1909

*Feb. 16.
*March 29.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PETERBOROUGH WEST.

JAMES ROBERT STRATTON (RESPONDENT) ..... } APPELLANT;

AND

JOHN HAMPDEN BURNHAM (PETITIONER) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE BRITTON.

Controverted election—Service of petition—Extension of time—Substitutional service—R.S.C. [1906] *c. 7, ss.* 17 *and* 18.

The provision in sec. 18, sub-sec. 2 of the Controverted Elections Act (R.S.C. [1906] ch. 7), for substitutional service of an election petition where the respondent cannot be served personally is not exclusive and an order for such service on the ground that prompt personal service could not be effected as in the case of a writ in civil matters may be made under sec. 17.

The time for service may be extended, under the provisions of sec. 18, after the period limited by that section has expired. *Gilbert* v. *The King* (38 Can. S.C.R. 207) followed.

APPEAL from the judgment of Mr. Justice Britton dismissing a preliminary objection to the election petition.

A petition against the return of the appellant Stratton as a member of the House of Commons was filed on Nov. 21st, 1908. Sections 17 and 18 of the "Controverted Elections Act" provide for service as follows:

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

17. An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed. R.S., c. 9, s. 11.

18. 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, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents at some place within Canada.

2. If service cannot be effected on the respondent or respondents personally within the time granted by the court, then service upon such other person, or in such manner, as the court on the application of the petitioner directs, shall be deemed good and sufficient service upon the respondent or respondents. 54-55 V., c. 20, s. 8.

The time for service expired on December 1st and on the following day an application was made to Mr. Justice Britton for an order for substitutional service based on the following affidavit made by the petitioner's solicitor the heading and jurat being omitted.

"I, William Henry Moore, of the City of Peterborough in the County of Peterborough, solicitor, make oath and say:

"1. I am the solicitor for the above named complainant, and on his behalf I caused the petition herein to be presented to this honourable court by my Toronto agents in this matter, namely, Messrs. DuVernet, Raymond, Jones, Ross and Ardagh, solicitors, on the twenty-first day of November last.

"2. After filing the said petition my said agents sent it to me to be served on the respondent, whose domicile and chief place of business is at Peterborough aforesaid.

"3. The same was received by me on the twenty-fifth day of November, 1908. I made inquiry for said respondent, but could not find him at Peterborough, and was informed he would be in Toronto the next day at

1909

PETERBOROUGH WEST ELECTION CASE.

his office, whereupon I returned the said petition to my said agents to be served. They returned it to me on the twenty-sixth of November last stating that he was not in Toronto.

"4. On receipt of said petition on the morning of the twenty-seventh of November last I handed it into the sheriff's office here with instructions to proceed without delay to serve the said petition on the said James Robert Stratton.

"5. The said petition was this day returned to me by Mr. Frederick J. A. Hall, Deputy Sheriff of the said County of Peterborough, with the statement that he had made every effort to serve the said James Robert Stratton, but had failed to do so."

His Lordship granted the order in the following terms the formal parts again being omitted.

"Upon the application of the complainant upon reading the affidavits of Frederick J. A. Hall and W. H. Moore filed and the exhibits therein referred to and upon hearing what was alleged by counsel for the complainant:

"1. It is ordered that the time for service of the petition herein be and the same is hereby extended till the twelfth day of December, 1908.

"2. It further ordered that a copy of the petition and of notice of the date of presentation thereof and a copy of the deposit receipt and of the appointment of the petitioner's solicitor may be served upon the respondent by delivering such copies to Roland Glover or such other clerk as may be in charge of the respondent's office at Peterborough.

"3. And it is further ordered that the costs of this order be costs in the matter of the said petition."

The petition was served on said Roland Glover on December 3rd.

A number of preliminary objections were filed and served, but when they came up for hearing all were abandoned except one, namely, that the petition had not been properly served the order of Mr. Justice Britton being null and void, having been made on insufficient material and after the time for service had expired. The objection was dismissed and the appellant then took an appeal to the Supreme Court.

THE CHIEF JUSTICE.—The rule as to the service of an election petition is laid down in section 17 of the "Controverted Elections Act," which provides that the petition, notice of presentation, and copy of deposit receipt are to be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in the alternative in such other manner as is prescribed by the Act, which must be interpreted to mean by the Act or by the rules of court made under the Act. Section 18 fixes a delay of 10 days after the day on which the petition has been presented for service of notice of the presentation of the petition and provides that this delay of ten days may be extended if, in effecting service, special circumstances of difficulty have arisen; this section also provides for substitutional service if it is found impossible to serve the respondent personally within the time granted by the court. Section 85 of the Act gives to the judges of the court authority to make rules and orders for the effective execution of the Act and the regulation of the practice and procedure with respect to election petitions.

It has been impossible for me to ascertain what were the rules in force in Ontario when the petition

1909

PETERBOROUGH WEST ELECTION CASE.

The Chief Justice.

was served, but it was not contended by counsel on the argument that any rule existed affecting the questions in dispute in the appeal.

I construe these sections to provide that service may be made in either one of three ways:

1° In the manner in which a writ of summons is served in civil matters in the provinces. (Sec. 17.)

2° In such manner as the court directs on the application of the petitioner in the special circumstances mentioned in section 18.

3° In such manner as may be provided for by the rules of Court. (Sec. 18.)

In Ontario the service of a writ of summons in civil matters is provided for by consolidated rule 146, which is:

> Where service is required the writ may be served in any county or district in Ontario and the service thereof shall be personal; but if it appears to the court or a judge on affidavit that the plaintiff is unable to effect prompt personal service, the court or judge may order substituted or other service by advertisement or otherwise.

It is not doubted that the *service* made in conformity with the order of the 2nd December, 1908, would be valid if this were a civil case, and that order is in my opinion as effective made as it was within the extended period as if made before the expiration of the 10 days allowed for service, if the judge had jurisdiction to grant the extension after the 10 days within which the service should be made had expired, of which I have no doubt. *Gilbert* v. *The King*(1) and cases there cited. We have no power or right to ignore the provisions expressly made relating to the manner of service by the 17th section of the Act and should not put a construction on the 18th section which would involve such a result. The sections pro-

(1) 38 Can. S.C.R. 207.

vide alternative modes of service, one in conformity with the service of writs of summons in the province and the other the personal and substitutional service expressly prescribed in the 18th section. But the latter method of service is not exclusive and I hold that if the service was made in the manner prescribed by the rule applicable in civil matters it is a good service. The judge who gave the order explains the facts in this way:

> The application was made *ex parte*. If for want of proper information as to the facts, the petitioner has obtained an improper order, it was at his own risk. *It did appear to me, on affidavit, that the petitioner was unable to effect prompt personal service of the petition and notices, and so in the exercise of my discretion I made the order.*
>
> The respondent being a business man of large interests, in different parts of Canada, the service upon his clerk, Roland Glover, or upon the clerk in charge of the respondent's office at Peterborough, should be as good as personal service, and therefore should be deemed personal service.
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> Assuming that at the time I had jurisdiction to make any order allowing further time, I do not think the order bad by reason of its directing substitutional service as well, in one order. Rule 146 in my opinion applies and the petitioner had, up to that time, been unable to effect "prompt personal service."

I am of opinion that the order made by Mr. Justice Britton under these circumstances not having been set aside under the practice of the Ontario court as made improvidently or without sufficient material, stands as a good order and that the service under it was a legal one without the letter and spirit of the Act and gave the court jurisdiction over the respondent.

GIROUARD, DAVIES and DUFF JJ. concurred in dismissing the appeal with costs for the reasons given by the Chief Justice.

IDINGTON J.—If we read sections 17 and 18 of the "Controverted Elections Act" as absolutely meaning

1909

PETERBOROUGH WEST ELECTION CASE.

Idington J.

that there must be three stages taken in reaching substitutional service of an election petition then this appeal ought to be allowed, but not otherwise.

The three stages I refer to are first an attempt to serve personally within ten days as the Act requires, when read in light of the local practice as to service of writ of summons; secondly, an order either within or beyond that term directing an extension of time for service, which must, if the order do no more than extend the time, be personal service; and thirdly, an order for substitutional service if attempts to make personal service have after due effort failed.

I conceive there may be cases in which these several steps and that order of events might properly be exacted, but I do not think it is imperative. Many cases quite likely to arise would render such a performance slightly ridiculous.

Take the case of a member elect living abroad beyond the possiblity of being reached within the statutory limit of time for service or any reasonable extension of it, by order of court or judge, why should the second step have to be taken when doing so would be an absurdity?

I think effect can be fully given to every word of these sections (and such ought to be the endeavour in construing anything) by limiting the use of the power to extend for personal service to the cases where the "special circumstances of difficulty in effecting service" are of such a character as to justify an application for the extension and not to extend its application to the cases where the granting of the order would be farcical.

Both sections 17 and 18 substantially as at present have always existed in the Act and with transposi-

tions and slight changes have throughout been supposed to be operative each covering its own appropriate ground.

I think also both sub-sections of section 18 must be read together just as if one whole. The section stood as a whole for many years undivided into sub-sections as it now stands since the revision of 1906. I do not suppose it was intended by this severance to change its meaning yet at first blush it reads since as apparently of a different meaning. In the other way of reading literally the requirement in sub-section 2 without relation to what has gone before of "personally within *the time granted by the Court*" the second sub-section would be reduced to an absurdity for the second extension of time to provide for substitutional service would be a "time granted by the court."

I do not pretend the case is free from difficulties. I am somewhat shaken in the opinion I arrived at in former cases and now express on seeing the opinion I find of the late Chief Justice Armour and the late Mr. Justice Street in the *Haldimand Case*(1), at p. 484 *et seq.*, before the Act was amended, but in the main as it now is.

This opinion comes from authority I regard so highly I would have followed, in the absence of conflicting decisions here, if the decision of that case had turned upon it.

The opinion is at best, however, mere *obiter dicta*, though framed by as careful a man as I ever knew and adopted by another.

Taking the other view I have indicated as to the meaning of the sections the extension for mere per-

(1) 1 Ont. Elec. Cas. 480.

1909

PETERBOROUGH WEST ELECTION CASE.

Idington J.

sonal service was unnecessary before permitting substitutional service.

When I arrive at that conclusion, and hold as I do for the reasons Mr. Justice Britton has assigned in that regard that he had power to make the order after the expiration of the ten days permitted for personal service, all the rest seems to me mere matter of discretion which should not be interfered with.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Watson, Smoke & Smith.*
Solicitor for the respondent: *William H. Moore.*