CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE WEST RIDING OF ASSINIBOIA.

1897

*Feb. 16.
*Mar. 24.

NICHOLAS FLOOD DAVIN, (RESPONDENT) ..... APPELLANT;

AND

JOHN McDOUGALL, (PETITIONER)..... RESPONDENT.

ON APPEAL FROM A DECISION OF MR. JUSTICE RICHARDSON.

Appeal—Election petition—Preliminary objection—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 8, s. 50.

The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections with s. 50 of the Controverted Elections Act, and if it were no judgment on the motion could put an end to the petition.

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

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APPEAL from a decision of Mr. Justice Richardson, in chambers, granting a motion by the petitioner to have preliminary objections to the petition struck out.

An election petition was filed against the return of the appellant in the general election for the House of Commons on June 22nd, 1896. Preliminary objections to the petition were filed with the clerk of the court on August 3rd, the fifth day after service of the petition, at 2.30 p.m. An ordinance of the North-west Territories, Judicature Ordinance no. 6 of 1893, sec. 17, subsec. 1, provides that during the summer vacation, which comprises the months of July and August, the office of the clerk shall be closed at 1 p.m.

A summons was taken out by the petitioner, returnable before Mr. Justice Richardson in chambers, calling upon the appellant to show cause why the objection should not be struck out as not having been filed within five days after service of the petition as required by sec. 12 of the Controverted Elections Act, R. S. C, ch. 9. On return of the summons the learned judge held that the five days had expired at 1 p.m. on August 3rd, and that the objections were not properly filed and that the petition was at issue. An appeal was taken to the Supreme Court from that decision.

McIntyre Q.C. for the appellant, referred on the merits to *Rolker* v. *Fuller* (1); *Bothwell Election Case* (2).

Howell Q.C. and *Chrysler* Q.C. for the respondent. The court has no jurisdiction to entertain this appeal. It is not an appeal from a decision on preliminary objections and no decision on the matter can put an end to the petition. See *Salaman* v. *Warner* (3).

McIntyre in reply cited Powell on Appellate Jurisdiction (4).

(1) 10 U. C. Q. B. 477.
(2) 9 Ont. P. R. 486.
(3) [1891] 1. Q. B. 734.
(4) Pp. 104,371.

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SEDGEWICK J.—A petition in this case was duly presented under the Dominion Controverted Elections Act, and was served on the appellant on the 29th of July, 1896. Preliminary objections were presented and filed on Monday the 3rd of August following, but at half past two o'clock in the afternoon. Section 12 of the Act provides that such objections must be presented within five days after service of the petition, and the Judicature Ordinance, no. 6 of 1893, sec. 17, subsec. 1, enacts that the office of the clerk of the court shall on Saturdays and during vacation be closed at one o'clock in the afternoon.

On the 2nd of September the respondent took out a summons calling upon the appellant to show cause why the preliminary objections should not be struck out or otherwise disposed of, subsequently giving notice that on the hearing of the motion he intended to take the ground that the preliminary objections had not been filed within the five days prescribed by the Act, inasmuch as they had been filed after one o'clock on the Monday referred to. Upon the hearing of this motion—a motion to strike from the files, or otherwise dispose of the objections—the learned judge, Mr. Justice Richardson, gave judgment sustaining the contention that the respondent was too late in filing his objections, and that the petition was therefore at issue. In other words, he held that he could not hear the objections upon their merits, and up to the present time there has been no judgment passed in respect to the validity of any of them. It is from this decision that this appeal is taken, and a motion has been made before us to quash on the ground that this court has no jurisdiction to entertain it.

We are all of opinion that this motion must prevail. Section 50 of the Act is as follows:

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50. 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 and 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. 38 V. c. 11 s. 48 part ; 42 V. c. 39 s. 10.

It is only then in two cases that an appeal to this court is provided for, first, from the judgment on a preliminary objection, and secondly, from a judgment of the trial judges upon the trial. But it is not from a judgment upon all preliminary objections that an appeal lies. The objection must be of such a character as, if allowed, would *put an end to the petition.*

For two reasons the objection to our jurisdiction must prevail. First, the judgment appealed from was not a judgment upon a preliminary objection. It was only a judgment upon a motion to set aside a preliminary objection. As I have said, there has as yet been no judgment upon these objections. They may have been well or ill founded. There has been no decision on that, and it is only from such a decision that an appeal lies. I need not elaborate this point further, as much that the learned Chief Justice has just said in dealing with the Marquette case (1) applies equally here.

And secondly, even if this were a judgment upon a preliminary objection, it is not that kind of objection that the statute covers. The judgment upon the motion before the court below did not put an end to

(1) See next page.

the petition. Had the judgment been the other way, and he had decided that the objections were filed in time, that likewise would not have put an end to the petition.

For these reasons we think the appeal should be quashed with costs.

We deliberately refrain from expressing an opinion upon the merits of the judgment appealed from. As we have no jurisdiction the merits are not before us.

Appeal quashed with costs.

Solicitors for the appellant: *Hamilton & Jones.*

Solicitor for the respondent: *H. A. Robson.*