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*Feb. 17.
*Mar. 24.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE COUNTY OF LUNENBURG.

CHARLES EDWIN KAULBACH, (RESPONDENT)..... } APPELLANT;

AND

JOHN DREW SPERRY (PETITIONER)...RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE HENRY.

Election petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—R. S. C. c. 9—54 & 55 V. c. 20, s. 3 (D).

By 54 & 55 V. c. 20, sec. 3, amending The Controverted Elections Act (R. S. C. c. 9) an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit.

Held, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief.

Held further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit as in case of an exhibit the references in the affidavit being sufficient to show what petition was referred to.

It is no objection to an election petition that it is too general (as by the act it may be in any prescribed form) if it follows the form that has always been in use in the Province. Moreover any inconvenience from generality may be obviated by particulars.

APPEAL from a decision of Mr. Justice Henry of the Supreme Court of Nova Scotia, dismissing preliminary objections to an election petition filed against the return of the appellant at the general election for the House of Commons on June 23rd, 1896.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

The petition filed against the return of the respondent was accompanied by an affidavit of the petitioner, as required by the amendment to the Controverted Elections Act, 54 & 55 Vict. ch. 20, sec. 3, that he had reason to believe and did believe that the allegations in said petition were true. The respondent filed preliminary objections, among which were the following:

"3. The petition herein is not in any prescribed form and not in the form prescribed by the Dominion Controverted Elections Act or by any rules of court made under said Act.

"18. Said alleged affidavit does not in any way refer to the petition herein and it does not appear that the petition referred to in said alleged affidavit is the petition herein.

"26. The said John Drew Sperry had not at the time he swore to the said affidavit any reasonable grounds to believe and he did not believe that the material allegations in the said petition were true.

"27. The said petitioner had not any reasonable grounds to believe that the several allegations in the said petition were true and the said affidavit was irrelevant and scandalous and made without any sufficient information or reasonable grounds for belief within the meaning of the statute, and was and is an abuse of the practice and proceedings of this honourable court and an evasion of the said statute and a fraud on the court."

Counsel for the appellant wished to examine the petitioner as to his affidavit which was refused by the judge who heard the preliminary objections, all of which were dismissed, the following judgment being pronounced on objection no. 18:

"The principal contention before me was that the affidavit of the petitioner presented at the time of the

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presentation of the petition should have had the petition annexed to it and should have referred to the petition as so annexed, or should have had it identified as an exhibit and referred to it as such. The practice books and some decisions were referred to, to show that exhibits to affidavits must be verified in either of these ways.

"I am of the opinion that the practice referred to does not govern the present question. According to that practice an exhibit must be proved in a certain way. In order to be proved by an affidavit an exhibit must be so marked and so referred to as to be distinctly identified. The one must be proved, made evidence, by the other, without the aid of anything extrinsic.

"In the present case the affidavit was not used for the purpose of making the petition evidence. It was used for the purpose of complying with the statute which provided that at the time of the presentation of the petition there should be presented therewith a certain affidavit by the petitioner. The references to the petition in the affidavit are ample, if the case is not governed by the practice referred to, to show what petition is referred to. I think it is sufficient that it has been proved that the statute was complied with."

This appeal was then brought from the judgment dismissing the preliminary objections.

W. A. B. Ritchie Q.C. for the appellant referred to *Reg.* v. *Hulme* (1); *Reg.* v. *Holl* (2).

Russell Q.C. and *Congdon* for the respondent.

The judgment of the court was delivered by:

KING J.—This is an appeal from an order of Henry J., dismissing preliminary objections to an election petition.

(1) L. R. 5 Q. B. 377. (2) 7 Q. B. D. 575.

The main point in the appeal arises from the provisions of the Act 54 & 55 Vict. ch. 20, sec. 3, providing for the presentation of an affidavit at the time of the presentation of the petition, and is raised by the 26th and 27th of the preliminary objections.

26. The said John Drew Sperry had not at the time he swore to the said affidavit any reasonable grounds to believe, and he did not believe, that the material allegations in the said petition were true.

27. The said petitioner had not any reasonable grounds to believe that the several allegations in said petition were true, and the said affidavit was irrelevant and scandalous and made without any sufficient information or reasonable grounds for belief within the meaning of the statute, and was and is an abuse of the practice and proceeding of this honourable court, and an evasion of the said statute, and a fraud on the court.

The matter came on for hearing in a summary way before Mr. Justice Henry, and the following extract from the minutes of the learned judge shows what took place respecting the matter of the above recited objections :

Mr. Borden wishes to call or cross-examine petitioner as to his affidavit for the purpose of showing that there were no reasonable grounds for the allegations therein contained. I reserve my decision as to this.

At a later stage of the hearing the learned judge noted his refusal to allow the petitioner to be examined, which of course is to be taken as relating to cross-examination as well.

Subsequently judgment was delivered dealing with the remaining questions, and on the 11th December the order appealed from was made.

Section 3 of 54 & 55 Vict. ch. 20, is in amendment of the legislation relating to the qualification of petitioners, and is as follows :

Section 5 of the Dominion Controverted Elections Act is hereby amended by adding the following paragraph at the end thereof :

At the time of the presentation of the petition there shall also be presented therewith an affidavit by the petitioner that he has good

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reason to believe and verily does believe that the several allegations contained in the said petition are true, and thereafter, should any elector be substituted for the petitioner, then, and in every such case, such elector, before being so substituted, shall make and file an affidavit to the same effect.

What was presented by the petitioner has the formal requisites and the substantial requisites of an affidavit, and no question arises as to its properly expressing the mind and intention of the deponent. What is deposed to is also in conformity with the requirements of the Act:

> I have good reason to believe, and verily do believe, that the several allegations contained in the said petition are true.

What the respondent in the proceedings sought to do, according to the minutes of the learned judge, was to show by the examination or cross-examination of the petitioner that there was no reasonable grounds for the allegations; in other words, that there were no reasonable grounds for the petitioner's belief. But the Act has made the deponent the judge as to the reasonableness of the grounds of his belief, and the affidavit does not form any part of the body of proof to be passed upon by the court on the trial of the petition.

It is said that the existing belief to which he is required to depose must be an honest belief. Granted. But the question back of that is as to how the honest belief is to be proved, and whether the election court can inquire into it. The Act treats the petitioner as a person fit to form an opinion on the subject of his beliefs, and as a credible person who will declare his honest belief under oath subject to the responsibilities of such a proceeding, and adopts his act as a qualification *inter alia* for his becoming petitioner.

For wilful and corrupt swearing to what he knows to be untrue he is liable in a court of proper criminal jurisdiction, but his credibility is not to be impeached in the election court in respect of this

statutory affidavit. It may be that many vexatious and unfounded election petitions might be brought in this view of the law. This, however, presupposes a laxity of legal and moral restraint, and in any view may be for the consideration of the legislature.

Cases where the intention of the deponent is shown not to have gone with the apparent affidavit are not now in mind, but there is no suggestion of that here. For example, a petitioner might be insane, or an illiterate petitioner might make oath to a form of affidavit supposing it to be an affidavit in another proceeding. In such case there would be no real affidavit. In the circumstances of this case the proposed examination and the cross-examination seem to have been irrelevant.

Another preliminary objection was that the petition was not in proper form. The objection apparently was that it was too general. But the factum of the appellant admits that it was in a form which had been used in the province of Nova Scotia prior to the passing of the statute 54 & 55 Vict. ch. 20, the 3rd section of which requires the petition to be accompanied by an affidavit of the petitioner.

But that Act effected no change in the form of the petition, which still depends upon R. S. C. ch. 9, sec. 9, to the effect that the petition may be in any prescribed form, but if or in so far as no form is prescribed it need not be in any particular form, etc. The admission of the factum indicates that if any form was prescribed in Nova Scotia such was substantially followed. At all events no variance from prescribed form is alleged, or shown. Inconvenience from the generality of the petition is always practically obviated by the particulars.

The remaining objection raised before us is that the affidavit referred to did not sufficiently identify the

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petition. This point has been adequately and satisfactorily dealt with by the learned judge who heard the objections and his judgment on the point is adopted.

The result is that the appeal is to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Borden, Ritchie & Chisholm.*

Solicitor for the respondent: *Henry T. Ross.*