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* Feb. 21.
* March 16

QUEBEC COUNTY ELECTION APPEAL.*

APPEAL from the judgment of Mr. Justice Caron dismissing the election petition on the ground that the petitioners had not proceeded to trial within six months from the presentation of said petition.

The petition to set aside the election for the electoral district of Quebec county in the province of Quebec, was presented on the 9th of April, 1887.

On the 20th day of the same month preliminary objections were fyled by the defendant and on the 30th day of May next the same were dismissed.

On the 26th of August a motion to fix a day and a place for the trial of the petition was presented, which motion was continued to the 5th of September by a ruling of Mr. Justice Caron.

At the latter date the same motion was again continued to the 12th day of September, and on that day the trial of the petition was fixed by Mr. Justice Casault, to be held on the 31st of the month of October at Quebec.

On the 13th of September a notice of the time and place of trial was given by the prothonotary of the Superior Court according to law, and copies thereof were sent to the petitioners, to the respondent and to the sheriff.

On the 26th day of September a petition was presented on behalf of the petitioner to fix a day for the personal examination of the defendant; this petition was, by consent of the parties, continued to the 30th September and subsequently to the 3rd, 4th and 8th of October, by rulings of Messrs. Justice An-

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* Present—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

drews, Caron and Casault.

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On the 26th of October the defendant having failed to appear, though duly summoned by subpoena, the case was continued to the 28th to enable the defendant to produce affidavits to justify his absence.

That affidavit having been produced, the petitioners then moved for an extension of time for the trial of the petition. On the 2nd day of December two rules were argued, one for extension of delay on behalf of the petitioners and the other by defendant to declare delay of six months for the beginning of the trial lapsed and the petition dismissed accordingly.

The former was dismissed and the latter declared absolute and the petition was dismissed by the following judgment:—

"The parties having been heard by counsel upon the "rule of the 30th day of November last to the end that "whereas more than six months have elapsed from the "time when the petition in this cause was presented; "and whereas the petitioners have not yet proceeded "with the trial of such petition; and whereas the trial "of said petition has not commenced within six months "from the time when the said petition was presented; "the said petition be dismissed and that no further pro-"ceedings be had on the same; it is ordered that the "said rule be and the same is made absolute, and the "said election petition be and the same is hereby dis-"missed, each party paying his own costs."

Bossé Q.C. for respondent moved to quash the appeal for want of jurisdiction.

MacDougall Q.C. and *Martin contra.*

The statutes and cases relied on by counsel are reviewed in the judgments.

Sir W. J. RITCHIE C. J.—This question has been decided during the present sittings, and I can only repeat what I then desired to say, viz: That I think

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the appeal to this court is limited under sec. 50 of ch. 9, R. S C., to judgments, &c., on preliminary objections the allowance of which has been final and conclusive and has put an end to the petition, or which objection, if allowed, would have been final and conclusive and have put an end to the petition, and to judgments or decisions on questions of law or of fact of the judge who has tried such petition.

The objection here is not, in my opinion, an objection to a preliminary objection under this clause, nor is it from a judgment or decision on any question of law or of fact of the judge who has tried the petition. The petition was never tried, and the appeal is from the decision of a judge who treated the petition as abandoned, and on which no further proceeding could be had. Our authority to hear appeals is strictly statutory, and unless the matter appealed from can be brought within the terms of the statute we are powerless to interfere. Had the legislature intended to give an appeal in a case such as this that intention should have been made clearly to appear by the terms of the statute. If it was the intention that there should be an appeal in a case such as this there has been a *casus omissus* in not making such intention apparent. The appeal should therefore be quashed.

FOURNIER J.—The question to be determined on this appeal is whether this court has jurisdiction to entertain an appeal from Mr. Justice Caron's judgment dismissing the election petition against the return of the respondent as member for the House of Commons for the electoral district of the County of Quebec.

In order to arrive at a proper conclusion on this important question I think it desirable first to refer at length to the sections of the Dominion Controverted Elections' Act (1) which in my opinion are material

(1) R. S. C. ch. 9.

on this point and afterwards to give a synopsis of the pleadings in the case.

The material sections of that act are as follows:—

13. Within five days after the decision upon the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same, if none are presented, the respondent may fyle a written answer to the petition, together with a copy thereof for the petitioner; but whether such answer is or is not fyled, the petition shall be held to be at issue, after the expiration of the said five days, and the court may, at any time thereafter, upon the application of either party fix some convenient time and place for the trial of the petition.

43. At the conclusion of the trial the judge shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void, and other matters arising out of the petition and requiring his determination, and shall, except only in the case of appeal hereinafter mentioned within four days after the expiration of eight days from the day on which he shall have given his decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of the evidence, and the determination thus certified shall be final to all intents and purposes.

50. An appeal shall lie to the Supreme Court of Canada under this act by any party to an election petition who is dissatisfied with the decision of the court or a judge.

(*a.*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive and have put an end to such petition; provided always that, unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial to the petition.

(*b.*) From the judgment or decision on any question of law or of fact of the judge who has tried such petition.

56. No election petition under this act shall be withdrawn without the leave of the court or judge (according as the petition is then before the court or before the judge for trial) upon special application made in and at the prescribed manner, time and place.

The election petition in this case was presented on the 9th April, 1887. On the 20th of the same month preliminary objections were filed, and on the 20th of May Mr. Justice Casault dismissed them without

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costs. On the 26th August a motion was made to the Superior Court to fix a day and a place for the trial of the petition; this motion was continued by consent of parties to the 12th September, and on that day the trial of the petition was fixed by Mr. Justice Casault, to be held on the 31st of October, at Quebec. On the 26th September application was made to the judge to fix a time for the personal examination of the respondent, and this application was continued by consent until the 10th October, when the petitioners applied to have the day fixed for the trial of the petition changed from the 31st of October to the 19th December, as being more suitable for all parties. The application being based on the following consent filed by the attorneys of record :—

CONSENT OF 10TH OCTOBER, 1887.

Les parties consentent à ce qui suit :

Vu la motion à être présentée ce jour de consentement en cette cause.

Les pétitionnaires consentent à l'ajournement tel que convenu mais sans préjudice à leurs droits.

Le défendeur et intimé déclare renoncer aux délais et ne pas s'en prévaloir et consent à ce que tous les procédés ajournés soient faits avec la même force et effet plus tard qu'ils le seraient si l'ajournement convenu aujourd'hui n'aurait pas lieu.

Si le défendeur ne comparait pas le vingt-six novembre tel que dit dans la dite motion, les petitionnaires ne seront pas tenus de produire leurs particularités le douze décembre prochain ni de procéder à la preuve le dix neuf du même mois, mais ils auront droit de faire remettre la cause et la production des particularités jusqu'à dix jours après que le dit défendeur aura comparu pour répondre aux questions qui lui seront posées de la part des pétitionnaires.

Quebec, 10 Octobre 1887.

(Signé) JOSEPH MARTIN,
Proc. des pétitionnaires.
ANGERS, CASGRAIN ET HAMEL,
Procs. du défendeur Caron.

Mr. Justice Casault thereupon fixed the trial for the 19th day of December. On the 29th November the attorneys for respondent took out a rule *nisi* to dismiss the petition for want of prosecution within six months

from the time when the petition was presented. On the 19th December Mr. Martin, attorney for the petitioners, fyled the following affidavit:—

AFFIDAVIT OF JOSEPH MARTIN RESPECTING DELAYS.

Je soussigné, Joseph Martin, avocat de la cité de Québec, étant dument assermenté sur les Saints Evangiles, dépose et dit:—

Je suis le procureur des petitionnaires en cette cause. Durant la vacance de la cour entre le premier juillet et le premier septembre derniers je suis allé plusieurs fois à la chambre des juges de ce district, au palais de justice, en cette cité, pour demander de procéder, et que ce n'est que le vingt-trois août que l'un des juges a consenti à prendre ma requête pour fixer l'enquête; Qu'au jour fixé pour la présentation de cette requête, un certain avocat non autorisé par moi et accompagné que par le conseil du Defendeur sont allés devant l'honorable juge Caron, avant l'heure fixée dans l'avis sur la requête, et tous deux ont fait remettre la requête au douze septembre, par jugement de son Honneur, et que ce jugement que je n'ai pu réussir à faire changer a été la cause que la fixation de l'instruction et l'audition des témoins en cette cause n'a pas eu lieu dans les six mois après la présentation de la pétition.

Que les pétitionaires ont toujours été prêts et ont persisté pour procéder à l'intruction de la pétition dans cette cause,

Et j'ai signé,

JOSEPH MARTIN.

On the 26 December, Mr. Justice Caron delivered the following judgment, dismissing the election petition:

The parties having been heard by counsel upon the rule of the 30th day of November last, to the end that, whereas more than six months have elapsed from the time when the petition in this cause was presented, and whereas the petitioners have not yet proceded with the trial of such petition, and whereas the trial of said petition has not commenced within six months from the time when the said petition was presented,—the said petition be dismissed and that no further proceedings be had on the same: It is ordered that the said rule be and the same is made absolute and the said election petition be, and the same is hereby dismissed, each party paying his own costs.

The petitioners filed an exception to the judgment rendered, dismissing their election petition, and declared their intention to appeal therefrom.

Now, sections 13, 43 and 56, with the exception of the first part of sec. 50, are the revised enactments of the corresponding sections of 37 Vic. c. 10, viz.: secs.

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11, 29, 54 and 38 Vic. ch. 11, sec. 48, and it should be remembered that these very same sections have already been the subject of mature consideration for this court in the case of *Brassard* v. *Langevin* (1). In that case (though I must say I was of a contrary opinion) the court held that "the hearing of the preliminary objec- "tions and the trial of the merits of the election peti- "tion are distinct acts of procedure," and that the judgment then under appeal was not appealable because the appeal was not from the decision of a judge who had tried the merits of the petition. The reasoning of the majority of the court is based upon the fact that the act as framed carried out a distinction as to the separation of the powers and jurisdiction *of the court* and those *of the judge at the trial.* Mr. Justice Strong, in whose judgment Sir Wm. B. Richards, the late Chief Justice of this court, concurred on this point, says (2) :—

Section 54 (which is verbatim section 56 of the Revised Statutes, chapter 9, which I have read) of the act contains a provision recognizing a distinction very pertinent to the question raised here; it relates to the withdrawal of a petition and enacts that a petition shall not be withdrawn without the leave of the court or judge, according as the petition is then before the court or before the judge for trial, upon special application.

After the petition is set down for trial the functions of the court are at an end, for no provision similar to that embodied in section 23 of the Controverted Elections' Act, 1873, authorising a judge who tries a petition to reserve a case for the opinion of the court, is contained in the act of 1874. There is, therefore, *a well defined line of demarcation* between the two jurisdictions, *that of the court* and that of the *judge who tries the petition*.

and, at page 327, he proceeds:

This practice of disjoining the hearing of preliminary objections from the trial, which does not correspond with any similar proceeding provided for by the English act, was probably suggested by the course of proceeding formerly adopted by the election committees who, though bound by no prescribed rules but being free to regulate their proceedure in each case according to convenience, were accustomed to hear and determine *in limine* objections taken to

(1) 2 Can. S. C. R. 319. (2) At p. 324.

the qualification of the petitioner, and others of the same class, before proceeding to investigate the merits of the petition. These considerations appear sufficient to demonstrate that the Controverted Elections' Act, 1874, deals with the hearing on preliminary objections and the trial of the petition as two distinct acts of procedure having for their objects different results and which it was the policy of the act to keep separate. Parliament has indeed in so many words recognised the separation between the jurisdiction of the court before trial and that of the judge *after the petition is set down for trial*, when in the 54th section it requires the withdrawal of the petition to be with the leave of the court or judge. (According as the petition is then before the court or before the judge for trial.)

It is evident the court held in that case the line of demarcation, when the functions of the court were at an end, to be: "*After the petition was set down for "trial.*" From that moment therefore the election petition is before the trial judge, who alone can make a report to the Speaker, under sec. 43, declaring the respondent duly elected or unseated for corruption by agents or otherwise.

The interpretation put on section 18 chapter 2 of 38 Vic. by the Supreme Court of Canada having been brought to the notice of Parliament, the act was amended by 42 Vic., ch. 39, giving the right of appeal from the decision *of the court or judge*, on preliminary objections, and as under sec. 13, after the expiration of five days from the decision of the preliminary objections the petition is to be at issue, and the court is to fix a time and place of trial, and as it has been decided by the highest court of the Dominion that from that moment the election petition was under the control of the trial judge, from whose judgment, in the words of sec. 50 (*b*) "on any question of law or of fact", an appeal would lie, it was believed it would not be in the power of a single judge to dismiss an election petition or unseat a member of Parliament without appeal, if provision was made for an appeal from the judgment, rule, order or decision of any court or judge on any preliminary ob-

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jection to an election petition. Now, applying the law as interpreted in the case of *Brassard* v. *Langevin* to the facts of the present case, can it be said that the procedure in this case reached the line of demarcation where the jurisdiction and powers of the court or judge ceased, and the powers and jurisdiction of the trial judge commenced? And is there a decision of the trial judge on any question of law or of fact from which an appeal lies under sec. 50 of ch. 9, R. S. C?

It is evident if we follow the ruling of this court in the case of *Brassard* v. *Langevin*, to which I have referred, that on the 12th September, when Mr. Justice Casault ordered that the trial of the election petition should be held at Quebec on the 31st October, 1887, the procedure in the case had reached *that line of demarcation* when the jurisdiction of the court or judge as regards all preliminary proceedings was at an end, and the exclusive jurisdiction of the trial judge commenced. Consequently all subsequent proceedings in the case were proceedings before the judge who had charge of the trial of the merits of the petition, and if any question of law or of fact arose on such proceedings, it would be one which had to be decided by such judge whose decision is subject to review on an appeal to this court, and whose decision in the event of no appeal being taken is, under sec. 43, to be certified in writing to the Speaker of the House of Commons.

If no appeal had been taken it would no doubt have been the duty of the learned judge who had charge of the petition, and who decided that the petition should be dismissed, to have made his return to the Speaker declaring the respondent duly elected. On the pleadings the learned judge having decided as a question of fact whether six months had elapsed without proceeding, and as a question of law whether the statute should be construed as he had done, does not his judg-

ment dismissing the election petition *after the same had been set down for trial* determine a question of law and of fact appealable under sec. 50 (*b*) ? I can come to no other conclusion than that such a judgment is appealable.

HENRY J.—This is an appeal from the judgment of one of the judges of the Superior Court of Quebec, on a petition of the appellants against the election of the respondent as a member of the House of Commons for the County of Quebec, who decided that the petition should be dismissed because the trial thereof was not commenced within six months from the date of the presentation of the petition.

It is objected on the part of the respondent that no appeal to this court lies from the judgment, and

Secondly, that if it does, that the judgment was warranted by the provision of sec. 32 of ch. 9, of the Controverted Elections Act.

By sec. 48 of the Supreme and Exchequer Courts Act an appeal from a judgment on an election petition was provided to be taken by any one

Who may be dissatisfied with the decision of the judge who has tried such petition on any question of law or of fact.

In the case of *Brassard and others* v. *Langevin* (1) it was held by a majority of this court (Fournier and Taschereau JJ. dissenting), that a judgment on preliminary objections:

Was not appealable, and that under that section an appeal will be only from the decision of a judge who has tried the merits of an election petition :

And it was held by my brother Strong, (Richards C. J. concurring),

That the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure.

That judgment was given in April, 1878, and during the following session of Parliament it was provided

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

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by the Supreme Court Amendment Act of 1879 that

An appeal shall lie to the Supreme Court from the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition the allowance of which shall have been final and conclusive and which shall have put an end to the petition, or which would, if allowed, have been final and conclusive and have put an end to the petition.

Preliminary objections are provided by the statute to be tried before a judge, and they are, in my opinion, such preliminary objections as are taken within the prescribed five days. After they are decided nothing remains to be tried but the *merits of the petition.*

What then constitute the merits of the petition? After the preliminary objections are disposed of everything in law or fact that can be legally urged on either side which should be considered by the judge when dealing with the issues raised by the petition and the answer thereto if one has been filed. He is authorized, and he alone, as the judge to try the merits to decide not only the questions before him raised by the evidence but *every question of law.* He may be the same judge who decided as to the preliminary objections, but if so he has no longer any control as to the preliminary questions pointed out by the statute, and his whole jurisdiction is *as to the merits of the petition* including as well all legal questions as matters of fact. The two tribunals are as distinct from each other as if the trial of the preliminary questions was to take place in one court and the trial of the merits of the petition in another. The judge who tried the preliminary objections fulfilled his whole duty when he decided as to them, and then the statute provides that the trial judge shall be seized of the *whole jurisdiction* to determine every matter of law or of fact necessary for a final judgment upon the merits either to dismiss the petition or to set aside the election and report to the Speaker of the House of Commons as pro-

vided by the act.

After the preliminary objections were disposed of, there appear to have been several orders passed from time to time, appointing the time and place for the appearance of the respondent to be examined, and for the hearing of the merits of the petition. The orders were made by judges acting, as they must have done, as trial judges. The matter was at issue on the 25th of August, 1887, and every motion and order made after that time had reference to the trial of the merits of the petition, and were inseparably connected therewith. On the 29th November, 1887, an order *nisi* was obtained on the part of the respondent to dismiss the petition on the ground that the six months' prescribed for the commencement of the trial had elapsed. That order was subsequently made absolute and the petition dismissed. From the latter order the appellant appealed to this court; and, as previously stated, the right of appeal in such a case is contested. That question calls for our judgment.

The Legislature, having first provided an appeal from the judgment of the trial judge on all matters of law or of fact, subsequently provided for an appeal from the judgment of the judge who tried preliminary objections in all cases where the judgment put an end to the petition, or might have done so if the judge had so decided. The intention of the Legislature was evident that in all cases where the decision of the judge who tried the preliminary objections set aside the petition, or might have done so, or the trial judge on any question of fact or law did so, an appeal should lie. No interregnum could take place—as soon as the preliminary objections were disposed of adversely to the party taking them the trial judge became, *eo instanti*, seized with the power and duty of disposing of every matter of law or of fact as to the adjudication *on the*

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merits of the petition. I feel bound to hold therefore that the question of law raised as to the six months prescribed for the commencement of the trial was a matter of law to be decided alone by the trial judge and that it was to all intents included as one of the matters of law to be decided by him, and an appeal from his decision is provided.

Having arrived at the conclusion that the subject matter of the appeal is regularly before us I must deal with the decision appealed from.

In order to arrive at a satisfactory construction of section 32 chapter 9 of the revised statutes of Canada I have referred to sections one and two of the Controverted Elections' Act of 1875, chap. 10, from which sec. 32 was taken and condensed. Section 1 provides that

> Whenever it appears to the court or a judge that the respondent's presence at the trial is necessary, the trial of an election petition shall not be commenced during any session of Parliament, and in the computation of any delay allowed for any step or proceeding in respect of any such trial or for the commencement of such trial under the next following section, the time occupied by any such session shall not be reckoned.

Section 2, as far as touches the present inquiry, is as follows;

> Subject to the provisions of the next preceding section (* * *) the trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with *de die in diem* until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place. * * * *

It is in my opinion clear, under the provisions of the two sections just quoted, that the time of sitting of Parliament was provided to be reckoned only in the case mentioned in the first section and not applicable to any other. Comparing the provisions of those sections with those of section 32, before mentioned, I have arrived at the conclusion that the latter section

was not intended to and did not essentially amend the provisions in the two other sections. The object in the revision of the statutes was not to amend but to consolidate and condense them; and unless a manifest change of provision was made I think that courts should not impute any intention of doing so.

I am therefore of the opinion that the decision of the trial judge on the point in question was correct and should be affirmed.

By the second section referred to it is provided that the trial shall be commenced within the six months,

Unless on application supported by affidavit it be shown that the requirements of justice render it necessary that a postponement of the case should take place.

If then in the course of a trial a motion should be made for a postponement of the case under that section I should be inclined to the opinion that the decision thereon would be appealable to this court. Such an application is not, in my opinion, addressed merely to the *discretion* of the judge. If then a strong case was made out for or against the decision this court, in my opinion, could review the judge's decision.

Section 33 of the Controverted Elections' Act, ch. 9 of the Revised Statutes, is different in its wording from the provision in section 2 before cited.

Following section 32 it provides that

The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary.

That provision is wholly directed to the discretion of the court or a judge and the decision is final. If therefore the judge should decide that an enlargement should be made, his decision cannot be reviewed, and if within the prescribed six months he enlarges the time for the commencement of the trial within the terms of the section beyond the six months his

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decision is final. The section requires the motion for such enlargement to be supported by an affidavit which should disclose facts and reasons to justify the enlargement.

The record of the case shows that on the 23rd of August a motion was filed to appoint a time and place for the hearing of the petition. On the 26th the motion was continued to the 5th September. On the 12th September the hearing was ordered to take place on the 31st October. On the 26th September a motion was filed to fix a time and place for the examination of the respondent. On the 28th of September the motion was continued to the 30th September. It was further continued to the 4th of October, and on that day continued to the 10th October, and on the latter day, to the 11th October. It was subsequently ordered, by the consent of the respondent's counsel, that the 31st of October should be fixed for the production of proof of the allegations of the petition and hearing. On the 10th of October, and by the same consent, the time was changed to the 19th of December for the hearing and the production of proof, and the 26th November for the appearance and examination of the respondent, and an order therefor was made. The respondent having failed to appear at the time and place named in the order, an order *nisi* was passed on the 30th November that in consequence of the respondent having been absent on public business the time for his examination should be postponed to the 10th January, and the hearing and production of proof to the 27th January. An order *nisi* was obtained on the part of respondent on the 30th November to dismiss the petition returnable on the 2nd December, and on the 27th of the same month the order absolute to dismiss the petition was passed.

The petition having been presented on the 9th of

April, the prescribed six months expired on the 9th of October. The record shows that on the 8th of October, after several adjournments, an order was passed, that the petition to fix a day for the personal examination of the respondent stand continued to the 10th of October, the day after the expiration of the six months, and on the latter day the petitioners moved, by consent, to fix a day for the examination of the respondent, for filing particulars and for the trial of the petition upon which an order was passed postponing the hearing of the petition from the 31st October to the 10th of December. It is evident from the record that the appellants were from the month of August desirous to bring on the hearing but delay took place from time to time in consequence of the failure of the respondent to appear as ordered for personal examination to enable the petitioners to file their particulars as alleged, and thus the cause was delayed until, according to my views, the prescribed six months had expired.

By section 33 of cap 9 R. S. C., the power of enlargement beyond the six months, as I read it, is given to the court or a judge from time to time, if on an application *for that purpose* supported by affidavit, *it appears to such court or judge* that the requirements of justice render such enlargement necessary; and I think that if an application had been made supported by affidavit before the expiration of the six months the trial judge had power to enlarge the time from time to time and that his decision would be final. If it appeared to him that the affidavit was insufficient and he declined to order the enlargement the expiry of the six months put an end to the petition. I cannot find, however from the record that any such application was made supported by affidavit, and as the legislature has stipulated that the power of

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enlargement must be on an application supported by affidavit I am of the opinion no application could be otherwise made, nor could any valid order be made. As the result of the governing decisions on the point I am also of the opinion that the application must be made before the expiration of the prescribed six months.

As the continuances, as stated in the record, were by consent, it is contended that the respondent must be taken to have waived any objection. By his counsel he certainly agreed to do so and, in ordinary cases, would be bound by the agreement, but in the present it is different on principle from most others. Here at the expiration of the prescribed six months the statutory functions and jurisdiction of the judge are at an end unless he has enlarged the time for the hearing as prescribed in section 33, and the mere agreement of the parties could not confer upon him any judicial power or jurisdiction.

After the expiration of the prescribed six months during which the legislature has limited the time for the commencement of the trial a judge could not try the case unless he went contrary to the provision of the statute. If, then, he had no jurisdiction as to the trial, if he could not try the merits of the petition, say, three days after the expiration of the prescribed six months, how could he give himself jurisdiction by enlarging the time to a future day? I can find no decision nor any principle upon which such a proposition could be sustained.

For the reasons given I am of opinion that the case came legitimately before this court by appeal.

I am, however, of opinion, that for the reasons I have given it should be dismissed with costs.

TACHEREAU J.—Whether an appeal lies to this court

or not, from the decision of Mr. Justice Caron, has been settled by this court in three cases during the present sittings of the court. The question is therefore settled and cannot be re-opened. I am of opinion that the appeal should be quashed.

GWYNNE J.—I am of opinion that the statute which regulates appeals in Controverted Election Petitions gives no appeal to this court from a rule or order of the nature of that which is the subject of the present appeal, namely, a rule of the Superior Court of the Province of Quebec, (in which court the Controverted Election Petition in the present case was pending) dismissə such petition for want of prosecution.

The Legislature has restricted appeals to this court in these Controverted Election Petitions to two cases, one of which is from the judgment of the Superior Court in which the election petition is filed or of a judge thereof, and the other from the judgment of the judge presiding in the trial court, (a court wholly distinct from the Superior Court in which the petition is filed) after the trial of the issues joined on such petition upon the merits, upon any question of law or fact arising upon such trial. The former is an appeal from a judgment upon a preliminary objection. Now the term "preliminary objection" as used in the statute, has a special meaning which, as appears by the 5th and 12th sections of ch. 9, of the Revised Statutes, is an objection to the sufficiency of the contents of the petition, or to the status of the petitioner, "*or to any further* "*proceedings on the petition by reason of the ineligibility* "*or disqualification of the petitioner.*" In the present case the respondent did, under the provisions of these sections, file certain preliminary objections, which were disposed of by an order of dismissal of the date of the 30th May, 1887,

Whether the respondent filed an answer to the peti-

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Gwynne J.

tion after the dismissal of his preliminary objections does not appear, but whether he did or not the cause and matter of the petition was at issue upon the merits at the expiration of five days from such dismissal of the preliminary objections, and no other *preliminary objections*, in the sense in which that term is used in the statute, or so as to make any decision thereon appealable to this court, could thereafter be taken. The order of the 30th May exhausted the respondent's power to make any other preliminary objection in the sense in which that term is used in the statute. It is impossible therefore to read the statute as was contended for by the learned counsel for the appellants, as constituting any objection made anterior to the trial to be a preliminary objection within the statute, and so the decision upon it appealable to this court. The order, therefore, of the Superior Court, dismissing the petition out of that court for want of prosecution, is not made by the statute appealable to this court, and we have no jurisdiction to entertain an appeal from such decision.

So neither can such decision be regarded as a decision upon a question of law or fact arising upon a trial of the matter of the petition which has never taken place, and which, if it had, would have been a proceeding in a wholly different court, namely, the trial court. It was quite competent for the Legislature in their discretion to leave the decision of a motion to dismiss a Controverted Election Petition for want of prosecution to the absolute discretion and judgment of the court in which the petition was filed, there to be dealt with according to the course and practice of the court, and this is what, in my opinion, the statute in effect does. The appeal, therefore, in the present case, must be quashed with costs for want of jurisdiction in this court to entertain it.

Appeal quashed with costs (1).

Solicitor for appellants: *Joseph Martin.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

(1) The appeals in the Montmorency and L'Islet controverted elections were also quashed for the same reason.

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