CONTROVERTED ELECTION OF THE COUNTY OF CHARLEVOIX

1878
*Jan'y 25.
*April 15.

OSÉE BRASSARD AND OTHERS.....APPELLANTS;

AND

HONORABLE L. H. LANGEVIN.....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA, FOR THE DISTRICT OF SAGUENAY.

Appeal,—Election petition—Jurisdiction—Preliminary objections, judgment on, not appealable—sec. 48, chap. 11, 38 *Vic.*

On the 21st April, 1877, an election petition was fyled in the Prothonotary's office at *Murray Bay*, District of *Saguenay*, against the Respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 *Vic.*, cap. 11, sec. 48.

Held,—That the said judgment was not appealable and that under that section an appeal will lie only from the decision of a Judge who has tried the merits of an election petition. [*Taschereau* and *Fournier*, J. J. dissenting.]

Per *Strong*, J., (*Richards, C. J.*, concurring,) That the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure (1).

(1) By *The Supreme Court Amendment Act of* 1879, sec. 10, it is provided that "An appeal "shall lie to the Supreme Court "from the judgment, rule, order "or decision of any Court or "Judge on any preliminary objection to an Election Petition, the "allowance of which shall have "been final and conclusive, and "which shall have put an end to "the petition, or which would, if "allowed, have been final and "conclusive, and have put an end

*PRESENT:—Sir William Buell Richards, C. J., and Strong, Taschereau, Fournier and Henry, J.J.

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THE question to be decided in this appeal, was whether a judgment maintaining preliminary objections and dismissing an election petition was appealable under the 48th section of the Supreme and Exchequer Court Act.

The facts appear sufficiently in the head note and the judgments.

Mr. *A. F. McIntyre*, for Appellant :—

The petition has been virtually tried, for the judgment of the Court amounts to a final judgment against the petitioners. We must read section 25 of the Supreme and Exchequer Court Act in connection with section 48. If this Court has not jurisdiction in such a case as this, then it is in the power of any Judge to oust the appellate jurisdiction of this Court in every controverted election case. The policy of the law has not been to diminish the right of appeal but to extend it. The judgment in this case is final and therefore appealable. *See Freeman* on judgments (1); *Powell* on the law of appellate proceedings (2).

Mr. *H. C. Pelletier* for Respondent :—

The judgment is final and without appeal.

The 8th section of the Statute 38 *Vic.*, chap. 11, (the Supreme and Exchequer Court Act) says positively: "Any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge *who has tried such* petition, &c.," may appeal from said judgment. In the present case, we have not to consider

"to the petition: Provided al- "so order: and provided also,
"ways, that an appeal in the last- "that no appeals shall be allowed
"mentioned case shall not operate "under this section in cases in
"as a stay of proceedings or to "litigation and now pending, ex-
"delay the trial of the petition, "cept cases when the appeal has
"unless the Court, or a Judge of "been allowed and duly filed."
"the Court appealed from, shall

(1) Secs. 29, 30, 33.

(2) Pp. 364, 368.

a decision given at the time of the *trial* of an election petition, but a judgment given on *preliminary objections.*

If an appeal is allowed from every decision of a judge, it would be impossible to proceed with a petition. "Trial" means the examination of witnesses, &c. See *Hardcastle*, Laws and Practice of Election Petitions (1); and *Wolferstan*, Law of Election Petitions (2).

STRONG, J.:—

This was an appeal from a judgment rendered by His Honor Mr. Justice *Routhier*, of the Superior Court of the Province of *Quebec* for the District of *Saguenay*, in the matter of a petition filed by the Appellants, under the Controverted Elections Act 1874, against the return of the Respondent as member of the House of Commons for the Electoral District of *Charlevoix*. The return of the writ of election to the Clerk of the Crown in Chancery in which the Respondent was declared to be duly elected a member of the House of Commons, was published in the *Canada Gazette* on the 7th April, 1877. The Appellants filed their petition against the return on the 21st April, 1877. A copy of the petition is alleged to have been served on the Respondent on the 27th April. On the 28th April, 1877, an application was made on behalf of the Respondent to Mr. Justice *Routhier* to extend the time for filing preliminary objections to the petition until the 22nd May following, which application was allowed. On the 22nd May, the Respondent filed his preliminary objections against the further maintenance of the Appellant's petition. The objections material to be noticed here (being those which the learned judge sustained) are the first and fourth.

The first objection is, "That no certified copy of the

(1) pp. 14 & 18. (2) p. 44.

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"said petition has been served on the Respondent;" and the fourth, "That no notice of the presentation of the "petition and of the security was served on the Re- "spondent."

The Appellants inscribed these objections for proof and hearing for the 12th July last, when counsel for both parties appeared before Mr. Justice *Routhier*, and, no evidence being entered into by either side, the objections were argued and taken *en delibéré*.

On the 24th of July the learned Judge gave judgment, holding the first and fourth objections to be well founded, and dismissing the Appellant's petition with costs. The appeal to this Court is from that judgment. The grounds of the appeal are, that the judgment is wrong and cannot be maintained. *First*, Because there was no proof of any kind establishing the objections. *Secondly*, Because the burthen of proving the objections was upon the Respondent.

The first objection in answer to this appeal, set up by the Respondent in his factum and in argument at the Bar, was, that the decision of the Court below was final, as having been pronounced by a Court of last resort, and that this Court has no jurisdiction.

The procedure for the trial of Controverted Elections under the Act of 1874 (37 *Vic.*, Cap. 16) may, so far as it is material here, be succintly stated as follows :—

The petition must, subject to some exceptions not applicable here, be presented not later than thirty days after the day of publication in the Gazette of the receipt of the return to the Writ of Election by the Clerk of the Crown in Chancery.

The presentation is to be made by delivery to the Clerk of the Court. At the time of the presentation a deposit of $1,000 is to be made, for which the Clerk is to give a receipt, which shall be evidence of the deposit. Within five days after presenting the petition and

making the deposit, or within such other time as the Court or a Judge may allow, a notice of the presentation of the petition and of the security, together with a copy of the petition, is to be served on the Respondent. Within a like delay, after service of the petition, the Respondent is to present any preliminary objections which he may have against the petition, or the petitioner, or against any further proceedings. The Court or any Judge thereof is to hear these objections, and is to decide them in a summary manner. After the expiration of five days from the decision of the preliminary objections, or from the expiration of the time for presenting them, if none be presented, the petition is to be deemed to be at issue, and the Court is to fix a time and place of trial. So far, all the proceedings are to take place in or before the Court in which the petition has been presented, or before one of the Judges of that Court. By section 13 the petition is to be tried by one of the Judges of the Court without a jury. The trial is to take place, unless otherwise ordered by the Court, in the electoral district the election or return for which is in question. At the conclusion of the trial the Judge must determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and other matters arising out of the petition, and requiring his determination ; and shall, except only in the case of an appeal, immediately after the expiration of eight days from the day on which he shall have given his decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of the evidence ; and the determination so certified is to be final to all intents and purposes. If any charge is made in the petition of any corrupt practice having been committed at the election, the Judge is, in addition to such certificate, and at the same time, to report

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in writing to the Speaker: (*a*) Whether any corrupt practice has or has not been found to have been committed by or with the knowledge and consent of any candidate at the election, stating the name of the candidate and the nature of the corrupt practice. (*b*) The names of any persons who have been proved at the trial to have been guilty of any corrupt practice. (*c*) Whether corrupt practices have, or whether there is reason to believe they have, extensively prevailed at the election. The Judge may, at the same time, make a special report to the Speaker as to any matters arising in the course of the trial, an account of which, in his judgment, ought to be submitted to the House of Commons.

Section 54 of the Act contains a provision recognizing a distinction very pertinent to the question raised here; it relates to the withdrawal of a petition and enacts, "That a petition shall not be withdrawn without the leave of the Court or Judge according as *the petition is then before the Court or before the Judge for trial*, upon special application," to be made as prescribed by general rules.

This clause recognizes and carries out very clearly a distinction which runs through the whole Act, as to the separation of the powers and jurisdiction of the Court and those of the Judge at the trial.

After the petition is set down for trial the functions of the Court are at an end, for no provision similar to that embodied in section 23 of the Controverted Elections Act of 1873, authorizing the Judge who tries a petition to reserve a case for the opinion of the Court, is contained in the Act of 1874. There is, therefore, a well defined line of demarcation between the two jurisdictions, that of the Court and that of the Judge who tries the petition. It appears, then, that a Judge who is called upon to decide a "preliminary objection" pre-

sented under section 10, exercises the jurisdiction of the Court in which the petition is filed.

This jurisdiction is not restricted as to locality, but the objections may be heard and determined at any place within the jurisdiction of the Court, whilst the trial of the petition in the absence of an order of the Court, founded on some special circumstances, must be had within the Electoral District. Again, whatever may be the proper construction of the words "preliminary objections," whether they are to be taken as applying to every irregularity or failure to comply with the procedure laid down by the Act of Parliament and the rules of Court, as well as to objections which might be taken to the qualification of the petitioner, or to the latter class of objections only, it is plain, that their determination does not comprise any such decision as the Judge at the trial is bound to come to. In deciding preliminary objections, the Judge cannot determine whether the member whose election or return is complained of, or any other person, was duly returned or elected, or whether the election was void. He can have no evidence before him to enable him to enter into the merits of the petition, and, consequently, he cannot make the report to the Speaker required by the 30th section of the Act of 1874.

In determining preliminary objections, although the Judge may have to hear evidence he is in no sense "trying the petition." The 10th section, and the whole context of the Act, indicates that the two proceedings of hearing preliminary objections and the trial of the petition are separate and distinct, to be taken before different tribunals, at different times, and possibly at different places. The determination of the preliminary objections has for its object an adjudication upon such exceptions as the Respondent to a petition may take to the status of the Petitioner and to his compliance

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with the statutory pre-requisites to being permitted to proceed to trial.

If the decision of the Judge on the objections is against the Respondent, his functions are terminated; he cannot proceed to enquire into or try the merits of the petition. On the other hand, the decision which section 29 of the Act of 1874, makes it incumbent on the Judge at the trial to pronounce is one, on the grounds of law and fact, upon which the validity of the election is impugned, and upon those grounds also on which by way of recrimination the Respondent may seek to invalidate any claim to the seat made by the Petitioner on his own behalf, or on that of some other person. Manifestly, this is a very different process from that to be gone through with by the Court or a Judge dealing with preliminary objections only. In short, the word "preliminary" imports that these objections are to be precedent to some proceeding in which the merits of the election and of the petition are to be enquired into, and the Statute authorizes no other proceeding for that purpose than the trial of the petition. The words "preliminary objections" are, therefore, to be construed as an elliptical expression for objections preliminary to the trial.

The convenience of such a division of the enquiry under the petition is very obvious. It is calculated to save large expenditure in summoning and paying witnesses, generally very numerous, to testify for and against the merits of the petition which would be useless and wasteful, if the preliminary objections were reserved until the trial and should then appear to be well founded. It relieves the Judge from the inconvenience and loss of time which might be occasioned in going to the Electoral District to hear mere technical points of law argued, and it tends to disembarrass the trial on the merits, when it comes on, from collateral

issues, and to save time which might otherwise be consumed in long arguments as to the qualification of the Petitioner or the regularity of his proceedings, whilst the witnesses on the merits were uselessly kept in attendance.

This practice of disjoining the hearing of preliminary objections from the trial, which does not correspond with any similar proceeding provided for by the English Act, was probably suggested by the course of proceeding formerly adopted by the Election Committees, who, though bound by no prescribed rules, but being free to regulate their procedure in each case according to convenience, were accustomed to hear and determine *in limine*, objections taken to the qualification of the Petitioner, and others of the same class, before proceeding to investigate the merits of the petition. These considerations appear sufficient to demonstrate that the Controverted Elections Act of 1874 deals with the hearing on preliminary objections and the trial of the petition as two distinct acts of procedure, having for their objects different results, and which it was the policy of the Act to keep separate. Parliament has, indeed, in so many words recognized the separation between the jurisdiction of the Court before trial and that of the Judge after the petition is set down for trial, when, in the 54th section it requires the withdrawal of the petition to be with the leave of the Court or Judge,

According as the petition is then before the Court or before the Judge for trial

Then, the Respondent's proposition is, that the appeal to this Court is limited to one from the decision of the Judge who tries the petition, and does not include an appeal from the determination of the Court or Judge on the hearing of preliminary objections.

Section 48 of the Supreme and Exchequer Court Act is the enactment which confers the jurisdiction on this

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Court, and it repeals sections 33, 34 and 35 of the Act of 1874, which had provided for appeals in the Province of *Quebec* to the Superior Court sitting in Review, and in the other Provinces to the Court in which the petition was presented sitting in banc. These repealed clauses in themselves shew that they were meant to confer the right of appeal from the Judge at the trial only. Section 33, which has reference to appeals in *Quebec* cases, requires the Court of Review to determine and certify its determination and decision to the Speaker upon the several points and matters, as well of fact as of law, upon which the Judge might otherwise have determined or certified his decision, in the same manner as the Judge would otherwise have done at the trial, and declares that the determination of the Court thus certified shall be final to all intent and purposes

Section 35, which relates to appeals from the Provinces other than *Quebec*, is to the same effect, and contains even stronger indications that the appeal was intended to apply only to the substance and merits of the petition.

These sections, however, are repealed by section 48 of the Supreme Court Act, which contains express words not found in the repealed clauses of 37 *Victoria, Cap.* 10, limiting the appeal to one from the Judge at the trial. After enacting a repeal of the sections just mentioned, to take effect so soon as the Supreme Court should be organized, and in the exercise of its appellate jurisdiction, it proceeds as follows:—

> And thereafter any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition on any question of law or fact, and desires to appeal against the same,

may do so by adopting the mode of procedure which had been provided for by the repealed section 35 of the

Act of 1874, and it requires the Registrar to certify the decision of this Court to the Speaker in the same manner as the Judge at the trial is required to do by the provisions of the former Act already referred to, and it lastly declares that the judgment and decision of the Supreme Court shall be final to all intents and purposes.

Applying this section to the case in hand, it cannot possibly be said, having regard to what appears to be the proper construction of the Act of 1874, as already stated, that Mr. Justice *Routhier*, when he heard these preliminary objections, "tried the petition," nor would it be possible for the Court, if it came to the conclusion that the preliminary objections ought to have been overruled instead of allowed, to pronounce a decision which would have been final on the merits of the petition, nor could this Court in any aspect pronounce a judgment upon this appeal which would warrant such a certificate as in every case of appeal this Court is imperatively bound to send to the Speaker of the House of Commons. Therefore the inevitable result of the construction I have placed upon the Controverted Elections Act of 1874, in treating the hearing of the preliminary objections and the trial as distinct acts of procedure, requires me to hold that the decision complained of is not a proper subject of appeal.

The language of the 48th section of the Supreme Court Act, already quoted, seems so explicit that it scarcely requires the aid of any extrinsic argument to support the construction I uphold, but it may well be thought that an enactment which would have made every decision upon preliminary objections or upon interlocutory or incidental motions or applications in litigated election proceedings appealable, would have been most undesirable, since it might have been used vexatiously and oppressively, both as regards delay

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and expense. If from every incidental decision in the proceedings in a controverted election, the parties were to be at liberty to resort to this Court by way of appeal to be remitted back upon the determination of the appeal against the objection to the primary Court, there to resume the contestation of the merits, the litigation would be prolonged to the prejudice not merely of the parties to the petition but to the detriment also of the constituency whose representation was in dispute. It cannot be presumed, that the Legislature intended to authorize such appeals, for it may be truly said that there is no class of litigation in which judicial despatch is more desirable than that arising out of controverted elections. The interests of all concerned, those of the parties, the Courts and the public alike, require reasonable promptitude of decision in such cases. There may, no doubt, be exceptional cases in which the rights of parties to petitions may be seriously affected by erroneous decisions on preliminary points and motions, but the balance of convenience greatly preponderates in favor of confining appeals to the merits. Were this Court to concede the right to take an appeal in the present case, an equal process of reasoning in construing the Act would require it to admit an appeal from the most insignificant motion which could be made. There is, therefore, every argument to be drawn from convenience in favor of restricting the appeal, as the Legislature has done to one upon the merits of the petition, the decision of which must be conclusive.

But supposing I am wrong in this opinion as to the policy of the law, and even though in particular instances the interpretation of the Statute restricting appeals to the merits of the petition might seem to leave parties without relief against erroneous decisions, such consequences would afford no ground for wresting the plain words of the 48th section of the Supreme Court

Act from their obvions primary meaning and extending them so as to include such cases as the present. Where the language of a Statute is doubtful, arguments drawn from unjust and inconvenient results may be of force, but where there is no ambiguity of language they cannot affect judicial construction, whatever weight they may have as reasons for Legislative amendment.

A majority of the Court agreeing on the question of jurisdiction, there is no necessity for discussing the second point argued on this appeal; that involving the correctness of the judgment which is called in question.

In my opinion, this Court has no jurisdiction to entertain the appeal, which should, therefore, pursuant to section 37 of the Supreme and Exchequer Court Act, be quashed, with costs to be paid to the Respondent.

THE CHIEF JUSTICE concurred with *Strong*, *J.*

TASCHEREAU, J :—

Je dois donner un court aperçu des faits de la cause en ce qui concerne le présent appel.

1o. Le 21 avril 1877. Les appelants, contestant l'élection de l'Intimé, produisent leur pétition et en déposent une copie au bureau du protonotaire de la Cour Supérieure du district de *Saguenay*, qui sous sa signature en date du même jour reconnaît en avoir reçu copie, et de plus les appelants déposent la somme de mille piastres en un billet de la Puissance du *Canada*. Cette pétition ne porte aucun certificat de sa signification ni d'avis du jour de sa présentation à l'Intimé, et on ne trouve pas au dossier un certificat d'avis du dépôt des mille piastres et de leur destination, ou d'aucun cautionnement quelconque.

2o. Le 9 mai 1877. Les pétitionnaires, présents appelants, produisent au greffe du bureau du protonotaire du district de *Saguenay* un avis informant l'Intimé que le

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douze de ce même mois de mai 1877 ils demanderont au Juge du district de fixer un jour pour l'instruction de la pétition.

3o. Le 12 mai 1877. L'Intimé présente une requête pour extension de délai pour produire ses objections préliminaires, et ce délai lui est accordé jusqu'au 22 mai, et le 21 mai l'Intimé produit ses objections préliminaires, et le 12 juillet la cause est inscrite au rôle pour preuve et audition sur les objections préliminaires. La cause est mise en délibéré devant M. le juge *Routhier* qui, le 21 juillet, renvoie la pétition sur le principe qu'aucune copie certifiée de la pétition, non plus qu'aucun avis de la présentation de cette pétition et du cautionnement n'ont été signifiés au défendeur.

Maintenant la première question qui est soulevée en cette cause par l'Intimé, l'honorable M. *Langevin*, est celle de savoir si la décision du Juge, sous les circonstances que je viens d'exposer, est ou n'est pas susceptible d'appel, en un mot, si une décision sur les objections préliminaires est susceptible d'appel. L'Intimé le prétend, et il a en sa faveur l'opinion de mes deux honorables confrères qui viennent d'exposer leur vues à ce sujet. L'Intimé se fonde sur la section 48 de la 38e *Vic.*, ch. 11, (Acte constitutif de la Cour Suprême) pour y trouver une distinction entre le droit d'appel d'une décision sur les objections préliminaires et le droit d'appel de la décision du mérite de la pétition même. Je ne trouve rien dans cette section pour justifier cette distinction. La section est en ces termes :

Sec. 48. When the Supreme Court is organized, and in the exercise of its appellate jurisdiction, the thirty-third, thirty-fourth and thirty-fifth sections of the Act passed in the thirty-seventh year of Her Majesty's reign, and intituled "An Act to make better provision for the trial of controverted elections of members of the House of Commons, and respecting matters connected therewith," shall be repealed, except as hereinafter provided with respect to proceedings then pending, and thereafter any party to an election petition under

the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition, on any question of law or fact, and desires to appeal against the same, may within eight days from the day on which the Judge has given his decision, deposit with the clerk, or other proper officer of the Court (of which the Judge is a member) for receiving moneys paid into such Court at the place where the petition was tried, if in the Province of Quebec, and at the chief office of the Court in any other Province, the sum of one hundred dollars as security for costs, and a further sum of ten dollars as a fee for making up and transmitting the record; and thereupon the clerk or other proper officer of the Court shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said Court, &c., &c., &c.

Je ne trouve rien en cette section pour justifier la prétention de l'Intimé. Au contraire j'y vois qu'il y a appel de toute question de droit ou de fait. Or, en la présente cause le Juge qui en a été chargé, a adjugé sur les questions de droit et de fait, 1o. de droit, en décidant que les appelants devaient commencer l'enquête et faire la preuve, 2o. de fait, en décidant qu'ils avaient failli de prouver leurs objections préliminaires.

Une contestation d'élection est soumise au même Juge qui peut *ab initio* la conduire jusqu'à jugement final; il est obligé de décider également les objections préliminaires aussi bien que le mérite même, et il y a dans l'un et l'autre de ces cas une importance et une responsabilité égales, et de la décision de ces objections préliminaires, comme de celle du mérite de la pétition, dépend le sort de cette pétition; les intérêts d'une division électorale peuvent en être également et fatalement affectés.

Je ne vois aucun motif légal ni rationel pour justifier une telle distinction du droit d'appel sur des questions également importantes quant au résultat. Au contraire, je trouve un argument sérieux dans le danger de laisser à un seul homme le pouvoir d'adjuger en dernier ressort sur des objections préliminaires.

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Je ne puis me reconcilier à l'idée que la législature au moyen de cette section 48, et de l'emploi des mots: "*Judge who tried the petition*," ait voulu dire que le Juge chargé d'adjuger sur une contestation d'élection et qui la renvoie *in toto* sur des objections préliminaires n'y a pas complètement mis fin et n'a pas jugé la pétition d'une manière substantielle, "*did not try the election.*" Il l'a tellement jugée cette contestation d'élection qu'il l'a renvoyée à toutes fins que de droit, et sans laisser aux pétitionnaires l'espoir de renouveler cette contestation.

Sous un autre aspect, on peut dire que la prise en considération d'une contestation d'élection par un juge commence avec la lecture et l'étude de la pétition, des moyens de défense, et se termine avec la preuve, si on n'y met fin auparavant par le renvoi sur objections préliminaires. Tout cela forme le *trial*, savoir: la preuve et l'adjudication sur tous les points en litige, et c'est là la seule interprétation plausible à donner à cette section 48.

Quant à cette première question relative au droit d'appel, je considère que les prétentions de l'Intimé sont non fondées.

Mais il y a dans les autres objections que l'Intimé énonce en son factum, quelque chose que je considère comme très sérieux.

Les appelants prétendent que l'Intimé comme excipant, devait commencer sa preuve sur les objections préliminaires, et l'Intimé soutient le contraire, et je considère que l'Intimé a raison sur ce point. Il est le défendeur, il se tient donc sur la défensive; il dit à ses adversaires, vous m'accusez, montrez à la Cour que vous m'avez assigné conformément aux réquisitions du statut, et que vous m'avez signifié un certificat légal du cautionnement et un avis du jour de la présentation de la pétition. Les appelants ou n'ont pu, ou n'ont pas voulu

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faire cette preuve et Son Honneur le juge *Routhier*, devant qui elle devait se faire, a renvoyé la pétition, faute par les Appelants d'avoir établi ce qui était la bâse, la fondation de la pétition, savoir, que les pétitionnaires avaient signifié à l'Intimé une copie certifiée de la pétition, un avis de sa présentation, et du cautionnement fourni tel que la loi l'exige.

Mais comme je l'ai dit, les Appelants prétendent que c'était à l'Intimé à prouver ces négatives, vû qu'il était l'excipant. Je conçois qu'il peut y avoir des cas où l'excipant puisse être tenu de prouver un plaidoyer affirmatif qui attaquerait une présomption légale. Dans le cas présent la loi ne présume pas que les Appelants se soient conformés aux requisitions du statut en ce qui concerne la signification des documents exigés comme assignation de l'Intimé. C'était donc aux Appelants à commencer cette preuve et non à l'Intimé qui n'avait qu'à attendre les bras croisés la preuve de ces significations. Il lui faudrait prouver une négative, ce qui dans la plupart des cas est impossible, cette preuve incombait aux Appelants comme ayant ou devant avoir en mains les documents nécessaires pour l'établir, d'après la section 40 du statut des élections de l'année 1874 qui énonce que le service de la pétition et des avis de sa présentation, et d'une copie du reçu du dépôt ou du cautionnement doivent être effectués autant que possible en la même manière qu'un bref de sommation en matière civile, ou en toute autre manière qu'il pourrait être prescrit. Or, à défaut de toute autre injonction à cet égard, le Code de Procédure Civile de la province de *Québec* doit régler, et de fait règle, ce mode de signification par les articles 56, 57, 77, 78, 80. Ces articles exigent que les significations de sommations soient effectuées par un huissier ou par une personne quelconque qui en donnera un certificat sous forme d'affidavit.

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Les Appelants prétendent que l'Intimé a admis avoir reçu une copie de la pétition, mais il n'admet pas qu'il ait reçu avis de sa présentation, ni d'une copie du cautionnement, ou du reçu du dépôt pour en tenir lieu. Si cet aveu de l'Intimé quant à la réception d'une copie de la pétition peut être interprété contre lui (ce que je ne crois pas), toujours est-il vrai que son objection quant à l'absence d'un certificat de signification de l'avis de sa présentation et de la copie du cautionnement subsiste en son entier et doit être fatale aux Appelants. Le dossier en cette cause ne démontre nullement l'accomplissement d'aucune de ces formalités essentielles exigées par le statut et sans lesquelles la pétition ne peut exister. Je le demande, comment était-il possible au Juge qui a prononcé le jugement de passer pardessus de telles irrégularités. Je crois de plus que M. le Juge *Routhier* ne pouvait exercer aucune discrétion à cet égard, et de son propre mouvement, sans y être requis par les Appelants, accorder un délai ultérieur aux Appelants pour rectifier leurs erreurs ou omissions. Les Appelants ne paraissent pas avoir aucunement essayé ce moyen d'y remédier, et s'en sont tenus à leurs prétentions que j'ai signalées. Ils ont eu grand tort ; pour ces raisons, je suis d'opinion,

1o. Qu'il y avait en faveur des Appelants un droit d'appel du jugement renvoyant les objections préliminaires.

2o. Qu'au mérite de l'appel, le jugement doit être confirmé avec dépens contre les Appelants.

FOURNIER, J. :—

Le présent appel est de la décision rendue en cette cause, le 24 juillet dernier, maintenant des objections préliminaires produites par l'Intimé, et renvoyant la pétition produite par l'Appelant contre son élection.

L'Intimé a soulevé devant cette cour une question au

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sujet de la compétence de celle-ci à entendre le présent appel. C'est de cette question qu'il faut d'abord s'occuper, car de sa décision dans la négative dépend le sort de la cause.

L'Acte des Elections Contestées de 1873, sec. 14, admettait, dans les mêmes termes que celui de 1874, sec. 10, les objections préliminaires à la pétition. Ces objections sont définies d'une manière générale dans l'un et l'autre acte, comme étant toutes les objections ou raisons d'insuffisance que le défendeur pourra faire valoir contre le *pétitionnaire*, ou la *pétition*, ou contre toute *procédure ultérieure* sur la pétition, et la Cour ou le Juge doit en décider sommairement. Mais la constitution de la Cour n'est pas la même dans les deux actes.

Le statut de 1873 établissait une Cour d'élection composée de trois juges, dont chacun, individuellement, ainsi que tous les autres juges qui pouvaient y siéger, exerçaient au sujet des pétitions d'élections des pouvoirs différents de ceux de la Cour.

Ainsi, un seul juge pouvait décider de la validité des objections faites au cautionnement et de tout ce qui s'y rapportait, et exercer les pouvoirs de la Cour d'élection, excepté lorsqu'il était déclaré que la Cour seule pouvait décider, ou quant aux points de droit soulevés par la pétition, ou dans un cas spécial (*spécial case*), ou dans les questions réservées par le Juge pour la décision de la Cour. Le Juge avait le pouvoir de réserver sans distinction tous les points de droit soulevés dans les procédures faites en vertu de l'acte.

Quant aux objections préliminaires qui devaient être décidées sommairement, il y avait juridiction concurrente entre le Juge et la Cour.

L'Acte de 1874 a fait disparaître ces différences de pouvoir entre un seul Juge et la Cour telle que composée auparavant. Aujourd'hui, la Cour ne consiste plus que d'un seul juge qui décide sur toutes les procédures

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qui peuvent avoir lieu au sujet d'une pétition d'élection, ainsi que sur toutes les questions de faits et de droit qui peuvent y être soulevées. Il doit décider finalement, sans pouvoir les référer à la Cour; car la Cour c'est lui-seul, la distinction entre les pouvoirs de la Cour et du juge n'existant plus.

Au lieu du pouvoir qu'avait le Juge en vertu de l'acte de 1873, simplement de réserver la décision des questions de droit pour la Cour, composée de trois juges, la loi de 1874 avait substitué l'appel, pour la province de *Québec*, à la Cour de Révision. Toute partie à la pétition pouvait, dans les huit jours de la décision, faire transmettre le dossier à cette Cour. Les procédures devaient y être conduites comme dans une cause en révision, et la Cour devait prononcer sa décision sur les matières de fait et de droit sur lesquelles le juge aurait pu lui-même prononcer, et de la même manière qu'il aurait pu le faire.

Les pouvoirs exercés à cette époque par la Cour de Révision ont été, en vertu de la 38me *Vict.*, ch. 11, sec. 48, transférés à cette Cour qui doit prononcer, tant sur les questions *de droit* que sur les questions *de faits*, le jugement qui aurait dû être rendu par le juge de la décision duquel appel est interjeté.

La principale objection que l'on fait au droit d'appel en cette cause provient de ce que dans cette sec. 48 l'on emploie, pour désigner le jugement dont il y aura appel, les expressions suivantes : " the decision of the Judge who has *tried* such petition ; " et aussi de ce que plus bas dans la même section, le régistraire est requis " to set down the *matter of the said petition* for hearing." On prétend que ces expressions ne peuvent s'entendre que du mérite de la pétition, et non pas d'une décision sur des objections préliminaires ; que partant cette Cour n'a pas droit de prendre connaissance du présent appel, bien que le jugement dont on se plaint mette fin à la pétition.

C'est en donnant au mot *trial* une signification restreinte qu'il ne me semble pas avoir dans cet acte, qu'on arrive à cette conséquence. Ce terme (*trial*) ne doit pas s'appliquer seulement à l'examen des faits concernant le mérite de la pétition, puisque d'après la loi il peut y avoir plusieurs *trials* dans la même contestation, savoir: *trial* sur les objections préliminaires, et *trial* sur le mérite de la pétition. L'examen de la matière de fait en issue étant un *trial* d'après la définition technique, ce terme devait donc s'appliquer à l'instruction de la contestation soulevée par les objections préliminaires aussi bien qu'à l'examen du mérite de la pétition; la loi en se servant de cette expression indique l'un aussi bien que l'autre, puisque, dans les deux cas, il y a lieu à l'examen (*trial*) des questions de faits.

Mais on dira, peut-être, que dans le cas actuel les objections préliminaires, n'étant fondées que sur des moyens de forme attaquant la régularité de la signification de la pétition et des avis requis par la loi, elles ne font pas régulièrement la matière d'une telle procédure. Cependant d'après la section 10, *toute raison* suffisante pour empêcher *toute procédure ultérieure* sur la pétition est indiquée comme pouvant faire le sujet d'objections préliminaires sur lesquelles il peut être prononcé un jugement qui met fin à la contestation. Or, il n'existe pas, je crois, d'autre manière de prendre avantage de ces irrégularités que par objections préliminaires.

De tout temps cette manière de procéder a été admise, et de tout temps aussi, on a considéré que les expressions *try the merits of the petition*, *try the matter of the petition* s'appliquaient au jugement rendu sur ces objections comme au jugement décidant le mérite de la pétition.

C'est par des objections préliminaires que dans la cause de *Honiton*, (1) le membre siégeant prenait avantage, 1o.: du fait que la pétition produite n'était pas de

(1) 3 Luders "On Elections."

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bonne foi une pétition *renouvelée*, ainsi que la loi l'exigeait à cette époque, lorsque la procédure n'avait pas été terminée dans la session, mais un *duplicata* de celle qui avait été présentée dans une session précédente ; 2o : que les pétitionnaires s'étaient rendus coupables de corruption.

Le Conseil du membre siégeant argumentait ainsi : Both these points are preliminary conclusive objections to the trial of the cause ; contending, that if established by evidence, the Court ought not in justice to proceed upon it. That though the duty of the members, *enjoined by oath*, required *a trial of the matter of the petition* referred to them, yet this rule was necessarily subject to the fundamental rules of practice, by which the Court proceeded : because all trials were necessarily guided by such rules. For, if it could be supposed that the names to a petition were forged, or that the parties had no interest or right to petition, it would be proper to receive the evidence of the facts, and if found true, to reject such petition. For in such cases there are no merits to try ; and the ends of justice would be obtained in this manner, although the terms of the oath would not be literally obeyed.

Le comité adopta cette manière de voir et déclara que le membre siégeant pouvait faire la preuve de la nullité de la pétition, et prouver aussi l'irrégularité dans la signature et la présentation de la seconde pétition. Le résultat final fut le renvoi de la pétition pour les motifs invoqués dans les objections préliminaires. La cause de *Bedford* en 1728 était du même genre.

Ces décisions ont été rendues en vertu de l'acte 10 *Geo.* 3, ch. 16, communément appelé le *Grenville act* lequel contient au sujet de la référence d'une pétition d'élection à un comité, les mêmes expressions que celles employées dans la 38 *Vict.* ch. 11., sec. 48. La section 72 de cet acte décrétait que le comité général auquel était référée la formation des comités spéciaux pour la décision des pétitions d'élection ferait rapport à la Chambre des noms des membres "of such select committee appointed *to try the merits*."

Par la section 73 il était exigé des membres ainsi nommés qu'ils prêtassent le serment de

well and truly *to try the matter of the petitions* referred to them, *and* a true judgment to give according to the evidence, and shall be taken to be as a select committee legally appointed to *try* and *determine* the *merits* of this return of election so referred to them by the House.

Section 78. Such select committee shall meet at the time and place appointed for that purpose, and shall proceed to *try the merits* of the election petition so referred to them.

Cependant, en dépit des expressions si souvent répétées "*to try the merits, to try the matter of the petition*, to determine the *merits of the return* of election," on a de tout temps divisé la contestation d'une élection et admis des moyens de forme plaidés par objections préliminaires, dont la décision avait l'effet de terminer la contestation. J'oserais dire sans craindre de commettre une grave erreur, qu'il a été jugé autant de pétitions d'élections sur des objections préliminaires, que sur le mérite même de ces pétitions. Cependant les réferences, faites aux comités chargés de les décider, étaient "*to try the merits*," malgré cela on n'a jamais eu l'idée que c'était forfaire au serment "*to try the merits*" que de décider finalement du sort d'une pétition sur des moyens de forme. Telle a toujours été la jurisprudence tant en *Angleterre* qu'ici, depuis que la décision des élections contestées a été transférée de la Chambre des Communes à des comités spéciaux assermentés pour cet objet, c'est à dire pendant un siècle.

On ne doit donc pas hésiter à conclure que ces expressions "*try the merits*" signifiaient dans l'acte impérial des élections contestées de 1770, et dans notre statut provincial de 1851, le procès (*trial*) sur les objections préliminaires aussi bien que le procès (*trial*) sur le mérite de la pétition.

En répétant les mêmes expressions dans l'acte des élections contestées de 1873 et 1874 ainsi que dans la

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38e *Vic.*, ch. 11, sect. 48, la législature est censée d'après les règles ordinaires d'interprétation des statuts, avoir adopté et conservé l'interprétation donnée antérieurement à ces expressions. Dans la section 48, conformément à la jurisprudence établie, les expressions "try the petition" ou "try the matter of the petition" doivent avoir la même signification qu'auparavant.

Conséquemment l'appel donné dans ces termes doit aussi comprendre l'appel d'un jugement qui, quoique rendu sur des objections préliminaires décide en même temps le mérite de la pétition et anéantit la contestation.

D'ailleurs les termes de la section 48 donnant le droit d'appel me semble ne laisser aucun doute sur ce sujet; "any party to an election petition under the said Act, who may be dissatisfied with the *decision* of the judge who has *tried* such petition, *on any question of law* or *of fact*, and desires to appeal against the same etc." C'est de la décision que l'appel a lieu, non pas du procès (*trial*) et cette décision peut être rendue "on the *trial* of a question of *law* or of *fact*." Dans le cas actuel il y avait l'un et l'autre; et c'est de la décision sur les questions de fait et de droit que l'appel est donné, sans distinction d'appel sur le mérite ou sur les objections préliminaires. La loi ne fait à cet égard ni restriction ni distinctions, et là, où elle n'en fait pas, il n'est pas permis au juge d'en faire.

Pour ces raisons, je suis d'avis que l'appel devrait être reçu.

Quant aux questions soulevées sur le mérite, il serait inutile d'entrer dans leur considération, puisque la majorité de la Cour est d'opinion qu'il n'y a pas d'appel du jugement dont on se plaint en cette cause.

HENRY, J.:—

The points in this case I have found not to be so easily resolved as, at the hearing, I was inclined to think

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They were raised by two issues, numbers one and four, in the shape of preliminary objections, by the Respondent as follows:—

The Respondent asked to have the petition dismissed because, as he alleges,

1st. No certified copy of the petition was served upon him, and

2nd. No notice of the presentation of the petition and of the bail (cautionement) was served upon him.

The learned Judge before whom the matter came decided in favor of the Respondent on both points; and dismissed the petition with costs. From that judgment the Petitioners appealed to this Court; and, in addition to the claim of the correctness of that decision, the Respondent takes the ground that, inasmuch as the merits of the petition were not heard and adjudicated upon by the learned Judge, no appeal will lie.

I will deal with the latter objection first, as it touches the jurisdiction of this Court to try the merits of the judgment given on the other points at issue.

The appeal directly to this Court in controverted election cases is given by section 48 of the Dominion Act of 1875, entitled: "An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of *Canada*."

It provides for the repeal of sections 33, 34 and 35 of the Controverted Elections Act of 1874, and enacts that:

> Any party to an election petition under the said Act, who may be dissatisfied with the decision of *the Judge who has tried such petition on any question of law or of fact*, and desires to appeal against the same, may appeal to this Court. And the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said Court ought to have been given by the Judge whose decision is appealed from.

It also empowers this Court to make orders as to the money deposited; as to the costs of the appeal; and also

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for the taking of further evidence when improperly rejected, and it further provides :

That the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the Court upon the several questions, as well of fact as of law, upon which the Judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, and with the same effect, &c.

The thirty-third section of the Act of 1874, so repealed, provided for appeal from the Judge to the Court of Review in *Quebec* or *Montreal*, as the case might be, as follows :

Provided also that in the Province of *Quebec*, any party to the petition may, after depositing the neccessary sum of money as security, &c., file in the same office an inscription for review, notice of which must be given to each of the opposite parties, &c., * * * and all other proceedings shall be had *as in a case of review*. And the Court shall determine and certify its determination and decision to the Speaker upon the several points and matters, as well of fact as of law, &c.

as in section 48 of the other Act hereinbefore first quoted.

Section 34 provides for the appeals to be made to the Court of Review at *Quebec* or *Montreal*, as the case might be.

Section 35—

Provided, also, that in any other of the Provinces any party to the petition who may be dissatisfied with the decision of *the Judge on any question of law or of fact*, and desires to appeal against the same, may, within eight days from the day on which the Judge has given his decision, deposit in the Court of which the said Judge is a member, with the proper officer of the Court, &c., the sum of one hundred dollars, &c., by way of security for costs, &c.

The *matter of the petition* is then to be set down "for hearing before the full Court." And the said appeal shall thereupon be heard and determined by the said full Court, and the judgment shall be pronounced both upon questions of law and of fact, as should, in the

opinion of the said Court, have been delivered by the said Judge, with the same conclusion as to the power to dispose of the deposit and the costs of the appeal, the certificate to the Speaker, and the finality of the judgment in substance as in the section which gives the appeal to this Court.

Under the circumstances in this case, then, could a party, dissatisfied with the decision of a Judge of the Superior Court of *Quebec* as to the preliminary objections, appeal to the whole Court? By the Act the preliminary questions may be tried by the Court or a Judge, and sections 3 and 7 declare what "the Court" and "the Judge," when used in the Act, shall mean. Section 3 provides:—

In this Act and for the purposes thereof, the expression, "the Court," as respects elections in the several Provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned, *or any Judges thereof*, &c.

And section 7 provides:—

The expression, "the Judge," shall mean the Judge trying the election petition, *or performing any duty to which the enactment in which the expression occurs has reference*, &c.

Section 10 provides for the filing of preliminary

Objections or grounds of insufficiency which he may have to urge against the petition or the Petitioner, or *against any further proceedings thereon*; and the Court, or any Judge thereof, shall hear the parties upon such objections or grounds, and shall decide the same in a summary manner.

I have no doubt that the objections taken were legitimate ones in this case, which, if proved, would be sufficient to cause the dismissal of the petition, but the consideration of which I consider unnecessary.

By the Act of 1874 no part of the proceedings in regard to preliminary objections need necessarily come before "the Court"; for section 3 makes a Judge "the Court," with plenary powers. The Judge who tries the preliminary objections is, for the time being, "the

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Court," and, if so, no appeal to the whole Court would lie, unless expressly provided by the Statute. I think, therefore, no appeal would lie to the whole Court. Section 7 says that "the Judge" shall mean not only the Judge trying the petition, but a Judge performing *any duty to which the enactment in which the expression occurs has reference.*

Section 33 provides for an appeal to the whole Court within "eight days from the day on which *the Judge* has given his decision," and for the hearing of the appeal, and enacts, that all other proceedings shall be had as in a case of Review.

It has been contended that an appeal will only lie from the decision of the Judge who tried the merits of the petition, and not from the Judge who tried the preliminary objections. Section 33, however, gives an appeal from the decision of "the Judge," without any distinction, as between the Judge trying the preliminary objections and the Judge trying the merits of the petition. The words "performing any duty," would, no doubt, in some respects, and for some purposes, apply to and include the Judge trying the preliminary objections. The section in question says, in substance, that "the Judge" shall mean and include a Judge other than the Judge trying the petition, but it may not still be applicable to "the Judge" trying the preliminary objections and still have abundant application otherwise.

If it be considered wise or necessary that the party against whom a decision is given on a trial of the merits should be entitled to an appeal, why should there not be an appeal when an erroneous judgment on the preliminary objections deprives the petitioner of a trial on the merits, and leaves the Respondent illegally in his seat. I cannot conclude the Legislature intended to leave parties interested and the status of the Legislature itself dependent to such an extent on the decision

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of any one Judge with out appeal. The question here is however not so much, what the *intention* was, but whether an appeal in such a case is, by legislation, provided. That it is not by express provision is clear, and I must confess I find no little difficulty in arriving at the conclusion that it is necessarily to be implied. The words of the clause giving the appeal to this Court provide for such appeal only from "the decision of the Judge who has tried such petition;" and the five latter words, being clearly words of limitation, we cannot extend the provision beyond them, unless by other parts of the Act it is patent they were not intended to be so construed. I have sought in vain for anything in any of the enactments to justify the conclusion that the restrictive words in question were not intended to have their full effect. If the Legislature intended an appeal should be had from the judgment on the preliminary objections, the restrictive words were unfortunately used; but I feel myself bound to interpret the several Statutes as I find the wording of them requires irrespective of results.

What is meant by the words "tried the petition"? They are, to my mind, intended to distinguish between the Judge who has tried *the merits of the petition* from a Judge who may have tried *the preliminary objections*.

Section 13 of the Act of 1874, provides that every election petition shall be tried by one of the Judges, &c., without a jury; and settles where the trial shall take place.

"The Judge who has tried the petition," is here pretty plainly indicated, and certainly does not, in my opinion, include the Judge who tries the preliminary objections. It is not necessarily the same Judge who tries both; and although it may be asserted that the Judge who tries the preliminary objections does indirectly, as in this case, determine the election, and in

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that way *try the petition*, is such a trial what the Statute refers to? I have had no small difficulty on that point; but I cannot see my way clear, after a studious consideration of all the legislation upon the subject, to the conclusion that such should be the proper legal interpretation of the words by which an appeal is provided. The clause giving the appeal to this Court, as also those giving the appeal to the other Courts under the Act of 1874, clearly point to *a final judgment and report to the Speaker;* and if it was intended that the judgment on preliminary objections should be the subject of an appeal, no final judgment could in many cases be given, and the matter would, in case of reversal, have to go back to a Judge to try the merits of the petition. For such there is no statutory provision; and when considering the words of limitation I have mentioned in connection with that fact, and the provision for the peculiar and final judgment to be given on appeal, and report of the same to the Speaker, I feel myself bound to conclude, either that no appeal in such cases was intended, or, that if it was, the legislation for it is defective. Section 29 of the Act of 1874 provides that the Judge shall, after eight days from the time of his decision, unless in case of an appeal, certify his determination to the Speaker, and it shall be final; and the same provision for eight days' time for an appeal is given in section 32, where provision is made for a decision upon a "special case" agreed upon. Section 10, which provides for the trial of preliminary objections, has no such time given, but says that

> The parties shall be heard upon the objections and grounds, and that the Court or a Judge shall decide the same in a summary manner.

The distinction that thus appears as to the judgment in the latter case from those under sections 29 and 32, would lead to the conclusion that on the trial under section 10, no appeal was contemplated. There are,

however, several reasons in opposition to those I have mentioned, but I cannot help feeling that they are not sufficient to control those I have given for the conclusions I have arrived at. Taking this view, it is unnecessary for me to refer to the remaining points.

Appeal quashed with costs.

Solicitors for Appellants: *Langelier & Langelier.*

Solicitor for Respondent: *H. Cyrias Pelletier.*