CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF LAPRAIRIE.

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*Feb. 16.

ARTHUR GIBEAULT (PETITIONER).....APPELLANT;

AND

L. C. PELLETIER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, DISTRICT OF MONTREAL.

Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months' limit—R.S.C. ch. 9 secs. 14 and 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and to attend to the case in which his presence was necessary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election petition" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.

Held, reversing the judgment of the court below, that the order was in effect an enlargement of the time for the commencement of

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*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

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the trial until after the session of Parliament and therefore in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. R.S.C. ch. 9. sec. 32.

APPEAL from the judgment of the Superior Court for Lower Canada (Bourgeois and Mathieu JJ.) dismissing the election petition in this case on the ground that the trial had not been commenced within six months from the time when such petition had been presented.

The petition was presented on the 16th April, 1891, and the trial was fixed for the 10th December, 1891, by order of Mr. Justice De Lorimier.

On the 21st of April, 1891, the respondent appeared personally and filed an election of domicile at his office, 25, St. Gabriel Street, Montreal, and filed also a plea, in which he denied all the allegations of said petition.

On the 23rd of April, 1891, upon an application made by appellant, the Honourable Mr. Justice Wurtele granted an order to examine the respondent on the 27th of the same month under the authority of section 14 of the Controverted Elections Act.

On the 27th of April, 1891, the respondent presented to the Hon. Mr. Justice Wurtele the following motion:

" Whereas the session of Parliament is to be opened on Wednesday, the twenty-ninth of April instant at Ottawa, P.O.;

" Whereas he must leave to-morrow to go to Ottawa where he is called by his duties as a member of Parliament;

" Whereas he has not too much time to-day to prepare himself for his departure, and to attend to things which are absolutely necessary for such departure;

" Whereas it is impossible for him to appear before this honourable court, and to answer to the interrogatories which are to be put to him for the present without preventing the fulfilment of his duties as a member of the House of Commons ;

" Whereas it is impossible for him to get ready for said session of Parliament, and to fulfil its duties and to attend to the present case at the same time ;

" Whereas he is himself the defendant's attorney ;

" Whereas it is absolutely necessary for him to be constantly in court to attend to the present election petition ;

" Whereas it shall not be possible for him to appear in answer to the interrogatories, and to attend to the present case in which his presence is necessary before the closing of said session ;

" Whereas the notice of said interrogatories is irregular because it was served last Friday only, and that the hours of Sunday do not count when they serve to complete the delay ;

" That the defendant should not be forced to appear before the closing of said session of Parliament."

That motion was supported by the following affidavit :

" The said Louis Conrad Pelletier, the defendant in this case being duly sworn upon the Holy Evangelists depose and saith :

" That the session of Parliament is to be opened on Wednesday, the twenty-ninth of April instant at Ottawa, P.O.

" That he must leave to-morrow to go to Ottawa where he is called by his duties as a member of Parliament ;

" That he has not too much time to-day to prepare himself for his departure and to attend to things which are absolutely necessary for such departure ;

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"That it is impossible for him to appear before this honourable court, and to answer to the interrogatories which are to be put to him for the present, without preventing the fulfilment of his duties as a member of the House of Commons;

"That it is impossible for him to get ready for said session of Parliament and to fulfil its duties, and to attend to the present case at the same time;

"That he is himself the defendant's attorney;

"That it is absolutely necessary for him to be constantly in court to attend to the present election petition;

"That it shall not be possible for him to appear, answer to the interrogatories, and to attend to the present case for which his presence is necessary before the closing of said session; and has signed."

When that motion was presented the Honourable Mr. Justice Wurtele granted it generally.

The order signed by the judge is as follows:—

"Having heard the parties by their counsel on the respondent's motion asking not to be forced to appear and answer to interrogatories until after the session which commences on the twenty-ninth of April instant, having examined the procedure and deliberated, I, the undersigned, order the said respondent not to appear until after the said session of Parliament. Costs reserved.

(Signed) "J. WURTELE,
"J. C. S."

On the 1st of October, 1891, an application was made to the court to fix a day for trial, and it was fixed for the 10th December. The session of Parliament opened on the 27th April, and was prorogued on the 30th September.

Mr *Choquette* for appellant. On the 10th December the trial commenced, but before the first witness was

examined the respondent filed an objection to the jurisdiction of the court and asked that the petition be dismissed because the trial had not commenced during the six months following the filing of the petition. The petition in this case was filed on the 16th April and was served on the same day.

This case comes within the exception contained in section 32 of the Dominion Controverted Election Act. The respondent appeared personally on the 21st April and filed an election of domicile at his office, 25, St. Gabriel Street, Montreal, and filed also a plea in which he denied all the allegations of the petition, and two days afterwards the appellant made an application to a judge in chambers for an order to examine the respondent under sec. 14 of the Dominion Controverted Elections Act. This was two days after the petition was at issue.

The application to examine the respondent on the 27th April was granted, and on the same day a motion was made by the respondent which reads as follows: (The counsel then read the motion, *ubi supra.*)

It is upon this motion and the judgment rendered on it that the present appeal depends. It is important to consider attentively the motion and the affidavit of respondent in support of the motion and which is as follows: (The counsel then read the affidavit—*ubi supra.*)

From the evidence and the record in this case I submit it was shown conclusively to the court within the meaning of section 32 that the presence of the respondent at the trial was necessary and therefore the time occupied by the session should not be computed.

(The Chief Justice.—We would like to hear the counsel for the respondent.)

Mr. Lajoie for respondent:

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This case hinges upon the interpretation to be given to the judgment of Mr. Justice Wurtele. Unfortunately we have only a translation of it. In this case we rely upon the judgment of this court in the Glengarry case. There is no order of the court or evidence that the presence of the respondent was necessary at the trial. The application made by appellant was under sec. 14 for the preliminary examination of the respondent, a preliminary proceeding before the date of the trial, independent of the trial, and I submit that the appellant had notwithstanding this order a perfect right to commence the trial during the session; and if he had applied for an order to fix the date of the trial, then the respondent might have moved for an order of enlargement under sec. 33 or sec. 32. I admit that he was not bound to go on, but he should have obtained the order of the court postponing the trial under secs. 32 and 33, notwithstanding the order postponing the preliminary examination.

(Taschereau J.—The order in effect says that the examination preliminary to the trial shall not take place until after the session, and consequently that the trial shall be postponed until after the session.)

(The Chief Justice.—The moment the preliminary examination is postponed, *ex necessitate* the trial is postponed.)

There was no order saying the trial should not be commenced.

(Strong J.—Suppose the court, upon the application of the respondent, gave time to put in an answer, and it is put in as directed but not within the six months, could the respondent then turn round and say the court has no jurisdiction? The postponement here has been at the instance and for the benefit of the respondent, and he now asks us to help him to evade the trial?)

The appellant must come within the literal terms of the statute. See p. 459, 14 Can. S.C.R. Glengarry case. He should have obtained an enlargement.

(Strong J.—The party who obtained this order was estopped from raising such objection, for if the appellant had given notice of trial, he would have been met with this order.)

(Gwynne J.—There is nothing in the statute showing the necessity of an order being taken out under sec. 32?)

According to my reading of the decision of this court in the *Glengarry Case* (1), the appellant should have obtained a formal order of enlargement under section 33.

The court did not call upon the counsel for appellant to reply, but delivered judgment at once.

Sir W. J. RITCHIE C.J.—We have not the slightest doubt about this case. The respondent made an affidavit in support of his motion that "it was not possible for him to appear to answer to the interrogatories (which the appellant had the right under the statute to put to him prior to the trial) and to attend to the present case for which his presence was necessary before the closing of the session." Then there was an order of the judge postponing the preliminary examination of the respondent until after the session of Parliament. The judge in my opinion was quite right in making the order, but now the respondent wishes us to hold that having obtained an order preventing the petitioner from proceeding during the session on a preliminary examination,—preliminary to what? to the trial,—he, the petitioner, was still bound to go on with the trial during the session. The facts in the *Glengarry Case* (1) are quite different and the decision in

(1) 14 Can. S.C.R. 453.

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that case has no applicability to the present. There can, I think, be no doubt that this appeal should be allowed and the case sent back in order that the trial should be proceeded with.

STRONG J.—Under section 32 what is necessary to be shown is that it appears to the court or a judge that the respondent's presence at the trial is necessary, and that if the judge so considers then such trial shall not be commenced during any session of Parliament, and in the computation of any time or delay allowed for any step or proceeding in respect of the trial or for the commencement thereof, the time occupied by the session of Parliament shall not count. Then the respondent by his affidavit, shows that his presence was necessary at the trial because he distinctly swore that it was absolutely necessary for him to be constantly in court to attend to the present election petition, which would render it impossible for him to fulfil his duties as a member of the House of Commons, and he asked that he be not obliged to submit to examination, until after the session. Thereupon this preliminary examination was by an order of the court postponed until after the session. Now unless we can say that by that order the judge intended that the petitioner should be deprived of the statutory right of a preliminary examination of the respondent, it is a necessary inference that it appeared to him when he granted the order that the respondent's presence at the trial was necessary.

I think there can be no doubt that the decision of the court below was wrong and that this appeal should be allowed with costs.

TASCHEREAU J.—I am of the same opinion.

GWYNNE J.—I think the order made by the judge might have been more accurately drawn up, yet the order shows that, in the opinion of the judge, the presence of the respondent at the trial was necessary.

PATTERSON J.—The respondent is not in a position to complain even if no order was made. It seems that on the 23rd April, 1891, an order was made for the preliminary examination of the respondent, and upon the 27th April he made an affidavit in support of a motion to postpone his examination in which he stated that it was absolutely necessary for him to be constantly in court to attend to the present election petition, and that it would not be possible for him to appear to answer the interrogatories, and to attend to the present case in which his presence was necessary, before the closing of the session.

Now, looking at section 32, it enacts that if at any time it appears to the court or a judge that the respondent's presence at the trial is necessary such trial shall not be commenced during any session of Parliament. There is nothing said about an order. In this case, admitting that no order was made, the respondent swore that his presence was necessary. He cannot now say the trial should have been proceeded with. He comes literally within the operation of the section, having made it appear that his presence was necessary at the trial. I am of opinion that under the circumstances of this case the time occupied by the session of Parliament should not be included in the computation of the delay for the commencement of the trial, and therefore that this appeal should be allowed.

Appeal allowed with costs.

Solicitors for appellant: *Mercier, Beausoleil, Choquette & Martineau.*

Solicitors for respondent: *Bisaillon, Brosseau & Lajoie.*