
1884 JOHN JOSEPH HAWKINS..... APPELLANT;
 *Feb'y. 12, 13,
 14.
 *Feb'y. 25. AND
 WILLIAM THOMAS SMITH *et al.*..... RESPONDENTS

ON APPEAL FROM GALT, J., SITTING FOR THE TRIAL OF
 THE BOTHWELL CONTROVERTED ELECTION CASE.

*Ballots—Scrutiny—Irregularities by Deputy Returning Officers—
 Numbering and initialing of the ballot papers by Deputy Re-
 turning Officer, effect of—The Dominion Elections Act, 1874, Sec.
 80—Corrupt practices—Recriminatory case—Evidence.*

In a polling division No. 3 *Dawn* there was no statement of votes
 either signed or unsigned in the ballot box, and the deputy

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

returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the resuming up of the votes by the learned Judge of the County Court, nor in the recount before the Judge who tried the election petition,

Held,—(Affirming the decision of the court below,) that the ballots were properly rejected.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle.

Held,—(Affirming the ruling of the learned Judge at the trial,) that these ballots were valid.

Per *Ritchie, C.J., Fournier, Henry, and Gwynne, JJ.*, concurring: whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or round O, then such non-compliance with the law renders the ballot null.

Division I, *Sombra*—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer, who had been putting his initials and the numbers on the counterfoil not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them.

Held,—(*Gwynne* and *Henry, JJ.*, dissenting,) that the irregularities complained of, not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving

1884

BOTHWELL
ELECTION
CASE,

1884

BOTHWELL
ELECTION
CASE.

provisions of sec. 80 of the Dominion Elections Act, 1874. *Jenkins v. Brecken* followed. 7 Can. S. C. R. 247.

Per *Henry, J.*, that although the ballots should be considered bad, the present appellant, having acted upon the return and taken his seat, was not in a position to claim that the election was void.

The Judge at the trial refused to allow a witness to be examined on a supplemental charge of a corrupt practice before the evidence on the principal charges had been closed.

Held.—That it was in the discretion of the Judge when to receive the evidence, and as no tender of it was subsequently made, the refusal of the Judge could not be made the subject of appeal,

APPEAL from the judgment of *Galt, J.*, rendered on the 12th January, 1884, declaring that the appellant (*J. J. Hawkins*,) was not duly elected a member of the House of Commons for the electoral district of *Bothwell*, but that the Honorable *David Mills* was elected, dismissing the petition against the respondent *James Stephens* (the returning officer at said election,) with costs to be paid by the petitioners, and giving judgment in favor of the petitioners with costs to be paid by the appellant (*J. J. Hawkins*), other than the costs of the said *J. Stephens*, which were directed to be paid by the petitioners.

The petition, pleadings, and the facts of the case fully appear in the judgments hereinafter given, and more particularly in the judgment appealed from, which is as follows:

“*GALT, J.* :—The petition, briefly stated, charges the returning officer *Stephens* with having “wilfully, unlawfully, and improperly neglected and refused to include in his addition of the votes the number of votes given for each candidate from the statements in the ballot boxes returned by two of the deputy returning officers, and which two statements gave the Hon. *David Mills* a majority of votes over those given for the said *John Joseph Hawkins*, the result of which was to give to the respondent *Hawkins* a majority of votes.

"The petition further charges the returning officer with having improperly and unlawfully permitted the deputy returning officers for certain polling subdivisions after the ballot boxes were opened to amend or put in statements as to the voting at their polling subdivisions, and in adding up and determining the number of votes for each candidate, which gave the respondent, *Hawkins*, a majority. That the returning officer declared the said *Hawkins* elected and declared his intention of making his return to the writ of election accordingly, whereupon proceedings were, within the time in that behalf limited by the 14th section of 41 *Vic.*, duly taken to have a final addition or summing up of said votes made by the proper judge in that behalf, and such proceedings were thereupon had before such judge that the number of votes given for each candidate, from the statements contained in the several ballot boxes returned by the deputy returning officers, was re-summed up, and the said judge duly certified to the said returning officer, that upon adding and summing up the votes given at the said election for the respective candidates, as shewn by the said statements, he found and declared that 1,576 votes were given for the said *Mills*, and 1,564 for said *Hawkins*, and that the said *Mills* was elected for the said electoral district by a majority of 12 votes; that thereupon it became the duty of the said returning officer to declare the said *Mills* elected, and to make his return to the said writ accordingly; but that he unlawfully and improperly refused to declare the said *Mills* elected, but made a special return to the writ in which he declared the said *Hawkins* as having a majority of votes, and setting forth the foregoing certificate of the learned judge, but that he, the returning officer, had been served with no certificate of a re-count of said ballots, nor had the said ballots been re-counted. The petitioners then

1884
BOTHWELL
ELECTION
CASE.

1884

BOTHWELL
ELECTION
CASE.

allege that the said *Mills* had a majority of the votes, and claim the seat for the said *Mills*. The petition then charges corrupt practices, etc., etc.

"The answer of the respondent *Hawkins* may be shortly stated to be that he was duly elected, that his majority had been reduced by the improper conduct of certain of the deputy returning officers, that the judge of the county court had improperly refused to recount the ballots, and charging corrupt practices, etc., etc.

"The answer of the respondent *Stephens* sets out the circumstances under which he refused to count the votes given in No. 3 Division of *Dawn*, and in No. 1 *Camden*, but as I shall have occasion to refer to these cases at length it is unnecessary to set forth the particulars of the defence, and he denies all improper conduct on his part. After the case was at issue an order was made for the production of all the ballots and papers, and the whole of the ballots were examined and corrected before me at the trial, so that, except in so far as the returning officer is concerned, the course pursued by the deputy returning officer, in either signing or omitting to sign the different statements of votes, is of no consequence. The result of the counting before me showed a majority in favor of Mr. *Mills* of 9, the totals being for *Mills* 1,574, and for *Hawkins* 1,565.

"There are three sub-divisions at which the statements of votes were in question before me, viz. : No. 3 *Dawn*, No. 1 *Sombra*, and No. 1 *Camden*. The facts as regard No. 3 *Dawn* are very simple, there was no statement of votes either signed or unsigned in the ballot box, and consequently the returning officer very properly refused to include them in his addition of the votes, and, singular to say, when the different parcels were opened each of the votes must have been rejected, the deputy returning officer having endorsed on each ballot paper the number of the voter on the voter's list, so that there could be

no difficulty whatever in ascertaining how each elector had voted ; fortunately this mistake cannot be said to have had any effect on the result, as the numbers were so close, there being a difference of only five in favor of Mr. *Mills*. These votes are not included, either in the count before the returning officer, the re-summing up of the votes by the learned judge of the county court, nor in the re-count before myself.

“ Division 1, *Sombra* : The returning officer included the votes in this division in his count so that he has nothing to answer respecting it. When the packages of ballots for this division were opened and examined before me it was found that none of the ballot papers were initialled by the deputy returning officer, and Mr. *Cameron* contended that all these votes should be disallowed.

“ The gentleman who had acted as agent for Mr. *Hawkins* was examined as a witness ; he stated that the deputy returning officer had put his initials and the numbers on the counterfoil, not on the ballot paper ; this was precisely what was done in the case of *Jenkins v. Brecken*, reported in the current volume of Supreme Court reports, and on the authority of that case I overruled the objection. The witness, however, stated that he told the deputy returning officer he thought this was wrong, that he put no mark on the ballot ; the officer looked over the Act, but found nothing to satisfy his mind ; he did, however, initial and number some of the ballot papers, about twelve, but when at the close of the day he took these ballots out of the box he carefully obliterated the mark he had put upon them. Mr. *Cameron* then urged that these must necessarily be rejected as the deputy returning officer had no right to interfere in any way with the ballots after they had been placed in the box, and that as it was not known for which of the candidates the votes had been given

1884

BOTHWELL
ELECTION
CASE.

1884

BOTHWELL
ELECTION
CASE.

the whole should be disallowed, and therefore the election should be declared void, as it could not be said that the disallowance of these votes might not change the majority. It is quite plain that whatever the deputy returning officer did, he did in good faith and with an anxious desire to do his duty ; no person was allowed to see the front of the ballot papers, and as there can be no reason for supposing they were not the very papers furnished by him and used by the voters, I see no reason why they should now be rejected. I may say I looked at the ballot papers when they were before me, and I could see no trace of any mark on any of them. The deputy returning officer was not examined, I presume, because, on the evidence given by the respondents' agent, I had overruled the objection.

The case of division 1, *Camden*, remains to be considered. This is by far the most important, as it was in consequence of the returning officer refusing to count these votes, the respondent *Hawkins* appeared to have a majority and was declared elected by the respondent *Stephens*. It was represented to me by *Meredith*, Q.C., who appeared for Mr. *Stephens*, that that gentleman had been bitterly attacked and all sorts of improper motives imputed to him, and he was desirous of giving his evidence to exonerate himself from all such charges. The evidence on this part of the case (that is to say the re-count of the votes) had been closed when this was said. I told Mr. *Meredith* I could see no evidence whatever of any improper conduct on the part of the returning officer ; he appeared to me to have acted with a desire to do his duty, and that it was quite unnecessary for him to refute charges which, in my opinion, had no foundation ; and if he had made a mistake in rejecting the statement in question it was after he had exercised an impartial judgment. When the returning officer on the day appointed proceeded to add up the

votes as set forth in the statement enclosed in the ballot boxes, it was found that in several cases the statements were unsigned; the returning officer stated that he did not feel authorized to add in the votes set forth in these statements. On this being said, several of the deputy returning officers who were present came forward and signed their statements, which were then received and counted by the returning officer. These statements are all in the form under sec. 57. The deputy returning officer for 1 division, *Camden*, was not present, and he swore that he had been advised to be absent from home on that day; the consequence was that the returning officer refused to accept the statement contained in the ballot box, and virtually disfranchised all the voters in that division. It was proved that the gentleman who had acted as agent for Mr. *Mills* at this poll, and who had received a certificate from the deputy returning officer, under sec. 58 of 37 Vic. ch. 9, signed by him, produced the certificate to the returning officer and desired him to accept that in lieu of the unsigned statement; this he refused to do, and, in my opinion, acted properly in so doing, as there is nothing in the Act which authorizes him to act on anything but the statement contained in the ballot box. The simple questions then are:—Should the returning officer have acted on the unsigned statement, and if not, should he have acted on the certificate of the re-summation by the learned judge of the county court? The answer to these questions are of no consequence now so far as the election is concerned, as all the ballots have been re-counted, but they are of importance to the returning officer.

“By sec. 10 of 41 Vic, amending sec. 55 of 37 Vic., ch. 9—

“Immediately after the close of the poll the deputy returning officer shall open the ballot box and proceed to count the number of votes given for each candidate.

1884
BOTHWELL
ELECTION
CASE.
—

1884
BOTHWELL
ELECTION
CASE.
—

In doing so he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the vote could be identified. The other ballot papers being counted and a list kept of the number of votes given to each candidate and of the number of rejected ballot papers, all the ballot papers indicating the votes given for each candidate respectively shall be put into separate envelopes or parcels; and those rejected, those spoiled and those unused shall each be put into a different envelope or parcel, and all those parcels being endorsed so as to indicate their contents shall be put back into the ballot box.

“By sec. 57 of 37 *Vic.*, ch. 9—

The deputy returning officer shall make out a statement of the accepted ballot papers, of the number of votes given to each candidate, of the rejected ballot papers, of the spoiled and returned ballot papers, and of those unused and returned by him, and he shall make and keep by him a copy of such statement, and enclose in the ballot box the original statement, together with the voter's list, and a certified statement at the foot of each list of the total number of electors who voted on each such list, and such other lists and documents as may have been used at such election. The ballot box shall then be locked and sealed and shall be delivered to the returning officer, or to the election clerk, who shall receive or collect the same. “The deputy returning officer and the poll clerk shall respectively take the oaths in forms Q. and R. to this Act, which shall be annexed to the statement above mentioned.”

“The statement found in the ballot box is as follows :

‘Statement under sec. 55.

' Election for the electoral district of *Bothwell*, held on Tuesday, the 20th day of June, 1882.

Votes given for <i>Hawkins</i> ,	44
Votes given for <i>Mills</i> ,	72
Rejected,	5
Unused,	101
Spoiled,	1

1884
 BOTHWELL
 ELECTION
 CASE.

' I certify the within statement to be correct.

' Deputy Returning Officer.' "

" On this being produced, Mr. *Cameron* objected that there is no statement under 57, that this is a statement under sec. 55, but not signed by the deputy returning officer, and that there is no affidavit annexed. No statement is signed under sec. 55, what is required by that section is that upon opening the ballot box the deputy returning officer shall proceed to count the number of votes given for each candidate, and to reject certain votes ; then the other ballot papers being counted and a list kept of the number of votes given to each candidate and of the other ballot papers, shall each be put into a separate envelope, and all these parcels shall be put back into the ballot box ; nothing is said about placing the list in the ballot box. Then comes sec. 56, which has no bearing on this question ; and then sec. 57, which requires a statement of the number of votes etc. ; and by sec. 59 the returning officer shall ' add together the number of votes given for each candidate from the statements contained in the several ballot boxes returned by the deputy returning officers.' This, therefore, is the only mode by which the returning officer can make his return, as he has no authority to re-count or even inspect the different parcels. I have examined the forms furnished to the deputy returning officer, not only in this division, but also at the other divisions in which the returning officer allowed the statements to be signed. In all these cases I find forms

1884
BOTHWELL
ELECTION
CASE.
—

under sec. 55, and one under sec. 57, so that it appears impossible that a deputy returning officer could with the slightest attention to his duty make a mistake between them. It appears to me there were two under sec. 55 and one under sec. 57. I have already pointed out that there is no statement required under sec. 55, but these forms are used in giving certificates to the agents of the candidates. The certificate given to the agent of Mr. *Mills* was produced; it is exactly the same, the writing the same and the figures the same, as that found in the ballot box, which is unsigned. I was under the impression at the trial, not having had an opportunity of ascertaining the difference between the statements contained in the paper furnished to the deputy returning officer, that the only error was in the deputy returning officer having omitted to sign a proper statement. I find now that I was mistaken. There was no statement prepared under section 57, and moreover, as was urged by Mr. *Cameron*, there was no affidavit annexed to the unsigned statement. It is true there was an affidavit in the prescribed form, but it was not annexed to any statement or other paper, and it is specially required by section 57 that it shall be annexed to the statement required by that section, and by which alone the returning officer is to be guided in adding up the votes. I find, therefore, the returning officer was right when he refused to count the so-called statement in his recapitulation of votes.

“The question that remains is, whether the returning officer was justified in returning Mr. *Hawkins* after receiving the certificate of the learned judge of the County Court. By section 14, 41 *Vic.*, ch. 6, ‘in case it is made to appear within four days after that on which the returning officer has made the final addition of the votes for the purpose of declaring the candidate elected, on the affidavit of any credible witness, to the County

Judge of any county in which the electoral district, or any part thereof, is situated, that such witness believes that any deputy returning officer at any election in such electoral district in counting the votes has improperly counted or rejected any ballot papers at such election, or that the returning officer has improperly summed up the votes, etc., the said judge shall appoint a time, within four days after the receipt of the said affidavit by him, to re-count the votes, or to make the final addition, as the case may be, and shall give notice in writing to the candidates, or their agents, of the time and place at which he will proceed to re-count the same, or to make such final addition, as the case may be, and shall summon and command the returning officer and his election clerk to attend then and there with the parcels containing the ballots used at the election, which command the returning officer and his election clerk shall obey.'

1884
 BOTHWELL
 ELECTION
 CASE.
 —

"It is plain from the foregoing that there are two courses open to a party interested in disputing the return, and these depend on the nature of the objection. The returning officer, having no control over the ballots, has nothing to do with them or a recount of them, but he is responsible that his addition of the different statements is correct; if therefore the complaint is against the action of the returning officer it must necessarily be for a re-summation. But if the objection is that the ballots themselves have been mis-counted or improperly counted by the deputy returning officers, then there must be a re-count of the ballots, and the learned judge is, by the 4th sub-section, directed to re-count the votes according to the rules set forth in section 55 of the Dominion Elections Act of 1874. Within the time limited by the Act, application was made to the learned judge for a re-summation of the statements, not for a re-count of the votes, on the ground that the returning

1884
BOTHWELL
ELECTION
CASE.
—

officer had improperly refused to count the statements from 3 *Dawn* and 1 *Camden*; the learned judge thereupon made the following order, addressed to the candidates, the returning officer and the election clerk:

“‘You are hereby required to take notice that I, on the application of *Matthew Wilson*, Esq., solicitor for *David Mills*, one of the candidates at said election, and on reading the affidavit, etc., have appointed Monday, the twenty-sixth day of June, A.D. 1882, at the hour of eleven, in the forenoon, at my chambers in the town of *Chatham*, to make the final addition of votes taken at said election on 20th June, 1882, and that at said time and place I will proceed to make such final addition, etc.”

“The parties did attend before the learned judge, upon which occasion a protest was delivered by Mr. *Atkinson*, as counsel for respondent *Hawkins*, protesting against any alteration being made in the return, unless on a general re-count of the votes. This objection was over-ruled by the learned judge, who made the following order:—

“‘Pursuant to an appointment and order made by me on 24th June, 1882, and in the presence of *David Mills* and *John Joseph Hawkins*, and of *James Stephens*, returning officer, and *Charles Stephens*, election clerk, and after hearing counsel for all parties, and adding and summing up the vote given at said election for the respective candidates, as shewn by the statements of the various deputy returning officers, I find and declare that fifteen hundred and seventy-six votes were given at said election for said *David Mills*, and fifteen hundred and sixty-four votes for said *John Joseph Hawkins*, and that the said *David Mills* is elected for said electoral district by a majority of twelve votes. To which I hereby certify, and of all of which I notify you, the said *James Stephens*, returning officer.’”

"This result was obtained by adding to each of the candidates the number of votes given at No. 1, *Camden*, there being no mistake in the original summation by the returning officer.

1884
BOTHWELL
ELECTION
CASE.

"The returning officer made a special return to the Clerk of the Crown in Chancery, setting out all the facts and concluding: 'I have not been served with any certificate by the Judge of the County Court of the county of *Kent* of the result of the re-count of votes made by him, as provided by sub-section four of section sixty-seven of said act, nor with any other certificate or document other than the paper marked B, hereto annexed.—(already set out.)

"Having received no certificate of a re-count of ballots, or of a result of a re-count of the votes at said election, as provided in sub-section four of section sixty-seven of said Act, I have deemed it my duty under the circumstances set out in this, my report, to allow the declaration made by me to stand, and make the return accompanying this report, and which return is so made upon the grounds and for the reasons mentioned in this my report.' "

"For the reasons already given, I consider that on an application for a resummation only, the learned judge has nothing to do with the deputy returning officer; his duty is simply to reconsider the addition of the different statements as made by the returning officer. In the present case the recapitulation of votes made by that officer stated that there was no statement signed by the deputy returning officer at division 1, *Camden*, and therefore the learned judge should have taken some steps to ascertain the number of votes given at that division before altering the recapitulation of the returning officer; and this could only have been done by a re-count of the ballots, as there was no statement with an affidavit annexed, nor in truth any statement under

1884
BOTHWELL
ELECTION
CASE.

section 57 of the statute ; and he should have certified the result to the returning officer. This was not done, and I therefore think the latter was not bound, nor would he have been justified in altering his return. It is to be observed the returning officer, in his return to the clerk of the crown in chancery, set forth fully all the circumstances of the case, and it does appear to me that so far as his conduct in adhering to his original return is concerned it was quite unnecessary to make him a party to the present petition, as an application might have been made to the court to amend the return.

“There were a number of charges of corrupt practices by the respondent *Hawkins*, but as I had declared that I found Mr. *Mills* had a majority of votes, they were not proceeded with. The respondent *Hawkins* then proceeded to call witnesses in support of charges of corrupt practices against *Mills* by himself and his agents. A number of witnesses were examined, but I find that none of the charges were proved.

“I give judgment declaring that *John Joseph Hawkins* was not duly elected, but that the Honorable *David Mills* was duly elected.

“I dismiss the petition against *James Stephens*, with costs to be paid by the petitioners.

“I give judgment in favour of the petitioners, with costs to be paid by the respondent, *John Joseph Hawkins*, other than the costs of the said *James Stephens*, which are to be paid by the petitioners.

“(Signed,)

“*Thomas Galt.*”

12th Jan., 1884.

From this judgment, the respondent in the court below (*Hawkins*) appealed to the Supreme Court of Canada, limiting his appeal in his notice of appeal as follows :

"And further take notice that the said respondent, *Hawkins*, limits his said appeal to the following questions, viz., the learned judge should not have held the Hon. *David Mills* entitled to the seat, but should have held the respondent, *Hawkins*, entitled to retain his seat, or should have ordered a new election upon the grounds:

1884

BOTHWELL
ELECTION
CASE.

"1. The learned judge upon the count of the ballots counted a number of ballots in favour of Hon. *David Mills*, which should not have been counted, on the ground that the same were improperly marked, or were marked so that the same could be identified, and refused to count a number of ballots for the respondent, *Hawkins*, which were properly marked and should have been counted for him.

"2. The learned judge should have refused to count any of the ballots cast in polling division number one for the township of *Sombra*, said ballots not appearing to be initialled by the deputy returning officer, and no evidence having been given at the trial to identify them as the ballots supplied by the deputy returning officer.

"3. The learned judge should have disallowed as many of the ballots cast at number one polling division in the township of *Sombra*, as appear by the evidence to have been initialled and numbered by the deputy returning officer, and such initialling and numbering to have been after the close of the poll obliterated by the deputy returning officer.

"4. The learned judge should have refused to count any ballots for polling division number one for the township of *Camden*, there being no proper statement or verification of the ballots cast, or of the result of the poll at said polling division.

"5. The learned judge should not have declared Hon. *David Mills* entitled to the seat in consequence of it appearing upon the scrutiny of the ballots at polling

1884
BOTHWELL
ELECTION
CASE.

division number three for the township of *Dawn* were so marked as to enable the voters to be identified.

“6. The learned judge should have held charges number two, twenty-one and twenty-three in the schedule to the objections of the respondent, *Hawkins*, filed, to have been proved, and should have held that *David Mills* was incompetent to take his seat, on the ground that the evidence upon said charges showed corrupt practices committed by the agents of said *Mills*, and that one vote should have been struck off from the number of votes cast for said *Mills* for each of the persons referred to in said charges, or proved by the evidence thereunder to have been guilty of corrupt practices and the learned judge should have admitted further evidence of agency in respect of said charges and such evidence should now be admitted.

“7. The learned judge should have allowed the respondent, *Hawkins*, to give evidence upon the additional charges of corrupt practices set forth in the schedule put in at the trial, and evidence upon said charges should now be admitted. Dated this 26th day of January, 1884.”

The principal question upon which the appeal in this case was decided, was as to the validity of the votes in Division No. 1, *Sombra*. The rulings of the learned judge at the trial as to the ballots in the other divisions, which were objected to as being imperfectly marked, were affirmed.

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

Upon a scrutiny of the ballots at the trial it appeared that none of the ballots cast at polling division number one for the township of *Sombra* contained the initials of the deputy returning officer for that polling division, and no evidence was given to show that the ballot papers were those supplied by the deputy returning

officer. These ballots ought to have been rejected by the deputy returning officer under the provisions of sec. 55 of the Dominion Elections Act, 1874, inasmuch as *prima facie* they are not the ballot papers supplied by the deputy returning officer and there is no evidence contra, and if these ballots are held good and counted the secrecy of the ballot might in any polling place be evaded and the evident intent of the Act frustrated. Sec. 80, Dominion Elections Act, does not remove the difficulty inasmuch as it cannot be said that the election at this particular polling place was conducted in accordance with the principles laid down in the Act.

1884
BOTHWELL
ELECTION
CASE.

These ballots, to the number of ten or twelve, were, before being deposited in the ballot box, initialled and numbered by the deputy returning officer of that polling division, and after the close of the poll, when the ballots were being counted, the deputy returning officer improperly obliterated said numbers and initials, and it was his duty, under the provisions of sec. 55 of the Dominion Elections Act, 1874, to have rejected these ballots on account of their having upon them a writing or mark by which the voter could be identified.

Under these circumstances the petitioners cannot show that the said *Mills* has a majority of legal votes. The ballots cast at number one polling division for the township of *Sombra* are illegal votes, or at least ten or twelve of these votes were improperly counted, and if so, the court cannot say which candidate has a majority of legal votes; therefore the election should be declared void. The case of *Jenkins v. Brecken* (1), relied on by the petitioners, is clearly distinguishable.

The irregularities in regard to the voting at number one polling division for the township of *Sombra*, and at number three polling division for the township of *Dawn*, resulted practically in open voting, and does not

(1) 7 Can. S. C. R. 247.

1884

BOTHWELL
ELECTION
CASE.

come within the saving provisions of sec. 80, Dominion Elections Act 1874, and there should be a new election.

I submit further on behalf of the appellant that corrupt practices have been proved to have been committed on behalf of the Hon. *David Mills*, sufficient to entitle the appellant to have such a number of votes struck off from the votes polled for the said *Mills*, as to disentitle the said *Mills* to the seat and to leave the appellant with a majority of legal votes, and that corrupt practices have been shown to have been committed by agents of the said *Mills*, by reason whereof the said *Mills* is disentitled to the seat, under the provisions of the Dominion Elections Act, 1874.

[The learned counsel then reviewed the evidence on this part of the case.]

The learned judge at the trial erred in refusing to permit the appellant to enter upon evidence in respect to the various corrupt practices set out in the supplementary list put in at the trial, inasmuch as no order had been made limiting any time within which the appellant should give particulars of the charges of corrupt practices upon which he intended to rely, and inasmuch as there is no provision for obtaining such particulars from the appellant. It is submitted, therefore, that the appellant should have been allowed as a matter of right to enter upon such evidence and that at any rate, as a matter of discretion, such particulars should have been allowed at the trial, and that the appellant should now be allowed an opportunity of giving evidence thereunder. (Rule VIII., under Dominion Elections Act, 1874.)

Mr. *Lash*, Q. C., for respondents :

Upon the authority of the case of *Jenkins v. Brecken* in this court, it is not competent for Mr. *Hawkins* to affirm the validity of the election by taking his seat

thereunder and claiming still to hold it, and at the same time to disaffirm the election and seek to have it avoided because of alleged irregularities by those who conducted it.

1884
BOTHWELL
ELECTION
CASE.

It is contended that the ballots at No. 1 *Sombra* should all be rejected because not initialled by the deputy returning officer. The case of *Jenkins v. Brecken* settles this question, and such ballots should be counted. Then as no objection was raised to such ballots before the deputy returning officer, the appellant cannot now raise such objection under sec. 66 of the Dominion Elections Act, 1874.

Though the ballots cast at No. 1 *Sombra* appeared to have by the evidence borne initials and numbers which were afterwards rubbed off, yet there are no means now of ascertaining for whom such ballots were cast, and as the appellant has not filed a petition or otherwise attacked the election on this ground he cannot now claim that it is void because of the irregularity. The secrecy of the ballots was preserved, and no objection was taken at the close of the poll.

The irregularities complained of are such as are covered by section 80 of the Act.

Then, as to the corrupt charges against Mr. *Mills* none of them were proven, and the judge came to a proper conclusion with respect to them. Even if any such practice had been committed the person guilty thereof was not an agent of Mr. *Mills*, and the evidence to prove the agency was not properly tendered. It was in the discretion of the judge at the trial when to allow evidence as to additional charges.

RITCHIE, C.J.:

This is an appeal from a decision of Mr. Justice *Galt* unseating the sitting member and declaring that Mr. *Mills* was duly elected as member for the House of Commons for the electoral district of *Bothwell*.

1884

BOTHWELL
ELECTION
CASE.

Ritchie, C.J.

Objections were taken before us with reference to individual ballots which have imperfect crosses or marks on them. During the argument we sustained the rulings of the learned judge as to these, with the exception of some which were retained for further consideration, but, however decided, they cannot have any effect on the result of this case. After a good deal of consideration, I find it impossible to lay down a hard and fast rule by which it can be determined whether a mark is a good or bad cross. I think that whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but there was also an intention so to mark the paper that it could be identified, in which case the ballot should, in my opinion, be rejected. But, if the mark made indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null. The irresistible presumption from such a plain and wilful departure from the terms of the statute being that it was so marked for a sinister purpose.

I am aware that in coming to this conclusion I am differing from the decision in the case of *Woodward v. Sarsons* (1), but I cannot bring my mind to the conclusion that a ballot should be refused when there is evidence of an honest attempt to make a cross. One ballot objected to which was marked, as may familiarly be said, by an inverted V, thus \wedge . I think this good as showing an intention to make a cross and no indication of an intent at identification. There are also two ballots upon which are to be found more

crosses than one. If the principle I have just referred to is a correct one, then these ballots should be received. However, as there are two ballots on the other side marked in the same way, it would make no difference in the conclusion if we ruled otherwise.

1884
 BOTHWELL
 ELECTION
 CASE.
 Ritchie, C.J.

In poll No. 4, *Chatham*, there was a ballot good on its face found in the spoiled ballot envelope, and not among the rejected ballot papers. This ballot could not either affect the election. There was nothing on the ballot to show that it could have been rejected on the ground alleged, viz: because it was marked for both parties. Now, I have looked at it, and I cannot discover the slightest mark of any kind whatever on the ballot, except the × opposite the name of *Mills*. The returning officer swears "none rejected." No hypothesis has been put forward which could justify the ballot being rejected except that it is alleged it was treated as marked for both candidates. My own eye sight tells me that there is on this ballot nothing whatever to justify this allegation, on the other hand there is, in my opinion, a very reasonable hypothesis that the voter may have wrongly marked the ballot, and discovering his mistake returned it to the officer as spoiled and got another in its place.

The returns of the officers show that 139 voted at this polling place, and 139 were counted without the two, of which this is one, alleged to have been spoiled, which is conclusive that this could not have been a rejected ballot.

Then there are the statements given by the deputy returning officer under secs. 55 and 57, in which it appears that the accepted ballot papers were 139 in number, and then the sworn statement that "one hundred and thirty-nine votes were polled in polling district No. 4, *Chatham*. In my opinion, therefore, the judge was right in treating this ballot as a spoiled ballot and not a rejected ballot.

1884

BOTHWELL
ELECTION
CASE.

Ritchie, C.J.

Then really the only point in this case which could affect the election is the one raised in reference to No. 1 *Sombra*. I entirely agree with the learned judge that the case of No. 1 *Sombra* is directly within the principle of the case of *Jenkins, v Brecken* (1). The learned judge thus summarizes the evidence as to No. 1 *Sombra*.

[The learned Chief Justice then read from the judgment of *Galt, J.*, (2).]

The agent of Mr. *Hawkins* and the deputy returning officer appear to have been equally at fault, as to the strictly correct course to be pursued, and both appear to have been acting in good faith and desirous of doing what was legal and right. The opinion of the deputy returning officer, influenced no doubt by what Mr. *Hawkins's* agent said, changed his mode of procedure, which was exactly that pursued in the *Brecken* case, and initialled and numbered about 12 of the ballot papers when he seems to have thought he was in error in changing the course he at first adopted, and returned to his original mode of procedure; but does not meddle with the ballots so irregularly initialled. On the close of the poll, however, having evidently, from changing his mode of numbering and initialling, and reverting to his original practice, become satisfied that the course he had adopted was not regular and proper, he obviously endeavored, in the presence of the agents of the parties, to remedy the irregularities; and so when the poll was closed and the ballot box opened, as the learned judge expressed it: "The returning officer in good faith and with an anxious desire to do his duty," endeavored to remedy the wrong he had committed by carefully and effectually obliterating the marks he had put on these ballots so completely, the learned judge says, "that he could see no trace of any mark on any of them." He also says that no person was allowed

(1) 7 Can. S. C. R. 247.

(2) *Ubi supra* 681.

to see the front of the ballot papers, (and which I think is the fair inference from the evidence,) whereby the secrecy of the ballots was preserved and the identity of the ballots, as furnished by him and used by the voters, clearly established, because they must have been the very papers furnished by him and used by the voters, otherwise they could not have had the numbers and initials of the deputy returning officer on those which he obliterated, and all this in the presence of the agents of both parties without the slightest objection on their part, but, on the contrary, the fair inference is, with their implied, if not expressed, assent and concurrence. And this is the fair inference from the evidence of *Dawson*, the respondents' agent, and I may say if they had been seen by the deputy returning officer, I should doubt whether even this would affect the question, because the secrecy in such a case would be as much preserved by the oath of the deputy returning officer as in the case of ballots he marks for illiterate voters.

1884
 BOTHWELL
 ELECTION
 CASE.
 Ritchie, C.J.

It seems to me that this in no way differs from the principle acted on in *Jenkins v. Brecken*, but is a much stronger case for the application of that principle. The only difference being the rectification of the error or irregularity by the officer at the close of the poll. The appellant's contention is, that this rectification made a ballot bad in the box good out of the box, but this, though on the surface plausible, is, in my opinion, by no means a legitimate or accurate way of stating the case; if literally so, it is no more nor less in effect than was done in the *Brecken* case. In what respect does the present case differ substantially from that of an officer inadvertently marking a ballot and giving it to a voter and before being used he discovers that he has improperly marked it, and then and there effectually expunges the mark and hands it to the voter? In such a case he

1884
BOTHWELL
ELECTION
CASE.
Ritchie, C.J.

immediately, before any harm is done, corrects his error. In the present case the officer, in the fair and legitimate discharge of his duty, innocently, but irregularly, marks a ballot; discovering his error at the very first moment it could be done, in the presence of the agents of the parties, he proceeds to undo what he had improperly done, and he accomplishes this in such a manner that the secrecy of the ballot is preserved, and also in such an effectual way that there is no possibility that any party could be injured thereby, and this, too, in the presence and without the slightest objection or protest on the part of the agents of the candidates. Under such circumstances I can discover no difference practically between the case of correcting the error before or after the polling, the effect being precisely the same in both cases. I am therefore by no means prepared to hold that, in the case of an accidental and innocent irregularity, honestly and *bonâ fide* rectified on the spot before any injury has or can have resulted either to the candidates, the voters, or to the public, such rectification can be ignored and the irregularity relied on as invalidating the election. At the same time I am free to say I think the actions of the deputy returning officers should be always watched and subjected to rigid scrutiny.

But assuming this to be an irregularity and the rectification of it equally irregular, if ever there was a case to which section 80 of the Dominion Statute is applicable it seems to me this is peculiarly that case. That section is as follows:—

No election shall be declared invalid by reason of a non-compliance with the rules contained in this act, as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the returning officer, under the provisions of this act, or by any mistake in the use of forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question, that the election was

conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election.

1884

BOTHWELL
ELECTION
CASE.

Ritchie, C.J.

Now, as regards these votes, it cannot be doubted the election was conducted in accordance with the principles laid down in the act, and I think it equally clear that any non-compliance with the rules contained in the act, as to the taking of the poll or the counting of the votes, did not affect the result of the election.

The secrecy of the ballot was not infringed, the ballots are unquestionably those given by the deputy returning officer to the voters, the voters have freely marked them for the parties for whom they desired to vote, the candidates have got the benefit of the votes marked for them, the public have had the benefit of the votes so cast so far as they affect the return of one or other of the candidates. On what principle, then, or with what object, should the election be set aside? The only reason alleged, as I understand the contention, is that as the ballots alleged to have been marked were bad ballots when put in the box and cannot now be identified, and so picked out, it cannot be told for whom the parties using them voted, and therefore all the votes polled at that polling place should be excluded from the count. But this contention answers itself, and so far from establishing the invalidity of the election furnishes, in my opinion, an overwhelming reason why the validity of the election under sec. 80 should, so far as this polling place is concerned, be sustained; this construction, while it strictly preserves the principles on which it is provided the election shall be conducted, prevents to a large extent the election from being jeopardized or defeated by the default or innocent action of the returning officers, which evidently was the intention of the legislature in enacting section 80. Therefore, with regard to

1884

BOTHWELL
ELECTION
CASE.

Ritchie, C.J.

these votes also, I concur with the learned judge, who tried this case, that they should be held good.

There were some charges of corrupt practices by reason whereof the appellant claims that Mr. *Mills* is disentitled to the seat. One is the *Mowat-Gordon* case; the second, the *Bachard* case, and the 3rd, the *Craig* case. These the learned judge who tried the case thought had not been sustained as there was not any proof of agency. I have carefully read the reasons given by the learned judge and looked at the evidence, and I am not prepared to say that he has arrived at a wrong conclusion in any of these cases, even if he was wrong in concluding that the loan of five dollars by *Gordon* to *Mowat* was not a bribe (a rather doubtful case) as there is clearly no evidence to show that *Gordon* was the agent of *Mills*, the most that could be done would be to strike off that vote and that would not affect the election.

There is one point which, it is alleged, was not dealt with by the learned judge, but is now relied on by Mr. *Cameron*, though not included in the notice of appeal, viz., the right to tender evidence of agency in the case of *Craig*, I think the counsel has not placed himself in a position in the lower court to claim that privilege on appeal. As to another point, viz., the refusal to allow charges to be added, the learned judge exercised his discretion, which he had a perfect right to do.

For these reasons, I am opinion, that the appeal should be dismissed with costs.

STRONG, J.:—

While agreeing that the ballots in this case were sufficiently marked, I am not prepared to lay down any general rule as to what is or is not to be deemed a sufficient marking, or whether a cross or an attempt

to make a cross is indispensable. I desire also to add that by assenting to the grounds upon which the judgment proceeds, I do not mean to preclude myself from the right to consider in any future case in which the question may arise, whether *any* mark put on a ballot by mistake and in good faith by a deputy returning officer is to be held a ground for rejecting the ballot. Subject to these observations, I concur with the Chief Justice.

1884
BOTHWELL
ELECTION
CASE.
—
Strong, J.
—

FOURNIER, J. :—

Par leur pétition les Intimés ont réclamé pour l'honorable *David Mills*, le siège de la division électorale de *Bothwell* à la Chambre des Communes, actuellement occupé par l'Appelant. Celui-ci a répondu qu'il avait été dûment élu pour la dite division, mais n'a pas produit de contre-pétition attaquant la validité de la dite élection. Cependant, comme il en avait le droit en vertu de la sec. 66 de l'acte d'élection de 1874, il a allégué des actes de corruption commis par l'Intimé et ses agents, suffisants s'ils sont prouvés, pour empêcher son adversaire d'être déclaré dûment élu.

L'honorable juge *Galt*, qui a procédé au procès de cette pétition, a déclaré que M. *Mills* avait obtenu une majorité de neuf votes sur son concurrent et déclaré qu'il avait droit au siège de la dite division. Il a en même temps renvoyé les accusations de menées corruptrices.

C'est de ce jugement qu'il y a appel à cette cour.

L'Appelant ayant, en vertu de la sec. 48 de l'acte de Cour Suprême réglant l'appel à cette Cour en matière, d'élections,—donné avis qu'il limitait son appel à certaines questions énumérées dans son avis, la Cour est en conséquence appelée à ne se prononcer que sur les questions suivantes :—

1. Les bulletins trouvés dans la boîte de scrutin du

1884
BOTHWELL
ELECTION
CASE.

—
Fournier, J.
—

poll no 1 du township *Sombra* ne portant pas les initiales du député officier rapporteur devaient-ils être rejetés pour cette raison ?

2. Comme il est en preuve que dans le même poll dix ou douze bulletins portant les initiales du député officier-rapporteur et le numéro du votant sur la liste électorale ont été déposés par le député officier-rapporteur dans la boîte du scrutin—et qu'au dépouillement du scrutin, les initiales et les numéros mis par le dit député officier-rapporteur ont été par lui effacés—ces dix ou douze bulletins ne devraient-ils pas aussi être retranchés ?

3. L'état du poll trouvé dans la boîte du scrutin au poll n° 1, township de *Camden*, n'étant pas signé par le député officier-rapporteur tous les bulletins du poll ne devraient-ils pas être rejetés ?

4. Tous les bulletins déposés au poll n° 3, township de *Dawn*, étant numérotés, ont été rejetés par le juge ; au lieu de simplement rejeter les bulletins n'aurait-il pas dû, comme le prétend l'Appelant, déclarer l'élection nulle en conséquence de cette irrégularité et de celles qui ont eu lieu au poll n° 1, *Sombra* ?

5. Enfin, les accusations de menées corruptrices sont-elles prouvées ?

Dans l'examen des bulletins nous en avons trouvé un certain nombre marqués d'une manière qui n'est pas strictement conforme à la loi qui exige que le voteur fasse une croix dans la division du bulletin où se trouve le nom du candidat pour lequel il entend voter. Pour les personnes habituées à l'usage de la plume, le signe d'une croix est très facile à faire ; mais il n'en est pas de même pour les personnes illettrées. On sait par une expérience de tous les jours quelle difficulté éprouve la plupart de ces personnes à se servir de la plume, lorsqu'elles sont appelées dans les affaires ordinaires, à faire leur marque d'une croix comme attestation de leur

signature. C'est tellement le cas que la plupart du temps, celui qui écrit leurs noms au bas d'un document, est le plus souvent obligé de tenir et même de diriger la plume que ces personnes se contentent de toucher pour accomplir la formalité voulue. Aussi, n'est-il pas étrange de voir sur les bulletins beaucoup de croix très irrégulièrement faites. S'il fallait rejeter tous les bulletins ne portant pas une croix semblable au *fac simile* donné par la loi, un grand nombre de voteurs se trouverait de cette manière privé de l'exercice de leur droit de franchise. Mais la loi doit-elle être interprétée aussi strictement ? Son but étant d'assurer le secret du vote, ne doit-on pas considérer au contraire comme valides les bulletins faisant voir à leur face une tentative faite de bonne foi pour faire une croix ainsi que la loi le veut ?

Parmi les bulletins que nous avons examinés, il s'en est trouvé où la tentative du voteur à faire une croix se rapprochait plutôt de la forme d'un V que de celle d'une croix ; quelques-uns ont mis deux croix ; d'autres y ont fait une seule ligne soit perpendiculaire, soit horizontale. La première chose à faire avant de décider de la validité du bulletin était sans doute d'adopter une règle uniforme d'après laquelle ils seraient tous admis ou rejetés. Nous avons déjà pour nous guider dans cette opération les principes énoncés dans la cause de *Woodward vs Sarsons* (1), où les mêmes difficultés au sujet de la marque des bulletins ont été soulevées et dans laquelle la cour (C. P.) a adopté les règles suivantes qui sont d'une application évidente à la présente cause. (2)

The ballot paper must not be marked so as to show that the voter intended to vote for more Candidates than he is intitled to vote for, nor so as to leave it uncertain whether he intended at all, or for which Candidate he intended to vote, nor so as to make it possible,

(1) 10 L. R. C. P. 733.

(2) P. 733,

1884
BATHWELL
ELECTION
CASE.
Fournier, J.

1884

~
BOTHWELL
ELECTION
CASE.

—
Fournier, J.
—

by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

If these requirements are not substantially fulfilled, the ballot paper is void and should not be counted, and if it is counted, it should be struck out on a scrutiny.

But the placing of two crosses, or a single stroke (thus 1) in lieu of a cross, or a straight line (thus, 1)—one mark like an imperfect letter P in addition to the cross, or a star instead of a cross, or a cross blurred or marked with a tremulous hand, or a cross placed on the left hand side of the ballot paper, or a pencil line drawn through the name of the Candidate not voted for, or a ballot paper torn longitudinally through the centre—*Held* not to avoid the vote, in the absence of evidence of connivance or pre-arrangement.

Les règles ci-dessus énoncées ont été considérées comme contenant une saine doctrine et en partie adoptées par les juges. Dans le cours de la discussion de cette cause l'honorable juge en chef ayant soumis à l'examen de ses collègues une règle formulée de manière à couvrir à peu près toutes les difficultés qui peuvent être soulevées à propos de la marque des bulletins, tous les membres de la Cour y ont donné leur adhésion. Cette règle n'est toutefois pas susceptible d'une application aussi générale que celle énoncée dans la cause de *Woodward et Sarsons*, car on ne pourrait pas l'invoquer pour valider un bulletin, comme dans les cas ci-dessus cités, ne portant par exemple qu'une seule ligne perpendiculaire ou horizontale. Dans ce cas suivant notre règle on ne peut pas considérer qu'il y a eu de bonne foi une tentative de faire une croix, et les bulletins marqués de cette manière seraient rejetés. Je n'ai pas besoin de répéter ici la formule de cette règle que l'honorable juge en chef a déjà lue tout au long dans ses notes sur cette cause.

L'examen des bulletins ayant été fait d'après les règles ci-dessus énoncées, le résultat devant cette Cour a été le même que devant l'honorable juge *Galt*, donnant une majorité de neuf voix à M. *Mills*.

La question soulevée au sujet des votes au poll n° 1,

Sombra, dont la nullité est demandée par l'appelant, parce que les bulletins ne portaient pas les initiales du député officier-rapporteur est déjà venu devant cette Cour dans la cause de *Jenkins et Brecken* (1).

1884
BOTHWELL
ELECTION
CASE.

Fournier, J.

Sur ce point la décision de la Cour est résumé comme suit :

That in the present case, the Deputy Returning Officer having had the means of identifying the ballot papers as being those supplied by him to the voters, the neglect of the Deputy Returning Officers to put their initials on the back of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election.

L'appelant prétend que cette décision ne saurait s'appliquer à la présente cause, parce que la preuve faite dans celle-ci est insuffisante pour identifier les bulletins. Cependant dans l'une comme dans l'autre, les initiales ont été mises sur la marge au lieu d'être sur le dos du bulletin. Le voteur muni d'un semblable bulletin le rapportait au député officier-rapporteur qui avait toute la facilité possible de s'assurer que c'était bien le bulletin qu'il avait donné, en enlevant la marge portant ses initiales, avant de mettre le bulletin dans la boîte du scrutin. Il acquérait par là une connaissance positive que le bulletin déposé était bien celui qu'il avait fourni. Il est vrai qu'il a manqué dans cette cause une preuve qui a été faite dans celle de *Jenkins*. Le député officier-rapporteur et le clerc du poll n'ont pas été entendus comme témoins pour confirmer par leurs témoignages le fait de l'identité des bulletins. La raison de cette omission est que l'un de ces officiers était mort, (le député officier-rapporteur) et l'autre absent aux Etats-Unis, lorsque la preuve a été faite. *J. P. Dawson*, l'un des agents de l'Appelant était présent à l'ouverture de la boîte du scrutin et à l'exception de quelques minutes il avait été présent au poll toute la

(1) 7 Can. S. C. R. 247.

1884

BOTHWELL
ELECTION
CASE.

Fournier, J.

journée. Il a vu le député officier-rapporteur prendre les bulletins de la boîte, les compter et les lui montrer ainsi qu'aux autres agents qui étaient présents. Il n'a vu aucune irrégularité dans la manière de conduire l'élection à ce poll, si ce n'est celle qui forme le sujet de la deuxième question. Cette irrégularité consiste dans le fait que dix ou douze bulletins sur le dos desquels se trouvaient les initiales du député officier-rapporteur et le n° qui se trouve vis-à-vis le nom du voteur sur la liste électorale ont été donnés à autant de voteurs qui les ont remis au député. Celui-ci les a déposés ainsi marqués dans la boîte du scrutin. La chose s'est passée de la manière suivante : *Dawson*, l'un des agents de l'Appelant, rapporte que le député officier-rapporteur ayant mis ses initiales sur la marge des bulletins et qu'il ne les avait pas mises sur le bulletin même, lui en fit la remarque en lui disant que ce n'était pas suivant la loi,—sans toutefois lui dire comment il devait faire. Après cette observation le député officier-rapporteur mit ses initiales et les nos. sur dix ou douze bulletins. Ayant ensuite examiné la loi et n'y trouvant pas la solution qu'il cherchait, il revint à sa première manière de ne mettre ses initiales que sur la marge sans aucune marque sur le bulletin.

Lorsque le député officier-rapporteur, à la clôture du poll, sortit les bulletins de la boîte au scrutin, il les montra un par un à chacun des agents des candidats. Lorsqu'il arriva aux bulletins portant les numéros et ses initiales, il les effaça avec un morceau de caoutchouc, et les compta ; il n'en fut pas compté d'autres que ceux qu'il avait sortis de la boîte. Il déclare aussi n'avoir pas vu d'autre irrégularité dans la manière de conduire l'élection à ce poll que celle qui a eu lieu par rapport à ces 10 ou 12 bulletins marqués comme susdit. Il dit aussi que personne n'a pu voir comment avait voté ceux qui avaient déposé des bulletins marqués, parce

que les marques en furent effacées avant qu'ils ne fussent comptés et si bien effacés que l'honorable juge *Galt* n'a pu voir la moindre trace de ces marques. Quant à l'identité de ces bulletins, elle est certaine, puisqu'ils ont pu être reconnus par les numéros et les initiales comme étant ceux fournis par le député officier-rapporteur. La preuve établit aussi positivement que le secret du vote n'a pas été violé par ces irrégularités.

1884
BOTHWELL
ELECTION
CASE.
Fournier, J.

On peut encore fortifier la preuve faite de l'identité de tous les bulletins, tant de ceux qui ne portaient pas originairement d'initiales que de ceux sur lesquels les initiales et les numéros qui y avaient été mis ont ensuite été effacés, par le serment solennel que le député officier-rapporteur à ce poll a prêté pour constater la régularité de ces procédés. Entre autres choses il déclare qu'il a tenu le poll correctement, constate le nombre de votes donnés à chaque candidat, à son poll, et dépose de plus :

That to the best of my knowledge and belief, it contains a true and exact record of the votes given at the polling station, in the said polling district, as the said votes were taken thereat ; that I have faithfully counted the votes given for each candidate, in the manner by law provided, and performed all duties required of me by law ; and that the report, packets of ballot papers, and other documents required by law to be returned by me to the Returning Officer, have been faithfully and truly prepared and placed within the ballot box, as this oath will be,—to the end that the said ballot box, being first lawfully sealed with my seal, may be transmitted to the Returning Officer according to law.

Si la preuve en cette cause n'est pas aussi forte que celle faite dans la cause de *Jenkins*, elle est toutefois suffisante pour nous convaincre que les bulletins déposés au poll n° 1, *Sombra*, malgré les irrégularités auxquelles il a été fait allusion ci-dessus, sont certainement les mêmes que ceux qui ont été fournis par le député officier-rapporteur, et qu'il a comptés à l'ouverture de la boîte du scrutin dans laquelle il les avait déposés.

1884

BOTHWELL
ELECTION
CASE.

Fournier, J.

Maintenant ces irrégularités ayant été commises de bonne foi, sans aucune intention quelconque d'éluder les dispositions de la loi, n'est-ce pas le cas de faire application du principe admis par cette cour dans la cause *Jenkins vs. Brecken* au sujet du défaut d'initiales sur les bulletins, tant à ceux qui n'ont jamais eu d'initiales qu'à ceux sur lesquels après avoir été mises, elles ont été effacées

Il n'est peut-être pas sans danger d'admettre qu'un député officier-rapporteur ait pu changer l'état d'un bulletin ; mais si la chose n'est jamais faite autrement qu'elle l'a été dans la présente cause, c'est-à-dire de la meilleure foi du monde, dans l'unique but de réparer immédiatement et avant qu'aucun tort n'en fût résulté, et du consentement de tous les agents des candidats, une erreur qui, si elle n'eût pas été réparée alors, auraient pu avoir de graves conséquences ;—il est bien certain qu'il ne saurait jamais résulter d'inconvénients d'un tel procédé fait dans les circonstances où l'a été celui dont il s'agit. Il en serait tout autrement, s'il y avait la moindre preuve que le député officier-rapporteur en agissant ainsi avait la plus légère idée que ce changement pouvait profiter plutôt à l'un qu'à l'autre des deux candidats, je n'hésiterais pas alors à mettre de côté toute la votation faite à ce poll. Je suis en conséquence d'avis que la décision de l'honorable juge *Galt* sur les deux questions concernant les irrégularités qui ont eu lieu au poll n° 1, *Sombra*, étant conforme à celle de *Jenkins vs. Brecken* et au principe de la sec. 80 de l'acte des élections de 1874, doit être confirmée.

La troisième irrégularité dont se plaint l'appelant est fondée sur ce que l'état du poll trouvé dans la boîte du scrutin au poll n° 1 *Camden* ne portait pas la signature du député officier-rapporteur. Cette question a eu une grande importance dans cette cause ; car l'officier-rapporteur se fondant sur cette irrégularité n'a pas

compté les votes donnés à ce poll, ce qui a eu l'effet de donner une majorité apparente à l'appelant qu'il a déclaré élu. L'officier-rapporteur mis en cause pour répondre de sa conduite à cet égard, a été reconnu par l'honorable juge justifiable d'en avoir agi ainsi. Comme il n'y a point d'appel de cette partie de cette décision, il ne reste qu'à savoir si malgré cette omission de la signature, suffisante pour excuser l'officier-rapporteur, les votes enregistrés à ce poll ne devaient pas être comptés. Dans un décompte de la votation ordonné par le juge du comté à la demande de l'intimé les votes omis à ce poll furent comptés et l'état de la votation déclaré comme étant de 1576 pour l'intimé et 1564 pour l'appelant. Toutefois l'ordre du juge n'ayant pas été communiqué à l'officier-rapporteur, celui-ci fit son rapport conformément à la détermination qu'il avait prise de ne pas accepter l'état non signé qui est dans la forme suivante :

Statement under sec. 55.

Election for the Electoral District of Bothwell, held on Tuesday, the 20th day of June, 1882.

Votes given for Hawkins,	44
Votes given for Mills,	72
Rejected,	5
Unused,	101
Spoiled,	1

I certify the within statement to be correct.

Deputy Returning Officer.

Si, comme l'a déclaré l'honorable juge *Galt*, les pouvoirs de l'officier-rapporteur, ne lui permettent pas d'examiner les bulletins pour vérifier cet état il n'en est pas de même du juge appelé à faire un décompte de la votation. Sans entrer dans la considération des devoirs respectifs de ces deux officiers, il est indubitable que sur la contestation de l'élection, le juge, qui a présidé au procès de cette pétition avait droit de se servir non-seulement des documents trouvés dans la boîte du

1884
BOTHWELL
ELECTION
CASE.
Fournier, J.

1884

BOTHWELL
ELECTION
CASE.

—
Fournier, J.
—

scrutin, mais d'autres preuves secondaires qui auraient pu lui être fournies, pour arriver au véritable chiffre de la votation. Sa juridiction est complète à cet égard. L'examen des bulletins devant la Cour en première instance et ici ayant constaté le véritable état de la votation, la question d'irrégularité du certificat est ici sans importance, car il est évident qu'elle n'a nullement affecté le résultat de la votation.

La quatrième question est au sujet du poll n° 3 de *Dawn*. Là tous les bulletins ont été numérotés et rejetés pour cette raison. L'appelant ne s'en plaint pas pas, mais il s'appuie sur ce fait et sur celui des dix bulletins du n° 1 *Sombra*, sur lesquels les nos. et les initiales ont été effacés, pour demander la nullité de l'élection prétendant que ces faits étaient de nature à affecter le résultat de l'élection. Malheureusement il ne peut établir cette conséquence,—car il est absolument impossible de connaître pour qui ont été donnés les dix ou 12 votes du poll n° 1 de *Sombra*—et quant à ceux de *Dawn*, leur rejet n'est évidemment pas à son détriment, mais à celui de son adversaire qui avait une majorité de cinq votes sur lui, dans ce poll.

L'appelant peut-il après avoir maintenu la validité de l'élection et occupé son siège en Chambre, en demander maintenant la nullité, sans avoir présenté de pétition à cet effet et sans s'être conformé à toutes les formalités voulues par la loi pour être admis à demander la nullité d'une élection ? Cette question n'est pas nouvelle ; elle s'est présentée plusieurs fois déjà devant les tribunaux et notamment devant cette Cour dans la cause de *Jenkins* et *Brecken*, et dans celles de *Sommerville* et *Laflamme* (1) où elle a été jugée en sens contraire aux prétentions de l'appelant.

D'ailleurs avant de déclarer nulle une élection pour cause d'irrégularité, les tribunaux exigent d'après l'au-

(1) 2 Can. Sup. C. R. 216.

torité suivante *Woodward v. Sarsons* (1) une preuve que l'appelant n'a pas faite :

To render an election void under the ballot act, by any reason of non observance of or non compliance with the rules or forms given therein, such non observance or non compliance must be so great as to satisfy the tribunal before which the validity of the election is contested, that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election.

1884
BOTHWELL
ELECTION
CASE.
Fournier, J.

Les moyens de nullité fondés sur les irrégularités mentionnées plus haut sont évidemment insuffisants d'après cette autorité et doivent être rejetés.

Il ne reste plus que les accusations de menées corruptrices pratiquées par l'Intimé ou ses agents. Après avoir lu avec soin la preuve que l'Appelant a offerte à ce sujet, je me bornerai à dire que le verdict de l'honorable juge *Galt* est le seul qu'il pouvait rendre en se fondant sur cette preuve, et que c'est avec raison qu'elles ont été renvoyées.

Pour toutes ces raisons je suis d'avis que le présent appel doit être renvoyé avec dépens, et que l'Appelant n'a pas été dûment élu, mais que l'honorable *David Mills* a été dûment élu.

HENRY, J. :

I concur in the conclusion arrived at in the court below by the learned judge who tried this case, and also with the learned Chief Justice of this court, with the exception of one point, and that is as regards the ballot papers which were numbered by the returning officer in No. 1 *Sombra* and handed to the voters and then returned to him so numbered. The statute provides that the ballots should only have his initials and these have not. In the case of *Jenkins v. Brecken* I was of opinion that it was a fatal defect, but the ma-

(1) L. 10 C. P., p. 733.

1884

BOTHWELL
ELECTION
CASE.

Henry, J.

majority of the court on that point were of a contrary opinion, and therefore on that point we must be governed by the decision in that case. But as to the numbering of the ballot papers it is a very different thing, for by numbering them the returning officer could identify the voter, although if he had only put his initials on them he would be unable to do so. The clear intention of the statute is, that no mark shall be put on the ballot which can leave that ballot open to a suspicion that it was so marked in order to identify the voter, and if such a mark is put on a ballot, it should, in my opinion, be declared illegal and bad. All these questions have been decided in the case of *Woodward v. Sarsons* (1), and the head note in that case giving the result of the judgment, is as follows :

To render an election void under the ballot act, by reason of a non-observance of or non-compliance with the rules or forms given, such non-observance or non-compliance must be so great as to satisfy the tribunal * * that the election has been conducted in a manner contrary to the principle of an election by ballot.

Under this decision it appears to me that all the votes objected to as improperly marked and allowed by the learned judge in the court below were properly allowed, and the only question then is as to the ballots objected to as having been numbered. Now, the object in not allowing the papers to be numbered, is to prevent anybody finding out for whom the parties who got these ballots have voted. If we allow a ballot paper, which is numbered when handed to the voter, to be valid, then we put it in the power of the returning officer who has put the number on, with the aid of others, to be able to say for whom these persons voted. It seems to me that in every such case the law has been evaded, and there is not that secrecy which the candidates under the statute are enti-

tled to exact. It is true that in this case it is contended that the returning officer acted in good faith, but if we are to be called to decide upon that question of good faith, it will be opening for this court, as well as for the court below, an issue which was never intended to be tried under the statute. Under these circumstances I am justified in arriving at the conclusion that when a ballot paper has been numbered it is a ballot paper which should not be counted, because a returning officer would always be able, by referring to his notes, to ascertain for whom the voter has voted, and he can communicate his knowledge to his friends and thereby secrecy has been done away.

But in this case the appellant, although he does not claim to retain the seat on this ground, claims that the election should, in consequence of these ballots having been numbered, be declared void.

The question, it appears to me, is whether he is, as appellant in this case, in a position to ask this court to arrive at such a result. In the case of *Jenkins v. Brecken*, the learned Chief Justice says :—

He (the respondent) accepts the return which gave him a majority of votes, takes his seat in Parliament as a duly elected member, and when his right to hold the seat is attacked, urges on this court to adjudge that at a legal election, regularly and properly held, he was elected by a majority of the electors, and that the majority being so in his favor, he is lawfully entitled to hold the seat he now occupies, but with the same breath, he says : If you cannot find the majority in my favor, then the whole election is irregular, illegal and void, and must be set aside ; so that the validity or invalidity, according to his contention, is made to depend upon his having or not having a majority of votes ; in other words, he says, through his counsel : If you find I have a majority of votes, it's a right good election and should not be disturbed, but if you find Mr. *Brecken* has the majority, it's a dreadfully bad election by reason of divers illegalities and irregularities, and, forsooth, in the public interests should not be allowed to stand. In the meantime, bad as this respondent contends the election is, great as is the public exigency, when he has not the majority, that it should be set aside, he finds it a good enough elec-

1884

BOTHWELL
ELECTION
CASE.

Henry, J.

1884

BOTHWELL
ELECTION
CASE.

Henry, J.

tion to enable him to take his seat in Parliament and make laws for those unfortunate electors who have by these illegalities, mistakes, or irregularities of the returning officers, been prevented from legally electing their members.

But this contention cannot prevail. It shocks common sense. If he wished to attack this election, he should have attacked it by petition, depositing his \$1000 as security, when all the candidates at the election would be respondents, as would the returning officer whose conduct is complained of, as provided by section 64.

My brother *Strong*, in reference to this point also says :

The petition was filed by Mr. *Brecken* claiming the seat as having a majority of the legal votes. If the appellant desired to raise this question as to the validity of this election he should have presented a petition himself praying its avoidance, but this he has not done.

The 66th section of the act of 1874, manifestly does not enable him to impugn the election as wholly void and irregular, without a petition ; it merely enables a respondent to a petition, by which the seat is claimed, to recriminate, by shewing that even if the petitioner should prove that he has a majority, he is, by reason of the illegal conduct of himself or his agents, disentitled to have the seat awarded to him.

In that case although differing from the majority of the court on the point as to the initialling of the ballot papers, I said :—

As to the other point, I think it was the duty of the sitting member, if he did not wish to allow the respondent to take the seat, to resign his own seat, and file a petition setting forth grounds to avoid the whole election. Then all parties interested would have been heard, which has not been the case here. They are not here, and this court cannot take upon itself to decide upon the rights of parties who have not been brought before it.

In reference, therefore, to these votes if the appellant had not taken his seat and the respondent was now sitting, according to the views I entertain, I think the appellant as a petitioner would have been entitled to have had the election declared void, but having taken his seat, in the face of the judgment of *Jenkins v. Brecken*, I cannot see how we can now at his request

declare that the seat he is claiming should be declared void.

It is true that the appellant in this case could have the election declared void on account of acts of disqualification committed by the respondent or his agents, but as there is no evidence, in my opinion, to arrive at such a conclusion, I have come to the conclusion that in the present case the appellant is not entitled to the seat, and that the respondent is entitled to retain the seat to which he has been declared entitled by the judgment appealed from.

1884
 BOTHWELL
 ELECTION
 CASE.
 Henry, J.

GWYNNE, J. :

I have entertained--and I confess I do still entertain—grave doubts whether we should not be acting more in conformity with the spirit of the Dominion Elections Act, if we should insist upon a precise fulfilment of the terms literally prescribed by the 45th sec. of the Act, by requiring every ballot paper, in order to constitute a good vote, to be marked with a single cross. The statute having prescribed a particular description of mark, and that prescribed being so easily made, it should, I think, be required as the only mode of complying with the statute. It would seem, however, that some people have a difficulty in making this so simple mark if we may judge from the very imperfect attempts to make it appearing upon some ballot papers ; to avoid, therefore, as far as possible running the risk of avoiding an honest vote, I concur in adopting as the rule by which the court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers in order to constitute a good vote, the rule as laid, down in the judgment of his lordship the Chief Justice in this case, however difficult the application of that rule may be in some cases, and however imperfect it may be in enabling us to draw with certainty the

1884

BOTHWELL
ELECTION
Case.

Gwynne, J.

correct inference upon the question whether a particular mark was put upon the ballot with an honest or with an improper intent. In *Woodward v. Sarsons* (1) the Court of Common Pleas in *England* held, that there being two or more crosses on a ballot paper did not invalidate the vote. Although there is this difference between the Imperial Act, upon which that case proceeded, and the Dominion Elections Act, that in the former the directions as to the manner in which a voter shall mark his ballot paper are contained in a schedule to the Act and not in the body of the Act, whereas in the Dominion Election Act they are prescribed in the body of the Act itself, still, as to the question whether two or more crosses upon a ballot paper should invalidate a vote, I cannot say that I see any difference between the two Acts; for the prohibition as to marking a ballot paper with any mark so that it could be identified is, in both cases, in the body of the Acts. Such double marking is treated in *Woodward v. Sarsons* as merely indicating, in an emphatic manner, the intention of voting for the one candidate. While the double marks may be, and perhaps in some cases are, put upon ballot papers merely with that intention, they may also be, I think, and perhaps in some cases are, put upon them with quite a different intention; namely, with the intention of affording means by which the voter could be identified for the purpose of procuring for him, in accordance with a promise to that effect, pecuniary recompense for his vote; and the possibility of their being used for this latter purpose seems to my mind, I confess, a sufficient reason for disallowing all ballot papers so marked. If they are to be disallowed only upon evidence being adduced of an arrangement having been made that the voter should put such additional crosses upon his ballot paper, the difficulty of proving such

(1) L. R. 10 C. P. 749.

pre-arrangement will be always so great, that we shall defeat, I fear, the object of the act, and render void a very material part of it which imperatively prescribes that all ballot papers having any mark upon them by which the voter could be identified shall be rejected.

1884
BOTHWELL
ELECTION
CASH.
Gwynne, J.

As, however, uniformity of decision in matters of this kind is all important, and as I cannot see any substantial difference in this particular between the Dominion Elections Act and that upon which *Woodward v. Sarsons* was decided, and as my learned brothers are all of opinion that such double marking should not *ipso facto* avoid a ballot, I concur in considering the point as settled by the judgment of the Court of Common Pleas in *Woodward v. Sarsons*. So doing, and adopting the rule as laid down by the Chief Justice in this case of all the contested ballot papers, there is only the one marked with an inverted V at polling division No. 6 *Chatham*, which I am not satisfied comes within the rule as above laid down, and which, therefore, I think, should be disallowed. The disallowance of this ballot would, however, make no difference in the result arrived at by the learned judge.

I see nothing in the case which would justify any interference with the judgment of the learned judge upon any of the cases of corrupt acts, nor, indeed, with his judgment upon the other points in the case save only in one, which, however, is, in my judgment, the one upon which the whole case turns; and with the greatest deference for the opinions of the learned judge and my learned brothers in this court, I am bound to say that I am of opinion that the deputy returning officer at polling division No. 1 *Sombra*, erred in counting as good the votes contained in the ballot papers which had been marked by himself with the numbers on the voters' list opposite to the names of the voters to whom those ballot papers were given. Both

1884

BOTHWELL
ELECTION
CASE.

Gwynne, J.

under the express provisions of the statute, and the judgment of the Court of Common Pleas in *England* in the case of *Woodward v. Sarsons* (1), those ballots should not have been counted, but should have been rejected for precisely the same defect as avoided all the votes cast at the polling division No. 3 *Dawn*.

The duty of the deputy returning officer at the close of a poll is imperatively prescribed by the 55th sec. of the Dominion Elections Act of 1874, as amended by the 10th sec. of the act of 1878, 41st *Vic.*, ch. 6. That section enacts that immediately after the close of the poll the deputy returning officer shall proceed to count the number of votes given for each candidate, and in doing so he shall reject all ballot papers upon which there is any writing or mark by which the voter could be identified. Now it cannot be questioned that a voter could be identified by his number on the voters' list being on his ballot. Whether in point of fact he was, or was not, so identified at the time of the counting is a matter of no importance in the eye of the law. The statute in effect declares that a mark by which a voter could be identified is sufficient to avoid the ballot upon which such mark is.

Neither does the statute make any difference as to the persons by whom such mark may be put upon the ballot. By whomsoever it was put upon it, the statute equally avoids the ballot and prescribes imperatively that it shall not be counted. In the present case, as in that of *Woodward v. Sarsons*, the avoiding mark was put upon these ballots by the deputy returning officer himself. In that case it was not doubted that the 234 ballot papers so marked were void; they were declared to be such and that they could not be counted, but there the not counting them made no change in the result of the election because the candidate for whom 234

(1) L. R. 10 C. P. 748.

of the ballots thus rejected were cast had independently a majority of legal votes cast for him. The only difference which exists between that case and the present, is that the deputy returning officer here, when proceeding with the count, assumed to rectify, as he thought, the mistake which had been committed by himself, so that he might count the ballots so marked, and although the statute said they should not be counted, he proceeded to erase and has so successfully erased the numbers with which he had marked the ballot papers that they cannot now be identified, and so it cannot be ascertained for whom the votes in those ballot papers were given. The only question therefore is, was it competent for the returning officer to erase those marks and then to count the ballot papers. There is nothing in the statute vesting such authority in him, and, in the absence of an express provision to that effect, I am of opinion that he had no authority whatever so to do, and that we cannot sanction his act in so doing without in effect repealing the statute, the sole duty of the deputy returning officer after the ballot papers are put into the ballot box and the poll is closed, and his sole authority, is to count ballots therein as directed by the statute, and not to count but to reject, and to return as rejected, all ballot papers upon which there is any writing or mark by which the voter could be identified. Such a mark being on the ballot paper avoids the ballot. This being so, the ballot is void from the moment it is put into the ballot box with the avoiding mark upon it; and because it is so void the statute says it shall not be counted. The statute gives no power to the deputy returning officer to make a void ballot good and then to count it. His simple duty was to reject all ballots that were in the ballot box when he opened it which the statute directed him to reject, and to count only such as the statute directed him to count. All

1884

BOTHWELL
ELECTION
CASE.

Gwynne, J.

1884

BOTHWELL
ELECTION
CASE.

Gwynne, J.

those being rejected which the statute said should not be counted, the rest only were to be counted. He had no authority whatever to erase any thing being on any ballot paper which he found in the box upon opening it at the close of the poll. If he might make a bad vote good, which he had himself made bad by putting the prohibited mark upon a ballot paper, I cannot see why he might not make a bad vote good in a case where such mark had been put upon it by the voter. In this particular case I am free to admit that there is nothing in the evidence which justifies us in imputing to the deputy returning officer anything but an error of judgment, but if the imperative language of the statute should be disregarded because the officer's conduct was attributable solely to an error of judgment, it must needs be disregarded also in the case of a corrupt officer, who might do the same thing from a corrupt motive which he had the tact to conceal or to make to appear to be innocent; so to rule would be plainly to repeal the statute, and to substitute a totally different provision from that which the statute in express terms enacts.

In the present case the deputy returning officer by the mistake which he committed with intent, no doubt, to correct his first mistake, has unfortunately made the matter worse than it would have been if he had left the ballot papers with the prohibited mark upon them, for thereby he has rendered it impossible for the tribunal trying the election petition to say for which candidate those marked ballots were cast, and the result is that as the majority either way is so small, it is impossible to say which of the candidates had a majority of good, valid and countable votes. Had he suffered the marks which he had wrongly put upon the ballots to remain there unerased, we could have seen for whom the votes were given, and

we could have determined as in *Woodward v. Sarsons* whether they had or not, and in what manner, affected the result of the election ; but having erased the marks and counted the ballots, as it is now impossible to identify the ballots which he so counted, and which the statute declared should not have been counted, we cannot say which candidate had the majority of good votes, and we have therefore, in my opinion, no alternative left to us but to say that there has been no election. It has been argued that such a decision would be at variance with our judgment in *Jenkins v. Brecken*, but there is really no resemblance whatever in this particular between that case and the present. In that case the sitting member, after that the petitioner had, upon a scrutiny, succeeded in establishing that he had polled a majority of good legal votes, claimed the right of insisting under the 66th section of the Controverted Elections Act of 1874, 37 *Vic.* ch. 10, that the election was wholly void apart from the result arrived at on a scrutiny, and for reasons altogether unconnected with the question as to which of the candidates had polled a majority of legal votes. The contention of the sitting member was that, although his opponent had established that he had polled a majority of the legal votes, still the election should be avoided by reason of the returning officer not having properly regulated the polling districts as to the numbers of the voters, not having supplied the deputy returning officers in certain districts with a sufficient number of ballot papers, and not having in one district provided sufficient accommodation in the polling booths ; and it was held that such objections could not be made by way of recrimination under the 66th sec. of 37th *Vic.*, ch. 10, and that if they should prevail at all they should prevail wholly independently of any enquiry as to who had the majority of the votes polled. It is obvious that between that

1884
 BOTHWELL
 ELECTION
 CASE.
 Gwynne, J.

1884

BOTHWELL
ELECTION
CASE.

Gwynne, J.

case and the present there is no parallel whatever. Here the whole matter is connected with the scrutiny, and is confined to the question—which of the candidates had the majority of legal votes polled for him? The petitioners insist that Mr. *Mills* had. The respondent insists that he himself had, but, in investigating for the purpose of determining the question thus raised, it appears that at one of the polling booths certain ballot papers were marked in such a manner that the voters using those ballot papers could be identified, and that these ballot papers were counted although the statute imperatively prescribed that they should not be counted. These ballot papers, as the deputy returning officer when counting them erased the marks which he had himself put upon them, cannot be identified, and therefore it cannot be ascertained for whom the voters using them voted. The ballot papers having, however, been illegally counted by the deputy returning officer, ballot papers equal in number to those illegally counted should, in my opinion, be rejected from the votes cast at this polling division; but as it is impossible to say from which of the candidates the illegally counted ballot papers should be deducted, the result is that it is impossible by reason of the slight difference in the number polled for each to say which of the candidates had a majority of the legal votes. Under these circumstances the tribunal upon which is cast the duty of determining which had such majority, must needs find itself incapable of determining this question, and has no alternative therefore left to it but to declare that there has been no election, and that all that has taken place must be set aside and a new election held to enable the constituency to solve the difficulty; and to this effect, in my opinion, our report to the Speaker of the House of Commons should be.

Appeal dismissed with costs.

Solicitors for appellant: *Blake, Kerr, Lash & Cassels.*

Solicitors for respondents: *Fitzgerald & Beck*