

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF SHELBURNE
AND QUEEN'S.

1905
*June 28.
*Oct. 3.

EDWARD A. COWIE (PETITIONER) . . . APPELLANT;

AND

WILLIAM S. FIELDING (RESPONDENT) } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF CHIEF JUSTICE
WEATHERBE.

Controverted election—Practice—Service of petition abroad—Subsequent service in Canada.

Service of an election petition out of Canada being void, does not invalidate a subsequent legal service in Canada.

APPEAL from the judgment of Weatherbe C.J. allowing preliminary objections to the petition against the return of respondent as a member of the House of Commons and dismissing said petition.

A copy of the election was served on the respondent in London, England, by order of a judge of the Supreme Court of Nova Scotia. Subsequently, respondent having return to Canada, another copy was served on him at Ottawa within the time for service as extended by a judge under the Elections Act. Preliminary objections to the petition were filed, in some of which the respondent claimed that he had never been served as required by law. These objections

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

1905
SHELburne-
QUEEN'S
ELECTION
CASE.

were allowed by the Chief Justice of the Supreme Court of Nova Scotia, who held that the service in London was void, but that it prevented a second service, and he dismissed the petition.

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

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

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Chief Justice of Nova Scotia dismissing, upon preliminary objections as to the service thereof on the respondent, the appellant's petition against the return of the respondent as member of the House of Commons for the electoral district of Shelburne and Queen's, N.S., at the general elections of 1904.

The said petition was presented in due time under the statute on the 12th of December, 1904. Before it could be served the respondent had left for Europe. On the 16th of December an order was taken extending the time for service to the 10th of February, 1905. On the same day an order was taken giving leave to effect service on the respondent in Austria or in England. On the 3rd day of February, 1905, the respondent was served at London, in England.² On the same day an order was taken extending the time for service to the 25th of March, 1905, and on the 28th day of February, the respondent having returned to Canada, service was made upon him personally at Ottawa. On the 6th day of March (the 5th being a Sunday), within five days of the service upon him at Ottawa, the respondent appeared by attorney and filed the preliminary objections now in question, having taken no notice of the service upon him in England. The judgment *a quo* dismissed the petition on

the ground: 1st. That the service in England was bad because not authorized by the statute. 2ndly. That the service at Ottawa was also bad because a first service had been made or attempted to be made in England.

1905
SHELburne-
QUEEN'S
ELECTION
CASE.
The Chief
Justice.

With deference, there is, in my opinion, error in that judgment upon the second point, and I would allow the appeal upon the ground that the service at Ottawa was a perfectly good and valid one.

The respondent has to admit that, but for the previous attempted service in England, the validity of that service at Ottawa could not be questioned under the provisions of the statute 54 & 55 Vict. ch. 20, sec. 8; *Queen's and Prince (P.E.I.) Election Case*(1). Now, as held by the court below, that service in England was clearly unlawful; the statute does not authorize a service out of Canada and, without a direct authorization, such a service is void. Compare *Williams v. The Mayor of Tenby*(2). And that being so, the appellant had a perfect right to effect a personal service at Ottawa within the extended delay.

A defective previous service cannot, as the respondent would contend, invalidate a subsequent service made in conformity with the statute; *Glengarry Election Case*(3). The respondent, who rightly insists that the service in England was a nullity *de non esse*, having no force and effect whatever, and treated it with contempt, would now argue that it has the effect of nullifying the service at Ottawa. I fail to see upon what ground that contention can be supported.

Another ground of appeal taken by the appellant is as to the striking out of his petition by the judgment the allegations of corrupt practices by the re-

(1) 20 Can. S.C.R. 26.

(2) 5 C.P.D. 135.

(3) 20 Can. S.C.R. 38.

1905
SHELBUERNE-
QUEEN'S
ELECTION
CASE.

The Chief
Justice.

spondent at the previous election of 1900, and in allowing No. 16 of the respondent's preliminary objections. As to this part of the judgment no appeal lies under sec. 50, ch. 9, R.S.C., as the allowance of this paragraph of the preliminary objections would not alone have put an end to the petition. Compare *McIntosh v. The Queen*(1). So that paragraphs 23 to 34 of the petition remain struck out.

The appellant has argued that, by appearing and filing preliminary objections, the respondent had waived his right to complain of the irregularities or deficiencies of the service. Though it is unnecessary to determine the point, in the view we take of the merits of the preliminary objections, yet it is not inexpedient to remark that the decision in the *Montmagny Election Case*(2) does not support that contention.

The appeal must be allowed with costs and the preliminary objections dismissed with costs.

GIROUARD J.—The notice of the election petition served upon the respondent in London, England, was contrary to 54 & 55 Vict. ch. 20, sec. 8, and is null and void. But the service made personally upon him in the City of Ottawa within the prescribed time was valid. There is no law and no authority for holding that a process of law cannot be served a second time, when, as in this instance, the first service was bad. The service may even be validly made twice or thrice; such a course would involve only a question of costs. The appeal should be allowed with costs.

DAVIES J.—For the reasons given by me in the case of *King's (N.S.) Election Case; Parker v. Borden*(3),

(1) 23 Can. S.C.R. 180.

(2) 15 Can. S.C.R. 1.

(3) 36 Can. S.C.R. 520.

just decided, I am of opinion that the service upon the appellant outside of Canada of the notice of the presentation of the petition in this case was not a good service.

1905
SHELburne-
QUEEN'S
ELECTION
CASE.

Davies J.

I concur, however, with all my colleagues in holding that the personal service subsequently effected upon the appellant was a good service, being in conformity with the statute, and not being in any way affected by the previous invalid service. This latter service was made in Canada and within the time therefor properly extended by the proper authority. The appeal should be allowed with costs.

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

IDINGTON J. concurred in the result but not in the reasons.

Appeal allowed with costs.

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

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