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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 11TH, 1920.

CITY OF TORONTO v. TORONTO R.W. CO.

Street Railway—Agreement with City Corporation—Percentage of Gross Receipts—Action for—Counterclaim—Account—Items—Interest—Appeal—Costs.

An appeal by the plaintiffs from the judgment of LENNOX, J., 15 O.W.N. 31.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

C. M. Colquhoun, for the appellants.

D. L. McCarthy, K.C., for the defendants, respondents.

THE COURT allowed the appeal from the main question arising under the counterclaim; the respondents' accounts for work done by them, $14,966.18, to be added to the cost of construction and apportioned according to the order of the Ontario Railway and Municipal Board. The appeal was also allowed as to the item of $67.44 and disallowed as to other small items. No costs of the appeal.

COURT FOR TRIAL OF CONTROVERTED ELECTION PETITIONS.

MULOCK, C.J. EX., AND ROSE, J. OCTOBER 12TH, 1920.

*RE DUFFERIN PROVINCIAL ELECTION.

*JOHNSON v. SLACK.

Parliamentary Elections—Provincial Election—Corrupt Practices—Expenses of Candidate Nominated by Organised Body of Electors—Subscribers to Fund—Promise of Repayment in Event of Success of Candidate at Polls—Ontario Election Act, sec. 167—Inducement to Subscribers to Vote—Payments to Scrutineers for Work at Polls—Disguised Payments for Votes—Payments Honestly Made to Persons whom Candidate Entitled to Employ—Secs. 111, 162 (2)—Right of Person who Expects to be Paid to Vote—Sec. 13 (2)—Person Voting with Knowledge that he has no Right—Sec. 177—Dismissal of Petition—Costs—Security-deposit—Ontario Controverted Elections Act, sec. 21.

The trial was at Orangeville and in Toronto.
W. H. Price and Gordon N. Shaver, for the petitioners.
Gordon Waldron, for the respondent.

THE COURT, in a written judgment, said that the charges which were pressed were two in number. The first was based upon the raising of money by the Farmers' Clubs in the constituency, or some of them, for the purpose of defraying the election expenses of the respondent, who was nominated by a convention of the United Farmers of Ontario and their sympathisers.

At or immediately after the convention, there having been some suggestion by some of those present that the Clubs might well pay half the expenses of the candidate, the respondent stated that he did not desire that that course should be taken; that, in the event of his success, he would prefer to pay his own expenses; but that, if he was defeated, he thought there would be nothing unfair in the Clubs paying the expenses, or he would be glad if the Clubs did pay the expenses.

After the convention, some of the Clubs sought subscriptions and raised very small amounts: two of the Clubs sent these amounts to the treasurer of the Farmers' county organisation—the others kept them in their own hands.

* This case and all others so marked to be reported in the Ontario Law Reports.

After the election, the funds which had been sent to the treasurer were returned to the Clubs, and these moneys, as well as the moneys which the Clubs had kept in their own possession, were repaid to the original subscribers. The amounts of the individual subscriptions were small—from 50 cents to $2.

It was argued that the respondent's promise or statement, at or after the convention, however it was worded, amounted to a promise to the subscribers that, in the event of his success, he would repay any moneys which they put up for the purpose of meeting the expenses of the election, and that by such promise he gave each subscriber a direct financial interest in the result of the election, and thus made a promise which, to use the words of sec. 167 of the Ontario Election Act, R.S.O. 1914 ch. 8, was a promise of a payment to a subscriber in order to induce the subscriber to vote at the election.

This argument was not well-founded. The respondent did not seek nomination nor did he know, apparently, before he went to the convention, that there was a probability of his being nominated. He was the candidate of an organisation many of whose members were ready to subscribe money to help defray the expenses of his election. Being ready to subscribe money for that purpose, it was inconceivable that their zeal on behalf of the candidate could have been increased by a promise that the trifling sums which they had subscribed would be repaid in the event of their candidate being successful, or that the respondent, in making his promise to pay his own expenses if he should be elected, could have had in his mind any intention of inducing the subscribers, or any other person, to vote or refrain from voting at the election or to assist in electing him.

This charge failed.

The second charge was that a number of persons were promised payment for acting as scrutineers, and, after the election, were paid. It had long been the practice in Dufferin to pay scrutineers; and, although the evidence indicated that no person who was asked to act as a scrutineer was told that he would be paid for acting, it was shewn that some of those who consented to act expected that they would be paid; and perhaps it would not be unfair to assume that, in many cases, the agent of the candidate and the person whom the agent asked to act both knowing of the custom, there was an implied bargain that, after the election, the scrutineers would be paid.

After the election was over, the respondent asked his agents throughout the riding to pay the scrutineers who acted in their respective districts, and many of such scrutineers were paid. There was no concealment of this fact: the payments to scrutineers were shewn as part of the election expenses in the return which was made by the respondent's financial agent to the returning officer.

It was charged that the employment of and payments made to these scrutineers were corrupt—the employment with the implied promise of payment being a mere cloak for a promise to pay for voting, and the payment being in fact, a payment for voting.

Those of the scrutineers who were called as witnesses said that they voted.

The Court, however, found no evidence of any corrupt intentions in the employment or in the payment of these scrutineers; and found nothing in the law indicating that payments honestly promised or made to these scrutineers, who are persons whom the candidate is entitled to employ (see sec. 111 of the Ontario Election Act), are anything other than those bona fide payments for lawful and reasonable expenses in connection with the election which, by sec. 162 (2), are expressly declared not to be bribery.

Those of the scrutineers who expected to be paid for their services had no right to vote: sec. 13 (2); and, if any had been shewn to have voted knowing that they had no right to do so, they might have been found guilty of corrupt practices: sec. 177; East Elgin Case (1899), 2 Ont. Elec. Cas. 100. But the number of votes lawfully cast was not in question; and there was no attempt to shew that any one who voted knew that he had no right to do so—indeed the inference was that the persons whose acts were in question did not know that it was against the law for one who expected to be paid for services in the election to vote.

The petition failed.

The costs of the respondent ought to be paid by the petitioners and the money deposited as security ought to be applied in payment of such costs, after payment of those charges which, by sec. 21 of the Ontario Controverted Elections Act, R.S.O. 1914 ch. 10, are given priority.

MAGEE, J.A., AND SUTHERLAND, J. OCTOBER 12TH, 1920

*RE GRENVILLE PROVINCIAL ELECTION.

*PAYNE v. FERGUSON.

Parliamentary Elections—Provincial Election—Corrupt Practices—Bribery—Failure to Prove Agency—Payment to Bandsmen—Evidence—Failure to Shew Corrupt Intent—Promise to Aid Voter in Obtaining Employment for Daughter—Vague Reference to Vote—Denial of Corrupt Intent—Inference—Refreshments Furnished by Candidate after Close of Meeting of Party Convention at which Candidate Selected—Ontario Election Act, R.S.O. 1914 ch. 8, secs. 168, 169—"At a Meeting"—Contract of Candidate with Government—Printing Contract with Incorporated Company of which Candidate Owns Nearly all the Shares—Control of Company—Separate Entity—Legislative Assembly Act, R.S.O. 1914 ch. 11, secs. 11, 12 (b).

George Arthur Payne, the defeated candidate at the provincial election in October, 1919, petitioned to have the election of George Howard Ferguson as member for the Grenville electoral district declared void, the respondent declared disqualified, and himself (the petitioner) declared elected. The respondent cross-petitioned for a declaration that the petitioner was guilty of corrupt practices and could not be awarded the seat.

The petition and cross-petition were tried at Brockville and in Toronto.

Gordon Waldron, for Payne.

W. N. Tilley, K.C., H. A. Stewart, K.C., and W. H. Price, for Ferguson.

THE COURT read a judgment in which it was said that various corrupt practices and illegal acts were alleged in both petition and cross-petition, of which particulars were given. At the trial no evidence was offered on behalf of the petitioner as to some of his particulars, and as to others it was conceded that the evidence failed to disclose irregularity or corrupt practice. The claim to the seat was also abandoned by the petitioner's counsel; and, in consequence of that abandonment, the respondent did not attempt to prove his cross-petition.

Three cases of bribery or attempted bribery of voters by one Lampkin were proved; and the evidence led to the conclusion that Lampkin was supplied with funds from some source. He was an

active supporter of the respondent, but there was no proof to establish any agency for the latter, and this was conceded by counsel for the petitioner.

A payment of $5 by one Boyd to a voter was proved; Boyd made an explanation of it. The transaction was, to say the least, a very suspicious one, but it was unnecessary to make a finding as to whether the payment was corrupt. Boyd admitted having worked in the election for the respondent, of whom he was an old friend, but there was not sufficient evidence to make him an agent of the respondent.

Other charges were not proved, and in cases where the charges were proved the evidence of agency was insufficient.

A public meeting of electors had been called in the respondent's interest at a place near Cardinal. The respondent and Dr. Reid, Minister of Railways in the Dominion cabinet and federal member for Grenville, were to speak at this meeting. Dr. Reid had formerly lived in Cardinal, and his mother lived there. Before the meeting he and the respondent were dining at her house, when the local band, a voluntary organisation of musicians, came to the front of the house and played there. Dr. Reid handed $30 to one Burchill, who was at the house, to be given to the band. Burchill went out and paid it to the bandmaster, who subsequently distributed it among the members of the band—10 in all. No previous arrangement for the visit of the band to the house was shewn to have been made, and no request for money was made on their behalf. The intention apparently was to honour their distinguished townsman of former days; it did not appear that the presence of the respondent in the house was known; and the respondent was not at the time aware of the payment. Dr. Reid had been a member of the band, and had always taken an active interest in it. It had been the custom of the band for many years to turn out on occasions of public interest and to pay compliments to individuals; and it was shewn that it was usual at such times to give some gratuity to the bandsmen. The amount given by Dr. Reid was not shewn to have been in excess of what was usual. Dr. Reid knew that among the bandsmen were men who were not likely to vote for the respondent; but it could not fairly be inferred that the election influenced his action. It was unnecessary to deal with the question of agency. The payment was not corrupt—it was attributable to Dr. Reid's sense of his personal position in the village where he had once lived.

One O'Brien said that he spoke to the respondent with a view to getting a position for his daughter as teacher in a city school. According to O'Brien, who was not of the same political party as the respondent, the respondent told him to have his daughter make application to the Department of Education, and he would

render assistance, and added, "You do what is right and I will do what is right." The respondent denied having used the words quoted, and said that he merely expressed his readiness and desire to assist, in such circumstances, any resident of his district to attain a proper object. His denial must be accepted. And the words said to have been used were too vague to draw from them any reasonable inference of corrupt intent.

At the meeting of the Conservative association, at Spencerville, on the 6th October, 1919, called to select a candidate for this election, and at which the respondent was nominated, there were 80 or 90 persons present. After the close of the meeting most of the persons present went for dinner to the local hotel, and the respondent told the hotel-keeper that he (the respondent) would pay for the dinners, and he did pay. The amount paid was said to be $70. This was charged against the respondent as an illegal act.

Reference to secs. 168 and 169 of the Ontario Election Act, R.S.O. 1914 ch. 8; the North Ontario Election Case (1884), 1 Ont. Elec. Cas. 1; Prescott Election Case (1884), 1 Ont Elec. Cas. 88, 93.

The circumstances, so far as brought out, seemed to preclude the idea that there was a corrupt intention so as to bring the case under sec. 169. The diners were, so far as appeared, all the friends and supporters of the respondent, and his act should be attributed rather to the desire to shew appreciation of the continued confidence of his friends than to any attempt to gain strength in the polling.

As to sec. 168, there being no evidence that any invitation had been given at or during the meeting or at the place of meeting, and the business having been concluded and the delegates dispersed, and, so far as shewn, the arrangement to pay having been made after the dispersal, the case was to be distinguished from the Prescott Case, supra, and the Muskoka and Parry Sound Election Case (1884), 1 Ont. Elec. Cas. 197. It was more like the East Middlesex Case (1903), 5 O.L.R. 644, where it was held that there was no breach of the section.

Since these cases the wording of the section has been changed by substituting "at a meeting" for "to a meeting." This would seem to limit rather than to extend the scope of the prohibition as to furnishing refreshments.

This charge failed.

The work of printing the proclamations for the nomination and polls and those for the voting on the prohibition referendum and also of the ballots for each and cards for the polling booths was given by the returning officer for the electoral district of Grenville to the Advance Printing Company Limited, of Kempt-

ville, in the county of Grenville. The company did the work and rendered an account for $190.54, which the returning officer paid out of moneys received from the Provincial Government. It appeared that the respondent was the holder of all but a few shares in the printing company. He said that he controlled it absolutely.

Section 11 of the Legislative Assembly Act, R.S.O. 1914 ch. 11, makes ineligible as a member of the Assembly any one holding or enjoying, undertaking or executing, directly or indirectly, alone or with another, by himself or by the interpositions of a trustee or third person, any contract or agreement with His Majesty, or with any public officer or department, with respect to the public service of Ontario, or under which any public money of Ontario is to be paid for any service or work, matter or thing.

The printing company, though incorporated, may be termed a "one man company," and its contracts do in fact redound to the profit or loss of the respondent in effect as if they were contracts by him and in his own name; but yet the company is a legal entity, separate from its shareholders. Unless it can be said that the company became merely an alias for the respondent or merely his agent, the company alone, and not he, would be responsible on its contracts, and he could neither sue nor be sued thereon.

Reference to Salomon v. Salomon & Co., [1897] A.C. 22; Blair v. Haycock Cadle Co. (1917), 34 Times L.R. 39.

There was here no evidence, beyond the ownership of the shares and the respondent's statement that he controls the company, to warrant a finding that it was only another name for himself, or only his agent; and there was certainly none to warrant a finding that he could have sued for the price of the printing or been sued for any failure in performing the contract.

The respondent did not come within the exception in clause (*b*) of sec. 12 of the Act, and was expressly relieved by that section.

Both the petition and the cross-petition should be dismissed without costs.

HIGH COURT DIVISION.

LOGIE, J. OCTOBER 15TH, 1920.

FELDSTEIN v. SCULTHORP.

Contract—Purchase and Sale of Grain—Formation of Contract—Correspondence—Conditions—"Crop Conditions"—"Approval of Sample"—Rejection of Sample—Vendors Relieved from Contract—Action by Purchasers for Breach—Dismissal.

Action for damages for breach of a contract for the sale by the plaintiffs to the defendants of 2,000 bushels of pease.

The action was tried without a jury at a Toronto sittings.
A. C. McMaster, for the plaintiffs.
Grayson Smith, for the defendants.

LOGIE, J., in a written judgment, said that the contract was said to be contained in the correspondence.

After setting out the correspondence, the learned Judge said that the contract, on the 25th July, 1917, stood complete, with two conditions, viz., "subject to crop conditions" and "sample meeting with approval."

On the 27th September, the plaintiffs were advised that the defendants would not have more than 666 bushels to ship, and the plaintiffs recognised this and acquiesced.

On the 14th November, the defendants shipped their first sample, which the plaintiffs, by letter of the 19th November, stated was satisfactory; and the result was a completed contract, enforceable by either party, for the purchase and sale of 666 bushels of Marrowfat pease at $4 per bushel, to be paid for on delivery in Pittsburg, with freight from Port Hope added.

The matter, however, did not stand thus, but was put at large by the subsequent conduct of the parties, and neither party treated the acceptance of the first sample as finally binding.

New samples were forwarded, and were rejected by the plaintiffs.

The plaintiffs and defendants dealt, to the knowledge of each, with the crop planted by farmers from seed supplied by the defendants; and the defendants were not, by the terms of the contract, obliged to purchase in the market other pease not grown from the defendants' seed to fill the plaintiffs' contract.

Even if this were not so, there was an almost total failure of pease in Ontario in 1917; and the defendants could not, even if

they were bound by their contract to do so, supply any other pease. They were not to be had. There being only one crop, that of the defendants, in esse, and the samples having all been drawn from this crop, the plaintiffs, when, by their letter of the 7th February, 1918, they rejected the samples of this one crop, rejected the defendants' pease in toto, and thus relieved the defendants from their agreement.

The plaintiffs then, having exercised their undoubted right to reject the samples and with them the bulk, could not now be heard to ask for something better for which they had not contracted.

Action dismissed with costs.

ESSEX GROWERS LIMITED v. G. J. LEMON & CO.—MIDDLETON, J. —OCT. 14.

Contract—Sale of Goods—Memorandum of Sale not Containing all Terms of Bargain—Action for Damages for Non-delivery—Defence —Statute of Frauds—Dismissal of Action—Costs.]—Action by the purchasers of 4 car-loads of potatoes against the vendors for damages for failure to deliver. The action was tried without a jury at Orangeville. MIDDLETON, J., in a written judgment, said that upon the issue of fact the plaintiffs succeeded, but the Statute of Frauds was a conclusive answer to the action. The memorandum of sale found in the telegram of the 4th March was not sufficient, because it did not contain all the terms of the bargain. It was part of the bargain that the potatoes should be packed in 150 lb. bags, suited to the United States market, instead of 90 lb. bags, as usual in Canada—though the price was to be computed on the basis of 90 pounds per bag. It was also agreed that 300 bags, 45,000 lbs., should constitute a "car." It was now too late to dispute the proposition that all the terms of the bargain must be found in the memorandum, either expressly or by necessary implication. While the action failed by reason of this statutory defence, there was more than enough in the defendants' conduct in the transaction and in the litigation to warrant the refusal of costs. R. L. Brackin, for the plaintiffs. C. R. McKeown, K.C., for the defendants.