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JUDGMENT OF CHIEF JUSTICE BARKER

In the Carleton Election Case.

OWENS (PETITIONER) AND UPHAM (RESPONDENT.)

The parties to this petition were candidates at a provincial election held in and for the County of Carleton on the 1st of December last. On the 22nd December, Owens the unsuccessful candidate filed this petition for the purpose of setting aside the election on the ground of corrupt practices. On December 22nd the Clerk of the Pleas sent the copies necessary for service and publication to the Sheriff of Carleton who received them on the following day, December 23rd. On the next day December 24th, the Sheriff served the respondent. At that time there was no daily newspaper published in the County, but there was a weekly paper called "The Press." In the first issue of this paper after the Sheriff received the papers for service, he caused a copy of the petition to be published, and continued it in the three consecutive issues in order to satisfy the requirements of section 81 of the N B Controverted Election Act (Chp 4). On that state of facts McLeod J made an order fixing he 16th of February as the date of trial. On January 26th a motion was made to rescind that order on the ground that the petition was not at issue so as to be set down for trial as there had been no publication as required by the Act. Section 18 is as follows:—"Publication of any paper or notice shall, when it is not otherwise expressed, be by posting printed copies of such papers or notices on the Court House, *in* the Registry Office of the County, to which the petition relates or by publishing the same for three consecutive days in a paper or papers published in the County. The order was set aside on the ground that publication in a newspaper referred to daily papers and not to weeklies as it is possible only in the case of the former to secure publication for three consecutive days as had already been held by the Cour. in Herbert versus Hanington 14 N BR 324 That motion was argued on February 5th and judgment was given on February 12th. On the 27th of January that is the day after the rule to set aside the order had been granted—the Sheriff posted a copy of the petition on the Court House and as is alleged, another copy *in* the Registry Office as is directed by Section 81 already quoted. The application for an order fixing a day of trial was then renewed on this altered state of facts, and on hearing the parties McLeod J on the 31st of May made an order fixing the 17th of August next for the trial, and on the same facts he on the same day, made a separate order extending the time for commencing the trial until the 1st of December next. Motions have now been made to rescind these two orders on the following grounds:—

1. That there was in fact no posting *in* the Registry Office as the Act requires, &.

2. If there had been, it would not have satisfied the Act in point of time, the Sheriff being obliged by section 6 to publish the petitions forthwith whereas he delayed doing so from December 23rd until January 27th a period of thirty five days.

I think the motions must succeed on both grounds. It has been put forward here that as this statute has for its object the establishment of a tribunal authorized to inquire into the corrupt and illegal practices which prevail at parliamentary elections, and in cases where the successful candidates return has been procured by such practices, to set it aside, a liberal construction should be given to the statute and objections at all technical in their character should be disregarded. It must however be borne in mind that the jurisdiction exercised on the trial of these petitions is a statutory one and that this Court has no authority to exercise it except subject to the limitations which the legislature has imposed. These petitions are primarily cases between the petitioner and respondent. The public are interested in the result but their interest whatever it may be is worked out through the litigation of the Petitioner and Respondent, (Per King J at P 557 in Wood versus Emerson 26 N B P 532.) As to the first point the facts are these. The municipality of Carleton acting under the authority of an Act of the legislature, (45 Vic. Chp 77) caused a brick building to be erected in Woodstock for County purposes. I quote from Mr Jones who in his affidavit gives the following account of the occupation of the building. "He said, brick building is occupied as follows. On the first floor thereof the room nearest to the door and in front of the building is occupied by John L Carleton, Esquire, Judge of the Carleton County Court, as the Judge's Chambers and has been so occupied by the said Judge for about three years; the room immediately in the rear of the said Judge's Chambers and the vault connected with the last mentioned room is occupied by John S Leighton, Esquire, Registrar of Deeds in and for the County of Carleton, as the Registry Office of the said County, and the vault situate on the first floor having its entrance into the main hall is used by the Registrar of Probates for the said County of Carleton, for the purpose of storing the records of the Probate Court; on the second floor there is a vault having its entrance from the hallway which is used by the Clerk of the Carleton County Court for the purpose of storing the records of the said County Court, and has been so used for the period of at least ten years; the rooms on the second floor are at present occupied and have been occupied for about five years by the said John S Leighton as a residence. "I think it quite likely that the main object which the municipality had in view by the erection of this building was to provide a suitable office for the Registrar of Deeds where he could conveniently carry on the business of his office and have a suitable vault for the preservation of the records. The capacity and arrangement of the building I think negative the idea that this was the sole object of the Municipality. And the manner in which the building is now and for many years past has been used and occupied shows beyond all doubt that the greater part of it is not now and never has been used directly or indirectly as a part of the Registry office. The only entrance to the building, except a cellarway in the rear, is through a pair of doors in the front of the building about six feet back, forming a vestibule to which there are no doors. On the side of this vestibule the Registrar of Deeds had placed a notice board so that notices required to be posted in his office could be posted there. It was on this board that the petition was posted by the Sheriff, and the question is whether that satisfied the requirements of the statute which directs the petition to be posted *in* the registry office. This is a question which *in* my view goes to the jurisdiction of the Court. The right to set the cause down for trial is based on the fact that by the service and publication of the petition the respondent is compelled to answer it. The requirements may seem fanciful or useless but they are what the legislature has said shall be done, and it is beside the question to say some other provision is quite as good or that variations from the statutory directions are immaterial.

In Niseworthy and Buckland L R 9 C P 233 a question arose as to the authority of a revising barrister to strike a name off the list of voters. This depended among other things upon a certain notice which was to be sent to the voter, "at his place of abode as described in such list," this is a list of voters to be filed with the overseers. Finding that the voters address was incorrectly stated in the list the overseers without any authority changed the address so as to correct the error. And the notice was sent to the correct address and not to the one stated in the list. No one will argue that a notice sent to the wrong address is not more likely to go astray than if sent to the right one. The Court however held that this requirement was a condition precedent to the barristers right to inquire into the voters qualification that the notice should be sent precisely as the Act required. Keating J Says "I can very well understand the revising barrister looking at the abstract justice of the case, seeing that the address as altered was the true address of the voter; and so far as the merits go, I should feel very much disposed to support his view. But the words of the Act are express. The service was not such as the law required and therefor the voter ought not to have been called upon to prove his qualification" Brett J says—the objection "therefore has failed to satisfy the condition precedent to the authority of the revising barrister to call upon the voter to prove his qualification." In the Montmagny Election Case 13 S C R. 1 a question arose as to the service of an election petition filed against Choquette. It appeared that the service was made by delivering the petition to Martineau, Choquette's law partner, in their office which was in the basement or lower flat of a house of which the upper part was occupied by Choquette and his family as a residence. There was communication between the office and residence inside, though there were separate entrances for the two from the street. The service was held bad. Sir William Ritchie C J, said, the service must be made "either upon the defendent in person or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family and it is only in the absence of a regular domicile that the service may be made upon the defendant at his office or place of business if he has one. It is very clear in this case that the service was not upon the defendant in person at northe place of his ordinary residence, nor was it on a reasonable person belonging to the defendants family upon whom the service could have been made, it being shown he had a domicile and ordinary place of business and reasonable members of his family, but it was at the office or place of business of the defendant on his partner not being a member of his family. It is not for us to inquire whether this was not for all practical purposes as good if not possibly a better service than at his residence on a member of his family; it may or may not have been so; what we have to determine is, was it a legal service which gave the Court jurisdiction over the Defendant. I am clearly of the opinion that the service was not a legal service within either the letter or the spirit of the Dominion Controverted Elections Act." After stating that the objection was a substantial one and proper to be raised by way of preliminary objection the Chief Justice said "I cannot conceive an objection coming more directly under the designation of a preliminary objection to an election petition or a more substantial one than an objection such as this which alleges that the election petition has not been properly and legally served and so the defendant has not been made subject to the jurisdiction of the Court and therefore should not be compelled to answer the petition." Henry J says, "From the evidence it appears that the office in question is in the basement of the Appellants residence—the dwelling being above it and access to it being by another entrance. Besides the office there is in the basement what is called a summer kitchen not used in the winter season and a wood house. The service was not in that part of the building in question which formed the domicile or residence of the Appellant. The objection is not merely a tecnical but substantial one affecting the jurisdiction of the Judge. The article enunciates the principle that such jurisdiction shall be exercised only when the party in question is legally served as prescribed, and in the absence of such service no judge could legally proceed to try the merits."

The Lisgar Election Case, 20 S C R I, may be referred to as showing that the provisions in the statute as to service and publication are obligatory and not merely directory. It has been suggested that the words "Registry Office" do not necessarily mean the office of the Registrar of Deeds but might mean the office of the Registrar of Probates. I do not see how any such question can arise here for the Registrar of Probates has no office in this building; he has a vault for keeping his records but no office. The vestibule of the building could however be no more a part of the one office than the other. Sections 3 and 5 of the Registry Act (Chap 151 Con Stat) make it very clear that the Registry office of the County means the office of the Registrar of Deeds. This vestibule may be a much more public place than the inside of the registry office or the outside of a Court house, but it is not the place selected for the purpose by the legislature. The public are directed to go to the Registry office for information as to election petitions. There they can find a copy of the petition and the notice of trial. If they find none why should they go elsewhere, what is there to suggest that they should go to the vestibule of the building any more than any other place? If the vestibule is in the Registrars office what part of the building is not in it? I cannot see that this vestibule is any more in the registry office than it is in Judge Carleton's Chambers or Mr Leighton's private apartments. The registry is not open on Sundays or public holidays and on other days only from ten in the morning till four in the afternoon. This vestibule is open at all times both day and night. There is a distinction between the meaning of the phrase "*in* the Registrars Office" as applied to a building occupied exclusively as a registry office and its meaning as applied to a building in which other officials have their offices. Take for example Court Houses, of which there are several of the kind in the Province, where there is the registry office, the Sheriff's office and others and where there is more than one public entrance. Could it be said that a notice posted up in the vestibule of the Court House was posted in the office of each official in the building. If the statute required notices to be posted in the registry office, the Sheriff's office and in the office of the Registrar of Probates would the requirements of the Act be met by one notice being posted in the vestibule selected by the Sheriff for the purpose? That is the effect of the argument. I think the petition was not posted *in* the registry office as the Act requires.

The second point involves the meaning to be given to the word "forthwith" in section 6 which provides as follows:—"On presentation of the petition the Clerk of the Pleas shall send a copy of the petition to the Sheriff of the County to which the petition relates who shall *forthwith* publish the same in the County or City, etc. In determining this point regard must of course be had to the nature and object of the proceeding and the circumstances attending the Act to be done. It is a rule of the Court that where a defendant is put upon terms to plead forthwith he must do so in twenty-four hours. If he is to plead *instanter* he must do so on the same day. In the case of the Sheriff neglecting to arrest under a cap ad resp., he is liable to an action if he does not arrest at the first opportunity. Brown versus Jarvis 5 Dowl. 285. So also in the case of a CA. Sa the plaintiff has a right of action for the very first hour during which the Sheriff might arrest but does not:—Clifton versus Hooper 6 Q B D 475. In exparte Lamb 19 Ch D 169 where the copy of notice of appeal was to be sent forthwith after the appeal was entered two days delay was held fatal. Jessell M R says "I think the word "forthwith" must be construed according to the circumstances in which it is used. As in Hyde versus Watts (12 M and W 254) there is a covenant to insure a man's life, there must of necessity be some delay for the act could not be done in a moment. But where an act which is required to be done "forthwith" can be done without delay, it ought to be so done."

In the Queen versus the Justices of Berkshire L R 4 Q B D 469 a question arose as to a recognizance which the statute required the appellant should enter into "immediately" after notice of appeal. Four days were allowed to elapse and the delay was held fatal. Cockburn C J, says "the notice was given in due time but the appellant did not enter into the recognizance until four days afterwards. Did this satisfy the words of the statute? The question is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, rigorous action without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

See also Maxwell versus Scarf 18 Ont. 529. On looking at the act it will be seen that the times limited for the several steps in the procedure are short. In the first place the petition must be presented within twenty-one days after the return of the member has been made to the Provincial Secretary. The duplicate petition has to be served on the respondent within fourteen days after the petition has been presented, and the petitioner is required within fourteen days more to file in the Clerk's office the necessary proof of service. Under ordinary circumstances therefore a petition would be at issue and the cause ready to be set down for trial in say thirty days. That is several days less than the Sheriff allowed to pass before he made the publication now relied on. One might I think assume that as the respondent has to be served within fourteen days, the posting of the notice, which is the official notice to the public must be done in a much shorter period in the absence of any circumstances arising out of the act of service itself or incidental to it causing some delay, of which there is in this case no suggestion whatever. The Sheriff allowed thirty five days to pass without making attempt at doing what the Act required. He served the respondent promptly on the 24th December and admittedly there was nothing to prevent him from posting the notices as the act required whenever he chose to do so. The delay may be explained by his belief that the publication in the weekly paper was a compliance with the Act. That no doubt is an explanation, but the Sheriff's mistake as to the meaning of the Act cannot change the effect of the word "forthwith" and a make a good service out of a bad one. If he had neglected serving the respondent until after the fourteen days had elapsed the service could not have been rendered good by the fact that the Sheriff had mistaken the law and thought the time was twenty days instead of fourteen. If there had been in this case any circumstances whatever to which the delay might be attributable it might be that this Court would not feel disposed to interfere with the decision of the Election Court Judge as to their sufficiency. But there are in fact no such circumstances and there was nothing done; not that everything might not have been done promptly and without delay, but because the Sheriff made a mistake and adopted a means of publication of his own instead of that prescribed by the legislature.

In Rogers versus Turner 26 N B. 104 it was held that service of the petition on the respondent within the fourteen days was obligatory and I can see no reason why the posting of the notice by the Sheriff should not be equally so. Rogers versus Wallace 24 N B 459 and Archie versus Burns 31 N B 533 maybe referred to as showing that the provisions of this Act as to procedure must be strictly adhered to.

Both orders must be rescinded with costs and costs of summons.

The American Fourth is worse than war according to statistics. New York had 341, Boston 110, Philadelphia 381, and many more from different parts of the country. In Camden during celebration a cannon exploded a piece of the gun killing a woman and six-weeks-old infant. Another person had the top of his head blown off and still they say that everything considered, the number of casualties are much less than last year and previous years.

CITIZEN SOLDIERS ARE MAKING GOOD.

SPLENDID WEATHER FOR NEARLY THE WHOLE TIME OF CAMP.

Since the soldiers arrived in camp the weather has been almost perfect. Slight showers arose but not enough to dampen the spirits of the men, who are enthusiastic soldiers. The routine of camp is as follows: 5 30 a m one of the guns of the 10th Field Battery is fired, this is Reveille. The band plays and camp takes on the business of the day. The cooks turn out at or a little before gun fire and start breakfast which is served between 6.00 and 6.30 a m. The band drills from 7.30 to 8.00 o'clock a m, when they go to rehearsal. The companies fall in for drill at 8.30 and drill until 12 noon with thirty minutes rest from 10 to 10.30. Dinner is served immediately after drill. In the afternoon the companies drill from 2.00 until 4.30 p m. Supper is served immediately after drill.

Officers mess call is sounded at 5.30 pm. The band plays in front of the tent during supper.

The mounting of the guards and pickets is done at 6.30 pm. The guards are inspected, the old guard is relieved while the picket in charge of an officer is marched to town to see that the soldiers who are out of camp are orderly and to "gather in" all those who are late or have not started to go to the camp ground when "first post" is sounded. We must say that this is a very orderly camp the men all behaving like gentlemen therefore the picket has very little to do. At 9.30 the last gun of the day is fired and the orderly sergeant makes his sounds, roll call is on, and the soldier who fails to answer "present" when his name is called is punished or as the case may be let off with a reprimand. This half hour is called "Tutto." "First post" is sounded immediately after the gun is fired; "last post" is sounded at 10.00 pm. At 10.15 "lights out" or "taps" is sounded and all noise is hushed.

The above routine applies to Artillery Engineers and the 67th.

The reading tent is well supplied with reading matter thanks to the generosity of those who so kindly met the Chaplain's request for such.

Sunday July 4th Divine service was held on the parade grounds. The different companies of the 67th regiment paraded on their drill grounds at 9.45 am and headed by their band marched to the service grounds. The 67th formed in front of a gun limber from which the Chaplain was to address the men. The Engineers to the left and the artillery to the right. The band position was to the left of the gun limber a double quartette of the band formed immediately behind the Chaplain while a double choir were seated at the right. The service prescribed by the D O C was read and the men who had been supplied with leaflets of the service and the hymns joined in the singing and responsive reading. The music was exceptionally good. The Chaplain preached a very instructive and interesting sermon at the close of the sermon, which we are very sorry we cannot publish for want of copy) the national anthem was rendered. Lieu-Col Dibblee then gave the command to march the different parade grounds and dismiss. The band played the beautiful sacred march "Onward Christian Soldiers" to which the troops marched like veterans.

Dinner over, the camp being crowded with citizens sight seeing, the band rendered a short concert in the afternoon but on account of the rain this was cut short.

Monday morning orders came to be in readiness for General's Inspection Brigidier General Drury arrived at Camp for inspection at 2 o'clock. The 67th Regiment was first on the grounds with band. The Engineers paraded at the right of the 67th and the 10th Field Battery on the extreme right. After inspection which last 45 minutes the different regiments were drilled by the different company commanders. The band did some manoeuvres while playing of which the general spoke very highly. After drill and inspection. a concert was given at the officers mess of the 67th and the band then marched to the Officers mess of the 10th Field Battery and Engineers where they also gave a short concert. The men will drill each day now until camp breaks up. In the evening sports of different character will be the order of the day and a large crowd of citizens will no doubt be on the grounds to witness them.

BAND

H T Bonnell, Band Sergt; J W P Dickinson, Band Corp; Jas E Porter, Geo B Woolen, Guy Murphy, C E Whitlock, Jas Wright, Shephard Wright, Sanford James, W B Till, Frank Till, F Speers, D E Wiley, Henry Flewelling, F Risteen, Geo Britton, Jas Taylor, J A Dock, Paul Porter, Vaughn Bedell, Geo Wright.

The following are the names of the Staff Officers 67th Regiments:

G D Perkins	Lt Colonel
A H Margison	Adjutant
H P Carvell	Quartermaster

(Continued on page 8.)