

1891
 *Oct. 29. *CONTROVERTED ELECTION FOR THE
 ELECTORAL DISTRICT OF THE
 COUNTY OF KING'S (N.S.).*

FREDERICK W. BORDEN (RE- } APPELLANT;
 SPONDENT)

AND

DAVID BERTEAUX (PETITIONER)RESPONDENT.
 ON APPEAL FROM THE DECISION OF THE SUPREME
 COURT OF NOVA SCOTIA.

*Election petition—Preliminary objections—Service at domicile—R. S. C.
 ch. 9, sec. 10.*

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household during the five days after the presentation of the same is a sufficient service under sec. 10 of the Dominion Controverted Elections Act even though the papers served do not come into the possession or within the knowledge of the respondent. [See now 54-55 Vic. ch. 20, sec. 8.]

APPEAL from the decision of the Supreme Court of Nova Scotia overruling and dismissing the preliminary objections of the said appellant, Frederick W. Borden, the respondent in the court below to the petition against the election of the said Frederick W. Borden presented by the said respondent, David Berteaux, at the office of the clerk of the court at Halifax, on the twentieth day of April, A.D. 1891.

A number of objections were taken in the said preliminary objections, but these have been confined by notice pursuant to subsection 3 of sec. 51, chapter 9 of the Revised Statutes of Canada, to certain questions.

*PRESENT :—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

The present appeal was decided upon the fourth question submitted, which is as follows:

Fourthly—Did the act of leaving a copy of the said petition and accompanying documents at the domicile of the said Frederick W. Borden at Canning in the said County of King's with the wife of the said Frederick W. Borden during the five days after the presentation of the same or within the term of the service of the said petition as extended by the order of Mr. Justice Meagher without the said copy of petition or papers coming to the possession or knowledge of the said Frederick W. Borden constitute a service of the said petition and accompanying documents so as to authorize further proceedings thereon?

The petitioner resides at Somerset in the County of King's. The sitting member (appellant) resides at Canning in said County of King's. The petition was filed at Halifax on the 20th April, 1891.

On the 25th April the petitioner obtained an order extending the time for serving the petition.

On the 30th April an order was made by Mr. Justice Graham to serve the petition on the appellant at Ottawa.

The petition and receipts, notice of its presentation, and the orders extending the time for service and directing service upon the respondent at Ottawa, were served upon the said respondent at Ottawa. The said petition and accompanying papers were served at the domicile of the said respondent, at Canning in the County of King's, within five days after the presentation of the petition, and again within the extended time for effecting service of the same.

Roscoe for appellant :

As to the fourth question, there is no evidence that the appellant ever saw or heard of the papers that were left at his residence.

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Section 11 of the act provides for the same manner of service—personal service—of the petition and papers as in civil matters or in such other manner as prescribed.

In the province of Nova Scotia there is but one way of serving process without the intervention of the court in civil cases, namely, actual personal service. It has never been prescribed that service might be made by leaving the papers at the respondent's domicile. There is nothing in section 11 or in any rule or manner prescribed which would warrant such a method of service.

It has been contended, however, that by inference drawn from the latter part of section 10, service might be made by leaving the petition and papers at the respondent's domicile. If this be so then sections 10 and 11 are inconsistent, and in that case the provisions of section 11 must prevail. *Wood v. Riley* (1).

But the meaning of the latter part of section 10 as applied to the province of Nova Scotia is not that service may be made by leaving the petition and papers at the domicile of the respondent. In the province of Quebec service of ordinary civil process may be made "upon the defendant in person or at his domicile or at the place of his ordinary residence speaking to a reasonable person belonging to the family." See article 57 of the Code of Civil Procedure. In Quebec, as it is quite evident that service may be made in civil process by leaving the same at the domicile of the party, the words in the latter part of section 10, "if service cannot be effected on the respondent or respondents either personally or at his or their domicile," are capable of literal application, but in Nova Scotia service cannot be effected by leaving process at the domicile of a party to be served unless by order

(1) L.R. 3 C.P. 27.

of the court or a judge, so that the words "if service cannot be effected on the respondent or respondents either personally or at his or their domicile," cannot mean that service may be effected that way, inasmuch as it cannot be effected in Nova Scotia that way at all in civil cases, and saying that if service cannot be effected in one of two ways when it is impossible to have it effected in but one of those methods, is to eliminate from the statute in its application to Nova Scotia the reference to the way which cannot be employed excepting by violating the law in Nova Scotia, and as a consequence violating the terms of sec. 11. The obvious construction of sec. 10 in the light of sec. 11 is to incorporate the operative part of sec. 11, immediately after the word domicile in sec. 10, when the section would read as follows: "If service cannot be effected on the respondent or respondents either personally or at his or their domicile, whichever may be as nearly as possible the manner in which a writ of summons is served in civil matters, then it may be effected upon such other person or in such other manner as the court or judge on the application of the petitioner directs." The evident intent of these two sections—regard being had to the manner of service of civil process in the province of Quebec—is that a petitioner shall try to serve the petition and papers in the way in the province where the petition is to be served applicable to the service of a writ of summons in civil matters, and if he cannot effect such service then the court or a judge shall direct the method of service.

In the construction of statutes the intention to be gotten from the statute should prevail, and the construction is to be made on all the parts of the statute together; Hardcastle's Statutory Law, page 67 and cases there cited.

But there is another reason for the construction

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claimed by the appellant. If the petition is to be served in Nova Scotia by leaving it at the domicile of the party it would be altering the law as to service of civil process in that province and compelling a construction of sec. 10 inconsistent with sec. 11. This should not be done on account of a mere inference or implication to be extracted from part of a clause of a statute. To do that needs an express and unmistakable provision. The respondent to an election petition in Nova Scotia has the right to claim personal service of that paper, and that right should not be taken away unless by a plain and unmistakable provision of the law; Hardcastle's Statutory Law, pages 48, 49, 52 and 53. The case of *Walsh v. Montague* (Haldimand) (1) does not consider the effect of sec. 11 of the act nor the necessity of harmonizing it with sec. 10 nor any of the principles involved in adopting the view taken.

Boak for the respondent. Service of the petition and accompanying documents was made at the respondent's domicile within five days after the presentation of the petition and again after the time for effecting personal service had been extended. Such service is a good service within the meaning of sec. 10 of the act; *Walsh v. Montague* (Haldimand) (1).

Per Curiam: A service at the residence or dwelling house of the respondent by delivering a copy of the petition and the other papers prescribed by the statute to a grown up person is a good and valid service under section 10 of the Dominion Controverted Elections Act.

Appeal dismissed with costs.

Solicitor for appellant: *W. E. Roscoe.*

Solicitor for respondent: *H. W. C. Boak.*

(1) 1 Ont. El. R. 485.