CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BURRARD.

JOHN MAYFIELD DUVAL (PETITIONER) ..... APPELLANT;

AND

GEORGE RITCHIE MAXWELL (RESPONDENT)..... RESPONDENT.

1901
*Oct. 2.
*Oct. 29.

ON APPEAL FROM THE DECISION OF MR. JUSTICE MARTIN.

Election petition—Deposit of copy—Preliminary objections.

Where a copy of an election petition was not left with the prothonotary when the petition was filed and, when deposited later, the forty days within which the petition had to be filed had expired.

Held, Gwynne J. dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. Rep. 65). *Lisgar Election Case* (20 Can. S. C. R. 1) followed.

Per Gwynne J.—The Supreme Court is competent to overrule a judgment of the court differently constituted if it clearly appears to be erroneous.

APPEAL from a decision of Mr. Justice Martin (1) maintaining preliminary objections to a petition against the return of respondent as member elect for the electoral district of Burrard.

The only question to be decided on this appeal was whether or not the petition was out of court by the fact that a copy was not deposited with the prothonotary when the petition was filed or within the forty days allowed by the Election Act for filing it.

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

(1) 8 B. C. Rep. 65.

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J. Travers Lewis for the appellant. The *Lisgar Election Case* (1) which Mr. Justice Martin followed may be distinguished from this. There no copy of the petition was ever filed and the subsequent steps required by the statute were therefore not taken. In this case all those steps were taken and no prejudice has been suffered by the respondent. The learned counsel cited also *Folkard* v. *Metropolitan Railway Co.* (2); *Robertson* v. *Robertson* (3); *Smith* v. *Baker* (4).

McDougall for the respondent referred to *Edwards* v. *Roberts* (5); *North Ontario Election Case* (6); *Noseworthy* v. *Buckland* (7).

THE CHIEF JUSTICE.—The preliminary objection upon which the court below dismissed the petition was simply this, that whilst the petition was filed within forty days after the holding of the poll, a copy of the petition required by the English rules of court (made applicable by the Controverted Elections Act, 49 Vict. cap. 9, sec. 34) was not filed with the petition nor until the time limited for filing a petition had expired. The election was on the 6th of December, 1900. The petition was filed on the 15th of January, 1901, but a copy was not filed until the 17th or 18th day of January, 1901, the latter dates being subsequent to the expiration of the time for filing the petition.

With great respect for the opinions of those from whom I differed in the Lisgar case, I must say that I still adhere to all that I said in my judgment in that case. My views, however, did not prevail, and it was determined by the majority of the court that a non-

(1) 20 Can. S. C. R. 1.
(2) L. R. 8 C. P. 471.
(3) 8 P. D. 96.
(4) 2 H. & M. 499.
(5) [1891] 1 Q. B. 303.
(6) 3 Can. S. C. R. 374.
(7) L. R. 9 C. P. 233.

compliance with the rule requiring the filing of a copy contemporaneously with the filing of the petition was a fatal omission.

It was suggested on the argument that this case could be distinguished from the Lisgar case for the reason that here a copy of the petition was filed two or three days subsequently to the petition, whilst in the Lisgar case no copy was ever filed, and it was said that the provision authorising the court or a judge to enlarge the time showed that the omission was not fatal.

The same argument as that put forward here, namely, that the rule in question was not imperative, was urged in the Lisgar case and as I thought then was well founded.

I cannot, however, see that the subsequent filing of the copy distinguishes this case in principle from the Lisgar case, by which I am bound and which I must therefore reluctantly follow. Mr. Justice Martin's decision was correct and this appeal must be dismissed with costs.

TASCHEREAU J.—I would dismiss this appeal. When the law says that the petition must be presented not later than forty days after the holding of the poll and that with that petition a copy thereof shall be left for the returning officer, it seems to me to be just as imperative to leave the copy within forty days, as it is to present the petition itself within that delay. Here, no copy was left during the forty days. The argument that whatever the length of time after the forty days the copy is filed the object of the law is accomplished and no prejudice is caused, is, in my opinion, not tenable. It might as well be contended that a petition may be filed after the forty days. The law says that both the petition and the copy shall be

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left with the clerk *not later* than forty days after the election.

Gwynne J.

GWYNNE J.—I feel difficulty in concurring in the proposition that it is not competent or proper for this court to reverse a judgment of the court differently constituted if it clearly appear to be erroneous.

This court is not invested with the prerogative of finality as is the House of Lords whose judgments are the law of the land until and unless varied by Parliament. Nor is this court invested with the prerogative of infallibility so as to prevent its seeing error in one of its own judgments. Not being incompetent to perceive error if there be error in a judgment of the court it must, I think, be competent for it to correct such error if it clearly appear and it be in the interest of the due administration of justice that the error should be corrected.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry O. Alexander.*

Solicitor for the respondent: *D. G. MacDonell.*