

Judgement of the Lords of the Judicial Committee of the Privy Council on the Petition of Kennedy v. Purcell, from the Supreme Court of Canada ; delivered 7th July 1888.

Present :

LORD HOBHOUSE.

LORD MAONAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[Delivered by Lord Hobhouse.]

This petition gives rise to a question of considerable importance. The decision complained of has been made under the provisions of the Canadian Controverted Elections Acts ; and it will be convenient to refer briefly to those provisions of the Acts on which the judgement of their Lordships is mainly rested.

The principal Act, 49 Vict., cap. 9, is contained in the Revised Statutes of Canada of the year 1886, and is amended in some respects by a subsequent statute passed in 1887. The Act of 1886 consolidates and amends previous Acts passed for the purpose of giving to courts of justice the power of deciding disputed elections which was previously possessed by the elected bodies themselves. The course of procedure is as follows. A petition is to be presented to the local Court, which is to have the same powers as if such petition were an ordinary cause within its jurisdiction, Sects. 2, 3, 5, 35. Very short periods of time are

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prescribed for giving notice of the petition, for taking preliminary objections to it, and for answering it if those objections are overruled, Sects. 10, 12, 13. Every petition is to be tried by one of the Judges of the Court without a jury, Sect. 31 of the Act of 1887. The trial of every petition is to be commenced within six months of its presentation, and to be proceeded with from day to day until it is over, Sect. 32. The Court may enlarge the time for commencement of trial, or the period limited for taking any step or proceeding, Sects. 33, 64. The Judge may order a special case to be stated for the decision of any question, but it is "as far as possible" to be heard before that Judge, Sect. 49. An appeal from the Judge's decision may be made to the Supreme Court of Canada within eight days. If there is no such appeal, the Judge is within four additional days to certify his decision to the Speaker of the House of Commons, who is to take action thereupon "at the earliest practicable moment," or "without delay." If there is an appeal, the Supreme Court is to decide, its Registrar is to certify the decision, and the Speaker to take action upon it, Sects. 43, 46, 47, 50, 51.

The election in question took place on the 22nd February 1887, when Mr. Purcell was returned as duly elected. The petition was presented on the 25th April following, immediately after the session of Parliament commenced. On the 1st of December 1887 the Court of Common Pleas made an order enlarging the time of trial for two months. On the 13th January 1888 the trial took place before Mr. Justice Rose, who declared that the election of Mr. Purcell was void, and that he had been guilty of corrupt practices. He appealed to the Supreme Court, who, on the 29th March 1888, reversed the decision of Mr. Justice Rose, and dismissed the petition.

It appears that the decision of the Supreme Court did not turn on the merits of the case, but entirely on questions of procedure, which were three in number. First, whether the time during which Parliament was sitting should be computed as part of the six months allowed for the commencement of the trial. Secondly, whether after the expiry of the six months the Court has power to extend the time for trial. Thirdly, whether the Appellant, not objecting to the enlargement when the order was made, was entitled to object afterwards. On all or some of these questions two out of the five Judges who heard the appeal were in favour of the petitioner, but the other three Judges decided in favour of Mr. Purcell on all of them.

It is now urged by the petitioner that inasmuch as the questions decided are important questions of law affecting the construction of the election statutes, and there is good ground for doubts as to the soundness of the decisions, Her Majesty in Council should entertain an appeal. On the other side the importance of the questions is not denied, nor is it denied that the decisions on them are fairly open to argument. But it is contended, first, that the subject matter is not one with respect to which the prerogative of the Crown exists; and secondly, that if the prerogative does exist, it is not proper to exercise it.

To support the first proposition the case of *Theberge v. Landry* (2 L. R., Appeal Cases, 102) is relied on. That case arose under the Quebec Elections Act of 1875, by which the jurisdiction to try election petitions was given to the Superior Court, whose decisions were declared "not susceptible of appeal." The petitioner sought to appeal on the merits of the election. The decision of this Committee was, not that the prerogative of the Crown was taken away by the general prohibition of appeal, but

that the whole scheme of handing over to courts of law disputes which the Legislative Assembly had previously decided for itself, showed no intention of creating tribunals with the ordinary incident of an appeal to the Crown.

In the case of *Valin v. Langlois* (5 L. R. Appeal Cases, 115), the petitioner asked for leave to appeal from a decision of the Supreme Court of Canada under the Controverted Elections Act of 1874, which is one of the statutes consolidated by the Act now in question. The ground of appeal was that the Act, being a Dominion Act, was *ultra vires* of the Dominion, in assuming to give the Courts in Quebec jurisdiction over elections in Quebec to the Canadian House of Commons. This Committee held that there was no ground for any such contention, and dismissed the petition. But it was said that if they had doubted the soundness of the decision below they would have advised Her Majesty to grant leave to appeal. That opinion is now relied on as limiting or contravening the effect of the decision in *Theberge v. Landry*.

Their Lordships do not think that for the present purpose any useful or substantial distinction can be taken between the statute which was the subject of decision in *Theberge v. Landry*, that which was the subject of decision in *Valin v. Langlois*, and those which are now in question. In all three cases there is the broad consideration of the inconvenience of the Crown interfering in election matters, and the unlikelihood that the Colonial Legislature should have intended any such result. In all three there is the creation of a special tribunal for the trial of petitions, in the sense that the litigation is not left to follow the course of an ordinary lawsuit, but is subjected to a special procedure and limitations of its own. And in all three there is the same expression of the intention to make the Colonial

decision final. But such variance as there is between the two cited cases is only to this extent, that the Committee in the latter case must have thought that the question of the existence of the prerogative was still susceptible of argument, when the dispute went to the very root of the validity of a law passed by Parliament to take effect in a province. Their opinion on an *ex parte* hearing, and on the sole question whether or no there should be any further argument on the matter at all, cannot be put higher than that.

Their Lordships do not find it necessary to give any decision on the abstract question of the existence of the prerogative in this case, because they are satisfied that if it exists it ought not to be exerted in the case before them.

It is true that the questions are very debateable, and that they affect the administration of the whole law on this subject. But the range of cases affected by them must be very narrow. It is not suggested that in the present Parliament there is a single case except the one under appeal. There can be no other case till fresh elections take place; and if the decisions now given have really misinterpreted the mind of the Legislature, and are calculated to establish rules of procedure less convenient than those intended, the Legislature can at once set the matter right. This peculiarity of the subject matter largely diminishes the force of the consideration, usually a strong one, that the decision complained of affects general questions of law.

The next observation is that the statutes show throughout a desire to have these matters decided quickly. There are the most obvious reasons for such a desire. The legal duration of a Parliament, is, as their Lordships understand, five years, and its usual duration four years.

It is most important that no long time should elapse before the constitution of the body is known. And yet if the Crown is to entertain appeals in such cases, the necessary delays attending such appeals would greatly extend the time of uncertainty which the Legislature has striven to limit.

Again, the intention to confine the decision locally within the Colony itself is just as clear as the intention to get it passed speedily, because it is expressed that the decision of the Supreme Court shall be final. And it seems to their Lordships that there are strong reasons why such matters should be decided within the Colony, and why the prerogative of the Crown should not, even if it legally can, be extended to matters over which it had no power, and with which it had no concern, until the Legislative bodies chose to hand over to judicial functionaries that which was formerly settled by themselves. Before advising such an exertion of the prerogative, their Lordships would require to find indications of an intention that the new proceedings should so follow the course of ordinary law as to attract the prerogative. But the indications they do find are of the contrary tendency.

The result is that their Lordships cannot advise Her Majesty to grant the leave asked, and that the petition must be dismissed with costs.
