CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF WENTWORTH.

1905
*June 2.
*Oct. 3.

W. O. SEALEY (PETITIONER).....APPELLANT;

AND

E. D. SMITH (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MEREDITH C.J. AND MR. JUSTICE TEETZEL.

Controverted election—Secrecy of ballot—Act of D.R.O.—Numbering ballot.

Under the Dominion Controverted Elections Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified whether made by him or not. Hence, when the deputy returning officer in a polling district placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected. Judgment appealed from (9 Ont. L.R. 201) affirmed, Sedgewick and Idington JJ. dissenting.

APPEAL from the judgment of Chief Justice Sir William R. Meredith and Mr. Justice Teetzel (1), avoiding the election of the respondent Smith for the Electoral District of Wentworth, Ont.

The following case was stated for the opinion of the judges assigned to try the election petition:

"1. The election above referred to was holden on the 27th day of October and the 3rd day of November, A.D., 1904, when the petitioner William Oscar Sealey and Ernest Disraeli Smith were the candidates.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 201.

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"2. Pursuant to the provisions of the Dominion Elections Act, the returning officer for the said election did by proclamation indicate and name the time when and the place where he would add up the number of votes given to each of the candidates at said election, namely: Thursday, the 10th day of November, A.D. 1904, at the hour of 10 a.m., at the Town of Dundas, in the said electoral district, and at the said time and place the said returning officer did add up the number of votes given to each of the said candidates, and did declare the petitioner William Oscar Sealey to have received 2,938 votes, and did declare the respondent to have received 2,918 votes, and did declare the petitioner duly elected.

"3. Pursuant to the provisions of the Dominion Elections Act a recount was held before the senior judge of the county court of the County of Wentworth at Hamilton on the 18th day of November, 1904, and on the 21st day of November, 1904.

"4. The said judge after the conclusion of the said recount and final addition certified to the returning officer that the petitioner, William Oscar Sealey, had received 2,889 votes, and that the respondent, Ernest Disraeli Smith, had received 2,899 votes, and the said returning officer thereupon declared the respondent duly elected.

"5. At the poll in polling sub-division No. 23 of the said electoral district the deputy returning officer on each ballot, before handing the ballot to a voter to mark, put the same number on the back of the ballot as was put opposite such voter's name in the poll book used at said poll, and such numbers still remain on the back of the said ballots and in the said poll book.

"6. At the poll mentioned in the preceding para-

graph 47 ballots were marked for the petitioner and 22 for the respondent.

"7. On the said recount the judge disallowed and declined to count for either candidate any of the ballots cast at said polling sub-division No. 23, on the grounds that in his opinion the numbers on the back of each ballot was a mark by which the voter could be identified.

"8. Pursuant to the provisions of the Dominion Controverted Elections Act, on the 25th day of November, 1904, the petitioner filed his petition herein, and on the 10th day of December, 1904, the respondent herein filed his cross-petition against the said William Oscar Sealey.

"9. The time for the trial of said petitions has been fixed for Wednesday, the 1st day of February next, at the court house in the City of Hamilton, at which time and place it is agreed it shall proceed.

"10. On the trial of said petition and cross-petition no witnesses shall be called and no evidence shall be given except the above stated case, and the facts herein set forth and the inspection by the court of the poll book and ballots used at said election at said polling sub-division No. 23, and the deductions to be drawn therefrom and all the other charges contained in said petition shall be dismissed without costs and the said cross-petition shall be dismissed without costs.

"The questions for the opinion of the court are:

"First: Is the respondent, E. D. Smith, the duly elected member for the Electoral District of Wentworth?

Secondly: If not, is the petitioner, W. O. Sealey, the duly elected member for the said Electoral District of Wentworth?

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"Thirdly: Or is the said election for the Electoral District of Wentworth null and void?"

On said case the trial judges reported as follows:

"The undersigned two of the justices of the High Court of Justice for Ontario assigned to try the above petition and cross-petition do hereby certify that on the first and second days of February, A.D. 1905, at the City of Hamilton, in the above electoral district, we held a court for the trial of and there tried the petition and cross-petition between the said parties respecting the above election.

"By agreement between the parties all matters in dispute in the said petition were comprised in a case stated for the opinion of the court pursuant to section 49 of the Dominion Controverted Elections Act, and all charges of corrupt practices were abandoned and no witnesses were examined at the trial.

"After hearing what was alleged by counsel on both sides:

"We find and report that neither of the parties to the said petition and cross-petition of the candidates at the said election was duly elected and that the said election was and is void.

"In the said petition and cross-petition of the respondent charges were made that corrupt practices had been committed at the said election, but all the said charges were abandoned and no evidence was given in support thereof. We repeat, therefore, that no corrupt practice was proven before us to have been committed by or with the knowledge or consent of either of the candidates at the said election.

"We have no means of forming a belief whether corrupt practices have or have not extensively prevailed at the said election.

"We have no reason to believe that the inquiry in-

to the circumstances of the election has been rendered incomplete by the action of any of the parties to the said petition or that further inquiry as to whether corrupt practices have extensively prevailed is desirable."

Aylesworth K.C. for the appellant referred to the *East Hastings Election Case*(1); *Russell Election Case*(2); *Bothwell Election Case*(3); *Digby Election Case*(4); under the Acts in force prior to 1900, and to the *North Simcoe Election Case*(5); and the *London Election Case*(6); decided after the Election Act of 1901.

Lynch Staunton K.C. and *Duff* for the respondent. The Election Acts call for absolute secrecy of the ballot, which should be held in view in construing their provisions. Veale on Statutes, p. 140; *Washington* v. *Grand Trunk Railway Co.*(7).

The ballots were clearly invalid and properly rejected. *Pritchard* v. *Mayor of Bangor*(8); *Bridport Election Petition*(9).

THE CHIEF JUSTICE.—This is a plain case, as I view it, and, notwithstanding the able argument at bar by appellant's counsel, I unhesitatingly think that his appeal must be dismissed. His contentions are, virtually, that the statute does not mean what it says. When it decrees in so many words that all the ballots upon which there is any writing or marks by which the voter could be identified must be rejected it

(1) Hodg. El. Cas. 764.
(2) Hodg. El. Cas. 519.
(3) 8 Can. S.C.R. 676.
(4) 23 Can. L.J. 171.
(5) 41 Can. L.J. 29.
(6) 41 Can. L.J. 39.
(7) 28 Can. S.C.R. 184.
(8) 13 App. Cas. 241.
(9) 19 Q.B.D. 498.

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does not say, as the appellant would contend, that the deputy returning officer is authorized to count a ballot so marked simply because it is himself who has marked it. The principle of the Act, it must be conceded, requires absolute secrecy of the ballot for the protection of the voter; and that, in the public interest, as well against the deputy returning officer as against every one else.

It must be because, as a general rule, all ballots marked by a deputy returning officer are not to be counted, that it was enacted by the amendment of 1886 (as declaratory law 49 Vict. ch. 4, sec. 8) that, by exception, those the marking whereof by himself is specially provided for by the Act have to be counted.

Le sous-officier-rapporteur (says the French version in clear terms) écartera tous les bulletins qui porteront quelques mots écrits ou quelque marque ou indication autre que le numero écrit inscrit par le sous-officier-rapporteur dans les cas ci-dessus prévus qui pourraient faire reconnaître le votant.

Why would the statute enact by way of exception that those ballots falling within the class of cases specially provided for as to marking by the deputy returning officer shall not be rejected if all those marked by him not falling within that same class of cases were likewise not to be rejected. To enact that those the marking of which is authorized shall be counted was to enact, or taking it to be the law, that those the marking of which is not authorized shall not be counted.

That amendment of 1886 declaring, *ex abundanti cautelâ,* that votes legally marked by a deputy returning officer under the Act are not to be rejected cannot be construed as meaning that those he illegally marks are also not to be rejected.

Then Parliament, by allowing the statute to remain as it is since 1886, must be taken to have tacitly acquiesced in the construction that has generally been put upon it by the courts, that any mark upon the ballot paper by which the voter could be identified, never mind by whom made, voids the vote.

The appeal is dismissed with costs.

SEDGEWICK J. (dissenting).—I am of opinion that the appeal should be allowed.

GIROUARD J.—If any doubt could be entertained as to the meaning of the former statute, that doubt has been removed by the Dominion Controverted Elections Act of 1900, adding the two last lines to section 80. Section 96 cannot help the appellant; quite the reverse, for it evidently refers to the exceptional cases mentioned in section 80. Mr. Aylesworth has admitted that possibly, by means of the numbers on the back of the ballot, the voter could be identified, and that the end which Parliament intended to achieve, namely, the perfect secrecy of the ballot, would be defeated. It is perhaps to be deplored that the fate of an election should thus be left in the hands of dishonest or ignorant deputy returning officers, unfortunately too numerous. Parliament alone can remedy such a serious result, so contrary to the popular government of a free country.

The appeal should be dismissed with costs.

NESBITT J.—I concur with the Chief Justice.

IDINGTON J. (dissenting).—This case turns upon the interpretation to be given to sub-sec. 2 of sec. 80 of the Dominion Elections Act, 1900.

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The end of sub-section 1 and the whole of section 2, are as follows:

* * * he shall open the ballot box and proceed to count the number of votes given for each candidate, giving full opportunity to those present to examine each ballot.

2. In counting the votes he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified, other than the numbering by the deputy returning officer in the cases hereinbefore provided for.

Has Parliament by this directed the deputy returning officer to count only such ballots as he may choose?

That seems to be the issue. For if we follow the respondent's reading of the golden rule of construction he invokes, then the officer can, before counting, destroy such ballots as he may desire should not be counted.

The court, it is said, in such an event can do nothing to relieve from what may have been an accident, or to defeat what may have been a fraud.

The election may be set aside. That is no efficient remedy. It may be exactly what the officer designed to bring about.

The innocent blunder here may find its counterpart in fraud hereafter. Either may happen. Either must defeat the purpose of the Act, if we listen to the pretention put forward that secrecy is the sole thing to be considered.

To maintain seriously the proposition that the main purpose and policy of the Act is to secure the secrecy of the ballot is to overlook what the Act is for.

The purpose of the Act is to give effect to the will of the people.

The signification thereof by ballot is but a means to that end.

The interpretation we are asked here to adopt, must be adopted alike in the cases of fraud and accident as respondent's counsel properly conceded. That interpretation would sacrifice the object of the Act for the conservation of the manner of effecting its purpose.

Is it possible that Parliament can ever have intended that?

It has been said for ages that a statute is to be expounded "according to the intent of them that made it."

Rules of construction are but means to realize that intent.

The rule appealed to is as follows:

> In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, and no further.

It would be hard to recognize the observance of this rule in the results that the respondent's contention leads to.

It would be observing the first part of the rule and discarding the rest.

Could there be a greater absurdity than that the will of the people must be defeated by means of the machinery designed to give effect to it and a continuation of such results be rendered possible?

Is not this sub-section just one of the cases within the exception in the rule? May not the grammatical and ordinary sense of the words be so modified as to avoid the absurdity and repugnance?

Does the rule not clearly indicate in the light of

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the facts we are to pass upon that such is the proper view to take?

The intention of Parliament would then be found rather than in any view that renders it necessary to make a travesty of such intention and declare the election void.

Drastic measures may be needed to preserve the secrecy of the ballot, but that would not do it. The harm, if any, has been done, the possibility of betrayal by the officers and agents of the secrets they are bound by law (see sec. 96, sub-secs. 5, 6) to keep sacred still exists.

Why should we adopt any other remedy than that expressly given?

A prosecution for breach of this statute is what Parliament has plainly indicated as all that it is intended should in this regard be given for such a purpose as the preservation of secrecy. Why above all should we adopt such a futile remedy as setting aside this election? Why should we confuse the two things? The secrecy of the ballot and the selecting power of the people as shewn by their votes that this enactment was intended to procure are quite distinct and, as I have said, are respectively means and purpose; and each has separate and distinct enactments for safeguarding it.

Is it not much more consonant with reason to read the whole of this sub-section 2 as directory? Reading it so accords with these considerations I have pointed out.

That would give it such elasticity as would enable the court to set aside the election when the facts seemed to demand it so that justice might be done, and refrain from such a course when unnecessary within the provisions of section 152, the predecessor of

which in identical words was relied upon in the *Bothwell Election Case*(1).

But whether the section is directory or mandatory and imperative its primary purpose is to guide this officer in counting ballots. Can it be conceived possible that it was ever meant to guide him to reject in regard to marks accidentally or improperly made by himself?

He was bound by every principle of law and ethics not to use the fruits of his own wrong to the detriment of others.

Was it not only his duty to discard his own wrong, but also obliterate it as soon as seen, so that others should not be misled?

He has discarded it. He failed to obliterate it. He fell short thus in the discharge of his duty as declared by this court in the *Bothwell Election Case*(1).

In this way of looking at the case it is one that comes within the curative provision I have referred to.

But when we consider the purview of the Act is there any need of thus refining; perhaps over-refining?

The ballot was to protect the man from the master and defeat the briber's arts.

It was clear that if there could be a means of the man assuring the master or the purchased voter assuring his corrupter how the vote has been cast then the Act might be defeated. The purpose of the Act, as I have said, was to give effect to the will of the people and to limit the expression of such will to worthy freemen and reject that of the confessedly unworthy.

(1) 8 Can. S.C.R. 676.

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To prevent this a direction was adopted by section 41 and schedule L., declaring that if the voter

placed any marks on the ballot paper by which he can afterwards be identified his vote will be void.

It is abundantly clear to my mind that this and this only was the kind of marking and the only marking that within the sub-section now under consideration was expected to occur, and which it was intended to prevent or deprive of success.

It is almost impossible to imagine that it was ever supposed by any one, that a sworn officer of the law, having accidentally or innocently made a mark, was a something likely to happen and needing such an absurd method of rectification or remedy.

It is surely repugnant, therefore, to the general purview of the statute to read this sub-section 2 in an absolute and narrow literal sense.

Moreover, there are presumptions of law that have uniformly been held to be implied in the legislative use of general words to restrict their ordinary meaning so that manifest wrong and injustice will not result from giving them their widest sense.

For example, when a statute authorized in express words "any or the nearest justice of the peace" to try certain cases, it was held that such general words would not authorize a judge to try any such case out of the territorial limits of his own jurisdiction: See 1 Hawke P.C.C. 65, sec. 45; *Re Peerless* (1); *The King* v. *Inhabitants of Fylingdales* (2).

It was also held that giving power to grant an injunction, in all cases in which the judge or court should consider it "just and convenient" did not extend the authority of the court beyond cases where

(1) 1 Q.B. 143, at p. 153. (2) 7 B. & C. 438.

there was an invasion of recognized and legal or equitable rights.

In *Reg.* v. *Coaks*(1) it was held that the law declaring that he having the majority of votes should be declared elected, was not to override the general law that those who knowingly should vote for one ineligible throw away their votes. This case has been criticized in some points but not in this, or overruled as far as I can see.

The statute which enacted that "every conveyance" in a particular form should be valid would not cure a defective title; *Ward* v. *Scott*(2); *Whidborne* v. *Ecclesiastical Commissioners*(3); *Forbes* v. *Ecclesiastical Commissioners for England*(4).

The 12 Car. II. ch. 17, which enacted that all persons presented to benefices in the time of the Commonwealth, and who should conform, as directed by the Act, should be confirmed therein "notwithstanding any act or thing whatsoever," was held obviously not intended to apply to a person who had been simoniacally presented.

The Factors Act which enacts that *any agent* "entrusted with the possession of goods" shall be deemed their owner is confined by the general scope and object of the enactment to mercantile agents and transactions.

Ruther v. *Harris*(5) decided that a provision of forfeiture of "fish taken by him and any net or moveable instrument used by him in taking the same" operated even where *no fish had been caught* and that the net *ineffectively used for the purpose was forfeited.*

(1) 3 E. & B. 249.
(2) 3 Camp. 284.
(3) 7 Ch. D. 375.
(4) L.R. 15 Eq. 51.
(5) 1 Ex. D. 97.

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The provision in the Railway and Canals Traffic Act imposing liability for loss "occasioned by the neglect or default of such company or its servants" was held in *Shaw* v. *Great Western Railway Co.*(1) not to cover theft by a servant of the company.

In *The Queen* v. *Harrald*(2), an Act declaring that wherever

> words occur which import the masculine gender the same shall be held to include females for all purposes connected with and having reference to the right to vote in the election of councillors, etc.,

was held not to apply to married women.

And when Baron Parke in *Miller* v. *Salomons*(3) had to interpret an Act requiring one to take and subscribe the oath of adjuration "according to the form therein set down and prescribed" he stated the rule of interpretation now appealed to here and departed from the literal meaning, and remarked that in case of absurdity, inconsistency or repugnance,

> we may predicate that the words never could have been used by the framers of the law in such a sense.

I think these illustrations are sufficient to shew that the modification I suggest, as required here by the purview of the Act, of the grammatical sense of the words in question are well within precedent and authority. See Maxwell, Hardcastle and Endlich if further illustrations be needed.

There is no decision binding this court to adopt such an interpretation of this sub-section as the respondent contends for. We have been pressed to accept dicta that appear in the *Bothwell Election Case*(4) as expressing the opinion of this court upon the question raised here. In that case the deputy re-

(1) [1894] 1 Q.B. 373.
(2) L.R. 7 Q.B. 361.
(3) 7 Ex. 475, at p. 546.
(4) 8 Can. S.C.R. 676.

turning officer, at No. 1 Sombra Poll, did just what the deputy returning officer is complained of doing in this case. But when he was counting the ballots he came to the conclusion that those which had written upon them the objectionable numbers ought not to have been so numbered, and he proceeded to obliterate the numbers, and did so in the presence of the agents of the parties to the election, and then counted the ballots as if nothing had been marked. What right had he to do this? What right if the sub-section in question is to be given such an absolute literal interpretation as asked for could he possibly have? The sub-section speaks clearly and distinctly in relation to the appearance of the ballots when taken from the ballot box.

If the deputy returning officer had the right after the ballots were taken from the box thus to rectify his mistake surely all that is asked by the appellant here is simply an extension of the same procedure. The court is asked to ignore here what the officer there, as the court held, had properly obliterated. So far, therefore, from the *Bothwell Election Case*(1) being a decision in favour of the respondent I read it as in favour of the appellant's contention. What the appellant says is, that the words are not inflexible, and do not in law require an inflexible interpretation. And that the court seems expressly to have decided. It is true, that the late Mr. Justice Gwynne in that case dissented and his opinion is quite consistent with the interpretation contended for by the respondent here. The late Mr. Justice Henry also seems to have indicated that but for *Jenkins* v. *Brecken*(2) he might have been of the same mind, but joined the majority of the court.

(1) 8 Can. S.C.R. 676.

(2) *Queen's (P.E.I.) Election Case*, 7 Can. S.C.R. 247.

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The late Chief Justice Ritchie said:

It seems to me that this in no way differs from the principle acted on in *Jenkins* v. *Brecken*(1), but is a much stronger case for the application of that principle, the only difference being the rectification of the error or irregularity by the officer at the close of the poll. The appellant's contention is that this rectification made a ballot, bad in the box, good out of the box, but this, though on the surface plausible, is, in my opinion, by no means a legitimate or accurate way of stating the case; if literally so, it is no more nor less in effect than was done in the *Brecken Case*(1). In what respect does the present case differ substantially from that of an officer inadvertently marking a ballot and giving it to a voter and before being used he discovers that he has improperly marked it, and then and there effectually expunges the mark and hands it to the voter? In such a case he immediately, before any harm is done, corrects his error. In the present case the officer, in the fair and legitimate discharge of his duty, innocently but irregularly marks a ballot; discovering his error at the very first moment it could be done, in the presence of the agents of the parties, he proceeds to undo what he had improperly done, and he accomplishes this in such a manner that the secrecy of the ballot is preserved, and also in such an effectual way that there is no possibility that any party could be injured thereby, and this, too, in the presence and without the slightest objection or protest on the part of the agents of the candidates.

He also said before this in regard to the question of secrecy having been preserved:

And I may say if they had been seen by the deputy returning officer I should doubt whether even this would affect the question because the secrecy in such a case would be as much preserved by the oath of the deputy returning officer as in the case of the ballots he marks for illiterate voters.

Mr. Justice Strong, in his brief judgment concurring with the Chief Justice, says:

I desire also to add that, by assenting to the grounds upon which the judgment proceeds, I do not mean to preclude myself from the right to consider in any future case in which the question may arise, whether *any* mark put on a ballot by mistake and in good faith by a deputy returning officer is to be held a ground for rejecting the ballot.

The late Mr. Justice Fournier, in his judgment,

(1) *Queen's (P.E.I.) Election Case*, 7 Can. S.C.R. 247.

states the facts, follows much the same line of reasoning as the Chief Justice, and finds, as he believed, according to the principle of the judgment in *Queen's (P.E.I.) Election Case; Jenkins* v. *Brecken*(1) and of the then sec. 80, that was identical with the present sec. 152, to which I have adverted.

I am, therefore, unable to assent to the proposition that the *Bothwell Election Case*(2) can in any way be relied upon to support the respondent's position here. And I do think that it is a most significant thing that so able and astute a lawyer as Mr. Justice Strong should have preserved, in the way he did, his right to declare, if he saw fit, the meaning of the then section. His intimation to my mind is plain.

As to the decisions upon the English Ballot Act, 1872, and the Election Act of Ontario, there is one observation to be made applicable to both. These Acts were framed upon an entirely different principle from the Dominion Elections Act, 1900. Under the former in both cases numbers had to be put upon the back of the ballots and so they were traceable. Scrutiny might be had, and incidentally to scrutiny, numbers such as were put upon the back here would facilitate the exposure of secrecy, supposed to be covered by the ballot. It would do more. It would facilitate, when secrecy was violated, the improper revelation to one bent upon what was intended to be kept secret.

On the other hand, the Act we are now considering in its whole scope prevents possibility of scrutiny. There is no chance of such a thing being successfully sought for. There is no reason in such an act to anticipate disclosures by means of the machinery put in operation necessary for a scrutiny.

In one way of looking at all this consideration of

(1) 7 Can. S.C.R. 247. (2) 8 Can. S.C.R. 676.

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the two kinds of legislation it may be said that the necessity (in the case of this Act) for prohibition of anything tending to expose the ballot to identification needs to be construed more liberally than otherwise and given effect to with the utmost rigour. It may be said that the prohibition of scrutiny indicates an intention to make of secrecy the supreme guide for the interpretation of the Act.

On the other hand when there is no practical possibility of the numbers that are complained of being seen and thereby leading to identification of the voter there can be no necessity for the rigid interpretation, and it cannot be predicated of the legislation to be interpreted that it was supposed necessary at the expense of all else so to protect the voter. Whichever may be the proper inference, or whatever may be the proper reasoning to be drawn from a comparison of the English cases and the Ontario cases with this, I do not think, when we consider the difference in the policy of those Acts, upon which those decisions are respectively founded, that they can be held for our present purpose as of high authority.

In regard to the Ballot Act, 1872, I do not find in it any such curative provision as I have referred to as existing here, and relied upon in the *Bothwell Election Case*(1). In both that Act and the Election Act of Ontario it is expressly provided, in addition to forbidding the counting of the ballot having unauthorized writing upon it by which the voter can be identified, that *it shall be void.* The Act in hand is one that by these different features and other minor details is so much differentiated from the Acts I have just referred to that its interpretation must be sought for upon consideration of its own purview, and can-

(1) 8 Can. S.C.R. 676.

not be aided much by considering entirely different legislation.

With every respect, I think in this case there has been entirely too much importance attached to the secrecy of the ballot and the risk of exposure and identification by means of the numbers wrongfully placed by the deputy returning officer. When is this to take place? I have pointed out that it cannot be through the means of the scrutiny. I think it cannot be by the means of the first count of the votes by the deputy returning officer or by means of the recount by the judge.

I entirely agree on this point with the well-reasoned judgment of Judge Ardagh where he held in the *North Simcoe Election Case,* in 1904(1), that the deputy returning officer had no right to look at the poll book and compare it with the ballots. One has but to read the whole of sec. 80, sub-sec. 1, to see that it contained two distinct directions as to the work to be done by the deputy returning officer. One relates to the disposition to be made by him of the papers including ballots spoiled and unused and poll books and only then when he has completed that part of his work shall he open the ballot box and proceed as directed in the language I have quoted from the section. His simple duty at the next stage of the proceeding is to count ballots. He does not need to refer to the numbers on the poll book for identification in any way. When he sees his own numbering wrongfully put upon the ballots he is under no necessity in order to understand what that means to refer to any poll book. No one else has a right any more than he to refer to the poll book for that or any other purpose, after the total number of votes has been checked.

(1) 41 Can. L.J. 29.

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No comparison of numbers on poll book and ballot paper can properly be made at any stage of the proceedings till a trial of a petition, and then only so far as to discover the nature of the impropriety to be investigated.

The counting the number of votes that appear on the poll book as having voted has all been accomplished before the count or recount of ballots is made.

The proceedings before the county judge are simply a repetition of what I have thus described as having been done by the deputy returning officer. I see no occasion for looking at or inspecting the poll books. The number of the ballots cast can be checked without any such reference and, with all respect, I think ought to be checked without any such reference.

If this all be right when is the terrible disaster to overtake the secrecy of the ballot? By what means is such a thing to be accomplished? One can conceive of resorting to methods to which the deputy returning officer might be a party, and, with his connivance, improper results might be obtained, but that as well as the improper use by the deputy returning officer of such numbering as done here can be dealt with when fraudulently done, and the fraudulent act defeated by such remedy as setting aside the election if need be, or by declaring the correct results. Fraud has to be reckoned with in every phase of human activity, has to be met by the strong arm of the law, and when the case, that rests upon fraud as the basis of the improper dealing that has led to such numbering of ballots as here complained of, arises, it must be dealt with by the way and in the spirit that the courts have to deal with fraud and wilful wrongdoing, both in election and in other cases.

I dissent, with respect, from the opinions of those

who attach such supreme importance to the secrecy of the ballot. And I have adverted thus to the subject to shew wherein I think it is in this connection of little moment. I may add also that, whilst the ballot no doubt protects the weak against the strong, it is but a very small fraction of the electorate who need and actually depend on such protection.

The great majority of freemen are proud to avow their opinions and openly declare outside the polling booth their preferences. When one reflects on this well-known fact and the exceptional nature of the case we have to deal with, I think it must be seen that far too much importance is attached to the secrecy that helps the few, and too little weight given to the wrong done the many. Such protection is bought at a price I am sure the legislature never intended to pay. We have in the judgment of the trial court appealed from the opinion of Sir William Meredith, concurred in by Mr. Justice Teetzel, that the interpretation which I have been arguing for would be the correct reading of the provision as it stood before the revision of the statutes in 1886. I quote the following from their opinion:

> Reading the provision as to the rejection of ballot papers as it stood before the revision of the statutes in 1886, in connection with the directions for the guidance of electors in voting, no canon of construction would be violated, I think, by interpreting the words "any writing or mark by which the voter could be identified" as meaning any such writing or mark placed on the ballot paper as is mentioned in the directions, and therefore as extending only to those placed on it by the voter himself or by his connivance or with his consent.

This opinion, I think, should govern this case, for I do not think that the change made in the revision of 1886 makes any difference. I think the following remark made by Baron Martin in *Miller* v. *Salomons* (1)

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at page 531, might well be applied to the amendment in question:

> It is quite notorious that Acts of Parliament are frequently made and that much more frequently sections are introduced to meet objections and set at rest doubts without much consideration as to whether they be really well founded or not.

The amendment consists in the addition of the words, "other than the numbering by the deputy returning officer in the cases hereinbefore provided for," at the end of the sub-section in question.

This amendment seems to have come into the statutes simply in the process of revision in 1886 and in considering it, and what effect is to be given to it as a change of the law, if any, I think regard should be had to 49 Vict. ch. 4, sec. 8.

I am, with great respect, unable to see how or why this change should make any difference in the interpretation. It would be necessary by the application of the principles I have sought to apply herein for the officer to adopt the same line of duty, and the court to avoid the same absurdity and repugnance to the purview of the Act.

Applying those principles and the considerations that Chief Justice Meredith seems to think are properly to be had in view, the result would be the same. There had been an obvious oversight in not originally making the exception that these words provided, and all that seems to happen is that the Commissioners in the revision observing the oversight added these words. The amendment proceeds upon the presumption that the officer will have discharged his duty, will not have acted improperly, and that the proper interpretation of the section as it originally stood would be the correct one when thus added to.

I think the appeal ought to be allowed, but inas-

much as the judgment appealed against was in accord with judicial opinions that might reasonably be followed, and that it might be said bound the court below, yet does not bind this court, I would not give costs.

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Appeal dismissed with costs.

Solicitor for the appellant: *J. P. Stanton.*

Solicitor for the respondent: *H. C. Gwyn.*