1879

*Nov. 3.
*Nov. 10.
*Dec. 12.
*Dec. 20.

CONTROVERTED ELECTION OF NORTH ONTARIO.

GEORGE WHEELER .....APPELLANT;

AND

WILLIAM HENRY GIBBS.....RESPONDENT.

Election appeal, notice of setting down for hearing—Power of Judge who tried the petition to grant an extension of time for giving such notice—Supreme Court Act, sec. 48—*Rules* 56, 69.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the Court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the Judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Act,

Held,—That this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the Court could not grant relief under rules 56 or 69; and that, therefore, the appeal could not be then heard, but must be struck off the lists of appeals, with costs of the motion.

Subsequent to this judgment, the appellant applied to the Judge who tried the petition, to extend the time for giving the notice, whereupon the said Judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down by the Registrar for hearing by the Supreme Court at the February Session following, being the

---

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal or failed to bring the same on for hearing at the next session, and that the Judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this Court.

Held,—That the power of the Judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the Judge having made such an order in this case, the appeal came properly before the Court for hearing. (*Taschereau*, J., dissenting.)

THIS was a motion by the respondent to quash the election appeal in the matter of the Controverted Election of the appellant as member duly elected of the House of Commons for the Electoral District of the North Riding of the County of *Ontario*.

Judgment, allowing the petition of the respondent and personally disqualifying the appellant, was rendered by Mr. Justice *Armour*, on the 6th February, 1879, and the sum of $100 was, within eight days after the said judgment, paid into the Court, and also ten dollars, the prescribed fee for making up and transmitting the record.

The record was transmitted to the Registrar of the Supreme Court on the 11th June, 1879. On the 24th September, 1879, application was made on behalf of the appellant to the Chief Justice, under rule 55 (S. C. R.), to dispense with printing part of the record. It appearing, when this application was made, that the fee for entering the appeal had not been paid to the Registrar under rule 56 and schedule therein referred to, the Chief Justice refused to entertain the application until such fee should be paid, and the appeal duly entered. Thereupon the agent for the appellant's solici-

1879

WHEELER v. GIBBS.

tor paid the fee, and the Chief Justice made the order as asked. On the same day the case was set down for hearing by the Registrar of the Court for the October session.

On the 20th October, 1879, the agent of the appellant's solicitor made another application to further limit the printing, and to limit the appeal to the personal charges, which was granted by a Judge in Chambers on payment of $5 costs to the respondent.

On the 28th October, 1879, although no application had been made to the Judge who tried the petition for further time to give notice, the appellant gave notice to the respondent that the appeal had been set down for hearing.

The respondent thereupon moved to quash the appeal upon the following, among other grounds:—

"And for that the appellant did not cause his said appeal to be set down for hearing before this honorable Court, and a notice thereof to be given to the respondent pursuant to the statute and rules in that behalf, and did not obtain an enlargement of the time to give such notice.

"And for that, the said appellant caused the said appeal to be set down for hearing before the now ensuing session of this honorable Court without giving any notice thereof to the respondent."

Mr. *Cockburn*, Q. C., for respondent:—

The notice served on the 28th October is not in accordance with the 48th section of the Supreme and Exchequer Court Act and rule 51 of the Supreme Court Rules. The provision in the statute that a notice in writing shall be given to the parties affected by the appeal is imperative, and the omission to give such notice is an objection to the jurisdiction of this Court, and cannot be waived. Moreover, the orders taken out since the appeal has been set down, were steps taken by

the appellant, and respondent was bound to attend the applications made on the part of the appellant. An appeal in election matters is given by this 48th section of the Act, and as the notice that the appeal has been set down is a condition precedent, this Court has no jurisdiction, nor any power to relieve against failure to give it. See *Maxwell* on Statutes (1), and cases there cited.

Mr. *McTavish* for appellant:—

The objection regarding the failure to give notice of the time of hearing within three days is only a formal one under rule 69 of the Supreme Court Rules; no proceeding in this Court can be defeated by any formal objection. A great deal of delay occurred in the Court of Queen's Bench in having the record prepared and forwarded to *Ottawa*, and it was impossible to find out when the proper time had arrived to give notice, as appellant did not know on what day the Registrar would set down the appeal for hearing. Since the delay to give notice within the time required by the statute had expired, the respondent, through his attorney, waived this objection by appearing on two applications made in Chambers by appellant for limiting the appeal, and on one of which appellant was condemned to pay $5 costs, which appellant paid, and respondent accepted. The appellant has been allowed to proceed with the printing of the record and fyling of his factum, and it is too late now to object that a proper notice has not been given.

It was on account of the orders issuing that the notice was not given. The objection is a formal one and under the 69th rule, the Court has power to allow the appeal to go on. Both parties agreed that the case was to be argued this session. Everything has been done except the giving of the notice. Under rule 70 of

(1) P. 334.

1879
WHEELER v. GIBBS.

the Supreme Court Rules, this Court can extend the time. The constitutency, if the appeal is quashed, may be unrepresented for two Parliaments, and the appellant be personally disqualified in the meantime. The objection should have been taken the first day of this session.

The court will see by the affidavit that both parties, knowing the difficulty with which the appellant had nothing to do, understood and agreed that the appeal would be argued on the merits in the October sessions.

1879
Nov. 10.

THE CHIEF JUSTICE :—

This was an application to dismiss the appeal for want of the notice required to be given by the 48th section of the Supreme and Exchequer Court Act, which regulates appeals in controverted election cases, and which enacts that thereafter "any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition on any question of law or of fact, and desires to appeal against the same, may, within eight days from the day on which the Judge has given his decision, deposit with the clerk, or other proper officer of the court (of which the Judge is a member) for receiving moneys paid into such court at the place where the petition was tried, if in the Province of *Quebec*, and at the chief office of the court in any other province, the sum of $100 as security for costs, and a further sum of $10 as a fee for making up and transmitting the record; and thereupon the clerk, or other proper officer of the court, shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said court at the nearest convenient time, and according to any rules made in that behalf under this Act;

1879

WHEELER v. GIBBS.

and the party so appealing shall thereupon, within three days, or such further time as the Judge who tried the petition may allow, give to the other parties to the said petition affected by the said appeal, or the respective attorneys or agents by whom such parties were represented at the trial of the petition, notice in writing that the matter of the petition has been so set down for hearing in appeal as aforesaid,—in and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the Judge whose decision is appealed from."

This cause was, at the instance of the appellant, duly set down for hearing on the 24th day of September, 1879, for this present sitting of the court. No notice in writing was given to the respondent, the other party to the said petition affected by the said appeal, or the attorney or agent by whom such party was represented at the trial of the petition, within the three days, as provided by the Act, nor was any further time allowed by the Judge who tried the petition, nor has any reason been given, or excuse offered, for not giving the notice, nor has any consent or agreement to waive or dispense with such notice been shown, so that the case rests on the bald question of a non-compliance with a provision requiring notice in writing to be given.

The jurisdiction this Court exercises over cases such as this is purely statutory, and no discretion is given by the statute to dispense with its requirements, nor is any authority given to the Court, or the Judges, to enlarge the time for giving this notice; the power or discretion to do this has been specially delegated to the

1879

WHEELER v. GIBBS.

Judge who tried the petition,and no general power has been conferred on this Court to deal with the matter. The obvious intention of the Legislature was that the party interested in the appeal should have speedy notice, and that the appeal should be promptly heard. The appellant cannot ignore the provisions of the statute, nor can this Court dispense with the requirements of the law, and deprive a party to the petition, affected by the appeal, of any privileges or advantages the statute has given him.

This notice is the first and only intimation the respondent has of the appeal—the previous steps by the appellant are *ex parte*; until this notice is given, as respects the respondent, as was said by *Erle*, C. J., in *Scott* v. *Durant* (1), "there has been no completed appeal," and it is only when so completed that "the appeal shall thereupon be heard and determined" by this Court. The words of *Wilde*, C. J., in *Norton* v. *The Town Clerk of Salisbury* (2), in reference to an appeal against the decision of a barrister appointed to review a list of voters under the 6 and 7 *Vic.*, c. 18, sec. 62, are very applicable to this case. He says: "In dealing with this Act of Parliament, which has for the first time delegated to a court of law a duty of much interest to the community, it behoves us to confine ourselves as strictly as may be within the path the Legislature has marked out for us;" and at the conclusion, he says; "It appears, therefore, to me that the the condition upon which alone the power of the Court to entertain the appeal rests not having been observed, we are bound to decline to hear it."

Rule 69 has been invoked on behalf of the appellant, which is that "no proceeding in the said Court shall be defeated by any formal objection;" but this cannot avail him. This is not a formal objection, nor can the

(1) 13 C. B. N. S. 218. (2) 4 C. B. 34.

rule apply if it was, because the Judges of this Court can only make rules extending "to any matter of procedure or otherwise not provided for by the Act, but for which it may be found necessary to provide, in order to insure the proper working of the Act and the better attainment of the objects thereof, and all such rules, not being inconsistent with the express provisions of the Act, shall have force and effect as if therein enacted."

It does seem hard, in a case such as this, that by any inadvertency, oversight, or neglect, the appellant should be shut out from his appeal; and were it in my power, I should gladly afford him an opportunity of having his case heard and determined in this Court. But the fault rests neither with the law, which is expressed in plain unambiguous language, nor with this Court, which must expound the law as it is written, regardless of consequences. *Jus dicere et non jus dare* is our province, or, as *Alderson*, B., says in *Miller* v. *Salomens* (1), "My duty is plain. It is to expound and not to make the law; to decide on it as I find it, not as I may wish it to be."

As, then, the express requirements of the statute have not been duly complied with, I am of opinion, that this appeal cannot be entertained, and it must be struck out of the list of appeals.

STRONG, J.:—

I am of the same opinion as the Chief Justice. The provision of the 48th section of the *Supreme Court Act*, requiring notice to be given within three days after the appeal has been set down for hearing, is imperative and not merely directory. The *Interpretation Act* requires us to place that construction on the words:

(1) 7 Ex. 543.

1879

WHEELER v. GIBBS.

"*shall* thereupon within three days thereafter * * * give notice."

The notice is, therefore, a condition precedent to the exercise of any jurisdiction by this Court, and the authorities quoted by his lordship shew decisively, that it is a well established rule of construction that the performance of a preliminary act, upon which jurisdiction depends, can neither be dispensed with nor waived. The case of *Peacock* v. *Reg.* (1) is a direct authority for this position.

Another rule applied to statutory requirements similar to that in question here is, that the Court cannot relieve a party against an omission to take a particular step in procedure within a limited time, when the public or any class of persons other than the parties to the proceedings are interested. In my judgment the condition of giving three days notice, in this section, is not imposed for the benefit of the respondent alone, but the public have also an interest in its strict performance.

Further, it appears to me that the respondent did nothing which could be considered an act of waiver. The appearance of the respondent's solicitor on the application to the Chief Justice with reference to printing the case, was on the same day the appeal was inscribed for hearing, and, therefore, too early to have any such effect. The attendance on the motion before Mr. Justice *Fournier* could not have any such consequence, inasmuch as the respondent assented to nothing, but merely appeared and asked for his costs.

Lastly, I am of opinion, that even if the Court were not excluded from enlarging the time for service by the two rules of statutory construction I have before stated, it could not interpose, for the reason that the statute, by giving power to enlarge the time to the Judge who tried the petition, must be construed as precluding this Court from making an order of the same kind.

(1) 27 L. J. Q. B. 224.

The appeal should be struck out of the list of appeals with costs.

FOURNIER, J., concurred:—

HENRY, J.:—

After giving a great deal of consideration to this matter, with a view of keeping it under the jurisdiction of the Court, I regret that I have been unsuccessful in finding any reason by which this Court would be justified in retaining this appeal. The statute which has been referred to is of too imperative a character to be called in question in regard to the petition which is now before the Court. In the ordinary cases, a notice of appeal is required to be given within eight days. In this case, there is no notice of appeal provided for, and the notice—the want of which is complained of in this case—is the first notice the party gets that any such appeal has been taken. I think, therefore, it is material to the jurisdiction of this Court that this notice should be given as the statute provides. In the ordinary cases of appeal, the notice, I think, perfects the appeal, and it is then within the jurisdiction of this Court to be dealt with, and, if so, might, in that case, I think, be brought under the terms of rule 70 of this Court.

Now, had it been provided for in the statute that notice of appeal should be given, and that such notice had been given, I would consider the case was then legitimately in this Court; but, unless that notice were given in the ordinary appeals, I would consider the case was hardly here, and, therefore, not within our jurisdiction. I concur with my learned brethren in saying that this is a case which is specially provided for by the statute, and that the terms of it, by which the party is entitled to appeal, ought to be complied with; and, if not, under the authorities of all the cases which have been referred to and others I have turned

1879

WHEELER v. GIBBS.

my attention to, I regret to, say, this being, I think, a condition precedent, there is no appeal; and that the party is not regularly in this Court. I was in hopes that under the waiver that had been shown here, the case might still have been heard, but I think there is a fundamental objection, and that the waiver, such as it is, cannot be admitted. Under these circumstances I regret to say I feel myself bound to decide that this appeal is irregular, and, therefore, so far as it is now before us ought to be quashed.

TASCHEREAU, J.:—

For the same reasons, which it is needless to repeat, I concur with the decision and am of opinion that the appeal should be quashed. No doubt the appellant suffers great hardship, but, after all, he suffers from his own neglect.

GWYNNE, J.:—

I have endeavoured to support the position contended for upon the part of the appellant, that the notice, required to be given by the 48th section of the *Supreme Court Act*, is a matter of procedure only, and that the clause, requiring it to be given, is directory only and not imperative; but I regret to say that I am unable to arrive at that conclusion. True it is, that the same point may arise under the 68th section,on an appeal to this Court from the Exchequer Court, the notice there required being identical with that required by the 48th section, save only in so far as the words in the latter section, "or such further time as the Judge who tried the petition may allow," may make, if it does make, any difference. Every thing required to be done in the 48th section preceding the giving the notice of appeal is authorized to be done *ex parte*—behind the back of the respondent. The deposit of $100, as security for costs,

within 8 days from the day on which the Judge has given his decision, is the *ex parte* act of the person against whom the decision is given, and this is made a condition precedent to the clerk of the Court making up and transmitting the record to the Registrar of the Supreme Court. The transmission of that record is an *ex parte* act, of which the person in whose favor judgment was rendered is not, in the contemplation of the statute, deemed to have notice, except by the notice required to be given of its having been received by the Registrar of this Court, and by him set down for hearing at the nearest convenient time. So that the only notice which the statute provides to perfect the appeal is the notice required to be given to the opposite party within three days from the matter of the petition being set down by the Registrar of this Court, "or such further time as," not this Court, but "the Judge who tried the petition may allow." This, then, being the only notice of appeal provided by the Act, without which the respondent would know nothing of an appeal being contemplated, the words in the section, "and the appeal shall thereupon be heard and determined by the Supreme Court," seem certainly to make the giving the notice a condition precedent to the hearing of the appeal, and so the objection is not merely one of procedure only, but affects our jurisdiction to hear the appeal.

It was contended that the appearance of the respondent to two summonses, signed by a Judge of this Court, in respect of matters connected with the appeal, should be held to be a waiver of the want of notice, but our jurisdiction in this matter being wholly statutory, I fear we cannot adopt this view.

Regina v. *The Justices of Middlesex* (1) is a strong authority upon this point. The motion was for a mandamus, directed to the justices of the County

(1) 7 Jur. 396.

1879

WHEELER v. GIBBS.

of *Middlesex*, commanding them to enter continuances, and hear an appeal against a conviction under 4 Geo. 4, c. 98, s. 87, which required notice of appeal to be given within six days after the cause of complaint shall have arisen. The conviction took place on Monday the 2nd May, the notice of appeal was received on Monday the 9th May—the 8th being Sunday. The appeal came on to be heard at the sessions on the 6th July, when the appellant appeared in Court prepared to prosecute his appeal. On the appeal being called on, counsel for the respondent, without requiring service of the notice of appeal, or any other fact, to be proved, applied to have the hearing of the appeal adjourned to the next sessions, which was ordered accordingly. The next sessions commenced on the 7th August, when the case was again adjourned to the next sessions, which commenced on the 12th October. Upon that day both parties appeared by their counsel, and the appellant with his witnesses, when the respondent, by his counsel, admitted service of the notice of appeal on the 9th May as aforesaid, but objected to the appeal being heard on the ground that the notice of appeal was not served within the prescribed six days, and thereupon the Court of Quarter Sessions, acting upon the objection, refused to hear the appeal, and the conviction was confirmed. It was strongly contended, that the appearance of the respondent, and procuring the adjournment of the case without making the objection relied upon, operated as a waiver of the objection. It was also contended that, as the seventh day was a Sunday, the notice was good, but the Court, *Williams* J., said: "The question I had to determine arises upon the distinct language of the statute, and upon that language how can I say that this notice was given within six days. I think the plain words of the Act are not to be got rid of." And he adds, "I feel the less regret at coming to this conclusion because there were five

1879

WHEELER v. GIBBS.

days in which the notice might have been served, but the appellant chose to neglect and to raise this discussion." And the rule for the mandamus was discharged.

I cannot see that the appearance of the respondent's attorney upon the summonses relied upon can deprive him of the right to insist that he has never received that notice, the giving of which constitutes the means provided by the statute to subject him to the jurisdiction of this Court in relation to the matter in appeal.

The cases relied upon by Mr. *Cockburn* were cases of want of, or of defect in, the notice, which was made a step preliminary to the party appealing. I at first thought, and was in hope that I should find, this constituted such a difference as would make them inapplicable in this case, but, as the notice required by this statute is made a step preliminary to our hearing the appeal, and is the only means provided by the statute for subjecting the respondent to our jurisdiction, they seem equally to apply here; for although we may have jurisdiction to hear and determine the case, if the parties should choose to argue it without any notice, we have no jurisdiction to compel the respondent to submit to our jurisdiction, if he has not received the statutory notice, or under such circumstances to hear the case *ex parte*, in the absence of the respondent.

[*Case struck out of the lists of appeals with costs of the motion.*]

1879

Dec. 12.

Subsequently to this order, an application was made by the appellant to Mr. Justice *Armour*, who tried the election petition, to extend the time for giving the notice. On the 22nd November, 1879, the learned judge granted the application and made an order "extending the time for giving the prescribed notice till the 10th day of December, then next," and within the extended time the case was again set down by the Registrar for

1879
WHEELER
v.
GIBBS.

hearing by the Supreme Court at the sitting of February, 1880, being the nearest convenient time, and notice of such setting down given.

The respondent on the 12th December, 1879, moved the Court to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, and failed to bring the same on for hearing at the next session after the appeal had been instituted, and that the Judge had no jurisdiction to grant the order made on the 22nd November, 1879.

Mr. *Cockburn*, Q. C., appeared on behalf of the appellant, and Mr. *Hodgins*, Q.C., on behalf of the respondent. Their arguments, and cases cited, are referred to in the judgments hereinafter given.

1879
Dec. 20.

THE CHIEF JUSTICE:—

This is an application to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session after it was ripe for hearing. The motion is in the matter of an election petition tried before Mr. Justice *Armour*, a Judge of the Court of Queen's Bench of *Ontario*, under the Dominion Controverted Elections Act of 1874, in which the present appellant was respondent and the present respondent was petitioner. Judgment was delivered on the 26th of February, 1879, and the sum of $100 was, within eight days after the said judgment, paid into the Court of which the said Judge was a member, and also ten dollars, the prescribed fee for making up and transmitting the record. The record was transmitted to the Registrar of this Court, who, on the 24th day of September, set down the matter of the said petition for hearing by this Court at its then next sitting, being the nearest convenient time. The party so appealing did not thereupon, within three days, give the notice required by section 48 of the

Supreme and Exchequer Court Act, and did not obtain an allowance of further time for giving such notice from the Judge who tried the petition. On the third day of November, the respondent applied to this Court to have the said appeal struck out of the list of causes entered for hearing at the then sitting of this Court, for want of such notice, whereupon, and by reason of no such notice having been given, the Court did declare that the said cause could not, under the terms of the Supreme and Exchequer Court Act, be now heard and determined,and ordered the said case to be struck out of the list of appeals. Subsequently, an application was made to the Judge who tried the said petition to extend the time for giving the notice,whereupon the said Judge granted the application, and made an order "extending the time for giving the prescribed notice till the 10th day of December then next," and within the extended time notice has been given, and the case has been again set down by the Registrar for hearing by this Court at the sitting in February next, being the nearest convenient time.

The respondent's contention is that, no extension of time having been allowed by the Judge before the cause was set down in this Court, and no notice in writing having been given within the three days after the case was first set down,the jurisdiction of the Judge who tried the petition was at an end; that he was *functus officio*, and had no power or authority to make the said order of the 22nd of November, and that therefore the case cannot be heard in this Court, and the appeal is consequently at an end, and should be dismissed. The learned Judge appears to have been of this opinion, but having been told that the Supreme Court thinks that he had the power, he assumed to make the order.

After what took place on the argument, it is only necessary to repeat that the learned Judge was incor-

1879

WHEELER v. GIBBS.

rectly informed, and to re-affirm that this Court never expressed any such opinion, but, on the contrary, carefully and avowedly refrained from doing so. As regards the present enquiry, this is now wholly immaterial. The only question we have to determine is: had, or had not, the Judge who tried the petition power to extend the time as he has done? If he had, then, having granted the extension, and notice having been given within the extension granted, the matter is now ripe for hearing, and the appeal cannot be dismissed. It cannot be disputed, that if the Judge had the power, the exercise of that power cannot be now questioned, it being purely a matter of discretion, resting with the Judge who tried the petition, and not appealable, and with which we have nothing to do.

In considering this case it is very important, as was suggested by my brother *Strong* on the argument, to refer to the 35th section of the Dominion Controverted Elections Act of 1874, which was repealed by the Supreme and Exchequer Court Act, when the Supreme Court was organized and came into the exercise of its appellate jurisdiction. That 35th section provided that any party to the petition, being dissatisfied with the decision of the judge, and desiring to appeal, might, within eight days from the day on which the Judge gave his decision, deposit in the Court of which the Judge was a member the sum of $100 by way of security for costs, whereupon the Clerk of the said Court was required to set the matter of said petition down for hearing before the full Court of which the Judge was a member, as therein provided; and the statute goes on to say that the party so appealing shall thereupon, within three days, or such further time as the Judge may upon application allow, give to the other parties to the said petition affected by the said appeal, or their respective attorneys, or agents, &c., notice in writing that the matter of said petition

has been so set down to be heard in appeal as aforesaid. After providing that the party appealing may limit the subject of appeal, it proceeds: "And the said appeal shall thereupon be heard and determined by said full Court." The section of the Supreme and Exchequer Court Act which repeals this 35th section provides for a like appeal by any dissatisfied parties, and makes similar provision as to time, place, and amount of deposit of $100 as security for costs, and provides for the further sum of $10 as a fee for making up and transmitting the record, and that thereupon the Clerk or other proper officer of the Court (that is the Court of which the Judge is a member) "shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said Court at the nearest convenient time and according to any rules made in that behalf under this Act; and the party so appealing shall thereupon, within three days, or such further time as the Judge who tried the petition may allow, give to the other parties to said petition affected by said appeal, or the respective attorneys or agents by whom such parties were represented at the trial of the petition, notice in writing that the matter of the petition has been so set down for hearing in appeal as aforesaid," and by which notice said party so appealing may limit the subject of appeal, &c., and the appeal shall thereupon be heard and determined by the Supreme Court.

The great difficulty which appears to have weighed on the mind of the learned Judge—who, while extending the time, expressed so strongly his opinion adverse to his right to do so—was his difficulty in conceiving that the Legislature could, in his own words, "have intended that a Judge in the Court below should be making orders respecting, and meddling with, the proceedings of the Supreme Court, after the cause had become a cause

1879

WHEELER v. GIBBS.

in that Court," and apparently this forced the learned Judge to the conclusion that "the application," that is, the application for an extension of time, "could only have been made and such allowance granted before the matter of the petition had been set down for hearing in appeal, and not afterwards; that after the matter of a petition had been set for hearing in appeal in the Supreme Court the cause thereupon became a cause in the Supreme Court, and the Judge who tried the petition thereupon ceased to have any authority to make any order in the cause."

It is self-evident that the Legislature contemplated cases in which an extension of the very short period of three days might be necessary, and it is equally clear that such extension was confided to the discretion of the Judge who tried the petition, and to him alone. It was so vested in him alone under the first Acts, and when the Legislature took the appeal from the full Court of which he was a member and vested it in the Supreme Court, it still specially reserved to the Judge who tried the cause, in precisely the same terms, the power to extend the period of time, which would necessarily commence, under the repealing Act, to run from and after the time when the cause was entered in this Court. I cannot think it possible that the Legislature could have intended, as the Judge suggests, that the allowance could only be granted before the matter of the petition had been set down to be heard in this Court. Until the petition was set down, how could it be known that an extension would be necessary? In this case the decision was given on the 26th day of February, 1878, but the record was not transmitted till the 11th day of June last, over three months afterwards. By the affidavits in the case it appears this delay arose from the inability of the officers in the Court below to prepare the record of the proceedings for transmission,

as to which, it appears, the appellant did not know when the same would be transmitted, and therefore in such a case it would be utterly impossible, it appears to me, for an appellant to know whether, when transmitted, he would be able or unable to give the notice, and as until the case was entered there were no three days to extend, I am somewhat at a loss to understand how an extension of a period that did not exist, and of which the applicant could have no knowledge, could be reasonably asked or granted, except possibly under very exceptional circumstances. Can there be a doubt that, under the Act of 1874, the Judge during the three days would have had authority to extend the time? I am at a loss to conceive upon what grounds it can be contended he could not. Or could it be possible that under the original section, if from exceptional circumstances it became impossible to give the notice within the short period of three days, and equally impossible to reach the Judge by reason of sickness or absence on judicial duty, or on account of some other cause, so that an extension could not be obtained within the three days, that appellant should be shut out by no neglect or fault of his own from his appeal, and should have inflicted upon him the irreparable injury of a disqualification for seven years without an appellate hearing (1). And where, as the Judge says in this case, no party would be injured by the extension, I think this never could have been intended. It seems to me clear, that whatever power or discretion a Judge who tried the cause may have had under the 35th section of the Controverted Elections Act of 1874, he has under the 48th section of the Supreme and Exchequer Court Act, because the power and the authority are confided to him in precisely the same language, and the matter to be remedied or provided for is likewise precisely

(1) See *Banner* v. *Johnson*, L. R. 5 H. L. 157.

1879

WHEELER v. GIBBS.

the same. Therefore, I think the construction in both cases should be the same.

If, in acting under the Controverted Elections Act of 1874, the Judge, and he alone, might extend the time after the entry for hearing before the full Court of which he was a member, and during or after the three days, why should he be limited under the Supreme and Exchequer Court Act to an extension before the cause is entered in this Court, and thus be excluded from extending the time during and after the three days, and so make the enactment practically comparatively, if not wholly, useless? In dealing with the matter during or after the three days under the 35th section of the Controverted Elections Act of 1874, there is admittedly no incongruity, as the Judge who acts is a Judge of the Court in which the cause is; but is there any substantial incongruity under the Supreme and Exchequer Court Act? Is it not rather fanciful than real? The application for an extension of time is not to the Judge as to the Judge of a Court having seizure of the case, and so, as such Judge, having a control over the proceedings in the Court of which he is a member by virtue of its ordinary jurisdiction. The application is in a purely statutory proceeding, of a very peculiar character, to a Judge who heard the case, for the exercise of his discretion, under a statutory authority which entrusts to him alone the exercise of such discretion, and whose jurisdiction has not wholly ceased, but is continued to enable him to extend the time for giving the notice, if in his opinion it is right to do so, not thereby in any way interfering or meddling, obstructively or objectionably, with any matter with which this Court has full power to deal, but, on the contrary, in aid of the proceedings before this Court, in a matter over which this Court has not power, to enable the appellant to get the appeal in a position

1879

WHEELER v. GIBBS.

to be heard in this Court, and so to give this Court full seizin thereof by giving it authority to hear and determine the merits of the case.

But if the incongruity was so great as the learned Judge supposes, that should not prevent us from giving the words of the statute their legitimate construction, or from recognizing the power conferred on the Judge who tried the cause, though not a member of this Court. There can be no doubt that the Legislature deemed the Judge who tried the case—and who therefore would be necessarily conversant with all the proceedings therein and circumstances connected therewith—the most competent to deal with this question, rather than this Court or its Judges, who could know nothing of all that had taken place—a knowledge most necessary for the exercise of a sound judicial discretion.

I may add also that the construction which has thus been put on the words "shall thereupon within three days, or such further time as the Judge who tried the petition may allow" is only in accordance with the strict literal language used, which is consistent with a well-known canon of construction—that 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. I think therefore that in this case, the statute not having limited the authority of the Judge, his power of extending the time is a general and an exclusive power, to be exercised according to sound discretion, and that so long as there has been no final disposition of the case, whenever that discretion is invoked the Judge, and he alone, has power to extend the time for giving the notice, and having done so in this case, it is now properly before this Court for hearing, and the appeal cannot be dismissed.

The question we decided when we refused to hear the appeal on a former occasion was entirely different

1879

WHEELER v. GIBBS.

from that now before us. We were then prevented from hearing the case by the express terms of the statute, which left us no discretion; we are now equally prevented from refusing to hear it, there having been a compliance with the provisions of the statute.

FOURNIER, J., concurred.

HENRY, J.:

When this case was under consideration at an earlier part of this Session, and when, owing to the notice of the setting it down for hearing not having been given within the three days from the time of such setting down, as required by section 48 of the Supreme and Exchequer Court Act, we decided to strike out the appeal, as then before us, the position of the case was essentially different from that it now occupies.

When our judgment was delivered the notice given was not within the prescribed three days; and the time for giving it had not been extended by the Judge who tried the merits of the petition. We felt therefore, that the requirements of the provision had not been fulfilled, and that, as the statute prescribed a limit and made necessary an order of the presiding Judge, to whose discretion alone it was left to extend the time, and as he had not exercised that discretion, we felt we could not extend the time, and had simply to say the proceeding was irregular and defective. The defect in the proceedings just mentioned has been since remedied by an order of the Judge; and that objection having been removed the appeal has been again set down for hearing, and the prescribed notice since duly given. The motion we have since heard was to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal or failed to bring the said appeal on to be heard at the first term of this Court after the appeal was ripe for hearing.

1879

WHEELER v. GIBBS.

The ground of the motion is, therefore, that the appellant unduly delayed to prosecute his appeal, or, in other words, failed to bring it on for hearing at the first term of this Court after the appeal was ripe for hearing.

Our previous judgment was given on the motion of the respondent himself, alleging that the case was not then ripe for hearing. By the order of the Judge extending the time, the inscription for hearing, and the notice subsequently given, it has since then, for the first time, become ripe for hearing; and no delay has since occurred. The papers on file, and referred to on the argument, show that, since the making of the order of the Judge, before alluded to, everything is regular. If the Judge had the power to make that order the proceedings are altogether regular, and if he had not, is the act of his having done so, legitimately questioned by the motion now under consideration, which is founded only on alleged *delay*. It is stated to be founded on section 41 of the Supreme and Exchequer Court Act, and the argument of the respondent was based on that section. Under it, the Legislature has limited our jurisdiction as to the dismissal of appeals, and, by it, we are to be governed. The words used in it are in substance the same as those we find in the notice of motion and in the motion itself. In the case, as at first before us, the notice of motion was for

> An order setting aside all proceedings taken in this appeal by the appellant and striking the appeal out of the list of causes set down for hearing at the (then) "next Session of this honorable Court, or for an order dismissing the appeal in this case out of this honorable Court," * * * or for such other order as might be deemed just.

The grounds were fully set out, and, amongst numerous others, the objection was taken that the notice of hearing, for the reasons before stated, was irregular and

1879

WHEELER v. GIBBS.

defective. Upon that objection we decided to strike out the appeal from the list of causes, as moved for.

In view of the present condition of the proceedings, can we consider them with the object of deciding upon their validity, under the present motion? If our power in such cases to dismiss an appeal was a general one for irregularity, we might, perhaps, go as far back as to consider the validity of the Judge's order (admitting that section 41 applies to election cases) and, on this motion, dismiss the appeal —if irregularity or nullity were found. I am, however, of the opinion, that as we have been asked to grant the motion solely on the ground of *delay*, and as the statute restricts our inquiry to the matter of delay, we cannot, in my opinion, on this motion, decide upon an alleged irregularity or nullity of an order made by a Judge before or after the inscription for the hearing in this Court. Under the provisions of the statutes applicable to such cases, and the circumstances of this case, I think the proper, and indeed the only time, to raise the question of the validity of the Judge's order for the enlargement of the time to give the notice, is at the argument on the appeal.

By section 37, this Court is given power to quash proceedings (which I take to mean a power to be summarily exercised) on motion, but that summary power is confined to two cases, one where an appeal does not lie, and the other where such proceedings are taken against good faith.

It is under section 38 we derive the general power to dismiss an appeal, but the provision only applies to cases heard and decided on the merits of the subject matter of the appeal. The result, therefore, of my best consideration is that, under section 38, we can only inquire as to alleged delays after the appeal was had. That under section 37 our power to quash proceed-

ings is confined to the two cases it provides for. That section 38 is limited, as I have just stated, and that our power being so limited, cannot be exercised on the motion made on the part of the respondent. This view of the position was not presented at either of the arguments, and as, at the time of the first one, we were occupied in session, and, therefore, unable to give the matter such full consideration as it has since had, and as the question was not raised at the first argument or considered by the Court, no decision was given on it. My present view, therefore, although apparently, is not really, opposed to the judgment we gave.

The validity of the Judge's order is now questioned; and as we have heard the parties fully on the point, it may be as well that we should give our views in regard to it. When the provision was originally made the Judge who tried the merits of the petition, was a member of the Court to which an appeal was given from his decision; and, it having been properly presumed he would be better qualified than the whole Court, or any other member of it, to judge of the proper extra time to be given, the legislature vested the power solely in him.

When the Act was passed for the creation of this Court, by section 48 the appeal from the Judge's decision was directed to be to this Court, but with a provision as to the extension of time for giving the notice, in the same words as those employed in the repealed section of the previous Act. The irresistible conclusion is, I think, that the Legislature intended the Judge to exercise the same discretionary power in the one case, that he could have done in the other. I have called it a *discretionary* power, and I have done so advisedly, for if exercised within the prescribed three days, or as I think afterwards, no Court can question his decision; unless, indeed, it was founded in fraud or the extension

1879

WHEELER v. GIBBS.

was so great as to be unreasonable, and evidently an abuse of his power.

It is, however, contended that his discretion is confined to the prescribed three days, and that when they had passed he had no power to make, as in this case, an order for further time. His power is not *expressly* limited to the three days, but it is contended the Legislature must be considered so to have intended it.

The power being unlimited by the section as to the time during which it may be exercised, can we, or ought we to limit it—or, in other words, are we bound to do so. No decision has been cited to sustain the latter proposition, and I can find none.

The decision of the appeal involves heavy penal consequences to the appellant, and we should be fully satisfied that we are bound by law to do so, before arriving at the conclusion contended for; and if after full consideration, a reasonable doubt remains, we are bound, I think, to resolve it against that contention. I feel justified in saying that by no rule of construction, nor for any other reason that I can discover, are we *bound* to say that the Legislature intended to limit the time to the three days. There is no principle or dictum that I can find which makes it obligatory on us to say so.

If right in that view we must say further that, although posessing, as contended for, the abstract power, we cannot claim to have the right to exercise it, when it would at least be doubtful that our doing so would be what the Legislature intended.

Admitting, however, we have the power, ought we to exercise it in this case which in many respects is peculiar? The difficulty has arisen from the failure to give the notice in the prescribed time; or to get the time extended. The giving of the notice was a condition precedent to the right, not to appeal, but to

subsequently validate the appeal when taken. Some delay was caused, by the difficulty shown in getting the necessary papers returned to this Court, through the pressure of other business on the time of the officer of the Court at *Toronto*. The case was inscribed for hearing in this Court in October last, being the first Session after the record was transmitted, and it might, and would, no doubt, have been disposed of on the merits in its order, but for the objection founded on the want of the prescribed notice made by the respondent. The fact that the case was inscribed for hearing was brought very shortly afterwards to the knowledge of the respondent's counsel and agents; and other proceedings were had before a Judge or Judges of the Court limiting and defining the issues to be argued, in which the respondents counsel took part. The respondent's counsel were justified, as we have held, in taking the course they did to prevent a hearing of the appeal; but still, under the circumstances disclosed, the objection was purely technical, although one we felt bound to sustain. Being wholly of that character, it operated nevertheless to prevent a hearing. By the Judge's order, since made, that technical difficulty has been removed, and I don't think the case is one in which we are called upon to weigh very nicely the power of the Judge to make it, or in which justice requires that any doubts that exist should be resolved in favor of the respondents.

I have fully considered the difficulties suggested by the learned Judge, when making the order, after the appeal had been taken to this Court and dismissed for the want of the notice. When, however, he made that order, the appeal having been dismissed, I think the case was remitted back to the same position it previously occupied, as fully as if no appeal had ever been had. His original jurisdiction, for a time suspended by the appeal, was, I think, restored by the order of this

1879

WHEELER v. GIBBS.

Court, which merely dismised it. When the Judge's order was made, this Court had parted with any jurisdiction as to its subject matter given it by the appeal. Where the Appellate Court has no jurisdiction, and so decides, the result is to remit back the case to the court appealed from. Such, I think, it must be considered was the result in this case.

A question might have been, and was raised by the learned Judge, as to the entitling of his order, whether it should be in this Court or in the Court appealed from; but it is unnecessary to decide that point, as two orders have been made, one of which is entitled in this Court. I may remark, however, that the discretion as to the extension of the time must, according to the statute, be always exercised by the Judge *after* the appeal has been had, the case inscribed for hearing, and the matter then regularly in this Court. Any subsequent affidavits or other papers would then be properly entitled in this Court. The Legislature had the right to say by whom subsequent acts in this Court should be performed; and having provided that the Judge who tried the merits of the petition should be alone authorized to make such an order, no objection could be successfully raised to its validity, or to its being entitled in this Court, on the ground that it was made after the appeal was taken, for the statute expressly so provides. This peculiar duty was left with the Judge when the main subject was removed by the appeal.

I think, therefore, we must conclude that the clear intention was, notwithstanding the appeal, to leave to the Judge the discretionary power of giving further time for the notice, and that his order was properly headed or entitled in this Court. The provision, to my mind, is too plain to admit of a doubt.

I think for the reasons given that this motion should be refused, and the appellant allowed to be heard on

the merits of the appeal; but, taking all the circumstances into consideration, without costs.

TASCHEREAU, J.:—

I have the misfortune to dissent from the judgment about to be rendered on the motions now before us in this case.

It seems to me that this right of the Judge, who tried the petition, to give an order which shall apply to proceedings in the Supreme Court, and, as in this case, to relieve a party from his default and negligence in his proceedings in the Supreme Court, should not be extended by interpretation. This power given to a Judge of the inferior Court to give an order in the case, when the case has gone out of his hands, and is before the court appealed to, is of an unusual character. It cannot be denied that the legislative authority had the right to give him such a power. But I think that we ought not to extend it in any way whatsoever, and I would hold that the Judge has that power only during the three days following the setting down for hearing. After these three days, he is *functus officio*. If we hold that he has that power, even when these three days have elapsed, where shall be the limit? In this very case, the Judge has actually given such an order almost two months after the case had been set down for hearing. Can the law have purported to allow this? In my opinion, if the law allows of an interpretation which would prevent such consequences, that interpretation should prevail.

But here, not only has this order been given after the three days following the day on which the case was set down for hearing, but it has been given after the day on which it was to be heard. Now, it seems to me that, even admitting that the Judge could give this order after the three days mentioned in section 48 of the

1879

WHEELER v. GIBBS.

Supreme Court Act, the case, on the 24th of September, having been set down for hearing on the 27th of October last by the Registrar of this Court, as he was bound to do under this section, it was only between these two dates, and before the day it was so set down for hearing, that, at any rate, the application to the Judge who tried the petition to allow a further time than the three days for giving notice of such hearing should have been made, and such notice should have been given. In other words, the statute provides only for one setting down for hearing, and it is this hearing, the one fixed by the Registrar at the nearest convenient time, of which notice must be given within three days, or of which the Judge may allow an extension of time to give notice. The statute seems to me to say so positively. "Notice in writing that the matter of the petition has been *so* set down for hearing," are the words. Now *so* means the setting down by the Registrar, upon the transmission to him of the record, for hearing at the nearest convenient time. Of course, it is before the day fixed for hearing that the notice must be given of such hearing, and so it is before that day, and before that day only, that, in my opinion, the Judge who tried the petition can extend the time for giving such notice. It is the notice of the setting down by the Registrar on the reception of the record, that the Judge who tried the petition can allow to be given after the three days following the setting down. For this notice, and for no other, does the statute give him jurisdiction, and I fail to see how we can extend his jurisdiction in the matter to another setting down for hearing and another notice not provided for by the statute. That is always even supposing that he can give this order after the three days mentioned in the statute. Then, it seems to me, and the learned Chief Justice has just expressed this to be his opinion, if I understood him correctly, that it is

after the case is set down for hearing, that the Judge can extend the time to give notice of the day fixed for such hearing. Indeed, it is obvious that the appellant cannot give notice of the day fixed, before that day is actually fixed, and so, that it is only after the day for hearing has been fixed, that the appellant will, under any circumstances, ask an extension of delay for giving notice of the day so fixed. But here, the contrary has taken place. The Judge has extended the delay *before* the case was set down for hearing, that is to say before the setting down *de novo* for hearing in February next. Now, I fail to see in the statute that the Registrar had any power of so setting down the case for February next, or that any one had the power to authorize him so to do.

As to the cases cited by the appellant on his argument against these motions: In *Lord* v. *Lee* (1) it was held that a Judge may extend the time given by statute for the arbitrators to make the award, after that time has expired. But I do not think this applies. This case here, it seems to me, must be governed by different principles. There nothing but private rights, and contestation between private individuals as such, were in question. But election cases affect public interests. That is why Parliament, instead of leaving to the parties the power of setting down their case for hearing as in ordinary cases, has *ordered* the Registrar to do so, in election cases, for the nearest convenient time, after the transmission to him of the record. Parliament evidently intended that election appeals should not be delayed.

Scott v. *Burnham* (2), cited by the appellant, does not seem to me to have any application to this case; nor does *Chowdry* v. *Mullick* (3). In *St. Louis* v. *St. Louis* (4), also cited by the appellant, the Privy Council held

(1) L. R. 3. Q. B. 404.
(2) 3. Ch. Cham. R. 399.
(3) 1 Moore P. C. C. 404.
(4) 1 Moore P. C. C. 143.

1879

WHEELER v. GIBBS.

that a motion to dismiss the appeal could not be granted, because the rule allowing a year and a day for prosecuting an appeal is not imperative on the King in Council, and the respondents had no right to complain of delay after laying by themselves eight months without making any application. The case is not in point. In *Leggo* v. *Young* (1), also cited, it was held that the Court will not entertain a second application upon grounds which might and ought to have been brought forward upon the former occasion. That was for ordinary acts of procedure, but here, I take it, we are dealing with a question affecting the jurisdiction of this Court to hear and determine this appeal.

It has been held, in recent cases, in *England*, that the Court of Appeal will not enlarge the time for appealing where, owing to the mistake made *bonâ fide* by the appellant's legal advisers, the time within which the appeal should have been brought has been allowed to run out. I refer to *International Financial Society* v. *City of Moscow Gas Co.* (2); *Craig* v. *Phillips* (3); *In re Mansel*, (4); and *Highton* v. *Treherne* (5).

In *International Financial Society* v. *City of Moscow Gas Co.* (6) *James*, L. J., said:—

I am of opinion that we cannot give any time. The respondents here say they are within the rule, and they have a right (and I think it is as valuable a right as anything which a subject has in this country,) to know when they can rely upon the decree or order in their favour. The limitation of the time to appeal is a right given to the person in whose favour a Judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading, through any conduct of the other side, as was mentioned in the analogous case of vacating inrolment, which came before Lord *Cottenham*, and afterwards before Lord *Chelmsford*, in which it was laid down that the right of the suitor was *ex debito justitiæ* to keep

(1) 17. C. B. 549.
(2) L. R. 7 Ch. D. 241.
(3) L. R. 7 Ch. D. 249.
(4) L. R. 7 Ch. D. 711.
(5) 39 L. T. N. S. 411.
(6) L. R. 7 Ch. D. 247.

his inrolment of the decree, if it was made in due time, unless in very special cases. For instance, where there was anything like misleading on the part of the other side, or where some mistake has been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must abide by the consequences of that mistake. Beyond all question, in this case there was abundance of time to have brought the appeal, if it was intended really and *bonâ fide* to appeal from the order as pronounced.

Baggally, L. J., in the same case, said:—

I am of the same opinion. This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time.

In re Mansel, Jessel, M. R., said (1):

Has any sufficient case for extending the time been made? No reason has been given but that the solicitor's clerk made a mistake as to the meaning of the rule. If that is to be allowed as a sufficient reason for relaxing the rules they might as well be repealed. The opposite party is not answerable for the mistake, and is entitled to the advantage of it, unless he has done something to mislead the applicant.

These cases, I know, are not exactly in point, and as not one of the Judges doubted their right to grant this appeal after the time allowed therefor had elapsed, they may perhaps be invoked by the appellant as sustaining his contention, viz.: That even after the three days elapsed, Judge *Armour* could grant him an order extending the delay to give notice of the hearing.

But as to this contention of the appellant, it is not supported by these cases, because, the Supreme Court

(1) L. R. 7 Ch. D. 713.

1879

WHEELER v. GIBBS.

Act, sect. 26, virtually says that, in election cases, the time within which to appeal cannot be extended, and I think that, since the legislature specially made that provision as to election cases, for the right of appeal therein, we may apply the same principle as to the order of the Judge and the notice of hearing in such election cases.

Another feature of the case is this: Mr. Justice *Armour*, in fact, decided that he had no jurisdiction and no authority to grant this order. But, as it was stated before him, and even sworn to, I understand, that this Court had expressed the opinion that he had the power so to do, he, in deference to this view so stated to him, granted the order. Now, we have positively stated that this Court had never expressed the opinion that Mr. Justice *Armour* had such a power, and that this assertion made to him was erroneous and unfounded in fact, though we are satisfied that the gentleman who made it did not wilfully and knowingly assert a fact contrary to truth. Mr. Justice *Armour's* decision, in the exercise of his discretion, we could not review. He alone could give this order, and, if he refused it, the case was at an end. Now, he says that he, left to his own judgment, would have refused this order. He grants it, only in deference to an expresion of opinion which is stated to him to have been given from this Court. Now, this expression of opinion we never gave; the Respondent obtained, then, Mr. Justice *Armour's* order under false pretences. Without these false pretences, without this assertion before the Judge of a false statement, through error and misapprehension, no doubt, but yet false, the Judge tells us that he would not have granted this order. Are we to allow the appellant the benefit of having obtained this order under such circumstances? Must

1879

WHEELER v. GIBBS.

we not treat Mr. Justice *Armour's* judgment as a refusal of the order?

It has been said that it would be a hard case for the appellant, if he could not appeal from a decision by which he is deprived of his civil rights for seven years. But whose fault would it be, if that was so? His, and his alone. He would have to bear the consequences of his own negligence. And, may I ask, is there no hardship in, for such a length of time, either depriving this *North Ontario* constituency of a representative in the House of Commons, or, still worse, in imposing upon it, as its representative, a man, whose election as such has been declared void, who, by a court of justice whose judgment in that respect is not impugned or appealed from, has been declared never to have been duly chosen as such by the electors thereof; and this, because this man himself has failed to conform himself to the law in his proceedings in this case, and because he has obtained an order upon the assertion of a fact which turns out to be untrue, though he may have believed it.

When I see that the statute allows only eight days to appeal in election cases, instead of thirty days, as in the other cases; when I see that, though it gives the right to extend that delay in the other cases, it specially exempts the election cases from this extension of the delay to appeal; when I see that it gives only three days to the appellant to give notice of the hearing; when I see that, in accordance with the spirit of the Act, the rule of this Court orders the deposit of the factums only three days before the first day of the session fixed for the hearing of the appeal, instead of thirty days in the other cases, I think that we ought to pause before sanctioning proceedings by which the hearing of this appeal is so long delayed, and before relieving the appellant of an act of negligence and

1879

WHEELER v. GIBBS.

disobedience to the law for which he has not even attempted to give a shadow of excuse.

Of course, these were considerations for Mr. Justice *Armour*, in the exercise of his discretion in granting the order, if he had jurisdiction to grant it, but they also seem to me to be material and important when we have to decide whether Mr. Justice *Armour* had jurisdiction, and at what time and what period of the case he ceased to have jurisdiction in the matter according to the statute. And when I see that by rule 12 of this Court and the form of the schedule A thereof, combined with section 14 of the Act, it is provided for a special session of this Court for the hearing of election cases, I think that the least the appellant should have done, even admitting that Mr. Justice *Armour* had jurisdiction to give him this order, at the time it was given, should have been to apply to this Court or to the Chief Justice for a special and early session to hear his appeal, which would undoubtedly have been granted to him, instead of having fixed for hearing for February next only a case in which judgment has been given in February last. Here again I find that the appellant has unduly delayed, under the circumstances, to prosecute his appeal.

I would be of opinion to grant the respondent's motion to dismiss the appeal, under sect. 41 of the Supreme Court Act, because the appellant unduly delayed to prosecute his appeal, in not giving notice within the three days after the case was set down for hearing on the 24th September, or having failed to do so, for not obtaining from Judge *Armour* within these three days, or, at all events, at any time before the 27th of October, the day on which the case was to be heard, an order extending these three days, and for not having given notice at any time before the said 27th of October

of the said hearing on the said day, as also for having had the case set down for February only.

I would, under the circumstances, think it better to grant the respondent's motion asking us to report to the Speaker of the House of Commons the proceedings in the case, such as they appear in the case and as they have taken place before us. It may be that this report could not be acted upon by the Speaker, because it would not be in strict conformity with the statute. But nevertheless, I should think it the best thing to do under the circumstances. We have not to decide what should be done on this report, and we may later, if we hear this case, find ourselves obliged to make to the Speaker a report not much more in accordance with the statute (1).

GWYNNE, J., concurred with *The Chief Justice* and *Strong*, *Fournier* and *Henry*, J. J.

Motion refused without costs.

Solicitors for appellant: *Hodgins & Spragge.*

Solicitors for respondent: *Cameron & Appelbe.*