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NORTON v. HOARE. [No. 1.]

Isaacs J. Gavan Duffy J. Rich J.

The legal principles which govern this portion of our legal system, although, of course, discernible in the older cases upon careful sifting, yet, in their application to modern circumstances, have gradually required of recent years more precise segregation and arrangement, and that is why we are not able to find illustrations exactly in point. This fact has probably led to misconception; but since 1892 the matter has steadily evolved until at last the principles are distinctly seen, and are given their legitimate and appropriate effect, where a false statement injurious to property has been made.

Nothing unreasonable must be done; no unnecessary step, such as personal violence, or assault, must be undertaken; retaliation is not permitted; but the warding off, by exposing the detractor, of injury, not measurable and not capable of definite ascertainment if it should actually happen, may, according to the circumstances in which, and the motive with which, it is done, be most reasonable.

Indeed, it may be more effectual than an injunction, because an injunction may not enlighten the world as to the true value of the assailant's testimony.

For these reasons it is clear that the objections to the amendment have no basis either in authority or principle; but it is desirable to guard against it being supposed that anything is said as to the intrinsic merits of these particular parties or this particular plea, or whether on full examination, in light of the real facts, the plea can be sustained as a privileged communication. The appeal, as a matter of law, must, with an exception, be allowed. That exception is that the following words should be eliminated from the proposed sub-paragraph (*b*) of par. 7 of the defence, that is to say, "and certain articles written by him in such newspaper." Those words set up neither personal defamation, nor disparagement of property. The mere fact that the articles were written by the defendant does not connote property after publication, and the final proposed words of that paragraph claim property, not in the articles, but in the newspaper only.

POWERS J. I concur, for the reasons given in the judgments which my brothers *Barton* and *Isaacs* have just delivered.

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Appeal allowed. Order appealed from discharged. Defendant to have liberty to amend his defence by inserting the words proposed to be inserted, except the words "and certain articles written by him in such newspaper." Appellant to pay the costs of and occasioned by the summons and amendment. Costs of appeal to be costs in the cause.

Solicitors, for the appellant, *Snowball & Kaufmann.*
Solicitor, for the respondent, *H. H. Hoare.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HEDGES . . . . . PETITIONER;

AND

BURCHELL . . . . . RESPONDENT.

COURT OF DISPUTED RETURNS.

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PERTH, *Oct.* 31; *Nov.* 3.

Barton A.C.J.

Parliamentary Election (Commonwealth) — Court of Disputed Returns — Election Petition—Practice—Discovery—Inspection of documents in custody of person not party to proceedings—Commonwealth Electoral Act 1902-1911 (*No.* 19 *of* 1902—*No.* 17 *of* 1911), *secs.* 196A, 199, 201—*Election Rules* 1904 (*Statutory Rules* 1904, *No.* 49), *r.* 2—*Rules of the High Court* 1911, *Order XXXIV., r.* 2.

The Court of Disputed Returns has no power to make an order giving a party to a petition leave to inspect and take extracts from the rolls and other documents used at or in connection with an election of a member of the Commonwealth Parliament, which are in the custody of public officers, prior to the hearing of a petition disputing the validity of the election, the Chief Electoral Officer not being a party to the proceedings.

APPLICATION to the Court of Disputed Returns.

William Noah Hedges, the unsuccessful candidate in an election of a member for the House of Representatives for the Electoral Division of Fremantle held on 31st May 1913, having

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filed a petition disputing the validity of the election of Reginald John Burchell thereat, applied for an order entitling him to inspect and take extracts from the rolls and certain other documents used at or in connection with the election. In his affidavit in support of the application he alleged that duplicate voting and improper practices had taken place with regard to the election. The application was opposed by Burchell.

Moss K.C., for the petitioner. Sec. 199 of the *Commonwealth Electoral Act* 1902-1911 empowers the Court to act in these matters according to equity and good conscience. This section is very wide, and gives the Court power to make an order such as is asked. If the order be not made there will be no possible way in which the petitioner can collect the facts necessary to dispute the validity of the election. [He also referred to the *Commonwealth Electoral Act* 1902-1911, sec. 201; *Election Rules of* 1904 (*Statutory Rules* 1904, *No.* 49), rule 2; *Rules of the High Court* 1911, Order XXXIV., rule 2.]

Hudson, for the respondent. The Court has no power to grant the application: it comes within neither the Rules or the Act. [He referred to *Elder* v. *Carter* (1).]

Moss K.C., in reply.

Cur. adv. vult.

NOV. 3.

BARTON A.C.J. This is an application to the Court of Disputed Returns on behalf of William Noah Hedges, the petitioner, for an order that he be entitled to inspect and take extracts from the rolls used by the Returning Officer, and the proceedings of the officers at the election held on 31st May last for a member of the House of Representatives for the Fremantle Electoral Division, including all rolls used subsequently to that date in connection with the re-checking of the count of such election. It was also asked that a certain roll now in the possession of the Divisional Returning Officer, and used by William Abbott Watson at the

(1) 25 Q.B.D., 194, at pp. 198-199.

re-check, be delivered to the petitioner; but that portion of the application has been abandoned.

The question which, of course, arose at the outset was whether there was authority to make such an order, and I was referred to some sections of the *Commonwealth Electoral Act*. The first was sec. 199, which says:—"The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not." That section, however, it is scarcely necessary to point out, was enacted for the purpose of guiding the Court in the exercise of powers granted to it, and cannot be read as a grant of additional power. Sec. 201 was also referred to. It enacts that "All decisions of the Court shall be final and conclusive without appeal, and shall not be questioned in any way." It was pointed out to me that as any order I might make could not be appealed against, it was competent for me to make this order. But there is a great difference between enacting that a decision shall be final, and enacting that a certain power shall or may be exercised. It is impossible to come to the conclusion that the protection of the order from appeal, or even from any corrective jurisdiction, if this section indeed goes so far, will justify the Court in making an invalid order. Such an order might be challenged in another way if an attempt were made to enforce it. These sections, then, do not help the applicant to establish the existence of the power contended for.

Then I was referred to Order XXXIV., rule 2, and although other rules were mentioned, it is the only one which admits of argument in favour of the grant of this power, and I shall deal with it alone. It was pointed out that this rule was incorporated in the procedure of the Court of Disputed Returns by the *Election Rules of* 1904, of which the second provides:—"The Rules of Court contained in Part I. of the Schedule to the *High Court Procedure Act* 1903 . . . shall, so far as the same are applicable, and are not inconsistent with these Rules, extend and apply to proceedings in the High Court in the exercise of its jurisdiction as the Court of Disputed Returns." Order XXXIV., r. 2, is in these terms:—"The Court or a Justice may, in any

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cause or matter, at any stage of the proceedings order the attendance of any person before the Court or a Justice for the purpose of producing any writing or other document named in the order which the Court or Justice thinks fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial."

It will be observed that this is a rule authorizing the Court or Judge to order the attendance of a person for the purpose of producing any writing or other document. What the Court is asked to do here, however, is in effect to order discovery.

But there is a more formidable obstacle to holding that this rule is applicable to the present proceedings, and it is this. Under sec. 196A of the Electoral Act, the Chief Electoral Officer is "entitled by leave of the Court of Disputed Returns to enter an appearance in any proceedings in which the validity of any election or return is disputed, and to be represented and heard thereon, and in such case shall be deemed to be a party respondent to the petition." He is not a party in the present proceedings, nor has he made any application under the section. So that as far as this matter is concerned he is a third party altogether.

The modern process of discovery, which is in effect a substitution for the old proceeding by separate Bill of Discovery, originated in the necessity for some provision for the speedy eliciting of facts from an opposing party in the course of the same suit; and that reason in no way applies so as to warrant the application of such a provision to third persons.

Several reported cases have been decided since 1884 with regard to this rule, which is the English Order XXXVII., rule 7. The first which I need mention is the case of *Central News Co.* v. *Eastern News Telegraph Co.* (1). There the Queen's Bench Division in 1884 held that the power, if any, conferred on the Court by the rule was one which should be exercised with extreme caution, and that no sufficient ground had been shown for the production of the documents asked for. That was an application for the production of documents by a company not a

(1) 53 L.J.Q.B., 236.

party to the action. The Court was composed of Lord *Coleridge* C.J. and *Williams* J. Lord *Coleridge* said (1):—"Without saying that the Court would not, in a proper case, make such an order, it would, in my judgment, be extremely oppressive to hold that, wherever it might tend to the convenience of one of the parties to an action or saving of expense, a person not a party to the cause, nor yet a witness, and having in fact nothing to do with the action, should be compelled by process of the Court to produce his private and secret papers for the purpose of some matter connected with a suit in which he has no interest."

There is a difference in the present application, because the petitioner pointed out that the rolls were in a sense public documents; but that difference does not affect the question of power. It is worthy of note that in the case cited the Court went no further than to say that the power was one which should be exercised with extreme caution. It did not say that the Court could not exercise it against third persons.

Since that date, however, the Divisional Court has gone further. In *Straker Bros.* v. *Reynolds* (2), decided in 1889, the head-note is as follows:—"The plaintiffs in an action applied under Order XXXVII., rule 7, for an order for leave to inspect the books of persons who were not parties to the action, and for the production of such books at the office of the plaintiffs' solicitors: *Held*, that the Court had, under Order XXXVII., rule 7, no jurisdiction to make the order." In the course of the judgments *Wills* J. said (3):—"The effect of rule 7 is, in my opinion, to render documents in the possession of witnesses examined before the trial liable to production in the same manner as documents in the possession of witnesses called at the trial. It is said that rule 7 has the further effect of rendering such documents, documents which are in the hands of third persons, open to inspection, for it is inspection which is here really applied for, just as if they were documents in the hands of the opposite party in the action. And certainly in *Central News Co.* v. *Eastern News Telegraph Co.* (4), though the Divisional Court there refused to make an order for the inspection of documents in the pos-

(1) 53 L.J.Q.B., 236, at p. 238.
(2) 22 Q.B.D., 262.
(3) 22 Q.B.D., 262, at p. 264.
(4) 53 L.J.Q.B., 236.

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session of third persons, Lord *Coleridge* C.J. does seem to have expressed an opinion that the Court had power to grant the application under the rule. He, however, while expressing this opinion, pointed out the necessity for extreme caution in the exercise of the jurisdiction, assuming it to exist." Then *Wills* J. goes on to say (1):—"In my opinion the rule was intended by those who framed it to be strictly construed, and I think that it gives the Court or a Judge power to order the production of documents for the purpose of the preliminary examination of witnesses before the trial, but does not give the Court or a Judge power to order inspection, properly so called, before the trial, of documents in the hands of persons who are not parties to the action. Had the intention been to render documents in the hands of third persons liable to inspection, properly so called, before the trial, the rule would have contained express words to that effect." So that even if the rule gives power to order the production of documents by witnesses who are not parties, for the purposes of preliminary examination, it does not, according to the case cited, extend to authorize an order for the inspection of documents in the hands of third persons, and would not therefore apply to an application such as this.

But the most important case on the subject is *Elder* v. *Carter* (2), decided a year later than the case last mentioned. There the Court of Appeal, which consisted of *Lindley* and *Bowen* L.JJ., held that rule 7 of Order XXXVII. was not made for the purpose of giving to litigants any new right to discovery against persons not parties to the proceedings, but in order to remove the difficulties which existed before the rule was made in compelling the production of documents by parties at any stage of the proceedings other than the hearing or trial. In his judgment *Lindley* L.J., who dealt fully with the matter, said (3):—"I am not at all desirous of doing more than to say that the rule cannot be construed so as to enable a litigant to obtain discovery from any person who is not a party to the proceedings. That is what is sought by this application. I have no doubt whatever that that is the true view to take of the rule; and I think, when the

(1) 22 Q.B.D., 262, at p. 265. (2) 25 Q.B.D., 194.
(3) 25 Q.B.D., 194, at p. 199.

authorities, such as they are (and they are very few), are looked at, there is not one which is adverse to that view." *Bowen* L.J. agreed, and also pointed out that production could not be properly granted under the rule when it amounted to "interfering with rights of third parties at a moment when there is no evidence being taken in the cause, and when the presence of the document is not necessary for the purpose of carrying out or completing any order which has been made." The order sought was one directing the appearance of a company by its proper officer to produce books and other documents for the purpose of showing certain dealings with shares. Further on (1) the Lord Justice said:—"An attempt has been made to extract out of a rule which has simply got to do with 'practice and procedure' in an action, a power of obtaining inspection from a third person outside the action. If such a power existed, it would be most inquisitorial, and might be used for purposes of infinite oppression. In this particular case, I dare say it would work no oppression at all; but we have to construe the rule."

Finally, there was the case of *O'Shea* v. *Wood* (2), in which *Jeune* J. had, in an action by a plaintiff propounding a will, refused an order applied for by the defendants for the inspection of documents, it appearing that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix, whose will was in dispute, and had in his possession diaries and other papers relating to her and her affairs, which papers were the property of the solicitor. The decision of *Jeune* J. was appealed from, and the report of the appeal is to be found in the same volume (3). I cite this case merely for the purpose of quoting what *Lindley* L.J. said about *Elder* v. *Carter* (4), which he assisted to decide (5):—"This is an appeal from *Jeune* J. and relates to two classes of documents. . . . The result of the evidence is that they are the property of the solicitor. It is quite clear, then, that the plaintiff cannot be ordered to produce them; and as against the solicitor, what right have the defendants to see them now on an application of this kind? None. The solicitor might be called upon to produce them at the trial under a *subpœna*

(1) 25 Q.B.D., 194, at p. 202.
(2) (1891) P., 237.
(3) (1891) P., 286.
(4) 25 Q.B.D., 194.
(5) (1891) P., 286, at p. 288.