

October, but was not proceeded with. On the 16th December application was made by respondent to the court to have the petition declared abandoned on the ground that six months had elapsed after the petition had been presented without the trial having been commenced, as provided in s. 32, c. 9, R.S.C. This application was granted by the court, and the election petition was dismissed. On appeal to the Supreme Court of Canada it was held (FOURNIER and HENRY, JJ., dissenting), that there was no provision in the Dominion Controverted Elections Act authorizing an appeal from such an order or judgment (R.S.C. c. 9, s. 50), and therefore the present appeal should be quashed, with costs, for want of jurisdiction.

Appeal quashed with costs.

Ferguson, for appellant.

McIntyre, for respondent.

In the L'Assomption Election Appeal, where the judgment appealed from was the decision of the judge refusing to set aside the election petition, on the ground that the trial had not been proceeded with within six months since the date of its presentation, and there was a subsequent judgment of the court setting aside the election on the admitted acts of corruption by agents, it was also held that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Presfontaine, for appellant.

Bisaillon, for respondent.

In the L'Islet Election Appeal, the appeal was quashed for the same reason as that given in the Montmorency case.

BENDER v. CARRIERE *et al.*

Executory contract—Non-fulfilment of—Action for price—Temporary exception—Incidental demand—Damages—Cross appeal.

In March, 1883, B contracted with C *et al.* for the delivery of an engine, in accordance with the Herreshoff system, to be placed in the yacht "Ninie," then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August C *et al.* took out a *saisie conservatoire* of the yacht "Ninie," and claimed

\$2,199.37 for the work and materials furnished. B petitioned to annul the attachment, and pleaded that the amount was not yet due, as C *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favor of B, both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract, and report on the defects. A report was made by which it was declared that the contract of C *et al.* was not carried out, and that work and materials of the value of \$225 were still necessary to complete the contract.

On motion to homologate the expert's report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that Court held that as C *et al.* had not built an engine as covenanted by them, B's plea should be maintained, but as to the incidental demand, the Court held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench, that Court, taking into consideration the fact that the yacht "Ninie" had since the institution of the action been sold in another suit, at the instance of one of B's creditors, and purchased by C *et al.*, the proceeds being deposited in Court to be distributed amongst B's creditors, credited B with \$225 necessary to complete the engine, allowed \$750 damages on B's incidental demand, and gave judgment in favour of C *et al.* for the balance, viz., \$1215.00 with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada, and cross-appeal as to the amount allowed on incidental demand by the Court of Queen's Bench, it was

Held, reversing the judgment of the Court of Queen's Bench (SIR W. J. RITCHIE, C.J., and TASCHEREAU, J., dissenting), that as it was shown that at the time of the institution of C's action it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C *et al.* covenanted to build it, their action was premature.