1892

*Feb. 16.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PRESCOTT.

ISIDORE PROULX (RESPONDENT).....APPELLANT;

AND

ALEXANDER RODERICK FRASER AND XAVIER MILLETTE (PETITIONERS).....RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF FALCONBRIDGE AND STREET JJ.

Election petition—Status of petitioner—When to be determined—R. S. C. ch. 9 ss. 12 and 13.

In this case the respondent by preliminary objection, objected to the status of the petitioner, and the case being at issue, copies of the voters' lists for said electoral district were filed, but no other evidence offered and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, and the objection was renewed, but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection. R. S. C. ch. 9 ss. 12 and 13.

APPEAL from the judgment rendered on the 15th day of December, 1891, by the Honourable Justices Falconbridge and Street, maintaining the election

*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

petition filed against the return of the appellant and voiding the appellant's election as member for the House of Commons for the electoral district of Prescott.

The petition was filed in the Court of Appeal for Ontario on the 20th April, 1891.

On the 25th April a preliminary objection to the petition was delivered and filed on behalf of the respondent in the court below, in the words following:—

1. "The petitioners were not, nor was either of them, duly qualified to vote at the said election, whereby they are, and each of them is, incapable of being petitioners; wherefore the said respondent, as a preliminary objection to the said petition, and before he can be compelled to answer the same, objects and demurs to the same as aforesaid, and prays judgment on the said objection, and that the said petition may be quashed and dismissed and no further proceedings may be allowed to be taken on the same."

On the 26th May notice was given and served on the appellant, of a motion to be made before the Honourable Mr. Justice McLennan, a judge of the Court of Appeal for Ontario by the petitioners in the court below, to set aside or dispose of the preliminary objection.

In support of that application there were filed the affidavits of the petitioners and the copies of the voters' lists for the polling districts in which the petitioners were voters, duly certified by the revising officer for the electoral district of the county of Prescott.

No affidavit or other evidence was filed or offered for argument.

Mr. Justice McLennan after hearing the parties on the said motion on the 6th June last, made the order setting aside and ordering to be taken off the files the said objection with costs to the petitioners in any event as follows:

1892

PRESCOTT ELECTION CASE.

"Upon reading the petition herein, the said preliminary objections, the affidavits of the petitioners respectively and the exhibits therein referred to, and upon hearing counsel for all parties and counsel for the respondent admitting that the matters and charges contained in the said preliminary objections cannot properly be disposed of on a summary hearing of preliminary objections:

"It is ordered that the said preliminary objections and the presentation and filing thereof be and the same are hereby set aside and ordered to be taken off the files of this court without prejudice to the right of the said respondent if so advised to raise the matters and charges contained in the said preliminary objections at the trial of the petition herein.

"It is further ordered that the costs of the said preliminary objections and of this motion be costs in the cause to the petitioners to be paid to them by the respondent in any event of the petition."

Under the general order made pursuant to sec. 2 of the act of 1887, chap. 7, for distribution of election petition for trial, this petition was assigned to the Queen's Bench Division of the High Court of Justice for trial.

The appellant filed an answer to the petition, and the petition being at issue, an order was made on 26th September by the Honourable Justices Falconbridge and Street, judges of the Queen's Bench Division of the High Court of Justice, fixing the 15th of October for the trial of the petition.

At the trial the counsel for the respondent renewed his objection as to the status of the petitioners, and after hearing counsel the court ruled that as the preliminary objections had been taken off the files of the court by order of Mr. Justice McLennan, there was an end of the matter and that it was not the duty of the petitioner at the trial of an election to prove his status,

and after the trial the election was declared void by reason of corrupt acts by agents of the appellant.

The appellant thereupon appealed to the Supreme Court of Canada.

Belcourt for appellant cited and relied on R.S.C. ch. 9, sec. 35 and subs. 12 of sec. 2, Rule 37 General Election Rules for Ontario; Rule 531 Cons. Rules for Ontario; Bigelow on Estoppel (1). The *Stanstead Case* (2). The *L'Assomption Case* (3), and the *Quebec County Case* (4).

Ferguson Q.C. for respondent contended that the trial judges ruled properly in regard to this question of the status of the petitioners, that it was not open for trial before the trial judges and that it had been disposed of by the order dismissing the preliminary objections, and cited and relied on *The Charlevoix Case* (5), the judgments of the Honourable the Chief Justice, and of the Honourable Mr. Justice Strong (6).

The *Megantic Case* (7). The judgments of the Honourable the Chief Justice, Mr. Justice Taschereau and Mr. Justice Gwynne. The *Youghal Case* (8).

The *Glengarry Case* (9), judgment of the Hon. Mr. Justice Gwynne.

The *Stanstead Case* (2), judgments of the Hon. Mr. Justice Gwynne and Mr. Justice Patterson.

Sir W. J. RITCHIE C.J.—We do not desire to hear the respondent's counsel in this case. We have heard the argument of the learned counsel for the appellant who has said all that could be said in the matter, but really, I think, there was nothing for him to

(1) 5th ed. p. 719. R.S.C. ch. 9 sec. 50.
(2) 20 Can. S.C.R. 12.
(3) 14 Can. S.C.R. 428.
(4) 14 Can. S..C.R. 434.
(5) 2 Can. S.C.R. 319.
(6) P. 323.
(7) 8 Can. S.C.R. 169.
(8) 1 O'M. & H. 291.
(9) 14 Can. S.C.R. 461.

1892

PRESCOTT ELECTION CASE.

Ritchie C.J.

say. There has been a full adjudication upon this matter. The objection came at the proper time before Mr. Justice McLennan and the affidavits showed that the petitioner was on the list and duly qualified to vote. Whether that was so or not is not material. The judge read the affidavits and after hearing both sides he adjudged that the preliminary objections should be dismissed, and further that they should be taken off the files of the court. The counsel for the sitting member acquiesced in that decision and took no exception to the ruling. Then, because the learned judge has chosen to attach to his judgment a permission, or whatever it may be called, to the parties to bring the question up on the trial, though the statute says it must be dealt with as a preliminary objection, it is claimed that the trial judges have jurisdiction to deal with it and there is an appeal from their decision. That cannot be so. The statute is clear and there has ceased to exist in this case any preliminary objections as they have been dismissed and taken off the files of the court.

Under these circumstances, I think there is nothing for us to do but to dismiss this appeal with costs.

STRONG J.—The appellant insists that at the trial of this petition the learned judges in refusing to entertain his objection that the petitioner was not qualified to maintain the petition for the reason that he had not the status of an elector, ruled erroneously.

Such a point must be taken by way of preliminary objection. It was so taken in the present case, but the preliminary objection was ordered to be taken off the file by a judge having undoubted jurisdiction to make that order. Therefore the learned judges at the trial, having no preliminary objection before them,

could not do otherwise than they did in refusing to adjudicate upon the objection to the petitioner's status.

Further, Mr. Justice McLennan having dealt with the preliminary objection by ordering it to be taken off the file could not confer any larger jurisdiction than the statute itself conferred on the trial judges by delegating to them the decision of a question raised by the objections which had been set aside and ordered to be taken off the files.

I will not express any decided opinion as to the right generally of the judges at the trial of an election petition to decide preliminary objections. The words of section 12 are "the court or judge shall hear the parties" on such objections, and by section 2, subsection (*k*) "the judge" is interpreted as meaning the judge trying the election petition. It would, however, certainly seem from the expression "preliminary objection" that a question so raised was intended to be decided in some proceeding anterior to the trial. Moreover, unless this construction were adopted the object for which certain objections are required to be taken in this preliminary form would not be attained.

Although under the circumstances of this case it is not necessary to decide the point I incline to think that, notwithstanding the interpretation clause, the context indicates that by "judge" in section 12 is meant not the judge at the trial, but a judge who shall adjudicate previously to the trial, that is a judge of the court in which the petition is filed, sitting in Chambers. If this is the proper construction it follows that the judges at the trial have no jurisdiction to deal with preliminary objections at all. The *Youghal Case* (1) cited by Mr. *Ferguson*, though deciding nothing positively, favours this view.

The appeal must be dismissed with costs.

(1) O'M. & H. 291.

1892

PRESCOTT ELECTION CASE.

TASCHEREAU J.—I concur.

GWYNNE J.—I entertain not the slightest doubt that the course pursued by the learned judges at the trial of this cause was the only course that under the circumstances appearing, they could have legally pursued and that they would have erred if they had entertained as matter before them at the trial upon the merits, the matter which had been raised by preliminary objection to the status of the petitioner.

PATTERSON J.—I have nothing to add to what I have said to-day in the *Bellechasse Case* (1), and what I said in the *Stanstead Case* (2).

Appeal dismissed with costs.

Solicitor for appellant: *N. A. Belcourt.*

Solicitor for respondents: *A. Ferguson.*

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(1) 20 Can. S. C. R. 181. (2) 20 Can. S. C. R. 12.