CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE YUKON TERRITORY.

1906

*May 1, 2.
*May 14.

JOHN GRANT (PETITIONER) .....APPELLANT.

AND

ALFRED THOMPSON (RESPONDENT.....) RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE CRAIG.

Controverted election—Petition—Preliminary objections—Status of petitioner—Evidence—Premature service—Return of member.

On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent.

A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington JJ. dissenting.

APPEAL and cross-appeal from the judgment of Mr. Justice Craig allowing one of the preliminary objections taken to the election petition filed by the appellant, and dismissing said petition.

Polling on an election for the House of Commons in the Yukon Territory took place on 16 Dec., 1904, and the respondent Thompson received the greater number of votes. On the 25 Jan., 1905, a petition against his return was filed by the appellant who delivered preliminary objections thereto which came

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

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on to be heard before Mr. Justice Craig in August, 1905.

The learned judge allowed preliminary objection No. 11, and dismissed the petition. That objection was that "the petitioner is not a person who had a right to vote at the election to which the said petition relates." The hearing on Aug. 15th was adjourned and leave given appellant to file a certified copy of the voters' list used at the election. When it was resumed a list of voters was produced headed "Polling Division No. 3(c)," but certified to be a true copy of the list in "Polling Division No. 36," No. 3(c) being the proper designation. This copy was filed without objection on respondent's part and the appellant testified, also without objection, that he had called on the enumerator and found his name on the list; that he had voted at the election; that on tendering his vote and being told that his name had already been voted on he took the oath required in case of personation; and that he was the John Grant named in the list. The trial judge held the certified copy to be, for several reasons, insufficient and the status of petitioner not proved. From that decision the petitioner appealed to this court.

Two other preliminary objections, Nos. 1 and 3, which were overruled by the judge, were that the respondent was not when the petition was presented a member of the House of Commons and a person against whose election or return a petition could be presented under the Election Act. The ground for this objection was that the respondent was not a member for the purposes of an election petition until he had been declared elected by the returning officer. Under the Act relating to elections in the Yukon Territory the date for declaring the result of the elec-

tion is fixed by the returning officer and in the present case said date was more than fifty days after polling day. As the petition had to be filed within forty days from polling day it was impossible to wait for the declaration.

The respondent gave notice of a cross-appeal from the judgment of Mr. Justice Craig dismissing said objections Nos. 1 and 3, and the appeal and cross-appeal were argued together.

Ewart K.C. and *Glyn Osler* for the appellant.
Travers Lewis for the respondent.

SEDGEWICK J.—I concur in the judgment of Mr. Justice Davies.

GIROUARD J.—I am of opinion, for the reasons stated in the judgment of Mr. Justice Idington, that the appeal should be allowed and cross-appeal dismissed.

DAVIES J.—These two appeals arise out of a controverted election petition filed by Grant who claimed to be a voter to avoid the election of Thompson, the member elected in the Yukon District.

Both appeal and cross-appeal come before us from a judgment on preliminary objections taken alike to the petitioner's status to prosecute the petition, and to the petition itself as having been filed before the returning officer made his return to the writ of election.

The trial judge maintained the objection to the petitioner's status holding, in accordance with previous decisions of this court, that the onus was upon

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the petitioner to prove that he was a person who had a right to vote at the election in question. He held that this must be proved either by the production of the original voters' lists used upon the day of election, or by the production of a copy properly certified. He further held that the certified copy produced in evidence from the Clerk of the Crown in Chancery was fatally defective not only because of the insufficiency of the certificate of the Clerk of the Crown in Chancery attached to the list, but also because the certificate of the enumerator appearing at the foot of the certified copy produced shewed that it was a "copy of the voters' list in polling division No. 36," and not No. 3(c), which was the poll where the petitioner claimed to have had the right to vote.

The latter objection when read in conjunction with the heading of the list which shewed it to be a "List of voters, Electoral District of the Yukon Territory, Polling Division No. 3(c)" might be difficult to uphold if the decision depended upon it.

I do not think however that it does, or that the production in evidence of the original list or copy duly certified is in all cases imperatively required. In the very case before us I find all the facts necessary to prove the petitioner's status duly proved by the oral testimony, not objected to, of the petitioner himself. Of course the primary evidence to shew whether petitioner's name was on the list actually used was the production of the list itself or of a duly certified copy under the statute, but if, as was the case here, oral testimony proving all the essential facts was allowed to be put in without objection, then it cannot be successfully contended afterwards that this proof is insufficient. If objection to the oral testimony had been taken that would of course have

called for the production of the list or of a properly certified copy. But in the absence of any such objection the oral testimony given was quite sufficient.

I am therefore of the opinion that the appeal *Grant* v. *Thompson* on the question of the petitioner having given sufficient proof of his status must be allowed.

The cross-appeal involves a most important point as to the construction of the Controverted Elections Act as amended in 1891, with respect to the date when petitions may be filed. Mr. Ewart for the petitioner contended that the polling day must be construed to be the "election" or the close of the election and that a petition may be filed under the Act any day after the polling day and that the summation by the returning officer of the votes polled on the declaration day appointed by him for such summation and the return to the writ made by him in consequence of such summation, are not necessarily part of the election as the word or phrase is used in the Controverted Elections Act.

As the Act was originally passed, and as it remained for many years upon the statute book, such a question as is here presented could hardly have arisen. By sub-sec. 6 of sec. 9 of the original Act the petition must have been presented not later than "thirty days *after* the publication in the Canada Gazette of the receipt of the return to the writ of election by the Clerk of the Crown in Chancery," unless it questioned the return or election upon grounds arising subsequently as specified in the section. It would be impossible, I would say, successfully to contend under this provision fixing a specified time after a specified event for the filing of a petition that it

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could nevertheless be presented before the specified event occurred. I would read that clause as undoubtedly providing thirty days after a specified official act (the publication in the Gazette of the return) for the filing of a petition and by irresistible inference prohibiting its filing before such event occurs. And I do so because, in my opinion, the petition itself provided for in the 5th section of the Act necessarily depends upon the facts of a return to the writ having been made in some way improperly or of the time for making it having elapsed and no return made, the special provision relating to a petition for disqualifying a defeated candidate necessarily being dependent upon the return, the words being "any candidate not returned." The importance of determining the proper construction of the Act as originally passed will be readily seen. In 1891, sub-sec. (b). of sec. 9 was amended by providing that the petition must be "presented not later than 30 days after the day fixed for the nomination in case the candidate or candidates have been declared elected on that day, and in other cases forty days after the holding of the poll," unless it questions the election or return upon grounds arising subsequently as therein specified. Now this amendment only had reference to the time within which the petition had to be presented. It did not in any way change or amend section 5 or the construction to be placed upon it.

Under the statute before it was amended the return to the writ of election or the failure of the returning officer to make it was, in my opinion, an essential prerequisite to the right to file a petition. The amendment merely altered the date from which the time allowed for the filing of a petition should be counted. It in no wise altered the jurisdiction of the

Election Court to entertain a petition or the essential pre-requisites to the right to file it. Before the amendment the 30 days allowed for filing were to be counted from and after the publication in the Canada Gazette of the return to the writ. After the amendment 40 days were allowed from the day of polling within which the petition must be presented. But that in no way changed the law that it should not in any case be presented until the return to the writ had been made. Generally speaking the practice had been to appoint a day from 7 to 10 days after the polling day as declaration day for the summation of the votes polled, the declaration of the result and the making of the return. And so when the day of polling instead of the day of publication of the return was selected by Parliament as that from which the time was to run, 40 days and not 30 days were given so as to permit of the making of the return to the writ and still allow the usual 30 days after that for the filing of a petition. But such change did not either expressly or impliedly change or amend the 5th section of the Act which authorises the filing of a petition, or permit of such filing before the return to the writ of election or the expiration of the time for making the return.

It is argued, however, that all candidates nominated are from the date of their nomination "candidates not returned" within the meaning of those words in the 5th and 9th sections of the Act and that there is nothing to prevent a petition being filed against any of them for unlawful acts "by which they are alleged to have become disqualified" *before* the return day or as I understand the argument, even before the polling day. But reading those two sections together, it seems to me clear that the "candi-

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date not returned" is the candidate not returned by the returning officer in his return to the writ of election. It would seem absurd to hold that a candidate afterwards duly returned by the returning officer as elected was a candidate "not returned" by him. These words evidently relate to the defeated candidate and not to the elected one, and no candidate can be truly said to be a "candidate not returned" until after the return is made, when for the first time it is officially ascertained and known who is the successful or elected candidate and who the defeated one. The error in the appellant's argument is in confounding the result of the polling with the return. It by no means follows that the candidate receiving the majority of votes is always returned. Experience has shewn that this is not so, and that sometimes returning officers either violating or neglecting their statutory duties have returned the minority candidate as elected or made a double return, or an undue return, or other return not the proper one. In all such cases the statute provides a remedy. But until the return is made or the time for making it expires no petition can be filed. So far as a petitioner complains "of the undue election or return of a member or that no return has been made or that a double return has been made or of matter contained in any special return made" it clearly has the return as the pivot or centre around which it revolves and without which it cannot be filed and where the same section speaks of "an undue return or election of *a member*" or any unlawful act "by *any candidate not returned*" it seems to me to have one meaning and that is to refer to the successful and the unsuccessful candidates as they appear by the return calling the one returned the "member" and the one defeated the

"candidate not returned," and to provide expressly for the presentation of a petition or cross petition against the defeated candidate personally to disqualify him.

The trial judge who expressed himself as doubtful upon the construction of the Act on the point in question, seemed to have his doubts removed because he thought such cross petition

was afterwards provided for by a separate and distinct section.

On this point I venture to think however he was misled. The subsequent section doubtless to which he had reference was sub-sec. (b) of sec. 9, but the cross petition provided for expressly in the latter part of that sub-section is one by the *sitting member* as he is called against his opponent who was not returned in the special case only where a petition had been presented against the sitting member for some

corrupt practice by such member or on his account or with his privity since the time of such return,

that is the return to the writ of election, in which cases the petition may be presented at any time within thirty days *after the date of such payment or corrupt act.*

Such a petition and cross petition might be filed weeks or months after the polling and the return and therefore cannot have any effect upon the construction of sec. 5 under which the petition in this case was filed and which the amended sub-section provides must be filed not later than 40 days after the holding of the poll.

The petition in this case was filed within such forty days but inasmuch as at that time the day for the summation by the returning officer of the votes

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polled and the making of his return had not been reached, there was not anybody or any return against whom or which a petition could be filed, or any want of return which could be complained of.

Clearly there was then at the time of such filing no official knowledge of the result of the polling; no summation of the votes had been or could have been made; no one of the candidates had been declared elected or returned, and no return had been made or could have been made by the returning officer. Neither of the candidates could then be properly said to be a "candidate not returned," within the meaning of the section so as to authorize even the filing of a disqualifying petition against him. And as for Thompson, against whom the petition was filed, so far from being a "candidate not returned," he was the candidate actually returned by the returning officer when the time came for him to make his returns.

The result is unfortunate no doubt, but it is caused entirely by the amendment to the Act of 1891 coupled with the fixing of the declaration day by the returning officer some 50 days after the polling. Under the circumstances no petition would lie under the Controverted Elections Act. Not before the expiration of the 40 days for there was then no return made to the writ and no one, and no act or return to petition against, and not after the return had been made because then the time within which a petition could be filed had elapsed. We cannot, however hard the case may be, construe the statute otherwise than according to its plain language and meaning. Parliament alone can by amendment prevent a repetition of such an unlooked for result. The court is powerless and as the election court had no jurisdiction to proceed upon such a petition as that filed in this case before

there had been any summing up, declaration or return, the preliminary objection should have prevailed and must now be given effect to, and the appeal allowed.

IDINGTON J.—The appellant who is a petitioner herein was held by the learned judge of the Territorial Court of the Yukon Territory to have failed to establish that he was entitled to petition.

The learned judge seems to have inferred from the *Richelieu Election Case*(1) and other cases in this court that the petitioner was bound to produce a properly certified copy of a proper list of voters which shewed thereon the name of the petitioner as a voter.

These cases were decided under statutes which provided that means of proof.

In the statutes that govern this case there is apparently no such provision. The petitioner is therefore driven to other means of proving his standing as an elector and consequent right to petition against a candidate.

He was sworn as a witness on the motion and gave what to my mind is *primâ facie* evidence, and for the present purpose, as it is uncontradicted, conclusive evidence of his right to vote. It is this. He swears that he was put by the enumerator on the voters' list for the division in question.

He presented himself as a voter. He was told another had personated him. He claimed then the right to tender his vote and was sworn accordingly to prove his identity.

It forms an essential part of this particular oath that the list there being used must by the deputy re-

(1) 21 Can. S.C.R. 168.

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turning officer be shewn the voter and he be thus enabled to see the name and description to identify himself. When satisfied of that he can take the oath but not before. This man says he was thus satisfied and took the oath. He, speaking of this incident, says there was only one name John Grant on that voters' list.

It is just as plain as if in express words he had said to the learned judge on this inquiry, I am one of the voters named in the list which was used at the polling place in question.

If he had been allowed to say so and no objection made to such secondary evidence on the grounds that it was such, how could it be gainsaid in law or in fact?

The objection taken a month or so before to an order to open the matter up is not of the nature of such an objection as called for here. It savoured not of an objection to giving of secondary evidence but something else and was entirely at the wrong time to be effective in securing the rejection of secondary evidence.

When counsel fails to object at the proper time to secondary evidence it stands, and when he goes further and elicits as he did here the very facts that made the secondary evidence conclusive, he has no right to complain.

If the petitioner had not been personated he never could have been in the position to give this proof. He would not have been tendered any oath of identity and never have been shewn the voters' list.

I have some doubt if the apparently wide provisions of the Canada Evidence Act, 1893, would have helped, if proper objection had been taken when the

exhibit of the certified list was produced. The ten days' notice is not the trouble I conceive possible. I also doubt if a subpoena could have brought the clerk on this motion with the documents to the court. I need not enlarge, for I think the exhibit being presented without protest and accepted without the objection as to mode or form of certificate thereto was good evidence and can if need be relied on here. I do not read it as raising doubts or difficulties. I think there are none.

The ordinary legal presumptions supply all else needed, beyond this evidence of the petitioner, to maintain his right.

The appeal should be allowed.

As to the cross-appeal that presents two alternative questions for consideration.

If the petition can be presented before the declaration of the result of the election then the appeal fails. If it cannot be presented as an attack on the election as well as against a candidate it may possibly be upheld as a petition against a candidate within the alternative of section 5 relative to candidates not elected.

In such case also the appeal must fail.

I think that we can without stultifying Parliament, or doing violence to its language, or denying justice or doing any injustice to any one, find ample grounds within recognized canons of construction to hold that in such a case as this the petition as against an election may be presented before the declaration.

The settled policy of Parliament has been for a long time past to relegate all questions relative to elections to the courts of justice. Whether Parlia-

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ment can entirely divest itself of its constitutional powers in that regard or may have power yet remaining to deal with any unprovided cases is beside the question.

The settled policy stands expressed in section 68 of the Controverted Elections Act, as follows:

> All elections shall be subject to the provisions of this Act and shall not be questioned otherwise than in accordance therewith.

Such imperative language binds us to find if we can in the statute as it stands amended a meaning that will execute this purpose.

> That which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it

says one high authority; and another says

> if the grammatical sense would involve any absurdity, repugnance or inconsistence, the grammatical sense must then be modified, extended or abridged so far as to avoid such an inconvenience but no further.

See quotations in Hardcastle, (3 ed.) p. 97. Apply that here. The limitation in section 9 is that the petition must be presented

> not later than * * forty days after the *holding* of the poll.

The word "election" may have a technical meaning in some parts of this Act.

The interpretation clause is vague but gives a meaning which the context in other parts of the Act may call sometimes for a technical sense reading. In itself the interpretation clause does not necessarily imply more than the usual acceptation of the word election in relation to members. Nothing appears in the Act to take away from the word "election" its plain ordinary meaning and reduce, as sought here, the use of it in section 5 to an absurdity. The phrase

there is "an undue election of a member" as contra-distinguished from "an undue return" and other alternatives. This clearly distinguishes the election from the return. Again, why should the time for the presentation run from the date of the poll if it never could be presented before the declaration? And especially why so when in so very many obvious cases (of which this is one) it might be an impossibility to comply with such a limitation? Take the word "election" here to mean nomination and the polling of the votes, which are commonly and popularly known as the election, and a petition could be framed to meet all that and be presented at any time after the poll—within forty days—and there is no difficulty in the matter. But the suggestion is urged that notice of the petition must be given the member. Once the petition is filed the court could extend the time for service of notice and no difficulty exist. And in this connection too much importance is attached to the use of the word "member." A man is not technically speaking a member until the return is in the hands of the Clerk of the Crown, if then.

Appellant's counsel did not shrink from supporting his client's position, though recognizing, properly, this logical result.

I fail to see any right to draw the line at the declaration. It must be at the time when ready for gazetting or as judgment appealed from holds.

Of course if the express language were that the petition could not be presented until after declaration we would be bound by it. But short of the most express language I would not feel constrained to so interpret the Act as to defeat its purpose.

When we find not only in section 5 distinctly

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separate causes for petition such as "undue return" and "undue election," etc., but also elsewhere throughout the Act many cases of distinguishing the return from the election and that the Act's interpretation of the word "election" permits of a double sense, we will not be astray in accepting the plain ordinary meaning of the word election to which I have already referred. I prefer that to the absurd result we are asked to bring about by allowing this cross-appeal.

It must moreover be observed that section 9, subsection (b), prescribing the time of forty days from the poll for presenting a petition repeals and is substituted for one which postponed the time until, or at least prescribed it within a time running from, the gazetting of the return of the member. This radical change accounts for many inconsistencies in the Act as it now stands amended.

These inconsistencies must yield to the application of the rules of construction I have adverted to, rather than that the Act become an absurdity. And so far as necessary to give full effect to this amendment, that which still stands unrepealed by express enactment must be held to have been thereby modified, and if, and so far as, need be impliedly repealed.

If we must proceed by such a narrow method of interpretation as appellant seeks then it should be followed to the end and the petition allowed to stand as literally within the meaning of section 5, a good petition against one who was then a candidate but not elected.

We are not concerned as to its form for section nine is obviously intended to avoid all difficulties of form and it suffices to have any substance covering and comprehending what is appropriate to the

facts and possible issue within the Act as subject matter of a petition.

I think this cross-appeal fails and must be dismissed.

MACLENNAN J.—I concur for the reasons stated by Mr. Justice Davies.

Appeal allowed without costs and cross-appeal allowed without costs.

Solicitors for the appellant: *Black & Black.*
Solicitor for the respondent: *Frank T. McDougal.*