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admitted facts, it is, of course, still open to the defendants to show such a state of facts as will exclude the implication.

For these reasons we think that the appeal should be allowed, and the demurrer over-ruled, with such costs as would have been payable if it had been over-ruled with costs in the first instance. The cause must be remitted to the Supreme Court to do what is right in execution of this judgment. The respondents must pay the costs of the appeal.

Appeal allowed. Demurrer over-ruled, with such costs as would have been payable if it had been over-ruled with costs in the first instance. Cause remitted to the Supreme Court to do what is right in execution of this judgment. Respondents to pay the costs of the appeal.

Attorney for appellant, *A. H. Delohery.*

Attorneys for respondents, *Perkins & Fosbery.*

Foll *Nile v Wood* 76 ALR 91

Foll *Hickey v Tuxworth (No2)* 47 NTR 44

Appl *Hickey v Tuxworth* 87 FLR 161

Cons *R v Pearson; Ex parte Sipka* 152 CLR 254

Dist *Tanti v Davies (No2)* [1996] 2 QdR 591

Foll *Rudolphy v Lightfoot* (1999) 167 ALR 105

[HIGH COURT OF AUSTRALIA.]

NORMAN CAMERON . . . . . PETITIONER;

AND

SIR PHILIP FYSH . . . . . RESPONDENT.

DENISON ELECTION PETITION.

COURT OF DISPUTED RETURNS.

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HOBART, *April* 18.

Griffith, C.J.

Commonwealth Electoral Act—Amendment of Petition—Crosses on ballot-paper—Irregularities—Evidence—New case sought to be made at hearing.

A new fact relied on to invalidate an election will not be allowed to be set up by amendment of the petition after the time allowed by law for presenting a petition.

The requisites of the cross prescribed by the *Commonwealth Electoral Act* to be put upon the ballot-papers considered.

A petitioner will be kept strictly to the case made by the petition.

At an election for the House of Representatives for the electoral Division of Denison, in the State of Tasmania, held on 16th Dec., 1903, there were three candidates, Sir Philip Fysh, Norman Cameron, and Andrew Kirk ; the first-named was declared by the Returning Officer to have been duly elected, the voting being, for Sir Philip Fysh 3,662 votes, for Cameron 3,630 votes. Cameron thereupon filed a petition praying (*inter alia*) that the respondent Fysh be declared not to have been duly elected, and that the petitioner be declared to have been duly elected.

The petition, as originally framed, alleged numerous offences by the respondent, or his agents, against the provisions of the *Electoral Act,* together with several irregularities in the conduct of the election. A recount was also claimed.

By order, dated the 29th March, 1904, it was by consent ordered by *Griffith,* C.J., in Chambers, that the portions of the petition which charged the respondent and his agents with offences against the *Electoral Act* be struck out.

Lodge, for the petitioner. On the petition as it now stands, the points open to the petitioner, apart from those arising upon the ballot-papers themselves, are:—(1) That electors whose names were on the roll were refused permission to vote : (2) That some of the polling places were not open during the whole of the time fixed for the election : (3) That certain persons on the State roll were refused the right to vote: (4) That there was undue influence as to voting at the New Town Charitable Institution.

[GRIFFITH, C.J.—It appears that 255 ballot-papers were rejected as informal. I propose first to examine these papers and consider the alleged informalities for which they were rejected.]

Clarke (with him *S. S. Dobson*), for the respondent. Notice has been received from the petitioner that he does not now claim the seat.

[GRIFFITH, C.J.—That may be so, but it is absolutely necessary to examine these ballot papers. It may appear upon examination that the result of the election is not affected ; on the other hand, it may appear that the respondent was not duly elected.]

[The result of this scrutiny was that 38 additional votes were allowed to the petitioner, and 37 to the respondent, while one vote

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was reserved for further consideration. During the course of the proceedings His Honor laid down the following principles.]

GRIFFITH, C.J. In order to make a vote valid there must be something in the nature of a cross opposite a candidate's name. A cross opposite the name of one candidate and a line opposite the name of another create an ambiguity, and such a vote ought not to be counted. A number of votes appear to have been rejected because a black pencil had been used instead of a blue one, but I think that is not a sufficient ground for disallowing them. On one ballot-paper a cross has been put opposite the name of each of the three candidates, and two of such crosses have been carefully obliterated. That is, I think, a good vote. There is one ballot-paper with a cross opposite a name which is struck through; that I reserve for further consideration. The old system of voting was to strike out the name of the candidate for whom the elector did not desire to vote, and it may be that this particular elector really intended to vote against the candidate opposite whose name he has placed the cross.

Lodge asked for leave to amend the particulars by inserting an allegation that several persons had been refused permission to vote at Middleton, a polling place outside the division.

Clarke objected, on the ground that the application ought not to be granted at this late stage.

GRIFFITH, C.J. This is substantially a new ground of objection to the election. The *Electoral Act* requires the petition to set out the facts relied on to invalidate the election, and it must be filed within forty days after the return of his writ. If I were to allow the application I should practically be extending the time for presenting the petition. I refuse the application.

Evidence was then heard.

F. P. Bowden, the Divisional Returning Officer, said Jas. H. Smith was the Deputy Returning Officer at Cascade-road, with J. Addison as poll clerk. Mr. Gadd was the scrutineer for Sir Philip Fysh at the Fern Tree.

William R. Rockwell, auctioneer's clerk, and an elector, said he

went to the Fern Tree polling place on his way to a sale at Huonville, with two or three others. It was just after 8.30 a.m., and they were told by Mr. Gadd, respondent's scrutineer, that the polling booth was not open, so they proceeded on their way, and did not vote as desired. Did not go and see if the polling place was really open; took Gadd's word for it. It might have been open all the same.

Howard E. Wright, Hobart, deposed that he attended to vote at the school house, Cascade-road, about 9.30 a.m., but could not find the presiding officer. He had been told that he had left the room for a few minutes to telephone for some additional forms.

Geo. A. Mather, Lower Sandy Bay, said his name was on the State roll as a voter, but he was refused the right to vote for Denison, both at the Town-hall and the Model School. His name was not on the House of Representatives roll.

F. R. Seager, superintendent of the New Town Charitable Institution, said he was presiding officer at the New Town Charitable Institution, which was made a polling place of itself.

Lodge.—How were the votes of the blind and illiterate inmates recorded?

Clarke objected to the question.

Lodge.—I am entitled to show that undue influence was used with respect to the votes of the blind and illiterate. The mere fact of the Superintendent of the Institution acting as presiding officer is sufficient to show that he exercised control over the voters.

GRIFFITH, C.J.—How does it come within any category of illegal practice? I do not see anything illegal in appointing the superintendent of the Institution to be Deputy Returning Officer there.

Lodge.—It was highly irregular to appoint the superintendent to be Returning Officer at the Institution. He would have the means of influencing the votes of the inmates.

GRIFFITH, C.J.—I do not express any opinion about the propriety of the appointment. If it is not forbidden by Statute, I cannot interfere. It may or may not have been wise on the part of the Divisional Returning Officer to appoint the superintendent as Deputy Returning Officer; but the respondent is not responsible for that.

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Lodge.--People at the Charitable Institution were not in a position to exercise their free judgment under such circumstances, and it is an irregularity which should be taken notice of.

GRIFFITH, C.J.—I am bound to take notice of charges of irregularites properly raised, but this is pleaded in the petition as an act of undue influence on the part of the respondent. The Divisional Returning Officer who appointed Mr. Seager as Returning Officer was not Sir Philip Fysh's agent. I do not sit here to try questions of morals, but questions of law. Even if undue influence were proved, it would be necessary to adduce some evidence to show that it affected a sufficiently large number of votes to probably affect the result of the election. You have not tendered any evidence to connect the respondent or his agents with anything that may have occurred at the Institution. Is it contended that Mr. Seager, the superintendent of the Institution, was the respondent's agent ?

Lodge.—No; but misconduct on the part of a presiding officer should not be allowed.

GRIFFITH, C.J.—I do not find any case of that sort alleged against the respondent. Perhaps you suggest that Mr. Seager and the respondent were friendly.

Lodge.—Mr. Seager would know how the inmates voted; they could not have recorded their votes without his intervention. The first quality of a Returning Officer is to be impartial.

GRIFFITH, C.J.—That is not the case made by the petition. The allegation is that the respondent was guilty of illegal practices, and the respondent is not responsible for the superintendent of the Institution being appointed Deputy Returning Officer. I reject the evidence.

After an adjournment,

Lodge informed the Court that he was not in a position to offer any evidence to connect the respondent, or his agents, with any undue influence that might have been exercised at the institution.

Clarke.—There is nothing to answer. All that is shown is that on the morning of the election two or three men were told that the polling booth at the Fern Tree was not open at 8.30 a.m. There is no evidence that it was not open.

As to one of those, named Rockwell, he was on the roll for North Hobart as Rockall, and it may be that, had he gone there to vote, his right would have been denied.

There is no evidence that any votes were lost at the Cascades polling place by the temporary absence of the officer in charge.

Then the votes of two men were refused because their names were on the State roll, not the Commonwealth roll, making five altogether, and some of those might not have voted for the petitioner.

Lodge said that certain evidence which he had tendered having been excluded he was unable to prove anything that would affect the result of the election.

GRIFFITH, C.J. Before the oral evidence was taken, it appeared that the respondent had a majority of 31 votes. The evidence shows that 4, or possibly 5, votes may have been lost. Even if that be so, the result of the election would not have been altered. And perhaps some of those five actually did vote. As to the objection that voters on the State roll, and not on the Commonwealth roll, were not allowed to vote, I am not inclined to encourage the idea that they had any right to vote. No evidence was given of the allegation that the respondent, by himself or his agents, had been guilty of illegal practices or undue influence, such as would invalidate the election. It was not proved that the respondent caused the superintendent of the Charitable Institution to be appointed as Deputy Returning Officer there with the view of influencing the votes of inmates; and, even if it had been proved, there was nothing to show that he did influence one of those votes. It is not my duty to discuss the manner in which the Divisional Returning Officer discharged his duty of appointing deputies; but I fail to see anything inherently wrong in that officer having appointed the superintendent of the Institution to be Deputy Returning Officer; there is no evidence of his having exercised any undue influence or of his having had any relations with the respondent. Although certain paragraphs relating to illegal practices have been struck out of the petition, if evidence had been tendered to prove the prevalence of such practices to such an extent as probably to have affected the result of

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the election, I should have allowed those paragraphs to be treated as particulars of the general allegations of undue influence affecting the election. There is, however, a total absence of any evidence showing any illegal practice or undue influence. The petition therefore fails, and is dismissed with costs against the petitioner.

Petition dismissed with costs.

Solicitors, for petitioner, *Roberts & Allport.*
Solicitors, for respondent, *Dobson, Mitchell & Allport.*

[HIGH COURT OF AUSTRALIA.]

DIXON . . . . . APPELLANT;

AND

TODD . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1904.

BRISBANE, *May* 16, 18.

Griffith, C.J., Barton and O'Connor, JJ.

Bill of Sale—Bills of Sale Act (*Queensland*) 1891, *sec.* 4—*Insolvency Act* 1874, *secs.* 107-8-9.

By the law of Queensland a bill of sale has no effect as an assignment of chattels until registration.

By the *Insolvency Act* of 1874, sec. 105, an assignment made by a debtor in insolvent circumstances in favour of a creditor, not being for a reasonable and sufficient consideration given at the time, is voidable as against creditors if insolvency follows within six months.

A bill of sale was executed on 30th May for a then present advance of money, but was not registered until 18th August, at which date the maker was alleged to have been in insolvent circumstances. He was adjudicated insolvent within six months.

Held, that as against the trustee in the insolvency, the bill of sale was liable to be avoided as not having been made for a reasonable or sufficient consideration given at the time of execution.

Decisions of *Real*, J., and the Full Court, (1904) Qd. St. R. 128, reversed.