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*Feb'y.20,22.

## THE DOMINION CONTROVERTED ELECTIONS ACT, 1874.

## ELECTION PETITION FOR THE COUNTY OF KING'S COUNTY, PROVINCE OF NOVA SCOTIA.

DAVID M. DICKIE.....APPELLANT;

AND

DOUGLAS B. WOODWORTH.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Election appeal—Exparte order by Judge extending time for service of petition—Rule rescinding the same—Right of appeal from—42 Vic., ch. 39, The Supreme Court Amendment Act of 1879, sec. 10.*

On the 16th August, 1882, upon the *exparte* application of the solicitor for petitioner, *Rigby*, J., granted an order extending for twenty days the time of the service of the petition and of the notice of presentation thereof, and of the security having being filed and the copy of the receipt for said security. On the 25th August, 1882, the respondent obtained from *Rigby*, J., a rule *nisi* to set aside the order of the 16th August.

On the 27th September, 1882, this rule *nisi* was made absolute with costs on the ground that the order of the 16th August was improvidently granted and without sufficient cause shown.

On the 30th September, 1882, on the application of the petitioner, supported by affidavits, *Rigby*, J., made another order extending to the 15th of October then next the time for service of notice of presentation of petition and of security with a copy of petition.

On the 16th of October, *Rigby*, J., granted a rule *nisi* (returnable before the Supreme Court of *Halifax*,) to set aside the

*PRESENT:—Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

petition, the presentation thereof, the order made on the 30th September preceding the service of petition, &c., and all further proceedings.

On the 15th January, 1883, this rule *nisi* was made absolute, without costs, by the Supreme Court of *Nova Scotia*, on the principal ground that the affidavits on which the *exparte* order of the 30th September was granted disclosed no facts unknown to the petitioner when the order of the 16th August was obtained. The petitioner thereupon appealed to the Supreme Court of *Canada*.

*Held*,—(*Fournier* and *Henry*, JJ., dissenting), that the rule appealed from was not "a judgment, rule, order, or decision on a preliminary objection" from which an appeal would lie under section 10, 42 *Vic., ch.* 39—(The Supreme Court Amendment Act of 1879.)

APPEAL from a judgment of the Supreme Court of *Nova Scotia* making absolute without costs a rule *nisi* to set aside a previous order of *Rigby*, J., made in the matter of the election for *King's* county, on the 30th September, 1882, and the service of the copy of the petition, together with the presentation thereof, and the other papers served under the authority of the said order.

On the 5th day of August, 1882, the petition herein was presented at the office of the clerk of the court at *Halifax*.

The respondent was not within five days served with a copy of the petition.

On the 16th day of August, 1882, an order extending the time for service of the petition, &c., was granted by *Rigby*, J., upon the affidavits of the sheriff of *King's* county and of the petitioner. On the 31st day of August, 1882, the respondent herein was under the last-mentioned order duly served with a copy of the said petition.

On the 25th day of August, 1882, an order *nisi* was granted by *Rigby*, J., to set aside the last-mentioned order and the service of the said copy of the said petition.

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On the 27th September, 1882, the last-mentioned order was made absolute, on the ground, as appears by the judgment of the learned judge, that his *exparte* order of the 16th August extending the time for service was improvidently granted

On the 30th of September, 1882, *Rigby*, J., granted a new order extending the time for service to the 15th October, on affidavits of the said petitioner, the said sheriff, and of the agent of the said petitioner, and on other papers on file in the said petition.

On the 12th of October, 1882, the said respondent was, under the last-mentioned order, duly served with a copy of the said petition.

On the 16th of October, 1882, *Rigby*, J., granted an order *nisi*, returnable before the Supreme Court of *Nova Scotia in banco*, to set aside the second service of the said petition, on the grounds, amongst others, that the said last-mentioned order was obtained on a second application and on a state of facts known to the petitioner and his counsel at the time when the first order for extension of the time for service was applied for.

On the 15th day of January, 1883, the said last-mentioned order *nisi* was made absolute by the court *in banco* on the last-mentioned ground solely, and the present appeal is from the rule making that order absolute.

On motion to quash the appeal for want of jurisdiction, it was contended that the judgment appealed from was not a "judgment, decision, rule or order" which comes within the meaning of the 10th section of the Supreme Court and Exchequer Court Amendment Act of 1879.

*H. McD. Henry*, Q.C. for appellant.

Mr. *Hector Cameron*, Q.C. for respondent.

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RITCHIE, C.J.:—

The petitioner in this case allowed the time prescribed by the statute to pass; he then applied *exparte* to the judge for an extension of time within which to serve the petitioner, which the judge granted, but subsequently, on the *exparte* application of the respondent on cause shown, rescinded the order granting the extension, on the ground that the order was made improvidently. The petitioner made a new application to the judge seeking to have this last order rescinded and further time granted; the judge granted a rule *nisi* returnable before the full court; on cause shewn the court refused to interfere, on the ground that, inasmuch as all the facts set forth, and materials on which this second application was based, were in the knowledge or possession of the petitioner at the time he made his first application, a second application was not open to him.

The judge having in the first instance made an *exparte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted, and the petitioner, though served in fact before its rescission, on its rescission ceased to be served in law, such service being of no force or effect, the rescission simply amounting to a refusal to extend the time. I do not think it can be for a moment contended that from such a refusal there was any appeal to this court.

Again, when the petitioner made his second application for the extension and the Court refused to make the order *nisi*, this too was nothing more than a refusal to extend the time. It appears to me, as at present advised, that the ground on which the Court refused to entertain the application, if called on to decide the question, was amply sufficient to justify such refusal,

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and I am quite at a loss to understand how this refusal can be appealed from any more than if the judge had refused to entertain the application in the first instance. In *Brassard* v. *Langevin* (1), it was decided that there could only be an appeal on the merits not on preliminary objections, and subsequently the statute was passed allowing an appeal from a judgment upon preliminary objections. I cannot look upon this as an objection in the nature of a preliminary objection such as the statute contemplates, and therefore the motion to quash should be granted with costs.

STRONG, J.:

I concur with the Chief Justice. I think this question ought to be looked upon as *res judicata*. Before the statute of 1878 there was no appeal from any decision on an election petition, except on the merits, and it was so held by this court in the second *Charlevoix* case. By the Act of 1879 an appeal is given from any decision on a preliminary objection which, if allowed, is final and conclusive and puts an end to the petition. By the context of the statute it is clear that what is meant is a judgment upon a substantial objection raised by the sitting member against the petition and not a decision on a mere point of practice or procedure. This is clearly not such a preliminary objection as comes within the statutory provision, and if we were to entertain this appeal we should be opening the door to appeals from every incidental order made during the pendency of a petition. I am, therefore, of opinion that this appeal is without any statutory authority to warrant it.

FOURNIER, J.:—

In this case there was a service of the petition, and

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

whether good or bad there was a service. Now the usual way to take objection to an irregular service is by preliminary objection, and in this case the respondent instead of doing this, took out a rule *nisi* to set aside this service as irregular, and have the petition dismissed. In my opinion there is no difference whatever as to the result; the difference, if any, is in words. The statute has not defined what shall be considered a preliminary objection. In this case, as in the case of *Brassard* v. *Langevin*, the objection taken is to the irregularity of the service, and such objection could be taken as a preliminary objection. I think, therefore, that the Supreme Court, after the judge had granted an extension of time for making service, could not set aside that service or revise his order. There is no power given by the statute to the Supreme Court of *Nova Scotia* to set aside a service and put an end to a petition on appeal.

HENRY, J.:—

I have fully considered this case in regard to the whole question of election trials provided for by the Legislature, and the question in the case of *Brassard* v. *Langevin*. This court decided that the objections taken in that case were preliminary objections, and that under the statute which gave an appeal to this court in election petitions there was no appeal, except from a decision after the trial of the merits. Then the Legislature steps in and provides in the Act of 1879 for an appeal from an order, rule, or decision on preliminary objections. The statute says:

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 to the petition; Provided always that an appeal in the last

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mentioned case shall not operate as a stay of proceedings, or to delay the trial of the petition, unless the court, or a judge of the court appealed from, shall so order; and provided also that no appeals shall be allowed under this section in cases in litigation and now pending, except cases where the appeal has been allowed and duly filed.

Now, what are the preliminary objections here, and for what object was this rule *nisi* taken out?

I will first refer to the position of the case as it stood when the learned judge granted the second order to allow the service to be made, and extended the time for making it. He had before him the affidavits and he decided that the first order he granted should be rescinded. Whether he was right or wrong in coming to that conclusion, it is not necessary for us now to say, nor whether he had the right to pass the second order or not. However he made the order granting an extension of time for serving the petition, and having done so, he was *functus officio*. If the respondent was dissatisfied with that order the statute provided an appeal to this court; he did not appeal, but applied to the judge to set aside his own order. I have looked at the rule and it reads as follows:

Upon hearing read the affidavit of *Douglas B. Woodworth*, sworn herein the 23rd day of August last past, the affidavit of *Simon H. Holmes*, sworn herein the 23rd day of August last past, the affidavit of the said *Douglas B. Woodworth*, sworn herein the 16th day of October instant, and the exhibits thereto annexed, the second affidavit of *Douglas B. Woodworth*, sworn herein the 16th day of October instant, without exhibits, the affidavit of *Watson Bishop*, sworn herein on the 14th day of October, instant, and the exhibits thereto annexed, the affidavit of *John Redden*, sworn herein the 14th day of October instant, the affidavit of *Stephen Belcher*, sworn herein the 13th day of October instant, the affidavit of *Stephen Belcher*, sworn herein the 28th day of September last past, the affidavit of *Stephen Belcher*, sworn herein the 15th day of August last past, the affidavit of *David M. Dickie*, sworn herein the 28th day of September, last past, the affidavit of *David M. Dickie*, sworn herein the 14th day of August last past, the affidavit of *Hugh McD. Henry*, sworn herein

the 29th day of September, last past, the affidavit of *James P. Cunningham*, sworn herein the 13th day of October instant, the order of his Lordship Mr. Justice *Rigby*, made herein on the 16th day of August, last past, and the affidavits and papers on which the same was granted, the order *nisi* to set aside the said order granted by his Lordship Mr. Justice *Rigby*, the 25th day of August last past, the judgment or decision of his Lordship Mr. Justice *Rigby*, filed herein on the 26th day of September, A.D. 1872, the order absolute thereon, dated the 27th day of September last past, and order of his Lordship Mr. Justice *Rigby* granted herein the 30th day of September last past, and the affidavits and papers on which the same was granted, the affidavits and papers on file herein, and on motion.

I do order that the petition on file herein, the presentation thereof, and all proceedings now outstanding had on the said petition, or in virtue thereof, the order of his Lordship Mr. Justice *Rigby*, made herein the 30th day of September last past, the service of the said order and all proceedings had thereon, the service of the said petition, notice of presentation and of the security made, had and effected under and in virtue of the said order on the said 30th of September, the deposit receipt, and the service of the same served on the respondent herein, be set aside and all further proceedings on the said petition stayed on the following grounds [giving the grounds].

Unless cause to the contrary be shewn before the Supreme Court at *Halifax*, on the first day of the ensuing term thereof, in December.

This rule the learned judge made returnable before the full court, which court I find make this rule absolute upon the ground that the judge had no power to pass the second order.

In the first place, I do not recognize the jurisdiction of the Supreme Court of *Nova Scotia* to deal with such a case, nor that the judge has the power to create such a jurisdiction by making his order returnable to the court. In my opinion what the learned judge should have said is, "I have exercised my discretion, and if I have erred, you have a right of appeal."

I am perfectly aware that there are some cases where a judge can rescind his own order, but this is not such a case. As it is said in *Chitty's* Practice of the Law (1):

(1) Vol. 3, p. 35.

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Unless a judge's order has been made under the authority of a statute and thereby deemed to be final, or it has been previously agreed by the parties that it shall be final, either party dissatisfied with his decision may, if he apply in a reasonable time, move the full court "to set aside" or "rescind such order," and all proceedings taken thereupon. 'When an order has been made under an express power given by statute, it is sometimes conclusive, and is not subject to review, unless an appeal to the court be expressly or impliedly given.

In the case before us the learned judge has given his decision based on the authority of a statute, and the present appellant was by his decision given a statutory right to serve his petition. Can it be said that a week after the judge can take away that right? If the judge had even no right to make that second order, he had not the right to, or power to, set it aside. The proceeding here is not an appeal from a mere matter of procedure, but from an order putting an end to the petition, and if the court below had no right to rescind the judge's order this court has the right to reverse their decision. Now I maintain, taking the whole election law together, that this court alone could rescind the judge's order. By holding the contrary, we decide that a judge can give judgment in favor of one of the parties and subsequently reverse his own judgment—a power which no judge possesses. I think that the judge in this case having once granted the order, neither he nor the Supreme Court of *Nova Scotia* could set it aside; certainly not because it was considered he had come to a wrong conclusion.

Now, let us look at the preliminary objections.

*Douglas B Woodworth*, the respondent or person against whose election and return a petition of *David M. Dickie* has been filed, objects to any further proceedings herein on or in virtue of the said petition on the following grounds which he presents as preliminary objections or grounds of insufficiency against the said petition or any further proceedings thereon.

1. Because the said petition was never presented.
2. Because the said petition was never presented by a duly quali-

fied person as required by the provisions of the Dominion Controverted Elections Act, 1874.

3. Because the said petition was not left at the office of the prothonotary of the Supreme Court at *Halifax*.

4. Because the said petition was not presented within thirty days after the publication, in the *Canada Gazatte*, of the receipt of the return to the writ of election of a member for the County of *King's* County aforesaid, by the Clerk of the Crown in Chancery, and it does not specifically allege any act of bribery to have been committed since the time of such return.

5. Because the said petition was not delivered at the office of the clerk of this court during office hours as prescribed by the said Act.

6. Because the said petition was not delivered at the office of the clerk of this court, or left at the office of the prothonotary, at *Halifax*, by a person duly qualified, within thirty days after the publication in the *Canada Gazette* of the receipt of and return to the writ of election of a member for the County of *King's* County, by the Clerk of the Crown in Chancery, and it does not specially allege any Act of bribery to have been committed since the time of said return.

7. Because the said petition was not presented by a person duly qualified to do so under the provisions of the Dominion Controverted Elections Act, 1874.

8. Because the said petition was not presented by a person who had a right to vote at the election to which the petition relates, or by a candidate at such election.

9. Because the said petition was not presented by a person who had a right to vote at the election to which the petition relates, or a candidate at such election, within thirty days after the publication in the *Canada Gazette* of the receipt of the return to the writ of election of a member for the said County of *King's* County by the Clerk of the Crown in Chancery, and it does not specifically allege any act of bribery to have been committed since the time of such return.

10. Because notice of the presentation of the petition and of the security, accompanied with a copy of the petition, was not served on the respondent within five days after the day on which the petition was presented, or within any prescribed time, or within any longer time allowed by the court or any judge thereof.

11. Because notice of the presentation of the petition and of the security, accompanied with a copy of the petition, was not served by petitioner on the respondent, as required by the provisions of the Dominion Controverted Elections Act, 1874.

12. Because the said petition and notice of the date of the pre-

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sentation thereof and a copy of the deposit receipt were not served on the respondent, as required by the provisions of the Dominion Controverted Elections Act, 1874.

13. Because the notice of the presentation of the petition and of the security accompanied with a copy of the petition was not served on the respondent within five days after the day on which the petition was presented, or within the prescribed time, and, if a longer time for service was allowed by the court or a judge thereof, the said allowance was not made until after the time prescribed for said service had expired, and the said allowance on that account was irregular and void, and the said court or judge had then no power or authority to allow any longer time for such service.

14. Because the order of Mr. Justice *Rigby*, dated at *Halifax* the thirtieth day of September, A.D. 1882, extending the time for the service of the said petition, notice of presentation thereof, and of the security, and by virtue of which the same were served, is *ultra vires* and was not granted until the prescribed time for the service thereof had expired, and after the power and authority of the court or a judge thereof to make any such order had ceased to exist.

15. Because notice of the presentation of the said petition and of the security, accompanied with a copy of the said petition, was not served on the respondent within five days after the day on which the petition was presented, or within the prescribed time, and no longer time for such service was allowed by the court or a judge thereof.

16. Because the deposit receipt, a copy of which was served on the respondent, was not signed by the clerk of the court as required by the provisions of the Dominion Controverted Elections Act, 1874.

17. Because an order extending the time for the service of the said petition and notice had been previously granted by a judge of this court and afterwards discharged on the merits before the said order, dated at *Halifax* the thirtieth day of September, A.D. 1882, was obtained, and the said last-mentioned order was obtained on a second application and on a state of facts fully known to the petitioner and his counsel at the time the first order was applied for.

18. Because the said order of the thirtieth of September, aforesaid, extends the time for the service of the said petition and notice, until the fifteenth day of October, 1882, and allows the said petitioner to serve respondent therewith on the said fifteenth day of October, which day was Sunday, and the said order is therefore illegal and void.

19. Because an order had been granted under the said act, extending the time for the service of the petition, and notices herein pre-

viously to the said order of the thirtieth of September, and the statute could not be a second time invoked to secure an extension of time for the service of the said petition and notice.

20. Because an order extending the time for the service of the said petition and notice had been previously granted by a judge of this court, and afterwards discharged, because the same had been granted without sufficient cause shown, previously to the said order of the thirtieth of September being granted, and no new facts have arisen or transpired since the granting of the first of said orders on account of which the said order of the thirtieth of September should be granted.

21. And because the said order of the thirtieth of September was improvidently granted, and without any sufficient cause or reason.

22. And the respondent prays that this honorable court, or a judge thereof, may hear the petitioner and respondent on and as to the foregoing preliminary objections and grounds of insufficiency, and decide the same in a summary manner.

Dated at *Halifax*, in the county of *Halifax*, this seventeenth day of October, A.D 1882.

*DOUGLAS B. WOODWORTH.*

Surely these are all legal questions. There is here no question of fraud or misrepresentation in obtaining the order upon which the respondent would be entitled to move to have the order rescinded in the first instance by the judge of the Election Court, and afterwards if unsuccessful by appeal to this court.

Looking at the case, of *Brassard* v. *Langevin* (1) which we decided here, [the learned Judge then read the head note in that case,] are not these the same objections that are taken in this rule *nisi*. A majority of the court in that case held that they were preliminary objections, and therefore not appealable under the law as it then stood. I can see no difference in the objection taken here. For these reasons I think this motion to quash should not be allowed to prevail.

TASCHEREAU, J.:—

I am of opinion that the appeal should be quashed

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

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for the reasons given by the Chief Justice and Mr. Justice *Strong*.

GWYNNE, J.:—

I am also of opinion that the judgment of the Supreme Court, making a rule *nisi* to set aside a previous order granted by Mr. Justice *Rigby ex parte* absolute, is not appealable under the Supreme and Exchequer Court Amendment Act of 1879.

*Appeal quashed with costs.*

Solicitors for appellant: *Henry & Weston.*

Solicitor for respondent: *J. N. Ritchie.*