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Hon. Wendell Phillips Jones, K.C., M.P.P., Solicitor General.

Hon. W. P. Jones
Retains the Seat.

Judge Barker Dismisses the Protest and Completely Exonerates the Sheriff.

At the Court House on Friday last Judge Barker dismissed the election protest, with costs to be paid by Simms. Attorney General Pugsley and F. B. Carvell, M. P., appeared for the respondent, Hon. Mr. Jones, and A. B. Connell, K. C., was on hand to look after the petitioner's interests. After argument by the various lawyers the learned Judge gave his decision, of which the following is an exact copy.—

SIMMS (PETR.) VS. JONES (RESP'T.)

Barker J.—Since this Court adjourned on the 9th August I have had an opportunity of examining the evidence and the authorities by which it seems to me this case must be determined. My views have not been changed by the argument which I have heard to-day and I therefore see no reason for delaying my decision. If I am wrong I can be set right on appeal by the Supreme Court.

The election to which this petition relates was rendered necessary by the respondent vacating his seat on his acceptance of the office of Solicitor General. The whole question involved is whether or not the petitioner presented his nomination paper and deposit to the sheriff by noon of nomination day. The petition alleges that the petitioner actually did this but the sheriff refused to accept it. That being the only issue involved it is not necessary to discover who abstracted or concealed the bible and thereby caused so much trouble, though it was quite proper that the repondent and the sheriff and officers of his Court should have come forward and stated they were in no way implicated in that transaction. The petitioner's case is not that he was prevented by the respondent or by the sheriff or by any one else from filing his nomination in time. On the contrary he alleges that he actually did file it in time and the sheriff refused to accept it. This is the question of fact to be determined. The petitioner is a lawyer and professes to be and no doubt is familiar with the requirements of the Election Act. The signatures to his nomination paper were procured by one Charles Boyer. He says that on the day preceding nomination day he took the paper to Woodstock and gave it to the petitioner—that he and the petitioner were at Mr. Connell's house in the evening of that day, that the paper was then all complete except that it required his oath as to the electors' signature—that he had gone to Woodstock for the purpose of swearing to the petition as both the petitioner and Mr. Connell knew, but that he was not asked to do so until he was sent for the following day. So little interest does the petitioner seem to kave taken in the matter that he went to the Court House on nomination day at 10 or 15 minutes past eleven o'clock knowing that the nomination paper was not complete and that it must be filed before noon. He then telephoned to Mr. Connell at Woodstock two miles away, to hunt up Boyer and send him to the Court House to swear to the nomination paper. The petitioner swears that Boyer arrived at the Court House at "about twelve minutes to twelve." He then had to find a Justice of the Peace to administer the oath and a Bible upon which to administer it. A man who was in earnest one would think, would under the circumstances, have utilised the time consumed in getting Boyer to the Court House, in securing both bible and Justice. That was not done, and as no bible could be found more confusion ensued. A search was made, but as the bible, which had been used that morning in taking the necessary oaths of the officials and which was always kept on the table of the Clerk of the Court, could not be found, the petitioner, Boyer and the Justice went to a house a short distance away, where the necessary oath was administered. The petitioner returned to the Court room as he says at 3 minutes to 12 o'clock by his watch. He then went into the Barristers' room through the Court room where the sheriff was, remained a short time and then came back to the court room and handed the nomination paper to the sheriff. As it was, I presume owing to the hurry and confusion, Boyer took oath an which he should not have done, for he swore that the names of the electors who signed the nomination were duly registered as voters for the electoral district and entitled to vote though he had not seen the electoral lists at all. I confess it seems to me almost impossible to reconcile the petitioner's conduct and apparent want of interest with a bona fida intention of contesting the election at all. However we have him, according to his own testimony presenting his nomination paper three minutes before the last moment of time allowed, as indicated by his watch. The question is, was the petitioner's nomination within the time limited by the Act? Sec. 65 of "The New Brunswick Election Act" (Cap. 3 of R. S. 1903) provides that—"On the day appointed for opening the election, the sheriff shall hold his Court for the nomination of Candidates at the County Court House, between the hours of ten and twelve o'clock in the forenoon" &c. Sec. 66 provides as follows—"The sheriff shall not receive any nomination of candidates after 12 o'clock noon but shall keep his court open until 2 o'clock" &c. Whatever force there might seem in an argument in favor of construing sec. 65 as directory and not imperative there can I think be no doubt as to the true construction of sec. 66. The words of that section are clearly prohibitive, and in my view the sheriff was quite right in thinking himself absolutely prevented from receiving any nomination after 12 o'clock. It is not a matter in any way left to his discretion and there are the strongest reasons why it should not be. In Rex vs. Leicester 7 B. & C. 12, Lord Tenderden says—"It has been asked what language will make a statute imperative if the 54th. Geo. 3 Cap. 34 be not so? Negative words would have given it that effect, but those used are in the affirmative." In Barker vs. Palmer, Grove J. says—"In construing Acts of Parliament provisions which appear on the face of them obligatory, cannot, without strong reasons given be held only directory. The rule is that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court and there is no such power here." In the Glengarry Election Case 14 S. C. R. 453 the present Chief Justice of Canada in speaking of the power to extend the time for the commencement of an election petition trial after the time allowed by the statute had expired, says—"It has been further argued on the part of the respondent as one of the grounds in support of his contention that the enactment of sec. 32 as to the six months is directory only and not mandatory; that in various acts, where the legislature has intended that proceedings shall be taken after a certain time, the clause limiting such time contains the words "and not afterwards." To this the answer is obvious. When such a clause has these words "and not afterwards," it is plain and plainer than the present one, then there is no room for interpretation." In Ex parte Danaher 27 N. B. at page 370 King J. says—"There is an obvious difference between saying I shall do a certain thing not later than a certain date and saying that I shall not do it later than such a date." Mather vs. Brown 1 C. P. D. 596 may be referred to as showing how strictly positive enactments are construed in dealing with nominations for municipal elections. The filing of the nomination paper with the sheriff within the specified time seems to me as requisite for a valid nomination as that the requisite number of qualified electors should have signed it. It follows that in my view the sheriff was quite right in refusing the nomination if in fact it was as he alleges it was not presented to him until after twelve o'clock. I determining that question I should feel disposed to accept the decision of the returning officer unless the evidence clearly showed him to be in error or that he had acted in some improper manner. In conducting an election the sheriff is discharging both judicial and ministerial duties; he is a sworn public officer and he is primarily responsible for the proper conduct of the proceedings of his Court, and where he has decided as a fact that the time at which a nomination paper was handed to him was after twelve o'clock I think I should feel myself bound by that decision, unless it was established by very clear evidence that he was wrong. Some one must be the judge of the time and I think the responsibility rests upon the official to whom the legislature has entrusted the direction of the proceedings. It would have been a very simple thing for him, petitioner, to have ascertained from the sheriff the precise time by which he was governing his Court. The petitioner does not seem to have taken this simple and obvious precaution. In the first place the sheriff opened his Court at 10 o'clock by his watch. Two hours later by the same time it should close to all further nominations. The evidence of Mr. Milmore who was the Sheriff's Clerk and was present when the Court opened goes to show that the Sheriff was particular in opening at sharp ten, though by his watch it was three minutes to ten; that is to say Milmore's watch was three minutes slower than the Sheriff's. And he testifies that when the petitioner handed the Sheriff his nomination paper it was exactly 12 by his watch. He says:—"Mr. Simms came in the door and went through into the Barristers' room and as the time was near closing I was quite surprised he did that. He came up here to where the Sheriff was sitting—the Sheriff had his watch in his hand and he handed him his nomination paper and wanted him to take it. They were not speaking very loudly. I had some difficulty in hearing them. I heard the Sheriff say it was three minutes after 12. I was still sitting in the Stenographer's chair with my watch in front of me on the desk. He says it was then 12 o'clock by his watch and while they were speaking the time had gone past 12. Foster, the Deputy Sheriff says that some time during that day he compared his watch with the Sheriff's and found his time three minutes faster than the Sheriff's. He says he looked at his watch when talking to the petitioner and when Boyer arrived at the Court House and found that it was 12 minutes to 12, agreeing in that respect with the petitioner. He also says that when the petitioner was returning with the affidavit it was 4 minutes past 12 by his watch. After that the petitioner came in the Court room, passed into the Barristers' room, remained for a minute or so and then came and offered the Sheriff the paper." The Sheriff himself says that it was 3 minutes after 12 when the paper was tendered to him and refused and that the $100 was handed in after he said something about it a minute later. He says his watch is a good time-keeper which he purchased from Dalling who has charge not only of the Town clock but also the clock in the C. P. Ry. station at Woodstock from which the train hands take their time. He also says that on the morning of nomination day his watch was correct both by the Town clock and by Dalling's time. He also states in the evening of that day the respondent was in his house when the Town clock struck seven and his watch was right "on the dot" as he expressed it. This evidence was also in some respects corroborated by the Respondent. It seems clear that the sheriff opened his Court at 10 a. m. by his watch and that by the same watch he closed it at 12 and that is was by the same watch three or four minutes after 13 when the petitioner tendered his nomination. I accept the sheriff's time not only for the reasons I have mentioned but because I think it was accurate, possibly not scientifically accurate to a second but sufficiently so to meet the requirements of the matter in hand. Upon what evidence am I to say that the sheriff's watch was wrong? It is true that it differed a minute or two from the time indicated by the watches of others present as theirs also differed. But what evidence have I to show me that theirs or one of theirs was right and the sheriff's therefore wrong. If I were to set aside this election on the ground that the petitioner's nomination was handed in before noon I could only do it on the assumption that the sheriff's watch was too fast. I could only do that by accepting, without the slighest reason for it so far as I can see, the time as shown by some other person's watch. There is as much reason for selecting Foster's time which was some three minutes faster than the Sheriff's as there is for selecting Milmore's which was about three minutes slower.

Some point has been made as to the Sheriff having counted the $100 and it is said that he would not have done so if the time had actually past. The evidence, however, I think shows that the money was not tendered until after the time had really expired. So it is immaterial what the Sheriff's object was in counting the money for it is not alleged that by doing so after the time there was any waiver even if there could be any. So far from this being the case the petition alleges "that the nomination paper and deposit of money were delivered to and deposited with the said Sheriff as such returning officer at the said election before twelve of the clock on the day of the said election but the said Sheriff as such returning officer refused to accept the said nomination paper and deposit so made and delivered as aforesaid."

I think the petition must be dismissed with costs to be paid by the petitioner and I declare that the respondent was duly elected and returned and is entitled to retain the seat.