

not be so required under any circumstances.' Well, I do not so understand the Act. This matter, as was mentioned by my hon. friend the Minister of Marine and Fisheries the other evening, was to some extent argued out by lawyers on both sides before the Committee on Privileges and Elections last year; and the Manitoba cases and the Haldimand case, both dealing with this matter, were referred to, and the committee eventually decided to admit evidence of how the voter marked his ballot, because in that case there was not any legal proceeding questioning an election or return. Of course, it may be suggested to me if that is the law, why do you desire any provision made with respect to this matter? I say that I desire provision made because this is a very important matter, upon which doubts have been raised by eminent lawyers, and it is one upon which there should be no doubt.

It is quite true that the chief justice of the Supreme Court of Canada, in a proceeding questioning an election and return, has dealt with this matter in the manner referred to by the Minister of Justice, but the opinion stated by the chief justice of the Supreme Court of Canada in deciding the particular case before him was a mere dictum with respect to the matter we are now considering, would not be binding on any other court. He was dealing with the right of ascertaining how an elector voted in a proceeding questioning an election and return, and not with such a case as will arise before this commission.

Then, on the other hand, you have the Manitoba cases which were referred to also before the Committee on Privileges and Elections, you have the Manitoba case of Regina vs. Saunders. That was a case stated for the opinion of the court, a Crown case reserved, which is reported in 11 Manitoba Reports, page 559. It was held in that case that notwithstanding section 71 of the Election Act, to which I have just referred, voters may be required, upon the trial of an indictment for offences against the Election Act, to state for whom they have marked their ballots. I refer to the judgment of Hon. Mr. Justice Killam, pages 564 and 565, setting forth the reasons which led him to that conclusion:

It is true that in the Haldimand election case, 15 S.C.R., 495, Strong and Taschereau, J.J., expressed opinions upon the general policy of the Act which, at first sight, may seem opposed to this view, but they were dealing with an election petition, and the construction of the clause forbidding that, on such a proceeding, a person who has voted shall be required to state how he has voted. The circumstance that the prohibition is limited to proceedings questioning the election or return is some indication that parliament did not intend it to extend to other proceedings. It seems unnecessary to refer in detail to the English and Irish cases cited, which my learned brother has already reviewed.

I may say, in passing, that the Minister of Justice seems to think that there is some

Mr. BORDEN (Halifax).

difficulty as to whether such evidence is the best evidence. Well, that seems to me a suggestion much more fanciful than practical. Here you have a hundred ballots, and none of them would be good if they bore any identifying mark, and how can you, by the production of those ballots, say that you are assisting in producing the best evidence? It is also a fanciful objection because there is no difficulty about producing the ballots. If the ballots are to be of any assistance in getting the best evidence, have been produced, but still let the witness give evidence. And Mr. Justice Killam uses that very argument. He says:

The general rule is that the best evidence obtainable must be given, and, naturally, the best evidence of the contents of a written instrument—and a ballot paper, with the marks upon it is certainly a written instrument—is the original instrument. But the rule requiring its production and identification yields to circumstances, as in the well-known cases of lost documents, documents which the opposite party will not produce, inscriptions or documents affixed to walls, documents held by a solicitor claiming a lien upon them, public documents in official custody, documents held by parties abroad who refuse to part with them, &c.

Then the Minister of Justice makes another suggestion.

The MINISTER OF MARINE AND FISHERIES (Sir Louis Davies). The court held there that the evidence could be given.

Mr. BORDEN (Halifax). Quite so. I trust the Minister of Marine and Fisheries does not misunderstand me. What I desire to have made plain in this case is that the evidence may be given. There has been some supposed conflict of judicial authority. For myself, I do not think that there is any conflict of judicial authority. Gentlemen for whose opinion I entertain very much more respect than I do for my own, have held the contrary view. For that reason I suggest that this question should be made plain, for the reason that the Minister of Marine and Fisheries holds a very strong opinion of mine on this question.

The MINISTER OF MARINE AND FISHERIES. So far from holding an opinion in opposition to that of the hon. gentleman, I hold an opinion in unison with him, and so declared, as did every other lawyer on the Election Committee.

Mr. BORDEN (Halifax). I recollect the hon. gentleman did express that opinion before that committee; but if I am not mistaken he rather came around to the opposite opinion in dealing with this matter in the present session.

The MINISTER OF MARINE AND FISHERIES. No, I never did.