

THE ELECTION CONTEST

Judge Wetmore's Decision, in Full.

BARNETT TWP'S VOTE THROWN OUT

HASLET DECLARED ELECTED.

In the Court of Common Pleas of Forest County.

In considering the questions involved in this issue, our attention is first directed to the Township of Barnett.

The 13th specification in the answer of Samuel H. Haslet, the respondent, states:

"That in the Township of Barnett the election was wholly illegal and void, and the total returns thereof should be rejected from the count, for the reason that the election was held at the school house in Clarington, instead of the Murray house which was the place fixed by law; that the said school house is some eighty rods distant from the Murray house, and there was no sufficient reason why the election should not have been held at the place fixed by law.

The statement of facts in relation to this township, as gathered from the evidence are as follows:

The Act of 15th April, 1835, section 64, Pamphlet Laws 1834-5 page 337, enacts that the electors of the township of Barnett, in the county of Jefferson, shall hereafter hold their elections at the house of Alexander Murray, in said township.

By a joint resolution of the Legislature, approved April 11, 1848, Forest County was erected out of parts of Jefferson County. See same Pamphlet Laws 1851, pages 744 and 745, as thus erected the whole of Barnett township was in Forest County.

The third section of said joint resolution is as follows:

Resolved, That until said County shall be organized for judicial and county purposes, it shall remain attached to Jefferson county for such purposes, and elections shall be held in the townships as they now are, without reference to the lines of the said new county, and the returns made as heretofore, to Jefferson County.

The Act of 5th April, 1849, Pamphlet Laws 1849, 368, fixes the times for holding Courts in Forest County.

The Act of April 3d, 1851, sections 7 and 10, Pamphlet Laws 337, requires the election of County officers.

The Act of 2d April, 1850, section 3d, enacts, That the north bank of the Clarion river at high water mark, from where the west line of Elk County crosses said river to the place where the east line of Clarion County crosses said river is hereby declared and made the south boundary of Forest County. Pamphlet Laws of 1850, page 315.

The Clarion river, as appears by reference to a map of the state, runs easterly and westerly through Barnett township, and the portion of said township on the north side of the river remains in Forest County, and that part of said township on the south side of the river is, by this change of the lines of the County of Forest, in the County of Jefferson.

The Act of 21st April, 1854, section 2d, Pamphlet Laws page 446, enacts, That from and after the passage of this Act, it shall be lawful for the qualified voters of Barnett Township, Jefferson County, to hold their general and township elections at the house of Orrin Butterfield, in said township.

The parol evidence taken by J. H. Donley, Commissioner, in relation to Barnett township, is substantially as follows:

James Brandon, sworn, says, He

has resided there over 30 years. When he first settled there the elections were held at the Murray house. The man's name was Alexander Murray. It was in Jefferson County. They held the elections in that house until 1853 or 1854. They built a new house on same lot 3 to 6 rods from old one.

The elections were first held in the old house and then moved to the new one. The elections were held in November last at the school house, not quite one fourth of a mile from the Murray house. The new house was built after the death of Alexander Murray by Ormal Thing, who lived there afterwards with Mrs. Murray, and the house was sometimes called Thing's hotel. The Murray house is and was located on Water street facing the river. The place for holding the elections was removed from Thing's hotel to an office Dr. Baker built, where Mrs. Shields now lives. This was done in 1854 or 1855 or 1856, and the election was held there one year. The road then running up the river now runs back by the school house, and that is the main road. The election was moved from the Dr. Baker office to the old school house, and when the old school house was torn down a new one was built near it, and the elections held there. There is a road adjoining the Murray lot that runs up to the school house. The new Murray house was only occupied a year or two for holding elections. There are six houses between the Murray house and the school house.

Wm. Shields, sworn, says, Resides in Clarington, Barnett township, Forest County, and has resided there since May 1851. The election was held at the Murray house when Pierce was elected President. This was in 1852. The election was held last fall at the school house. It is near one-fourth of a mile from the Murray house. First attended the election at the Murray house in 1852. This was held in the new Murray house. It was not completed.

Archibald Black, sworn said, First voted in Barnett township, in 1845, in the old Murray house. Voted at the school house in November last. School house 60 to 80 rods more or less from Murray house. After they left the Murray house elections held for two years that he recollects in office of Dr. Baker. It was built for Doctor's office. The old Murray house was gone before 1851 or 1852, and the new one built on the lot. Ormal Thing built the new house, and he and the Widow Murray kept it. It was a public house. The place for holding the elections was taken from Dr. Baker's office to the school house between 1850 and 1854. The old school house was taken down and a new one built near it, and the election was held there last fall.

James P. Black, sworn, said, Moved to Barnett township in the fall of 1850; first voted in 1851 at the Murray house. Cannot say whether the new building was upon it. Think the election was held in the new building. Think election was held at Dr. Baker's office in 1854.

Solomon Fitzgerald, sworn, says, Resides in Barnett township. Was there at the election in November last, at the school house at Clarington. Suppose it about one fourth of a mile from Murray house.

Isaac Long, sworn, says, In the fall of '54 the election was held in the office belonging to Dr. Baker, and in spring of 1855 the election was held at the school house. The old Murray house was in Forest County.

The foregoing evidence was by witnesses produced by Samuel H. Haslet. The following evidence was by witnesses produced by the petitioner, plaintiff.

W. R. Coon, sworn, says, Moved in Barnett township in 1839. It was then in Jefferson County. Election was held at the Murray house. The Thing hotel was built next this house, and it was then torn down; think in 1851. Think election held in 1852 in Dr. Baker's office. About 50 rods more or less from where Murray house originally stood. Do not recollect that the election was ever held in the new Murray house, called Thing's hotel. We wanted to hold it there and he refused to let us have it. Held the election at Baker's office once. I think in 1852. The election was next held in school house No. 1, called Clarington school house. A new school house was built near old one, and partly on same lot, and the

last election in November was held there. They petitioned the Legislature to hold the election in the school house, and after that it was held there. This is about 70 rods from where Murray house stood. The nearest house they could get to the Murray house was the office of Dr. Baker, and that was got for one year. They then petitioned for the school house.

The sheriff's proclamation fixes the Clarington school house, Barnett township as the place for holding the general elections in 1876.

The conclusions of fact, drawn from the evidence are briefly as follows:

First. On the 15th of April 1835, the house of Alexander Murray was fixed by the Legislature as the place for holding the elections for Barnett township, then in Jefferson County.

Second. On the 11th of April, 1848, Forest County was erected from part of Jefferson County, and the whole of Barnett township was then included in Forest County, and was located on both the north and south side of the Clarion river, said river passing in an easterly and westerly direction through the township.

Third. On the 2d of April 1850 the north bank of the Clarion river at high water mark was made the south boundary of Forest County in Barnett township.

This Act of the Legislature divided the township, and that part of the same south of the river was in Jefferson County, and the balance of the township, north of the river remained in Forest County.

Fourth. The Act of 21st April, 1854 fixed the house of Orrin Butterfield as the place for holding the elections in Barnett township, Jefferson County. This left the house of Alexander Murray on the north side of the Clarion river in Barnett township, Forest County, designated by the Act of 15th of April, 1835, as still the place for holding the elections in that township.

Fifth. The elections were held at this house until 1851 or 1852, when, after the death of Murray, a new house was erected on the lot near the site of the old one, and was kept by the Widow Murray and a man by the name of Thing. Several of the witnesses state that the election was held at the new Murray house in 1852, but W. R. Coon says he thinks that when they changed from the old Murray house it was to the office of Dr. Baker, and that they wanted to hold the election in the Murray house and were refused. The election was held at the office of Dr. Baker for one or two years. This was about fifty rods from the Murray house.

There were several other houses, 3 to 6, between the Murray house and the school house, but whether suitable as places for holding elections, or whether they could be obtained for that purpose the evidence does not disclose.

After the petition was sent to the Legislature asking that the school house be made the place for holding the elections, they were held there; first in the old school house, and afterwards in the new one near by it.

The legal rules bearing on the facts have received our careful and considerate attention.

The election in November last was not held at the place designated by law for the same.

When the old Murray house went down, the new one, built on the same lot and kept by the widow of Murray and Thing, was the legal and proper place for holding the election. The preponderance of the evidence shows that the elections were held for a year or two in the new house when the place was changed to the office of Dr. Baker. We have not satisfactory reasons given for the change. The election officers who made it have not stated why it was done, and Mr. Coon does not give the facts with sufficient detail and precision to enable us to arrive at a satisfactory result.

The change from Dr. Baker's office to the school house was because they had petitioned to the Legislature for it, and afterwards held the election as though the Legislature had by law fixed the school house as the place.

There were two changes made from the place fixed by law, 1st, to the office of Dr. Baker, and 2d, to the school house, and no authority has been shown by act of the Legislature or by order of the court for making these changes. Neither does the evidence disclose that controlling necessity to have existed which might create a legal excuse for the changes.

In Melion's Appeal, 18 P. F. Smith 333, the elections in two townships were held in places other than those appointed by law, and Thompson, C. J., in delivering the opinion of the Court, says:

"The place for holding the general elections in this Commonwealth have always been fixed either directly by the Legislature or by the court under authority given by the Legislature, or by a vote of the people under the Act of 20th of April, 1854. Hundreds of acts in our statute books fully attest the legislative supervision of the appointment of places for holding general elections, and it is extended to all possible contingencies which may occur; for instance, when a particular building is designated as the place for holding the elections in a township or district, and is destroyed, changed or altered so as to be unsuited for the purpose, another place must be assigned by the proper court, subject to the action of the Electors under the Act of 1854. See Act of 17th April 1866. Even in case of the existence of a contagious disease, rendering a change necessary, the place for holding the election must be designated by the Governor, and notice thereof given by the sheriff, at least seven days before the day of the election. See 94th section of the Act of 2d July, 1839.

"Can it therefore be maintained in view of these provisions of law that the place fixed for holding elections are merely directory, and may be disregarded by the election officers, without any other effect on the poll than that which takes place in all regularly defined districts? We assuredly think not. What is the meaning of the requirements in the Act of 1839 of the notice to be given by the sheriff by proclamation of the time and place of holding the general election, if not to notify voters where they are to assemble for the purpose of voting. This duty is mandatory upon the sheriff. A fixed place, it seems to me is as absolutely a requisite according to the election laws as is the time of voting. The holding of elections at the place fixed by law is not directory, it is mandatory, and cannot be omitted without error. I will not say that in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous grounds as a matter of necessity. *Necessitas non habet legem.* But then the necessity must be absolute, discarding all ideas of convenience. It is not, however, necessary to adjudicate authoritatively as to this. To remove the place of an election three miles from that designated by law, or from a village and across a considerable stream, a half a mile or more distant from the village where it ought to have been held, or from a designated school house to a vacant house more than half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void, and if the vote taken be counted, constitutes an undue election. This was decided by a committee of the House of Representatives of this State, in setting aside the election returns from Potter county, which gave the seat to the contesting member.

"The sole ground was that the election had been held at a place not fixed by law, in one of the townships in the county, but in another place. House Journal 1856, page 204. This was not a decision by the House in its political character, as suggested, but by a committee in a judicial character. There were one or more distinguished lawyers upon it. Indeed, the election laws are generally as well understood by laymen in the country as by lawyers, and it is no argument against the decision that laymen were of the committee. By the 15th section of the Act of July, 1839, the inspectors and judges are required to meet at their respective places appointed for holding the elections in the district to which they respectively belong, &c. Where is there any authority for meeting elsewhere? I find none. But this was disregarded as to the place fixed in the case in hand, without even an attempt to show an overruling necessity justifying it, if we might conclude that that might justify it. It seems to me that if the judges could carry and hold the elections in districts half a mile distant from the appointed place, they might carry and hold them three miles, as they did in one district complained of, and if they might go three miles distant, as they did in one district, they might without altering the principle of action in the least, go ten. It would assuredly inaugurate a fruitful source of fraud and furnish a most fertile field for litigation. We cannot give our consent to any such practice."

The opinion by Trunkey, P. J., in Mark et al. vs. John Park, delivered July 9, 1875, is to the same effect. Their school house in Plum township was removed and used for private purposes, and the election was held in a new school house about 80 rods distant without legal authority for the change, and this was declared illegal. We have given much of the opinion in the case of Melion's appeal because the facts and reasoning are applicable to the case before us. It may be said the Sheriff's proclamation fixed the Clarington school house as the place. It is the duty of

the sheriff to give notice of the general election, and in the advertisement he shall list, enumerate the officers to be elected; 2d, designate the place where the election is to be held, &c.

The error in the notice given by the sheriff as to the place where the election was to be held, could not change the place fixed by law, and can not therefore affect the question raised in this case.

If no place for the election had been designated by the authorities whose duty it is to appoint the same, and the citizens, whose right to vote is guaranteed by the constitution had attended and voted for necessary county and State officers at a time and place fixed by the sheriff's proclamation, a different question would be presented.

We can not distinguish the present case from Melion's appeal, and by the rules of law there announced, we are compelled to the conclusion that under the evidence taken, specification No. 13, in the answer of Samuel H. Haslet, the defendant, is sustained, and that the election in said township for Member of the Legislature was wholly illegal and void, and is therefore rejected from the count. The rejection of the vote of Barnett township renders it unnecessary to consider the other issues raised by the complaint and answer, as their decision would not alter the result. This was conceded in the argument by the counsel for the respective parties.

Our conclusion of law from the facts in evidence, is, that Samuel H. Haslet, the defendant, received the greater number of legal votes, and is entitled to the certificate of election.

Attorney for Petitioners excepts to the opinion of the Court in this case. L. D. WETMORE, President Judge. Feb. 26, 1877.

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