1887
*Oct. 27, 28.

DOMINION CONTROVERTED ELECTION ELECTORAL DISTRICT OF SHELBURNE.

THOMAS ROBERTSON.....APPELLANT

AND

JOHN WIMBURN LAURIE, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Election Petition—Service of Copy—Extension of time—Discretion of Judge—R. S. C. ch. 9, sec. 10.

An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of ch. 9, R. S. C.

Semble, per Ritchie C.J. and Henry J., that the court below had power to make rules for the service of an election petition out of the jurisdiction.

Per Strong J.—An extremely strong case should be shown to induce the court to allow an appeal from the judgment of the court below on preliminary objections.

APPEAL from the decision of the Supreme Court of Nova Scotia, overruling certain preliminary objections presented by the appellant against an election petition filed against the appellant by the respondents.

The petitioner Laurie was a candidate at the election,

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

and resides in the County of Halifax, about two hundred miles from Shelburne. The other petitioner, Bowers, resides in Shelburne, in the County of Shelburne. The solicitors of the petitioners reside at Shelburne, about two hundred miles from Halifax.

The petition was filed at Halifax on the second day of May, 1887, in the afternoon. On the same day the petitioners' agent, at Halifax, telegraphed to the petitioners' solicitors, at Shelburne, informing them of the fact. An affidavit, which had been previously prepared, was immediately sworn to on the third day of May by the petitioner, John Bowers, for the purpose of obtaining an order to serve the petition out of the jurisdiction of the court, the appellant being then in the city of Ottawa. This affidavit was forwarded at once and reached Halifax on the morning of the fifth of May, and an application was immediately, on the same day, made to the Chief Justice for an order to serve the petition out of the jurisdiction, and to extend the same for service. This order was granted, and the documents were forwarded by the first mail to Ottawa and served on the appellant on the ninth of May, 1887.

On the 13th May, the appellant obtained an *ex parte* order to extend the time for presenting preliminary objections.

On the 23rd May, 1887, the appellant filed a notice of appointment of agent or appearance.

On the 28 May, 1887, the appellant filed preliminary objections, and amongst others the following:—

5. The service of said petition and of said notice and receipt was too late and made after the time limited therefor had expired, and was and is irregular and void, the said petition was presented on the 2nd of May, A.D. 1887, and the copy thereof and said notice and receipt not served on the respondent, Robertson,

1887

SHELBURNE ELECTION CASE.

until May 9th, A.D. 1887, and the order granted May, 13th, A.D. 1887, extending the time for service was improvidently granted and on insufficient grounds, and was void and irregular for the following reasons:—

"(*a.*) At the time of the presentation of said petition the respondent Robertson, was, to the knowledge of petitioners, attending the present session of Parliament at Ottawa, and with reasonable diligence said petition, after presentation, could have been forwarded to Ottawa and served on said respondent personally, within five days after said presentation, and the application for an extension of such time, which was *ex parte*, disclosed no special circumstances or difficulty in effecting service, but on the contrary disclosed the fact that such application was made within three days of the presentation of said petition, with no attempt to serve said respondent up to that time, although from affidavits used in such application it appeared that the petitioners knew where such respondent was, and by the ordinary means of mail communication had ample time, had diligence been used, to serve said respondent at Ottawa within the five days.

"(*b.*) Said application for extension was made, and the order granting such extension was made *ex parte* on the application of petitioners three days after the presentation of said petition without disclosing any facts not known to them on the date of presentation, and without accounting in any way for not having attempted to effect service up to that time.

"(*c.*) When said petition was presented the respondent, Robertson, was, to the knowledge of petitioners, at Ottawa, in the County of Carleton, in the Province of Ontario, attending the present session of Parliament, holden at Ottawa, which was, and to the knowledge of the petitioners was, to continue in session, and the petitioners by reasonable diligence after presenting the

petition herein on May 2nd, could have forwarded the same by the ordinary mail conveyance to Ottawa, and procured service thereof easily within five days after presentation.

"(*d.*) The petitioners, on the application for the said extension and the said order, improperly concealed the foregoing facts set out in paragraph (*c*), and by reason of such concealment obtained said order."

On the 14th day of June. 1887, on motion of the petitioners, the preliminary objections were set down for hearing before the Chief Justice, on the 5th day of July, 1887, on which day the appellant moved on affidavit, and obtained an order to continue the hearing until the 25th day of July, 1887.

On the 5th day of August, 1887, a rule was taken by the petitioners to have the preliminary objections heard before the court in banco, on the tenth day of August, 1887.

On the 6th day of August, 1887, the appellant gave notice of motion before the court in banco, for the said tenth day of August, 1887, to set aside the order granted by the Chief Justice on the fifth day of May, 1887, and on the fifteenth August, the said preliminary objections were dismissed and set aside with costs.

The 20th rule of the rules of the Supreme Court of Nova Scotia, in relation to Controverted Elections, passed on the 26th day of April, 1887, is as follows:—

"When the party against whom any petition is filed "is not within the Province of Nova Scotia, the "petition and accompanying documents shall be "served in such a manner as one of the judges shall "direct."

R. W. Scott Q.C. for appellant contended that a copy of the petition was not served in time within five days after its presentation; that the order of the honorable the Chief Justice of Nova Scotia made in chambers,

1887

SHELBURNE ELECTION CASE.

extending the time for effecting service for the period of fifteen days from the seventh day of May, was not based "on any special circumstances" or "upon any difficulty in effecting service," and was therefore not warranted by the statute inasmuch as it is clear and undeniable:

First. That the petitioners knew the appellant was in Ottawa attending to his duties as a member of the House of Commons.

Second. That had the copy of petition been sent to Ottawa for service even up to noon on the day after the presentation of the petition, the service might have been effected on the fifth of May, leaving still two days to spare before the expiration of the five days allowed by the statute.

He also contended that the application for such extension of time was not made till the third day after the presentation of the petition—no effort having, in the meantime, been made to serve a copy on appellant, though it was well known at the time the petition was presented that appellant was in Ottawa.

Graham Q.C. for respondent contended that the extending the time for service was a matter of discretion of the judge, and this court ought not to interfere with the decision of the Supreme Court of Nova Scotia declining to overrule his exercise of discretion. *Wigney* v. *Wigney* (1); *Huggins* v. *Tweed* (2); *Golding* v. *Wharton* (3); *Re Merchant Banking Co.* (4); *In re Terrill* (5); *Watson* v. *Rodwell* (6).

Sir W. J. RITCHIE C. J.—I have not any hesitation in expressing my opinion in this case at once. I think that where the legislature has entrusted

(1) 7 Prob. Div. 177.
(2) 10 Chan. Div. 359.
(3) 1 Q. B. D 374.
(4) 16 Chan. Div. 635.
(5) 22 Chan. Div. 493.
(6) 3 Chan. Div. 380.

1887

SHELBURNE ELECTION CASE.

Ritchie C.J.

to a judge a discretion to be exercised by him, there should be strong and substantial reasons presented to warrant us in interfering with the discretion so exercised by him. And if after that discretion has been exercised, an application has been made to the full court, and that court with the knowledge of all the circumstances connected with the matter has confirmed the exercise of that power, there is still greater reason why this court should not interfere. I throw out of consideration altogether in this case the point raised as to the power of the Supreme Court of Nova Scotia to make rules in relation to the service of the presentation of the petition when the respondent is out of the province, and jurisdiction of the court in which the petition is filed. If I was called on to express an opinion at the moment, I would, as at present advised, think the court possessed such power. But in the view I take of the case, no necessity arises for expressing an opinion on that question. The circumstances of this case show in my opinion, that a very proper discretion was exercised by the learned Chief Justice in extending the time, having regard to the shortness of time, 5 days. Where the place where the party is to be served is so far from the Province of Nova Scotia as Ottawa, and where the transaction arose in Shelburne where the petitioners' agent is supposed to be, and in view of the possible interruption of the mail by accidents or otherwise, and that the party could not know whether the respondent was actually at the time in Ottawa or not (as we know that members are in the habit of often absenting themselves), and that the person to whom the letter is addressed might be out of town, having regard to considerations such as these, I cannot say the petitioners' agent did not exercise reasonable precaution in applying for an extension of time, or that the judge exercised a wrong discretion

1887

SHELBURNE ELECTION CASE.

Ritchie C.J.

in granting a reasonable delay for serving the copy of the petition. It was in the discretion of the judge to say what under the circumstances would be a fair time and this court should not, as I said before, without strong and substantial reasons interfere with the discretion of the judge, and I cannot say there are any of these strong and substantial reasons suggested in this case, but the contrary.

STRONG J—I am also of opinion that this appeal should be dismissed. In the first place I consider the order was an exercise of discretion by the judge which is not properly a subject of appeal. But even if we treat it as an appealable decision, I am of opinion that it was in every respect a proper order to be made. The application for an extension of time was only a proper precaution to take having regard to the short delay allowed, and to the possibility of the respondent being absent from Ottawa when the papers reached that place.

It was held in the second Charlevoix case (1) that an appeal did not lie from judgments on preliminary objections. Subsequently to that decision, the law was altered, and an Act was passed authorizing such appeals. I think, however, from the circumstance that such an appeal as the present has been brought, that the Court ought to be astute to find reasons for disallowing appeals of this kind, which in the majority of cases will probably be brought merely for dilatory purposes.

FOURNIER J.—I concur in the appeal being dismissed with costs.

HENRY J.—I concur also on both points with the decision of the learned Chief Justice below and my

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

1887

SHELBURNE ELECTION CASE.

Henry J.

colleagues. Service was required within a certain time, and I think the judges of the court below have power to make rules for service out of the jurisdiction. Under the circumstances I think it was positively necessary, and even if not this court should not interfere with the exercise of the judge's discretion.

TASCHEREAU J.—I am of the same opinion. Upon reading the papers in this case I never thought this a serious appeal.

Appeal dismissed with costs.

Solicitor for appellant: *N. H. Meagher.*

Solicitors for respondents: *White & Blanchard.*