawful act, the 98th section declares that the wilful or intentional doing of an unlawful act shall be corrupt. Now, that the hiring here was wilful, that is, intentional, there can be no doubt, and the excuse that the party doing it did not know that it was made a corrupt act, or that it was an illegal act, cannot be received without frustrating the intent of the legislature by a judicial repeal of the act—*ignorantia juris non excusat.* As, however, the evidence does not affect the respondent personally with the act, the election can only be set aside for the corrupt act of an agent, with which corrupt act the evidence fails personally to connect the respondent, and to this effect the report to the House of Commons should be.

The appeal must therefore be allowed with costs, and the election be set aside for the above cause, also with costs.

Appeal allowed with costs.

Solicitor for appellants:—*John Milnes Macdonell.*

Solicitor for respondent:—*Sedley Blanchard.*