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*Nov. 2.

*Dec. 15.

EDOUARD GUILBAULT (RESPONDENT) APPELLANT;

AND

ANTHYME DESSERT *et al.* (PETITIONERS) ..... } RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE HENRI T. TASCHEREAU, SITTING FOR THE TRIAL OF THE JOLIETTE CONTROVERTED ELECTION CASE.*

Election petition—Commencement of trial—Order of judge staying proceedings during session of parliament—Power to adjourn—Recriminatory charges—49 *Vic. ch.* 9 - *Sec.* 31, *s.s.* 4, *sec.* 32, 33, *s.s.* 2; *and secs.* 35 & 42 - *Bribery by agent.*

After the trial of an election petition has been commenced the trial judge may adjourn the case from time to time, as to him seems convenient.

Where the proceedings for the commencement of the trial have been stayed during a session of parliament by an order of a judge, and a day has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded with their *enquête* and examined two witnesses after which the hearing was adjourned to a day beyond the statutory period as so extended to allow the petitioners to file another bill of particulars, those already filed being declared insufficient.

Held, there was a sufficient commencement of the trial within the proper time and the future proceedings were valid under sec. 32 of The Controverted Elections Act R. S. C. ch. 9.

In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat and the judge gave judgment avoiding the election.

Held, That section 42 of chapter 9 R. S. C. no longer applied and the judge was right in refusing to proceed upon the recriminatory charges.

Per Gwynne J.—That it would have been competent for the trial judge to have received evidence on the recriminatory charges but his refusal to do so it was not a sufficient ground for reversing the judgment avoiding the election.

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

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APPEAL from the judgment of Mr. Justice H. T. Taschereau declaring the election of the member of the House of Commons for the electoral district of Joliette void by reason of corrupt practices by agents.

The appeal was from the judgment upon the merits of the petition in the case and from two decisions delivered by the judge on the 12th of December, 1887, and one on the 30th January, 1888, on the application of the appellant to have the petition declared abandoned and at an end and to have the said petition dismissed out of court with costs, and said appellant declared duly elected by reason of the trial of the said petition not having been commenced within six months from the time said petition had been presented.

The material dates and proceedings in the case are the following :

On the 15th February, 1887, the nomination of the candidates took place.

On the 22nd of February the election was held and appellant was returned as the member duly elected.

On the 9th April the petition complaining of the undue return of the appellant and claiming the seat for the defeated candidate was presented.

Parliament met on the 13th day of April, 1887, and was in session until the 23rd day of June, 1887, on which day it was prorogued. On the 12th day of April, 1887, the appellant moved the court to have all proceedings suspended as well on preliminaries as on the merits during the session of the then Parliament.

Mr. Justice Gill granted the motion.

A plea to the merits was fyled on the 20th September, 1887, answer to said plea on the following day, and on the 22nd of September 1887 an application was made by petitioners to have a day fixed for the trial of the election petition.

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The trial for the election petition was fixed for the 22nd November, 1887.

On the 22nd November, 1887, the petitioners proceeded with their *enquête* before Mr. Justice Taschereau and examined two witnesses: A. M. Rivard, the returning officer, and Urgele Faust, and the case was by the honorable judge presiding at trial continued to the 5th December following (1887), in order to allow petitioners to file another bill of particulars; the particulars then fyled being declared insufficient.

On the 3rd of December, the defendant presented two motions to have the petition declared abandoned, and the defendant confirmed in his seat.

These two motions were taken *en délibéré*, and the court adjourned to the 12th of December and on that day rejected these two motions.

The defendant took exception to these two judgment, and the court further adjourned to the 5th of January, 1888.

On that day the defendant presented another motion contending that the petition having been presented on the 9th of April, 1888, more than six months, even excluding the session, had elapsed without any trial being fixed and held.

On that motion another *délibéré* was taken and the court was adjourned to the 30th January.

On that day the trial judge rejected the defendant's motion and ordered the trial to be proceeded with, and evidence was given on the following charges *inter alia*:

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier, le défendeur par lui-même directement ou indirectement et par ses agents et notamment par son agent le dit Adélard Barrette a donné, fourni, et a promis diverses sommes d'argent s'élevant à la somme de huit piastres

à Joseph Ratelle, fils, cultivateur de la ville de Joliette, dans le but de l'induire à voter en sa faveur ou de s'abstenir de voter contre lui.

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier, dans la dite paroise de Sainte-Mélanie, le défendeur par lui-même directement ou indirectement et par ses agents et notamment par le dit Adélard Barrette, a donné, fourni, prêté et a promis diverses sommes d'argent s'élevant à cinq piastres à François Xavier St-Jean, cultivateur et électeur de la paroisse Sainte-Mélanie, dans le but de l'induire à voter en sa faveur ou à s'abstenir de voter contre lui.

"Dans le cours de la dite élection, le defendeur par lui-même et par son agent le dit Adélard Barrette à Sainte-Melanie susdit, a donné, fourni, prêté ou est convenu de donner, fournir, ou prêter, promis des récompenses, des sommes d'argent s'élevant à dix piastres, des mets, boissons et autres considérations appréciables à prix d'argent à Nazaire Lapierre, cultivateur et électeur de la Paroisse de Sainte-Mélanie susdit, dans le but de l'induire à voter en sa faveur, ou de s'abstenir de voter contre lui.

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier à Sainte-Mélanie susdit, le défendeur lui même et par ses agents et notamment par les dits Adélard Barrette, et Joseph Edouard Perrault, deux de ses agents, a donné, prêté ou convenu de donner, prêter, a offert ou promis la somme de cinq piastres à Joseph Beaudry, cultivateur et électeur de Sainte-Mélanie susdit, dans le but de l'induire à voter en sa faveur on de s'abstenir de voter contre lui."

On the 1st February the court having decided that corrupt practices had been practiced by A. Barrette, an agent of the appellant, upon seven voters, and that

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seven votes should be deducted from the appellant's votes, leaving the defeated candidate with a majority of seven votes, the sitting member be allowed to proceed with his recriminatory charges on the 16th February.

On the 11th February the petitioners fyled a declaration withdrawing their claim to the seat.

On the 20th of February, the judge sent a written judgment to the clerk of the court at Joliette, declaring the election void by reason of corrupt practices by agents of the appellant, but without his knowledge.

Cornellier Q.C. and *Ferguson* for appellant contended: That the order granted by Mr. Justice Gill was not made upon an application to have the time extended for the commencement of the trial under sections 32 and 33 of ch. 9, R.S.C., but upon an application to delay proceedings under section 64, and therefore such order did not deprive the appellant of the right of claiming that in computing the time within which the trial of the present petition should have commenced the time of the session of Parliament should be included.

But, even if the time of the session should be excluded, the trial did not actually commence until the 30th January, because what took place before the judge on the 22nd November, 1887, was a nullity, the court having declared that the particulars which, according to the rules of practice, had been fyled six days before the commencement of the trial, were insufficient, and that as a matter of fact the evidence in the case was given in support of particulars fyled subsequent to the 22nd November.

On this branch of the case the learned counsel relied upon the *Glengarry case* (1).

As to merits the learned counsel admitted bribery, but contended that the evidence of Barrette's agency was

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

insufficient; and finally in any case the judgment was incomplete, because without notice the judge had deprived the appellant of the right of proving his recriminatory charges, a right which he had under sec. 9 of ch 9, R.S.C., and of which he was deprived by the judgment. The case should be remitted back to the court below as was done in the *Bellechasse case* (1).

Choquette and *Dugas* with him for respondent contended:

That the order granted by Mr. Justice Gill was one which in effect delayed all proceedings, including the fixing of the trial, and that the appellant who had applied for it could not now be allowed to ask that the time of the session should be included. As to what took place on the 22nd November, it was clear, that the trial then commenced; the trial judge was present and two witnesses were examined, and the trial was adjourned from time to time in order to complete the particulars, and if what took place on the 22nd November, the day fixed for the trial could, be said to have been illegal then the evidence of these witnesses which was to be found in the appeal book should not have been printed.

But as a matter of fact the judge who was present on the 22nd November was the trial judge, and when he delivered judgment he relied as much on the evidence taken on that day as on the subsequent days.

As to allowing evidence on the recriminatory charges there was nothing to be gained by it. These charges were put in and the judge allowed the evidence because, after the hearing of several witnesses, he came to the conclusion that bribery had been committed by an agent of the appellant on a sufficient number of votes to affect the majority and allow the defeated candidate to claim the seat, but upon the declaration

(1) 5 Can. S. C. R. 91.

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being fyled that we abandoned that portion of the conclusion of our petition by which we claimed the seat for the defeated candidate, all the judge had to do was to give effect to the decision he had arrived at at the closing of the *enquête*, viz: declare the election void by reason of corrupt practices.

As to the merits there was sufficient evidence of Barrette's agency in the appellant's own evidence to support the judge's finding. For he admits that he knew he was working for him and that all he desired was that he should not commit any illegal act. It is a finding of fact and the court does not reverse such a finding if there is any reasonable evidence to support it.

Cornellier Q.C. in reply: The petition and counter petition can only be disposed of together. If not it is in the power of any petitioner to defeat the right given to a candidate whose election is contested.

Sir W. J. RITCHIE C.J.—The nomination of candidates was held on the 15th February, 1887, the election on the 22nd February, 1887; the petition was presented on the 9th April, 1887; Parliament met on the 13th April, 1887, and was in session until the 23rd day of June, 1887, on which day it was prorogued. The defendant, the sitting member, caused a notice to be given to petitioners' advocates of a motion to suspend proceedings during the session of Parliament, a copy of which is as follows:—

Motion de la part du Défendeur, sans admettre qu'il soit régulièrement assigné, ou qu'il soit aucunement tenu de comparaitre et de répondre à la prétendue pétition en cette cause et sous la réserve expresse du droit de produire entièrement toute objection qu'il jugera à propos.

A ce que, vu la convocation du Parlement de la Puissance pour une session dont l'ouverture est fixée au treize avril courant, tous procédés ultérieurs en cette cause soient déclarés suspendus à compter du dit jour treize avril courant inclusivement, et qu'il avait en outre déclaré que le délai prescrit pour production d'objections préliminaires ou de réponse au mérite suivant le cas est, et restera suspendu

depuis et y compris le dit jour treize avril courant et n'expirera, qu'avec les deux jours qui suivront la clôture de la dite session, le tout avec dépens distraits aux soussignés.

Joliette, le 12 avril 1887.

McCONVILLE ET RENAUD,
Avcts et Procs. du Défendeur.

A. MM. CHAMPAGNE ET DUGAS.
Avcts. et Procs. des Pétitionnaries.

Messieurs,—Avis vous est par le présent donné de la motion ci-dessus que de la part du Défendeur nous présenterions à cette Honorable Cour à son ouverture jeudi le quatorze avril courant à dix heures du matin, ou aussitôt que conseil pourra être entendu au palais de justice en la ville et district de Joliette.

Joliette, le 12 avril 1887.

McCONVILLE ET RENAUD,
Avct. et Procs. du Défendeur.

The motion was heard before Mr. Justice Gill on the 12th of April, 1887, who pronounced a judgment granting the said motion in these words:—

La cour, parties ouïes sur la motion du défendeur qu'attendu l'ouverture d'une session du parlement du Canada, le treize du courant, et vu les dispositions de la section première du chap. 10 de l'acte 38 Vict., (Ottawa 1875) reproduites par la sec. 32 du chap. 9 des Statuts Revisés du Canada 1886, tous procédés ultérieurs en cette cause soient suspendus jusqu'à la clôture de la dite session du parlement.

Considérant que dans l'interprétation à donner au mot instruction (trial) dans la dite section de la loi, il faut comprendre tout le procès.

Considérant que la présence du défendeur dans le district électoral est aussi nécessaire pour préparer ses moyens de défense qu'elle le serait pour l'enquête et notament dans l'espèce où il a été affirmé à l'audience sans contradiction formelle de la partie adverse, qu'un second avis de contestation a été signifié au défendeur depuis son départ pour aller prendre son siège au parlement et s'il est forcé de se défendre pendant que durera la session, il lui faudra revenir immédiatement pour donner des instructions qu'il n'a pu donner avant son départ puisqu'il n'avait pas eu la signification qui a été faite à son domicile depuis.

Accorde la dite motion, dit que tous les procédés ultérieurs en cette cause sont suspendus pendant la dite session du parlement et que les délais pour la production de toutes défenses soit préliminaries, soit au mérite, ne courront pas pendant la dite session du parlement; les dépens sur la motion devront suivre le sort des frais généraux du procès.

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Which order unquestionably suspended all proceedings and brought the case within the operation of the 32 section of 49 Vic. ch. 9, which provides that:

If at any time it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament 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.

On the 22nd September the petitioners gave notice of a motion to fix a day for hearing of the petition and on the 10th day of October, 1887, Mr. Justice Taschereau, after having heard the parties on petitioners' motion, accorded the same and ordered that the hearing should take place at the court house in the town of Joliette, in the district of Joliette, on Tuesday the 22nd day of November then next. On the 22nd day of November, 1887, the trial commenced before Mr. Justice Taschereau, and the sheriff of Joliette, the returning officer, was examined and cross-examined; after this examination, on the suggestion of the judge and the parties consenting, the following admissions were made:—

Les parties admettent les procédés de l'élection tels qu'allégués dans la pétition ainsi que la proclamation faite du candidat élu, dans la "Gazette officielle du Canada." Les parties admettent de plus que les pétitionnaires ont et avaient les qualités et qualifications voulues pour se porter pétitionnaires ainsi qu'allégué dans la dite pétition.

Et le déposant ne dit rien de plus.

One Urgel Faust was then examined and after proceeding thus far the court adjourned till the fifth of December following.

The session of parliament having been excluded by the order of Mr. Justice Gill and the trial having been commenced on the 22nd of November the petitioner was within the six months.

But it has been contended that if the trial was com-

menced on the 22nd of November the judge had no right to adjourn the court until the 5th of December, but was bound to proceed with the same "from day to day until such trial is over;" but without stopping to enquire whether this provision, if it stood alone, is imperative or directory only, these words must be read in connection with sub-section four of section 31, which enacts that the judge at the trial may adjourn the same from time to time, and from any one place to another in the same electoral district as to him seems convenient;" and also sub-section 2 of sec. 33 which enacts that

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.

The court having been adjourned by the judge defendant's contention must fail.

The following is the judgment annulling the election, pronounced on the 20th February, 1888.

La cour ayant entendu les témoins examinés de part et d'autre et les parties elles-mêmes, par leurs procureurs respectifs, sur le mérite de la présente petition d'élection, et de la contestation d'icelle, ayant aussi examiné la procédure et toutes les pièces du dossier et sur le tout délibéré.

Considérant qu'il a été prouvé que des manœuvres frauduleuses ont éte pratiquées par des agents du défendeur à l'élection dont il s'agit, mais hors la connaissance et sans le connsentment du défendeur, et qu'ainsi l'élection susdite du défendeur est nulle.

Considérant que les pétitionnaires se sont désistés de cette partie des conclusions de leur pétition par laquelle ils réclamaient le siège pour le candidat Neven.

Maintient la pétition d'élection en tant qu'elle demande l'annulation de l'élection susdite, la rejette quant au surplus des conclusions, et en conséquence déclare nulle et sans effect l'élection du defendeur comme membre de la Chambre des Communes du Canada, pour représenter le district électoral de Joliette, dans la province de Quebec, laquelle élection a eu lieu le 15 février 1887, (pour la présentation des candidats) et le 22 février 1887 (pour la votation); déclare aussi nul et sans effet le rapport de la dite élection, et condamne le dit défendeur, outre les frais déjà adjugés pendant l'in-

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stance, aux frais de la dite pétition et des procédures sur icelle, et à tous les frais d'assignation, d'enquête et de sténographie rendus nécessaires par l'examen des témoins suivants des pétitionnaires : Francois-Xavier St. Jean, Adélard Barrette, Joseph Beaudry, Joseph Ratelle, fils, Israel Bélanger, Narcisse Gendron, Hormidas Desmarais. Onésime Clermont, Auguste Guilbault et Edouard Guilbault (le défendeur), les autres frais d'assignation, d'enquête et de stenographie devant être respectivement à la charge de chacune des parties qui les a encourus.

Et la cour accorde distraction de dépens à MM. Champagne et Dugas, procureurs des pétitionnaires.

There can be no doubt the judge was fully justified in declaring the election void by reason of bribery by the agents of the defendant. It is only necessary to mention the case of Adelard Barrette, a nephew of the defendant, who was clearly proved to have been a most active agent of the defendant and a most unscrupulous briber.

But it is contended that though the defendant had closed his *enquête* as to corrupt practices he should have been allowed to go into recriminatory proof against the defeated candidate H. Neveu, which it is claimed he had a right to do, the petitioners having claimed the seat for said Neveu. Had the claim not been withdrawn this he would clearly have had a right to do.

Sec. 5. A petition complaining of an undue return, or undue election of a member, or of no return, or of a double return, or of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, or at any election, may be presented to the court by one or more of the following persons :—

(a.) A person who had a right to vote at the election to which the petition relates ; or

(b.) A candidate at such election ;

And such petition is, in this act, called an election petition. Provided always, that nothing herein contained, shall prevent the sitting member from objecting under sec. 12 of this act, to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner, or from proving under sec. 42 hereof, that the petitioner was not duly elected. 37 Vic. ch. 10, sec. 7.

Sec. 42. On the trial of a petition under this act complaining of an undue return and claiming the seat for any person, the respondent may give evidence to show that the election of such person

was undue in the same manner as if he had presented a petition complaining of such election. 37 Vic. ch. 10, sec. 66.

Section 5 applies to any case where it is alleged any candidate has been guilty of any unlawful act, but section 42 is confined to cases where the seat is claimed but election undue.

If the claim of the seat is *primâ facie* sustained, then the respondent may give evidence to show that the election of such person was undue in the same manner as if he the respondent had presented a petition complaining of such election.

This is all reasonable enough, because so long as the seat is claimed the judge is still trying out the question of the election and the party entitled to the seat, and as to the party who should be returned by him as the duly elected candidate, but where the claim of the seat for the defeated candidate is not put forward, or if put forward in the petition is abandoned, the election of such candidate ceases to be in issue, for the simple reason that when the claim of the seat is withdrawn there is no election to try and there could be no object, in fact it would be a contradiction in terms, to attempt to show that the election of a person admittedly not elected was undue.

It follows, therefore, if the seat is not claimed, or if claimed the claim is abandoned, and a party is desirous of proceeding against any candidate for any unlawful act by which he is alleged to have become disqualified, he must proceed under section 5.

STRONG J.—I am also of opinion that this appeal must be dismissed. Whatever opinion I might otherwise have entertained as to the proper construction of section 32 of the Controverted Elections Act, if the question were now open, I consider I am bound by the decision of this court, in the *Glengarry Case* (1), to

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hold that every election trial must be commenced within six months from the date of the presentation of the petition unless it is expressly excluded by an order or judgment of the court or judge.

Here the petition was presented on the 9th of April, 1887. On the 14th of April an order or judgment was pronounced by the Honourable Mr. Justice Gill sitting in the Superior Court at Joliette, suspending all proceedings during the session of parliament which commenced on the 13th April and lasted until the 14th June, 1887. The trial of the petition commenced on the 22nd of November, for on that day witnesses were examined before the trial judge and other proceedings taken. This it appears to me was clearly in time. It is true that several adjournments took place which, it is argued, were not such as the 32 section of the act requires, viz., *de die in diem.* I think there is a two fold answer to this objection. First, I am of opinion that this provision is entirely directory, and second, there is section 35 which gives to the judge trying an election petition the same powers, jurisdiction and authority as a judge has in all other trials, and one of these powers is the power of enlarging the time for any step or proceeding in the case, and there are often circumstances which necessitate longer adjournments than *de die in diem.* So that there is nothing in the objection.

As regards the merits, I do not think it possible that a case could ever have come *sub judicé*, much less have reached an appellate court, in which the evidence of bribery was so plain and direct as in the present. Without going through all the cases, let me take that of Adelard Barrette, a nephew of the appellant, in which a clear and undeniable act of bribery is proved. The agency is admitted but the appellant seems to think that he can shelter himself under an

express prohibition to his agent against any unlawful proceedings. It is surely not necessary to add that this will not do, and that he is responsible for all the acts of his agents whether they were in breach of his instructions or in accordance with them. As to the point whether the judge had proceeded regularly in avoiding the election without proceeding with the recriminatory charges, I am of opinion that so soon as the claim of the petitioners to the seat was abandoned the judge was right in not proceeding further with the petition. If the appellant wished to take any proceedings against the defeated candidate for penal purposes he could still do so, but that should not in any way delay the rights of the electors to have the election set aside at the earliest possible moment.

The appeal should be dismissed with costs, the election declared void and the usual certificate sent to the Speaker of the House of Commons.

FOURNIER J.—L'appel est du jugement final prononcé par l'honorable juge H. T. Taschereau sur la contestation de l'élection d'un député aux Communes pour le comté de Joliette, et de deux autres décisions rendues par le même juge sur des motions, l'une pour faire déclarer la pétition abandonnée et périmée, parce que l'enquête n'a pas été commencée et poursuivie dans les six mois, —l'autre pour faire déclarer que le juge n'avait plus de juridiction pour procéder au procès de la dite pétition, attendu que les procédés ayant été suspendus sur requête de l'appelant pendant la dernière session, il s'était écoulé plus de six mois depuis la fin de la dite session.

Le jugement au mérite, en date du 20 février, a annulé l'élection pour cause de corruption pratiquée par les agents de l'appelant. Les deux autres décisions ont rejeté les motions tendant à faire déclarer que le juge n'avait plus de juridiction pour entendre la cause.

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A l'élection qui eut lieu le 22 février, l'appelant fut déclaré élu par le vote de l'officier rapporteur. Une pétition se plaignant de l'illégalité de son élection et réclamant le siège pour le candidat adversaire fut présentée le 9 avril. Le parlement étant convoqué pour le 13 avril, le 12 l'appelant demanda par motion de cette dernière date et obtint un jugement déclarant:—

Que sa présence était nécessaire pour préparer ses moyens de défense, qu'elle le serait pour l'enquête et notamment dans l'espèce où il a été affirmé à l'audience sans contradiction formelle de la partie adverse, etc. etc. Ordonne en conséquence que tous les procédés seraient suspendus pendant la dite session du parlement et que les délais pour la production de toutes défenses, soit préliminaires, soit au mérite ne courraient pas pendant la dite session du parlement.

La session commencée le 13 avril ne fut terminée que le 23 juin suivant; de sorte qu'en vertu de la loi électorale, sec. 32, et du jugement cité, le délai de six mois fixé pour le commencement du procès après la présentation de la pétition n'a pu commencer à courir que deux jours après le 23 juin.

Le 20 septembre l'appelant produisit son plaidoyer à la pétition auquel l'intimé répondit de suite, et demanda le 22 septembre 1887, qu'un jour fût fixé pour l'instruction de la pétition. Le 10 octobre 1887 par décision à cet effet, le procès fut fixé au 22 novembre suivant, devant l'honorable Juge Taschereau qui a rendu le jugement au mérite.

En exécution du jugement fixant le procès au 22 novembre, les pétitionnaires commencèrent leur preuve et firent entendre deux témoins: A. M. Rivard, officier rapporteur à la dite élection, qui prouva l'élection et rapport de l'appelant, ainsi que la publication de son élection dans la Gazette Officielle comme député de Joliette,—l'autre, Urgel Faust, est entendu au sujet de l'élection. Le même jour, à part l'audition de ces témoins, il se fit encore une partie importante de la preuve, consistant dans l'admission suivante donnée

par les parties :—

Les parties admettent les procédés de l'élection tels qu'allégués dans la pétition ainsi que la proclamation faite du candidat élu, dans la "Gazette Officielle du Canada." Les parties admettent de plus que les pétitionnaires ont et avaient les qualités et qualifications voulues pour se porter pétitionnaires ainsi qu'allégué dans la dite pétition.

Tous ces faits, tant ceux contenus dans les témoignages que ceux énoncés dans cette admission, comme ceux de l'élection et rapport de l'appelant, tels qu'allégués dans la pétition, la proclamation, les qualités et qualifications des pétitionnaires pour se porter pétitionnaires, sont tous des faits qu'il était essentiel de prouver. Il eût été impossible à l'intimé de réussir sans en avoir fait la preuve. Le procès (*trial*) a donc commencé au jour fixé, le 22 novembre, par la preuve de faits importants. La loi (sec. 32) exigeant le commencement du procès dans les six mois (*shall be commenced*) a donc été respectée. Après ces procédés du 22 novembre, le procès au lieu de continuer *from day to day* fut ajourné au 5 décembre afin de fournir aux intimés l'occasion de produire d'autres particularités pour remplacer celles qui avaient été déclarées insuffisantes. C'est alors que l'appelant fit les deux motions dont la substance a été donnée plus haut, à l'effet de faire déclarer que la pétition devait être considérée comme abandonnée et périmée. Ces deux motions ayant été décidées comme on l'a vu plus haut, il fut procédé à l'enquête sur les accusations de corruption contenues dans les particularités.

Cette preuve a constaté de manière à ne laisser aucun doute à ce sujet qu'il y avait eu des actes de corruption commis par des agents de l'appelant. L'honorable Juge en a déclaré sept cas pour lesquels il a rayé autant de votes donnés à l'appelant.

Puisqu'un seul de ces actes légalement prouvé suffit pour faire annuler une élection, il n'est pas nécessaire

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pour justifier l'annulation de celle dont il s'agit d'entrer dans le détail de tous ces cas. Celui rapporté par le témoin Beaudry est tellement flagrant qu'il suffit à lui seul pour faire déclarer l'élection nulle.

Adélard Barrette, neveu de l'appelant et l'un de ses agents, s'étant présenté chez Beaudry, eut avec lui l'entrevue que ce dernier rapporte ainsi qu'il suit :

R. Il est venu chez nous, il m'a demandé pour quel parti j'étais, j'ai dit "J'ai été pour monsieur Guilbault." Il a dit "A présent vous l'êtes encore." J'ai dit, "A présent je crois bien que je ne voterai pas cette année, je suis malade, je vais rester à la maison." Il a dit "Vous vous levez toujours, il faut que vous alliez voter pour lui." J'ai dit "Ça me coûte bien. Il a pris cinq piastres ($5) et il me les a données. Il a dit, "vous allez voter, travaillez pour nous autres." Ça fait que j'ai pris les cinq piastres ($5).

Q. Est-ce que Perrault était dans la maison, alors? R. Ils étaient présents tous les deux.

Q. Perrault et Barrette étaient présents tous les deux quand Barrette vous a donné les cinq piastres ($5)? R. Oui.

Indépendamment de cet acte de corruption la suite du témoignage fait preuve d'une convention entre Beaudry et les deux agents de l'appelant pour corrompre plusieurs autres voteurs. Beaudry rapporte que s'étant ensuite rendu à la résidence de l'appelant, celui-ci lui demanda comment allait l'élection, à quoi il répondit :

Je crois bien qu'il faudrait un peu de graissaille pour que les nuls qu'il y avait.

Là-dessus l'appelant dit :

Moi, je ne suis pas capable de donner d'argent, c'est défendu; par exemple, j'ai des agents qui pourront vous rencontrer. Je puis vous nommer là où ils sont et vous aurez ce qu'il vous faudra.

Q. Les a-t-il nommés, ces gens-là? R. Oui, il a nommé Zéphirin Tellier, Adélard Barrette.

Q. Adélard Barrette? R. Oui, qui est présent ici; Octavien Michaud.

Q. En a-t-il nommé d'autres? R. Oui, il a nommé monsieur Gervais.

Q. Quel est son nom de baptême? R. Je ne peux pas dire son nom; je le connais de vue, mais je ne peux pas dire son nom.

Q. En a-t-il nommé d'autres? R. Monsieur Perrault.

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Plus loin on lui fait les questions suivantes :

Q. Bien, monsieur Beaudry, êtes-vous bien positif à dire que monsieur Guilbault vous a dit de vous adresser pour de la graissaille... R. Oui, monsieur.

Q. .....Chez Barrette ? R. Qu'on aurait ce qu'il nous faudrait et d'envoyer fort.

Cette preuve serait suffisante pour constater l'agence de Barrette ; mais à ce témoignage on peut ajouter celui de l'appelant qui prouve bien des faits suffisants pour établir l'agence et qui finit par cette déclaration qui ne peut laisser de doute à cet égard :

Q. Est-ce la seule fois que vous lui avez parlé sur ce ton-là, à Barrette ? R. Chaque fois que je l'ai rencontré je lui ai toujours dit de prendre garde de se compromettre et de me compromettre. C'est cela que je lui ai défendu de faire, et d'autres le lui ont défendu aussi.

La défense se bornait évidemment à ne pas agir ouvertement, mais tout ce qui pouvait être fait secrètetement était accepté d'après l'appelant lui-même.

Il en est de même des autres cas cités par l'honorable juge, ainsi qu'il appert par son jugement du 1er février 1888.

La cour rend l'adjudication suivante :

En conséquence des actes de corruption prouvés contre l'agent du défendeur Adélard Barrette aux moyens desquels les nommés François X. St. Jean, Joseph Beaudry, Jos. Ratelle fils, Ephrem Laforest, Edmond Michaud, Israel Bélanger et Narcisse Gendron paraissent avoir été influencés, la cour retranche sept votes du nombre total des votes enregistrés en faveur du défendeur et retranche de plus du nombre des dits votes un autre vote à raison du fait que le nommé Hern. Desmarais, agent du défendeur, aurait voté bien que mineur.

La cour ajoute au nombre des votes du candidat Neveu un vote représentant le vote d'Onésime Clermont qui a été illégalement écarté par le Député Officier rapporteur au poll No. 9, paroisse Ste. Elizabeth. Sur application de la part du défendeur et attendu que le dit défendeur se trouve actuellement en minorité d'après la décision ci-dessus la cour fixe le 16me jour de février pour procéder à l'enquête récriminatoire et sur le scrutin demandé par le défendeur et permet à ce dernier de produire un bill de particularités le 10 février et la cour ajourne au 16e jour de février courant.

Lors de l'argument, l'appelant s'est plaint que le

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dernier jugement, en date du 20 février, manquait de précision et ne mentionnait aucun des cas de corruption à raison desquels l'élection était annulée ; ces détails étaient déjà donnés dans le jugement du 1er février ; il était inutile d'en faire la répétition dans le jugement suivant.

Si ce n'eût été de la question des six mois fixés pour le commencement du procès, il n'aurait pas porté le présent appel. Mais cette cause n'a aucune analogie avec celle de Glengarry (1). Dans cette dernière, la pétition avait été présentée le 25 avril 1887, et ce n'est que le 17 décembre qu'un ordre fut rendu par la cour des Common Pleas fixant le procès de la pétition au 12 janvier 1888. Aucune procédure n'ayant été adoptée pour faire déclarer que le procès serait suspendu pendant la session, les six mois fixés par la sec. 32 pour le commencement du procès étaient déjà expirés depuis longtemps lorsque la demande de fixation fut faite. La cour interprétant les diverses sections de l'acte des élections au sujet des délais et des ajournements du procès, comme suffisantes pour l'autoriser à fixer le procès après l'expiration des six mois, rendit le jugement fixant le procès au 12 janvier. Ce jour-là au moment où allait commencer le procès, l'avocat de Purcell renouvela devant le *trial judge*, l'objection qu'il avait faite devant la cour pour empêcher la fixation du procès, parce que les six mois dans lesquels il aurait dû être commencé étaient depuis longtemps expirés. Cette objection fut rejetée par le *trial judge* comme elle l'avait été par la cour. En appel devant cette cour la majorité des juges a décidé que les six mois fixés pour le commencement du procès étaient de rigueur, qu'une fois expirés, la cour, ni le *trial judge* n'avait plus de juridiction pour procéder au procès. Tant que cette décision ne sera pas modifiée, elle doit

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

être considérée comme ayant finalement règlé cette question. Aussi je n'entrerai dans aucun argument à ce sujet, me bornant à mentionner la tentative infructueuse faite devant le Conseil Privé pour la faire réformer, et à référer pour mes motifs de confirmation du présent jugement aux raisons que j'ai données dans cette cause de Glengarry et celle du comté de Québec (1).

Les six mois étaient incontestablement expirés dans la cause de Glengarry. Il est aussi incontestable qu'ils ne l'étaient pas dans la présente cause, parcequ'à la demande de l'appelant, la procédure avait été suspendue pendant la session, et que ce délai n'a commencé à courir que le 25 janvier, deux jours après la fin de la session, en vertu du jugement rendu le 12 avril. Le procès ayant effectivement commencé le 22 novembre comme on l'a vu par les procédés rapportés ci-haut, il se trouve donc avoir été commencé dans les six mois.

On a fait l'objection que la loi obligeait le juge à procéder *de die in diem*, mais cette objection est sans valeur, parce qu'ayant acquis pleine et entière juridiction sur la cause, par le commencement du procès, il était au pouvoir du (*trial judge*) juge présidant au procès, en vertu de la sec. 31 s.s. 4, d'ajourner de temps à autre.

The judge at the trial may adjourn from time to time, and from any one place to another, in the same electoral district, as to him seems convenient.

Cette section fait voir que l'objection en question est tout à fait frivole.

L'appelant s'est aussi plaint de ce que le juge a refusé de procéder à la preuve sur les accusations récriminatoires portées contre l'autre candidat pour lequel les pétitionnaires avaient demandé le siège. L'élection ayant été déclarée nulle et la demande du siège faite par les pétitionnaires retirée, il n'y avait plus lieu de pro-

(1) 14 Can. S. C. R. 429 & 461.

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céder sur ces charges. Je concours complètement dans les raisons données par Sir William Ritchie, justifiant le refus du juge de faire une enquête devenue tout à fait inutile. L'appel doit être renvoyé avec dépens.

GWYNNE J.—The learned counsel for the appellant contended that the order of the 10th of October was made upon an application under the 64th section of the Controverted Elections Act, and therefore, although general in its terms, ordering a stay of all proceedings, it must be construed as extending only the time for the respondent in the petition filing preliminary objections thereto or answering it un the merits without at all extending the time for going to trial; but I am of opinion, that assuming the order to have been made in view of and under the 64th section, it is nevertheless a good order for extending the time for the taking of all proceedings including the going to trial, and that, therefore, the petitioners had six months from the presentation of the petition given to them to go to trial exclusive of the session of Parliament. I am of opinion also that what took place on the 30th November was a commencement of the trial which, therefore, did commence within the extended time, and that the trial was duly continued by adjournment until judgment was pronounced. I am of opinion also that when sufficient evidence to avoid the election had been produced, it was competent for the learned judge to close the taking further evidence upon the petition, and to pronounce his judgment avoiding the election.

It is contended, however, upon this appeal by the respondent in the election petition, the now appellant, against the judgment avoiding his election, that inasmuch as the petitioners had claimed the seat for the other candidate, and notwithstanding that the claim had been withdrawn in the progress of the case for the

petitioners, and before the learned judge had expressed himself satisfied with the evidence that had been given as sufficient to avoid the election, he, the respondent, had a right before judgment avoiding the election should be pronounced, to go into evidence upon recriminatory charges which he desired to be allowed to prove, and he contends that by reason of the learned judge having declined to receive such evidence because of the claim for the seat for the other candidate having been so as aforesaid withdrawn, it is competent for him to maintain the appeal against the judgment avoiding the election.

Although it appears to me that it would have been competent for the learned judge to have received evidence on the recriminatory charges notwithstanding the withdrawal of the claim for the seat for the candidate in whose interest the petition was filed, as was done in the *Harwich Case* (1), still I do not clearly see how we can, on this appeal, make his declining to do so sufficient ground for reversing his judgment avoiding the election, which judgment, having regard to the evidence upon which it rests, is unexceptionable. The objection in fact is not one affecting the soundness of the learned judge's judgment avoiding the election. It calls in question the correctness of the judgment of the learned judge upon a matter of procedure in relation to a totally different matter, namely, a counter charge which the claim to the seat made on behalf of the opposing candidate, by the petitioners, enabled to be enquired into on the trial of the election petition, and the withdrawal of which claim the learned judge deemed sufficient to warrant his refusal to receive evidence of charges which could only be entered into then in respect of the claim to the seat which had been withdrawn. The determination of those counter

(1) 44 L. T. N. S. 187.

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charges, in whatever way they might have been determined, if the evidence upon them had been received, could have had no effect upon the question of the avoiding of the election. The learned judge's judgment upon that question would have remained, even if the recriminatory charges had been proved. The act does not appear to me to make provision for such a case as the present. To reverse the learned judge's judgment avoiding the election, not for any reason affecting the soundness of that judgment upon the merits, but because the learned judge did not enter upon the counter charges for the reason above stated would not, as it seems to me, be a step in the furtherance of justice, and I do not see how we could upon this objection, reverse a judgment which upon the merits of what is concluded by it is unexceptionable.

I think, therefore, that the only course open to us is to dismiss the appeal, and report accordingly to the Speaker of the House of Commons.

PATTERSON J.—This election was avoided by a judgment pronounced on the 20th of February, 1888, by Mr. Justice Henri T. Taschereau, for corrupt practices committed by agents of the successful candidate Edouard Guilbault without his knowledge or consent.

The petition was filed on the 9th of April, 1887. Four days afterwards, viz., on the 13th of April the session of parliament began and it continued until the 23rd of the following June.

The 22nd of November was named as the day for the trial by an order made on the 10th of October.

Guilbault who was respondent to the petition is the present appellant. His contention is thus stated in his factum :—

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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 should have found in favor of the appellant on his motions of the 12th December, 1887, and the 30th of January, 1888.

3rd. The learned judge should not, on the evidenoe, and on the record, have found in favor of the petitioners on charges of bribery by agents, and should not have voided the election.

The point made under the first of these grounds of complaint is that the trial was not commenced within six months from the filing of the petition.

If the session of parliament is included in the computation of the six months, that period expired on the 8th of October, while, if excluded, the time would extend to the 18th of December.

It is urged that whichever computation is adopted the six months period was exceeded.

But it happens that the appellant himself procured an order the effect of which was to exclude the session.

He gave notice on the 12th of April, the day before the meeting of parliament, that he would move on the 14th to stay all proceedings from the 13th of April till two days after the close of the session, and on the 14th the order he asked for was made.

The notice was of a motion in these terms :—

A ce que, vu la convocation du Parlement de la Puissance pour une session dont l'ouverture est fixée au treize avril courant, tous procédés ultérieurs en cette cause soient déclarés suspendus à compter du dit jour treize avril courant inclusivement, et qu'il avait en outre déclaré que le délai prescrit pour production d'objections préliminaires ou de réponse au mérite suivant le cas est, et restera suspendu depuis et y compris le dit jour treize avril courant et n'expirera qu'avec les deux jours qui suivront la clôture de la dite session, le tout avec dépens distraits aux soussignés.

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It was urged before us that the object of the motion was not to extend the time for the beginning of the trial, but to get further time to answer or object to the petition, by means of an order which the court or a judge is authorized by section 64 of R. S. C. ch. 9 to make. The motion asked, it is true, for an order of that kind, but asked it in addition to the stay of proceedings. The main application was for the stay during the session and the other matter seems to have been introduced to make it clear that while the petitioner's hands were to be tied as to proceedings on his part towards the trial the time was not to count against the respondent in respect to his proceedings.

The learned judge who made the order evidently understood the matter in this way. He refers in the order to the 32nd section of the act, but the direct authority for the order is section 33, and he pursues that section in giving reasons to show that the interests of justice rendered the enlargement necessary.

The document is in these words (1):—

There can be no question of the effect of that order in extending the time for the trial. In the face of it the petitioner could take no step during the specified time, while, but for it, he could have applied under section 13 at any time after the 15th of April, which was five days from the filing of the petition, to have a time fixed for the trial, provided no preliminary objections had been taken.

It may be worth noting that if the motion of the 14th of April had in its terms asked only for an extension of time till the end of the session for taking preliminary objections, it is not likely that a judge would have made the order without also extending the time for the trial, because, by section 13, the right to apply to have the time for the trial fixed is made to some

(1) See p. 465.

extent dependent on the disposal of the preliminary objections.

Upon these grounds we were all of opinion, and so held during the argument, that the effect of the order was that the six months limit reached to the 18th of December.

In the meantime, viz., on the 22nd of November, the election court sat for the trial of the petition, and two witnesses were examined to prove formal matters not affecting any of the charges. Evidence being then offered in support of one of the charges, it was objected that the article in the particulars was not sufficiently specific, and thereupon the petitioner was ordered to give better particulars and the court adjourned to the 5th of December. When it met on that day two motions against the jurisdiction based on the contention, which has been held to be unfounded, that the 22nd of November was beyond the six months' limit, were discussed and taken *en delibéré*, the court again adjourning till the 12th of December. On the 12th the applications were dismissed, and the judge having to preside, as we are told, at another court on the 13th, a further adjournment till the 5th of January took place. On that day the attack on the jurisdiction was renewed, the ground this time being that the extended time, which expired on the 18th of December, had been exceeded without the trial having been begun.

This contention, in the form in which it was advanced, wanted a foundation of fact. The trial had been begun on the 22nd of November. What was done on that day in proving certain essential facts was not repeated when the taking of evidence was resumed on the 30th of January after the various adjournments. If, after proving those facts on the 22nd of November, it had happened that no proof was given of any charge contained in the petition, either

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because the petitioner was unable or unwilling to adduce evidence, or because of the absence or insufficiency of particulars, or for any other valid reason, there would nevertheless have been a trial, and the petition might well have been dismissed.

The question of the trial having been begun on the 22nd November is, therefore, a simple one and must be decided against the appellant.

But there is another question upon the construction of section 32 that requires notice. By that section the trial is to be commenced within six months, "and shall be proceeded with from day to day until such trial is over."

Here there were several adjournments during the interval between the 22nd of November when the trial was begun and the 30th of Jauuary when the bulk of the evidence was taken. They were not different in character or duration from those frequently found necessary, and made without question, by all our ordinary courts. Can it be intended by this direction to proceed from day to day, that any adjournment which interrupts the continuous sittings of a court for the trial of a controverted election shall *ipso facto* oust the jurisdiction and render the petition *coram non judice*? If this is the effect it will be so in all cases, no matter what may be the cause of the adjournment, the illness or unavoidable absence of a witness, or of the judge himself, or any other accident beyond the control of the parties or the court.

There is nothing in the terms of the enactment, which are in form directory and not prohibitive, to make it necessary to adopt a construction involving consequences so anomalous and so calculated to do injustice, and that construction would, moreover, be at variance with the liberal spirit in which powers of amendment and of extending time are conferred by other sections of the act.

I think this is the first time the reading in question has been suggested. Adjournments such as those in this case have always hitherto been made when occasion for them arose, and a construction has thus, in practice, been put upon the provision, although no court may have formally pronounced upon it. That construction treats the provision as directory only, and I have no doubt of its being the proper construction.

It may be that this discussion of the provision is not necessary, for I am not sure that the appellant intended to raise the question. The objections taken by him from time to time in the court below were based on the contention, which we have held to be unfounded, that the trial was not begun on the 22nd of November, and not on any assumed obligation to proceed literally day after day. That is true of the motion of the fifth of January, as well as of the earlier ones. They all relied on the six months limit and on the denial that the trial had begun. But the petitioner in his formal answer to the last motion, which answer was filed on the 12th of January, asserted a full compliance with the statute.

Section 33, sub-section 2, declares that no trial of any 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.

The *de die in diem* rule is therefore not universal; and setting aside for the moment the directory character of the mandate, I apprehend that before a party can impeach a proceeding or maintain it to be void for non-compliance with the rule he must show that the case is not within the exception.

It is asserted by the petitioner in his answer to the motion of the fifth of January to be within the excep-

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tion, or facts are stated touching the engagements of the judge, tending in that direction, and some evidence in support of that statement has been read to us from the record, yet the petitioner has not, by any evidence, nor, as I understand, by any statement, negatived the exception, and we could not assume in his favour that the exception does not apply.

There is no reason from any point of view for holding the proceedings null by reason of the adjournments in question.

What I have said disposes of the second ground of complaint as well as of the first.

The third ground as formulated impeaches the judgment on matters of fact. From the discussion of the evidence which took place on the argument, it is clear that the finding of the learned judge on both questions, the agency of Barrette, and the act of bribery committed by him, are amply sustained by testimony on which it was the province of the learned judge to pronounce.

But under this head another objection has been urged, namely, that the learned judge refused to receive evidence of recriminatory charges which the appellant was prepared to give.

In the petition the seat was claimed for the defeated candidate. In those circumstances the appellant was entitled, by sec. 42, to give evidence to show that the election of the defeated candidate was undue, in the same manner as if he had presented a petition complaining of such election.

But the claim for the seat was withdrawn, for the reason that a scrutiny showed him to have a minority of votes, but at all events it was withdrawn. The learned judge thereupon considered that section 42 no longer applied. I think he was clearly right.

It has been argued that on this trial and on this

question the status of the appellant was the same as if he had, under section 5, presented a petition charging the candidate with corrupt practices. It is not necessary to decide whether such a petition could or could not have been presented under section 5. Assuming, however, that a substantive proceeding under that section or section 9, subs. *b*, could have been taken, it must have been within thirty days after the return, or fifteen days after the service of the papers, and upon giving security for costs. The proceeding under section 42 is authorized in order to avoid the awarding of the seat to a person who is disqualified or has not been duly elected, and can only apply so long as the seat is claimed. The language of the section creates no difficulty in this respect. It enacts that the recriminatory evidence may be given on the trial of a petition claiming the seat for any person. But the trial ceased to answer that description as soon as the petition ceased to claim the seat.

The whole proceeding under the section has reference to the seat, and the seat is no longer in question.

I am clearly of opinion that the appeal should be dismissed, and of course with costs.

Appeal dismissed with costs.

Solicitors for appellants: *McConville & Renaud.*

Solicitors for respondents: *Champagne & Dugas.*