CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF VAUDREUIL. 1893 *Mar. 7.

HUGH McMILLAN.....APPELLANT;

AND

ANTOINE VALOIS.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF PAGNUELO AND DOHERTY, JJ.*

Election petitions—Separate trials—R.S.C. ch. 9, secs. 30 and 50—Jurisdiction.

Two election petitions were filed against the appellant, one by A.C., filed on the 4th April, 1892, and the other by A.V. the respondent, filed on the 6th April, 1892. The trial of the A.V. petition was by an order of a judge in chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judges who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A.V. petition. Thereupon the appellant objected to the petition being

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*PRESENT:—Strong C.J. and Fournier, Gwynne, Patterson and Sedgewick JJ.

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tried then as no notice had been given that the A.C. petition had been fixed for trial and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election. On an appeal to the Supreme Court,

Held, 1st. That under sec. 30 of ch. 9 R.S.C. the trial judges had a perfect right to try the A.V. petition separately.

2nd. That the ruling of the court below on the objection relied on in the present appeal, viz. : That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by sec. 30 of ch. 9 R.S.C., was not an appealable judgment or decision. R.S.C. ch. 9 s. 50. (Sedgewick J. doubting.)

APPEAL from the judgment of Pagnuelo and Doherty JJ. who tried the election petition in this case and avoided the election upon the admission of the sitting member that he had been guilty of bribery by his agents without his knowledge.

Two petitions were presented and filed against the appellant; one by Alphonse Charlebois and one by Antoine Valois the respondent. The former was filed on the fourth day of April, 1892, and served the same day on the appellant. The other was filed on the sixth day of April, 1892, and served on the ninth day of the same month.

Preliminary objections were filed in both petitions and dismissed. General answers were also filed, and on the 22nd September, 1892, by an order of a judge in chambers, the trial of the Valois petition was fixed for the 26th October, 1892, and proper notice given.

On the 24nd October, 1892, the respondent moved a judge in chambers to have the order of the judge fixing the trial for the 26th October enlarged to a later date in order that the two petitions should be bracketed together, and that proper notices of the trial of both petitions together be given. This motion

was referred to the trial judges, and on the 26th October they having heard the counsel on the motion dismissed it and ordered the trial of the Valois petition to be proceeded with. Thereupon the petitioner examined one witness and the appellant filed a written declaration admitting that corrupt practices sufficient to annul his election had been committed by his agents at the said election, and on the evidence adduced and on the appellant's admissions judgment was rendered maintaining the election petition and voiding the appellant's election.

Bisaillon Q. C. for appellant relied on sec. 30 ch. 9 R.S.C. and cited Cunningham on Elections (1).

Choquette Q.C. for respondent contended that the case was not appealable, citing sec. 50 ch. 9 R.S.C., and the *L'Assomption Case* (2); and if appealable the judges at the trial had a perfect right to try the Valois petition separately. Moreover, on the 22nd of September, when the respondent applied to the judge to fix a day for the trial of the case, the appellant should have asked to join both cases for the trial and the judge would have probably granted his request, but he did nothing of the kind; and the judge having fixed the trial to take place on the 26th of October the trial judges were bound to be guided by the order of the judge who had fixed the trial in one case only and to proceed with it.

THE CHIEF JUSTICE (oral).—This appeal must be dismissed. The provision of the statute relied upon, as showing that the petition filed by Charlebois ought to have been tried at the same time as the present petition, is section 30 of the Dominion Controverted Elections Act. I think the last words of the section "unless the court otherwise orders" had precisely the

(1) Pp. 334-5.

(2) 14 Can. S.C.R. 429.

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effect which my brother Patterson has in the course of the argument suggested, namely, that it makes it a matter of judicial discretion whether the petitions shall be ordered to be tried together, or not, and that here we must assume that the judges thought fit, in their discretion, not to order them to be tried together.

Moreover, the Charlebois petition was out of court by reason of the lapse of time, according to the decision of this court in the *Glengarry Case* (1).

But I do not think we have any jurisdiction to entertain this appeal. It is not an appeal from a judgment on any question of law or fact of the judges who tried the election. In order to give jurisdiction to this court there must be some question of law or fact decided by the judge at the trial to be appealed against. This position is incontrovertible. If it should happen that another judge than the one who tries the petition makes an incidental order in the case that order is not appealable. This has been decided here more than once. No appeal lies except where expressly given by the statute, and the statute only confers a right of appeal in two cases: one from judgments on preliminary objections, the allowance of which puts an end to the petition; the other from a judgment on some question of law or fact of the judge who has tried the petition, which means from the decision of a matter of law or fact arising on the trial of the petition.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

GWYNNE J.—I entirely concur. It appears to me there is no appeal at all.

The appeal is not against the judgment of the trial judges but against an alleged irregularity in the procedure antecedent to and leading up to the trial.

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

PATTERSON J.—I agree also that we must dismiss the appeal, if not quash it, either one or the other. Our jurisdiction under sec. 50, ch. 9 R.S.C. is to hear appeals in two classes of cases, one from decisions on preliminary objections, and not from all preliminary objections but only from such as put an end to the petition. There is nothing here of that kind. The other from final decisions on any question of law or of fact by the judge who has tried the petition. The objection which is raised here is one entirely on a matter of practice. It is a mistake to read the direction contained in sec. 30 as having such a stringent effect as is contended for by the appellant. It is of a purely directory character. The direction that the two petitions shall be bracketed together, and tried at the same time. is expressly made subject to this, "unless the court otherwise orders." Suppose, if we can imagine such a case, that by oversight the prothonotary does not have the two petitions bracketed together, and one is tried, it surely cannot be argued that the other could not afterwards be tried. Even if the last words in the clause, "unless the court otherwise orders," had been left out, still the provision itself would be directory in its character. One test is: Suppose the application had been made in this case for an order to bracket the petitions to a judge in chambers, and it had been refused, would his decision have been appealable? The appeal now taken is made after the whole case has been tried, but suppose, without waiting for the trial, they had appealed from the decision, we would not have had jurisdiction to entertain it.

The appeal should be either dismissed or quashed.

SEDGEWICK J.—I agree that the appeal should be dismissed but I am not satisfied that an appeal does not lie in a case of this kind. No order was made in

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this case directing the two petitions to be tried separately, and therefore both should have been bracketed and tried together under sec. 30. The doubt which arises in my mind is, that assuming it was the case, was it not a point raised at the trial whether both petitions should be tried together or separately, and therefore appealable under sec. 50 c. 9 R.S.C.? But on the whole and on the merits I think the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitor for respondent: *F. X. Choquette.*