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*May 6

*Nov. 16.

ROBERT A. CHAPMAN AND WILLIAM J. ROBINSON..... } APPELLANTS;

AND

SILAS W. RAND..... .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Can. Temp. Act—Election under—Scrutiny—Powers of County Court Judge—Matters affecting the election.

A Judge of the County Court, in holding a scrutiny of the votes polled at an election under the provisions of the Canada Temperance Act, has only to determine the majority of votes cast, on one side or the other, by inspection of the ballots used in the election, and has no power to inquire into offences against the Act, and allow or reject ballots as a result of such inquiry. (Henry J. dubitante.)

APPEAL from a decision of the Supreme Court of New Brunswick making absolute a rule *nisi* for a mandamus.

An election was held in the County of Westmoreland, N.B., on a petition for a repeal of an order in council declaring the second part of the Canada Temperance Act in force in the said county. The election resulted in the defeat of the petition, and the present respondent applied to the Judge of the County Court for the said county for a scrutiny of the votes. The petition presented to the judge for an order for such scrutiny contained the following, among other matters, into which he was requested to inquire:—

That at one or more polling places in the parish of Botsford there was not a sufficient number of ballot

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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papers provided by the Returning Officer at said poll, and that in consequence thereof many electors who attended at said polling places, were unable to vote at said poll and were refused liberty to vote, because of such deficiency of ballot papers.

That divers persons were admitted to vote against the petition who were not qualified to vote, some of whom personated others who were entitled to, but did not vote, and that persons were induced to vote against the petition by bribery and other corrupt practices.

That many persons entitled to vote and desirous of voting in favor of the adoption of the petition, were deceived by the nature and form of the ballot papers used thereat, and in consequence of such deception voted against such petition unwittingly.

The learned judge declined to enter into the consideration of the above matters, whereupon the respondent obtained from the Supreme Court of New Brunswick a rule *nisi* for a mandamus to direct him so to do. This rule was subsequently made absolute.

The parties against whom the petition was directed to be brought appealed from the judgment making absolute the rule *nisi* for mandamus, to the Supreme Court of Canada.

A. G. Blair, Atty. Gen. for N. B., for appellants.

The principal question in the case is what is meant by a scrutiny of votes under sections 61 and 62 of the Canada Temperance Act, 1878? What are the powers of the judge, and what is the extent of the enquiry into which he may enter?

Sections 61 and 62 show clearly that the scrutiny intended by the Act is a scrutiny of the ballot papers only. The ballot papers, not the votes, are to be the subject of the scrutiny. In fact, unless reasonable grounds are shown to the judge by affidavit for a scrutiny of the ballot papers, he cannot proceed with

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the enquiry. The legislature, if intending to provide for a general enquiry into the validity of the election, would have required the affidavit to support the grounds, whatever they might be, on which the election was to be voided.

Section 70 should not be read as throwing any light upon sections 61 or 62. That section is to be found classified under the head of penalties. The section does not create a tribunal nor enlarge the powers of any tribunal already existing. Its object was, no doubt, to provide, out of an abundance of caution on the part of the draftsman of the Act, against any proceedings bringing the election into question which might possibly be taken in the Supreme Court.

I also contend that the writ of mandamus could not properly issue to compel Judge Botsford to enquire into the allegations in the third paragraph of section 8 of the petition.

(*a.*) Because such an enquiry is not within his jurisdiction.

(*b.*) Because he could not, if the allegations were proved, on such material, determine that the majority of votes was in favor of the petition.

(*c.*) Because it is not alleged, and it does not appear, that there were votes enough refused in consequence of such want of ballot papers, to alter the result if all such votes had been cast for the petition.

The allegations in the fifth paragraph of section eight of the petition are covered in part by the allegations in section four, and the writ could not properly issue to compel the judge to enquire as to those matters.

R. Barry Smith for respondent.

The county court judge, in addition to the powers conceded by the other side, is given the power to scrutinize the polling of votes so far as to ascertain

if the poll has been conducted in accordance with the principles laid down in the Act, and if, on the evidence, he finds it has not been so conducted, to declare the polling of votes invalid See Canada Temperance Act, secs. 61, 62, 63, 64, 70, 86 and 89; 41 Vic. ch. 6 s. 14 (D), and Allen C.J. in *ex parte Boyne* (1).

It will be observed, in the first place, that in sec. 61 the word scrutiny is used, not recount. This word implies a looking into, an investigation, an enquiry and a result of the same. In law it is used in connection with elections in the sense of an investigation into the mode of carrying on the election, and of ascertaining whether it has been done in accordance with the law applicable to it, and a subsequent judicial determination of the question of its validity. This is the ordinary legal meaning of the word, and in the 61st and 62nd sections of this Act there is nothing to show that it is not used in the ordinary legal sense. On the contrary, the provision of the 62nd section for the taking of evidence shows that it is intended to be so used. For why, if the powers of the judge are limited to a mere recounting of the votes as shown on the ballot papers, should he take evidence? It is not necessary to take evidence to show that two and two make four, or what the number of ballot-papers before the judge may be. It is clear he can hear some evidence. Where is the line to be drawn, and what right has he to restrict the evidence when the Act does not do so?

By construing the 62nd section in the way contended for by the respondent, it is made perfectly consistent with the 70th section of the Act. If the 62nd section is construed to give the judge only the power to recount and declare the numerical majority of ballots, this section is meaningless, because there would be no tribunal having cognizance of the question, *i.e.*, of the

(1) 22 N. B. Rep. 241.

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validity or otherwise of the poll. It will be noticed that in the 80th section of the Dominion Elections Act of 1874 this section is found, though with substantial differences. There the election is not to be declared invalid, &c., and the word election is used throughout, while here it is the polling of votes. The tribunal there referred to applies to any court which may have cognizance of the question, and by the very next Act, that relating to controverted elections, a tribunal is given cognizance of the question. Could it be reasonably contended that the 80th section referred to did not apply to the election court so erected? Here we have a tribunal established by the Act itself, and yet it is contended by the appellants that the 70th section does not apply to that tribunal. It is said that the word used would have been "judge" not "tribunal" if the reference had been to the county judge, but it will be remembered that in different provinces different judges are to enter on the scrutiny under sec. 61, and it was convenient to refer to the judge who might sit, according to locality, by some general name. If the judge is not meant, what tribunal is referred to? To what other tribunal is given the cognizance of the question? And it is important to note the wording of the section. No polling of votes shall be declared invalid by reason of a non-compliance, &c., as to the counting of the votes, &c. Now the judge is made the final tribunal as to counting, at least, sec. 63, and so no appeal or *certiorari* would lie, if he acted within his jurisdiction, from his decision. Then the declaring the polling invalid must have reference to his decision since he only is given the cognizance of the counting of votes.

Now, if the poll has not been taken, or if the votes have not been counted, in accordance with the principles laid down in the Act, and the result has been

affected by such defective counting or taking of votes, the judge shall declare the polling invalid. That is the obvious effect of section 70. But to ascertain the defect, and to learn whether it is one that affects the result, and whether it is or is not in accordance with the rules and principles of the Act, requires evidence to be taken by the judge and the hearing of the parties or their counsel. Thus the 70th section and the 62nd are rendered harmonious, and the provision for taking evidence is at once made clear and effective. On the other hand the amendment to the Elections Act, providing for a recount, as has been said already, provides for application to a judge on affidavit of a credible witness, instead of a petition and affidavits which are commonly used in cases of scrutiny and are expressly required by this Act; it provides that the grounds of the application shall be, that such witness believes that a deputy returning officer has improperly counted or rejected ballot papers, or that the returning officer has improperly summed up the votes, while this Act provides that the petition shall shew "reasonable grounds for entering into a scrutiny;" it defines the duties and powers of the judge, and expressly limits them to taking care of the ballots, counting them, correcting the statements, sealing up the ballots and certifying them to the returning officer, while this Act says he shall hear evidence and hear the parties or their counsel, and may determine whether the majority of votes given was or was not in favor of the petition, and that no polling shall be declared invalid, &c., as by the 70th section. The difference between the powers given to the judge by the two Acts is very marked and it is submitted that the 62nd and 70th sections of this Act bear out fully the proposition contended for, that the judge has power, not only to recount, but to take evidence, and if it appears to him that the poll has not been con-

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ducted in accordance with the principles laid down in the Act, to declare such poll invalid. For these reasons the judgment of the majority of the court below ought to be affirmed.

Sir W. J. RITCHIE, C. J.—Mr. Justice Palmer thus states the contentions in the court below. He says:—

> The applicant's contention is that the judge has jurisdiction, and ought to enquire into the number and the validity of the votes on both sides, and of the validity of the election itself, including the question whether it has been properly held, and all proceedings therein properly and fairly carried on in pursuance of the provisions of the Act; and in case it has not, to declare it void.

The other side contends that all such judge has power to do is, "to inspect the ballots, and, from such inspection, to decide, from what appears on their face, whether they are good or not; then counting them, determine which side has a majority of votes."

With reference to the term "scrutiny," Mr. Justice Palmer says:—

> It is a word commonly used in reference to elections and with reference to a full enquiry to determine both their result and validity.

That may, or may not, be so, but whatever may be the signification usually attached to the term in a general sense, when applied to elections the scrutiny provided for by the express terms of the Act is limited to a scrutiny of the ballot papers, and the duty of the County Court Judge to such a scrutiny, that is, to a critical examination of the ballot papers, and he is required, upon an inspection of the ballot papers and hearing such evidence as he may deem necessary in respect to such an examination, in a summary manner to determine whether the majority of the votes given as indicated by the ballots was or was not in favour of the petition. And section 66 provides that:—

> In case of such a scrutiny being entered into, then forthwith after the judge has determined whether the majority of the votes given

was or was not in favour of the petition, the returning officer shall transmit his return to the Secretary of State, and shall send with it a report of his proceedings, in which he shall make any observations he may think proper, and to the state of the ballot boxes or ballot papers as received by him; and in the event of a judge having determined, after a scrutiny of the ballot papers, that the majority of the votes given was or was not in favour of the petition, such returns shall be based upon, and shall be conformable to, such decision.

But no power or authority is given to the County Court Judge, that I can discover, to try and determine the validity of the election apart from and beyond scrutinizing the ballot papers. With reference to section 70, so much relied on, I think it is only necessary to say that that clause, in my opinion, confers no such power on the County Court Judge, however applicable it may be to a tribunal having power to supervise the proceedings of the election, and determine whether it has been properly held and all proceedings rightly carried out in pursuance of the provision of the Act, and generally to deal with the validity of the election. If the legislature intended to give this power to the County Court Judge, they have failed to do so in express terms or to make such an intention apparent by any reasonable inference.

I concur generally in the view expressed by Mr. Justice King in the court below, and also with the conclusion which has been arrived at by Mr. Justice Rose in a case lately decided in Ontario (1).

FOURNIER and TASCHEREAU JJ. concurred.

HENRY J.—I am not very positive on this matter, and have formed no very decided opinion; and as the majority of the court take a different view, I will not express myself strongly in favor of the respondents.

An appeal is made to the people to decide by their votes whether or not they will adopt the second part

(1) *In re* Canada Temperance Act, 9 Ont. R. 154.

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of the Canada Temperance Act in a particular locality. After the election, the returning officer transmits to the government the ballot boxes and a list of the votes cast, with a report of the result of the election, whereupon, if the result is in favor of the Act, a proclamation is issued declaring the second part of the Act in force in that locality.

In the conduct of these elections there is something more than a mere executive power; there are penalties imposed by the Act for unlawful practices, such as bribery, treating, &c.; there are qualifications of voters required; and a question is sometimes raised as to these qualifications. In trying a cause under the Controverted Elections Act the judge supervises the whole proceedings, takes evidence in regard to the qualifications, &c., and decides whether a vote shall be struck off or not; and he may declare the election void.

Under the Canada Temperance Act the judge has power to decide whether the vote shall remain or be altered, but there is no power given to void the election, unless it be implied from the words of the Act.

The result is that bribery and all sorts of corruption may be practised, but the election will not thereby be avoided, unless power is given to somebody to inquire into such acts, and alter or not the result of the election accordingly.

The Act uses the word "scrutiny," and I think Mr Justice Palmer very properly defines it, as used in reference to elections. Scrutiny, in law, has a broad, definite meaning; it means anything and everything connected with an election.

There is no such thing as a scrutiny of the ballot papers spoken of, to be exercised by the County Court Judge, and I take it there is something more than mere counting of the ballots intended by the word scrutiny.

Whether the ballot is right or wrong; whether par-

ties are guilty of corruption or not, are matters into which there is no provision made by the Act to enquire, unless it can be done under the scrutiny.

The Act requires that on the day and at the place appointed by the judge, the returning officer shall attend before him with the ballot papers, and the judge on inspecting such papers, and on hearing such evidence as he may deem necessary, and, on hearing the parties or their counsel, shall, in a summary manner, determine whether the majority of the votes given was, or was not, in favor of the petition to the Governor General in Council.

Now, what is the meaning of that? Nobody else has any authority to try out the question. Parties may prosecute under the Act, but that has no reference to the result of the election. On which side is the majority of votes? Does not that mean the majority of legal votes? Was it not the intention of the legislature that this judge should decide on the legality of the votes?

In this case it is in evidence, that in two balloting places the returns were wanting, there was no list got by the returning officer of the votes given at those polling places, nor did he ascertain the voting at those places before summing up as required by the Act. I take it that it came within the authority of the judge to include that as a part of the scrutiny provided by the Act, and to remedy any defects in that respect by the returning officer. If there was no list the returning officer was bound to get other evidence. That was not done by him in this case. Suppose that came before the judge, would he not have a right to ascertain the true number of votes cast at these polling places, that is to do what the returning officer omitted to do?

If the judgment of the court below is wrong, then corrupt or irregular practices will not avoid an election

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such as this. How can I come to the conclusion that the legislature intended this? I do not say that the judgment of the court below was right, but I very much doubt that the legislature did not intend that the County Court Judge should have the right to determine the election on the majority of legal votes cast.

GWYNNE J.—I am of opinion that the appeal in this case should be allowed with costs, upon the ground that the Canada Temperance Act does not give to the County Judge, upon entering into a scrutiny of ballots, jurisdiction over the points which he refused to entertain for the want of such jurisdiction, and the rule *nisi* for a mandamus in the court below should be discharged with costs.

Appeal allowed with costs.

Solicitor for appellants: *H. R. Emerson.*

Solicitor for respondent: *R. Barry Smith.*