CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MARQUETTE.

WILLIAM G. KING (PETITIONER).....APPELLANT; 1897

AND *Feb. 17, 17.

WILLIAM J. ROCHE (RESPONDENT).....RESPONDENT. *Mar 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Appeal—Preliminary objections—R. S. C., c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner.

The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C., c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act.

No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

APPEAL from a decision of the Court of Queen's Bench for Manitoba, reversing the judgment of a Judge

*PRESENT :—Sir Henry Strong C.J., and Gwynne, Sedgewick, King and Girouard JJ.

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in Chambers, and granting a motion to dismiss the petition filed against the return of the respondent.

The petition was filed on the 29th, and served on respondent on the 31st, of July, 1896. Nothing further was done until September 30th, when the petitioner, King, was examined under section 14 of the Controverted Elections Act, and on October 3rd notice was given to petitioner of a motion to strike the petition off the files of the court on the ground that the affidavit presented with the petition was false, and not that required by the Act. It seemed that on the examination the petitioner had admitted that he had no knowledge of the truth or otherwise of the facts sworn to in his affidavit.

The motion was heard before Mr. Justice Killam, who held that the matter should have come up on preliminary objections filed within five days from the date of service of the petition, and he dismissed it. On appeal to the full court his judgment was reversed and the order to strike the petition off the files made. The petitioner then took an appeal to the Supreme Court.

Tupper Q.C. for the respondent, moved to quash the appeal as not coming within section 50 of the Act which is the only section conferring jurisdiction, citing *The Glengarry Election Case* (1); *King's Election Case* (2); *Gloucester Election Case* (3).

Howell Q.C. and *Chrysler* Q.C. for the appellant, *contra*. This was really a preliminary objection, and an order could be made under section 64 of the Act extending the time for filing. See Cunningham on Elections (4); *In re Dufferin* (5); *In re Palmer* (6).

(1) 14 Can. S. C. R. 453.
(2) 8 Can. S. C. R. 192.
(3) 8 Can. L. C. R. 204.
(4) P. 253.
(5) 4 Ont. App. R. 420.
(6) 22 Ch. D. 88.

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Judgment was reserved on the motion and the hearing on the merits postponed.

The judgment of the court was delivered by:

The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal from an order of the Court of Queen's Bench of the Province of Manitoba, made on the 28th of December, 1896, whereby the court allowed an appeal from an order of Mr. Justice Killam, and ordered that the petition presented by the present appellant in the matter of this election, controverting the return of the respondent and also proceedings therein, be stayed. The petition was filed on the 29th of July, 1896, and was served on the respondent on the 31st of July. No preliminary objections were filed under section 12 of the Controverted Elections Act, R. S. C., ch. 9, and the petition, therefore, under section 13 of the same Act was at issue on the 6th of August. On the 30th of September, 1896, pursuant to an order made by the learned Chief Justice of Manitoba, under the provisions of section 14 of the Act, the appellant was examined before a special examiner. On the 3rd of October the respondent served on the appellant a notice of motion to "strike" the petition off the files of the court, on the ground that the affidavit presented with the petition pursuant to the requirements of section three of 54 & 55 Vict. ch. 20, "was false and was not such an affidavit as was required by the statute, and that the presentation of the petition was an abuse of the process of the court."

This motion having been heard before Mr. Justice Killam, was by him dismissed with costs, and an order to that effect dated the 20th of October was drawn up which was reversed by the order of the full court, which is the subject of this appeal.

Mr. Justice Killam held that the objection to further proceedings on the petition based on the dis-

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closures contained in the examination of the petitioner was one which could only be taken by preliminary objections under section 12, filed within five days after the service of the petition, and could not be taken by motion. The three learned judges who heard the appeal in *banc* were of opinion that the deposition of the petitioner shewed that his affidavit accompanying the petition was untrue, and that the presentation of the petition was an abuse of the process of the court.

On the appeal coming on to be heard before this court, the learned counsel for the respondent took the preliminary objection, which was also insisted on in the respondent's factum, that this court had no jurisdiction to entertain this appeal, inasmuch as it was not authorized by section 50 of R. S. C., ch. 9.

This section 50, which exclusively confers jurisdiction on this court in the matter of election appeals, is as follows:

An appeal shall lie to the Supreme Court of Canada under this Act by any party to an election petition who is dissatisfied with the decision of the court or a judge.

(*a*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection, if it had been allowed, would have been final or conclusive and have put an end to such petition. Provided always that unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition.

(*b*) From the judgment, or decision, on any question of law or of fact of the judge who has tried such petition.

Subsection (*b*) was originally introduced by the first Supreme and Exchequer Court Act, of which it formed the 48th section. In the *Charlevoix Election Case* (1), it was determined that subsection (*b*) conferred no jurisdiction on this court to entertain an appeal from the decision of the court to which the petition had

(1) 2 Can. S. C. R. 319.

been filed, or a judge, on a preliminary objection. Subsequently to this decision, subsection (*a*) was passed as an amendment or addition to the Controverted Elections Act.

The determination of the question now before us on the motion made by the respondent to quash this appeal, must therefore depend on the jurisdiction conferred on this court by subsection (*a*) of section 50.

Can we, having regard to the language of this provision, and to that of subsections 12 and 13, and to former decisions of this court, hold that the order of the Court of Queen's Bench was "a judgment, rule, order or decision" on a preliminary objection, within the meaning of subsection (*a*) ?

We are all of opinion that the "preliminary objection" referred to in this section, means a preliminary objection under section 12. The preliminary objection there defined must within five days after the service of the petition be "presented in writing," and a copy of it must be filed for the petitioner within the same limited period of five days. In the present case none of these requisites were complied with. No preliminary objections were presented in writing within the prescribed time, nor was any copy filed for the petitioner. The petition having been filed on the 29th and served on the 31st of July, it was not until the 3rd of October, some nine weeks after the service that notice of the motion to remove the petition from the files was served. In the meantime the petition was at issue under section 13, and was ripe for trial on the merits. It was therefore manifestly then too late to present preliminary objections under section 12, and the notice of the motion made before Mr. Justice Killam cannot be regarded as such a proceeding.

In the *Gloucester Case* (1) our late brother Fournier said:

(1) 8 Can. S. C. R. 204.

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I am also of opinion that an appeal will only lie from a decision on a preliminary objection which must be filed within the time prescribed by the statute, and if not filed within the specified time it cannot be treated as a preliminary objection.

In the same case Mr. Justice Henry said :

I think the preliminary objections referred to are those which are to be filed by the respondent. The question is whether we have jurisdiction in an appeal when those objections have not been adjudicated. Now I take it it must be limited to such preliminary objections.

In the same case I find in my reported judgment the following passage :

I think it is quite clear that under the Controverted Elections Act of 1874, and under the statute of 1879 (Supreme Court Amendment Act) we have only jurisdiction provided the preliminary objection is one of the kind which originally, and before this jurisdiction on appeal was conferred, was authorized by the statute to be filed.

In the *Quebec County Case* (1) Mr. Justice Gwynne said :

The cause and matter of the petition was at issue upon the merits at the expiration of five days from such dismissal of the preliminary objections, and no other preliminary objection in the sense in which that term is used in the statute, or so as to make any decision thereon appealable to this court, could therefore be taken.

In the same case Mr. Justice Henry (2) thus stated his view of the practice :

Preliminary objections are provided by the statute to be tried before a judge, and they are, in my opinion, such as are taken within the prescribed five days.

It therefore appears from the decisions quoted from, as well as from the plain construction of the statute, that the jurisdiction of this court (which in the case of election petitions, as in all other cases, is a limited statutory jurisdiction) is confined to appeals from the decision of the judge who tries the petition, and from the decision of the court or judge upon preliminary objections presented and filed within five days after the service of the petition, pursuant to section 12.

(1) 14 Can. S. C. R. 452. (2) P. 444.

It follows that in the present case we have no jurisdiction and cannot interfere with the decision appealed against.

In the Lunenburg case (1), which will be decided presently, we have come to a conclusion adverse to that of the Court of Queen's Bench of Manitoba, upon what may be called the merits of the motion to take the petition off the files, and one which also differs from that of Mr. Justice Killam, but in that case we were able to entertain the appeal, for the reason that the objection was raised in due form and within the prescribed time as a preliminary objection.

Any anomaly resulting from the different conclusions in the two cases is the necessary result of the legislation which regulates the jurisdiction of this court.

The appeal must be quashed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *H. M. Howell.*

Solicitor for the respondent: *J. Stewart Tupper.*

(1) See next page.