CONTROVERTED ELECTION OF QUEEN'S COUNTY, PRINCE EDWARD ISLAND.

1883
*Feb'y.21,22.
*Feb'y. 27.

JOHN THEOPHILUS JENKINS.....APPELLANT;

AND

FREDERICK DE ST. CROIX BRECKEN .RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE FOR THE PROVINCE OF PRINCE EDWARD ISLAND.

Election petition—Ballots—Scrutiny—37 *Vic., ch.* 9, *secs.* 43, 45, 55 *and* 80 ; 41 *Vic., ch.* 6, *secs.* 5, 6 *and* 10. *Effect of neglect of duty by a deputy returning officer.* 37 *Vic., ch.* 10, *secs.* 64 *and* 66.—*Recriminatory case.*

In ballot papers containing the names of four candidates the following ballots were held valid:

(1)—Ballots containing two crosses, one on the line above the first name and one on the line above the second name, valid for the two first named candidates.

(2)—Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments, valid for the first named candidate.

(3)—Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment.

(4)—Ballots marked in the proper compartments thus *Y*.

The following ballots were held invalid:

(1)—Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side.

(2)—Ballots marked with an *x* instead of a cross.

On a recount before the County Court Judge, *J.*, the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling

*PRESENT—Sir William J. Ritchie, Knight, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

1883

JENKINS
v.
BRECKEN.

districts, in which the appellant had polled only 331 votes and the respondent, *B.*, 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot. On appeal to the Supreme Court of *P. E. Island*, it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice *Peters* held that the ballots of the said three polls ought to be counted and did count them. Thereupon *J.* appealed to the Supreme Court of Canada, and it was

Held,—Affirming the judgment of Mr. Justice *Peters*, that in the present case the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters, and the neglect of the deputy returning officers to put their initials on the back of these ballot papers, not having affected the result of the election, or caused substantial injustice, did not invalidate the election. (The decision in the *Monck* Election Case commented on and approved of (1).

In this case *J.*, the appellant, claimed under sec. 66 of 37 *Vic.*, ch. 10, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, and fyled no counter petition,and did not otherwise comply with the provisions of 37 *Vic.*, ch. 10, The Dominion Controverted Elections Act.

Held,—That sec. 66 of 37 *Vic.*, ch. 10, only applies to cases of recriminatory charges and not to a case where neither of the parties or their agents are charged with doing any wrongful act.

Quœre,—Whether the County Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of sec. 56 37 *Vic.* ch. 10, at the time of the counting of the votes by the deputy returning officer.

APPEAL from a judgment of Mr. Justice *Peters*, of the Supreme Court of Judicature for the province of *Prince Edward Island*, declaring that the petitioner, *F. De St. Croix Brecken*, in the election petition against the return of *Theophilus Jenkins*, as the member elect representing *Queen's* county, *Prince Edward Island*, in

(1) Hodgins Elec. Cases, 725

the House of Commons of the Dominion of *Canada*, was the duly elected member of the Dominion Parliament for said *Queen's* county.

The election was held on the 20th of June, 1882. At the election the candidates were the petitioner and respondent, who ran together as the liberal-conservative candidates, and *Louis Henry Davies* and *David Laird*, who ran as the opposition candidates.

On the 27th day of June, the returning officer added up the votes and declared the result of the poll, as follows:—

Petitioner, (*Brecken*) 3472
Davies 3516
Respondent, (*Jenkins*)..... 3462
Laird..... 3062

And Messrs. *Davies* and *Brecken* were by him returned elected.

A recount was then applied for by the said *John T. Jenkins*, and held before a county court judge, and on such recount the said judge certified the result of poll, as follows:—

Davies..... 3164
Jenkins..... 3122
Brecken..... 3120
Laird..... 2759

The county court judge, in arriving at his conclusion, struck out all the ballots cast at three polling districts, namely, at districts Nos. 23, 27 and 33, at which districts the total number of votes cast were as follows:—

Brecken..... 345
Davies..... 334
Jenkins..... 331
Laird..... 289

The ground of rejecting these votes, was that the deputy returning officer had neglected to place his initials upon the back of the ballots. To this ruling

1883

JENKINS v. BRECKEN.

and certain other rulings on the recount, which are hereafter mentioned, the petitioner objected, and accordingly filed this petition.

The cause was tried before Mr. Justice *Peters*, who declared that the petitioner (present respondent) was duly elected for *Queen's* county at said election.

On a scrutiny of the votes, and on appeal to the Supreme Court, there were objections taken to several ballots.

The first ballot objected to by the appellant was one marked thus:—

Election for the Electoral District of Queen's County, June 20th, 1882.

I.	**BRECKEN.**  Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.**  Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

This ballot was allowed by Mr. Justice *Peters*, and his ruling was affirmed on appeal.

The next ballot objected to was marked thus:

Election for the Electoral District of Queen's County, June 20th, 1882.

I.	**BRECKEN.** X Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** X John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

First cross allowed for Mr. *Brecken*, second cross disallowed.

1883

JENKINS v. BRECKEN.

The next ballot was marked thus:

Election for the Electoral District of Queen's County, June 20th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

Allowed for Mr. *Jenkins*.

The next ballot was marked thus, with the slight pencil straight line in the first division :

Election for the Electoral District of Queen's County, June 29th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.	1
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister.	X
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon.	X
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.	

Disallowed by Mr. Justice *Peters* and allowed on appeal for Mr. *Jenkins*.

1883

JENKINS v. BRECKEN.

The next ballot was marked thus:

Election for the Electoral District of Queen's County, June 29th, 1882.

I.	**BRECKEN.** Frederick de Saint Croix Brecken, of Charlottetown, County of Queen's, Barrister.
II.	**DAVIES.** Louis Henry Davies, of Charlottetown, County of Queen's, Barrister. X
III.	**JENKINS.** John Theophilus Jenkins, of Charlottetown, County of Queen's, Physician and Surgeon. X
IV.	**LAIRD.** David Laird, of Charlottetown, County of Queen's, Journalist.

Disallowed by Mr. Justice *Peters* and his ruling affirmed.

The next ballot, the × was found to be on the back of the ballot corresponding with the division containing Mr. *Jenkins*' name and was disallowed.

The other material facts of the case and objections raised sufficiently appear in the judgments hereinafter given.

Mr. *Lash*, Q.C., for appellant, and Mr. *Hector Cameron*, Q.C., for respondent.

The main arguments of counsel and cases cited are fully set out in the judgments.

1883

JENKINS v. BRECKEN.

RITCHIE, C. J. :—

This was an appeal from the decision of Mr. Justice *Peters*, on the petition of *Frederick de St. Croix Brecken*, deciding against the return of *John Theophilus Jenkins*, as a member of the House of Commons, for the electoral district of *Queen's* County, in the Province of *Prince Edward Island*.

The candidates at the election were the respondent, *Louis Henry Davies*, the appellant and *David Laird*.

The Returning Officer declared the respondent and *Louis Henry Davies* elected and declared the total number of votes polled for each candidate to be as follows:—The respondent, 3,472; *Louis Henry Davies*, 3,516; the appellant, 3,462; *David Laird*, 3,052.

The appellant demanded a recount of votes before the Judge of the County Court; a recount was held before the said judge, and the result of such recount is as follows:—The respondent, 3,120; *Louis Henry Davies*, 3,264; the appellant, 3,122; *David Laird*, 2,759.

Thereupon the said appellant and *Louis Henry Davies* were declared duly elected to represent the said county in the House of Commons.

The County Court Judge, in arriving at his conclusion, struck out all the ballots cast at three polling districts, namely, at districts Nos. 23, 27 and 33, at which districts the total number of votes cast were as follows:—*Brecken*, 345; *Davies*, 334; *Jenkins*, 331; *Laird*, 289.

The ground of rejecting these votes was, that the deputy returning officer had neglected to place his initials upon the back of the ballots, he having by mistake placed them on the counterfoil. To this ruling and certain other rulings on the recount the petitioner objected, and accordingly filed this petition.

The appellant contended at the trial and still contends that the rules and provisions contained in the

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

act were not complied with and that mistakes were made which did or might affect the result of the election.

Mr. Justice *Peters* ruled that the ballots at said three districts ought to be counted and did count them,

The appellant filed objections and recriminatory case under 66th section of "The Dominion Controverted Elections Act, 1874," which are on fyle.

By 41 *Vic.*, ch. 6, sec. 43 of 37 *Vic.*, ch. 9 is repealed and the following substituted :—

Each elector, being introduced one at a time, for each compartment, into the room where the poll is held, shall declare his name, surname and addition, which shall be entered or recorded in the voters' list to be kept for that purpose by the poll clerk; and if the same be found on the list of electors for the polling district of such polling station, he shall receive from the deputy returning officer a ballot paper, on the back of which such deputy returning officer shall have previously put his initials, so placed that when the ballot is folded they can be seen without opening it; and on the counterfoil to which he shall have placed a number corresponding to that opposite the voter's name on the voter's list.

The 45 section of the same act is also repealed and the following substituted :—

The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments of the polling station, and there mark his ballot paper, making a cross with a pencil on any part of the ballot paper within the division (or if there be more than one to be elected, within the divisions) containing the name (or names) of the candidate (or candidates) for whom he intends to vote, and shall then fold up such ballot paper so that the initials on the back can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it, ascertain by examining his initials and the number on the counterfoil, that it is the same that he furnished to the elector, and shall first detach and destroy the counterfoil, and shall then immediately, and in the presence of the elector, place the ballot paper in the ballot box.

It is clear from the substituted section 45 of the Election Act, 1874, that the sole object of the initialling of the ballot is to enable the deputy returning officer

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

to ascertain, by examining his initials on the ballot and the No. on the counterfoil, that the ballot is the same that he furnished to the elector; this is to all intents and purposes as practically effected when the ballot paper with the counterfoil attached is handed to him and he examines the number and his initials upon the counterfoil as if the initials had been on the ballot paper, for the ballot paper and counterfoil are but, in fact, one paper, until after such examination he detaches and destroys the counterfoil. In this case, having by such examination established beyond the possibility of a doubt that the paper handed to him by the voter was the identical paper furnished by him to the elector, he then detached and destroyed the counterfoil, and immediately, and in the presence of the elector, placed the ballot paper in the ballot box, whereby all that the legislature intended to accomplish was effected beyond all question or doubt, viz.:—that the elector had handed back to the officer the very paper which the officer had furnished to the elector. The requirements of the statute having been substantially fulfilled, upon what principle can we, in the absence of any enactment declaring that misplacing his initials by the officer, though working no injury whatever, shall destroy the vote, punish by disfranchisement the voter who, so far as he is concerned, has been guilty of no violation of the law, but has marked his ballot and returned it to the officer as the law directs, and the officer has the means of identifying the ballot as effectually to all intents and purposes as if the initials had been on the ballot itself?

But we are not left to inference to discover the duty of the deputy returning officer in counting the ballots. The substituted section 55 as to the counting of the votes by the deputy returning officer, and on proceeding to count the number of votes given for each ca

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

didate, declaring what ballot papers he is to reject, enacts that "he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified." Does not this enumeration contain all the grounds which would justify a rejection of a ballot, and is not the maxim we find so often made applicable to the interpretation of statutes, viz.: *expressio unius est exclusio alterius* very applicable; for the grounds of rejection named are not put by way of example; but we have in addition this express language showing that the enumerated ballots only are to be rejected. In sec. 10, following the sub-sec. 55, are these words, "the other ballots being counted," &c. How is it possible the deputy returning officer could legally reject ballot papers which he had the means of identifying beyond a peradventure as having been supplied by him to the voters; which he has identified, and which he swears were the very ballot papers he had actually supplied to the electors respectively, and which they had marked, and from which he had, after such identification, detached the counterfoil, and which immediately, in the presence of the elector, he had placed in the ballot box?

And by sub-section 4 of section 14 of the act 41 *Vic.*, ch. 6, the judge is to proceed to recount the vote according to the rule set forth in sec. 55 of the Dominion Elections Act, 1874, as amended by 41 *Vic.*, ch. 6.

Again, where do we find in the act the slightest indication that the mere fact of non-initialling shall absolutely and arbitrarily destroy the vote? On the contrary have we not section 80 of 37 *Vic.*, ch. 9 which, though held in *Woodward* v. *Sarsons* (1) to apply to the conducting of the election generally, may serve as a guide

(1) L. R. 10 C. P. 733.

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

to the construction which ought to be placed on the act in reference to initialling. The section reads thus:

No election shall be declared invalid by reason of a non-compliance with the rules contained in this act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the person signing a nomination paper received by the returning officer, under the provisions of this act, or of any mistake in the use of the forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election.

Is not this misplacing of the initials merely a non-compliance with the rules contained in the act as to the taking of the poll, or a mistake in the use of the form contained in the schedules of the act? And does it not appear beyond all question or doubt that as regards those uninitialled ballots, notwithstanding this non-compliance or mistake, the election was conducted, so far as initialling is concerned, in accordance with the principle laid down in the act in reference thereto?

What was that principle, but that the deputy returning officer should have the means of identifying the ballot returned to him by the voter as the ballot furnished by him to the voter, and that he should not count any ballot not supplied by him? And is it not clear that notwithstanding his non-compliance or mistake he had the means of identification and did identify the ballot by means of his initials, and in fact did not count any ballots not supplied by him? Has not the taking of the poll and the counting of the ballots been to all intents and purposes practically and substantially on the principle laid down in the act? And is it not equally clear that the non-compliance of the deputy returning officer with the strict provisions of the act and the mistake of putting the initials on the counterfoil instead of the ballot did not in this election in the most remote degree affect the result of the election?

1883

JENKINS v. BRECKEN, Ritchie, C.J.

I do not wish to be understood that under no circumstances will the non-initialling of the ballots destroy the vote; on the contrary, if there are more ballots found in the ballot box than persons on the deputy returning officer's list, as polled, or if the returning officer is not enabled to identify them as having been furnished by him, or there is any evidence of fraud or collusion, or the irregularity complained of has in any way affected the result of the election, it is right enough that they should not be counted: but the evidence before us shows the very reverse to have been the case.

Kelly, deputy returning officer to district number twenty-three, says:

This is the poll book which I kept for this district; it was sent by ballot box by the sheriff. I took the oaths contained in it. I have put down the names, occupation and place of residence. I opened and examined the ballot box on opening poll in the morning. The candidates were all represented by agents. I emptied the box in the presence of agents, then locked the box and kept the key. I counted the ballot box in presence of agents at close of poll. I counted the votes in presence of agents. I put the ballot papers in envelopes (No. 1) *Brecken & Davies.* This is my writing on the back of envelope (No. 2); this is the envelope in which I put the ballots marked for *Brecken* and *Jenkins* (No. 3) marked 1 for *Davies* and *Jenkins*, 1 for *Laird* and *Jenkins* (No. 4.) Three disputed papers not counted, one voter made cross on back of ballot paper and two wrote their names instead of cross (No. 5.) Forty-four votes, forty-three marked for *Laird* and *Davies*, one for *Davies* alone. I counted the number of unused ballots and of rejected; none spoiled. I made up a return, and this is it. I and Poll Clerk swore to it. I gave each candidate a statement similar to this; kept one myself. I put this statement, the poll book and the ballots both used and unused into the box, locked and sealed the box and delivered it in Sheriff's office. I did not initial any of the backs of the ballots. When a voter asked for a ballot I put my initials and a number corresponding with the voter's name in the book on the counterfoil. I delivered that ballot to the voter with the counterfoil on it and with my initials and No. on the counterfoil. The voter then took it into the room, and when he brought it out I would take the ballot from him, I would look at my initials and the counterfoil then annexed, to see it was the same ballot I had given to him, and then I tore off the

counterfoil in the presence of the voter and then put ballot in box and destroyed the counterfoil. I did same with every ballot and every vote, and I looked when it was right back at every counterfoil to see that initials were there. I never separated the counterfoil until I had looked at my initials. No ballots were put in box except what I put in. I think it impossible that a ballot could be put in without my knowledge. I totted up the votes and the number of votes in the poll book agreed with the number of ballots found in the box. There was no objection made to the ballots on the ground that they were not initialled on the back. At the polling place there were three ballots disputed. These are they. I rejected them and they were not counted. I don't think it probable there was any ballot found in the box that I had not supplied.

Alexander Home—Deputy returning officer for district number 33, at the Engine House, in *Charlottetown*:

This is the poll book kept by me. I was sworn. It contains the name, occupation and residence of the voters. This is my signature to the book. The candidates were represented each by two agents. They were there all day, I examined the ballot box in the morning before poll opened in the present of the agents of all parties, nothing in them, then I locked it and kept the key. I remained in polling place all day. On poll closing I opened and examined box in presence of the agent. I counted the votes and made a return and swore to it. I gave a certificate to each party the same as this produced and I kept a copy. *Donald McKinnon* was poll clerk. I put all the unused ballots in envelopes and the writing on them is that of my poll clerk. I rejected four ballots, (these are they uninitialled by me). After adding up the ballots, I ascertained that the number found in the box corresponded with the number in the book, I then put the poll in the box and sealed the box and gave it to the sheriff. My initials are not on any of the ballots. A voter came in, I wrote his name, occupation and residence. As soon as poll clerk had that down I numbered the ballots on the counterfoil, according to number in the book. I numbered and initialled it on the face of the counterfoil. I folded it so that I could see the number and initials without seeing the face of the ballot, and when he returned it I tore that off, but before doing so I satisfied myself that that was the ballot I had given to the voter. I then put the ballot in the box and threw the counterfoil on the floor. I did this in every case. *There was no objection made by the agents that day, they could see the ballots put in.* I don't think it could be possible that any ballots could get in except what I put in. None could be taken out. If any were put in, it could not agree with the poll book.

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

Peter Burke:

I was deputy returning officer, district number twenty-seven. My initials are not on the back of the ballots. I initialled and numbered them on the counterfoil in every case before I delivered them to the voters. When they brought ballots back, I looked at my numbers and initials. I tore off the counterfoil and destroyed it, I satisfied myself in every case that the paper was the one I delivered to voter. I kept the ballot boxes under my own charge. I delivered them to the deputy sheriff. The number of ballots agreed with the number of voters.

There is no way in which I can identify the ballots. I swear that no ballots were put into the box but what passed through my hands. I initialled the ballots on the back of counterfoil. I won't be certain which side I initialled them, whether back or face. There was no official mark on the ballot after the counterfoil was taken off. I covered the box with paper and tied it round with tape and sealed it. I also enclosed the key in an envelope addressed to returning officer. No one could drop a ballot into the box, when I gave it up, without removing paper round the box and breaking seal. [Witness shews how he folded the ballot when he delivered it to the voter.] When I recovered it back from the voter, I tore off the counterfoil but did not open it or see inside of it.

It is probable that another ballot might not have been inside, I think it could not.

The evidence of these witnesses is uncontradicted. Their credit stands not only unassailed, but all evidence of fraud or wilful misconduct, either on the part of the returning officers or the candidates or their agents, is negatived, and any mistake or irregularity is admittedly attributable solely to mistake or inadvertence on the part of the election officers.

No doubt it is the duty of all officers engaged in the holding of an election to inform themselves fully of the provisions of the statutes under which they are acting and to be most careful strictly to comply with all requirements of the law, but though they do not do so it by no means follows all and every error they may commit or mistakes they may make necessarily invalidate the election and disfranchise the electors, though under circumstances such errors or mistakes may have such

effect, but for neglect of duty the statute, by section 108, prescribes a penalty in these words:—

> Any returning officer, deputy returning officer, election clerk or poll clerk, who refuses or neglects to perform any of the obligations or formalities required of him by this act, shall for each such refusal or neglect forfeit the sum of $200 to any person suing for the same.

Under section 66 the respondent seeks to have the election invalidated by reason of the returning officers not having properly regulated the districts as to numbers of voters, not having supplied the deputy returning officer in certain districts with a sufficient number of ballot papers, and not having in one district provided sufficient accommodation in the polling booths.

One cannot help being struck with the peculiarly anomalous, inconsistent and unreasonable position which, through his counsel, the respondent has placed himself in by his contention in this matter.

He accepts the return which gives him a majority of votes, takes his seat in Parliament as a duly elected member, and when his right to hold the seat is attacked urges on this court to adjudge that at a legal election, regularly and properly held, he was elected by a majority of the electors, and that the majority being so in his favor he is lawfully entitled to hold the seat he now occupies, but with the same breath he says :—if you cannot find the majority in my favor, then the whole election is irregular, illegal and void, and must be set aside ; so that the validity or invalidity according to his contention is made to depend upon his having or not having a majority of votes ; in other words he says through his counsel: "If you find I have a majority of votes it's a right good election and should not be disturbed, but if you find Mr. *Brecken* has the majority it's a dreadfully bad election by reason of divers illegalities and irregularities, and forsooth, in the public interests should not be allowed to stand." In the

1883

JENKINS v. BRECKEN.

Ritchie, C.J.

meantime, bad as this respondent contends the election is, great as is the public exigency, when he has not the majority, that it should be set aside, he finds it a good enough election to enable him to take his seat in Parliament and make laws for those unfortunate electors who have by these illegalities, mistakes, or irregularities of the returning officers, been prevented from legally electing their members.

But this contention cannot prevail. It shocks common sense. If he wished to attack this election he should have attacked it by petition, depositing his $1,000 as security, when all the candidates at the election would be respondents, as would the returning officer whose conduct is complained of, as provided by section 64, which is as follows:—

> Whenever any election petition complains of the conduct of any returning officer, such returning officer shall, for all the purposes of this act, except the admission of respondents in his place, be deemed to be a respondent.

But he claims the right to do this under sec. 66, but this section does not, in my opinion, give him any such right to attack the election on grounds which, if sustained, must make the election void *in toto*, and this, too, without the candidate whose election is not impeached, and without the returning officer whose conduct is complained of, and whose misdoings it is now contended avoids the election, being made parties.

As I read, sec. 66, which is as follows:—

> On the trial of a petition under this act, complaining of an undue return and claiming the seat for some person, the respondent may give evidence to show that the election of such person was undue, in the same manner as if he had presented a petition complaining of such election—

it only enables the respondent to show that the election of the person claiming the seat is undue as for corrupt or improper practices by himself.

Even if this view is incorrect and the respondent

could attack the election on the ground of irregularities by the returning officer, the respondent has not, in my opinion, on the facts of the case shown that this was not substantially an election by ballot, or that the constituency had not a fair and free opportunity of electing the candidate which the majority might prefer, or that there is any reasonable ground for believing that a majority by reason of the alleged irregularities might have been prevented from electing the candidates they preferred, nor that such irregularities affected the result of the election.

I express no opinion as to the necessity of objections to ballots being raised at the time of the count by the deputy returning officer under sec. 56, which is as follows:—

> The deputy returning officer shall take a note of any objection made by any candidate, his agent or any elector present, to any ballot paper found in the ballot box, and shall decide any question arising out of the objection; and the decision of such deputy returning officer shall be final, subject only to reversal on petition questioning the election or return.

The legislature seems to have been very particular to provide that the candidates or their agents should be present, or in their absence that the electors should be represented, and the provision seems to contemplate that matters in reference to the ballots should be then finally settled. Whether any such objection afterwards made is not too late, is a question, in the view I take, there is no necessity for investigating or settling; should the point hereafter arise in a case to render its determination necessary, it will, in my opinion, be worthy of serious consideration.

The appeal is dismissed with costs in this court, and in the court below, and a certificate will be issued in accordance with the provisions of the statute that *Frederick de St. Croix Brecken* has been duly elected a member of the House of Commons for the electoral dis-

1883

JENKINS v. BRECKEN.

trict of *Queen's* county, in the province of *Prince Edward Island.*

STRONG, J.:—

By the section which the amending act of 1878 substitutes for the 55th section of the original act of 1874, the ballots which the deputy returning officer is to reject are distinctly specified, and it is enacted that, "he shall reject all ballots which have not been supplied by himself."

The question arising on the scrutiny, as to the admissibility of the ballots which the deputy returning officers omitted to mark with their initials pursuant to the requirements of the substituted sections 43 and 45, must, it seems to me, depend entirely on the construction to be given to this provision of section 55.

It is to be observed that the words of the statute are, not that ballot papers not marked with the officer's initials are to be rejected, but only those which appear not to have been supplied by him.

In the present case it has been established to the satisfaction of the judge who tried the petition—and the evidence was ample to justify his finding—that the uninitialled ballot papers had all been supplied by the deputy returning officers. The very words of the statute have thus been complied with.

It seems plain, therefore, that we cannot now reject the uninitialled papers which have been counted by the officers who supplied them, merely because one of the directory provisions of the act has not been followed, and thus disfranchise a large body of electors in consequence of omissions arising from the mistakes of the officers.

Principle and authority both require that we should hold the requirements of initialling to be merely directory and not mandatory, and that in cases like the

present, where the officers are able to establish beyond a doubt that no ballots have been deposited which were not furnished by them, the election court, on a scrutiny, must hold they would not have been justified in rejecting ballots not initialled.

The act must be regarded as only requiring that it should appear to the satisfaction of the deputy returning officer that no ballots other than those supplied by him had been used by voters, and the initialling must be taken to have been a device to secure that end, and not to exclude the officers from identifying the ballots in another way, as they have done in the present case. This was the determination of Vice-Chancellor *Blake* in the *Monk* case, where that learned judge determined this identical point (1); and I think that decision affords us a sound and safe precedent to be followed in the present appeal. Then the 80th section, although I am of opinion it has no direct application to the question of rejecting or admitting votes on a scrutiny, but applies only to the case of an election impeached as being altogether void for irregularity, yet indirectly confirms the construction which I place on section 55, as showing that the provision requiring initialling is not absolute but directory only.

As regards the avoidance of the election for irregularities, either as respects the omissions to initial the ballots or on the other grounds urged, no case raising such a complaint is before us on which we can pronounce a judgment.

The petition was filed by Mr. *Brecken* claiming the seat as having a majority of the legal votes. If the appellant desired to raise this question as to the validity of the election he should have presented a petition himself praying its avoidance, but this he has not done.

(1) Hodgins' Election cases, 725.

1883

JENKINS v. BRECKEN.

Strong, J.

The 66th section of the act of 1874 manifestly does not enable him to impugn the election as wholly void and irregular, without a petition; it merely enables a respondent to a petition, by which the seat is claimed, to recriminate, by shewing that even if the petitioner should prove that he has a majority, he is, by reason of the illegal conduct of himself or his agents, disentitled to have the seat awarded to him

I think the appeal must be dismissed with costs, and a certificate granted that Mr. *Brecken* is entitled to the seat.

FOURNIER, J.:

Le résultat du scrutin devant cette cour, comme devant l'honorable juge *Peters* en première instance, a donné une majorité en faveur de l'Intimé.

L'Appelant, qui n'a pas jugé à propos de produire une réponse à la pétition, a cependant donné avis, en vertu de la section 66 de l'Acte des élections contestées, qu'il demanderait la nullité de l'élection pour deux raisons :

1o. Parce que dans trois bureaux de votation les voteurs n'ont pu voter en conséquence de l'insuffisance du nombre de bulletins dont le député officier-rapporteur avait été pourvu ; et que dans un autre, le no. 36, il n'y avait pas l'espace suffisant pour permettre aux voteurs d'arriver au bureau de votation, et qu'il y avait plus de deux cents voteurs dans cette division.

2o. Parce que dans trois bureaux de votation les bulletins ne portaient pas les initiales des députés officiers-rapporteurs. Ces députés officiers-rapporteurs ayant, par erreur, mis leurs initiales et le no. du votant sur le talon du bulletin, il s'est trouvé environ 675 bulletins ne portant pas d'initiales. Dans le décompte fait par le juge de comté, tous les bulletins ont été rejetés et l'Appelant s'est trouvé avoir une majorité de quinze

votes. Un rapport a été fait en sa faveur et il a pris possession de son siége. L'Intimé ayant produit une pétition contre le retour de l'Appelant, l'honorable juge *Peters* appelé à décidé cette contestation a admis la validité des bulletins retranchés. Cette décision a eu l'effet de rendre la majorité à l'Intimé.

Quant aux moyens de nullité invoqués dans la première question, on doit se demander d'abord, si l'Appelant a bien le droit de demander la nullité de l'élection en vertu de laquelle il siége actuellement. Peut-il en même temps affirmer la validité et la nullité de l'élection ? Peut-il en loi prendre cette position contradictoire de considérer l'élection comme légale pour lui et comme illégale s'il doit faire place à son adversaire ? Il ne le peut certainement pas d'après les nombreuses autorités citées dans le jugement de l'honorable juge *Peters*. En outre, un examen sérieux de la preuve démontre la futilité de ces moyens de nullité. En réalité, il est bien prouvé que personne n'a été privé du droit,de voter ni par manque de bulletins, ni par défaut d'accommodation dans les bureaux de votation.

Mais, était-il bien nécessaire pour l'honorable juge d'entrer dans l'examen de tous ces détails ? L'Appelant n'ayant pas jugé à propos de faire une contestation régulière de l'élection, pouvait-il en se prévalant seulement de la section 66 de l'Acte des élections contestées demander la nullité de l'élection ? Quel droit lui confère cette section ?

The Respondent may give evidence to show that the election of such person (claiming the seat) was undue, in the same manner as if he had presented a petition complaining of such election.

Cette section s'applique aux accusations récriminatoires que le membre siégeant peut faire pour démontrer non pas la nullité de l'élection d'une manière générale, mais faire voir que pour des motifs particuliers, corruption ou autres, le rapport (*return*) de son adversaire serait illégal et demander aussi sa déqualification. Ici

1883

JENKINS v. BRECKEN.

Fournier, J.

l'Appelant ne demande pas seulement à faire déclarer que le rapport de l'Intimé serait illégal, mais il demande la nullité de l'élection ; il se trouve à attaquer par son procédé non-seulement le droit de l'Intimé mais aussi la légalité du rapport de M. *Davies*, membre siégeant pour la même division, sans que ce dernier ait été mis en cause. Pour arriver à ce résultat il aurait été nécessaire de se conformer à toutes les dispositions de l'Acte concernant les élections contestées. Il fallait faire un dépôt de mille dollars, mettre en cause les parties intéressées et donner les différents avis requis par le statut ainsi qu'il a été décidé dans la cause de *Sommerville* et *Laflamme* (1) et *Devlin vs. Ryan* (2). Rien de tout cela n'a été fait. Toute cette partie de la preuve, qui n'avait pour but que de prouver la nullité de l'élection et non pas seulement la nullité du rapport de l'Intimé, a été reçu illégalement. En conséquence il n'y a pas lieu de décider si les moyens invoqués auraient été suffisants pour faire annuler l'élection. Cependant comme la preuve en a été faite, quoique illégalement, je n'hésite pas à dire que je partage entièrement l'opinion de l'honorable juge *Peters* sur son insuffisance.

Quant à la question de l'omission des initiales, elle a déjà été décidée dans l'élection de *Monk* par l'honorable ex-vice-chancelier d'*Ontario* (3). Je concours dans les raisonnements sur lesquels cette décision est fondée Bien que la loi électorale ait été amendée depuis, elle n'a pas dispensé, cependant, de la formalité obligeant l'officier-rapporteur à mettre ses initiales sur chaque bulletin. Les députés officiers-rapporteurs qui ont présidé aux polls où cette formalité a été omise ont tous été entendus comme témoins. Chacun d'eux a établi de la manière la plus positive que les bulletins trouvés dans la boîte du scrutin à la clôture de la votation était identi-

(1) 2 Can. Sup. C. R. 216. (2) 20 L. C. Jur. 77.
(3) Hodgins' Elec. R. 725.

quement ceux qu'ils y avaient respectivement déposés eux-mêmes. Ils ont aussi déclaré que personne n'a pu y introduire sans leur connaissance d'autres bulletins que ceux qu'ils y ont mis eux-mêmes. Aucune circonstance ne fait supposer qu'il y a eu fraude ou intention d'éluder la loi. Cette omission n'est due qu'à une erreur accidentelle. Il est vrai que la loi dit dans la forme impérative :

The voter shall receive from the Deputy Returning Officer a ballot paper, on the back of which such Deputy Returning Officer shall have previously put his initials.

Le devoir de l'officier-rapporteur est clair ; mais l'omission de sa part de se conformer à la disposition de la loi emporte-t-elle nullité du vote ? Si telle était l'intention de la loi, ce serait laisser le sort de la plupart des électeurs à la merci de l'impénitie, de la négligence, ou même de la mauvaise foi des députées officier-rapporteurs. La loi n'ayant pas prononcé la nullité on ne doit pas conclure qu'elle résulte de la forme du langage adopté. Les dispositions de cette nature adressées aux officiers publics sont généralement considérées comme directoires (*directory*) d'après l'autorité de *Maxwell* :

When the provisions of a statute relate to the performance of a public duty they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed or directory only. The neglect of them may be punishable indeed, but it does not *affect* the *validity* of the act done in disregard of them * * * It is no impediment to this construction that there is no remedy for non-compliance with the direction (1).

D'ailleurs la loi électorale, section 80, contient au sujet des irrégularités qui ne peuvent manquer d'avoir lieu en matière d'élections, une disposition formelle qui doit nous guider dans l'appréciation des effets de ces irrégularités.

No election shall be declared invalid by reason of a non-com-

(1) Maxwell on Statutes, p. 337.

1883

JENKINS v. BRECKEN.

Fournier, J.

pliance with the rules contained in this Act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the Returning Officer, under the provisions of this Act, or of any mistake in the use of the forms contained in the schedules to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.

Il est évident d'après la preuve en cette cause que l'élection dont il s'agit a été faite conformément aux principes contenus dans l'Acte des élections et que les irrégularités constatées n'ont pas affecté le résultat. En faisant application de cette section on doit donc déclarer que l'élection a été légalement faite.

En lisant la section 10 de l'acte amendé de 1878, la question ne fait plus difficulté. La section 55 de l'acte de 1874 qu'elle amende dit quels sont les votes que l'officier-rapporteur doit rejeter lors du dépouillement du scrutin.

In doing so he shall reject all ballot papers which have not been supplied by the Deputy Returning Officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark, by which the voter can be identified.

Nous avons la preuve ici que les bulletins sont ceux fournis par les députés officiers-rapporteurs; et tous ceux qui ont été admis par le jugement de première instance ne comportent aucune des causes de nullité mentionnées dans cette clause, si ce n'est ceux dont il a été disposé conformément à la seconde partie de cette clause concernant les bulletins qui ne doivent pas être comptés.

Pour ces raisons et pour celles développées dans le jugement si complet de l'honorable juge *Peters*, je suis d'avis que l'Intimé doit être déclaré légalement élu au lieu et place de l'Appelant. Le tout avec dépens.

1883

JENKINS v. BRECKEN.

HENRY, J. :—

The decision of the question of the validity of the ballots given at three of the polls, in the electoral district in question, having for its effect the seating of the respondent or of the appellant, it becomes very important to see whether the statute authorizes the rejection of these ballots, and to do so we have to look to the different clauses of the statute The 43rd section of the act 37 *Vic.*, ch. 9 provides that electors "shall receive from the deputy returning officer a ballot paper on which such deputy returning officer shall have previously put his initials." In the first place I may say that that portion of the provision of the law has not been complied with. The returning officer, therefore, handed to each elector a paper not authorized by law. The question, therefore, is of very great importance to decide whether the returning officer can pay disrespect to the law and put in a paper which is not in strict compliance with its provisions. If we say he can in that respect, why not in another, and the result would be the virtually giving to the deputy returning officer the power to do what he pleased. Was it then the intention of the legislature to place such a power in the hands of the deputy returning officers? The legislature, as I take it, must have had some object in making that provision, and must have had some good reason, some valid reason, for doing so. Now, in looking for the reason, we must first ascertain what the law is in regard to the Dominion elections. As I have already stated, the deputy returning officer must provide a ballot paper on which he shall have previously put his initials. He is but a ministerial officer and has been given no discretion—as to the placing of his initials on the ballot paper—to carry out or to violate the act at his pleasure, and by the judgment now

1883

JENKINS v. BRECKEN.

Henry, J.

appealed from it is shown he did not initial the ballot papers in question, there is therefore nothing but his testimony to show the identity and validity of the ballot papers. Was it the intention of the legislature that this should be?

If we turn to section 55 as amended it will be found that after the close of the polls it is the duty of the deputy returning officer when he counts the ballots to "reject *all* ballot papers which have not been supplied by the deputy returning officer." But what has he got to guide him in his decision? He finds no mark on the ballot papers to identify them. Has not the legislature, in order to prevent ballot papers being tampered with, directed that those which have not been supplied by the returning officers shall be rejected? And here the deputy returning officer could not identify them after once passing from his sight. If a recount takes place, under 41 *Vic.*, ch. 6, section 14, sub-section 4, the county judge is called up to make a recount, he has simply to do so, and when he finds ballot papers not initialled, how can he say they are those supplied by the deputy returning officer? He is bound to reject all ballots not supplied by the deputy returning officer, and I think, with the law before him, would be justified in rejecting all uninitialled ballots. He, too, is but a ministerial officer, and not entitled to take evidence. The only one who could testify at all would be the deputy returning officer, but how could he, days or weeks after parting with the possession of them, identify the ballots without any private mark to distinguish them? Besides, did the legislature intend to leave the whole question of the regularity of the votes to depend upon the statements to be made by the deputy returning officer? I confess that I find it difficult to come to any such conclusion. I have also some difficulty in arriving at the

conclusion that the non-compliance with mere formalities should avoid an election ; but then, on the other hand, it is seen that the security provided in this respect by the legislature is not found. We have section 80, which declares that mistakes of form only are not fatal.

[The learned judge then read the section.]

I think, however, that in the present case there is more than a mistake as to form. Besides the reference to rules in this section only applies to the rules in the act of 1874. When I look at these rules there is not one of them that refers to this question. Then as to mistake of forms, there is no mistake in the forms complained of here.

I am reasoning it out to show there is a difficulty in coming to a conclusion either one way or the other. The petitioner in this case has received a clear majority of votes, and unless the act has made it very clear that this majority is illegal, I would be reluctant to so declare. It is not in the province of the court to unseat a member for mere irregularities in carrying out the provisions of the law, which do not affect the result, unless the court can declare that the provisions are mandatory, and that the error on the part of the deputy returning officer shall, therefore, have the effect of avoiding an election.

The consequences of the decision of this court will be very serious, if it were not in the power of the legislature to clear up the doubt by further legislation, as no returning officer will hereafter be required to initial any of the ballot papers. With section 80 still in force, I shall not interpose any decision of mine to affect the judgment of the majority of this court, but shall content myself by expressing my doubts as to the correctness of it.

As to the other point, I think it was the duty of the sitting member, if he did not wish to allow the respon-

1883

JENKINS v. BRECKEN.

Henry, J.

dent to take the seat, to resign his own seat, and file a petition setting forth grounds to avoid the whole election. Then all parties interested would have been heard, which has not been the case here. They are not here, and this court cannot take upon itself to decide upon the rights of parties who have not been brought before it.

I concur, therefore, with my brother judges, in giving the seat to the respondent, expressing doubts as I have before stated, as to the powers of the deputy returning officers.

I hope the matter will be settled by the legislature, in order that these occurrences may not take place again, and that the legislature will determine whether or not the legality of the ballot papers should be left entirely to depend upon the option of the deputy returning officers.

TASCHEREAU, J.:—

I am of opinion that, upon the scrutiny, the ballots not initialled should not be counted, and that the judgment of the court below, on this point, should consequently be reversed. The legislative power, with the view of providing for fair and free elections, has ordered and decreed that they should be held according to certain rules laid down in the act on the subject.

What right has the judicial power to say that these rules are not to be followed? Parliament has devised certain means by which its elections are to be regulated, and the votes of the electors are to be given and admitted. Have we the right to say that other means, in our judgment, are equally good for the same purpose, and can be legally substituted for those decreed and adopted by parliament? The court below says "yes," and rules that in virtue of section 80 of the act of 1874 it has that power. But this is a grievous error, a pal-

pable misapplication and a gross misinterpretation of this section of the statute. By its very terms this section has no application whatever to a scrutiny of the votes; but has reference purely and simply to the avoidance of the whole election. Then the section would virtually be a repeal of the most important provisions of the act, if the construction put upon it by the court below was to prevail.

Section 27, as amended by 41 *Vic.*, ch. 6, of the act, for instance, orders that the ballot shall be a printed paper. But this is not necessary, says the court below, a written paper is just as good. The names of the candidates, for another instance, are ordered to appear on the ballot paper alphabetically arranged. But this is a mere matter of form according to the court below, and, if it is not proved that any elector has been deceived by this formality not having been followed, how the names of the candidates appear on the ballots is of no importance whatever. The voter, says the act, shall make a cross within the division containing the name of the candidates for whom he intends to vote. But these are mere formalities—simple directions, entirely optional, says the court below. And so on. If the judgment appealed from was to stand, not one of the rules laid down in the statute is to be held as imperatively ordered. Yet the language of this enactment itself leads to no ambiguity. "It shall be done," says the law-giver. But, says the court below, "It need not be done." The Interpretation act vainly decrees that the word "shall" is to be construed as imperative: the court below decrees that it is not imperative.

And upon what ground does the respondent ask us to support this judgment? Virtually none, except that to reject all non-initialled ballots would, as he contends, be virtually to leave it in the power of a deputy returning officer to control the election.

1883

JENKINS v. BRECKEN.

Taschereau, J.

But it is Mr. Justice *Peters'* decision that leaves the result of the election entirely depending on the arbitrary and illegally arrived at conclusion the deputy returning officer has come to at the counting of the votes, or on his evidence before the courts when the return is questioned.

Then are courts of justice now to presume that a sworn public officer will not do his duty? Is it not the contrary that must always be presumed? It is also obvious that the deputy returning officer, if unscrupulously disposed to do so, must necessarily have it in his power, without his being obliged to resort to these means of not putting his initials on the ballot papers, to more or less control the election. And, moreover, it is clear that under the Imperial statute, from which was taken 35-36 *Vic*, ch. 33, sec. 2, the omission by the returning officer to stamp the ballot with the official mark avoids the vote. The Imperial parliament, then, did not think that to leave such a power to the returning officer was objectionable. The initials of the deputy returning officer are substituted, with us, for the official mark of the Imperial Act; why their absence from the ballot should not, with us, avoid the vote, as the absence of the official mark in England avoids it, I cannot understand.

True, it is, that the Imperial statute, in express words, says that, in such a case, the vote is void. But a special enactment of that kind in our act would, it seems to me, have been superfluous, since the act decrees that the ballot paper to be given to the voter must be one on the back of which the deputy returning officer shall have previously put his initials. But, says the respondent, section 55 of the act (as amended) enacts that the deputy returning officer shall reject only the ballots which have not been supplied by him, so that if he is otherwise satisfied that the ballot is one he supplied,

he must count it, even if not initialled by him. But this is not so: the respondent reads this section 55 without reference to the other parts of the act. It is quite clear, as said Lord *Ormidale*, in the *Wigtown* case (1), that the statute does not contemplate that there should be an investigation by the deputy returning officer, when counting the votes at the close of the poll. He has to count only the ballots that he has supplied. But how is he to ascertain whether such and such a ballot has been supplied by him? Only, and clearly so, it seems to me, by his initials on the back of such ballot. If his initials are not there, he is to treat the ballot as not supplied by him. Section 45 of the act, as amended makes this clear. The voter "shall fill up such ballot paper so that the initials on the back can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it, ascertain by examining his initials and the number upon the counterfoil, that it is the same that he furnished to the elector." Here, it is plain, there is a special order, an imperative order, to this officer not to receive the ballot paper, except after having ascertained that it bears his initials. Yet, says the court below, it is not necessary that this ballot paper should be so initialled.

According to the statute, the deputy returning officer is prohibited from receiving as a vote, any ballot not initialled. If one is offered to him, he is obliged to refuse it—if he admits it, he disobeys the law, and there is no legal vote received. The ballot not initialled is not the ballot which, according to the principles of the act, can be counted as a vote. It is a nullity—a blank paper.

Section 55, it is argued, does not authorize the deputy returning officer to reject ballots not initialled by him. This contention is, it seems to me, opposed to the very

(1) 2 O'M. & H. 215.

1883

JENKINS v. BRECKEN.

Taschereau, J.

language of that section. It enacts, in express words, that the deputy returning officer shall reject all ballot papers which have not been supplied by him.

Now, section 43 orders him not to supply the voters with any but initialed ballots. And section 45 commands him, when the voter returns the ballot to him, to ascertain first that it is initialled, and then, and then only, to put the ballot in the box. Now, when in section 55 the legislature orders him to reject all ballots not supplied by him, does this not mean that all not initialled ballots are to be rejected, and that the initialled ones only are to be counted? The statute can mean nothing else, since, in the box, under the statute itself, the initialled ballots only are those that the deputy returning officer can have supplied. All those that are not initialled he has not supplied under the terms of the act. There can be, under the act, no ballot in that box not supplied by him other than those not initialled by him. In other words, the statute contemplates that all the ballots in the box that have been supplied by the deputy returning officer shall bear his initials. And so, when it orders the deputy returning officer to reject all ballots not supplied by him, it orders him expressly to reject all ballots not initialled by him.

Then, on a re-count, the judge has also to reject all ballots which have not been supplied by the deputy returning officer (41 Vic., ch. 6, sec. 14, sub-sec. 4.) Now, how can he ascertain which have been and which have not been so supplied, otherwise than by the initials on the back? The deputy returning officer is not before him, and he does not receive any evidence. Is he not obliged, then, to reject all non-initialled ballots? Is he not bound to treat all non-initialled ballots as not having been supplied by the deputy returning officer?

The case of *Woodward* v. *Sarsons* (1), relied on by the

(1) L. R. 10 C. P. 733.

respondent, is, as I read the report, entirely adverse to his contentions. The respondent cannot rely upon that part of the remarks of Lord *Coleridge* upon the question of the avoidance of an election. We are here on the question of scrutiny simply. Then Lord *Coleridge* bases his judgment mainly on the ground that the Imperial Act, as to the rules under consideration in that case, was purely directory. I have already said that the rule as to the initialling of the ballots, in our act, is imperative. Many of the rules, which in the Imperial Act are contained in the schedules to the act and in a directory form, are with us inserted in the body of the statute, in the imperative form. For instance, how the ballot shall be marked, in the Imperial Act, is, as remarked by Lord *Coleridge*, in the directory part of the act. With us it is in the body of the act, in imperative terms. Now Lord *Coleridge* lays down the rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." To illustrate the principle he so lays down in relation to this act, Lord *Coleridge* adds that as the second section of the Imperial Act enacts that "the voter having secretly marked his vote on the paper," there is, in the act, an absolute enactment that the voter shall mark his paper secretly so that this enactment as to secrecy must be obeyed exactly. Now, how can the respondent invoke that case in his favor? Is it not clear that Lord *Coleridge's* decision is directly in the sense that what the statute has ordered must be followed exactly, whilst what the statute has merely directed is sufficiently obeyed, if obeyed substantially?

Is it not imperatively ordered, in our statute, that the ballot shall be initialled by the deputy returning officer. And, I may add, sec. 80 of our act forms also part of the Imperial Act, and in fact has been taken from it. Yet,

1883

JENKINS v. BRECKEN.

Taschereau, J.

Lord *Coleridge* did not seem to think, as the court appealed from here seems to have done, that this enactment left to the courts the arbitrary power to declare the act not applicable to all elections. But says the respondent, it would be very hard to deprive a voter of his vote for the neglect of a public officer. To this, I will quote Lord *Ormidale's* answer to a similar objection in the *Wigton* case. "No doubt," he says, "this is a hardship upon the voter in one sense, but in the 'directions as to voting' which was put up in conspicuous places at the polling booths, reference is made to the official mark, and the voter has a particular duty to perform in reference to it; that is to say, he must fold up the ballot paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is on his voting paper."

This language is entirely applicable here. With us the deputy returning officer, not the voter as in *England*, puts the ballot in the box. See *Pickering* v. *James* (1); but here, as in *England*, the directions for the guidance of the electors are posted up in the poll, sec. 28, Act of 1879. And these directions tell the voter that the initials of the deputy returning officer must be on the back of the ballot, as they in *England* inform him that the official mark must be on it. The difference between the Imperial statute and ours being that, in the Imperial statute, this enactment, as to the voter being obliged to see that the ballot paper is duly marked or initialled is in what Lord *Coleridge* calls the directory part of the statute, whilst, with us, the similar enactment is, in imperative terms, in the body of the act itself.

I may remark that besides the deputy returning officer, whose duty it is to initial the ballots, besides,

the voter who has a right to ask a legal ballot, and consequently to insist that one duly initialled be given to him, there are in the polls the candidates or their agents, who also have a right to insist that the formalities required be fulfilled, and, if need be, to call the deputy returning officer's attention to the necessity of his initials being on the back of the ballot paper. This demonstrates that, after all, the deputy returning officer, who would be disposed to wilfully neglect to initial the ballot papers, would not find it so very easy to do so.

I am of opinion to allow this appeal. Upon the scrutiny the non-initialled ballots being rejected, this would give *Jenkins* a majority of two votes. I would therefor dismiss the petition complaining of his election and return.

Upon the other part of the case, I would find it difficult to say that *Jenkins* who has been duly elected was obliged to fyle a petition. How could he when elected, complain of the return? How could he be expected to attack the very return which declares him elected, before that return was at all questioned? How could he be expected to take the anomalous position of a member of Parliament asking a Court of Justice to annul the election under which he is such member, before his said election was at all impugned? Courts of justice are to redress wrongs, but *Jenkins* had no wrong to complain of, to ask redress from, when the returning officer returned him as the member duly elected For my part, I have never heard yet of the case of a member depositing $1,000 and fyling a petition for the purpose of complaining of his own return. *Jenkins*' position here seems warranted by sections 7 and 66 of the statute (1).

(1) *Waygood vs. James*, L. R. 7 C. P. 361.

1883

JENKINS v. BRECKEN.

GWYNNE, J.:—

It is not, in my opinion, open to the sitting member to raise under the 66 sec. of the Dominion Controverted Elections Act, the objection having relation to the ballot papers having run short at some of the polling places, insufficiency of accommodation, &c. Objections of that kind, if they should prevail at all, should prevail wholly independently of a scrutiny. If the defect in the supply of ballot papers was so small as to leave no doubt that the vast majority of the electors had exercised their franchise, the objection should not, I think, be open as between two of several candidates, the votes given for whom were so even that the want of two or three ballot papers might have turned the scale in favor of the one over the other, and that therefore as to them the election should be avoided while it remained unaffected as to the other candidates elected. I think that the want of a sufficient supply of ballot papers in order to constitute a good ground for avoiding an election, should be such a defect in the supply as to justify the avoiding it altogether, and that therefore the objection is one which should be raised upon a petition expressly relying upon it, and to which all the candidates elected should be made respondents.

Upon the point as to the allowance or rejection of the uninitialled ballots, I cannot so construe the act as to give to an act passed for the purpose of securing to the electors perfect freedom from all influence in the exercise of their elective franchise, the effect of disfranchising 675 electors, not for any default of theirs, but for a mistake of the deputy returning officers in the use of a form prescribed by the act, which mistake, as appears by the evidence, did not occur with any fraudulent intent, but arose from a mere misapprehension (*bonâ fide* entertained) as to the manner in which they should perform the act which the statute directed them to perform, and had not the effect of, in any manner, interfer-

ing with that secrecy which constitutes the essential principle of vote by ballot, and which cast no doubt upon the authenticity of the ballots when put by the officer into the ballot box, and when there was no suggestion or shadow of suspicion that it had been tampered with.

The act does not, in express terms, require me to give it a construction which would have the effect of avoiding all those uninitialled ballot papers, and in the absence of all suspicion of any fraud having been committed or attempted, and, indeed, in the particular case, of any suggestion of the possibility of any fraud having been committed, I do not think I am justified in putting on the statute such a construction by implication. The statute, no doubt, directs the deputy returning officer to put his initials upon the back of the ballot paper—for what purpose this is directed to be done the statute does not say. It does not in terms declare that the effect of the deputy returning officer neglecting to put his initials as directed, shall cause the vote of the innocent elector to be rejected. If the statute had intended such to be the result, in the absence of all fraud or suspicion of fraud having been attempted or contemplated, it would have, as I think, and should have, said so in express terms, and not having said so, I cannot think that we should supply the omission by implication The 55th section of the dominion statute of 1874, as amended by 41st *Vic.*, ch. 6, although apparently taken from the Imperial act 35th and 36th *Vic*, ch. 33, makes a provision as to the counting and rejection of ballots markedly different, as it appears to me, and as I must hold intentionally so, from the English act. By the 2nd sec. of the latter it is enacted that each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of vot-

1883

JENKINS v. BRECKEN.

Gwynne, J.

ing the ballot paper shall be marked on both sides with an official mark and d livered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper and folded it up so as to conceal his vote shall place it in a closed box in the presence of the officer presiding at the polling station, after having shewn to him the official mark at the back, and *any ballot which has not on its back the official mark, or* on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, *shall be void and not counted.*

Now, although by the 43rd section of the Dominion statute the deputy returning officer is directed to give to each voter coming up to vote a ballot paper with his initials on the back of it, so placed that when the ballot is folded they can be seen without opening it, yet by the 45th section it is the deputy returning officer who, upon being satisfied that the ballot paper brought up by the voter after having inserted his vote in it is the one which he had supplied to the voter, puts it into the ballot box in the presence of the elector and not as in the English act the elector in the presence of the officer, and when we look to the 55th section which regulates the counting and rejection of ballots when the ballot box shall be opened by the deputy returning officer in the presence of the poll clerk, the candidates or their agents, and of at least three electors, we find the direction to the deputy returning officer in counting *not* to be, as in the English act, to reject all ballot papers not having on their back the initials of the deputy returning officer, *but to reject all ballot papers* which have *not been supplied* by the deputy returning officer, all those by which votes have been given for

more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter can be identified. *All others* are to be counted, for the section proceeds to provide that: "All others *being counted*, and a list kept of the number given to each shall be put into separate envelopes, &c., &c." Now, what the deputy returning officers in the case before us did was this: they placed their initials upon the counterfoil in the honest belief that in so doing they were complying with the statute, and they gave the ballot papers with the counterfoils attached so initialled to the voters. Upon receiving them back from the voters so folded that they could see their initials without opening the ballots, they themselves detached the counterfoils from the ballot paper, both of which up to that time were one paper, and thus, being satisfied beyond doubt that the ballot papers brought back to them were those they had respectively themselves supplied to the voter, they put the ballot papers containing the votes into the ballot boxes, and upon opening them at the close of the polls in the presence of the candidates, their agents, and at least three electors, finding the number of votes in the respective boxes to correspond precisely with the number of ballot papers by them respectively supplied to the voters, they without any objection whatever being made, counted the uninitialled ballots (unless avoided for some other reason), as good votes, being perfectly satisfied, as they swear they were then and still are, that the ballot papers which they had respectively so put into the boxes were the identical ballot papers which they had respectively supplied to the voters. The deputy returning officers were therefore under these circumstances justified by the literal terms of the statute in counting those ballots, notwithstanding that they had made a mistake as to the place where their initials should have been placed.

1883

JENKINS v. BRECKEN.

Gwynne, J.

The power of the county judge upon recounting is prescribed by section 14 of 41st *Vic.*, ch. 6, and he is ordered to recount according to the rule above given in section 55 of the Act of 1874, as amended by 41 *Vic.* ch. 6, as governing the deputy returning officers upon their counting. So that the county judge cannot reject any ballot papers which had been supplied by the deputy returning officers. The directions to him are not to reject all ballot papers not having the initials of the deputy returning officers on the back. Now without evidence, as to his taking which no provision is made, that the ballot papers not initialled were not supplied by the deputy returning officers, I cannot see how he could be justified in rejecting ballots which the deputy returning officers, being well satisfied they had supplied, had counted, unless there should be some appearance of fraud, as for example the number of ballots in a box exceeding the number appearing by the poll book to have been supplied by the officer, or the like. Upon the evidence given before the learned Chief Justice upon the petition in this case, and in the absence of all suggestion or suspicion of fraud, or that any thing occurred which had interfered with the election being conducted according to the principles of the act, that is, as I understand it, being conducted with that perfect secrecy which constitutes the principle of vote by ballot, I think the learned Chief Justice was right in counting those uninitialled ballots, and that therefore his judgment should be affirmed and the result reported to the House of Commons.

Appeal dismissed with costs.

Sollicitors for appellant: *McLean & Martin.*

Solicitor for respondent: *F. Peters.*