CANADA REPORTS.

Approved R. v. Riley, 12 P.R. 98.

ONTARIO.

ELECTION CASES.

Considered North Duffrin Election, Re 4 Man. L.R. 233

Re Hamilton Election Petition.

(*Reported by* Mr. H. J. Scott, B.A., *Student-at-Law.*)

Recognizance—Petition against two members—Jurisdiction of Magistrate—Attorney as Surety.

Held, 1. That upon a petition against two members, only the same security in amount need be given as upon a petition against one.

2. That the place where it was taken need not be shown on the face of the recognizance.

3. That a practising attorney may be a surety.

4. That a county magistrate can take the recognizance in a city which has a police magistrate, if within his county.

[March 25, 1874.—Mr. Dalton].

In this case a summons was taken out to set aside the recognizance, petition and other proceedings, on the grounds that the recognizance was invalid, having been given for only $1,000, whereas, as the petition was against two members, it should have been for $2,000; that it was not duly acknowledged, not stating where it had been taken; that the magistrate who took it had no authority to do so, and that one of the sureties was a practising attorney, and thus incapacitated from being a surety.

Davidson shewed cause. This is a double application, being to set aside the petition, and also the recognizance; but they can not be both entertained at the same time, as 36 Vict., cap. 28, sec. 14, gives five days, after objections to the security are disposed of, to object to the petition. The recognizance is taken in the words of the form laid down by the Judges, and it is not necessary that the place where it was taken should appear on its face, if it was really taken where the magistrate had jurisdiction, and that this is the case is shown by an affidavit filed by the opposite party. If the objection is a valid one, being merely formal, leave ought to be given to amend, under the Administration of Justice Act. The question as to the jurisdiction of a magistrate, under sec. 308 of the Municipal Act of 1873, in towns or cities where a police magistrate has been appointed, is the same as that raised in the *West Northumberland Case*, and has been decided in favor of his jurisdiction. One of the sureties is a practising attorney, but the only authority for his not becoming a surety is a Rule of Court, which can only apply to that particular court, and the Act is quite silent as to this point. Under the English Act, which contains the same sections as ours, it has been decided that on a petition against two members only one deposit need be made: *Pease* v. *Norwood* L. R., 4 C. P. 235. Should any of the objections be considered valid, a new recognizance has been since filed, and should be allowed to be substituted for the original one.

J. K. Kerr, contra.—Under 36 Vict. cap. 28, sec. 11, the bond must be given at the same time as the petition, and it is with that bond only that we have to do, no second one being allowed to be put in. *Pease* v. *Norwood*, by which it has been decided in England that, upon a petition against more than one member, only a single deposit need be made, is distinguishable from this. Although the sections of the Acts are the same, the judgment in that case is stated to be given in regard to the practice which had prevailed previous to the passing of the Act, which practice was different from that prevailing in Canada, prior to our Act, and the case cannot therefore be looked upon as an authority. In addition to the arguments used in the *West Northumberland Case*, as to the jurisdiction of magistrates, the course of legislation shews that the intention of Parliament was to do away wholly with their jurisdiction in places where police magistrates are appointed. Section 373 of the Municipal Act of 1866 only used the words "shall adjudicate in any case." Then came the Law Reform Act of 1868, which repealed this section, and employed much wider words in section 11, shewing an intention to still further restrict the magistrate's jurisdiction, which intention is kept alive by section 308, Municipal Act, 1873. As to one of the sureties being a practising attorney, the same reason which prohibits his being a surety in a case in the ordinary courts, operates and should have the same effect now.

Mr. Dalton.—With regard to the point which affects one of the sureties in this case—that he cannot be bail because he is a practising attorney—I do not find any authority for disqualification on that ground. It is true that under the Rules of Court, and by long established practice under them, an attorney cannot be bail in an action in the Common Law Courts. But the sole foundation of this is a Rule of Court, which does, of course, prescribe the practice in the courts to which it applies. But it is mere practice; it never was intended to impose, nor could it impose, a general rule of law. It cannot, therefore, be applied without express enactment to the election court. An attorney also is good bail in criminal proceedings: Petersdorf on Bail, 511. As to the point which regards the amount of the security, that on a petition