

1905

\*June 28.

\*Oct. 3.

# CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF KING'S, N.S.

WILLIAM F. PARKER (PETITIONER) .. APPELLANT;

AND

SIR FREDERICK W. BORDEN (RE-  
SPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF WEATHERBE C. J.

*Controverted elections—Service of Petition—Service out of jurisdiction—Second service on agent—Nova Scotia Election Court Rules.*

Under the Dominion Elections Act service of an election petition cannot be made outside of Canada. Idington J. dissenting.

By rule 10 of the Nova Scotia rules under the Election Act, a candidate returned at an election may, by written notice deposited with the clerk of the court, appoint an attorney to act as his agent in case there should be a petition against him.

*Held*, than an agent so appointed is only authorized to act in proceedings subsequent to the service of the petition, and service of the petition itself on him is a nullity.

**A**PPEAL from the judgment of Weatherbe C.J. allowing the preliminary objections to the petition against respondent which denied that the same had been served and dismissing said petition.

By order of a judge the election petition was served on respondent at Boston, Mass., and the latter thereupon appointed an agent under rule 10 of the Supreme Court Rules relating to controverted elections, which is as follows:

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

Any person returned as a member may, at any time after he is returned, send or leave at the office of the clerk of the court a writing signed by him, or on his behalf, appointing a person entitled to practice as an attorney to act as his agent, in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address, within the City of Halifax, at which notices may be left.

1905  
 {  
 KING'S  
 (N.S.)  
 ELECTION  
 CASE.  
 —

A copy of the petition was afterwards served on such agent at Halifax after preliminary objections to the petition had been filed. By leave of a judge further objections were then filed, by which it was denied that the petition had ever been served, and on the hearing thereon the Chief Justice dismissed the petition for want of service.

The material sections of the Election Act and rules thereunder are set out in the judgment on this appeal.

*Lovett and R. V. Sinclair* for the appellant.

*Roscoe K.C. and Mellish K.C.* for the respondent.

THE CHIEF JUSTICE.—The respondent having been returned at the general elections of 1904 as a duly elected member of the House of Commons for the County of King's, N.S., the appellant on the 12th December, 1904, presented a petition impugning the said return.

As the respondent was then in Boston an order was taken by the appellant, on the 16th, extending the time for service to the 23rd of January, 1905, inclusive, and on the same day, 16th December, an order was taken giving leave to effect service on the respondent personally at Boston.

Under these orders the respondent was served personally at Boston three days later, on the 19th of December. On the 23rd the respondent, under the

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.  
The Chief  
Justice.

rules, appointed one C. F. Pearson as his agent and attorney, notice whereof was given by said Pearson on the 24th, and on the same day the respondent filed preliminary objections against the petition.

On the 23rd of January following, the petitioner himself casting a doubt upon the service in Boston, a second service of the petition was made at Halifax on the said Pearson, as agent of the respondent. What became of the first preliminary objections filed on the 24th of December does not appear by the printed record. They are not now in question. On the 6th of April, upon leave, a second set of preliminary objections was filed by the respondent against the petition on the ground, amongst others, that the said petition had never been duly served upon him. By the judgment now appealed from these preliminary objections were maintained, and the petition dismissed, the learned judge holding the service in Boston bad because not authorized by statute, and the service on Pearson also bad because not previously authorized by the court or a judge. This judgment is, in my opinion, unassailable.

As to the service in Boston there is nothing in the statute that governs this case (54 & 55 Vict. ch. 20, sec. 8), or the rules of the court construed with that statute, as they must be, that authorizes a service abroad. And no such service can be legally made without clear statutory authority. Here the statute must be construed as authorizing exclusively, first, a personal service anywhere in Canada, if possible, and, secondly, if that is not possible, a service upon such other person or in such other manner *in Canada* as directed by the court or judge. As to the service upon respondent's agent at Halifax, it is invalid because not authorized by the court or a judge. Rule 20 of the Election

Rules, N.S., enacts, it is true, that when a party against whom a petition is filed is not within the province, the petition shall be served in such manner as one of the judges shall direct, but the words "in such manner" must now be read as if followed by the words "in Canada." The appellant argued that under rules 10 and 46 of the N.S. Election Rules, the service on respondent's agent at Halifax was valid.

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

The Chief  
Justice.

Those rules read as follows:

10. Any person returned as a member may at *any time after he is returned* send or leave at the office of the clerk of the court a writing signed by him or on his behalf appointing a person entitled to practice as an attorney to act as his agent in case there should be a petition against him or stating that he intends to act for himself, and in either case giving an address within the City of Halifax at which notice may be left and in default of such writing being left within a week after service of the petition notices and proceedings may be given and served respectively, by posting up the same in the office of the clerk of the court.

This is a reproduction of rule 10 of the English and Ontario rules.

Rule 46 says that:

An agent employed for the petitioner or respondent shall forthwith leave written notice at the office of the clerk of the court of his appointment to act as such agent, and services of notices and proceedings upon such agent shall be sufficient for all purposes. (59 of the English rules and 49 of Ontario rules.)

At first I thought that the appellant's contention was well founded, and that these rules authorized the service of the petition on the agent, but after further consideration I have come to the contrary conclusion.

In England, though the two preceding rules referred to are enacted in the same terms, they could not have been intended to have any application to the service of the petition itself, since rule 14 specially adds that

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

—  
The Chief  
Justice.  
—

where the respondent has named an agent, the service of an election petition may be by delivery of it to the agent.

Rule 14 in Ontario is in the same sense.

Now when, in drafting their rules, the judges in Nova Scotia, who had before them the English rules, which in many instances they adopted textually, deliberately left out this last one, the legal inference is that they did not intend to authorize the service of the petition itself on the agent, but simply the service of the proceedings subsequent to an effective and valid service of the petition.

Then by the statute of 1891, subsequent to these rules, when the service cannot be made upon the respondent himself in Canada, it can only be made upon such other person as directed by the court or a judge. Here there was no order permitting service on respondent's agent. The service upon him was, therefore, void and ineffective.

The appellant further argued that the respondent had waived any objection he might have had against the service by appointing an agent and filing preliminary objections, and taking proceedings thereupon. This contention cannot be supported; *Montmagny Election Case* (1).

The preliminary objections alleging no service could not with any fairness be construed as admitting a legal service. The respondent here, it is true, filed a cross-petition, and such a proceeding could be taken perhaps only after service, but he carefully, in express terms, filed this cross-petition "without waiving any objection to the service of said petition."

It may be that the cross-petition filed on the 30th of December, 1904, is irregularly on the record; this

we do not have to decide. But it cannot have the effect contended for by the appellant of an unconditional admission by respondent of a legal service of the petition. There is nothing inconsistent in the respondent saying "a *de facto* service, or an attempted service, or what the appellant pretends to be a service has been made on me, or on some one else or somewhere for me, but I impeach the validity of that service, and appear for the exclusive purpose of asking the court to declare it illegal, ineffective and null."

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

The Chief  
Justice.  
—

Another point raised by the appellant is as to his allegations of corrupt practices by the respondent at a previous election which were struck out by the judge. As the petition must stand dismissed for want of service we need not adjudicate upon this point. I may as well remark, however, that no appeal would lie from the dismissal of the paragraphs of the petition relating thereto (23 to 34), if all the other preliminary objections had been dismissed, as the judgment thereupon would not in that case have put an end to the petition, but solely to the said paragraphs thereof; sec. 50, ch. 9, R.S.C.

The appeal is dismissed with costs.

GIROUARD J.—The service of the election petition in Boston is bad, because it was not made in Canada; 54 & 55 Vict. ch. 20, sec. 8. The second service in Halifax is also bad, because it was made not upon a general agent authorized by the respondent to accept service of an election petition and all papers connected with the same, but upon an attorney or agent authorized to represent him in a special cause already instituted. The appeal should be dismissed with costs.

DAVIES J.—I have carefully read and considered all the cases cited by the learned counsel who argued

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Davies J.

this appeal. I concur in and adopt the rule laid down by the Court of Appeal in *In re Busfield* (1), at page 132, by Cotton L.J., as the result of all the cases, in the following words:

Where anything like jurisdiction over the person has been sought to be exercised leave to serve abroad in cases not coming within the terms of Order XI., has been refused as in *Re Maugham* (2), and in *Re Mewburn's Settled Estates* (3). In my opinion the principle laid down by the late Master of the Rolls is correct, that the court has no power to order service out of the jurisdiction except where it is authorized by statute to do so.

Then does the Controverted Elections Act authorize such service out of the jurisdiction? The jurisdiction of the Election Court, as already determined by this court in the *Queen's and Prince Election Case* (4), so far as service of the petition is concerned, extends all over Canada. After that case was decided Parliament amended the 10th section of the Controverted Elections Act by 54 & 55 Vict. ch. 20, which in its 8th section declares that notice of the presentation of an election petition, etc., may be served on the respondent *personally* "at any place within Canada." The section goes on to declare that if such personal service cannot be made then service may be effected.

upon such other person or in such other *manner* as the court or judge on the application of the petitioner directs.

It is clear to my mind that this substituted service, if made on any other person than the respondent, was not authorized to be so made *out of Canada*, and it is equally clear to me that the "other manner" of service means some other manner within Canada, and does not alter and was not intended to alter the *place* where legal service could be effected. In other words

(1) 32 Ch. D. 123.

(2) 22 W.R. 748.

(3) 22 W.R. 752.

(4) 20 Can. S.C.R. 26.

substituted service alike with personal service must be within Canada, the statute not having either expressly or by necessary implication authorized it to be made out of the jurisdiction of the court.

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Davies J.

The result is that the personal service effected on the respondent in Boston was not a good service, and I fully agree with all my colleagues that the subsequent service without any special order therefore made upon the respondent's agent appointed for the purpose of taking exception to the personal service made upon him in Boston by preliminary objection was not a good service. The rules of the Supreme Court of Nova Scotia do not cover any such case, and the English rule and the Ontario rule, under which such service may be effected, seem to be designedly omitted. At any rate these later rules are not in the Nova Scotia rules.

The appeal, therefore, should be dismissed with costs.

NESBITT J.—I concur in the judgment of the Chief Justice.

IDINGTON J. (dissenting).—I think this appeal must be determined by the interpretation to be given to section 10 of the Dominion Controverted Elections Act as amended by 54 & 55 Vict. sec. 8, whereby it is made to read as follows:

Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, *within ten days after the day* on which the petition has been presented, or within the prescribed time, or within such longer time as the court, or any judge thereof, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents *at any place within Canada*. If service cannot be effected on the respondent or respondents personally within the time granted by the court or judge, then it may be effected upon such



1905  
 KING'S  
 (N.S.)  
 ELECTION  
 CASE.  
 —  
 Idington J.  
 —

other person, or in such other manner, as the court or judge, on the application of the petitioner, directs.

Obviously the first part of this section contemplates that notice of a petition must be served within Canada.

It is equally clear to my mind that service within Canada was intended to be in all cases a personal service if possible.

Then the second part of the section provides for service, when that cannot be so effected on the respondent,

upon such other person, or in such other manner as the court or a judge on the application of a petitioner directs.

When the service which the first part of the section provides for, that is the personal service within Canada, cannot be accomplished, I think the alternative proposition of the section, providing for all else in the way of service, commits the entire subject matter of service to the discretion of the court or judge to dispose of on the application of the petitioner. Power is given to direct service upon any other person than the respondent. It might be directed to be made upon any one named. Any person in the same association or representing the same party, or in some way from identity of interest likely to defend respondent's seat might well have been named, but failing that or the adoption of such plan of action, on whom can it be served?

The judge or court have committed to them, I think, in the widest possible sense the power to direct service on another person or by substitution in any way that the words "or in such other manner" are capable of authorizing to be done. Does that extend to a service beyond the jurisdiction?

Would it have been improper for the judge who made the order in this case to have directed only that notice and a copy of the petition should be mailed (say at Halifax) to the respondent at Boston and order that such should be service?

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Idington J.

When the judge knew that the respondent was sojourning at a place so near to his home as Boston, or if he had been even nearer, would he have discharged his duty properly by directing that the petition, as has been suggested, might be posted up with notice in the office where it was filed as a mode of service, and yet have refrained from directing a communication thereof by mail or otherwise to the respondent, simply because respondent happened to be beyond the boundary line?

Can it be said that a judge would have the discretion to direct the most obscure method of service, and that he must abstain from daring to direct transmission even for a few feet beyond the boundary line of Canada, of the notice of the presentation and copy of petition?

The whole difficulty, it is suggested, arises from the necessity for the observance of a highly technical rule requiring foreign service to be effected only by virtue of a statute.

One thing to be observed and borne in mind is that this proceeding is not one begun by way of a common law writ which never could have run into, or by any such semblance thereof as service abroad be permitted to run into, a foreign country.

The law permitting that to be done must be by or founded upon a statute.

It is likewise to be borne in mind that despite such rigid rule of the common law the practice of the Court of Chancery grew up whereby proceedings began by

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Idington J.

bill, and the invitation to answer was served abroad by means of a subpoena. It is said that might go for nothing. As to relief to be got against the person of the defendant it obviously must go for nothing, yet such service abroad seems to have been usual.

Side by side with these classes of cases which illustrate distinctly different growths of law the practice of service abroad, of notice in some form or other, of proceedings, in relation to things over which the court had a jurisdiction, grew. The curious may follow the inquiry in Daniell's Chancery Practice and other books wherein interpleader, for example, is shewn to have been one where the court first had required to be satisfied of such notice abroad, then proceeded to exercise, if the party abroad disregarded the notice, such jurisdiction as would give to those invoking the power of the court a remedy and protection in regard to their property within the jurisdiction which would have the effect of forever barring the right of him who happened to be abroad.

I am not concerned to follow this learning further than to shew that there was not, even long ago, an inflexible rule of law that was of such universal application, that every statute creating a new jurisdiction such as these election courts, must be held to have necessarily had implied in their constitution a limitation of power forbidding the use (unless most explicit, express language gave it recognition) of notice to be communicated to a party in a foreign country, as of any force or effect whatsoever.

Is there such an inflexible rule of law requiring us to place such a restricted meaning upon the comprehensive and the plain words in question?

I rather think there is not now any such principle of law by which we must so interpret the words now

under consideration, but on the contrary thereof that we must interpret the statute in the light of reason and daily practise and give to the words "such other manner" their widest signification.

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Idington J.

If we look at the history of foreign service as outlined in Piggott on Service out of Jurisdiction, or for my present purpose concisely set forth in the judgment of Lord Chancellor Chelmsford in *Drummond v. Drummond* (1), and we find that the authority upon which the courts have acted, in making rules under and by virtue of which foreign service has become almost a universal form of procedure, at first rested upon implied rather than express power, we will be better able to appreciate the importance of not confining the powers of the court or judge under the second part of the section I am now considering within too narrow limits.

The power upon which at that time such general jurisdiction rested is well put in the judgment I am referring to thus:

But one of the Acts in pursuance of which these orders are made is the 3 & 4 Vict. ch. 94, which is of much more extensive operation. It empowers orders to be made with respect to the process, pleadings and course of proceeding in the Court of Chancery, not only in certain specified particulars but also in general and comprehensive terms. Amongst others, power is given to make alterations "generally in the form and mode of proceeding to obtain relief and in the general practice of the court in relation thereto." These words seem to me to be sufficiently large to authorize rules to be made upon service to parties anywhere out of the jurisdiction, without which, in many cases, relief would not be attainable.

Can it be said that the words quoted

*generally in the form and mode of procedure to obtain relief and in the general practice of the court in relation thereto*

are any more definite or imply in any more de-

(1) 2 Ch. App. 32.

1905  
 KING'S  
 (N.S.)  
 ELECTION  
 CASE.  
 Idington J.

finite way that foreign service may be provided for than the words "in such other manner as the court or judge," etc., directs service to be had? Yet in *Drummond v. Drummond*(1) Lord Chancellor Chelmsford evidently had the opinion that these words he quoted were sufficient authority for providing by general rules for service abroad.

It is unnecessary to say more on this than point out that the expression which Lord Chelmsford quotes was not used in relation to service at all, but the words we have to interpret expressly relate to service.

Yet the rules committee, constituted of the most eminent lawyers of that day, felt authorized thereby to expressly provide for foreign service.

True such had to be submitted to Parliament before coming into force.

I think, however, if foreign service was then so much beyond legal ken, or habit of thought, as the argument here would indicate, the judges would have refrained from submitting, as they did, by virtue of such authority, rules (which would be in light of that argument of such an invasive character), providing for it.

When the judges of the Supreme Court of Nova Scotia enacted rules they had only general, comprehensive words empowering them to make such rules of court

for the effectual execution of this Act and of the intention and object thereof and the regulation of the practice and procedure and costs with respect to election petitions and the trial thereof and the certifying and reporting them.

They then, by Rule 20, provided as follows:

When the party against whom any petition is filed is not within the Province of Nova Scotia the petition and the accompanying

(1) 2 Ch. App. 32.

document shall be served in such manner as one of the judges shall direct.

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.

Idington J.

When a service was made in Ottawa of a petition filed in Nova Scotia, against the member representing one of the ridings in that province, without deciding the question of the extent of the authority given by the rule, this court held that the service was good and at the same time the late Chief Justice Ritchie remarked (1) :

I throw out of consideration altogether in this case the point raised as to the power of the Supreme Court of Nova Scotia to make rules in relation to the service of the presentation of the petition when the respondent is out of the province and jurisdiction of the court in which the petition is filed. If I was called on to express an opinion at the moment I would, as at present advised, think the court possessed such power.

Most of the other judges seem to have been impressed with the order for extending time being one of discretion, and the service having been made at Ottawa, seems to have been treated as if good though beyond the jurisdiction of the province. This was before the Act was amended so as to make it clear that personal service within Canada would be sufficient.

This seems to me, when we look at the original section 10, which it interprets, to differ in spirit from that mode of interpretation that we are now asked to apply to the amended one in regard to the principle of extra territorial service.

It makes the jurisdiction of the court in regard to the directing of such service as within the purpose of the Act as it then stood.

The amendment nowise affects the spirit in which this mode of interpretation of the *Shelburne-Queen's Election Case* (2) should be applied to the second part of the amended section.

(1) *Shelburne Election Case*, 14  
Can. S.C.R. 258, at p. 263.

(2) 36 Can. S.C.R. 537.

1905  
 KING'S  
 (N.S.)  
 ELECTION  
 CASE.  
 ———  
 Idington J.  
 ———

If we adopt the same ideal of interpretation and do not feel hampered by practice or mode of interpretation that restricts service to mean anything but foreign service, we are at liberty to interpret this second part of the section in the same spirit in which the first part was interpreted in that case.

It would be in accord with the spirit of modern legislation throughout the Dominion, and especially with the spirit of the special legislation of Nova Scotia in regard to the rules of practice for the local courts providing for service of writs of summons, or notice thereof, of notice of originating summons or petition, as the case may be, within the usual range of subjects such rules are made applicable to.

If the words I refer to are capable of authorizing the judges to make a general rule of practice going the length of providing for foreign service, then, I think, in default of the rule, the language enables in each specific case the court or a judge on the application of a petitioner to make such order as was made here.

The case of the *Credits Gerundeuse Ltd. v. Van Weede*(1) would seem very much in point.

It was an application for leave to serve a copy of an interpleader summons obtained under Order 57 out of the jurisdiction, and the application was granted. The court observed that they did not assert any present jurisdiction over Jordi or propose to compel him to submit to its process, but merely give him notice of the proceedings which were being taken.

Jordi had commenced action in the court claiming the goods or their value, but he was beyond the jurisdiction of the court. The order did not rest upon any

special legislation, but upon a long line of authorities, such as I have intimated above in regard to interpleader and other matters. I think the claim against the respondent is very much as was said by Sir Henry Strong in a somewhat similar case,

1905  
KING'S  
(N.S.)  
ELECTION  
CASE.  
Idington J.

that these petitions are not personal actions, but more properly actions *in rem*.

All these considerations and such authority must not be lost sight of when we come to interpret the authority that is given by virtue of the words

or in such other manner \* \* \* as the court or judge may direct.

I think the principles laid down by Lord Justice Bowen in *Re King's Trade Mark*(1) should be observed in the construction of this and any similar statute.

His exposition of the law therein seems amply to cover this or any other case. Amongst other things he says:

If the court at home has jurisdiction over the person or the thing, then the question whether sufficient notice has been given to anybody who is interested in the way in which the court exercises that jurisdiction, is a matter of municipal procedure—municipal procedure to be regulated by statute, or by rules of court, where the court is empowered to make rules, but if there is no statute and no rules of court, a procedure which is to be judged of by the light of natural justice. In the last mentioned case the question of the validity of the notice is a question of procedure. It is not a question of jurisdiction.

I think these words are applicable to this case when considering the meaning to be attached to the words we have to give effect to.

As to the application of words "other manner" see in *Jackson v. Rainford Coal Co.*(2) remarks of Chitty J.

(1) 40 W.R. 580; [1892] 2 Ch. 462. (2) [1896] 2 Ch. 340, at p. 344.



1905  
KING'S  
(N.S.)  
ELECTION  
CASE.  
Idington J.

The *West Algoma Election Case* (1) would seem, as well as these other considerations and decisions, to uphold the conclusion I have arrived at, that it was entirely within the discretion of the judge who made the order for personal service in Boston, to do so or not and that with the exercise of that discretion we have no right to interfere.

I may add that I would not if I could, for the order seems to me to be in accordance with reason and common sense as well as natural justice.

I think the appeal should be allowed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *John A. McKinnon.*

Solicitor for the respondent: *G. Fred. Pearson.*

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(1) 2 Ont. Elec. Cas. 13.