1901
*May 7.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE WEST RIDING OF THE COUNTY OF DURHAM.

CHARLES JONAS THORNTON (RESPONDENT)..... } APPELLANT;

AND

CHARLES BURNHAM (PETITIONER)...RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE STREET.

Election petition—No return of member—Illegal deposit—Parties to petition.

A petition under The Dominion Controverted Elections Act (R. S. C. ch. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents.

Held, that the petition as framed came within the provisions of sec. 5 of the Act and that T. was properly made a respondent.

APPEAL from a decision of Mr. Justice Street overruling preliminary objections to the election petition.

At the election of members of the House of Commons on November 7, 1901, for West Durham, the candidates were the appellant Thornton and Robert Beith. Thornton received the greater number of votes, but exception having been taken to the deposit of $200 at his nomination by marked cheque neither party was returned as elected, but a special return was made of the circumstances. Then an election petition was filed against Thornton and the returning officer which, after stating the necessary facts as to the petition and of Beith's nomination, alleged as follows:

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

"4. And your petitioner further states that at the time fixed by the said proclamation, or prior thereto, Charles Jonas Thornton, of the township of Clarke, in the county of Durham, farmer (hereinafter called the respondent), or some one on his behalf, did produce to the returning officer for the said election a nomination paper, stating therein the name, residence and addition of the said respondent as a person proposed, but neither at the time the said nomination paper was produced to and filed with the returning officer, nor at any time prior or subsequent thereto, was the sum of $200 in legal tender or in the bills of any chartered bank doing business in Canada, deposited in the hands of the said returning officer by or on behalf of the said respondent Thornton."

"5. And your petitioner further states that on the day fixed by the said returning officer for summing up the votes cast at the said election, objection was taken to the return of the respondent by reason of the invalidity of his nomination, as more particularly set forth in paragraph 4 hereof, and the said returning officer, in view of such objection, made a special return of all the circumstances to the Clerk of the Crown in Chancery at Ottawa, and returned no member as elected at the said election."

* * * * * * *

"7. And your petitioner submits that the nomination paper of the said respondent was invalid and should not have been acted upon by the returning officer, and by reason of the invalidity of the nomination paper of the respondent your petitioner submits that his election was null and void and that he should not be returned as member for the said Electoral District, but that the said Robert Beith, being the only candidate validly nominated at the said election, should have been returned as elected thereat."

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"8. And your petitioner further states that if it should be determined by this honourable court that the said respondent was duly nominated and entitled to have been returned as elected at the said election, such election of the said respondent was undue, and should be declared to be null and void, by reason of the fact that the said respondent by himself, by his agents and by other persons on his behalf before, during, at and after the said election, was guilty of bribery, treating, personation and undue influence, as defined by the Dominion Elections Act, the Dominion Controverted Elections Act, and other Acts of the Parliament of Canada, whereby the said respondent was and is incapacitated from serving in parliament for the said Electoral District."

The petition alleged other corrupt acts and prayed—

"(1) That it may be determined that the nomination of the said respondent was invalid and should not have been acted upon, and that the said Robert Beith should be returned as elected thereat, or that a new election should be ordered for the said Electoral District."

"(2) Or, in the alternative, that if this honourable court shall be of opinion that the said respondent was duly nominated at the said election, then that it may be declared that the said election was undue and should be declared to be null and void, for that the respondent, by himself, and by his agents, was guilty of the said several corrupt and illegal acts and practices hereinbefore charged as having been committed by him, or by his agents, before, during, at and after the said election."

Preliminary objections to the petition were filed on behalf of the respondent Thornton, among them being the following:

"The said petition in its form and contents and the relief sought is unauthorized in law, and is in violation of the provisions of sections 5, 6, 7, 8 and 9 of the Dominion Controverted Elections Act, inasmuch as it attempts to group together in one petition, with but one deposit of security more than one cause of complaint, to wit—no less than three causes of complaint. (1) Of no return; (2) Undue election of your said respondent; (3) Unlawful acts of a candidate, to wit, your said respondent, not returned, the effect of which is that your said respondent is alleged to have become disqualified to sit in the House of Commons."

Argument on the preliminary objections took place before Mr. Justice Street when they were overruled and an appeal was taken from his judgment to the Supreme Court of Canada.

W. D. McPherson for the appellant. Thornton should not have been made a respondent to this petition. It alleges that he was not a candidate and complains of "no return" of a member. The only person responsible for that is the returning officer. See *Harmon* v. *Park* (1).

All candidates are not necessary parties. *Monkswell* v. *Thompson* (2); *Lovering* v. *Dawson* (3); *Lyne* v. *Warren* (4).

Assuming the facts alleged in the petition to be proved the prayer could not be complied with. *North Victoria Election Case* (5) following *Stevens* v. *Tillett* (6).

Aylesworth K.C. for the respondent was not called upon.

(1) 6 Q. B. D. 323.
(2) [1898] 1 Q. B. 479.
(3) L. R. 10 C. P. 711.
(4) 14 Q. B. D. 73, 548.
(5) Hodg. El. Cas. 585.
(6) L. R. 6 C. P. 147.

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THE CHIEF JUSTICE.—(Oral): The law applicable to this case is contained in section 5 of The Dominion Controverted Elections Act (1), which section, so far as it is material to the appeal, reads as follows:

The Chief Justice.

5. A petition complaining of an undue return, or undue election of a member, or of no return, or of a double return, or of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons at any election may be presented to the court by any one or more of the following persons:

(*a*) A person who had a right to vote at the election to which the petition relates; or

(*b*) A candidate at such election.

The fifth paragraph of the election petition, which alleges that—

on the day fixed by the said returning officer for summing up the votes cast at the said election, objection was taken to the return of the respondent by reason of invalidity of his nomination, as more particularly set forth in paragraph four hereof, and the said returning officer in view of such objection made a special return of all the circumstances to the clerk of the Crown in Chancery at Ottawa, and returned no member as elected at the said election,

brings the case within the section of the Controverted Elections Act, just read, the petitioner being a person who had a right to vote at the election, and the allegation being that there was "no return" of a member elected.

The appellant claims that as it was alleged in the petition that he was not duly nominated, and therefore not a candidate, he could not be made a respondent. But he was a candidate *de facto* if not *de jure*, and Mr. Beith could not claim the seat without giving him an opportunity to assert his rights before the election court.

I am far from saying that all the points presented for our consideration are precluded by this decision. On the contrary, many of the arguments so ably urged

(1) R. S. C. ch. 9.

before us by counsel for the appellant may be renewed when the petition comes on to be heard on its merits and should then have great weight. Our present decision is on a matter such as might have been raised on demurrer in an action.

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred.

GWYNNE J.—I only desire to say this. I think that a petition framed as the one in this case could be properly presented to the election court, but I was doubtful whether or not it should have been presented against the returning officer alone, but that is a question which might more properly come up on the trial of the merits of the petition and not on preliminary objections. I do not dissent from the decision of the court.

Appeal dismissed with costs.

Solicitor for the appellant: *W. D. McPherson.*

Solicitors for the respondent: *Simpson & Blair.*