

P. PURCELL (RESPONDENT).....APPELLANT ;

AND

ALEXANDER KENNEDY (PETITIONER) RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE ROSE
SITTING FOR THE TRIAL OF THE GLENGARRY CON-

TROVERTED ELECTION CASE.*

*Election petition—Ruling by judge at trial—Appeal—Dominion Con-
troverted Elections Act (ch. 9, R. S. C., secs. 32, 33 and 50)—Con-
struction of—Time—Extension of—Jurisdiction.*

Held, 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada under sec. 50 (b.) ch. 9 R.S.C., Gwynne J. dissenting.

2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. (Gwynne J. dissenting.)

3rd. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order had been obtained on application made within said six months. An order granted on an application made after the expiration of the said six months is an invalid order and can give no jurisdiction to try the merits of the petition which is then out of court. (Ritchie C.J. and Gwynne J. dissenting) (1).

The following are the material sections of ch. 9 R.S.C., and upon which the court were asked to put a construction :

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

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

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APPEAL from a judgment of Mr. Justice Rose declaring the election of a member for the house of commons for the electoral district of Glengarry void by reason of corrupt practices and disqualifying the appellant.

The petition against appellant was presented and filed on the 25th April, 1887. Parliament was in

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 of the petition;

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

32. 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 from day to day until such trial is over; but 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; and in the computation of any time or delay allowed for any step or proceeding in respect of any such

trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included;

2. If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court or a judge thinks just.

33. 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 an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary;

2. No trial of an election petition shall be commenced or proceeded with during any term of the court of which the judge who is to try the same is a member, and at which such judge is by law bound to sit.

Sec. 64. The court or a judge shall, upon sufficient cause being shown, have power on the application of any of the parties to a petition, to extend, from time to time, the period limited by this act for taking any steps or proceedings by such party.

session from 23rd of April, 1887, to 24th June, 1887. The following order was made by the court of common pleas on the 1st December, 1887, extending the time for trial to 31st January, 1888.

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ORDER ENLARGING TIME FOR TRIAL.

Thursday, the 1st day of December, 1887.

Upon reading the notice of motion given by the petitioner herein during this present sitting the admission of service of the said notice of motion, and the affidavits and papers filed in support of this motion and upon hearing counsel for the parties on both sides, and it appearing to the court that the requirements of justice render such an enlargement necessary.

1. It is ordered that the time for the commencement of the trial of the petition herein be and the same is hereby extended for a period of two months, up to and inclusive of the first day of February next.

2. It is further ordered that the costs of and incidental to this application be costs in the cause.

On motion of *Robinson Q.C.*, of counsel for petitioner.

And on the 17th December, 1887, the following order fixing place of trial was made.

ORDER FIXING PLACE OF TRIAL.

Saturday, the 17th day of December, A.D., 1887.

Upon reading the notice of motion given by the petitioner herein during this present sitting, the admission of service of the said notice of motion and the affidavits and papers filed in support of this motion.

And upon hearing counsel for the parties on both sides, and it appearing to the court that special circumstances exist which make it desirable that the petition herein should be tried elsewhere than within the said electoral district of Glengarry.

1. It is ordered that the election petition herein be tried at the court house in the town of Cornwall in the county of Stormont, on Thursday the 12th day of January, A. D., 1888, at the hour of ten o'clock in the forenoon, and on such other subsequent days as may be needful.

2. It is further ordered that the costs of and incidental to this application be costs in the cause.

On motion of *Mr. C. Robinson Q.C.*, of counsel for the petitioner.

The trial commenced on the 12th January, Mr. Justice Rose presiding, and the following is an abstract

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 PROCEEDINGS AT TRIAL.

IN THE HIGH COURT OF JUSTICE COMMON PLEAS DIVISION.

The Dominion Controverted Election Act.

Re GLENGARRY.

ALEXANDER KENNEDY, petitioner.

P. PURCELL, respondent.

Tried before Hon. Justice Rose at Cornwall, on 12th January, 1888.

COUNSEL PRESENT:

Mr. D. MacMaster Q.C., Mr. E. H. Tiffany and Mr. McLellan for petitioner.

Mr. W. Cassels Q.C. and Mr. D. B. MacLennan Q.C. for respondent.

Mr. Cassels—Before the case is gone on with we wish to have the objection noted that your Lordship has no jurisdiction to try it. Three judges of the Court of Appeal have stated that the time of the session is not excluded. We say you have no power to extend the time. The Quebec Court of Appeal and the New Brunswick Court of Appeal have in effect held that there is no jurisdiction.

His Lordship—I rule with you that the time of the session is not excluded but that there is power to extend the time.

After the taking of evidence on the 13th January Mr. Justice Rose found as follows:—

FINDINGS OF JUDGE AT THE TRIAL.

I find that corrupt practices have been proved to have been committed by D. H. MacKenzie, an agent of the respondent, to wit: advancing by way of loan to Francis Saucier, \$100, John Tyo, \$200, and Alexander Vanier \$100, they being voters, in order to induce such persons to vote for the respondent.

I also find that such corrupt practices were committed by and with the knowledge and consent of the respondent.

I further find that a corrupt practice was committed by the respondent, to wit: advancing by way of loan to one Peter Kennedy, a voter, the sum of \$100, in order to induce such person to procure, or endeavor to procure, the return of the respondent to serve in the House of Commons.

I determine that the election was and is void by reason of such corrupt practices, and direct that the respondent pay the costs, charges and expenses, of and incidental to the presentation of the petition and the proceedings consequent thereon, save and except such costs, charges, and expenses as are by the Controverted Elections Act otherwise provided for.

(Signed,)

JOHN E. ROSE, J.

Jan. 13th, 1888.

The question upon which this appeal was decided was whether or not the court or judge, on the 12th January, 1885, had jurisdiction to try the merits of the petition, six months having elapsed since the date of the presentation of the petition.

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S. Blake, Q. C., Walter Cassels, Q. C.. (O'Gara, Q. C. with them) for appellant, contended:—

1st. There was no jurisdiction to try this matter. The petition was out of court at the time of trial and the judge should so have determined and dismissed the petition.

2nd. The learned judge erred in finding the present appellant guilty of bribery, and his judgment, assuming that he had jurisdiction to try the petition, should be reversed so far as the finding on the personal charges is concerned.

3rd. The learned judge should not, on the evidence, have found in favor of the petitioner on the charge of bribery by an agent and should not have voided the election.

The statutes, authorities, and cases cited are reviewed in the judgment of Mr. Justice Taschereau hereinafter given.

McMaster Q.C. and *MacLennan* with him for respondent contended:

1. That there was no appeal from the order extending the time. 49 Vic. ch. 9, s. 50.

2. The court or judge had the amplest power to extend the time. 49 Vic., ch. 9, s. 64.

3. The apparent exception in sec. 32 in the same act, requiring the commencement of the trial to be within six months of the date of presentation of petition, is itself the subject of a special exception in sec. 33, which empowers the court or a judge to "enlarge the time for the commencement of the trial," in the interests of justice, "notwithstanding anything in the next

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"preceding section," (that is the section in which the six months provision is) ; and hence the 32nd section must be regarded as directory.

4. If the 32nd section be not directory, but imperative, then the time occupied by the session of parliament and the terms of the Common Pleas division of the High Court of Justice must be deducted ; and the order for the extension or enlargement was made within six months of presenting petition ; and the trial was held within the period of the enlargement.

5. But even if the session of parliament and the terms of the court are included, in computing the six months from presentation of petition, the extension or enlargement might be made after the lapse of the six months, and the order of 1st December is good.

The following cases were relied on :—*West Middlesex case* (1) ; *Maskinonge case* (2) ; *Rex v. Loxdale* (3) ; *Addington case* (4) ; *Addington case* (5) ; *Ex parte Campbell* (6) ; *Rhodes v. Airdale Commissioners* (7) ; *Kingston case* (8) ; *Quebec West case* (9) ; *Wheeler v. Gibbs* (10) ; *Banner v. Johnson* (11) ; *Lord v. Lee* (12) ; *Sheffield v. Sheffield* (13).

On the merits the learned counsel commented on the evidence and contended that the decision of the court below should be affirmed.

Sir W. J. RITCHIE C. J.—But for the diversity of judicial opinion I should have thought the construction of the 32nd section very plain. We have the limit within which the trial of every election petition shall be commenced, namely within six months from

(1) 10 Ont. P. R. 27.

(2) 15 Rev. Lég. 615.

(3) 1 Bur. 447.

(4) 39 U. C. Q. B. 131.

(5) 12 L. J. N. S. 117.

(6) 5 Ch. App. 703.

(7) L. R. 1 C. P. 391.

(8) 39 U. C. Q. B. 139.

(9) 15 Rev. Lég. 609.

(10) 3 Can. S. C. R. 374.

(11) L. R. 5 H. L. 157.

(12) L. R. 3 Q. B. 404.

(13) 10 Ch. App. 206.

the time when such petition shall have been presented. and shall be proceeded with from day to day until such trial is over.

But it is said that in the computation of this six months the time during which any session of parliament is being held is not to be taken into account. But where in the statute is to be found authority for any such proposition? Had such been the intention of Parliament surely it would have been expressed in simple, plain, unmistakeable language, in some such words as these—"The trial shall be commenced within six months but in the computation of such six months the time during which a session of Parliament is being held shall not be computed."

Where the language of the act is plain and unambiguous we should not, I think, go outside of it to seek a construction at variance with such language. This view, that the sessions of parliament are to be excluded in all cases, is, in my opinion, entirely inconsistent with what follows in the statute:—"But 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." Is not the irresistible inference from this that sessions of Parliament are included in the six months, and that it is only when the presence of the respondent is necessary at the trial that proceedings shall not go on during the session? If no proceedings can be had during any session then the provision referred to would be meaningless, certainly wholly unnecessary and not capable of being acted on, and also the provision "that in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included." I think the time occupied by any such ses-

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sion of parliament refers to the session of parliament provided for by the section and not to sessions of parliament when the necessary presence of the respondent has not been made to appear and when it is not even claimed that the respondent's presence is necessary, and, in my opinion, very clearly negatives the idea that any session of parliament is to be excluded, but the one for which the special provision is made.

Upon the authority of *Wheeler v. Gibbs* (1) in this court, and *Banner v. Johnson* (2) I think the court had power to enlarge the time for the commencement of the trial though such order was not made within the six months from the time of the presentation of the petition, it appearing that the requirements of justice rendered such enlargement necessary, and I am therefore of opinion that the time was duly extended or enlarged and the judge was properly seized of the case. The respondent did not move to dismiss the petition as he might have done, and not having done so the petition remained in court subject to the jurisdiction of the court and to the discretion and power of the court or judge to extend the time, although the six months had expired. I do not think the limit in sec. 33 can be read into sec. 32 or be used in any way to affect the right to extend as provided by the latter section because it is expressly provided that the court or judge may notwithstanding anything in the preceding section which is sec. 32, from time to time enlarge the time for the commencement of the trial. I concur with the Court of Appeal of Ontario and the other judges who have taken and acted on this view.

A majority of the court being of opinion that the time occupied in the session of parliament is not to be included, and that as there is no power to extend the time after the six months has elapsed there has been

(1) 3 Can. S. C. R. 374

(2) L. R. 5. H. L. 157.

no legal trial, I think it would be as improper, as it would certainly be utterly useless, for me to discuss the merits of this case as they appeared on the alleged trial; such a discussion must, necessarily, be purposeless and productive of no possible results. In fact, if the judge had no legal right to proceed with the trial, and the trial is, consequently, of no legal effect, in other words no legal trial, there are no merits to discuss, for the simple reason that if there was no trial there were no merits of which this court, or any other court, could take cognizance.

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Mr. McMaster, in his factum, objects that there was no appeal from the order extending the time and it was submitted that there is no appeal from it.

That would be so under our late rulings, but there was no objection raised in this case by the learned counsel for the respondent, in his factum or in his argument, that there was no appeal to this court against the ruling of the learned judge on the point of law on the trial. It certainly was, as appears by the record, a point raised on the trial and adjudicated on by the learned judge, and therefore would seem to come, as at present advised, within the express words of the statute. The language of the statute is "an appeal shall lie from the judgment or decision, on any question of law or of fact, of the judge who has tried such petition." The majority of the court entertain no doubt on this point, and therefore the appeal will be allowed.

FOURNIER J.—Le jugement rendu en cette cause, le 13 janvier dernier, a déclaré l'élection nulle pour cause de corruption par les agents du membre siégeant et par lui-même personnellement. L'appel de ce jugement n'a pas mis seulement en question le bien jugé sur le mérite de la cause, mais il soulève également la ques-

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tion de savoir si le juge avait le pouvoir de procéder au procès, après l'expiration du délai de six mois fixé par la sec. 32 du ch. 9 des Statuts Révisés du Canada. Dans les autres causes d'élections entendues et décidées pendant le présent terme, la cour n'a pas décidé la question de l'interprétation à donner à cette section, parceque dans la forme où se présentaient ces causes, l'unique question à décider était de savoir si les jugements dont on se plaignait étaient appelables. Mais dans le présente cause, l'appel étant du jugement final, il a l'effet de soumettre à la revision de la cour toutes les questions de droit ou de faits décidées sur les divers incidents de la cause. Sur ce point il ne peut y avoir de difficulté. La cour est donc appelée à se prononcer sur l'effet de la sec. 32, décrétant que le procès d'une pétition d'élection devra être commencé pendant les six mois qui ont suivi la présentation de la pétition. L'interprétation de cette section soulève aussi la question de savoir si dans les six mois de délai, le temps de la session doit être exclu dans tous les cas.

Dans le cas actuel, la pétition a été présentée le 25 avril 1887. La réponse du membre siégeant a été produite le 30 juin 1887. La production de particularités a été ordonnée le 23 septembre, et elles ont été produites le 23 décembre.

L'appointement pour l'audition préliminaire du membre siégeant qui devait être examiné comme témoin le 9 novembre fut continué de consentement au 20 décembre. Ce jour-là il fut procédé à son examen.

Le 17 décembre un ordre fut prononcé fixant le palais de justice de Cornwall comme le lieu où se ferait le procès de la dite pétition.

Le 1er décembre une demande, appuyée d'affidavits, fut présentée pour faire étendre de deux mois le délai pour commencer le procès. Le dispositif de cet ordre est comme suit :

It is ordered that the time for the commencement of the trial of the petition herein be, and the same is hereby extended for a period of two months, up to and inclusive of the first day of February next.

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Au 12 janvier 1888, jour fixé pour le procès, les parties se présentèrent devant l'honorable juge Rose, chargé du procès de la pétition. Le membre siégeant par le ministère de W. Cassels, C.R., protesta contre l'instruction du procès de la manière suivante :

Fournier J.

Before the case is gone on with we wish to have the objection noted that Your Lordship has no jurisdiction to try it.... We say you have no power to extend time.... Three Judges of the Court of Appeal have stated that time of the Session is not excluded. We say you have no power to extend the time. The Quebec Court of Appeal and the New Brunswick Court of Appeal have in effect held that there is no jurisdiction.

L'honorable juge prononça sa décision sur les deux objections du savant conseil dans les termes suivants :

I rule with you that the time of the Session is not excluded, but that there is power to extend the time.

D'après sa décision le temps de la session n'est pas exclu des six mois pour le commencement du procès—et ce délai peut être étendu. Ces deux questions ayant été décidées par un ordre du juge chargé du procès (Trial Judge) et jugées au procès même, on ne peut soulever dans ce cas, la question qui s'est élevée dans les autres causes jugées pendant le terme, de savoir s'il y avait appel d'une décision renvoyant la pétition sur une motion déclarant que les six mois expirés, la cour n'avait plus de juridiction pour faire le procès—car dans le cas actuel, ce n'est pas la cour qui a jugé, mais le *trial judge*, et la question tombe clairement sous l'effet de la sec. 50 (b) déclarant qu'il y a appel—

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

Le droit d'appel est donc ici incontestable et la décision de ces deux questions doit être revisée par cette cour:

Il est sans doute regrettable qu'il ait été procédé au

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procès avant que la question du pouvoir du juge d'en agir ainsi ait été finalement réglée, car maintenant nous sommes en présence d'une enquête révélant des faits suffisants pour décider le mérite de cette affaire, mais dans la position où cette cause nous est présentée pouvons-nous nous en occuper? La réponse à cette question dépend entièrement de la solution de la question de juridiction. Si le juge était sans pouvoir pour juger, quelles que soient les conséquences, nous devons le déclarer et annuler le procès. Le respect dû à l'autorité de la loi l'exige.

Les objections du savant conseil étaient fondées sur la sec. 32 déclarant—

Sec. 32. 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 from day to day until such trial is over; but 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; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included;

2. If, at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the Court or a judge thinks just.

Quoique les opinions se soient partagées sur l'interprétation à donner à cette section, il me semble que dans la première partie, il est dit clairement que le procès de toute pétition d'élection devra être commencé dans les six mois de la date de sa présentation. Il n'est apporté à cette prescription impérative qu'une seule exception, celle que le procès ne sera pas commencé pendant une session, s'il a été démontré au juge que la présence du membre siégeant est nécessaire au procès. Ce tempérament était nécessaire pour corriger ce qu'aurait eu de trop rigoureux l'obligation de procéder dans tous les cas en l'absence du député élu. En procédant

pendant la session c'était le mettre dans la position ou de manquer à ses devoirs parlementaires, s'il s'absentait pour surveiller ses intérêts au procès, ou bien le priver de l'avantage de confronter ses accusateurs, s'il assistait au parlement. La loi me paraît avoir adopté un moyen de concilier les deux intérêts en permettant de suspendre la procédure pendant la session s'il était démontré à la cour ou au juge que la présence du membre siégeant était nécessaire au procès. C'est évidemment dans ce but qu'après avoir imposé d'une manière absolue l'obligation de commencer le procès dans les six mois, vient l'exception : " But 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." Cette disposition n'accorde au membre siégeant qu'une faculté dont il peut ou non se prévaloir, mais dont il ne peut obtenir le bénéfice qu'à la condition de démontrer au juge que sa présence est nécessaire au procès. S'il n'a pas jugé à propos de se conformer à cette condition, le temps de la session devra compter dans les six mois.

La règle établie au sujet de la computation du temps dans la dernière partie de la clause 32 en disant " the " time occupied by such session of parliament shall not " be included "—ne peut avoir un effet absolu et s'appliquer indistinctement à tout procès de pétition d'élection. Les mots *such session* se rapportent suivant moi à une session pour laquelle le juge a déclaré sur demande à cet effet, que la présence du membre siégeant était nécessaire. Autrement il y aurait contradiction manifeste entre cette disposition et la précédente : la première dirait que l'intervention du juge est nécessaire pour suspendre la procédure pendant la session, et la seconde dirait, au contraire, que cette intervention n'est pas nécessaire si le temps de la session doit être exclu. Ces raisons me paraissent suffi-

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santes pour en conclure que le temps de la session doit être compté dans les six mois, si un ordre n'a pas été donné par le juge pour suspendre la procédure pendant la session. Il n'y en a pas eu dans cette cause, et l'honorable juge a eu, suivant ma manière de voir, raison de juger que le temps de la session ne devait pas compter dans les six mois. Sous ce rapport je suis d'avis que son jugement doit être confirmé.

En peut-il être de même de sa décision sur la deuxième question déclarant que le temps du commencement du procès peut-être étendu au-delà des six mois fixé par la sec. 32 ?

On a vu d'après l'exposé des procédures donné plus haut, que dans les six mois qui ont suivi le 25 avril, il n'a été fait aucune demande à la cour ou au juge pour une extension de délai ni pour fixer le procès. Ce n'est que le 17 novembre que le lieu du procès a été fixé et, le 1er décembre, plus de sept mois après la présentation de la pétition, que le délai pour commencer le procès a été étendu jusqu'au 12 janvier dernier. Ces deux ordres ayant été prononcés après l'expiration des six mois, la cour possédait-elle encore le pouvoir de rendre de tels ordres ? La réponse dépend de l'effet que l'on doit donner à la première partie de la sec. 32. Si on le considère comme une injonction formelle et absolue de commencer le procès dans les six mois, il faut en conclure que la cour n'avait plus alors le pouvoir de prononcer les ordres en questions.

Tous les juges sont d'accord que la législature en faisant ce délai de six mois a voulu rendre beaucoup plus prompte qu'elle ne l'était auparavant, l'expédition des procès d'élection,—mais ils diffèrent d'opinion sur l'effet à donner à cette disposition. N'est-elle qu'un délai de procédure susceptible, malgré son caractère impératif, d'être considérée comme simplement directoire, ou bien cette disposition ne fait-elle pas plutôt essentiellement partie de la juridiction transférée des

comités parlementaires aux tribunaux civils sur les contestations d'élections ? Dans la section 2, il est formellement déclaré que cette juridiction sera sujette aux dispositions de cet acte (ch. 9.)

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Après avoir réglé le délai pour la présentation, le service de la pétition, le délai pour la production des objections préliminaires, la manière dont la contestation serait liée, vient l'injonction formelle que le procès devra être commencé dans les six mois de la présentation de la pétition et se continuer de jour en jour jusqu'à ce qu'il soit terminé. C'est dans cette section que le juge qui préside au procès doit trouver la source du pouvoir qu'il doit exercer. Il lui est enjoint d'une manière absolue de commencer le procès dans les six mois—il doit y procéder de jour en jour. Le caractère impératif de cette clause ne lui laisse aucune discrétion à cet égard. Le délai fixé, expiré, la juridiction cesse, à moins qu'elle n'ait été conservée en vertu de la sec. 33, par le procédé qu'elle autorise. Mais si aucun procédé de ce genre n'a été adopté pendant les six mois de la présentation de la pétition, le juge ou la cour est sans pouvoir pour fixer une autre époque pour le procès que celle indiquée par la sec. 32.

Le pouvoir donné par la section 33, peut-il être exercé après les six mois ? s'il le peut, la section 32 perd nécessairement son caractère impératif et absolue et devient tout-à-fait inutile. C'est la faire disparaître du statut. Si l'objet était réellement d'assurer une prompte expédition des affaires d'élection, il a été tout-à-fait manqué et la loi devient sans effets. Mais ses dispositions sont trop formelles pour qu'on puisse en arriver à une pareille conclusion. La section 33 qui aurait l'effet d'anéantir la section 32, cesse de produire cet effet et ne fait qu'assurer les fins de la justice, si on considère qu'elle n'a été introduite que pour remédier à ce que pourrait avoir, en certains cas, de trop rigoureux le délai de six mois. Il peut arriver fréquemment

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qu'un procès commencé dans les six mois et conduit avec diligence se trouve tout-à-coup arrêté par l'absence, ou la maladie des témoins indispensables, faudra-t-il dans ces cas pour obéir à la règle des six mois sacrifier les intérêts de la justice ? Non, la loi a voulu pour obvier à ces inconvénients que la juridiction puisse, dans ces cas, se continuer au delà des six mois.

Elle en indique le moyen dans la section 33. Mais ce moyen doit être employé pendant que la juridiction existe encore et avant l'expiration des six mois. S'il pouvait l'être après les six mois, la section 32 serait illusoire. En exerçant dans les six mois la faculté donnée par la section 33, chacune des deux sections 32 et 33 peut recevoir son entière exécution. Si les six mois de la section 32 sont expirés sans que le procès ait été commencé, la juridiction cesse et cette section reçoit son effet. Si les intérêts de la justice, d'après des faits qui doivent être établis par affidavit, sont jugés suffisants par le juge pour étendre le délai, la section 33 reçoit alors son effet et le but de la loi est rempli.

A part de la sec. 33, l'intimé a invoqué encore les sec. 2 et 64 du ch. 9 comme autorisant la cour ou le juge à étendre le délai au delà de six mois. La sec. 2 dit que les cours autorisées à décider les élections contestées auront, sujettes aux dispositions de cet acte..... (ch. 9) les mêmes pouvoir et juridiction dans les affaires d'élections qu'elles ont dans les matières civiles de leur juridiction ordinaire.

Cette disposition générale est faite pour rencontrer les cas non prévus par le statut et autoriser pour ces cas les cours à faire application aux affaires d'élection des règles de procédure et de pratique de leur propres tribunaux. Cette disposition ne peut être considérée comme pouvant annuler les dispositions spéciales ou y être substituée. Lui donner un semblable effet, ce serait mettre de côté la règle d'interprétation bien établie que les dispositions générales ne peuvent annuler les

dispositions spéciales d'un statut. On ne peut en conséquence s'appuyer sur cette sec. 2 pour annuler l'effet de la sec. 32 qui contient une prescription formelle au sujet du délai dans lequel doit se faire le procès. Le même argument doit s'appliquer à la sec 64 donnant le pouvoir d'étendre les délais.

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Après avoir examiné l'acte des élections contestées dans son ensemble et comparé ses diverses sections les unes avec les autres, j'en suis venu à la conclusion que pour donner à cette loi son véritable effet, je dois adopter l'opinion que le temps de la session doit compter dans les six mois, s'il n'y a pas eu demande au contraire,—et que le délai de six mois pour commencer le procès est de l'essence de la juridiction donnée—et qu'il n'est pas susceptible d'être prolongé au delà, à moins d'une demande spéciale faite conformément à la sec. 33, avant l'expiration des délais. En conséquence, je suis d'avis que le présent appel doit être alloué sur le principe que le juge n'avait pas le pouvoir de faire le procès de l'appelant.

S'il y a plusieurs points importants auxquels je n'ai point fait allusion, comme par exemple l'état de la jurisprudence en Angleterre sur la prorogation des délais d'appel, les deux décisions de cette cour dans *Wheeler v. Gibbs* (1), etc., etc., c'est que l'honorable juge Taschereau ayant eu l'obligeance de me communiquer les notes si savantes et si complètes qu'il a préparées sur cette cause, j'ai trouvé ces questions si bien traitées qu'il m'a paru impossible d'y rien ajouter. Non-seulement sur ces questions particulières, mais aussi sur celles de la computation du délai de la session—et de la limite à six mois de la juridiction pour commencer le procès,—questions qui ont été si complètement développées dans ses notes,—je suis heureux de pouvoir dire que je partage entièrement ses vues.

HENRY J.—In my judgment in the *Quebec County*

(1) 3 Can. S. C. R. 374.

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Election Case (1), delivered a few days ago, I held that the time of the sitting of Parliament, as referred to in section 32 of the controverted elections' act, was not to be added to the six months prescribed in that section for the trial of an election petition, unless in the particular circumstances referred to in that section.

I also held, in that case, that under the provisions of section 33 the court, or a judge, had no power to enlarge the time for the commencement of the trial of an election petition unless such enlargement were made by an order previous to the expiration of the prescribed six months, and I gave my reasons for arriving at those conclusions.

There is a general power given by sub-section 4 of section 31 of the act, to the judge at the trial to adjourn the same from time to time and from one place to another in the same electoral district, but in view of the provisions of section 32 a judge could not enlarge the time for the *commencement* of a trial beyond the prescribed six months from the presentation of the petition, unless by the terms of that section it was made to appear to the court or a judge that the respondent's presence at the trial was necessary in which case the time occupied by the session of parliament would be added to the prescribed six months.

No such application was made in this case and, therefore, the time for the commencement of the trial herein expired at the end of six months from the presentation of the petition.

No application was made to the court or a judge in this case under section 33 within the prescribed six months from the presentation of the petition, and I adhere to my holding in the *Quebec County Election Case* that the court or judge had no power to enlarge the time for the commencement of the trial by an order made subsequent to the expiration of the prescribed six months.

My conclusion in this case, therefore, is that the prescribed six months having expired the judge who tried the merits of this case had no jurisdiction or power to do so and that this court has no power to decide on the merits of the case by an appeal from his decision.

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I think, therefore, the appeal should be allowed and the petition herein dismissed with costs.

TASCHEREAU J.—By sec. 32 ch. 9 of the Revised Statutes of Canada, it is enacted that:—

Sec. 32. 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 from day to day until such trial is over; but 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; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included.

In the case now submitted the petition was presented on the 25th day of April, 1887, during a session of parliament which was closed on the 23rd June; subsequently on the 1st day of December following, that is to say, more than six months after the presentation of the petition, but within six months of the prorogation of parliament, an order was obtained from the Common Pleas Division extending the time for the commencement of the trial of the said petition for a period of two months, and on the 17th of December the trial thereof was definitely fixed for the 12th day of January, on which day it was held. At the opening of the case objection was taken by the respondent to the said petition to the jurisdiction of the court, on the ground that more than six months had elapsed since the presentation of the petition, and that the order extending the time for the commencement of the trial thereof was void and illegal because it had

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been given after the expiration of the six months and, therefore, given without jurisdiction. The learned judge presiding at the trial ruled that the time of the session was not excluded, and that the six months had elapsed, but at the same time ruled that the time had been legally extended. This trial therefore proceeded, and judgment was given setting aside the election for corrupt practices committed by the appellant. Upon the present appeal the same objections are taken on the part of the appellant, and are, of course, to be first determined.

First in order comes the question whether the delay of six months enacted by the aforesaid section 32 of the statute, for the commencement of the trial, is interrupted or suspended by a session of parliament in all cases, and whether or not it has been made to appear to the court or judge that the presence of the respondent at the trial is necessary. Upon this question there is, in my opinion, no room for doubt. As I read the statute, the general rule is that the trial of every election petition must be commenced within six months. The law enacts it in so many words. Can anything be clearer than its terms?—"The trial of every election petition shall be commenced within six months from the time when such petition was presented." To me it seems that, so far, the letter of the law is as plain and unambiguous as it can possibly be, and that it leaves no room for interpretation.

What does this clause next enact? It enacts, in clear terms again, 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 a session of parliament. Now, this is plainly enacted by way of exception to this general rule laid down in the first part of this clause. Within six months this trial must commence except, not when a session of parliament intervenes, that is not what this act says,

but when and only when upon an application on his part it is made to appear to the court that the presence of the respondent at the trial is necessary. If there is no such application, or if upon such an application the court is not satisfied that the presence of the respondent is necessary, the time runs, and the trial may be commenced during any session of parliament. All this seems to me so plain, that with the greatest respect for the contrary judicial opinions expressed on the point I cannot but say that it is, to my mind, inconceivable that any doubt could ever have arisen upon it.

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It is argued further, however, that under the last part of this said section the time occupied by a session of parliament is not to be included in the six months. But this construction is, it seems to me, totally repugnant to the other parts of the section. If in all cases a session of parliament is a suspension of the delay, as contended for by the respondent, why should the act oblige the sitting member, in order that the trial be not commenced during such session, to apply to the court, and to make it appear that his presence at the trial is necessary? Not only is he obliged to make an application for that purpose, but the court, before granting his prayer, must be satisfied by affidavits or otherwise that his presence is necessary, and, I repeat it, may if not so satisfied, fix a day for the trial to commence during and notwithstanding a session of parliament. It seems to me that if, in all cases, parliament had intended that the time occupied by a session should be excluded in the computation of the six months, it would have said so in so many words. This subject would have been accomplished by simply leaving out of this section 32, the middle part of it, so as to make it read: "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 from day to day until such trial is over ;

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but in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by any session of parliament shall not be included." That is how the respondent reads the statute, but that is not the statute; that construction leaves out a part of it, and this cannot be done. I am therefore of opinion that the six months mentioned in the said section expired in the case submitted on the 25th October.

Now, was the order of the 1st December extending the time for the trial of this petition valid and legal, or, in other words, can the time for commencing the trial be fixed or enlarged, under sec. 33 of the act, after the expiration of the six months mentioned in sec. 32?

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 an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary.

The appellant contends that this power to enlarge the time for the commencement of the trial expires with the six months referred to in the preceding clause. On the part of the respondent it is urged that this power exists even after the expiration of the six months.

As a first ground in support of the legality of the orders of the Common Pleas Division in this case, sections 2 and 35 of the act have been relied upon by the respondent. These sections enact, in substance, that as to election petitions the courts in the different provinces and the judge at the trial shall have the same power, authority and jurisdiction as if such petition were an ordinary cause within the jurisdiction of the said court or judge, but subject always to the provisions of the act. It is argued that as under rule 462 of the Ontario Judicature Act the power to extend the time for doing

an act or taking any proceeding is, in express terms, given to the court even after the time has expired, consequently the court, on an election petition, has the same power and may extend the time for the commencement of the trial, even after the expiration of the six months. But that argument upon reasoning and authority is groundless. The words "subject to the provisions of this act" govern these enactments.

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We consequently have first to ascertain what are the provisions of the act, and when any special provisions on any matter are found, they must be given full effect to, independently of the said sections 2 and 35. To hold such special provisions nullified or controlled by general clauses of this nature would be contrary to well settled rules on the construction of such statutory enactments. The case of *Maude v. Towley* (1) is a clear authority on this point. There an amendment had been allowed after the presentation of an election petition. The court, in ordinary causes, had full power to amend, and by an enactment exactly similar to those contained in sections 2 and 35, in question here, the election act which governed the case gave to the court, on election petitions, the same power and authority they had in ordinary causes, subject, however, as here, to the provisions of the act. It was argued that as the court had the power to amend in ordinary causes, it had the same power on an election petition. But the court rejected that contention. "It must be remembered that our jurisdiction in these matters is limited," said Lord Coleridge, C.J., and the court granted an order to set aside the amendment, on the ground that the words "subject to the act" governed the clause, giving them the same power as in ordinary cases, and that to allow the enlargement of the petition or an addition to it by an amendment after its presentation, would be to nullify the clause of the act which

(1) L. R. 9 C. P. 165.

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enacted that it should be presented within a certain time. This decision was approved of and followed in the more recent case of *Clark v. Walland* (1), and the court also then held that an amendment of an election petition enlarging the allegations of the petition and adding to it could not be allowed for want of jurisdiction. Referring to the words and subject to this act, in the clause there under consideration, Gwynn J. said: "Now, it cannot be contended that we can strike out these words of the section. We must give them some meaning, and the only meaning that can be given to them is, subject to the provisions of this act. We must therefore look to the provisions of this act." These cases are clearly in point.

In *Alldridge v. Hurst* (2) also, Grover J. said upon the same clause:—

It will be observed that the powers there given shall be subject to the provisions of the act, and we think it clear that the jurisdiction conferred by the act cannot in all respects be the same as that of the court in ordinary causes.

It seems to me clear, therefore, that sections 2 and 35 of the act can have no application to the commencement of the trial because special provisions have been enacted in the act upon the matter. For the same reason, I do not think that section 69 has any application here. That section enacts that the court shall have power to extend from time to time the period limited for taking any steps or proceedings. Now, by a well settled rule of construction, this general enactment of the statute cannot be extended to the commencement of the trial, because, for this proceeding, special provisions are enacted in the statute, sec. 33.

Now what is the interpretation to be given to this sec. 33? To answer this question, it would be manifestly contrary to all rules to read this section as if it were standing alone and by itself in the statute. The purport and intention of the legislature must be

(1) 52 L. J. Q. B. 321.

(2) 1, C. P. D. 410.

ascertained before we can correctly construe any particular clause of any act, and that, obviously, cannot be done without taking into consideration and weighing attentively all the act and more specially the clauses of it bearing particularly on the same identical matter. Now, here, this section 33 has relation to the time for commencing the trial of an election petition. A reference to section 32 immediately preceding it shows that this also contains an enactment on the same subject. Therefore, we cannot construe section 33 without taking into consideration sec. 32. One must be read in the light of the other.

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Now this sec. 32 enacts in so many words that the trial shall commence within six months. This is a clear, positive enactment, mandatory in its form. To say that it is merely directory is to read it out of the statute. If the parties are at liberty by simply not proceeding to tacitly consent that the trial should be held two, three, four years afterwards, or even not at all, the clear intention of the legislature is set at naught.

The policy of the law is to prevent the delays which, when the election petitions were tried by committees of the House of Commons, very often rendered these proceedings nugatory, and it has unquestionably enacted this period of six months for the commencement of the trial to force the petitioner to proceed. This enactment cannot have been made only in favor of the respondent, or of any of the parties to the cause, but it is undoubtedly based on reasons of public policy. The legislature intended that the state of excitement, agitation, and uncertainty in which it necessarily placed the constituency concerned in the election petition should not be unduly prolonged. Moreover the composition of the House of Commons and the representation of any one constituency is a matter that concerns the Dominion at large. I take it then that the legislature hav-

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ing so clearly expressed its intention that the trial of election petitions should not be unduly delayed, we are bound to see if the act does not bear a construction which will give effect to this intention. Now, to read sec. 32 as a mandatory enactment and as a peremptory limitation of time, at the expiration of which the petitioner is out of court, is the only possible way to attain that result. Otherwise, there would be no sanction to the command of the law. It would be leaving the law as if that six months' enactment were not in it, and operate as a virtual repeal of it.

By the construction which I think should be given to both these sections, 32 and 33, I give full effect to both; the trial must be fixed to commence within six months, but if at any time, on an application supported by affidavits, after a day has been so fixed by either of the parties, before the day so fixed, the court or a judge is satisfied that the ends of justice require it, the time so fixed may be enlarged. When section 33 speaks of the time for the commencement of the trial, it necessarily speaks of a time within the six months enacted in sec. 32. It is impossible to apply this sec. 33 to the judge at the trial, for, as to him, his powers to adjourn the trial, or postpone it from time to time, are regulated by sec. 31, sub-sec. 4.

It has been urged that by this construction of clause 32 means are given for collusion between the petitioner and respondent to allow the petition to lapse, inconsistently with the numerous precautions prescribed in the act respecting the withdrawal of a petition in order to protect the public interest. But there is no ground for this contention, as by sub-sec. 2 of that very same section 32, and, it seems to me, for the very purpose of preventing such collusion, at any time after the expiration of three months after such petition has been presented any elector may, if the trial has not been fixed, be substituted for the

petitioner.

Then, does not the construction contended for by the respondent here itself allow means, and I should think much easier means, of collusion between the parties to the petition? For according to this construction, not only is the petitioner not bound to proceed during the six months, but if in collusion with the respondent he may never proceed at all.

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The case of *Banner v. Johnson* (1) has been mentioned by the respondent in support of his contention, but in my opinion that case is entirely distinguishable. The holding there was that under a statute which enacted that an appeal should be taken within three weeks from the date of the judgment unless such time was extended by the Court of Appeal, an extension of time could be granted by such Court of Appeal after the expiration of the three weeks. But that was a case, it must be remembered, under the Companies Act, and where private interests only were in question. Then the clause there under consideration before the House of Lords was standing alone and entirely unconnected with any other part of the act. The reasoning upon which I have endeavored to show that upon the wording of section 32 on grounds of public policy the intention of the legislature was that no undue delay should retard the trial of elections petitions could clearly not have applied to the statute under consideration in the House of Lords. Here, as I have observed, it is not only one clause of the statute that we have to construe, but these two clauses 32 and 33 together. We must put such a construction on them that, if possible, both should have their full force and effect. Now the construction put upon section 33 by the respondent virtually repeals section 32 and frustrates the express enactment of the legislature that the trial should commence within six months. Under

(1) L. R. 5 H. L. 157.

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 Taschereau these sections, which in my opinion we are, according  
 J. to well understood canons of construction, bound to  
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The case of *Wheeler v. Gibbs* (1) in this court also relied upon by the respondent is also on a statute entirely different from this one. The question there to be determined turned upon the construction of sec. 48 of the Supreme Court Act, now sec. 51, ch. 9, of the Revised Statutes, as to the three days notice required by that section that the appeal has been set down for hearing. Now there, as in *Banner v. Johnston*, the clause under consideration stood in the act by itself and unconnected with any other clause of the act. The legislature while clearly enacting that the trial should commence within six months has omitted to provide as clearly for the appeal, and the consequences of this omission are exemplified in a striking manner by that very case of *Wheeler v. Gibbs*, wherein a judgment annulling the election given in February, 1879, was not heard in appeal till March, 1880, and the appeal not determined till June, 1880, sixteen months after the original judgment. The clause of the statute that governed *Wheeler v. Gibbs* left it open to the parties to postpone indefinitely and at their will and pleasure, by consent and without affidavits, the hearing of the appeal, while the clauses that govern the present case fix a limit of six months for the commencement of the trial and authorize an enlargement of time only upon application supported by affidavits. The same ground of distinction exists as to *Banner v. Johnston*. The court would not enlarge the time if not satisfied by the affidavits that there are good grounds for it,

(1) 3 Can. S. C. R. 374.

but then what becomes of the petition? Is it to be considered as having been out of court at the expiration of the six months, or if not at what period? Then, the petitioner may never apply for an enlargement of time and the respondent is not bound to move to dismiss it. Is the petition to stand till the expiration of parliament? Is a whole constituency thus to be left indefinitely in a state of uncertainty as to its representation in parliament? Has the house of commons thus indefinitely to suffer that one of its members sits there with a cloud on his title?

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His Lordship the Chief Justice in rendering judgment in the case of *Wheeler v. Gibbs*, said:—

Full effect should be given to the clear and definite words of the legislature, there being nothing on the face of the statute to indicate a contrary intention.

And the doctrines so laid down cannot be questioned. It is clear and sound law. But in the present case, on the face of the statute, as I read it, there is as regards the trial, the enactment of sec. 32 indicating that the power to enlarge the time for the commencement of the trial given by section 33 cannot be exercised after the expiration of the six months, an enactment similar to which none was applicable in *Wheeler v. Gibbs*. Otherwise, I repeat it, sec. 32 as to the six months' limit is useless and without any meaning. It must be noticed also in the case of *Wheeler v. Gibbs* that the delay of three days given for the notice of appeal there in question, was so short that the court would reasonably not construe the statute strictly, specially in a case of appeal, the right to which is always favorably viewed, and protected as much as possible by the courts. Here the delay given is certainly not short. In *Banner v. Johnston* I also remark one of their lordships, Lord Cairns, seems to have been greatly influenced by the consideration that if the House of Lords could not extend the time after the

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three weeks allowed by the statute, the House would virtually be without jurisdiction, or unable to exercise their jurisdiction for about one half of the year, a consideration which does not apply here. These two cases of *Banner v. Johnson* and *Wheeler v. Gibbs* are clearly distinguishable upon another ground. In the enactments there under consideration the proceeding, for doing which the courts held that the time could be extended even after the expiration of the time fixed by the statutes which ruled these cases, was a proceeding that could be done by one of the parties only. The notice of appeal could, of course, be given only by the appellant and the extension of time be asked only by him. Here it is clear that the extension of time for the commencement of the trial can be asked, under section 33, by any of the parties to the petition, and by the respondent as well as by the petitioner. It is a right common to them both. Now, it is evident that it is only within the six months from the date of the presentation of the petition that the respondent can require, or have any object in asking, an extension of time for the commencement of the trial. If, within the six months, the petitioner has not proceeded to get the trial fixed, and if he, by his not proceeding, leaves the respondent undisturbed in possession of his seat, the respondent has no enlargement of time to ask. He does not require any, or rather he gets all the enlargement possible by the simple non-proceeding of his adversary. This again shows that the enlargement of time permissible under section 33 must be an enlargement within the six months mentioned in section 32. Otherwise, while this enactment would, within the six months, apply to both parties, it would, after the six months, apply to the petitioner alone.

And what again shows clearly that this limitation of six months was intended to be peremptory is that

any other elector, if the petitioner does not proceed, can ask to be substituted for the petitioner at the expiration not of six months, but of three months, so that even in such a case the trial should commence within the six months. The petitioner is in default if he does not proceed within three months, and a new petitioner can be substituted for him. But, in any case, the trial must commence within six months. At the end of the three months in the first case, the petitioner is out of court, but the petition remains; but at the end of six months, the petition itself is out of court, if the trial has not been commenced, or the time therefor enlarged.

It has been further argued on the part of the respondent as one of the grounds in support of his contention that the enactment of sec. 32 as to the six months is directory only and not mandatory; that in various acts, where the legislature has intended that proceedings should not be taken after a certain time, the clause limiting such time contains the words "and not afterwards," and as example of this we have been referred to ch. 8 of the revised statutes, sec. 117; ch. 32, sec. 240, and to an Imperial Act. To this the answer is obvious. When such a clause has these words, "and not afterwards" it is plain and plainer than the present one; there is then no room for interpretation. But I fail to understand that we are to infer from that where these words are not in a statute, that a limitation of time therein means nothing and that proceedings for which a time is limited can always and in every case be done after the time so limited. There are a number of statutes where clauses limiting a time to do an act or take a proceeding have not the words "and not afterwards," and yet such act or proceeding clearly cannot be done or taken after the time limited. Take the very statute now under consideration, the

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Controverted Elections Act, sec. 12 thereof for instance enacts that within five days after the service of the petition, the respondent may present any preliminary objections he may have against the petition. Now, if I am not mistaken, it has never been contended that preliminary objections to a petition could be presented after the five days. Yet, the act does not say "and not afterwards." Another similar instance of this is to be found in section 51 of this very same act, which directs that a party desiring to appeal to this court shall within eight days deposit \$100 as security. I do not think it could have been contended that an appeal could be taken after the eight days, though there are no negative words in the clause. The case *Peacock v. R.* (1) is in that sense. There the right to appeal was given by a statute, upon the party dissatisfied with the judgment applying in writing within three days to the justice to sign a case. The appellant had allowed more than three days to elapse before making his application. The Court of Appeal quashed his appeal. "We have no jurisdiction, said the court, unless the provisions of the act are strictly complied with." Yet, there again the statute under consideration, limiting the time to three days, had not the words "and not afterwards."

The case of *Lord v. Lee* (2) has also been cited by the respondent in support of this contention that an extension of time may be granted in certain cases after the time first given to do any act has expired, but that case, which was on an arbitrator's award, was determined on the ground that the extension of the time within which the arbitrator has to make the award amounts to a ratification, a doctrine which clearly is not applicable to the present case. There as in *Banner v. Johnston* private interests only were in con-



troversy and the parties to the cause only could be affected by any of the proceedings, or by the result of the cause. And that obviously is why the statute which governed that case not only allowed an extension by the judge of the time for filing the award but also specially enacted that the time could be extended by consent of the parties. Now, under the act now under consideration, there is no such enactment; and, clearly, for obvious reasons, such an enactment would be repugnant to the whole policy of the act. It is evident that an enactment by which the parties to an election petition could be allowed, by consent, to enlarge the time for the trial thereof, or postpone it at their will and pleasure, would open the door to collusion between the parties which the legislature in so many parts of the act endeavored to prevent. But the respondent's contention is that, though the parties cannot by an express consent delay the trial, yet they may do it by a much easier mode, that is tacitly, and impliedly, by both agreeing not to proceed at all. Is it possible that the legislature intended it to be so and that the parties can so be at liberty to do indirectly, that which they cannot directly do, and so openly defeat and nullify the intention of the legislature?

I hold, for these reasons, that the judge in this case proceeded wholly without jurisdiction, and that all the proceedings before him were *coram non iudice*. The appellant appeals from his judgment at the trial, and from that judgment an appeal clearly lies; and the objection to his jurisdiction was clearly open to the appellant as a reason of appeal. The judge decided as a question of law that he had jurisdiction, and sec. 50 of the act gives an appeal from the decision on any question of law of the judge who tried the petition. I need hardly add that if the judge had no jurisdiction,

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the Court of Common Pleas' orders of the 1st and 17th of December could not confer on him any.

To give to these orders the effect of a kind of revivor order, by which a petition out of court was restored and brought into a new vitality, cannot, it seems to me, be seriously contended for. It follows in fact from what I have said that, in my opinion, these orders were made without jurisdiction, and are themselves null and void. I would allow this appeal with costs.

In the cases of *L'Islet*, *Montmorency*, *Quebec County* and *L'Assomption*, we recently held that there was no appeal to this court under section 50 of the act, because the appeals therein were not either from judgments on preliminary objections, or from the judgment or decision of the judge who had tried the petition, the only two appeals given by that section. Here the appeal is from the judgment of the judge who tried the petition, from which an appeal clearly lies.

GWYNNE J.—The election petition in this case was filed in the Common Pleas Division of the High Court of Justice for Ontario. By rule 23 of the rules of court enacted under the provisions of section 44 of 37 Vic., c. 10, (sec. 66, ch. 9 of the Revised Statutes,) it was enacted that,

The time and place of the trial of each election petition shall be fixed by the court and notice thereof shall be given in writing by the clerk of the court by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the petitioner, another to the address given by the respondent, and a copy by the post to the sheriff fifteen days before the day appointed for the trial. The sheriff shall forthwith publish the same in the Electoral Division.

By an order of the said Common Pleas Division of the High Court of Justice made on the 17th December, 1887, under the said rule No. 23, the issues joined in the said election petition were sent down to be tried at the town of Cornwall, in the county of Stormont,

upon the 12th day of January, 1888. Upon that day the trial court for the trial of the said issues, and which by the statute is made an independent court of record wholly distinct from the court in which the petition was filed, was opened as prescribed by the rule or order of the Common Pleas Division. Before the trial was entered upon counsel for the above appellant, the then respondent, objected to the jurisdiction of the said court to try the petition upon the naked ground that six months had elapsed since its presentation, and he asked the learned judge to note his objection, whereupon the trial proceeded and at its close the learned judge who presided at the trial court rendered his judgment in the following terms (1):—

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From this judgment the now appellant has appealed to this court on the ground :

1st. That the said trial court had no jurisdiction to try the petition ; that the petition was out of court at the time of the trial, and that the judge presiding at the said trial court should have so determined and dismissed the petition.

2. That the learned judge should not, upon the evidence, have found in favor of the petitioner on the charges of bribery by an agent and should not have avoided the election, and

3. That the learned judge erred in finding the present appellant guilty of bribery and his judgment, assuming that he had jurisdiction to try the petition, should be reversed so far as the finding upon the personal charges is concerned.

As to the first of these objections I am of opinion that the learned judge had jurisdiction to try the petition, and that he did right in proceeding with the trial, and that he not only should not have dismissed the petition, if he had had authority so to do, but that he had no

(1) See p. 456.

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authority to dismiss the petition upon the ground suggested or upon any ground. I am of opinion that the petition was not out of court at the time of the trial ; and further that the reason suggested why the learned judge should not have proceeded with the trial cannot be made a ground of appeal to this court against his decision upon the trial of the matter of the petition.

The trial court over which the learned judge who tried the petition presided is, as already pointed out, made by the statute a wholly distinct court from the court in which the petition was and still is pending. That Court was the Common Pleas Division of the High Court of Justice for Ontario, which court having, by the order dated the 17th December, 1887, sent the case down to be tried by a trial court, this latter court had no jurisdiction to enquire or decide whether the petition had, or had not, been sent down for trial regularly by the court making the order for such trial.

The Controverted Elections Act authorises the court in which the petition is pending from time to time to enlarge the time for the commencement of the trial of the election petition beyond the period of six months named in the act if, on an application for that purpose supported by affidavit, it appears to such court that the requirements of justice render such enlargement necessary. Now the trial court had no right to enquire or decide whether or not such enlargement had in point of fact taken place, or if it had, whether or not the order making the enlargement had been obtained regularly, at a proper time or upon proper material. Questions as to the validity of the order if obtained, or whether any such order had in fact been obtained, were questions with which the trial court had nothing whatever to do, and upon which it had no right to pronounce any judgment. Its jurisdiction was limited to trial of the issues sent down by the

Common Pleas Division to be tried, just as the jurisdiction of the old court of assize and *nisi prius* was limited to the trial of the issues of fact sent down by the court in which the action was pending to be tried by the court of assize and *nisi prius*; the duty of which court was to try such issues regardless of all questions whether the case was regularly sent down for trial or not, or whether sufficient or any notice of trial had been given or not, or the like. By sec. 13 of 37 Vic. ch. 10, corresponding with sec. 31 of ch. 9 of the revised statutes, now replaced by sec. 3, of 50-51 Vic. ch. 7, it is enacted that it shall be competent for the judge who tries an election petition "to decide any question raised as to the admissibility of the evidence offered or to receive such evidence under reserve subject to adjudication at the final hearing."

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Apart from questions of law as applicable to the evidence given, questions as to the improper reception or rejection of evidence seem to me to be the only questions of law which can arise upon the trial of the matter of an election petition. The only matter in respect of which an appeal is given to this court after the trial of an election petition is, by the statute, declared to be, "the judgment and decision of the judge who tried the petition upon any question of law or of fact," that is to say, as it appears to me, the decision of the learned judge upon the matters of fact and law involved in the issues of fact joined upon the petition, and his decision, if any there be, affecting the reception or rejection by him of evidence tendered in respect of such matters of fact.

It is the matter only of the petition as appearing on the record of the case, that is to say, the pleadings and the evidence which the statute authorises to be set down for hearing in appeal from the decision of the judge who tried the case, with this addition that in

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case it should appear 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 or upon commission. From the above clauses of the controverted elections' act it appears to me that the only matter which is appealable after trial is the judgment and decision of the judge upon the matters of fact and law involved in the issues joined upon the matter of the petition and upon any question of law arising in the course of the trial, affecting the decision upon the matters of fact, as the improper reception or rejection of material evidence.

In the appeal case before us it appears, although it does not seem to have been offered, or to have been admissible, in evidence upon the trial of the petition, that upon the 1st December, 1887, an order was made in the matter of the petition by the Common Pleas Division of the High Court of Justice where the petition was pending which is in the following terms (1):

Now it is, I think, very obvious that the trial court had no authority whatever to call in question the validity of this order or of that of the 17th December or to disregard them.

The suggestion made to the trial judge before the commencement of the trial to the effect that he had no jurisdiction to try the case was a vain, useless and irrelevant objection. It did not submit to his judgment and decision any point arising on the trial of, or affecting the matter of, the petition nor did it call for, nor could he legally make nor did he make, any judicial decision upon it. He simply proceeded to try the case in obedience to the order of the court in which the petition was pending as it was his duty to do. Whether or not an order had been issued by the Common Pleas Division within six months from

(1) See p. 455.

the presentation of the petition for extending the time for the commencement of the trial, of which order that of the 1st December was but in continuance, were matters not within the judicial cognizance of the trial judge at all. His judicial functions were limited to trying the matter of the issues joined on the petition sent down to him by the Common Pleas Division for trial. Anything therefore which may have been said by the trial judge in relation to the objection was, as it must needs have been, quite extra-judicial, for as judge presiding at the trial court in obedience to the orders of the Common Pleas Division of the High Court of Justice of the 1st and 17th of December, no question could legally have been submitted to his adjudication, calling for, or justifying him in giving, any judicial decision as to the validity or invalidity, the sufficiency or insufficiency of those orders. The Common Pleas Division was alone responsible for them. Under color however of an appeal from the judgment and decision of the trial judge rendered upon a trial of the petition upon the merits, the case has been turned into an appeal against the above orders of the Common Pleas Division against which, as was decided by this court in the present term in the *L'Assomption*, *L'Islet*, *Montmorency* and *Quebec County* election cases, no appeal lies whether the decision of the court which made the orders was right or wrong.

As an appeal to this court after the trial of an election petition can only be from the judgment and decision of the trial judge upon some question of law or fact arising upon the trial of the matter of the petition which it was competent for him and it was his duty to decide upon such trial; and as it was not competent for him to call in question the validity of the orders of the 1st and 17th of December, or to disregard them; and as in point of fact he did not

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make any adjudication or decision, nor, upon the trial of the matter of the petition, was it necessary that he should have made any decision, affecting the validity of the said orders, it is impossible, in my judgment, that upon this appeal, which is from the judgment and decision of the learned judge who presided at the trial court upon the merits of the matter of the petition, a point should be entertained by us affecting the validity of orders not made in the course of the trial—not affecting the matter of the petition which was being tried—not made by the judge of the trial court at all but by a wholly different court—a point in fact which it was not competent for the learned judge of the trial court to have decided and which was wholly collateral to, and forms no part of, the decision of the learned judge upon the merits which alone forms the subject of the present appeal.

We should be very careful not to defeat the object which the legislature had in view when it submitted all questions affecting the return of members of parliament and the purity of elections to judicial enquiry in the courts of law, and when after a trial of an election petition it limited an appeal to this court to an appeal from the decision upon any question of law or fact of the judge who has tried the petition.

In the present case a trial has taken place, witnesses have been called, examined and heard upon both sides, the merits of the case have been fully gone into and gravely argued by counsel, and the learned judge who tried the petition has pronounced the election to be void for corrupt practices, committed by the sitting member and his agents, whereby the sitting member procured his return as a member of the house of commons. From this decision an appeal has been taken, on which appeal the statute provides that it is the record of the case as tried which shall be set down for hearing in this court, which record presents only the



question whether or not the corrupt practices charged in the petition have been committed as the learned judge whose decision is appealed from has found them to have been. If we should now decline to adjudicate upon an appeal from this decision of the trial judge upon the merits so tried and adjudicated upon by him, and should so withhold from the house of commons the report required by the statute to be made to it, in relation to the corrupt practices found by the trial judge to have been committed, upon the ground that he had no jurisdiction to try the case, and that the orders of the 1st and 17th Dec., made by the divisional court, and in obedience to which the parties came before him and he tried the case, were made without any jurisdiction, we shall convert the appeal from one against the decision of the learned judge who tried the case, which is the only appeal authorised by the statute, into an appeal against the orders of the 1st and 17th Dec. and, we shall thus, I fear, be defeating the object of the legislature, which enacted that an appeal shall lie only from the judgment and decision of the judge who has tried the petition, and that upon such appeal it is the record of the case as tried which shall be set down for hearing by this court, and we shall be assuming a jurisdiction which, as we have already decided in the cases above mentioned, we do not possess.

But assuming the point to be open upon this appeal there is, in my opinion, nothing in it, for :—

1st. The time occupied in a session of parliament is, in my opinion, by the express terms of the act excluded in the computation of the time allowed for every step or proceeding in the matter of the petition necessary to be taken in order to bring the petition down to trial, and in such case the six months from the presentation of the petition had not expired when the order of the 1st of December was made, and

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2nd, Even if the six months from the presentation of the petition had then expired the order of the 1st of December was, in my opinion, a good and valid order within the provision of the statute as to enlargement of the time for the commencement of the trial.

Now that the time occupied in a session of parliament is not to be included in the computation of the time allowed for taking the several steps and proceedings necessary or authorised to be taken in respect of and for the purpose of bringing the matter of the petition down to trial and for the commencement thereof is, I think, very apparent if we refer to the steps and proceedings which are necessary or authorized to be taken, and to the statute 38 Vic. ch. 10, the substance of which the revised statute ch. 9 does not alter, although by altering the collocation of the sentences it creates some apparent confusion.

By 37 Vic. ch. 10, sec. 9, five days are allowed after presentation of the petition within which it may be served. By sec. 10 five days are allowed after service for the respondent to file any preliminary objections which he may have to urge. By sec. 11 five days were allowed after the dismissal of such preliminary objections, if dismissed, for the respondent to file an answer to the petition, and to serve a copy thereof on the petitioner, and it was by that section enacted that whether such answer should or not be filed, the petition should be deemed to be at issue after the expiration of the said five days, and the court, that is to say the court in which the petition was filed, was authorised at any time thereafter, upon the application of either party, to fix some convenient time and place for the trial of the petition. By sec. 13 it was enacted that notice of the time and place fixed for the trial of the petition should be given not less than fourteen days before the appointed day. By section 14 and the subsequent sections to 21 provision is made for the examination of

the parties, petitioner and respondent, after the petition is at issue and before trial for the purpose of obtaining evidence to be used at the trial; of which examination 48 hours notice is required to be given to the party to be examined. So in like manner by sec. 24 the petitioner or respondent may, after issue is joined on the petition, obtain a side bar rule or order of the court, still meaning the court in which the petition is pending, requiring the adverse party to produce within ten days after the service thereof, under oath, all documents in his custody or power relating to the matters in question, such production being also for the purposes of the trial and to be used as evidence thereat.

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Such being the proceedings necessary and authorized to be taken before the petition should be brought down for trial and for the purposes of such trial the 38 Vic. ch. 10, sec. 1 enacts that:—

Whenever it appears to the court or 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.

Now the only "delays allowed for any step or proceeding in respect of such trial" are the several times allowed and prescribed for the several steps and proceedings required or authorized to be taken in order to bring the petition down to trial, as above extracted from 37 Vic. ch. 10; there are no other steps or proceedings in an election petition case either before or after the commencement of the trial, consequently if the words "and in the computation of any delay allowed for any step or proceeding in respect of any such trial," are not construed as applying to such steps and proceedings, no application whatever can be given to them and they become in effect absolutely eliminated from the statute. The words "such trial" as used in this

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section plainly apply to the previous words "the trial of an election petition, and the words "such session" to the antecedent words "any session of parliament." The 2nd sec. of 38 Vic. ch. 10, subject to certain provisions therein contained as to enlargement of the time of trial by the court and other matters to which it is not necessary here to refer, enacted that the trial of every election petition should be commenced within six months from the time when the petition was presented.

Now, ch. 9 of the revised statutes while it alters the collocation of the sentences in 38 Vic. ch. 10, does not, in my judgment, make any alteration in the substance. It incorporates for consolidation into one act the several acts relating to controverted elections, including the several sections and provisions above extracted from 37 Vic. ch. 10, and as to the point now under consideration, which is the consolidation of 38 Vic. ch. 10 with 37 Vic. ch. 10, it places the sentences of the 1st and 2nd sentences of 38 Vic. in a different order from that in which they are placed in 38 Vic. without, in my opinion, altering the construction. Thus it enacts in sections 32 and 33 as follows:—

Sec. 32. 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 from day to day until such trial is over; but if 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; and in the computation of any time or delay allowed for any step or proceeding in respect of any trial or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included.

2. If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court or judge thinks just.

33. The court or judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for commencement of the trial, 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.

2. No trial of an election petition shall be commenced or proceed.

ed with during any term of the court of which the judge to try the same is a member and at which such judge is by law bound to sit.

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Now it cannot be doubted that the words "such trial" where they first occur in the above 32nd section relate to the words in the commencement of the section "the trial of every election petition," and there is no reason whatever why when the same words occur twice again in the same section they should receive any different interpretation—they all refer to the same words namely, "the trial of every election petition." The contention, however, is that in the sentence, "and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included," the above words "time or delay allowed for any step or proceeding in respect of such trial" do not relate to the times and delays allowed by the statute for steps or proceedings required to be taken in respect of the trial of election petitions generally, but to a case (after all these steps and proceedings have already been taken, and the petition has been brought down to trial), of no trial taking place by reason of the trial judge refusing to commence it because of the respondents presence thereat appearing to him to be necessary, a stage in the case of an election petition when no steps or proceedings in respect to the trial of it remain to be taken, and for which therefore no delays are by the statute provided or allowed. So likewise it is contended that the words "such session" in the sentence "the time occupied by such session of parliament shall not be included" have not reference to the precedent words in the section "any session of parliament," but only to a session during which a judge may have refused to try a petition upon the ground of his being of opinion that the respondent's

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presence at the trial is necessary. Such a construction, as I have already shown in my observations upon sec. 1 of 38 Vic. ch. 10, would render wholly nugatory the words "in the computation of any time or delay allowed for any step or proceeding in respect of any such trial" for after the postponement of the trial by a judge upon the ground of the respondent's presence at the trial appearing to him to be necessary, there is no step or proceeding whatever necessary to be taken or provided for in the statute, and for which any delay is allowed thereby. The plain meaning of the section appears to me to be that it is the trial judge who is prohibited from commencing the trial of an election petition during any session of parliament if the respondent's presence at the trial appears to him to be necessary. He is the person to form the opinion as to the necessity of the respondent's presence at the trial, and he is to exercise his own judgment on that question, notwithstanding that the petition may have been sent down for trial regularly by the court in which the petition is pending; and the residue of the section is (as was sec. 1 of the 38 Vic. ch. 10) for the purpose of providing that the time occupied in any session of parliament shall not be included in the computation either of the times and delays allowed by the act for the taking any steps or proceedings necessary to be taken in order to bring the case to trial, or for the commencement thereof. The section then will read thus:—

"The trial of every election petition shall be commenced within six months from the time when such petition" (that is the election petition to be tried) "has been presented and shall be proceeded with from day to day until such trial is over" (that is to say the trial of every election petition once commenced shall be proceeded with until the trial is over), "but if at any time it appears to the court or a judge that the respon-

"dent's presence at the trial is necessary such trial shall
 "not be commenced during any session of parliament"
 (that is to say, if upon the trial of any election petition
 coming on at any time, the respondent's presence at the
 trial or, at *such* trial, appears to the trial judge to be
 necessary, the trial of such election petition, or "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
 "any such trial, or for the commencement thereof as
 "aforesaid, the time occupied by such session of parlia-
 "ment shall not be included." That is to say the trial
 of an election petition shall not in a certain case be
 commenced during any session of parliament, nor shall
 the time occupied by such, that is by "any session of
 "parliament," just spoken of, be included in the com-
 putation of the times and delays allowed for taking the
 several steps and proceedings necessary to be taken in
 order to bring the case of an election petition to trial or
 for the commencement of such trial. This construction
 gives effect to every word of the section while the con-
 struction contended for by the appellant absolutely
 eliminates from the section or renders nugatory the
 chief part thereof as already shown, and the result, as it
 appears to me, is that while the parties may, if they
 think fit, during any session of parliament take all the
 steps and proceedings necessary to be taken in order to
 bring an election petition down to trial, and may even
 commence and proceed with the trial, yet they can
 not be compelled to do so for the time occupied in any
 session shall not be included in the computation of the
 times and delays by the act allowed for taking the sev-
 eral steps and proceedings in the cause in respect of
 bringing the case to trial or for the commencement
 thereof. This I confess appears to me to be the true,
 natural and reasonable construction of the statute.

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Now as to the validity of the order of the 1st Dec., assuming the time occupied in the session of parliament to be included in the computation of six months from the presentation of the petition allowed for bringing the case down to trial. The petition was filed during a session of parliament, upon the 25th April, 1887; the contention of the appellant is that upon the expiration of six months from that date, no rule of court for enlarging the time having been obtained during such six months, the election petition was out of court and that therefore the court had no jurisdiction to make any order in it, and in support of this contention two cases are cited, namely *Whistler v. Hancock* (1); and *King v. Davenport* (2). In those cases orders had been made dismissing the actions for want of prosecution unless a statement of the plaintiff's claim in the respective cases should be delivered within certain periods named in the orders, and such periods having elapsed without the delivery of such statements of claim it was held that in the terms of the orders *eo instanti* of the expiration of the periods named in the orders the actions became dismissed, and that thereafter no motion could be made in them; but these cases have no application to the present case for the statute does not what those orders did, it does not declare or enact that election petitions shall stand dismissed or shall be deemed to be out of court unless the trial shall be commenced within six months from the presentation of the petition; it simply directs as a matter of procedure that the trial shall be commenced within six months from the presentation of the petition with this proviso added, in sec. 33 of the act, ch. 9, revised statutes, that notwithstanding such direction the court may from time to time enlarge the time for the commencement of the trial if, on an application for

(1) 3 Q. B. D. 83.

(2) 4 Q. B. D. 402.

that purpose supported by affidavit, it appears to the court that the requirements of justice render such enlargement necessary; and with this further provision, contained in the 64th sec. of the act, that "a court "or a judge shall, upon sufficient cause^s being shewn, "have power on the application of any of the parties "to a petition to extend from time to time the period "limited by this act for taking any steps or proceedings by such party." Now in these cases of election petitions the ends of justice may as much require after as before the expiration of six months from the presentation of the petition that the time for commencement of the trial of the matter of the petition should be enlarged, as is the language of one of these sections, or extended which is the language of the other, and as the statute does not enact that the petition shall be deemed to be out of court or shall stand dismissed at the expiration of the six months from presentation of the petition unless the trial shall before then be commenced or an order for enlargement of the time for commencement of the trial shall before then be obtained the case was still in court and in the jurisdiction and under the control of the court upon the 1st December, and upon principle as well as the reasoning of *Banner v. Johnson* (1), *Lord v. Lee* (2) I am of opinion that the order of that date was good and valid even though the time occupied in the session be included in the computation of the six months from the presentation of the petition allowed for the commencement of the trial of it. When the legislature enacted that notwithstanding anything contained in the section which directs the trial to be commenced within six months from the presentation of the petition, the court might from time to time enlarge the time for the commencement of the trial if upon an application for that purpose supported by affidavit it

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(1) L. R. 5 H. L. 157.

(2) L. R. 3 Q. B. 404,

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should appear to the court that the requirements of justice rendered such enlargement necessary, and in another section that the court should upon sufficient cause shown have power upon the application of any of the parties to the petition to extend from time to time the periods limited by the act for taking any steps or proceeding by such party, I find it difficult to bring my mind to the conclusion that the intention of the legislature was that *eo instanti* of the expiration of six months from the presentation of the petition without an order having been made for extension of the time for commencement of the trial the court should become paralysed and its jurisdiction absolutely ousted, however much the ends of justice might require that the trial should be proceeded with, and that the corrupt practices charged in the petition should be investigated, but for the reasons already given this point is not, in my judgment, of importance in the present case. Entertaining this opinion I feel it to be my duty to express my opinion upon the merits of the case as the only matter which, in my opinion, is before us in the present appeal our duty in relation to which is plainly, as it seems to me, plainly pointed out in the statute.

The objection that the learned judge who tried the case should not, upon the evidence, have avoided the election on the ground of bribery by an agent appears to me to be quite untenable and indeed frivolous in view of what occurred at the trial. After the examination of the above appellant, the then respondent, (taken before a local master before the trial) had been read and after his oral examination at the trial and after much evidence had been given by persons who were his agents and others as to the general conduct of the election, and after evidence had been given upon three specific charges of corrupt acts alleged to have been committed by one McKenzie, the appellant's agent, by

loaning money to three persons of the names of Vanier, Saucier, and Tyo with corrupt intent, which charges are contained in items numbered respectively 35, 36 and 37 in the bill of particulars, and after the respondent at the election trial had given all the evidence he had to offer in respect of these charges, the learned judge addressed the respondent's counsel as follows, as appears by the printed case laid before us,

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I will hear you Mr. Cassels, the question of agency being admitted, on the question of corrupt practices by the agent.

Whereupon the learned counsel addressed the court as follows:—

There is no doubt there is an agency. As to the corrupt practices by the agent I am free to admit, it just depends upon how your lordship views the evidence. I am quite free to admit, even if these were *bonâ fide* loans, if the loans were induced or brought about by reason of a desire on the part of the agent to procure the votes or to influence the votes whether the loans were *bonâ fide* or not I suppose it would be within the statute a corrupt act, and the point comes down to the question of evidence as to what view your lordship takes about it. There is no doubt the facts are suspicious; the very fact of having lent the money on the eve of an election, and the very fact as it were of negotiations for the loans taking place at the time of a meeting, are all circumstances of suspicion. Then of course there is the evidence of these three men for what it is worth to the effect that they themselves stipulated that they should receive the loan as the price of their votes; my impression is that two of them really did not understand what they were saying; that they evidently talked French and rather in a broken way but, still, there is their evidence. As against that there is only the evidence of McKenzie. Now I cannot say one way or the other, and it is for your lordship to determine the fact. It is really a question of fact, for if you think the statement of these three men is correct that they put forward as a reason for the getting of this money that they would vote or not vote then, although the loans are genuine and *bonâ fide*, I think within the statute it is a corrupt act.

That the question was, as put here by the learned counsel, in effect only to be determined by the judge according to the view he should take of the evidence and of the credibility of the witnesses there can be no doubt, and the argument of the learned counsel seems

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to me to convey internal evidence of the great difficulty under which he labored of withholding in his argument an expression in justification of the judgment which he expected from the learned judge, namely, that the monies were corruptly loaned. His lordship in reply to this argument of counsel appears by the case to have said as follows :—

The way the evidence strikes me with reference to that is, we find an election meeting is being held of some character or another in the interests of Mr. Purcell on that evening; that there are three men who by some peculiar free masonry all learn that they can obtain money, and they attend there for that purpose, men whose needs have been pressing for various periods of time, but who never had made any application in the same quarter for relief; on that evening they met and all three of them made application for loans; all three of them obtained promises of loans and I cannot agree that they did not understand what they were saying because I took particular pains to endeavor to ascertain from them after counsel were through how they desired to place the facts; I think they understood they were obtaining loans, and were obtaining them as a condition for exercising their franchise and I think the way that was managed was this, that Leclair and Rousseau used their influence with these men to negotiate, and that McKenzie advanced the money and kept himself apart from any direct negotiations as to the voting. It seems to me that there is a clear lending of money by McKenzie as agent, using Leclair and Rousseau for the purpose of working out the scheme.

Upon hearing this enumeration of opinion from the learned judge, the above appellant's counsel said, "on these facts I do not want to waste time explaining the law." Now upon this it appears to me that this was an acceptance by the respondent's counsel of the soundness of the opinion of the learned judge upon the question of corrupt practices by the agent, and that the trial would have closed here with the assent of the respondent without any appeal whatever if the petitioner had been willing to waive all claim to a judgment upon that part of the petition which related to the charges of the candidate's connection with corrupt practices, committed by his agents for him and on his behalf,

and to the charges of direct bribery and corruption committed by himself personally. But, however that may be, as the cases upon which the learned judge expressed his opinion as above involved matters of fact only determinable by himself and depending upon the view taken by him of the credibility of witnesses examined before himself, an appeal from his determination of such pure matters of fact can not be entertained consistently with the decisions and uniform practice of this court to regard the decision of the trial judge in such cases as final.

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Upon the counsel for the respondent at the trial having expressed himself, as above stated, as unwilling to waste time explaining the law after hearing the judge's opinion on the facts the learned judge enquired of the counsel for the petitioner—"Do you intend to press the personal charges?" to which the counsel replied "Yes"; whereupon the learned judge said

I shall declare the election void by reason of corrupt practices by an agent so that whatever evidence you desire to further advance will be as to corrupt practices by respondent for the purpose of personal disqualification.

To which the petitioner's counsel replied

There are other agents

Upon which the learned judge said

As it has been said, and well said, I do not sit here inquisitorially. Having accomplished the purposes of the trial on any issue, I shall decline to receive further evidence for the mere purposes of enquiry. If the Parliament desire, upon my report, to have further inquiry as to corrupt practices in the constituency it will be in their province to appoint a commission for such purpose. I shall report as far as the evidence now appears to me that corrupt practices did extensively prevail in the constituency.

Now what the learned judge intended to convey by these observations was, clearly, as it appears to me, that being satisfied as to the committal of corrupt practices by an agent sufficient to avoid the election, and that corrupt practices

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did extensively prevail at the election, he would report the latter fact to the House who might institute if they should think fit further enquiries into such general corrupt practice, but that he would only receive evidence during the remainder of the trial upon all personal charges made against the respondent for the purpose of his disqualification.

Now as to the objection that the learned judge erred in finding the present appellant guilty of bribery and that this judgment should be reversed so far as his finding upon the personal charges is concerned. The argument of the learned counsel for the appellant upon this objection appeared to me, I must confess, to be rested upon what I think was hypercritical criticism of certain passages in the language used by the learned judge in certain conversations which took place between him and counsel during the progress of the trial rather than upon the merits of the case.

The learned counsel for the appellant complained of the manner in which the learned judge approached, and proceeded with the trial—that he took a mistaken view of the nature of the evidence required to substantiate charges of the nature of those under consideration—that he ignored in fact the maxim that in a criminal case the accused is entitled to the benefit of a doubt—that in effect he first found that the advances made by McKenzie referred to already as being contained in items 35, 36 and 37 of the bill of particulars were not made with the knowledge and consent of the appellant and that notwithstanding he afterwards gave judgment against the appellant that those advances were made with his knowledge and consent.

These grave imputations upon the conduct of the learned judge who presided at the trial might well have been spared without any prejudice to the interests of the appellant, as will appear, I think, upon a careful perusal

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And as to the last of those imputations first. The charges involved in items 35, 36 and 37 of the bill of particulars were that one McKenzie, an agent of the respondent at the election, gave to the respective parties named in those items the respective sums therein also mentioned for the corrupt purposes therein also respectively mentioned, and that he did so with the knowledge and consent of the respondent.

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When dealing with the learned judge's judgment upon the point of corrupt practices by this agent I have already shewn that after the respondent had given in all the evidence he had to offer upon the charge of the advances having been made corruptly by the agent the learned judge addressing the respondent's counsel said that he would then hear him "upon the question of corrupt practices by the agent," thus expressly limiting the question to the first branch of the charge, and after hearing counsel and expressing his opinion that there was a clear lending of money by McKenzie, the agent, for the corrupt purposes charged, he asked the petitioner's counsel whether he intended to press the personal charges, and being informed that he did, the learned judge said that he would declare the election void by reason of corrupt practices by the agent McKenzie, and that he would report that corrupt practices extensively prevailed in the constituency and that the trial should proceed upon the personal charges.

Now among the personal charges so to be proceeded with were those that the three several sums advanced by McKenzie to the respective persons named in the items 35, 36 and 37 were so advanced with the knowledge and consent of the respondent. Those charges were as much open as any other personal charges against the respondent. Hitherto the action of the

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judge had been confined to an inquiry whether the advances had been made corruptly by McKenzie. The charge of corruption in the respondent personally in relation to those advances was in no manner concluded by or involved in the result arrived at by the learned judge as to the fact of the advances having been made corruptly by McKenzie. In fact, of necessity, this latter question had to be determined first, and independently of the charge of corrupt knowledge and consent of the respondent, for the monies must be first found to have been advanced corruptly by McKenzie before the question as to their having been so advanced with the knowledge and consent of the respondent could arise. Now that both parties at the trial were well aware that the charge against the respondent personally, involved in the items 35, 36, and 37, remained to be tried appears from this that after two other charges of personal corruption had been entered upon and judgment upon one had, after argument of counsel thereon, been reserved, and the other had been dismissed as not proven, the petitioner's counsel, without any objection or remonstrance whatever, stated that he desired to examine the respondent further in relation to the three notes given by the three persons to whom the monies had been advanced by McKenzie, in fact in relation to the personal charges involved in items 35, 36, and 37, and he did accordingly submit the respondent to a further long and searching examination bearing upon those items and the respondent's general conduct during the election and his credibility, and at the close of the case, as I shall show by-and-bye, the learned judge, not only without objection or remonstrance of respondent's counsel but with his consent, proceeded to express the opinion which he had formed on the charges against the respondent involved in these three items, and in the charge upon which he had

reserved judgment, known as the Kennedy charge, for the apparent purpose of curtailing the proceedings and dispensing with the necessity of taking further evidence upon the very numerous charges of the respondent's personal connection with the very general corruption which, in the opinion of the learned judge as already expressed, had prevailed in the constituency at the election.

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Now some discretion must be allowed to a judge presiding at the trial of so very numerous charges of a grave nature as to the mode in which the trial shall be conducted and the time when it may without injustice be closed; and when the mode adopted meets with the approbation and consent of counsel employed at the trial, as it appears to have done in the present case, it seems to me, I confess, to be strange that this mode of conducting the trial should afterwards be impugned as a grave error in the judge, and should be made a ground of appeal against his judgment.

The imputation that the learned judge ignored the maxim that in a criminal case the accused is entitled to the benefit of a doubt, and that he took a mistaken view of the nature of the evidence required to substantiate charges of personal corruption which are attended with such consequences as the disqualification of the candidate, rests not upon anything in the matured judgment pronounced by the learned judge after an apparently very careful and complete consideration and analysis of the evidence bearing upon the points dealt with, but upon a conversation which passed between the learned judge and the respondent's counsel during the progress of the trial.

At the close of the evidence given in relation to the Kennedy charge, the learned counsel for the respondent having been called upon to say what he had to say

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upon this charge argued to the effect following :—

I say it is not proven. In the first place I understand that this charge is one of personal disqualification, and under the authorities when it comes to a criminal charge the court requires a larger amount of evidence than in the ordinary cases of avoiding an election, in fact there should be the clearest possible conviction.

Upon which his lordship is reported as observing :
There should be belief.

Upon which the counsel for respondent continued :
Positive belief. If it is doubtful—if the evidence is of a doubtful character—then it being of a criminal nature the court will find in favor of the respondent.

Upon which his lordship observed :—

I desire personally to say I have no rule of evidence differing in a criminal from that in a civil case, nor *vice versa*, whether a man is to be mulcted in a sum for damages or imprisonment. When proof has to be given and the proof is given, whether criminal or civil, the consequences must follow. I draw no distinction having regard to the result. The conscience of a jury or a judge must be satisfied, and when the fact is found let the consequences take care of themselves.

Upon these observations is based the grave charge that the learned judge took a mistaken view of the nature of the evidence required to support the charges and that he ignored the maxim that a person should not be convicted of a crime upon doubtful evidence, and that in case of doubt the accused is entitled to the benefit of it, whereas a less prejudiced and more candid criticism would, I think, lead to the conclusion that the learned judge was guilty of no such error as that imputed to him and that what he intended to convey and what his language does convey in this conversation is that with the consequences resulting upon the finding of the facts in issue he had nothing to do—that in civil as in criminal cases the common rule is that when the proof which has to be given in order to establish a fact in issue is given “the consequences must follow”—and that whether the trial be by a jury or by a judge without a jury “the conscience of the jury or the judge as the case may be must be satisfied

that the proof necessary to establish the fact in issue is given and then when such fact is so established neither jury nor judge have anything to do with the result"; so reading the learned judge's observations I do not see in what they are open to objection, and that this is the proper reading of them appears further from this, that the respondent's counsel having replied to them that

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No finding of facts should be given unless the judge is satisfied as to the truth of the facts.

The judge concurred in this observation of counsel, saying

Quite so. I think we may agree upon that definition of the rules of evidence.

The minds of judge and counsel having been thus brought into accord upon the subject of this little interlude, the learned counsel proceeded with his argument to its close, insisting upon the insufficiency of the evidence, in his view of it, to establish the charge, and the learned judge reserved his judgment to which I shall now refer for the purpose of showing how unfounded is the imputation that the learned judge took a mistaken view of the duty imposed upon him on the trial of these charges.

Upon the opening of the court on the morning of the 13th January, the learned judge having asked the petitioner's counsel to what particular point he then proposed to direct his evidence, he replied that he proposed to show that the candidate had knowledge of the general corruption which prevailed at the election. After some further remarks passed between counsel and the judge the latter, who had apparently employed the previous night in studying and weighing the evidence bearing upon the charges as to the knowledge and consent of the candidate to the advances made by McKenzie to the persons named in the items 35, 36 and 37, and upon the Kennedy case, addressed the counsel of both parties as follows—

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I may say that I have made up my mind, without announcing what conclusion I have arrived at, on the evidence of Rousseau (this related wholly to the three advances made by McKenzie) and the evidence in respect of Kennedy. It may be that if I declare my opinion in respect of that counsel may feel justified in acting upon it or may not. If the counsel desire it I will give it.

To this suggestion counsel consented, that is to say, they consented to the learned judge's then announcing the conclusion he had arrived at upon these charges. The respondent's counsel does not appear to have then entertained the idea that the personal connection of the respondent with the advances made by McKenzie, mentioned in items 35, 36, and 37 was no longer a matter before the court, or to have been taken by surprise at the judge's intimation that he was then prepared to give judgment upon those charges as well as on the Kennedy case; nor did he, either then or after hearing the judgment, complain that in the judge's then giving it there was any irregularity or anything whatever of which the respondent had reason to complain; on the contrary, he assented to the learned judge giving his judgment, who, thereupon, in a clear and exhaustive review, more especially of the evidence bearing upon the charge that the advances made by McKenzie were made with the knowledge and consent of the respondent, and also of the evidence in the Kennedy case, announced the conclusion at which he had arrived. He pointed out that the whole matter he had to decide depended upon the credit to be attached to the evidence of the several persons who had given evidence, and in a judgment which no one, I think, can read without being convinced that the learned judge was fully impressed with the responsibility of the duty he was discharging and was most anxious to arrive at a just conclusion, and to proceed only upon what appeared to him to be undoubted evidence, he concluded as follows:—

I feel bound, therefore, with regard to the evidence as to Kennedy, to credit the evidence of the bookkeeper; I credit it entirely. I

discredit the evidence of Kennedy where it is contradicted and I find with reference to that, that out of monies of the respondent, under the direction of the respondent, the witness Evans, his book-keeper, paid to Kennedy one hundred dollars for the purpose of being used in the election, and in order to induce Kennedy to procure the return of the respondent.

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I consider this evidence at this point not only in respect of the particular charge but also in connection with the evidence of Rousseau and what took place at Martintown, and finding as I do against the *bona fides* of the action of the respondent and against his evidence in respect to the transaction with Kennedy, the conclusion to my mind is irresistible that Rousseau is telling what really did occur, when he states that the respondent instructed him that the money might be advanced, and that he was to give that information to McKenzie; for I find that the conduct of the respondent is consistent alone with such a line chosen for himself and that the statement of the respondent that he gave no such instructions—that all the monies advanced by him were advanced for ordinary business purposes, loans upon security of personal credit or responsibility and which he purposes calling in—is not consistent with his conduct, is not consistent with what was done by McKenzie at Martintown, is not consistent with his dealings with Kennedy.

I therefore find that the action of McKenzie was under instructions, with the privity, consent and knowledge of the respondent and that the money which was paid out by McKenzie was paid out of monies which were placed to his credit by the respondent, and that the use of those monies for corrupt practices, in respect of which I have already avoided the election, was with the knowledge and consent and under the direct instructions of respondent.

The learned judge thus held that what evidence the respondent gave in his own favor was not worthy of credit—as was neither the evidence of McKenzie nor that of Kennedy where he was contradicted; and being of that opinion it was impossible for the learned judge, as he very clearly shows in his exhaustive review of the evidence, to have arrived at another conclusion than one in affirmation of the truth of the charges. With a conclusion so arrived at, upon the ground of the view entertained by the judge who tried the case as to the credibility of the witnesses and the degree of credit to be attached to that of each, we cannot interfere without reversing numerous decisions of this court

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and transgressing the inviolable rule that in such a court of appeal cannot interfere.

Having announced his judgment as above, the learned judge asked the petitioner's counsel if he desired to offer any further evidence and being answered in the negative proceeded with his judgment as follows:—

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There must be a time appointed for the trial of corrupt practices. The parties who will be summoned for that trial are the three parties who received the money at Martintown, namely Saucier, Tyo, Vanier, McKenzie and the respondent, and also Kennedy. I do not add to those names the name of the bookkeeper because I am not clear upon the evidence that he knew, although he might have suspected, the purpose for which the money was given, and he was acting under the direct instructions of his employer. It would have been more correct if he had assumed a more independent position in reference to it, but I give him the benefit of the doubt in my mind as to the reasons of his conduct, and I therefore do not require him to be summoned.

With respect to Rousseau there is no direct evidence that he did more than act with McKenzie and Purcell at Martintown. I should have added his name to the others did I not think, and I am shut up to the conclusion that he supposed he was acting upon the strength of the section which I read to him, and was giving his evidence under the protection of the section. If I had not given him that information I would not have been free to leave his name out from those who are to be tried for corrupt practices.

I find as a fact that the evidence he has given is reliable evidence and that his statements were true, and being given in the interests of the public and for the purity of elections I think I would not be carrying out the spirit of the clause if after such information I should require him to answer at the court for the trial of corrupt practices.

I have extracted this latter part of the judgment of the learned judge as it seems to show how careful he was to give to every one the benefit of any doubt existing in his mind upon the evidence, the contrary of which was so freely imputed to him in the argument addressed to us on behalf of the appellant.

In my opinion the appeal should be dismissed, and the judgment of the trial judge should be maintained.

and reported to the House of Commons, as provided by the statute. 1888

Appeal allowed with costs (1). GLENGARRY
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Solicitors for appellants: *MacLennan, Liddell & Cline.* Gwynne J.

Solicitor for respondent: *E. H. Tiffany.*

(1) Application for leave to appeal to the Judicial Committee of the Privy Council was made in this case and refused.—*Canadian Gazette*, vol. xi. p. 346.
