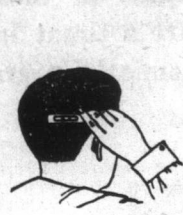


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## Supreme Court Judgment.

### Bay-de-Verde Election Petition Case.

In the matter of the Election Act 1918 and the amendments thereof; and in the matter of an Election of two Members for the House of Assembly for the Electoral District of Bay de Verde holden on the 3rd day of November, 1919 and in the matter of the Election Petition for the said District.

Between Albert E. Hickman, Petitioner and William H. Cave, Respondent.

The petition herein sets forth "that the petitioner was one of the candidates for election in the House of Assembly at the election for two members for the House of Assembly for the Electoral District of Bay de Verde holden on the 3rd day of November, 1919. That he was duly qualified as candidate for the said Electoral District of Bay de Verde and entitled to be elected a member of the House of Assembly for the said district. That on the 4th day of November, the ballots cast at the said election were counted at Western Bay in the aforesaid district by Isaac King the returning officer and the said Isaac King upon counting the said votes found the following votes cast for the following candidates:—

- Fred P. LeGrow . . . . . 1207
  - William H. Cave . . . . . 1198
  - Albert E. Hickman . . . . . 1193
- and thereupon declared the said Fred P. LeGrow and William H. Cave duly elected members for the House of Assembly for the said district and endorsed a return to that effect on the election writ and returned the said writ to H. M. Colonial Secretary. The petitioner complains that the said return is an undue return upon the grounds set forth in the petition and claims that certain votes objected to by him should be excluded in the computation and that a majority of the valid votes was cast in his favor. He therefore prays that the return be set aside, that a scrutiny be allowed of the votes given and that he be declared a duly elected member for the said district. Six grounds of objection are set forth in the petition, the first being that certain persons not competent to vote voted and that their votes were counted, whose names were not on the list of electors entitled to vote at the said election, nor upon the supplementary list of electors. Section 68 of the Election Act provides that:

"Any duly qualified voter whose name has been omitted from the list of registered voters may attend at the booth and claim the right to vote. Upon his answering upon oath

such questions touching his qualification to vote as may be prescribed by rules to be made by the Governor-in-Council and published in the Royal Gazette, and put to him by the Deputy Returning Officer that the applicant is qualified he shall be admitted to vote and his name entered on a separate list and his qualifications to vote shall be subject to enquiry and determination by the Court in the event of a trial of a controverted election."

A number of persons presented themselves at the polling booth for the district of Bay de Verde held at the King George V Institute at St. John's and claimed to be duly qualified electors entitled to vote for the district of Bay de Verde. As their names were not upon the register it was the duty of the returning officer to swear them as to qualification and put to them the questions appointed for that purpose. He explains that in cases where he knew the person and had no doubt as to his being a duly qualified elector he admitted him to vote without swearing him as to qualification and without asking the prescribed questions. This constitutes a serious neglect of duty on the part of the officer, but the question we are here concerned with is whether the neglect of the officer to do what the statute directed him to do invalidates the vote of the elector. As the officer by the fact of claiming a vote must be taken to have offered himself to be sworn, he is in no way culpable. Had the officer refused to take his vote it is clear that he could have enforced his right to vote if he was a duly qualified elector. This he would have done by notifying the returning officer of the candidate for whom he desired to vote, and having done this he would have been entitled to have his vote subsequently recorded as it had then been given. It would appear that as the law affords this remedy to a voter where there has been a wrongful refusal by the returning officer, and as it would be unreasonable for him to be put in a worse position by the officer's neglect than he would have been by refusal, he ought not to be deprived of the right which was admitted by the returning officer although admitted before proper preliminaries had been complied with by the officer, he having improperly concluded that they were unnecessary because he believed himself qualified from personal knowledge to certify the bona fides of the voter. We have read the section as directory and have admitted evidence as to the voters qualification. The result of the evidence has been that we are satisfied that of the twenty-eight votes attacked by the petitioner on the ground that the voter was not upon the electors list nor upon any supplementary list of qualified electors, viz.—Jethro Whalen, John G. Reynolds, Silas Thistle, Samuel Butt, James B. Evans, George Cooper, William Thistle, R. J. Crum-

mev, George Keats, James Mulley, George Budden, Henry T. King, Thomas King of James, Emanuel Butt, Douglas Wicks, Walter LeGrow, Eliel B. Day.

Of the remaining voters in this class eight have not been identified, namely:—William K. King, Henry J. Moore, John K. Keats, William J. King, Willis Whalen, Thomas Cave, William J. King, Vickers Riddies, and three votes are from persons non-resident in the district, namely:—Charles Moore, Eli Wheeler, Walter Turner. Therefore these eleven ballots must be looked at. One voter named in this class George Keats will be presently referred to by twenty-six of the petitioners these eleven ballots must be dealt with class 5.

The second ground of objection charges infamy at the time of the election. The petitioner has shown that three names were permitted to vote, namely:—Willy M. Hudson, Adam Flight, George W. Parsons.

These votes must be taken out. The third objection touches the question of mental competency, and only one voter is affected by it. After hearing medical testimony we ordered the striking out of the vote of Aaron Moore.

The fourth class objected to comprises persons who had not resided in Newfoundland for two years preceding the election. We found that the following persons were duly qualified, namely:—James S. Crummen, John J. Moore, George W. Davis. Of the remaining nine Eli Wheeler, Walter Turner and Charles Moore have already been dealt with in class 1. We also disallow the votes of William T. Whalen, Ernest Whalen, Simeon James Tilley, Robert Hudson, Wilfred Hudson, Henry Evans.

The fifth ground of objection affects six votes which the petitioner claimed to be void because the voters were not actually and bona fide residents in the district at the time of the election. We find Simeon James Tilley a duly qualified elector, but we allow the objection to the votes of Apollis Taylor, Fred B. Parsons, James Barrett, James B. Evans, George Keats. Although the respondent's objections to the petitioner's challenges are allowed and view by the trial Judges of their ballots and the counterfoils is necessary.

In exercise of the right allowed in the petition praying recitally, the respondent brought in a recriminatory list consisting of four classes. The first of these contains the names of Adam Flight, Willy M. Hudson and Daniel McCann, all of whom are objected to being that the votes are void because each voter was under the age of twenty-one years. The votes of Adam Flight and Willy M. Hudson have already been declared void on the petitioner's case and the evidence before us shows Daniel McCann to be of full age and a duly qualified elector.

The second class contains the names of voters who the respondent claims were not for the two years preceding the election resident in this Colony and were not actually and bona fide residents in the district of Bay de Verde at the time of the preparation of the list of electors. Five names appear on this list. The respondent's objection is sustained in the case of Robert Murray of Lower Small Point, Charles Murray of Adam's Cove and Ebenezer Green, Jr. of Old Perlican. William T. Whalen has been already dealt with as a member of the respondent's class and Joseph Joyce is a duly qualified elector.

In the third class are the names of two voters: John M. Murray, Adams Cove, Abram Sapp, Lower Adam's Cove, objected to as aliens. John M. Murray is a British subject and duly qualified elector; Abram Sapp, who is of foreign birth and has not been naturalized, was a member of the Newfoundland Regiment and served overseas. By the Act, Sec. 1 Cap 15 of 1919 it is provided "that notwithstanding anything in the Election Act, 1918, or in any other Act, every volunteer as defined by this Act shall be competent to vote at any poll taken during the present year for the election of members of the House of Assembly in and for the district within which he resided at the time of his enlistment and if he did not reside at any place within the Island at the time of his enlistment then in and for the district within which he resides at the day of polling." Volunteer is defined as any person who has served outside of this Colony during the present year as a member of the Newfoundland or Royal Naval Regiment and who was either born in this Colony or was a resident thereof at the time of his enlistment.

The words of the statute are comprehensive neither alienage nor infamy disqualifies a member of the Regiment who has served overseas. Sapp resided in the district at the time of his enlistment and also at the time of the election. His vote is therefore valid.

In class 4 the respondent gives the names of persons whose votes are objected to on the ground that they are void because the voters were guilty of bribery." It is not necessary to recite the names of all the voters mentioned in this list, because in a number of cases no evidence whatever has been produced and therefore the votes must stand unimpugned. Four persons are named as having travelled on railway passes, but the evidence does not satisfy us that they were guilty of bribery" or that their votes are affected. Amongst those charged with bribery is Martin White. It appears that Thomas Rose of Perry's Cove, was promised by Mr. Whiteway, a candidate and colleague of the petitioner, that his house would be hired as a polling booth. Another booth was subsequently taken and Rose, who was aware of this and had not prepared his house, deposes that before polling day Martin White, a neighbor, gave him \$5.00 in place of the \$5.00 which he would have been paid for the hire of his house as a booth. White, who was called as a witness, says that he is a poor man, but that he gave this money out of his own pocket and does not expect anybody to reimburse him. Rose proves that before polling day he had a visit at a late hour of the night from Samuel A. Case, who offered him a few dollars in place of the booth taken from him and that he refused to accept the money; that Case then asked him if Martin White had seen him and upon his replying in the affirmative, Case said, "I suppose that is all right." Case denies offering Rose money but admits visiting Rose on the Thursday night before the election. Case is an employee of the petitioner, spent several days before polling day in the district and had been active in promoting the petitioner's interest; he

was charged by one voter with intimidation. The circumstances are extraordinary and stood unexplained. The promise of the booth, both by Whiteway, the payment of the \$5.00 by White for the non-fulfillment of that promise, and the interference of Case taken together convince us that the whole transaction is tainted with illegality. The giving of the money affects White's vote and its acceptance by Rose has the like effect upon his. (The Boston Case 1 Peck, 434, 435.) The petitioner gave Stewart Parsons a voter of Freshwater, an allocation of \$20.00 against the special grant to be expended on a road from the main line to his house. The land between the main road and the house was Parsons' property. This allocation delivered at Freshwater in October before nomination day was forwarded by Parsons to the Public Works Department, which issued the cheque for \$20.00, and posted it to Stewart Parsons. Parsons deposes that it did not reach his hands.

Leonard Parsons applied to the Petitioner a few days before the election for \$30.00 to dig a well on his own land and received a cheque dated the 24th October from the Public Works Department, which he cashed before polling day. He did not dig the well. Thomas Trickett (of Ellijah) received an allocation for \$40.00 which he sent to the Board of Works and in return obtained a cheque for \$20.00 which he cashed him on the 24th. of October. He had applied for this money to one Isaac King and obtained this allocation through Hickman from King. The witness says that he promised Isaac King that if he got something for him he would vote for the man who would give it to him. He refers to King as Hickman's man and says he promised him to vote for him. He also says that the petitioner saw him before polling day and enquired if he had received the money. The petitioner gave evidence himself and swore that he had given the money to King with corrupt intent. He admitted that when he went to the district on his election campaign he took with him a quantity of blank forms of the Public Works Department and that he filled out a number of them to be sent to the Department where they would have to be countersigned by the Minister before cheques issued. The petitioner was at the time a member of the Executive Council and had represented the district of Bay de Verde during the last term of the House of Assembly. He had already been concerned in the allocating or appropriating of district moneys until a short time previous to his nomination at the last election.

It has neither been charged nor shown that the petitioner was a party to any corrupt bargain affecting the purchase or sale of a vote such as would have rendered him guilty of bribery at common-law. His conduct, however, has to be judged in relation to the provisions of the statute amendments made to that law. It is provided by our Election Act that:

"(1) Every person who shall directly or indirectly, by himself or by any other person on his behalf, give or lend or agree to give, or lend, or shall offer, promise, or promise to procure any money or valuable consideration to or for any voter, or to or for any other person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election.

"(2) Every person who shall directly or indirectly by himself, or by any other person on his behalf, procure or procure, or agree to give, or procure, or offer, promise or promise to procure or endeavor to procure any office, place or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election, shall be deemed to be guilty of bribery."

Commenting on this section in the Trinity case, Mr. Justice Little observed that: "It is to be stated that the section draws a distinction between money given or a payment made before and a payment made after the vote has been given."

That judgment dealt with allocations or appropriations of public moneys made by a candidate who, like the petitioner here, had been representative of the district and a member of the Executive Council. "It is not always," said the learned judge, "that such patronage as we find to have been vested in the respondents would have been so fairly exercised. Their honesty has not been impugned, no dollar of the moneys over which they assumed control appears to have been appropriated by them to other than public objects and purposes. Practice and custom it was alleged sanctioned their action in dispensing the moneys of their old district. But it must be remembered that was to change the old state and condition of things that our new laws were adopted and that what was the matter of practice or custom before, must, if opposed to the terms of the statute, cease and determine and be regarded as no longer permissible under the express and prohibitory terms of our laws." "If the act of the candidate affects, or is calculated to affect that freedom and equality which should exist in relation to the votes of the electors, it comes within the operation of the statute notwithstanding the innocency or ignorance of the party by whom or for whom the moneys are apportioned by candidates out of the funds of the district immediately preceding the nomination of the candidates" was in that case as in other cases tried in this Court held to be a breach of the statute.

Conformably to the law laid down in this Court in the several election cases heard and determined since the passing of the Election Act we feel compelled to hold that the allocations made to and accepted by these parties, namely, Stewart Parsons, Leonard Parsons and Thomas Trickett are in contravention of the Act and consequently that their votes must be regarded as bribed votes.

The conclusion we have arrived at upon the recriminatory case of the respondent is that under his second ground of objection (non-residence) three ballots, namely, those of Robert Peach, Charles Murray and Ebenezer Green, Jr., are invalid and that upon his fourth ground of objection, voters "guilty of bribery," five ballots are invalid, namely, those cast by Martin White, Thomas Rose, Stewart Parsons, Leonard Parsons and Thos. Trickett. Further, as the evidence elicited upon this enquiry has disclosed the fact that the bribery with which Stewart Parsons, Leonard Parsons and Thomas Trickett are charged by the recriminatory case was committed by the petitioner himself we shall be prevented if a majority of lawful votes should appear in his favor, from certifying that he was duly elected.

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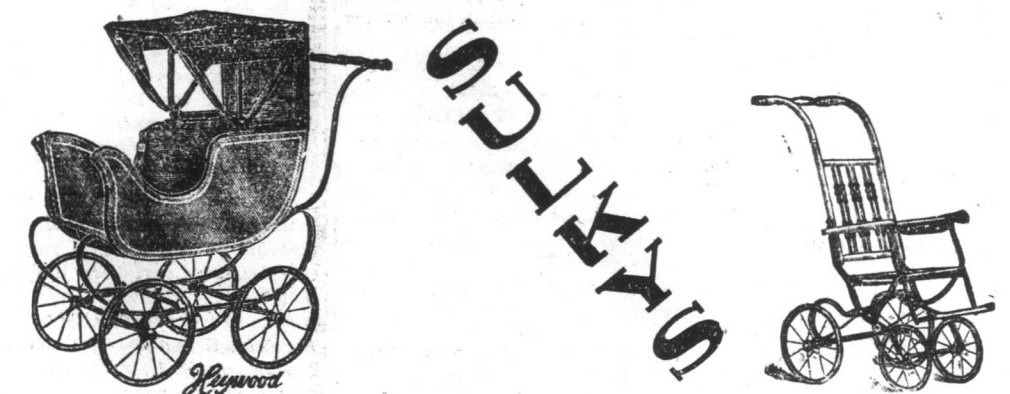


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