CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF LISGAR.

1891

*Oct. 27.

*Nov. 17.

THOMAS COLLINS (PETITIONER).....APPELLANT;

vs.

ARTHUR WELLINGTON ROSS (RESPONDENT)..... ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Election Petition—Preliminary objections—R. S. C. ch. 9, s. 63—English general rules—Copy of petition—R.S.C. ch. 9, s. 9 (h)—Description and occupation of petitioner.

Held, affirming the judgment of the court below, that the judges of the court in Manitoba not having made rules for the practice and procedure in controverted elections the English rules of Michaelmas Term, 1868, were in force, (R.S.C. ch. 9, s. 63), and that under rule one of said English rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the sub-

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

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ject of a substantial preliminary objection and fatal to the petition. Strong and Gwynne JJ. dissenting.

Held further, reversing the judgment of the court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal.

APPEAL from the judgment of the Court of Queen's Bench for Manitoba dismissing with costs, upon certain preliminary objections presented by the respondent, the petition presented to that court by the appellant under "The Dominion Controverted Elections Act," complaining, upon the grounds therein set out, of the undue election of the respondent as member of the House of Commons for the electoral district of Lisgar.

The court of Queen's Bench upheld the following objections, numbers two (2) and five (5):

Objection 2.—The name, residence, address and occupation of the petitioner are not set out in the said petition nor is any information or means given of identifying him, whereby the respondent is prevented from discovering whether there are any objections to the said petitioner.

Objection 5.—At the time of the presentation of the said petition at the office of the clerk of the court or prothonotary the petitioner did not leave a copy of the said petition with the said clerk or prothonotary for him to send to the returning officer of the said electoral district for publication, nor was any provision made for sending such copy to the said returning officer, nor did the petitioner furnish or pay to the said clerk of the court or prothonotary, or the returning officer, the costs, expenses and charges necessary for the publication of the said petition, pursuant to the provisions of the said act, and the rules and practice relating to the trial of election petitions, by reason whereof no copy of said petition was sent by said prothonotary to the said returning officer for publication as aforesaid, and

the same was not published by said returning officer in the said electoral district as provided by the said act.

The petition was styled as follows:—

"PETITION IN THE COURT OF QUEEN'S BENCH.

"THE DOMINION CONTROVERTED ELECTIONS ACT.

"In the matter of the election for the Electoral District of Lisgar for a member of the House of Commons, held on the twenty-sixth day of February, A.D. 1891, and the fifth day of March, A.D. 1891.

"Between THOMAS COLLINS, petitioner, and ARTHUR WELLINGTON ROSS, respondent.

"*To the Honourable the Judges of the Court of Queen's Bench for the province of Manitoba:*

"The humble petition of the above-named petitioner showeth as follows:—

"1. An election for a member of the House of Commons for the Electoral District of Lisgar, in the Province of Manitoba, was held on the twenty-sixth day of February and the fifth day of March last past.

"2. Your petitioner had a right to vote at the said election, &c."

Martin for appellant.

The second objection is that the name, residence, address and occupation of the petitioner are not set out in the petition, and the court proceeded largely upon this objection in making the order complained of.

The name of the petitioner, Thomas Collins, is given, and I contend that his residence, address and occupation need not be stated in the petition, either under the Controverted Elections Act, secs. 5 and 9, or under the English rules of 1868 (which, under section 63 of the act, are in force to a certain extent in Manitoba, no general rules having been promulgated by the Court of Queen's Bench under section 62). The

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form given in rule 5 indicates that the residence, though not the occupation, should be given, although rule 2 does not require that the residence should be given. At the most the omission to insert the residence of the petitioner is merely a clerical error, and application having been made at the hearing before the court below for leave to insert it, an amendment should have been allowed. The appellant further submits that the onus being upon the respondent to establish this preliminary objection, he should have filed material impeaching or throwing doubts upon the status or identity of the petitioner: *The Megantic Case* (1); *The Montmagny Case* (2).

In any event the objection does not go to the substance of the petition, but is purely formal and should not prevail. The English rule, No. 60, says: "No proceedings shall be defeated by any formal objection." The appellant refers also to sub-section 44 of section 7 of the Interpretation Act. Maxwell on Statutes (3). See also portion of the judgment of Lord Coleridge C.J. in *Woodward* v. *Sarsons* (4), a decision under the Ballot Act; *Liverpool Borough Bank* v. *Turner* (5); and *Re Lincoln Election* (6).

The judgment of Baron Martin in *The Shrewsbury Petition, Young* v. *Figgins* (7), is a case very similar to the present.

The fifth objection, that at the time of the presentation of the petition the petitioner did not leave a copy of the petition with the clerk to be forwarded to the returning officer for publication in the electoral district, was a principal ground upon which the court below proceeded in dismissing the petition.

In answer to this objection I contend that this is not

(1) 8 Can. S. C. R. 169.
(2) 15 Can. S. C. R. 1.
(3) P. 460.
(4) L. R. 10 C. P. 750.
(5) 2 DeG. F. & J. 502.
(6) 2 Ont. App. R. 324.
(7) 19 L. T. N. S. 499.

a preliminary objection which can be taken under the provisions of section 12 of the act. It is not a preliminary objection or ground of insufficiency against the petition or petitioner or against any further proceeding on the petition. The statutory provision is in the nature of a collateral proceeding intended, not for the benefit or to protect either the petitioner or the respondent, but to give the electors of the electoral division notice that a petition is pending and with the object of thereby preventing any collusive withdrawal or settlement of the petition. Such being the obvious intention of the provision the court, by giving force to this objection, has actually consummated the very result which the legislature intended to prevent.

The provision of the rule, being remedial in its nature and in the public interest, is not imperative but directory merely, and the omission to comply with it is not fatal to the petition. Such omission could be equitably remedied by granting the petitioner an extension of time, or by staying proceedings on the petition unless the provision of the rule had been complied with.

McCarthy Q.C. and *Haggart* for respondent. With respect to objection two the learned counsel cited and relied on the *Youghal case* (1); *The Megantic case* (2); Lewis' Equity Drafting (3); Story's Equity Pleading (4); *Hunter* v. *Mountjoy* (5); *Campbell* v. *Andrews* (6); and as to objection five, cited Cunningham on Elections (7); Dom. Con. Elections Act (8); Maxwell on Stats. (9); *Noseworthy* v. *Buckland in the Moor* (10); *Wheeler*

(1) 1 O. M. & H. 291.
(2) 8 Can. S. C. R. 169.
(3) P. 186.
(4) 9th ed. pp. 19, 20.
(5) 2 Ch. Cham. 90.
(6) 12 Sim. 578.
(7) P. 572.
(8) R.S.C. c. 9 s. 9 ss. *h* and secs. 62, 63.
(9) 2nd ed. p. 452.
(10) L. R. 9 C. P. 233.

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v. *Gibbs* (1); Hardcastle on Stat. Law (2); *Liverpool Bank* v. *Turner* (3); *Grace* v. *Clinch* (4); *Tipperary case* (5); *Knaresborough case* (6); *Boston case* (7); *Re South Renfrew* (8); Leigh & LeMarchant on Elections (9); Hardcastle on Elections (10), and English rules L and LX made under The Parliamentary Elections Act, 1868.

Sir W. J. RITCHIE C.J.—I think the second preliminary objection, viz., that the name, residence, address and occupation of the petitioner are not set out in the petition, is a purely formal one, and an amendment which appears to have been applied for should have been allowed. I cannot conceive that the sitting member could be in any way injured by the want of the "residence, address and occupation" of the petitioner, because he could have applied to a judge to stay proceedings till the same were furnished, or he could have raised an issue as to petitioner's right to vote at the election, as alleged by him in his petition, when in my opinion the burthen of establishing this status was on the petitioner, and failing to comply with which his petition would be dismissed.

As to the 5th objection which the court below sustained, stated shortly, it is, that no copy of the petition for transmission to the returning officer or cost of transmission, &c., was furnished by the petitioner to the prothonotary of the court when the petition was presented, by reason whereof no copy of said petition was sent by said prothonotary to said returning officer for publication, nor was same pub-

(1) 3 Can. S.C.R. 374.
(2) 2nd ed., p. 134.
(3) 2 De Gex. F. & J. 502.
(4) 4 Q. B. 606.
(5) 2 O'M. & H. 31.
(6) 3 O'M. & H. 141.
(7) 3 O'M. & H. 150.
(8) 1 Hodg. El. Cas. 556.
(9) P. 108.
(10) P. 17.

lished by the said returning officer in the said electoral district as provided by the Act.

By section 9 (*h*) of the Controverted Elections Act it is provided that on the presentation of the petition the clerk of the court shall send a copy thereof by mail to the returning officer of the electoral district to which the petition relates, who shall forthwith publish the same in such electoral district. The judges of the Court of Queen's Bench of Manitoba have made no rules under the 63rd section of the Act, which declares that in such a case:

> Until rules of court have been made by the judges of the several courts in each province in pursuance of this act, and so far as such rules do not extend, the principles, practice and rules, on which election petitions touching the election of members of the House of Commons in England were, on the twenty-sixth day of May, one thousand eight hundred and seventy-four, dealt with, shall be observed so far as consistently with this act they can be observed by the said courts and the judges thereof.

The English rules thus in force in Manitoba require the petitioner when filing the petition to leave with the clerk a copy of the petition to be sent to the returning officer. There was no compliance with this rule and no copy was ever sent to the returning officer. It appears to me this was by no means a mere formal proceeding, but an essential part of the presentation or filing of the petition, and unless the statute and rule were duly complied with there was no proper or due presentation or filing of the petition, and therefore the objection was a substantial objection as held by the court below.

STRONG J.—I think that in dealing with election cases it should be a golden rule that if there is any possible way of avoiding giving effect to technical preliminary objections and thus preventing the trial on the merits we should act upon it.

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As regards objections two and five, I cannot say they are fatal; objection two might have been cured by amendment; and a stay of proceedings until compliance with the practice would have been sufficient as regards the fifth. I am of opinion the appeal should be allowed and the petitioner should be at liberty to amend his proceedings.

FOURNIER J.—I concur in the dismissal of this appeal.

TASCHEREAU J.—If I had been sitting in the court of first instance I should probably have said that the 5th objection should not prevail, and would have given time to prove the status, but the court below having maintained it, I do not think we should interfere.

GWYNNE J.—None of the objections in the present case are, in my opinion, good preliminary objections within the meaning of that term as used in the statute. The statute in effect incorporates the rules of court in England under the Act of 1868 in matters not provided for by the statute, and where no rules are made by the court having jurisdiction in election petitions in the province where they are filed. In this case the court of Manitoba has made no rules, and the English rules therefore apply and become incorporated with the statute as affects election petitions in the Province of Manitoba.

One of these rules provides that "no proceedings under the Parliamentary Elections Act shall be defeated by any formal objection." Now, the omission to set out the name, residence, address and occupation of a petitioner in the body of a petition, the name of the petitioner appearing as it does here in the heading of

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the petition, thus:—*Thomas Collins*, petitioner, v. *Arthur Wellington Ross*, respondent—is, in my opinion, a mere formal objection; and any benefit to the respondent to accrue, or prejudice to be avoided by any of the omissions being supplied could be obtained by application to the court or a judge, as in an ordinary suit.

So, likewise, the not leaving a copy of the petition with the clerk of the court where the petition is filed, on the presentation of the petition, is a merely formal objection, and indeed the omission does not seem to work any peculiar prejudice to the respondent in any manner; and, if it did, that prejudice could be obviated by application to the court or a judge. The leaving a copy with the clerk does not so form part of the presentation of the petition that the omission to leave it would make void the filing of the petition. It is a proceeding wholly collateral to the petition and affords no reason why the respondent should not be required to answer the petition. In short, all the objections relied upon, so far as they are objections at all, are, in my opinion, merely formal and cannot therefore annul the petition. They are not, in my opinion, good preliminary objections, which term as used in the statute is, I think, applicable only to substantial objections either to the qualification of the petitioner or to the substance of the petition, or to some substantial reason why the matter of the petition should not be proceeded with.

PATTERSON J.—I concur in dismissing this appeal, and I do so with less regret than I should probably have felt if it were not apparent that the omissions that have proved fatal to the petition have arisen from want of careful attention to the 63rd section of the Controverted Elections Act, which, in the absence of rules made by the provincial court under section 62, gives

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the force of law in Manitoba to the English General Rules of Michaelmas Term, 1868. The first of those rules requires that when the petition is presented a copy of it shall be left to be sent to the returning officer under the provision which in our Act is sub-section (*h*) of section 9.

I think the failure to leave the required copy, in consequence of which no copy was sent to the returning officer, is properly made the subject of a preliminary objection, and has been properly held to be fatal to the further proceeding upon the petition.

Two things are to be done together, as directed by rule I. One is the presentation of the petition by delivering it to the officer, and the other is the leaving with the same officer the copy for him to send to the returning officer. If the former act were omitted no one would contend that the omission was not fatal notwithstanding that a copy and notices had been served on the respondent, or contend that it could be cured by delivering the petition *nunc pro tunc*. The second requirement of the rule may seem less fundamental than the first, but it is something prescribed to be done by the petitioner at the institution of the proceedings, and it is not easy to find safe ground for holding one requirement to be less imperative than the other.

We must hold the petitioner to the duty cast upon him by the law, without speculating, as we have been invited to do, on the comparative importance to him or to the respondent of his doing what the rule directs, in order that the petition may be promptly published by the returning officer.

The other objection given effect to in the court below, viz., the omission to state in the petition the petitioner's residence, might have been rectified by the judge without prejudice to either side. That is one

test of an objection falling within the class of formal objections which by rule LX are not to defeat a proceeding under the act. See the *Shrewsbury case* (1), Cor. Martin B. ; *Aldridge* v. *Hurst* (2), per Grove J. If the respondent was really ignorant of the matter he could have been given time to make enquiries.

If the omission of any description of the petitioner, by residence or otherwise, were a matter of substance and not of form, and must be held fatal to the petition, the rule would have to be applied in every case, even though it should appear, or be admitted, that the respondent was well acquainted with the petitioner and had seen him sign and present the petition. There is no indication in the statute or the rules that a practice so rigid and so unlike that which prevails in ordinary litigation is contemplated.

It is on the first mentioned objection that I think the decision should be sustained, and the appeal dismissed.

Appeal dismissed with costs.

Solicitor for appellant : *J. Martin.*

Solicitors for respondent : *Haggart & Ross.*

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(1) 19 L. T. N. S. 499.

(2) 1 C. P. D. 410, 417.