

1883  
\*Oct. 24.

**DOMINION CONTROVERTED ELECTIONS  
ACT, 1874.**

**ELECTION PETITION FOR THE COUNTY OF  
GLOUCESTER, PROVINCE OF NEW  
BRUNSWICK.**

DENNIS COMMEAU ..... APPELLANT;

AND

KENNEDY BURNS ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Appeal on Election Petition—42 Vic., ch 39 (The Supreme and Exchequer Court Amendment Act of 1879), sec. 10, construction of—Rule absolute by Court in banc to rescind order of a Judge in Chambers—Preliminary objection.*

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections

\* PRESENT—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained on the 3th October from Mr. Justice *Weldon* an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained upon summons a second order from Mr. Justice *Weldon* rescinding his prior order of 13th October, 1882, and directing that upon the appellant re-paying to the clerk of the Court, the amount of the security the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of *New Brunswick*, and the Court gave judgment, rescinding it. Thereupon petitioner appealed to the Supreme Court of *Canada*.  
*Held*,—That the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 *Vic.*, ch. 39, sec. 10, (The Supreme Court Amendment Act, 1879), and therefore not appealable.

*Dickie v. Woodworth* (1) followed.

**APPEAL** from a judgment of the Supreme Court of *New Brunswick* making absolute a rule *nisi* calling upon the petitioner to show cause why an order of Mr. Justice *Weldon*, made on the seventeenth January, 1883, in the matter of the Dominion Controverted Election for the County of *Gloucester*, Province of *New Brunswick*, whereby he rescinded a previous order which he had made on the 13th October, 1882, should not be rescinded.

This was an application to rescind an order of Mr. Justice *Weldon*, made on the seventeenth January last, whereby he rescinded a previous order which he had made in this matter on the 13th October, 1882. It appeared that a petition had been filed by the appellant under the "Dominion Controverted Elections Act, 1874," against the return of the respondent as a member for the County of *Gloucester* in the Dominion Parliament, that certain preliminary objections to the

(1) 8 Can. S. C. R. 192.

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petition had been filed and a time appointed for hearing these objections, and after several adjournments the following order was made by Mr. Justice *Weldon* on the 13th October last.

“ Upon application made to me by Mr. *Rand*, of  
 “ counsel for the respondent, and with and by consent  
 “ of the petitioner, and upon hearing read the affidavits  
 “ of *Burton S. Reed*, the attorney and agent of the peti-  
 “ tioner, of *Stephen Rand*, and of the above named re-  
 “ spondent, I do order that the said petition may be  
 “ taken off the files of the court, and that the sum of  
 “ one thousand dollars deposited as security in the  
 “ matter be paid to the petitioner or his agent, or to  
 “ such other person as may be duly authorized to  
 “ receive the same.”

In consequence of this order, the deposit of \$1,000 was paid by the Clerk of the Election Court to Mr. *Reed*, the petitioner's attorney, but the petition was not in fact withdrawn from the office. No further proceedings were taken in the matter until January, 1883, when, on the application of the petitioner, and on his affidavit that the withdrawal of the petition and discontinuance of the proceedings therein, and the withdrawal of the deposit were done by his attorney without his (petitioner's) consent, and that he was desirous that proceedings in the petition should be continued, a summons was granted calling on the respondent to show cause why the order of the 13th October should not be rescinded, and the petition proceeded with. At the hearing of this summons on the 17th January last, the following order was made :

“ Upon reading the summons granted by me, etc , I  
 “ do order that upon the petitioner's repaying or caus-  
 “ ing to be repaid to the clerk of this court the amount  
 “ of the deposit money paid into court upon the filing  
 “ and presentation of the petition, drawn out by his the

“petitioner’s agent or attorney under my said order of  
 “the thirteenth day of October aforesaid, that my said  
 “order be rescinded, and that the said parties be restored  
 “to their original status and rights the same as if  
 “such order of the said thirteenth day of October last  
 “had not been made.”

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Against this order the respondent appealed to the Supreme Court of *New Brunswick*, which court gave judgment rescinding Mr. Justice *Weldon’s* order, made in January, 1883.

On appeal to the Supreme Court of *Canada*, a motion to quash the appeal for want of jurisdiction was made.

Mr. *Blair*, Attorney General of *New Brunswick*, for appellant.

Mr. *Harrison* for respondent.

RITCHIE, C. J. :—

I cannot entertain any doubt that this is not an appealable case. It is not an appeal from a judgment on a preliminary objection, and I fail to be able to bring myself to the conclusion, upon any ground whatever, that this is a preliminary objection such as is contemplated by the terms of the Controverted Elections Act of 1874, or which can come under the express terms of the statute giving us the right to hear appeals from judgments on preliminary objections. And it is very clear we must have express authority by statute in order to hear election appeals

STRONG, J. :—

I am of the same opinion. I think it is quite clear that under the Controverted Elections Act of 1874, and under the statute of 1879 (Supreme Court Amendment Act) enlarging our jurisdiction to hear appeals from judgments, deciding preliminary objections to an election petition, we have only jurisdiction provided the pre-

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liminary objection is one of the kind which originally and before this jurisdiction in appeal was conferred was authorized by the statute to be filed. It must be an objection emanating from the respondent himself and of a particular class, such as for instance an objection taken by the respondent to the *status* of the petitioner. But here there is no objection of this kind. This is a much stronger case than the case of *Dickie v. Woodworth*, by which I consider the point now raised to have been finally settled. In my judgment, the appeal should be quashed.

FOURNIER, J. :—

I am also of opinion that an appeal will only lie from a decision on a preliminary objection—which must be fyled within the time prescribed by the statute, and if not fyled within the specified time, it cannot be treated as a preliminary objection. I do not think the decision in this case is appealable.

HENRY, J. :—

We have to place ourselves in the place of the Legislature in order to ascertain what was meant by the words “preliminary objections.” I think the preliminary objections referred to are those which are to be fyled by the respondent. The question is whether we have jurisdiction in an appeal when these objections have not been adjudicated. Now, I take it, it must be limited to such preliminary objections. But in this case the petitioner says : “I have not got to that stage of the proceedings when the preliminary objections can be adjudicated upon. I only want to show I am entitled to have my petition tried, but somebody went to the judge and represented to him that he had authority to withdraw the money, and he was not so authorized.”

This clearly shows that this is not such a preliminary objection as was contemplated by the Legislature.

I feel, though reluctantly, that I must agree with the decision arrived at by this court. It is not an appeal from a decision on the merits of a preliminary objection.

I may add that it might be said that the money has been improperly withdrawn. If Judge *Weldon* was right in his conclusion, the parties may be said to be still in court, and contend that Judge *Weldon* had a perfect right to order the money illegally withdrawn to be returned, and having given his decision on a question of fact, not of law, the full court had no power to rescind his order. I only regret this court has no power to revise that order.

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GWYNNE, J. :—

It appears to me the case is very plain. The appeal is not against any decision upon a preliminary objection to the petition at all, but against a judgment of the court rescinding an order of Mr. Justice *Weldon* which rescinded a prior order of his own, upon the ground that the court found that the first order was made and acted upon by the withdrawal of petition and of the deposit filed by the petitioner as security for costs, by and with the consent of the petitioner himself, who had thereby put himself out of court, and that therefore, the second order made by Mr. Justice *Weldon*, which order the judgment of the court now appealed from rescinded, was improperly made. Against such a judgment of the court rescinding an order of a single Judge in Chambers the statute gives no appeal.

*Appeal quashed with costs.*

Solicitors for appellant : *Gregory & Blair.*

Solicitor for respondent : *L. H. Harrison*