CONTROVERTED ELECTION OF THE COUNTY OF BELLECHASSE.

1880
*Nov. 4, 5.

1881
*Feb'y. 11.

ACHILLE LARUE.....APPELLANT;

AND

ALEXIS DESLAURIERS.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, DISTRICT OF MONTMAGNY, P. Q.

Election Petition—Supreme Court Act, Sec. 44—Right to send back record for further adjudication—Bribery—Appeals from findings upon matters of fact—Insufficiency of return of election expenses—Personal expenses of candidate to be included.

The original petition came before Mr. Justice *McCord* for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned Judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed."

This judgment was appealed from, and the now respondent, under sec. 48 of the *Supreme Court Act*, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice *McCord* had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the said cause proceeded with according to law.

The record was accordingly sent to the prothonotary of the Superior Court at *Montmagny*. Mr. Justice *McCord*, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice *McCord* had no jurisdiction to proceed with the case.

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

1880

LARUE v. DES-LAURIERS.

Held,—That the Supreme Court on the first appeal, could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court *a quo* to be proceeded with according to law, gave jurisdiction to Mr. Justice *McCord* to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48, *Supreme Court Act*. (*Fournier* and *Henry*, J.J., dissenting).

The charge upon which this appeal was principally decided was that of the respondent's bribery of one *David Asselin*. The learned Judge who tried the case found, as a matter of fact, that appellant had underhandedly slipped into *Asselin's* pocket the $5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the *Election Act*, and this payment was bribery. The evidence bearing on this charge is reviewed in the judgments below.

Held,—That an Appellate Court in election cases ought not to reverse on mere matters of fact the findings of the Judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below that appellant had been guilty of personal bribery.

2. Per *Taschereau*, J.,—That the personal expenses of the candidate should be included in the statement of election expenses required to be furnished to the Returning Officer under 37 *Vic.*, c. 9, sec. 123. [*Fournier* and *Henry*, J. J., expressed no opinion on the merits.]

[The judgment of *McCord*, J., (1) on the other charges was also affirmed.]

APPEAL from the judgment of Mr. Justice *McCord*, of the Superior Court for *Lower Canada*, by which the election of the appellant, as the member representing the County of *Bellechasse* in the House of Commons of the Dominion of *Canada*, was declared void, and the appellant personally found guilty of bribery.

At the general elections of September, 1878, the appellant was returned for the electoral district of

(1) 6 Q. L. R. 100.

1880

LARUE
v.
DES-
LAURIERS.

Bellechasse, and his election was contested by the respondent.

Mr. Justice *McCord*, before whom the matter of the petition against the return of the appellant was tried, having heard the parties and their witnesses, as well on the merits of the case as on an objection taken to the jurisdiction of the court, on the ground that the *Dominion Controverted Elections Act* of 1874 was unconstitutional, finally, on the 22nd April, 1879, without adjudicating on the merits of the case, decided that he had no jurisdiction, and on that ground alone dismissed the petition of the respondent. The respondent appealed from Mr. Justice *McCord's* judgment to the Supreme Court. Upon that appeal, Mr. Justice *McCord's* judgment was, on the 3rd March, 1880, reversed, the Supreme Court holding that the Act was constitutional, and that Mr. Justice *McCord* had jurisdiction to hear and determine the case, and it was ordered that the record should be transmitted to the officer by whom it had been sent to the Supreme Court, to have the said cause proceeded with according to law. Upon the record being sent back as ordered to the Prothonotary of the Superior Court for the District of *Montmagny*, Mr. Justice *McCord* took up the case, and, on the 10th May, 1880, pronounced the following judgment:

"Having heard the parties and their witnesses, examined into the evidence and documents filed and duly deliberated;

"Considering that it is proven that an agent of the respondent committed corrupt practices at the said election, by treating voters on the day of polling, on account of such voters having voted; that another agent of the respondent also committed corrupt practices in the same manner, and that another agent of the respondent committed corrupt practices at the said election

1880

LARUE v. DES-LAURIERS.

by paying for the conveyance of a voter to and from the poll on the day of polling;

"Considering that it is proved that the respondent himself committed corrupt practices at the said election: 1st. By giving money to a voter in order to induce him to endeavor to procure the return of the respondent; 2nd. By threatening another voter with the loss of his place, and also promising to endeavor to procure for the said voter an employment in order to induce him to refrain from voting at the said election; 3rd. By threatening a voter with a prosecution for damages in order to induce him to refrain from voting at the said election; and, 4th. By threatening another voter with the loss of his employment, in order to induce him to refrain from voting at the said election;

"I hereby declare and adjudge, that the said respondent *Achille Larue* was not duly elected and returned at the said election; and that the said election is void. And I further adjudge and order that the respondent do pay to the petitioner his costs in this cause.

By the Court,

A. Bender, P. S. C. M."

It is from that judgment that the present appeal was taken, and the grounds of appeal were:

1st. That Mr. Justice *McCord* had no right or jurisdiction to take up the case as he did, and give the judgment complained of; 2nd. That supposing he could have taken cognizance of the case, he could not pronounce a judgment upon the merits of the case; 3rd. That the judgment complained of is not supported by the evidence in the case.

Mr. *Langelier*, Q.C., appeared for the appellant, and Mr. *Amyot* for the respondent.

The charges upon which this appeal was decided, and the arguments and authorities relied on by counsel, are reviewed in the judgments.

RITCHIE, C. J.:

(After reading the above statement of the case, proceeded as follows);

I think there is nothing whatever in the two first objections. It has been very strongly urged that the petition having been heard on the merits and dismissed in the court below, it must be assumed to have been dismissed on the merits, and the appellant having expressly confined his appeal in his notice of appeal to the question of jurisdiction, this judgment on the merits was not appealed from. In his factum the appellant thus puts his contention:

2nd. Mr. Justice *McCord*, supposing he could take cognizance of the case as he did, could not pronounce any judgment on the merits of the case.

It will be remembered that the trial of the case had taken place, that after the adduction of their evidence by both parties the case had been argued on the merits and reserved by Mr. Justice *McCord*; that nearly three months afterwards he gave his judgment of the 22nd April, 1879. By that judgment he does not merely say that he declines to act in the matter, but that he dismisses the petition altogether: *the petition of the Petitioner is rejected and dismissed.*

Now the petition could only be rejected and dismissed by him as it had been submitted. viz: on its merits. We, therefore, say that the petition stood dismissed by a judgment not appealed from, nor impugned in any other way, when Mr. Justice *McCord* again took it up and rendered the judgment complained of.

It is true that Mr. Justice *McCord* says, in the said judgment, that he dismisses the petition only on the ground that he has no jurisdiction. But we contend that we have nothing to do with the reasons of the judgment, and that we must consider the judgment itself which dismissed the petition when it had been fully submitted on its merits.

I fail to see the least force in this objection.

The Judge below refused to adjudicate on the petition or on the merits of the case, because he held he had no jurisdiction. As to the now respondent's limiting or confining his appeal, there was nothing to limit or confine, there was no decision on separate distinct

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

propositions of law and fact, there was only one decision on one proposition of law—all he could appeal against was that decision, and all he could do was to ask the court to reverse that determination and hold, in opposition to the Judge, that he had jurisdiction, and therefore should have adjudicated on the matter of the petition on the merits; and this is simply what the appellant did do, and all this court did was to say that his contention was right and that the Judge was not without jurisdiction; that he should not have rejected or dismissed or refused to determine the case on the merits, but, instead thereof, should have proceeded to a final adjudication of the matters in controversy on the merits. Suppose we sustained the now appellant's contention, refused to review this case on the merits, and adjudged that Judge *McCord* had no right to go on with the investigation or to adjudicate on the merits of the petition, it could only be on the ground contended for, that the petition had been already dismissed, by the decision of the Judge below, on the merits, when in fact it had not been, and that that decision had not been appealed from, when there was no such decision to appeal from. The petition does not, at this moment, in fact or in law, stand on the records of any court dismissed on any ground whatever; the only judgment of dismissal, if judgment of dismissal it was, that has ever been given, has been reversed. This court has said the Judge was wrong in the conclusion at which he arrived in the only decision or judgment he ever did give, and so this court reversed that decision. If we now say further proceedings in the case, after the reversal of his judgment, cannot be had, to dispose of the real matters in controversy which never yet have been adjudicated on, what is to become of the petition? This court could not certify that it had been dismissed, if the judgment below was really a judgment of dis-

missal, because this court reversed that judgment; for the same reason the Judge below could not certify that the petition had been dismissed by him, because his judgment of dismissal ceased to be a judgment after reversal by this court. But in no case, and under no circumstances, could he truthfully certify that the petition had been dismissed on the merits, because the merits never were adjudicated on by him, or by any other court.

1881
LARUE
v.
DES-
LAURIERS.
Ritchie, C.J.

The only true certificate that could be given would be that the Judge of first instance had not adjudicated on the petition on the merits, but had refused to do so for alleged want of jurisdiction; that this court had adjudged that he had jurisdiction and should have decided the case on the merits and transmitted the record to the court below to be proceeded with according to law. This is not the certificate contemplated by the Act, and could not and would not, I should conceive, be accepted by the House of Commons as a final determination of the matter. The Judge having stayed his hand on the ground that he had no jurisdiction to proceed, and having been set right in this, and his judgment thereon having been absolutely reversed, why should not the petition stand as if no such erroneous decisions had been given? When the Judge discovers his error, why should the case not be heard, determined and disposed of on its merits according to law? When the Judge thought he had no jurisdiction he stopped the investigation and adjudication; when he finds he has jurisdiction, why should he not go on and do his duty? This court, having given the judgment the court below should have given, necessarily leaves the case just in the position it would have been had the Judge delivered that judgment in the first instance, and must necessarily be proceeded with after the judgment given

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

by this court as it should and would have been had the Judge delivered it himself.

I must say I can see nothing in reason or law to prevent this being done; on the contrary, I think it would be a scandal on the law if he could not and if he did not do so.

Suppose the Judge, at the outset of the hearing, had thought that he had no jurisdiction, or, after having heard part of the evidence in the case, it had occurred to him that he was without jurisdiction, and so he decided not to proceed further in the case, (and that is, in fact, just the present case,) and the party aggrieved comes to this court to get the Judge set right and his jurisdiction affirmed, and it is affirmed, is this court to assume the functions and duties of the Judge and try the case on the merits from the start, or take it up where the Judge left off? This is or must be the respondent's contention, in fact.

In answer to this: section 48 of the Supreme and Exchequer Court Act has been invoked as sustaining the contention that the appellant should have appealed as against a dismissal of the petition on the merits, and that then this court could have heard evidence and adjudicated on the case on the merits under the words of the section, "and in case it appears to the court that any evidence duly tendered at the trial was improperly rejected, the court may cause the witness to be examined before the court or a Judge thereof or upon commission."

I think this has no application at all to the present case. I think this court has no original jurisdiction in election cases, that there can be no appeal to this court except from an adjudication of the Judge who tried the petition on a question of law or fact. The words are: "Any party to an election petition in said Act (Controverted Election Act) *who may be dissatisfied*

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

with the decision of the Judge who has tried the petition on any question of law or fact, and desires to appeal against the same, may," &c. The latter part of section 48 referred to simply provides that where evidence has been duly tendered, and rejected by the Judge, in a case which he has heard and finally determined, and this court should hold that the evidence was legally admissible and should not have been rejected, and so overrule the decision of the Judge the evidence so rejected may be supplied, on appeal, in the manner pointed out; but surely by no construction can this be held to give this court original jurisdiction to hear and determine a case never determined in the court below, and to examine witnesses never duly tendered at the trial, nor improperly rejected, for the reason that the Judge, though he heard evidence, ultimately refused to try and decide the case on the merits for alleged want of jurisdiction. This court is not a court of first instance, and to give it jurisdiction there must be a decision on a question of law or fact against the decision of which dissatisfied parties desire to appeal.

It was also strongly urged that after the judgment of this court "Judge *McCord* had no right to take up the case as he did." The appellant thus puts his contention on this point in his factum:—

> Now the appellant contends that Mr. Justice *McCord* had no right to do so. By his first judgment of the 22nd April, 1879, he had entirely disposed of the case before him; he was by that judgment *functus officio*, and dispossessed of the case. Unless he was then again put in possession of the same by the judgment of this court, he could no more take cognizance of the case unless he was entrusted with it in the usual course of procedure fixed by law.

And he says:—

> Nobody will, for one moment, pretend that the judgment of this court did authorize Mr. Justice *McCord* or any other Judge or court to take up the case. That judgment, after having reversed Mr. Justice *McCord's* decision on the ground of jurisdiction, merely

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

ordered the transmission of the record to the Prothonotary of *Montmagny to have the said cause proceeded with according to law.*

And yet, strange to say, he adds :—

This, we contend, had the effect of putting the parties in a position to proceed in the court below as if Mr. Justice *McCord's* judgment on the question of jurisdiction had not been rendered.

And he further contends :—

The appellant contends that if anything more could be done as to the merits of the case, it could only have been after an application to the court by one of the parties, pursuant to notice to the other, to have a suitable day and place fixed for the trial of the case or for the hearing of the same upon the evidence already adduced (*Dominion Controverted Elections Act*, 1874, sec. 11).

The only part of all this contention that I can at all appreciate is where the respondent says the transmitting the record to the Prothonotary of *Montmagny* to have said cause proceeded with according to law, was to put "the parties in a position to proceed in the court below as if Mr. Justice *McCord's* judgment on the question of jurisdiction had not been rendered." This states, in my opinion, with the strictest accuracy, just what the effect of the judgment of this court was, namely, saying to Mr. Justice *McCord:* "You should not have given the judgment you did, but instead thereof you should have decided that you had jurisdiction, and assumed jurisdiction in the case, and should have decided it on the merits," which Judge *McCord*, acting on the decision of this court, rightfully, I think, proceeded to do.

As to the want of notice and as to the necessity of an application to the court "to have a suitable day and place fixed for the trial of the case, or for the hearing of the same upon the evidence already adduced under the Dominion Controverted Elections Act, 1874, sec. 11 :"

Before Mr. Justice *McCord* rejected or dismissed the petition for want of jurisdiction, all the evidence of both

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

parties had been heard, and the case had been argued on the merits and reserved for judgment, and so was in a position to be decided on the merits, and doubtless would have been so decided but for the opinion of the Judge on the question of jurisdiction; but, notwithstanding which, when the record went back for a final adjudication, the learned Judge, in his judgment appealed from and now before us, says:—

On the 31st January, 1879, the trial of this cause was closed, both parties were fully heard, and the case lay before me for a decision upon the merits subject, however, to certain objections to my jurisdiction filed by the respondent.

Being of opinion that I was without jurisdiction, *I abstained from adjudicating upon the petition;* but my judgment, maintaining the respondent's objections, having been reversed by the Supreme Court, the record was sent back "to have the said cause proceeded with according to law," and, consequently, I again found the case before me for a decision upon the merits.

Although, as I have just said, the parties had already been fully heard, I felt that, owing to the length of time which had elapsed since the hearing, they might fairly desire to refresh my memory as to their respective arguments and pretensions. I therefore offered the counsel of each of the parties a re-hearing of the case, but on both sides this was considered unnecessary, and my offer was declined. *It only remains with me now to render my judgment*, and, before doing so, to explain the ground upon which it is founded.

Under these circumstances what pretence can the party, now appellant, have to allege that "the whole case should have been gone through again."

On the merits of the case, I regret to say that after a careful examination of the evidence I cannot come to the conclusion that the learned Judge who tried this petition was wrong in his appreciation of that evidence in the case of *Asselin*, and not being so satisfied, it would not be right for me to disturb the judgment. As applicable to this case, I fully and entirely agree with the observations made by my learned predecessor in the case of *Somerville* v. *Laflamme* (1) where he says:—

(1) 2 Can. S. C. R. 260.

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

In a matter of this kind when the two witnesses appear to be equally respectable, and they positively contradict each other, and the surrounding circumstances do not lead the Judges in the Appellate Court clearly to the conclusion that the decision in the court of first instance is wrong, the Appellate Court ought not to interfere, though they might have decided differently, if they had seen the witnesses.

And I also feel the force of his observations as to the position of the Judge who has tried the case (1):—

> But the Judge who tries the cause in the first instance has many advantages over those who are called upon to review his decision, he sees the witnesses, hears their answers, sees whether they are prompt, natural, and given without feeling or prejudice, with an honest desire to tell the truth, or whether they are studied, evasive and reckless, or intended to deceive, &c.

A case such as this is very different from a case at common law; there the witnesses are in general disinterested parties, unconnected with the case and so more or less impartial, while in election cases the witnesses are generally strong partizans, or more or less mixed up with the election. The opinion of the learned Judge who has heard the case is entitled to great weight, and before his decision can be set aside, we must be entirely satisfied that he is wrong. In affirmance of this view, we have the repeated declarations of appellate courts that on questions of facts, such tribunals must be clearly satisfied that the conclusion at which the Judge who tried the case arrived is not only wrong but entirely erroneous.

With respect then to the charge brought against the appellant for bribing *Asselin*, the facts are these: It appears that *Asselin* was an influential man in one of the electoral districts and had been friendly to Mr. *Larue* in a former election. Previous to the election now in question, Mr. *Larue*, while on a canvassing expedition, met *Asselin* on the road and is invited by *Asselin* to go to his house, an invitation which was accepted. *Asselin*

(1) P. 227.

not being at home, Mrs. *Asselin* gave him and his carter a cup of tea and a biscuit. On a second occasion Mr. *Larue* called at the house of *Asselin* and was entertained by *Asselin* himself with a glass of whiskey and a biscuit, and when leaving Mr. *Larue* secretly or clandestinely slipped a $5 bill into *Asselin's* pocket. The witness says: "*Il m'a coulé quelque chose dans ma poche, j'ai cru que c'était un* $5." It was quite clear he never intended to and did not make any charge for this hospitality. When asked what was the value of the refreshments supplied, he answered that he had made no charge, and that the outside value would have been $1, and that when the appellant slipped the money into his pocket, he said: "*Gardez-ça.*" Mr. *Larue* does not admit he slipped the money into his pocket. He says he put it into *Asselin's* hands, but does not deny he put it there clandestinely, and assigns as a reason for not giving it to him publicly that he was afraid he might hurt his feelings. The reason he assigns for giving *Asselin* the money is that it was to pay for the trouble he had given him; to pay his expenses and those of his friends he should send there. No friends were ever sent, no expenses were ever shewn to have been incurred, and it is beyond doubt it never was intended that any part of this sum should be returned to Mr. *Larue*.

It is obvious that *Asselin* received this money not as payment for what he had done, or for what he would do. *Asselin* does not appear to have been an unfriendly witness to the appellant, but the contrary. There can be no dispute, then, that Mr. *Larue* gave *Asselin* $5, and that he gave it clandestinely, whether slipped into his hand or pocket; that at that time no such money was due *Asselin*, nor does any subsequent indebtedness appear to have been incurred.

In addition to which, Mr. *Larue* distributed among different persons throughout the county various

1881

LARUE v. DES-LAURIERS.

Ritchie, C.J.

sums of money amounting to several hundred dollars. He gives to one *Lamontagne* $10 to $15, to *Pouliot* $10, to *Turgeon* $5, to *Plante* $20, to *Labrecque* $50, to *Marcoux* $50, &c., in all, as he himself states, some $400 or $500, there being no debt or liability existing, and it does not appear that any one of these parties rendered any account of the disposition of these funds, or that any account was asked for or expected by the appellant, and we are left with the simple fact that this candidate distributed through the county, to prominent men in the county, sums of money clearly to be used in the election. The law is very clear—that each candidate at an election shall appoint an agent or agents for all his disbursements, and shall furnish the returning officer with a proper statement of his election expenses. In this case there was a return, and according to respondent's own testimony, the amount of his election expenses published by his election agent, with his knowledge and approbation, was not $400 or $500, but $20, and this sum did not include the $5 paid *Asselin*. As appellant says, no account of it was rendered. Can it be said he has not laid himself open to the presumption, which the authorities recognize, that this payment to *Asselin* and these moneys so distributed were not included because they were illegally expended? The reason he gives for not furnishing a statement of the expenditure of this money is that he considered that it was "personal expenses," and that he was, consequently, not bound by the law to pay it out through an agent or to furnish an account of it. But the learned Judge of the court below very properly answers this in this way:—

> It is evident that the respondent's pretension that the moneys he expended, which are not included in the published statement of his election expenses, were personal expenses, and such as he was

not bound to make known, is defeated by his own testimony. Common sense alone suffices to show that such expenditures, as I have enumerated, are not personal expenses; but even if this were not as self-evident as it is, the 125th section of the Election Act would render doubt impossible.

Surely Mr. *Larue* cannot say that the clandestine payment of $5 to *Asselin* was a personal expense. But it does not rest there, for *Asselin* adds "that he did no work and performed no service for the benefit of Mr. *Larue*." If the money was intended to be given as money to be spent as agent, Mr. *Asselin* ought to have returned what he had not earned. Mr. *Larue* never asked for it, nor for any account, and very obviously never intended *Asselin* should make any return or furnish any account. What possible avail can any legislation be for the purpose of securing a free and honest vote of the electors if a candidate can slip $5 into the pocket of one voter, give $10 to another and $20 to another, and so on, and these men never render an account of these monies, and the candidate asks for and expects none? Can there be any other conclusion arrived at than that these moneys were corruptly expended,—and where the Judge, who has tried the case and heard the witnesses, has arrived at an honest conclusion that such was the case, how can any appellate court, in the face of all these facts and these surrounding circumstances, say that such a conclusion was erroneous? It is always more pleasant for a Judge to arrive at a conclusion favorable to innocence than one which will bear so hard upon the appellant; but it is impossible for us to say, on the evidence adduced in this case, that the learned Judge who tried this case was wrong in his appreciation of the facts.

There are other cases put forward to which I do not think it necessary to refer, as the effect of my judgment on this case of *Asselin* is to confirm the judgment of the court below and dismiss the appeal.

1881

LARUE v. DES-LAURIERS.

FOURNIER, J. :—

It is the second time that this case comes in appeal before this court. The first appeal, under sec. 48 of the *Supreme and Exchequer Court Act*, was limited to one point, to wit: whether the *Dominion Controverted Elections Act of* 1874 was constitutional. On this second appeal a very important question, arising from the interpretation to be given to this same 48th section, is submitted to us, *i.e.*—whether after a first appeal, in which the right of appeal has been limited (as it may be under section 48) to certain questions of law or of fact, a second appeal may be had on that part of the case which was withdrawn from the consideration of the court in the first appeal. In other words, could this court, under the existing law, at the time of the first appeal, for any reason whatever, when seized of a case, send it back to the lower court? On the contrary, was it not the duty of this court to give a final judgment and to report its decision to the Speaker of the House of Commons, in conformity with the provisions contained in the 48th section? Or, which would amount to the same thing, at that time could there be two appeals in a controverted election case?

In order to properly understand the position of the parties, it is necessary to give a summary of the facts and procedure of the case. It will be remembered that after the general elections of 1878 the question as to the constitutionality of the *Dominion Controverted Elections Act of* 1874 was raised in a number of cases, and that the judges who where called upon to deliver their opinion dissented from one another. In the court of first instance the parties in this case did not make this objection as a preliminary objection within the delays specified in the

rules of practice, for it was only when the trial commenced that the objection was made; notwithstanding the objection, the judge ordered the trial to be proceeded with. The case was then heard on the merits as well on the question of law as on the questions of fact. On the 27th April, 1879, Mr. Justice *McCord* delivered a judgment, dismissing the petition, with costs. I do not assume that a judgment was rendered on the merits. I have in favour of my position the very words of the judgment, which says the petition is dismissed. To say the reverse, is assuming, in the face of his words, that no judgment was given. The effect of which was to annul the petition made by *Deslauriers* against the return of the present appellant, as member of the House of Commons for *Beilechasse*. The only reason given for this decision was that the *Controverted Elections Act* was unconstitutional. The questions of fact were not dealt with, although by the effect of the judgment the questions of fact as well as the question of law were decided, the petition being finally dismissed with costs. From this judgment the first appeal was taken.

Before referring to the proceedings taken on the first appeal, I will read that part of section 48 under which they were made. This section, after giving a right of appeal to the court, fixing the mode and delays of giving notice of appeal to the adverse party, gives to the appellant the right of limiting his appeal in these words:

In and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the judge, whose decision is appealed from, and the Supreme Court may make such order as to the money deposited as aforesaid, and as to the costs of the appeal as it may think just; and in case it appears

1881

LARUE
v.
DES-
LAURIERS.

Fournier, J.

to the court that any evidence duly tendered at the trial was improperly rejected, the Court may cause the witness to be examined before the court or a Judge thereof, or upon commission; and the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the court upon the several questions as well of fact as of law, upon which the judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, and with the same effect, and the judgment and decision of the Supreme Court shall be final to all intents and purposes.

Deslauriers, the then appellant and the now respondent, wishing to avail himself of these provisions, moved on the 22nd January, as follows:—

22nd January, 1880.—Motion on behalf of the appellant that, inasmuch as the present appeal is only upon the question of law raised by the respondent, to wit: whether the *Dominion Controverted Elections Act* 1874 is constitutional, the printing of the record be dispensed with, and further, that the delivery of any factum or points for argument in appeal be also dispensed with.

In support of this motion Mr. *Taillon*, as solicitor for the appellant, made an affidavit, and by the following paragraphs 2, 4, 5, 6, shows what *Deslaurier's* position was on that appeal.

2. That by the said record it appears that the above named appellant's petition has been dismissed on the grounds that *The Dominion Controverted Elections Act*, 1874, is *ultra vires*, because it gives to the judges of the Superior Court of the Province of *Quebec*, and to the said Superior Court of the said Province of *Quebec*, a new jurisdiction which can be conferred only by the Local Legislature of the said province.

4. That the question of law referred to in the second paragraph of this affidavit is the only question of law apparent in the said record.

5. That the said record is very voluminous and contains about 225 pages of foolscap, and that it would be very costly and expensive to get the same printed, and that the printing of the said record and of the lengthy evidence of numerous witnesses on questions different from that before this court would not in any way afford any additional facility in the decision of this case, because the only question is one of law, namely:—whether the said Act is constitutional or not; and I verily believe that the printing of the said record, and of the evidence contained therein on facts and of several documents uncon-

nected with the point in question, now before this court, will be unnecessary in the decision of the point raised.

6. That the appeal has been limited by notice to the question of the constitutionality of the said Controverted Elections Act of 1874.

This proceeding limiting the appeal, accompanied by affidavit to show that the required notice in such a case had been given, as seen above, was authorized by the 48th section, and was subsequently sanctioned by a judgment delivered on the 22nd January, 1880.

Thus, as it was his right to do, the appellant withdrew from the consideration of this court the questions of fact. Whatever were his motives in so doing, and whether by adopting this procedure he well understood his interests or not, whether or not there would be a failure of justice if a second appeal is not entertained, it is not for us to say; all that I need consider at present is whether he was legally right when he thus limited this appeal. It is impossible to deny that by the 48th section he was given that option. His appeal as limited was then heard and adjudged.

In this case, as well as in that of *Valin* v. *Langlois*, this court unanimously decided that the *Dominion Controverted Elections Act of* 1874 was constitutional; and this was the only question upon which the court was called upon to give its decision.

The order to transmit the record to the Lower Court is as follows:—

That the record in the said appeal should be transmitted to the proper officer of the Superior Court for *Lower Canada* in and for the District of *Montmagny*, being the officer by whom the said record was transmitted to this court, to have the said cause proceeded with according to law.

Relying on this order, the learned judge who decided the case in the first instance, for a second time undertook to sit on the case, and delivered the judgment which is now appealed from. The appellant *Larue*, who by this judgment was not only unseated, but was

1881

LARUE v. DES-LAURIERS.

Fournier, J.

also adjudged personally guilty of corrupt practices, in his turn brought the case in appeal to this court. He denies that the judge who had finally decided the case once had jurisdiction to give a second judgment, alleging that the judgment of this court given on 3rd March, 1880, was a final judgment, and that the case could not be sent back to the Lower Court for a judgment upon the facts. Is he right in his contention? I will at once remark that it would be a grave mistake to rely on any analogy or comparison taken from the procedure regulating civil cases, as applicable to election cases; for there cannot be any. In election cases, the right of appeal, such as we have it here, does not exist any where else. It is an exceptional right, heretofore unknown, and which is regulated by special provisions, which are to be found in the 48th section of the *Supreme and Exchequer Court Act*, and in the special rules of practice made by this Court for the prosecution of these appeals, as may be seen by the 50th Rule of the Supreme Court, rules which declare that the rules applicable to appeals in civil cases shall not apply to appeals in controverted election cases.

We must therefore look only to the 48th section of the Act and the special rules, in order to obtain a solution to the question now submitted to us.

Of course, I admit that in ordinary cases this court has not only the power, but very often it may be its duty to send back a cause before the court of first instance for one reason or another, but in election cases, under the circumstances of this case, it seems to me equally clear that we have no such power. There can be no circumstance, I think, no procedure, by virtue of sec. 48, which could authorize this court, once the appeal is brought before the court, to send back the case to the court of first instance, in order to be further dealt with. I have stated already that the necessary proceedings to

limit the appeal in this case had been taken, and that they were subsequently sanctioned by an order of a judge of this court. The case having been agreed on and submitted to us, what were we obliged to do? Our duty is well defined in the 48th section:—

It was to pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the judge whose decision is appealed from, &c., &c.

The court was bound to give the judgment which ought to have been given, and this is what was done so far as it was in the power of the court to do. The court could not do more. Could the court send back to the judge, who first tried the case, that part of the case which had been withdrawn by the act of the present respondent from the consideration of this court? Certainly not. I cannot understand how a contrary opinion can be seriously entertained. The court was bound to deliver a final judgment, as required by the 48th section:—

In the same manner as the said judge should otherwise have done, and with the same effect, and the judgment and decision of the Supreme Court shall be final to all intents and purposes.

It will be remembered that this case had been tried upon the merits, argued on the merits, and that a final judgment dismissing the petition was delivered by the judge who tried the case. The case was, therefore, ripe for an appeal on all questions of law and of fact. If the present respondent had not limited his appeal, it would have been the duty of this court to have given a judgment upon the questions of fact as well as of law, even admitting (which I unequivocally say they were), that they were not adjudged upon by the first judgment dismissing the petition.

It is contended that if the appeal had not been limited, this court would have had no power to express an opinion on the questions of fact, because the judge of

1881
LARUE
v.
DES-
LAURIERS.
Fournier, J.

the court below had not given any other reasons for his judgment, than that he was of opinion the Act was unconstitutional, and therefore did not give any judgment upon the facts. This contention certainly cannot be sustained, for, on the contrary, if a judge, as in the present case, is called upon to express his opinion upon a question of fact, does not do so, that alone in my opinion would be a good and valid ground of appeal, and in such a case, the law directs this court, not to send back the record to the judge who has not given a decision, but *to pronounce such judgment as ought to have been pronounced by the judge whose decision is appealed from.*

If it is said that this court would then be a court of original jurisdiction, then I say that we do act, and it is the duty of this court to act as a court of original jurisdiction every time that we reverse a judgment and pronounce the judgment that the court of original jurisdiction ought to have pronounced.

I therefore do not hesitate to say, that I am of opinion, that if the whole case had been submitted to us on the first appeal, our duty would have been to pronounce a judgment upon the questions of fact, which the judge of the court below ought to have pronounced. We are asked also what course would this court have adopted, if the judge, after hearing one or two witnesses at the trial, instead of completing the trial, had refused to hear any more witnesses and pronounced the judgment which was the subject of the first appeal? This objection can easily be answered, for by referring to sec. 48, it is clearly expressed what the duty of the court would be in such a case:

> And in case it appears to this court that any evidence duly tendered at the trial was improperly rejected, the court may cause the witness to be examined before the court or a judge thereof or upon commission

1881

LARUE v. DES-LAURIERS.

Fournier, J.

Thus, it is clear, that instead of sending back the case to the court below, it is the duty of this court to hear the witnesses. This part of section 48, in my opinion, deprives this court of all power to divest itself of any jurisdiction over the case. On the contrary, upon this court is imposed the duty of completing the trial, no doubt for the purpose of avoiding any delays which would naturally follow the sending back of the case, and also for the purpose of conforming to the spirit of the law respecting Controverted Elections, *i. e.*,—that these cases should be proceeded with without delay and with all possible despatch.

By this same section, the court is directed through its registrar

To certify to the Speaker of the House of Commons, the judgment and decision of the court upon the several questions as well of fact as of law upon which the judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said judge should otherwise have done, and with the same effect.

Once an appeal is brought, this court alone can certify to the speaker in accordance with the provisions of this Act, and the jurisdiction of the judge of the lower court ceases, and there is no law which gives us the power to send back the case to him in order to make the required certificate.

Those provisions of the 48th section, to which I have just referred, immediately follow that provision of the section which gives a party the right of limiting his appeal. These provisions clearly show that there must be a final judgment given on the appeal, and that although permitting an appeal to be limited, there was no intention that it might be divided and have several appeals in the same case. On the contrary, the legislature clearly intended that the one appeal which was granted should be as simple, as expeditious and as cheap as possible. To arrive at the conclusion that, because

1881

LARUE v. DES-LAURIERS.

Fournier, J.

the appeal may be limited, there can be several appeals in the same case, seems to me to put oneself in direct contradiction with the letter and spirit of the law.

I have no hesitation in saying that under the law which we are to look to in deciding this case, there can be no doubt on this point. This court has already decided this question in the case of *Brassard* v. *Langevin*, where it was held that a judgment on preliminary objections dismissing a petition, was not appealable, and that under that section (sec. 48, 38 *Vic.* C. 11) an appeal will lie only from the decision of a judge who has tried the merits of an election petition. I did not concur in that judgment, but since then the interpretation given by this court received the sanction of Parliament by 42 Vic., c. 39, sec. 10.

This section, although allowing an appeal on preliminary objections to an election petition, does not apply to cases then pending, except cases in which the appeal has been allowed and duly filed. This case cannot be governed by the proviso which is at the end of section 10. As I have just stated, if we are to be guided by the law and the decision in force before the passing of 42 Vic., c. 39, which was sanctioned on the 15th May, 1879, there could only be one appeal in an election case. Since, in order to remove the serious inconvenience which might result in having an election petition dismissed for some error in the procedure, which otherwise might have resulted in having the election declared null, the law has wisely given an appeal from a judgment on preliminary objections, but that is all. Section 48 has not been otherwise amended, and there is nothing which gives any additional remedy after the case has been tried on the merits.

I have already shown, when referring to the procedure, that no preliminary objections were filed in this case. The question as to the constitutionality of

1881

LARUE v. DES-LAURIERS.

Fournier, J.

the Act was raised at the hearing of the case on the merits. If even it could be said that the first appeal taken on the question of law was in fact such an appeal on preliminary objections as was subsequently allowed by 42 *Vic.*, c. 39, I would be still of opinion that c. 39 could not avail the appellant on this appeal. For by the proviso in that section, the right of appeal is not given in cases in litigation and then pending, except in cases where the appeal has been allowed and duly filed. The only case pending, in which the appeal had been allowed and filed, was that of *Valin* v. *Langlois*, which was filed in this court on the 30th June, 1879, and as the law was sanctioned on the 15th May, 1879, the proviso could only apply to that case, and thus this appellant was able to get a judgment of this court pronounced on an appeal from a judgment on preliminary objections. The same rule cannot apply in this case, as the case does not come within the proviso of sec. 10. The first appeal was only filed on the 23rd June, 1879, so that, if the then appellant had intended to avail himself of that proviso, he should have filed his appeal before the 15th May, 1879, the date on which the bill was sanctioned.

It is very evident that this Act cannot be invoked, first, because there were no preliminary objections; secondly, if there had been any, the appeal not being allowed and filed before the 15th May, 1879, it would not have come within the terms of the proviso of section 10. Now, as under the law there could only be one appeal, it is clear that the judgment which this court has already pronounced on the first was a final judgment, and that it should have been certified to the Speaker of the House of Commons in accordance with the provisions of the 48th section. The Judge of the court below had no jurisdiction over this case a second time, and this court had

1881

LARUE v. DES-LAURIERS.

Fournier, J.

no power to confer upon him any jurisdiction over this case, as it was our duty to pronounce a judgment "final to all intents and purposes." The terms "further proceedings," &c., in our first judgment, relied on by the Judge of the court below, cannot mean anything more than that the record was to be sent back for the purpose of taxing costs, issuing writ of execution, &c., &c.; but surely cannot mean what the learned Judge has thought it did, to give him the power of pronouncing a second judgment.

I am therefore of opinion that the duty of the court in the case now before us would be to declare that the court below had no jurisdiction to pronounce the second judgment which is now appealed from, and that the Registrar of this court should be directed to certify to the Speaker of the House of Commons that, by our judgment of 3rd June, we decided the question of the constitutionality of the *Dominion Controverted Elections Act*, 1874, which was the only question submitted to us by that appeal; and as we were not called upon to give an opinion on the questions of fact, because the appellant had limited his appeal, we had nothing to report upon the facts of the case.

For these reasons I cannot concur in saying that we can entertain a second appeal. I may add also that this is not the first case in which the party has limited his appeal. There have been several cases from *Ontario*, and amongst others the case of *Wheler* v. *Gibbs*. In that case the appellant limited his appeal to the question of disqualification, not appealing from that part of the judgment which declared his election void. Now, on this appeal he succeeded in having the sentence of disqualification set aside. What would be now the duty of this court, may I ask, if the appellant came before this court and asked us to set aside also that part of the judgment which declared the election void?

1881

LARUE v. DES-LAURIERS.

Henry, J.

We would treat his contention as being too absurd to be entertained. Yet this is virtually what we are now asked to do on this second appeal. What must be our answer? I certainly am ready to give the same answer that we would give to *Wheler* on a second appeal.

I do not express any opinion on the questions of fact, although I have carefully considered them, and in consequence I do not take part in the judgment which is to be delivered, keeping my seat only for the purpose of forming a quorum, in order that the judgment of the majority of the court may be delivered.

HENRY, J.:—

The question of the jurisdiction of the learned Judge who tried the merits of the petition in this case, and who, after having given a previous one which was appealed from to this court and decided on the point to which the appeal was limited, has since pronounced the judgment now under our consideration, was formally raised at the hearing before us and calls for our decision. The position of the case is as anomalous as unprecedented, and has demanded and received from me no little consideration and study; and, after briefly referring to the circumstances and law, I will give succinctly my views upon the issues raised.

No preliminary objections were taken to the petition; but, before the petitioner's case was opened, the jurisdiction of the learned Judge to try the merits of a petition, under the Dominion Elections Act, was objected to and argued before, but not decided by, him. He proceeded to try the merits of the petition, and after hearing all the evidence on both sides passed an order *dismissing the petition*, and gave as his reason for so doing the want of jurisdiction. From that judgment the petitioner appealed to this court, but took the necessary

1881

LARUE v. DES-LAURIERS.

Henry, J.

steps to limit the appeal to the question of jurisdiction of the Judge, and obtained an order from me to limit the printing of the case and factums to that point. After argument of the point of jurisdiction (the only one before us) this court unanimously reversed the judgment below. Some time afterwards (the record having been remitted back to the court below) the learned Judge took it up, and, without further hearing of the parties, or further evidence, gave the judgment in question. The question is, therefore, as to his power or jurisdiction.

It is contended that but one appeal can be taken in an election case, and that the Judge who tried the merits could not again have cognizance of the case after dismissing the petition by the order, and that an appeal having been had and determined, the Judge had no further jurisdiction in the case. It is contended, on the other side, that as his avowed reason for dismissing the petition was for want of jurisdiction, and his judgment being reversed, he was remitted to his original jurisdiction by the sending back of the record. We must see what are the legal provisions applicable to the case. The jurisdiction of both the Judge and of this court depends solely on the provisions of the statutes. As a Judge, merely, of the Superior Court he had no jurisdiction; nor had we any as a Court of Appeal. It is a distinct jurisdiction given for purposes and objects very different from those coming within the ordinary powers of the two tribunals, with different rules and provisions, and requiring different treatment and consideration, and the statute provides that, in cases not provided for by the rules of court under it,

> The principles, practice and rules on which election petitions touching the election of members of the House of Commons in *England* are, at the time of the passing of this Act, dealt with shall be

observed so far as consistently with this Act they may be observed by courts and Judges thereof.

1881

LARUE v. DES-LAURIERS.

Henry, J.

That and other provisions of the Act show plainly the intention of the Legislature to exclude the ordinary jurisdiction and procedure of the two tribunals created to try the merits of election petitions. The powers vested in the two tribunals must therefore be considered only such as are given specially by the statute, and the special rules made under it, and to be exercised as if the two tribunals had jurisdiction of no other cases or matters. The powers are limited by the statutes and rules made under them, which latter are specially directed to such cases, and other rules of this court declared inapplicable to election cases. The proceedings in appeal therefore cannot be affected by the practice or procedure in ordinary cases.

A majority of this court decided that under the statute first passed there was no appeal from the decision of the Judge on preliminary objections, and the Legislature remedied the difficulty which was felt as the law at first stood. An appeal lies therefore from the decision upon them, but the amended legislation in that respect does not in my view affect at all the question before us. At first sight it appears strange that in a case like this, where the petitioner, by the decision of the Judge against him at the trial, on the question of jurisdiction, should be compromised; and that the subsequent judgment of this court on that point alone, although in his favor, could be of no essential service to him. If, however, he has, by pursuing a wrong course, shut himself out from the benefit of a judgment on the merits, the fault must be found where it existed. By the appeal in the first instance the whole record could have come before this court, and as all the evidence had been taken the merits of the case might have been argued before, and adjudged on by, this court, and we

1881

LARUE v. DES-LAURIERS.

Henry, J.

would have been authorized and required to give the judgment which in our view should have been given by the Judge below. Having in the first place decided in favor of the jurisdiction, we would then have considered and adjudged as to the merits of the petition.

It is, however, contended that as the Judge who tried the petition had not given judgment on the merits we could not assume an original jurisdiction. That contention is, I think, unsupported by reason. Suppose for instance an election petition contains several charges, and proof to sustain some of them is adduced; but in giving judgment the Judge fails to refer to some of the charges proved, but sustains the petition on others, no one will contend that by such omission this court, on appeal, could not consider and decide upon the omitted cases. The Judge had given no judgment as to *them*, and still we could do so, although each charge stands independent of all the others. If, then, for several out of a number of cases, our right and duty would not be affected by the omission of the Judge, should not the same principle apply to all the offences charged? In this case the learned Judge substantially says "I have no jurisdiction, and therefore will pronounce no judgment on the merits." This court decided he had jurisdiction and that he should have given a judgment on the whole case, and, if the appeal had not been limited, we could have given the judgment he should have given. The Judge, no matter for what reason, gave a judgment on the whole case *by dismissing the petition.* He could not give any but a final judgment, and that he did give. If he had not done so, it could not have come to us by appeal. By coming fully to us we would, under his judgment dismissing the petition, have full cognizance of everything before him; and having all the evidence before us, could have pronounced judgment, as well on the merits as on the question of juris-

diction. Suppose the Judge, as he might have done, had merely dismissed the petition, would this court not have jurisdiction over the whole record on appeal? We certainly would, and giving a defective reason for his doing so, does not, in my opinion, alter the case.

It is contended that in a case where only part of the evidence had been taken, this court could not provide for having the remaining evidence taken, and that therefore we could not decide in a case where the whole evidence had been taken. I submit, in the first place, that the proposition is unsound, for if, under the statute, we have jurisdiction when the whole evidence was taken, a defect in providing for the other contingency does not affect our jurisdiction; and, in the second place, the statute gives this court the power, and it would be its duty, to have the balance of the evidence taken, provided it was, as it should be, tendered at the trial. If either party failed to tender the evidence the laches would be his own, and he should suffer the consequences. The words of the statute are so direct and plain that the most ignorant counsel could not be presumed not to understand them. But that difficulty does not meet us in this case, and, but for other references, I would not have thought it necessary to touch upon it.

If there is one feature more prominent than any other in the Act, it is that as little delay as possible should take place in the final decision of election petitions. The time for the different steps or proceedings in them is greatly shortened compared with other cases. The Judge who tries the petition is required, immediately on the expiration of eight days, to report his decision to the Speaker if no appeal has been taken, and the Registrar of this court is required to report in the same way the judgment of this court. This court is authorized to deal with the whole costs in the case, and to order in respect of the money

1881

LARUE v. DES-LAURIERS.

Henry, J.

paid into court as security, so as finally to deal with all matters connecting with it, showing the intention clearly was that the case was not to be remitted back for any purpose. The policy of the Legislature, as exhibited by the Act, was to hasten the final decision as far as practicable, and in order to prevent unnecessary delay by sending the record down to take evidence improperly refused, this court is authorized to have it taken in either of three modes pointed out. It is patent to my mind, from the whole construction of the Act, that the Legislature deliberately intended that when a case once came to this court the functions of the Judge ceased as regards the merits of the case, and this court should fully deal with the case to final judgment; and to show how the intention of the Legislature in regard to the prevention of delay has been frustrated in this case, I need only state that our judgment on the question of jurisdiction was delivered more than eleven months ago; and, but for the limiting of this appeal by the respondent, our judgment on the merits of the petition might have then ended the controversy.

There is no provision in the statutes for sending back the record from this court, and when a judgment has been given by the Judge, final in its nature but for the appeal, I can see no power in this court to authorize the Judge again to assume any jurisdiction in regard to it.

The formal order of this court was to remit back the record to be proceeded with according to law. If the law furnished no further means of proceeding, our order could not create them. The order was made without any hearing of the parties, but if they had been heard and the peculiar position of the case brought out before us, I, if then taking the same view as I now do, would certainly have objected to that course, and would have suggested what appears now to me to have been the

1881

LARUE v. DES-LAURIERS.

proper course, and that is for the Registrar of this court to have reported the special circumstances by which, through the act of the respondent, we were prevented from giving a judgment on the merits of the petition.

I think, therefore, the appeal should be allowed with costs.

Henry, J.

Holding the opinion I have expressed, I do not consider it necessary to express my view as to the merits of the petition, particularly as the majority of the court who differ from me in regard to the question of jurisdiction have agreed as to the merits of the petition also, and any opinion I might express would not affect the result.

TASCHEREAU, J.:

The appellant's contention, that Mr. Justice *McCord* should not have rendered judgment in the case till a new notice of inscription had been given, cannot be now sustained. It would, perhaps, have been more regular if this had been done, but whatever irregularity there may have been in the matter has been waived by the appellant's conduct in the court below. Having been informed by Mr. Justice *McCord* that the case was to be proceeded with, the appellant made no objection to it. He cannot here avail himself of irregularities which he was aware of, and to which he did not object in the court below.

On the merits, I am of opinion to dismiss the appeal. Indeed I do not see upon what grounds this case has been brought to appeal. *Couture's* case, did it stand alone, is so clearly proved by *Couture* himself, that the appellant's only hope of success before this court must have been based upon the assumption that this court would be disposed to review the judgment of the court below as to the credibility of this witness. Now when the Judge who presided at the trial, who heard this

1881

LARUE v. DES-LAURIERS.

Taschereau, J.

witness, who saw his demeanor in the box and the manner in which he gave his evidence, has believed him and has accepted his evidence as entirely reliable, can we here reject his testimony as unreliable and decide that he is not a credible witness? Is there anything in the record which would authorize us to do so? The general rule is, as stated by Lord *Chelmsford* in *Gray* v. *Turnbull* (1), that upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal, it must be shown irresistibly that the judgment complained of on a matter of fact is not only wrong but entirely erroneous.

In the *Halton* case (2) *Richards*, C. J., said:—

We do not think we can properly interfere with the decision of the learned Chief Justice as to the facts found by him, the general rule being that the finding of the Judge who hears the witnesses where there is conflicting evidence, and the decision turns on the credibility of the witnesses, should prevail. He sees the witnesses, hears their testimony, observes the way in which they answer questions, and is in a much better position to decide on conflicting evidence than those who merely read the statements of the witnesses, as they have been taken down. We are all of opinion that we ought not to interfere with the finding of the learned Chief Justice as to the matters of fact.

And *Strong*, J., added:—

The question of fact argued on this appeal must, I am of opinion, be held to be concluded by the determination of the learned Judge who tried the petition. * * * It is a principle well established in the procedure of appellate tribunals, including the highest court of the Empire—the House of Lords—that questions of fact depending on the veracity of witnesses, and the credit to be given to them, are concluded by the finding of the Judge of first instance, in whose presence the testimony is given (3).

Of course, this rule does not apply where the case

(1) L. R. 2 H. L. Sc. App. 54.
(2) 11 C. L. J. 273.
(3) See also *Davidson* v. *Ross*, 24 Grant at p. 50; and the *Alice*, L. R. 2 P. C. 295.

1881

LARUE v. DES-LAURIERS.

Taschereau, J.

depends upon the drawing of inferences from the facts in evidence (1), but there is nothing of the kind here.

Take *Couture's* case. *Couture* had been mayor of *Buckland* for seven years and was in the employ of the Local Government as a forester (*garde-forestier*). He was a Conservative, had worked against Mr. *Boutin*, the local member, at the last previous election, and had also worked actively against *Larue* during the election of 1875. On the 10th June, 1878, just three months before the nomination day for the present election, he met the respondent at Mr. *Swiberg LaRue's* at St. *Charles*. He states that *LaRue* then told him that Mr. *Boutin* had been doing his best to get him (*Couture*) turned out of place, but that he (*LaRue*) had done all he could to keep him in office; that an election was about to take place, and that if *Couture* acted as he had done during the previous election, it was pretty sure that he was done for, "*que son affaire était cuite;*" that he (*LaRue*) had stood by him and that it was on that account that he had not lost his place. He then says:

Je dis alors là à M. *LaRue* que je serais pour lui. Il me dit alors que si les gardes-forestiers tombaient, il me ferait avoir quelque chose de meilleur que ça; j'ai compris une position meilleure du gouvernement fédéral.

He swears that *LaRue* promised:

De sauver ma position, et que si les gardes-forestiers étaient abolis, j'aurais quelque chose de mieux que ça.

Further on he says:

Il ne m'a pas dit quoi; j'ai compté sur sa parole; il m'a dit que ses amis il en aurait soin; c'était pendant la dernière élection, je me suis rencontré avec M. *Achille LaRue* pendant la lutte, je ne suis pas capable de dire la date, et là M. *LaRue* me dit qu'il aurait soin de ses amis, et mille autres témoignages de même.

If *Couture's* testimony is to be relied upon, the judg-

(1) *Thurburn* v. *Steward*, L. R. 3 P. C. 478.

1881

LARUE v. DES-LAURIERS.

Taschereau, J.

ment of the court below is unimpeachable, and the court below having relied upon it and given credence to it, there is nothing in the record which would warrant us here to say that it must be rejected as unworthy of belief.

The appellant seems to think that because he, on oath, as he pretends to have done, positively denied the conversation with him, sworn to by *Couture*, *ipso facto* *Couture*'s testimony ought not to have been relied upon by the Judge who presided at the trial. Now, we cannot interfere in such a case with the finding of the learned judge on a question of fact. He found *Couture* a reliable and respectable witness and gave full credit to his testimony, and, without imputing anything derogatory to the character of the appellant, he, the said Judge, was of opinion that he, the appellant, must have forgotten a promise made in the heat of an electoral contest. Now, I do not see how the learned Judge could act otherwise. To believe *Couture* was not to impute perjury to *Larue*, whilst to reject *Couture*'s evidence would have been imputing perjury to him, *Couture*.

It is a recognized rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, whilst it is impossible to remember what never existed. This rule has received a frequent application. I will only refer to the case of *Lane* v. *Jackson*, in *England* (1), to the case of *Wright* v. *Rankin*, in *Ontario* (2), and to the case of *Still* v. *Hindekopers*, in the *United States* Supreme Court (3). In *Lane* v. *Jackson*, the Master of the Rolls said:

I have frequently stated that where the positive fact of a particular

(1) 20 Beav. 539.

(2) 18 Grant 625.

(3) 17 Wall. 384.

1881

LARUE v. DES-LAURIERS.

Taschereau, J.

conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties. An axiom of the civil law, originated at a time when the rule *testis unus testis nullus* prevailed, said in the same sense: "*Magis creditur duobus testibus affirmantibus quam milles negantibus.*"

I also agree with the Chief Justice that the *David Asselin* five dollars case has been made out against the appellant. The fact that the appellant did not include this sum in the return of his expenses required by the Act is a strong presumption that, in his own mind, this payment could not bear scrutiny (1). The contention that he was not bound to return this payment, because it was a personal expense, cannot be sustained. Mr. Justice *McCord* demonstrates clearly that, according to the appellant's own evidence, a part at least of these five dollars was not for personal expenses, and then the statute requires personal expenses as well as all other expenses to be included in the return required (2).

In fact, sec. 123 clearly says so; the word *expected* therein is a misprint for *excepted*; 26-27 *Vic.*, ch. 29, sec. 4, Imperial. But even as it reads it includes personal expenses: "A detailed statement of *all* expenses incurred *by* or on behalf of any candidate" must include personal expenses.

I am of opinion to dismiss the appeal with costs.

GWYNNE, J.:—

Upon the hearing of this appeal, it was objected that, after the case was remitted from this court to be pro-

(1) *Bewdley* case, 1 O'M. & H. 20; *Bradford* case, 1 O'M. & H. 30.

(2) See *Terriault* v. *Ducharme*, before the Court of Review, Montreal, 3 Legal News, 354; Rogers on Elections, 12th edition 348; Bushby's Election Law 97.

1881

LARUE v. DES-LAURIERS.

Gwynne, J.

ceeded with according to law, Mr. Justice *McCord* had no jurisdiction to take up the case and to pronounce a judgment upon the merits.

But for the countenance which this objection has received in this court I should have thought the point to have been free from all doubt.

The election petition came originally before Mr. Justice *McCord* for trial, when the then respondent, the now appellant, on the 27th January, 1879, before the trial of the petition was entered upon and any evidence tendered, filed, as a preliminary objection to the judge entering upon the case, a formal paper, insisting that he had no jurisdiction to entertain the petition. The learned judge did not at once pronounce judgment upon this objection, but reserved it for his consideration until the evidence upon the merits should be taken, when, if he should be of opinion that he had jurisdiction, he would, of course, proceed with the case upon the merits; but, if he should be of opinion that he had no jurisdiction, he, of necessity, must decline to enter into the merits, for in such case, in his judgment, the evidence which had been taken must needs be evidence taken *coram non judice*. At the close of the evidence, the learned judge, having taken *en delibéré* the objection to his jurisdiction, arrived at the conclusion that he had no jurisdiction in the case, and he therefore declined to enter into it upon its merits, and he made an order in the following terms:

> Having heard the parties on the objections made by the defendant to the petition of the petitioner, and after mature deliberation, *the objection made by the defendant to the jurisdiction of the Superior Court and its judges is declared well founded, and, in consequence, the said objection is maintained,* and the petition of the petitioner is rejected and dismissed.

Now, it is contended that this word "dismissed" being used here, the petition has been dismissed absolutely, and that the merits were therefore disposed

1881

LARUE v. DES-LAURIERS.

Gwynne, J.

of, and that the judgment given by the learned judge having been appealed it would have been open to this court, upon the former appeal, to have decided the case upon the merits, if the then appellant had not, as is said, limited his appeal to the question of jurisdiction This contention, as it seems to me, is based upon a very apparent fallacy; and, indeed, if the objection were well founded, it would be one to the order made by this court, upon the former appeal, when, for the reason that the merits had not been entered into at all by the court of first instance, this court remitted the record to be proceeded with according to law, that is, to be adjudicated upon by the constitutional tribunal of first instance upon the merits. As matter of law and of fact we know that the petition was not *dismissed*, and the order itself in which the word is used shows that it was not, in any other sense than that it was dismissed from the consideration of the learned judge, as the necessary consequence of his having maintained the objection taken to his jurisdiction, thereby holding that he had no jurisdiction to adjudicate upon the case, and having no such jurisdiction he could not adjudicate by dismissing the petition. It is to the substance that we must look, and not criticise too closely the accuracy of the formal expressions used. The appeal taken against this order was not, in truth, an appeal against an order dismissing the petition, but against an order maintaining objections taken to the judge's jurisdiction, the consequence of maintaining which objection was that justice had been frustrated by the petition not having been adjudicated upon at all. It is said that the appellant in that appeal limited the appeal to the question of jurisdiction; but there was nothing for him to limit,—that was the sole point which could have been appealed, for it was the sole point adjudicated upon, or professed or intended so to be, and the limitation was affixed by

1881

LARUE
v.
DES-
LAURIERS.

Gwynne, J.

the learned judge from the nature of his judgment. In that case, the evidence taken before Mr. Justice *McCord*, and which his judgment in effect held to have been taken *coram non judice*, could not properly have been brought before this court, and on motion of the then appellant, that as the appeal was only upon the question of law raised by the respondent, to wit, whether the *Dominion Controverted Elections Act* of 1874 was constitutional, there was no occasion for printing anything, the printing of the record and the delivery of factums were dispensed with. This order was a proper one to have been made, not because of the appellant (when in a position to appeal against an adjudication upon the merits) having limited his appeal to a point of law, but because the adjudication of the learned judge to the effect that he had no jurisdiction to entertain the petition, was the only thing which was decided and which was open to appeal. The 48th section of the *Supreme and Exchequer Court Act*, which enables this court to give such judgment as the Judge in the court below should have given, plainly applies to the case of an appeal from a judgment on the merits after trial. The whole frame of the section shows this, there is nothing in the Act to warrant this court in constituting itself a court of first instance to hear and determine the merits of an election petition in a case in which the constituted tribunal of first instance has refused to adjudicate upon the petition on the ground that it had no jurisdiction. The former appeal having been, as it only could have been, against the decision of the Judge, which was, that he had no jurisdiction, this court pronounced the only judgment which it could have pronounced, when it allowed the appeal, and held that he had jurisdiction, and remitted the record to him to be proceeded with according to law, and this only could be by his exercising the jurisdiction which he had declined to exercise, upon

1881

LARUE v. DES-LAURIERS.

Gwynne, J.

the ground that, in his opinion, he had it not. This he did by offering to the counsel of each of the parties a rehearing of the case, which both parties, considering it to be unnecessary, declined, and he proceeded to adjudicate on the petition upon its merits. From this adjudication this appeal is taken, which now for the first time brings the merits before this court to be dealt with under section 48 of the Act.

I am of the opinion, which I have invariably entertained in these election cases, that if there are any cases in which more than in others we should inflexibly adhere to the rule that we should never reverse upon mere matters of fact the findings of the learned Judge who sees and hears the witnesses and tries the case, unless we are convinced beyond doubt that his conclusions are erroneous, it is in these election petitions, where so much of necessity depends upon the manner in which the witnesses give their evidence.

I am of opinion, therefore, that the judgment of the learned Judge should be maintained, and that the election should be voided upon all the grounds upon which it has been pronounced to be void in his judgment.

As to the case of *Eusebe Couture*, it is urged that such a judgment would be at variance with the judgment of this court in *Somerville* v. *Laflamme*, but there is nothing in that case to the effect that where there is but one witness speaking directly to a charge of personal corruption which is denied by the accused person on oath, a Judge is relieved from the duty of seeking for other matter in the evidence which may incline his mind to believe the one in preference to the other, or to reject the testimony of one and believe the other for the manner in which they may have respectively given their evidence, or which relieves him from the duty of determining whether he finds anything in the evidence corroborative of the testimony of the one or of the other. In the

1881

LARUE v. DES-LAURIERS.

Gwynne, J.

case before us, the learned Judge has taken great pains to show that in truth the present appellant did not in his evidence under oath contradict *Couture* in the material points, but that it appeared to the learned Judge that the appellant's counsel so framed the questions put to him as to evade eliciting an answer in reality in contradiction of *Couture*, although upon a hasty view it might seem to be so, and he explains his reasons for believing *Couture*, and for attributing the appellant's contradiction of *Couture*, if he intended to speak in actual contradiction of him, to forgetfulness of what occurred in the excitement of his canvass. I confess that looking at the loose manner in which the contest, upon the appellant's part, appears to have been conducted, in many matters open to the imputation of corrupt intent, there is abundant matter in the evidence which might be referred to as supporting and justifying the conclusions arrived at by the learned Judge.

The appeal therefore should be dismissed and the result certified to the House of Commons, and *Nicolas Pouliot* and *Anselm Plante* should be reported as having been guilty of corrupt practices.

Appeal dismissed with costs.

Solicitors for appellant—Messrs. *Montambault, Langelier & Langelier.*

Solicitor for respondent—Mr. *Amyot.*