1883
*Mar. 20,30.
*June 10.

CONTROVERTED ELECTION OF THE WEST RIDING OF THE COUNTY OF HURON.

JAMES MITCHELL.....APPELLANT;

AND

MALCOLM COLIN CAMERON.....RESPONDENT

Dominion Controverted Election—Ontario Judicature Act, 1881, *effect of—Presentation of petition.*

The election petition against the election and return of the respondent was entitled in the High Court of Justice, Queen's Bench Division, and was presented to the official in charge of the office of the Queen's Bench Division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction.

Held,—[*Henry* and *Taschereau*, JJ., dissenting,] reversing the judgment of *Cameron*, J., (1) that the *Ontario* Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former Courts merged in it, and that those Courts still exist under new names; and that the petition had not been irregularly entitled and filed.

*PRESENT—Sir W.J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Taschereau JJ.

(1) 1 Ont. R. 433.

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APPEAL from a judgment of *Cameron*, J., (1) allowing a certain preliminary objection presented by and on behalf of the respondent, to the election petition of the appellant, and for ever staying proceedings under the said petition.

The petition was presented on the 12th day of August, A.D. 1882, and prayed that it might be determined that the respondent was not duly elected or duly returned for the Electoral District of the West Riding of the County of *Huron*, and that the election proceedings were void in consequence of the alleged fact that the respondent, during the election in that behalf, by himself and his agents, was guilty of corrupt practices within the meaning of the various Controverted Elections Acts.

The petition was entitled in the High Court of Justice (Queen's Bench Division), and was presented to and filed with Mr. *Alexander Macdonell*, acting for Mr. *R. P. Stephens*, Registrar of the said Queen's Bench Division of the High Court of Justice, at his office, at *Osgoode Hall*, in the city of *Toronto*.

At the time of the presentation of the said petition, the appellant's agent deposited with Mr. *Macdonell*, at the said office, and acting as aforesaid for Mr. *R. P. Stephens*, a Dominion note for $1,000 as security for the costs of the said petition.

On the 6th day of September, A.D. 1882, the respondent presented to the court certain preliminary objections to the appellant's petition and to any further proceedings being had thereon, and such preliminary objections having come on for disposition in a summary way, the preliminary objection to the jurisdiction of this court, being the respondent's first preliminary objection, was, on the 20th day of October, A.D. 1882,

(1) 1 Ont. R. 43; see also *North York* Election Case, 32 U. C. C. P. 458.

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allowed by the Honorable Mr. Justice *Cameron*, and was adjudged to be a good and sufficient objection and ground of insufficiency against the said petition and against any further proceedings thereon.

On appeal to the Supreme Court of *Canada*, the respondent moved to quash the appeal. 1. On the ground that the appeal should have been taken in accordance with the provisions and rules regulating ordinary appeals to the Supreme Court, and not under the provisions regulating election appeals, which it was contended did not apply to an appeal from a judgment on preliminary objections. 2. Because the deposit of $1,000 had not been made with the proper officer.

The court decided to hear the appeal on the merits.

Mr. *McCarthy*, Q.C., for appellant :—

The question which arises on this appeal, is whether the election petition of the present appellant, not having been presented to any of the courts mentioned in the Dominion Controverted Elections Act, 1874, *eo nomine*, the same is before any court having jurisdiction in respect thereof.

When this case was argued, each party claimed the benefit of the judgment of the Privy Council in *Valin* v. *Langlois* (1).

My contention is that the Dominion Parliament, having taken by name certain (then existing Provincial Courts), has conferred upon them and the judges wielding authority in them a jurisdiction to try election petitions over and above the ordinary jurisdiction vested in such courts and judges by virtue of the *British North America Act*. If this contention is correct in law, then the Dominion Parliament, having so made use of existing courts must be taken to have done so with the knowledge that the power of altering the name

(1) 5 App. Cases 115.

of any such courts was lodged in another legislative body, namely, the Legislature of *Ontario*, and must be taken to have conferred such jurisdiction subject to any change in name to be made by such other legislative body.

The effect of the *Ontario* Judicature Act is, so far as regards the trial of election petitions, merely a change in the name of the courts.

The Queen's Bench Division is in fact the Court of Queen's Bench named in the Controverted Elections Act of 1874, and not a new and different court. This is manifest from a consideration of the provisions contained in sec. 3, sub-sec. 3, of the *Ontario* Judicature Act, 1881, which provides that after that act takes effect the Court of Queen's Bench shall be called the Queen's Bench Division of the High Court, &c.; and sec. 9 of the same act which declares that the High Court of Justice shall be a continuation of the said courts. The mere change of name could not take away from the court the power to try election petitions as conferred upon it by the Dominion Parliament.

Sec. 87 of the *Ontario* Judicature Act upon which the learned judge relied so strongly, on the question of jurisdiction, relates only to practice and procedure in matters connected with Dominion Controverted Elections, and can not be construed as an expression of the intention of the Legislature that the Divisional Courts of the High Court of Justice should not retain jurisdiction in Dominion Controverted Election petitions.

Mr. *R. P. Stephens* was, at the time the petition was presented, Clerk of the Crown and Pleas of the Court of Queen's Bench, and the office where the said petition was presented was then the same as had been formerly occupied by the Clerk of the Court of Queen's Bench, and there was not then, nor has there since been, any office of the Clerk of the Queen's Bench, or of the Clerk

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of Crown and Pleas of the Court of Queen's Bench, other than that where the said petition was presented.

Mr. *Robinson*, Q.C., and Mr. *C. Moss*, Q.C., for respondent:—

I think the judgment of the Privy Council in *Valin* v. *Langlois* (1) has made it plain that the Dominion Controverted Elections Act, 1874, is *intra vires* of the Parliament of *Canada*, and that it established and constituted certain pre-existing Courts in the Province of *Ontario*, (the Court of Appeal, the Court of Queen's Bench, the Court of Common Pleas and the Court of Chancery) tribunals for the trial of election petitions; and by the same Act (2) established a system of procedure to be observed by such courts in the matter of controverted elections.

The tribunals so established by the Parliament of *Canada* could not and cannot be abolished, nor could their functions be interfered with, except by the Parliament of *Canada*; and they have never in fact been abolished, nor have their functions been abrogated or taken away by any Act of the Parliament of *Canada*. They are, therefore, still existent, and they still possess full and complete jurisdiction to receive and try Dominion election petitions.

This special jurisdiction of the Provincial Courts named did not and does not in any way result from their establishment or constitution as Provincial Courts by the Provincial Legislature, but is a separate and distinct jurisdiction for which they are solely dependent upon, and of which they can only be deprived by, the the Parliament of *Canada*.

The High Court of Justice, in which the appellant presented his petition, is a creation of the Legislature of the Province of *Ontario*, under the Provincial Act, 44 *Vic.*, ch. 5. (*Ontario* Judicature Act.)

(1) 5 App. Cases. 115. (2) 37 Vic., ch. 10, D.

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The Parliament of *Canada* has not vested in this Provincial Court (the High Court of Justice) the jurisdiction which had been conferred as above mentioned, upon the pre-existing Provincial Courts, with regard to Dominion controverted elections. The High Court of Justice has, therefore, *eo nomine*, no jurisdiction in the matter of Dominion controverted elections. Although the *Ontario* Judicature Act may be said to vest in the High Court of Justice such jurisdiction, powers and functions as were vested in the pre-existing courts by virtue of their establishment, by Provincial legislation, as Provincial Courts, yet that Act could not and did not vest in the High Court such jurisdiction, powers and functions as were vested in the pre-existing courts by virtue of their establishment by Dominion legislation (Controverted Elections Act, 1874), as Dominion Courts for the trial of Dominion controverted elections.

The framers of the *Ontario* Judicature Act did not profess to vest in the High Court of Justice any such powers. (44 *Vic.* ch. 5, sec. 87.)

From these considerations, it follows that petitions in respect of Dominion controverted elections should still be presented in the courts designated by the Controverted Elections Act of 1874, and that their presentation in the High Court of Justice is unauthorized and improper, inasmuch as the latter court has no jurisdiction to entertain such petitions.

The respondent refers to and relies upon the reasoning of Mr. Justice *Cameron*, in the judgment appealed from (1) and in his judgments in the *North York* case, upon the motion to strike out the preliminary objections, and upon the trial of the same objections respectively (2).

The following authorities, among others, were relied upon:

(1) 1 Ont. Rep. 433.

(2) 32 U. C. C. P. at p. 458.

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Re Niagara Election Case (1); *Re W Hastings Election Case*; *Re S. Ontario Election Case* (2); *Re Kingston Election Case* (3).

RITCHIE, C.J.:—

If the petition in this case had been entitled in and addressed "To the Court of Queen's Bench, of *Ontario*, "for the trial of Election Petitions, now known as the "Queen's Bench Division of the High Court of Justice of "*Ontario*," this would most certainly have been strictly and literally correct. If this would be sufficiently accurate, can it be said that presenting a petition in the Queen's Bench Division is not substantially a presentation in the Queen's Bench. The effect of the Judicature Act has, so far as Dominion legislation in relation to the Controverted Elections is concerned, done no more than give in *Ontario* another name to the court, leaving the jurisdiction in such cases untouched. The objection raised is so purely technical, that the most that can be said of it is, that if professing to present the petition in the Queen's Bench Division is not strictly and verbally correct, it is unquestionably substantially so, and is no more than a mere irregularity, and an objecjection which should not be permitted to prevail. But in my opinion it is not even worthy of the name of an irregularity. The local legislature could not take away from the Court of Queen's Bench the jurisdiction conferred on that court by the Dominion Parliament for the trial of controverted elections, nor have they attempted to do so; but, on the contrary, it is abundantly apparent that so far as the local legislature had any legislative power in the matter, their intention and desire was to continue the courts as they originally existed for the trial of Dominion Election Petitions.

(1) 29 U. C. C. P. 26. (2) 29 U. C. C. P. 270.
(3) 39 U. C. Q. B. 139.

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The local legislature had obviously no wish or intention to destroy or put an end to the Court of Queen's Bench, they merely united and consolidated the courts, and enacted that the Court of Queen's Bench should "thereafter be called the Queen's Bench Division of the High Court," clearly showing that the existence of the court was continued, merely its name changed.

A reference to secs. 6, 9 and 89 of the Act 44 *Vic.* ch. 5 (*Ont.*) makes all this abundantly clear:

Sec. 6.—Every existing judge is, as to all matters within the legislative authority of this province, to remain in the same condition as if this Act had not passed, and subject to the provisions of this Act, each of the said existing judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform if this Act had not passed.

JURISDICTION.

Sec. 9.—The High Court of Justice shall be a Superior Court of Record, and subject, as in this Act mentioned, shall have the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, the Court of Assize, Oyer and Terminer and Goal Delivery (whether created by commission or otherwise) and shall be deemed to be and shall be a continuation of the said courts respectively (subject to the provisions of this Act) under the name of the High Court of Justice aforesaid.

(2) The jurisdiction aforesaid shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by all or any one or more of the judges of the said courts, respectively sitting in court or chambers, or elsewhere, when acting as judges or a judge in pursuance of any statute or law; and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction.

Sec. 89.—Nothing in this Act, or in the schedule thereto, affects or is intended to affect the practice or procedure in criminal matters, or matters connected with Dominion Controverted Elections, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas division.

It may be all true enough, that so far as the Jurisdiction Act applies, the Queen's Bench Division of the

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High Court discharges its functions as a branch or a division of the High Court, but as regards the Dominion Controverted Elections Act, the Queen's Bench is not abolished; it is continued, exists and discharges its functions as the Court of Queen's Bench for the trial of Dominion Controverted Elections, a Dominion Court capable of discharging all and every function that pertain to it as a Dominion Court, and over and with which the legislature of *Ontario* has no jurisdiction or right to interfere; and therefore, notwithstanding the legislature of *Ontario* has for local purposes changed its name, it is denuded of none of its jurisdiction as a Dominion Court, of which it could alone be deprived by the Dominion Parliament.

The appeal should be allowed with costs and the preliminary objections to the election petition in this case be dismissed with costs.

STRONG, J.:—

Sub-section 3 of section 3 of the *Ontario* Judicature Act of 1881 enacts that

> The Court of Queen's Bench shall thereafter be called the Queen's Bench Division of the High Court.

Mr. *Maclennan*, in his annotated edition of that Act, appends this note to the sub-section in question (1):

> The English Act does not identify the existing courts with the divisions of the High Court bearing the same names; the *Ontario* Act expressly makes the High Court and its several divisions a continuation of the existing courts, under a new name.

It appears to me that this construction is correct, and that there can be no doubt of the identity of the present Queen's Bench Division with the former Court of Queen's Bench. It is true, it may be occasionally composed of different judges, since the other judges of the High Court are made *ex officio* members of the Queen's

(1) P. 3.

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Bench division, but this can make no difference, for it never could have been sensibly argued that the jurisdiction conferred by Parliament on the former Court of Queen's Bench could have been affected by the addition to it, under the authority of provincial legislation, of additional permanent or occasional *ex officio* judges. Then the question is reduced to the mere change of name. There can be no doubt now, since it has been decided by this court in *Valin* v. *Langlois* (1), and that decision has been approved by the Privy Council, that Parliament had power to confer jurisdiction in election petitions on provincial courts. Can it then be said that the continuance of this jurisdiction was dependent, not on the continued existence of the court, but also on the conservation of the name by which it was designated in the Act of Parliament originally conferring the jurisdiction? Surely we must hold that the mere name and style of the court is immaterial, and that the intention of Parliament was not to confer the jurisdiction upon the courts because they were known by particular names, but rather because they possessed certain jurisdiction and were composed of judges possessing certain qualifications, and that consequently it was a matter of no moment what change of name might be imposed by the provincial legislature, so long as the new court or division was continued as a judicial body identical in organization and jurisdiction with the old court; and this has been carefully provided for by the section referred to, which expressly conserves the identity of the new division with the former court. I am of opinion that the 87th section has no bearing on the present question. It refers not to judicial organization but to procedure and practice, and does not, in my judgment, keep the old court in existence under its former title for the purpose of the trial of Dominion elections. Had it

(1) 3 Can. S. C. Rep. 1.

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so provided, I should still have been of opinion that the erroneous entitling of the petition was not a fatal preliminary objection, but as the petition had in fact been filed with the proper officer of the proper court, and the deposit paid in accordance with the requirements of the statute, I should have considered that the irregularity might have been remedied by amendment. I need not, however, enter upon any discussion of this point, as I am clear that there was no irregularity. I am of opinion that the appeal must be allowed with costs.

FOURNIER, J.:

I am of opinion that this appeal should be allowed. I believe that the words of the statute are very clear—that the old courts have been continued under a new name.

HENRY, J:

This question is one of some magnitude, not only in regard to the parties in this suit, but in other respects; and it becomes a matter of importance to consider whether the tribunal that has been selected by the petitioners in this instance was the proper one under the Dominion statutes which provide for the trial of controverted elections. It is one of very great nicety, and, I may say, I have had a great deal of difficulty in arriving at any conclusion in regard to it. I was at first of the opinion that the judgment of Justice *Cameron*, who gave his judgment in this case in the court below, was perhaps untenable, inasmuch as there was but little, if any, change in substance in the constitution of the courts beyond the name. I agree that if an amendment had been sought for, within the time allowed for presenting the petition, it should have been allowed, but if the party at fault does not apply to amend, so as

to bring it within the time that is allowed for presenting a petition, I think it would be then too late. The petitioner, however, proceeded to trial on the petition as it is. When the trial was had on the preliminary objections it was competent for him to have moved to make the correct filing within the time allowed by law. That was not done. I think he was bound to do it, or he could not afterwards ask for the amendment. The 87th section which has been referred to, is as follows:

Nothing in this act, or in the schedule thereto, affects or is intended to affect, the practice or procedure in criminal matters, or matters connected with Dominion controverted elections, or proceedings on the crown or revenue side of the Queen's Bench or Common Pleas divisions.

Now, the question arises, does not that except from its operation altogether the Dominion laws providing for the trial of controverted elections? It was clearly the intention of the legislature, that the Judicature Act of *Ontario* was not to interfere in any way with the trial of controverted elections for the Dominion. But it is said, it is only a change of name. I should say, if the controverted election cases could be tried by the same judges it then would be, to all intents and purposes, but a change of name. I do not know that I am right in the decision I have arrived at, but as the majority have reached a different conclusion it will not affect the decision of the case, if I am wrong; but I am of opinion that the trial would be changed by the operation of this act Sec. 29, sub-sec. 4 provides, and sec. 31 says:

(4.) Every judge of the said High Court shall be qualified and empowered to sit in any of such divisional courts.

31. Subject to any rules of court, it shall be the duty of every judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other divisional court, to take part, if required,

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in the sittings of such divisional courts as may from time to time be deemed necessary for the transaction of the business of any of the divisions of the High Court.

Now, under these circumstances, if a petition were presented, before this act was passed, in the Common Pleas, a judge of the Queen's Bench could not sit on the trial. If, again, a petition were presented in the Court of Queen's Bench, a judge of the Common Pleas could not sit, but, by the change that is made by this statute, if a petition is now presented under this act in the Common Pleas division of the High Court, the merits of that petition could be tried by a judge of the Supreme Court or the Court of Queen's Bench, and *vice versâ*. Thus, it appears to me, there is an important change made in the trial of an election petition. When a party selected his court to try his petition, he selected either the Queen's Bench, or the Common Pleas, or the Court of Chancery, and he knew that his case would be tried by the proper judges of the court he selected. Now, a party may present his petition in any one of the divisions of these courts, and one of the judges of another division is not only authorized, but is required to sit and try it, if necessary. Now, there, it appears to me, is not only a change of name, but a change in substance, and if that is really the case, nobody will contend that the legislature of *Ontario* had the power to make a change to that extent in the law of the Dominion, which provides for the trial of election petitions. In fact, the Dominion act says, that a petition presented in the Court of Queen's Bench shall be tried by the judges of that court; if it is presented in the Common Pleas, it must be tried by the judges of that court, and if this act has effect, the very opposite is the result. It appears to me, under these circumstances, that there is an important and fundamental change as to the trial of these petitions. The legis-

lature of *Ontario* had not the power to make that change, and, therefore, if this petition has not been presented in the proper court, I think the petition itself must fail for want of jurisdiction. Now, it must be understood that, in making these remarks, I do not forget that the Court of Common Pleas for the trial of election petitions remains and has jurisdiction. If they can be tried under the old procedure, as established by the Controverted Elections Act, we would then have several tribunals, the Queen's Bench, Common Pleas, and the Court of Chancery, and the several divisions of the High Court of Judicature, equally competent to try the same case. Now, it appears to me, that when the original courts are still maintained, they are the proper courts to try these petitions, and they should be presented in these courts, as originally constituted. I do not express a very decided opinion on this point, and differing, as I do, from the majority of the court, I express it with no great confidence; but as I view the question, I think it is right that this appeal should be dismissed.

TASCHEREAU, J. :—

I am of opinion that the preliminary objections to the election petition should be maintained for the reasons given by Mr. Justice *Cameron* in the court below, and that consequently this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *McCarthy, Osler, Hoskin* and *Creelman*.

Solicitors for respondent: *Bain, McDougall, Gordon* and *Shepley*.