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*Oct. 29, 30.
*Nov. 17.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE COUNTY OF STANSTEAD.

TIMOTHY BYRON RIDER.....APPELLANT;

AND

SHIPLEY W. SNOW (PETITIONER).....RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE BROOKS.

Election appeal—Preliminary objections—Status of petitioner—Onus probandi—Equal division of court—Previous decision—Effect of.

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election.

On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed.

Held, per Sir W. J. Ritchie C.J. and Taschereau and Patterson JJ., that the *onus probandi* was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.

Per Strong J. that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence, the appeal should be allowed without costs.

Fournier and Gwynne JJ. *contra*, were of opinion that the *onus probandi* was on the respondent. *The Megantic Election case* (8 Can. S. C. R. 169) discussed.

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case.

APPEAL from a decision of the Superior Court for Lower Canada, District of Saint Francis, dismissing the

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

preliminary objections which had been filed by the appellant to the respondent's petition contesting appellant's election.

The preliminary objections filed by the appellant against the petition were 19 in number, but the only objection relied on by the counsel for the appellant on the present appeal was, viz: "14. Because the said petitioner had no right to vote at said election."

The 15th objection was as follows: "Because the said petitioner was guilty of unlawful acts and corrupt practices at and during said election, and was in consequence disqualified and not entitled to present the petition in this matter."

On the day fixed the petitioner adduced no proof. Appellant having stated that he desired to make proof applied to have the case continued. Petitioner insisted that if appellant intended to adduce any proof in support of his charges of corrupt practices he must furnish particulars. The court ordered particulars to be furnished the same day, and continued the case until the second day after.

When the day to which the case had been continued arrived the appellant declared that he had no evidence, and the case was then heard on the preliminary objections without evidence being adduced by either party and the judge dismissed the preliminary objections with costs.

In the Supreme Court when the appeal was called the question arose whether the judgment pronounced by the court in *The Megantic Election case* (1) was binding upon the court, the court in that case being equally divided and the following authorities were referred to by counsel for appellant: *Hadfield's case* (2), *In re Hall* (3); and counsel for respondent relied

(1) 8 Can. S. C. R. 169. (2) L. R. 8 C. P. 306.
(3) 8 Ont. App. R. 135.

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on Black on Judgments (1), and *Beamish* v. *Beamish* (2).

Geoffrion Q. C. The petitioner's status having been objected to he was bound in *limine* to prove his quality or status as an elector.

The question thus raised as to the burden of proof is not a mere matter of practice or procedure, it involves an important principle of law. In this case there is a direct negation of an essential averment in the petition. In the absence of any legal presumption in favour of petitioner he must prove his qualification in *limine* before proceeding to deal with the merits of the petition.

In *The Megantic case* (3) there was an answer of the petitioner denying the truth of the matters set forth in the preliminary objections, and the court was equally divided and the judgment is not binding.

In *Duval* v. *Casgrain* (4) there were two different tribunals to deal with the petition, each having a separate and distinct jurisdiction with the danger of the one encroaching upon the rights or powers of the other, whereas now, under the law as it stands, one judge deals with the whole case.

The allegations of the petition are not supported by an affidavit, nor is there any *primâ facie* evidence whatever in support of the petition.

There can be no legal presumption in favour of petitioner in this connection, any more than there would be in favour of a person suing in his quality of executor or trustee, or a municipal elector asking for the annulment of a municipal election, when the quality or status of the party suing is put in issue.

It has been held in two recent cases in the province of Quebec, that when a defendant alleges want of

(1) Sec. 523.
(2) 9 H. L. Cas. 274.
(3) 8 Can. S.C.R. 169.
(4) 19 L. C. Jur. 16.

jurisdiction by *exception déclinatoire* the onus of proving that the court has jurisdiction is on the plaintiff; *McCready* v. *Préfontaine* (1); *Fraser*. v. *Gilroy* (2).

White Q.C. for respondent.

Upon reading the fourteenth and fifteenth objections together it is evident they can scarcely be treated as a distinct allegation that the petitioner was not a qualified voter of the county of Stanstead, or that his name was not upon the list of voters. They simply say that petitioner had no right to vote at said election because he was guilty of unlawful acts and corrupt practices at and during the said election, and was, in consequence, disqualified and not entitled to present the petition in this matter.

So interpreted the *onus probandi* was clearly upon the appellant.

But even if the fourteenth objection, taken by itself, could be taken as a denial of the petitioner's quality or status, the jurisprudence affecting the question of the *onus probandi* has been well settled in the province of Quebec; *Duval* v. *Casgrain* (3); the *Megantic Election case* (4).

In this latter case it was held that, "the court being equally divided the judgment of the court below stands confirmed without costs."

This judgment has been treated in the province of Quebec as settling the procedure to be adopted in this province.

Later, in 1887, the point was again brought to the attention of the Superior Court in the district of Saint Francis in the case of *Hutchison et al. Petitioners* v. *C. C. Colby*, respondent. In that case the respondent had by his preliminary objection specially denied that petitioners had the quality of voters at the time of the

(1) 18 Rev. Leg. 118.
(2) 19 Rev. Leg. 80.
(3) 19 L.C. Jur. 16.
(4) 8 Can S. C. R. 169.

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election, or that their names appeared upon the voter's lists. When that case was put down for trial the petitioners brought the revising barrister with his lists, in order to prove their status. The judgment of the Superior Court on the preliminary objections was rendered on 22nd December, 1887, and was in these terms: "The court having heard the parties on the "preliminary objections, doth dismiss the same with "costs, except costs of witnesses which were unneces- "sary."

The state of the jurisprudence therefore in the province of Quebec, especially in the district of Saint Francis at the time when the preliminary objections in the present case were filed, was as above recited. If the petitioner had brought any witnesses he would have been condemned to pay his own expenses, as the court had already declared that it was unnecessary for him to bring such witnesses.

Sir W. J. RITCHIE C.J.—I am prepared to uphold what I said in the *Megantic Election case* (1). I think the burthen of proof was on the petitioner and therefore this appeal should be allowed and the petition dismissed.

STRONG J.—The onus of proof was on the petitioner, but the court below having been justified in following the Quebec jurisprudence and the *Megantic case* (1) decided by this court on an equal division, the appeal should be allowed without costs.

FOURNIER J.—Les objections préliminaires en cette cause sont nombreuses, mais une seule a été sérieusement plaidée. Cette cause a été inscrite pour la preuve

(1) 8 Can. S. C. R. 169.

sur les objections préliminaires devant la cour du district de St. François. Les principales objections sont :—

14. Parce que le pétitionnaire n'avait pas droit de voter à la dite élection.

15. Parce que le dit pétitionnaire s'était rendu coupable, pendant la dite élection, d'actes illégaux et de menées corruptrices et était en conséquence disqualifié et n'avait aucun droit de présenter la pétition en cette cause.

Au jour fixé pour la preuve le pétitionnaire n'en produisit aucune. L'appelant désirant faire preuve demanda la remise de la cause à plus tard. Le pétitionnaire Snow demanda des particularités des actes de corruption qui lui était reprochés et la cour les ordonna. Lorsque le jour fixé fut arrivé, l'appelant déclara qu'il n'avait aucune preuve à faire,—les objections préliminaires furent alors plaidées sans aucune preuve de part ni d'autre.

L'appelant prétendit qu'ayant nié par sa 14e objection le droit de voter du pétitionnaire, c'était à celui-ci à en faire la preuve et qu'il était obligé de produire les listes électorales pour prouver sa qualification. Il aurait peut-être pu en être ainsi, si l'appelant s'était borné à la dénégation de la qualité de voteur contenue dans la 14e objection ; mais par la 15e il ne s'en tenait plus simplement à une dénégation, mais il fait au contraire une allégation spéciale que le pétitionnaire a perdu son droit de voter parce qu'il s'est rendu coupable d'actes illégaux et de menées corruptrices à la dite élection, et qu'en conséquence il est disqualifié et n'a aucun droit de présenter la dite pétition.

Sur laquelle des deux parties retombait le fardeau de la preuve dans le cas actuel ? Toute la question se réduit donc à savoir qui devait commencer.

Autrefois devant les comités d'élection la pratique était d'obliger le pétitionnaire à faire preuve prélimi-

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nairement de sa qualification avant de procéder sur le mérite de la pétition. Cet ordre de procédure a été changé par l'acte des élections contestées 49 Vic. ch. 9, sec. 12, donnant au membre siégeant la faculté de présenter par écrit des objections préliminaires qu'il a à faire valoir contre la pétition ou le pétitionnaire, ou contre toute procédure ultérieure. La cour doit entendre les parties sur telles objections et les décider d'une manière sommaire.

La perte de la qualification par la commission d'actes illégaux ou par des menées corruptrices est sans doute un sujet d'objection préliminaire très sérieux dont le membre siégeant pouvait se prévaloir. S'il ne l'eût fait, le pétitionnaire eut sans doute été obligé, en procédant au mérite, de faire preuve de sa qualification de voteur ; mais il n'eut pas été obligé de prouver qu'il a perdu sa qualification par des actes illégaux ou des menées corruptrices. Ces faits forment régulièrement la matière d'une exception que l'appelant était libre de prendre ou de ne pas prendre. D'accusé qu'il était, il a jugé à propos de se faire accusateur, il en avait le droit. En agissant de cette manière à la qualité du pétitionnaire il s'est soumis aux conséquences de la maxime *excipiendo reus fit actor*. Il a voulu changer l'ordre de la contestation en affirmant que pour des faits spéciaux le pétitionnaire avait perdu sa qualification de voteur et il doit en faire la preuve. Il ne s'agit pas ici, comme l'a prétendu le savant conseil de l'appelant, de faire la preuve plus ou moins difficile d'une négation, mais bien de faire preuve de faits tout à fait matériels, comme des actes de corruption électorale ou d'autres actes illégaux. Il n'y a à cela aucune impossibilité ni théorique ni pratique, ce n'est pas la preuve d'une négation qu'on lui demande, c'est la preuve de faits spéciaux qu'il a affirmés et allégués.

Cette question est déjà venue plusieurs fois devant

les tribunaux et semblait avoir été réglée par la jurisprudence. Les savantes dissertations faites par les honorables juges de la Cour de Revision, à Québec, dans la cause de *Duval* v. *Casgrain* (1) me paraissent avoir épuisé les arguments à faire sur cette question. Le jugement de la cour a été que l'*onus probandi* retombât sur la partie qui avait plaidé par objection préliminaire le défaut de qualité du pétitionnaire.

Dans la cause de l'élection de Mégantic, *Fréchette* v. *Goulet et al.* (2), la même question fut soulevée et décidée par l'hon. juge Plamondon dans le même sens que la Cour de Revision. Les parties n'ayant point fait de preuve les objections préliminaires furent renvoyées. Ce dernier jugement fut porté en appel devant cette cour; elle est rapportée au vol. 8 des rapports de la Cour Suprême, page 169. Les juges furent également partagés d'opinion et les décisions confirmées en conséquence.

Bien qu'il n'y ait pas une majorité dans cette cour, la jurisprudence établie par la Cour de Revision de Québec, confirmée par le jugement de cette cour, a été suivie jusqu'ici. S'il s'agissait de revenir sur une décision qui aurait violé un principe de droit, ce serait notre devoir de le faire; mais il ne s'agit ici que d'une règle de jurisprudence, tout à fait indifférente en elle-même, qui pourrait tout aussi bien adopter l'affirmative que la négative sur cette question de savoir à qui il incombait de faire la preuve. Le seul intérêt qu'ont les plaideurs dans ces règles de procédure, c'est qu'elles soient fixées, afin de ne pas être exposés aux inconvénients qui pourraient résulter de l'incertitude à cet égard. Je ne vois aucun inconvénient à maintenir cette jurisprudence, tandis que de son changement il peut en résulter beaucoup pour les nombreuses contestations qui sont actuellement pendantes devant les tribunaux.

(1) 19 L. C. Jur. 16.

(2) 8 Can. S. C. R. 169.

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En outre, elle est suivant moi plus conforme au statut et à la maxime *excipiendo reus fit actor*.

Je suis d'avis que le jugement devrait ordonner à l'appelant de faire preuve sur ses objections préliminaires.

TASCHEREAU J.—I adhere to the views I expressed in the *Megantic Election Case* (1), but as it is the first time the court is called upon to decide whether or not a previous decision upon an equal division of its members is binding as an authority, with the consent of my learned colleagues, I will add that we are of opinion that such a decision is not binding (2), and therefore the preliminary objection taken in this case should prevail, the appeal be allowed and the petition dismissed with costs. This is the judgment which, in my opinion, Mr. Justice Brooks should have given, and should be the judgment of this court.

GWYNNE J.—I retain the opinion expressed by me in the *Megantic Election Case* (1), wherein Frechette was appellant and Goulet respondent that for the reasons there given, and upon the authorities there cited, the question upon whom lay the onus of proof upon a preliminary objection to an election petition affirming that the petitioner had no right to vote in whatever way the question might be decided was one affecting merely a point purely of procedure which it was within the competence of the election court conclusively to determine, and that therefore it was not a matter upon which this court should entertain an appeal. The case of *Frechette* v. *Goulet* (1), proceeded upon

(1) 8 Can. S. C. R. 169.

(2) See on this question *Beamish* v. *Beamish*, 9 H. L. Cas. 274; *Attorney-General* v. *The Dean, &c. of Windsor*, 8 H. L. Cas. 369; and in *re Hall*, 8 Ont. App. R. 135; and *The Vera Cruz*, 9 P. D. 96.

the authority of the case of *Duval* v. *Casgrain* (1), in which case the Court of Review in the district of Quebec held, that in such a case the *onus probandi* lay upon the respondent, who had raised the preliminary objection by averring that the petitioner had no right to vote at the election against the return in which he was petitioning. The court which rendered that judgment was at the time the judgment was rendered the final court for deciding all questions arising upon preliminary objections to an election petition, and upon all questions of practice and procedure arising in the election court in which the petition was filed. When subsequently the same question was raised in this court from a like judgment rendered in the election court of the same district in *Frechette* v. *Goulet* (2) this court was equally divided, and the appeal against the judgment of the learned judge who had followed the practice as laid down by the Court of Review was dismissed without costs; the plain result of this dismissal was that this court declined to interfere with the judgment of the court below upon a question which was in truth only one of mere practice and procedure, and it is not surprising that thenceforth the election court, before which the present case was, should be of opinion, as it was, that this point of procedure was established in accordance with the judgment of the Court of Review in *Duval* v. *Casgrain* (1). That this court should now entertain an appeal from a judgment in a like case upon the same point which has followed the practice as so settled in *Duval* v. *Casgrain* (1), with the judgment in which case this court has in the case cited declined to interfere, seems to me, I must confess, scarcely seemly and not calculated to reflect credit upon the administration of justice.

But I am of opinion for the reason also given in

(1) 19 L. C. Jur. 16.

(2) 8 Can. S. C. R 169.

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Frechette v. *Goulet* (1) that the judgment of the courts below upon the point of procedure under consideration was quite correct. The affirmation in a preliminary objection to an election petition, that "the petitioner had no right to vote," is not a joinder in issue upon anything alleged in the election petition—the petition is not before the court upon such an objection—the objection is a substantive affirmation put forward by the respondent as a sufficient reason why he should not be required to answer to, or join issue upon, anything in the petition. The sole duty of the court is to entertain the objection as one first suggested and raised by the respondent in justification of his not joining issue upon anything alleged in the petition. The statute provides that if a respondent has any objection to the status of the petitioner, he must present it by a preliminary objection filed within a limited time after the service of the petition. The status of the petitioner could only be affected by showing that he was not on the voters' list in use at the election. Now such an objection, standing by itself in the simple terms that the petitioner had no right to vote, is in truth an affirmation of a conclusion of law without the averment of any fact from which the conclusion is drawn. A right to vote at an election is a legal title incident upon the mere fact that the person claiming the legal right or title is on the voters' list when prepared and revised as required by law. The law expressly enacts that all persons who are on the voters' list so revised have the absolute right to vote at the election for which the list is prepared; an averment, therefore, that a person had no right to vote at a particular election is nothing more than an argumentative averment that he is not on the voters' list, for if he be on the voters' list governing at the election at which

(1) 8 Can. S. C. R. 169.

he claims to have a right to vote, his right to vote at that election is conclusive in law; the affirmation therefore in a preliminary objection merely that the petitioner had no right to vote at the election, of the return at which he complains, is nothing else than the averment of a conclusion of law without any fact being stated from which the conclusion is drawn, the only fact, however, from which it could be drawn being, that he was not upon the voters' list and so was not qualified to be a petitioner, and whether he was or was not on the voters' list was as much within the power of the respondent as of the petitioner to prove; so that upon whomsoever the learned judge in the court below might determine the *onus probandi* in such a case to be, no mischief or prejudice whatsoever could be caused to either party, and that an appeal should be entertained and the election petition should be dismissed because the court, following the practice as laid down several years ago by the Court of Review with the judgment of which court this court in *Frechet'e* v. *Goulet* (1) declined to interfere, decided that the *onus probandi* lay upon the respondent, seems to me, I must confess, to be calculated to bring the administration of justice in these election cases into discredit as tending to frustrate rather than to promote the ends of justice.

But in the present case I am of opinion that the true construction of the matters pleaded by the respondent by way of preliminary objection in the 14th and 15th paragraphs of his objections is, that he avers that the petitioner had no right to vote because the said petitioner was guilty of unlawful acts and corrupt practices at and during the election, and was in consequence disqualified and not entitled to present the petition in this matter. This is the only fact alleged from which the conclusion of law that the petitioner had no right to

(1) 8 Can. S. C. R. 169.

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vote is drawn. This was the view taken by the learned judge in the court below. The learned counsel for the respondent in his argument before us wished to separate what appears to me to be but one objection into two; in my opinion they are inseparable, and this cannot be done. The paragraphs 14 and 15 are in truth, as it appears to me, inseparable and therefore, for the above reasons I am of opinion that the appeal should be dismissed with costs.

PATTERSON J.—I concur in the opinion that the onus was on the petitioner to prove his allegation that he had a right to vote at the election. He could not present the petition unless he had one of the two qualifications mentioned in the 5th section of the statute, and the form of the petition given in the rules follows an ordinary mode of pleading in requiring him to state the character in which he claims a right to call on the respondent to answer his charges. The shape in which the challenge of his claim is framed is of little consequence. If put in an affirmative form, alleging that he was not entitled to vote at the election, it is none the less a traverse of the allegation in the petition, like a plea that a plaintiff who sues as executor is not executor, putting him to the proof of the quality he asserts.

Instead of adducing such proof by production of the voters' lists, or in some other way, or asking for time to do so in case his reliance on some opinions which have been mentioned to us had led to his being unprepared at the moment, he took the risk of standing on his contention that it devolved upon the respondent to negative the alleged right. He could not therefore reasonably expect relief from this court, even if we could do more than give the judgment which the court below should have given by sustain-

ing the objection made to the petitioner and dismissing the petition.

The challenge of the quality of the petitioner is properly a preliminary objection. It is one of those specified in the statute. It has, however, been sometimes said that it may be incumbent on the petitioner to give evidence of his status at the trial of the petition. I do not so read the statute. I think the question must be decided on the preliminary objections. Why preliminary? Preliminary to what? Clearly, as I understand section 13, preliminary to the duty of the respondent to answer the petition. It must be settled that there is a good petition properly presented by a qualified person, and when that is done—in other words "within five days after the decision on the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same, if none are presented"—the respondent may file an answer to the petition, and if he does not file an answer the petition is all the same to be at issue. Section 5 shows what is here meant by the petition which, whether answered or not, is to be at issue. By that section a petition may be presented complaining of an undue return, an undue election, no return, a double return, or unlawful acts. Those are the matters to be answered after the preliminary matters are settled; the only matters which, in default of an answer, are *ipso facto* put in issue; and the only matters for investigation at the trial.

I am of opinion that we should allow the appeal and dismiss the petition.

Appeal allowed with costs and election petition dismissed with costs.

Solicitor for appellant: *J. S. Broderick.*

Solicitor for respondent: *William White.*