THE DOMINION CONTROVERTED ELECTIONS ACT, 1874.

1882
*Nov. 14.
1883
*Jan. 12.

CONTROVERTED ELECTION OF THE COUNTY OF MEGANTIC, PROVINCE OF QUEBEC.

LOUIS ISRAEL FRÉCHETTE.....APPELLANT;

AND.

J. F. GOULET, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT PROVINCE OF QUEBEC.

Election petition—Preliminary objections—Onus probandi.

The election petition in this case complained of the return of the respondent as member elect for the County of *Megantic*, (*P Q.*,) for the House of Commons. The petition was met by preliminary ob-

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

1882

MEGANTIC ELECTION CASE.

jections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, &c. A day having been fixed for the hearing of these preliminary objections, no evidence was given upon them, and they were dismissed by *Plamondon*, J., who held, following the practice adopted by the Superior Court of *Quebec*, sitting as an Election Court in the *L'Islet* case, *Duval* v. *Casgrain* (1), that the *onus probandi* was on the respondent to support such objections.

On appeal to the Supreme Court of *Canada*, *Fournier*, *Henry* and *Gwynne*, JJ., were of opinion that the *onus probandi* was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner.

Contra, *Ritchie*, C. J., and *Strong* and *Taschereau*, JJ.

The Court being equally divided, the judgment of the Court below stood affirmed without costs.

APPEAL from a judgment of the Election Court of the province of *Quebec* dismissing the preliminary objections filed by the present appellant to the election petition of the respondents.

In this case a petition was presented by the present respondents complaining of an undue election and return for the county of *Megantic* at the last general election for the House of Commons. The petition was met by preliminary objections, the first of which was that the petitioners were not electors, nor qualified to vote at the election in question A day having been fixed for the trial and hearing of these preliminary objections, no evidence was given upon them either by respondent or petitioners, and the court dismissed them.

The principal question which arose on this appeal was, on whom was the *onus probandi* of the facts set up by the preliminary objections?

Mr. *Crepeau*, Q.C., and Mr. *Gormully*, for appellant.

Mr. *Irvine*, Q.C., for respondents.

The authorities relied on by counsel are referred to in the judgments hereinafter given.

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

RITCHIE, C.J. :—

This is an appeal from the decision of Mr. Justice *Plamondon*, dismissing the preliminary objections of the appellant to the petition of the respondents.

The main objection on which the appeal turns is :

" Because at the time of the election mentioned in the said petition, the said petitioners were not, and have not since been, electors according to the legal interpretation of the word, duly qualified to vote at the said election held in the month of June last."

On the 25th August the petitioners filed a notice to the respondent to have a day fixed for evidence and hearing on the merits of the preliminary objections ; and, on the judge's order, it was continued to the 31st August. The record states that on that day " the court asks the defendant's attorney if he is ready to proceed with his *enquête* upon preliminary objections, the defendant's attorney being requested so to do, does not proceed. The parties are heard on preliminary objections and cause taken *en délibéré*," and the court adjourned until the 4th September, on which day judgment was rendered on these preliminary objections, as follows :

Les objections préliminaires produits par le défendeur à l'encontre de la pétition d'élection en cette cause sont au nombre de quinze. Les objections première, deuxième, quatrième, cinquième et treizième s'appuient sur l'affirmation de faits dont la preuve incombait au défendeur excipant.

Il n'a pas fait d'enquête au sujet de ces faits. La cour ne peut donc s'en occuper.

This was upon the ground that the burden of proof on the issues raised was upon the defendant and not on the petitioners. The question on this appeal is, therefore, on whom the burden rests ?

The petitioners make the first assertion, an assertion essential to their case,—

That your petitioners were duly qualified electors at said election

1883

MEGANTIC ELECTION CASE.

Ritchie, C.J.

and had a right to vote thereat, and did vote thereat, and your petitioners are now duly qualified electors of said electoral district.

To this respondent pleads by way of "*objections preliminaires*" a denial of petitioners' assertion. Surely here is a perfect issue on a substantial and most material allegation, and unless substantiated, the petition, on which the petitioners' case rests, must fail, and therefore, it is no question of practice at all, nor matter of discretion as to who shall begin, as at *nisi prius*, nor is it a material question whether the party is benefited or injured by being required to commence, and all cases in reference thereto have, in my opinion, no bearing whatever on this case; it is a case of failure of proof on the part of the petitioners, and without which proof they cannot recover. Whenever a party sues in a representative character, such as executors, administrators, trustees, and the right to do so is disputed and put in issue, the party averring the right is always bound to establish it; in other words, the burden of proof is on him, because, if no proof is offered, he has failed to establish his right to sue, and again the affirmative is with him, and the evidence of his right to sue is within his own knowledge and is part of his case, which, when challenged, he must maintain. The question of a petitioner's status seems to me to be peculiarly a preliminary objection, which it is in the interest of all parties to have disposed of before costs are incurred on the issues on the merits, and indeed, where the status of the petitioner is put in issue, this must necessarily be first determined, because, if the petitioner has not the necessary qualification to enable him to petition, there can be no trial on the merits at all, because the ineligibility or disqualification of the petitioner being shewn, no further proceedings thereon should be had. That this is a preliminary objection contemplated by the statute, there

can be no doubt, because the statute expressly provides that when an objection is taken to the status of a petitioner, that is a preliminary objection, and then provides that these preliminary objections shall be tried within certain specified times under another provision.

In my opinion, when the statute provided that preliminary objections should be tried in the first instance, it did not in any way, directly or indirectly, expressly or by implication, intend to relieve the petitioner from the burthen of showing, when he complained of the election return, that he was a person duly qualified by law to do so, if this was disputed. There has then been no hearing of the objections, the Court, acting on the assumption that the burthen of proof was on the defendant, called on him to proceed to proof; it being my opinion, that the burthen of proof was on the petitioners, the judge should have so ruled, and should have called on them to proceed with their *enquête* and not on the respondent and if they then fail to do so, the judge should have sustained the objection and dismissed the petition. The course, however, the judge pursued was quite excusable, being in accordance with the case of *Duval* v. *Casgrain* (1), by which he considered himself bound. There was therefore a mis-trial, and we ought now to give the judgment the court below should have given, and declare that it is for the petitioner in the first instance to sustain his allegation of being an elector, and not on the defendant in the first instance to offer evidence to disprove his being so. I think the judgment of this court should be that the appeal should be allowed, but as the learned judge was guided by a procedure previously pursued in the province of *Quebec*, I should be disposed to remit the case back to the Superior Court, to call upon the party to proceed to his proof, and not to impose any

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

1883

MEGANTIC ELECTION CASE.

Ritchie, C.J.

costs in the case. I think the practice which is pursued in the province of *Quebec* should not affect us in this case, because the Dominion Election Act is applicable to all the provinces, and there should be uniformity upon a decision of this kind.

STRONG, J.:—

I concur with the Chief Justice in the view taken by him.

FOURNIER, J.:—

Je suis en faveur de renvoyer l'appel parceque cette cause doit être décidée par la cause de *Duval* v. *Casgrain* (1). Dans cette cause on a décidé que puisque le défendeur voulait changer l'ordre de l'issue et de la contestation, en produisant une objection préliminaire à la qualité du pétitionnaire, c'était au défendeur, qui par ses objections préliminaires affirmait la déqualification du pétitionnaire d'en faire la preuve.

Les raisons données en faveur de cette pratique par l'honorable juge qui a rendu jugement dans la cause de *Duval* v. *Casgrain* justifient le jugement dont est appel.

Je suis en conséquence d'opinion que le jugement de l'honorable juge *Plamondon* doit être confirmé.

HENRY, J.:—

The question for our decision is as to the correctness of the ruling of the learned judge before whom the petition in this case came for trial. The preliminary objections having been filed and having been denied, an issue was raised, and the one consideration—the only one indeed—is as to who should prove that issue. In the ordinary case of trials, he who alleges, even negatively, an affirmative matter, has thrown upon him by

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

the allegation the necessity of proving it. This is one of the first principles of pleading, and, although the matter may be stated negatively, still it is he who raises the issue, even in a negative form, that is required to prove it. In this case the petitioners, no doubt on the trial of the petition, would have been required to show their status and give evidence of it. This is an allegation contained in the petition, and, as soon as it is denied, the issue was thrown upon the petitioners to prove their position, viz.: "That your petitioners were duly qualified electors at the election, and had the right to vote thereat, and did vote thereat, and your petitioners are duly qualified electors of the said electoral district." When issue is taken on these allegations, the parties are no doubt required to prove them. It becomes necessary, however, to consider what the object of preliminary objections is, and the course of procedure which has been followed in regard to them. The object is clearly, in taking an objection, either that the petitioners are not qualified, or that it was too late, or any other objection to ascertain and show whether the parties are correctly before the court. This is no doubt a matter for a preliminary objection. The question is who is to prove the position? Is it the party who takes it in the first place as a preliminary objection? The respondent says: "I undertake to allege;" and, in my opinion, if he alleges, the onus of proving the allegation is upon him for the purpose of determining that question as a preliminary question. That is the beginning. That is the first allegation, and we must keep it separate altogether from the petition, because that same issue is raised on the petition, and, if the objection were not taken as a preliminary one, it would come up to be tried in its ordinary way. The respondent, however, says virtually to the court: "I allege and will be prepared to show that these parties are not eligible as peti-

1883

MEGANTIC ELECTION CASE.

Henry, J.

tioners." That is the undertaking, and the object of filing a preliminary objection is for the purpose of enabling the respondent to show that the petitioners had no right to file the petition against him. That being the case, we have the right to look at the pleading which creates that issue. It is as follows: "That the said preliminary objections and each of them is false and unfounded in fact and in law, and expressly denies the same." There is the issue. Who raised it? Who made the first allegation? The respondent. It has been decided by the whole court in *Montreal* that the onus of proof is on the party who alleges facts which, if proved, would go to prevent the petition from being heard. The learned judge here followed that decision of the *Quebec* court. I take it, that is a matter of procedure, and I think the authorities go to show very strongly the position that, in a matter of procedure, there ought to be no appeal at all. It is discouraged, and the practice is said to be now almost done away with in *England*. It is true that that procedure has been adopted only in *Quebec*, and I am not at all sure it is not the correct one to be applied to all the provinces and all petitions. I think it tends to prevent those preliminary objections being taken unless the party is prepared to offer some proof. What would be the use of a party filing a preliminary objection unless he is prepared to prove it? The respondent, holding the seat, is induced to file preliminary objections for the delay consequent upon them, and until very recently it was a stay of the whole proceedings. By recent legislation, the trial of the election petition nevertheless may go on. If the party himself does not give the evidence which is necessary to stay the proceedings, the trial is going on, and I suppose that now the petition is before the judge for the very purpose of taking this evidence under the original petition, showing clearly

that it was the duty of the respondent, if he desired a decision that would avoid the petition, to allege and give evidence of what he did allege for the purpose of avoiding it.

Under these circumstances, I think the practice in the province of *Quebec* is the correct one, and will tend to prevent these preliminary objections being taken unless the party is prepared to give some evidence of them, because there is very little use in making preliminary objections on allegations which the respondent cannot sustain. The fact of these parties not being electors or having a right to vote, he could have proved as easily as the other parties. All he had to do was to produce the regular lists and show that they were not on them. It is alleged that, if they were on the lists, they were so fraudulently. Surely the party who alleges fraud is bound to prove it? He says: "You fraudulently got yourself put on that list." It is the duty of the party who alleges fraud, to prove it. I think that the learned judge was right, that it is the true principle, that it is for the furtherance of the ends of justice that that should be the rule, and I therefore think the appeal should be dismissed.

TASCHEREAU, J.:—

This petition contains the usual allegation that the petitioners were duly qualified electors and had a right to vote, and did vote at the election in question. To this allegation, the respondent in the court below, (present appellant,) pleaded as a preliminary objection, that the petitioners were not duly qualified electors at the said election, as they alleged. Is this not in substance a plea of general issue to this part of the petition? The petitioners say "we were duly qualified electors;" the respondent says "you were not duly qualified electors." Why, in such a case, the burden of

1883

MEGANTIC ELECTION CASE.

Taschereau, J.

proof is not to be on the petitioners, I cannot understand. There is no legal presumption in their favor, there is no *primâ facie* evidence in support of their allegation that I can see, the voters' list is not produced, and moreover the facts to be proved lie peculiarly within their own knowledge. It is not denied that in *England*, and with us formerly before the parliamentary committees, the *onus probandi* of these facts lies and did lie on the petitioners. Why it should lie with us on the respondent, because under our statute he pleads the petitioners want of qualification by preliminary objections, I cannot see. As held by Mr. Justice *Johnson*, in the *Montreal Centre* case (1), if the respondent does not contest the petitioner's right to petition by preliminary objection, the petition is at issue, and the respondent must be held to have admitted the petitioner's *locus standi*. Our statute allows him to deny the petitioner's *locus standi* by preliminary objection, and to have the issue on this decided before the trial; but the burden of proof still lies on the petitioner upon that issue, and this is not as a mere matter of procedure, but as a fundamental principle of law. I am of opinion to allow the appeal and to render the judgment that the court below ought to have rendered, following the rule *actore non probante, reus absolvitus*, and that is to say, dismiss the petition.

GWYNNE, J.:—

This is an appeal from a decision of Mr. Justice *Plamondon* in an election case. Certain preliminary objections had been filed in the matter of the contested election for the county of *Megantic*, wherein the above respondents were petitioners, and the above appellant was respondent in an election court in the district of *Arthabaska* and province of *Quebec*. It is only with

(1) 18 L. C. Jur. 323.

the first three objections that it is at all necessary for us to deal.

In and by his preliminary objections the above appellant insisted, by way of opposition to the status of the petitioners, that he ought not to be called upon to answer the substance and merits of the election petition of the petitioners, but that on the contrary, the said election petition should be dismissed with costs for the following reasons:

"1st. Because at the time of the election mentioned in the said petition, the said petitioners were not, and have not since been, electors according to the legal interpretation of the word duly qualified to vote at the said election held in the month of June last.

"2nd. Because neither of them is a subject of Her Majesty of full age possessing the qualities and qualifications of proprietor, tenant or occupant as required by law, and that if the names of the said petitioners or any of them are entered on the voter's lists of their respective municipalities such entry was made illegally by fraud and collusion on their part.

"3rd. Because there exists no legal voters lists duly homologated in the township where petitioner (*McCurdy*) resides, nor in the parish of *Ste Julie de Somerset*, where the other two petitioners reside."

The petitioners filed their answer to these preliminary objections and say that the same are and each and every of them is false and unfounded in fact and in law, and the petitioners expressly deny the same and the sufficiency thereof, wherefore the said petitioners pray for the dismissal of the said preliminary objections with costs.

The 31st day of August, 1882, having been appointed for taking evidence upon the matter alleged in the preliminary objections, a court was held for that purpose, at which counsel for the sitting member (the above

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

appellant) and the petitioners attended, and the counsel for the above appellant did not, nor did the appellant himself offer any evidence in support of any of the allegations contained in his preliminary objections, and the learned judge, having been of opinion that the burthen of proving these allegations lay upon the appellant, dismissed the preliminary objections for the want of any evidence to support them. It is from his order dismissing the objections that this appeal is taken, and in my opinion the appeal should be dismissed, whether the learned judge was right or wrong in the opinion which he formed as to the party upon whom the burthen of proof lay.

The enquiry—upon whom does the burthen of proof rest when an issue between two parties is before a court—is practically the same as the inquiry—which party has the privilege, or incurs the duty, of beginning? The general rule upon the subject is that the issue must be proved by the party who states an affirmative, that is to say, he must begin, and not the party who states the negative; but a legal affirmative is not necessarily a grammatical affirmative, nor a legal negative a grammatical negative; on the contrary, a legal affirmative frequently assumes the shape of a grammatical negative, and a legal negative that of a grammatical affirmative, consequently a rule subsidiary to the above has been established, namely, that the issue must be proved by the party who states the affirmative in substance, that is the legal affirmative, not merely the affirmative; in form or the grammatical affirmative; that is to say, he incurs the duty to begin, but this duty to begin carrying with it the burthen of proving the issue, and which is expressed in the maxim *probandi necessitas illi incumbit qui agit*, raises only a mere question of practice and not of law.

In *Mills* v *Barber* (1), to an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded that the bill of exchange was given without consideration and for the accommodation of the drawer and endorsed to the plaintiff without value, to which the plaintiff replied that it was endorsed to him for valuable consideration. At the trial a question arose whether the plaintiff was bound to prove consideration for the bill which he had by his replication affirmed he had given, or whether the defendant, who had in his plea affirmed the grammatical negative that the plaintiff took the bill without consideration, was not bound to show the want of consideration. *Alderson*, B., who tried the cause, held that the *onus probandi* lay on the defendant who had affirmed the grammatical negative, and the defendant, not being prepared to prove the want of consideration, the verdict passed for the plaintiff. The correctness of this ruling having been questioned upon a motion for a new trial, Lord *Abinger*, delivering the judgment of the court after a very full argument of the case, said: "It is rather a question of practice than of law," and after referring to cases in which a different practice had prevailed, he stated that after consultation with the judges of all the courts the general opinion which prevailed among them was that in such a case the *onus probandi* lay upon the defendant, and thenceforth the practice has been to require the defendant to prove the want of consideration in such a case. That it is a mere rule of practice further appears from the fact that the judges of all the courts have assumed to vary the practice in certain cases, as in libel, slander, criminal conversation, and indeed in all cases where the plaintiff goes for substantial unascertained damages, by giving to the plaintiff the right to begin, although the sole issue upon the record be

(1) 1 M. & W. 430.

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

upon an affirmative plea the burthen of proving which the defendant has assumed. In *Mercer* v. *Whall* (1), where the circumstances under which the practice became established are stated, the matter is spoken of as merely a rule of practice, and where a wrong party is made to begin by the erroneous ruling of a judge at *nisi prius*, the only mode of rectifying that error is by a rule for a new trial, which in practice is never granted, unless it be made manifestly to appear that substantial injustice has resulted from that ruling (2). An appeal in such a case has never been heard of. Between cases arising before committees of the House of Commons and the present, there is this difference, that upon petitions before the House the whole case is at issue upon the averments in the petition, whereas in the case of preliminary objections, under our statute, there is no issue whatever upon the averments in the petition, but on the contrary the respondent below, the now appellant, propounds those objections which he affirms and relies upon as reasons why he should not be compelled to make any answer to, or to come to any issue upon the matters alleged in the petition. However, the contradictory decisions of Election Committees upon the point are, I think, in some measure capable of explanation upon the ground that these tribunals, also considered the point one of practice merely. In the *North Cheshire* case to which we have been referred (3), the committee was of opinion that, the petitioners' qualification and status as petitioners being disputed, they should prove the allegation of qualification averred in their petition before proceeding further. In the *Harwich* case (4) counsel for the sitting member objected to the qualification and status of the petitioner and pro-

(1) 5 Q. B. 462.

(2) *Edwards* v. *Matthews*, 11 Jur. 398; and *Bramford* v. *Freeman*, 5 Ex. 734.

(3) 1 P. R. & D. 215.

(4) 1 P. R. & D. 73.

posed to offer evidence in support of his objection, but the committee in that case without calling on the other side resolved that the petitioner, having claimed to vote, and having actually voted at the election, the committee are of opinion they must proceed with the case. From the *Dundalk* case (1) it appears to me to be clear that the committee in that case thought that the burthen of proving that a person averred not to be a natural born British subject lay upon the person making the averment; for the resolution of the committee was, that it has not been proved that the sitting member is disqualified as an alien.

In *Duval* v. *Casgrain* (2) the Court of Review, sitting as an Election Court for the district of *Quebec*, in which district the county of *Megantic* is situate, held, that upon a preliminary objection calling in question the status and qualification of a petitioner, the burthen of proof lay upon the party who, by his preliminary objection, had affirmed the disqualification. Without at present enquiring whether that was a right or a wrong decision, it seems to me to be sufficient to say that it was the decision of an election court, which was at the time the ultimate court for deciding all questions arising upon election cases within the district in which the county of *Megantic* is situate, and of a court competent to establish its own practice upon the point, and the learned judge, before whom the question in the present case arose, having that case before him, cannot surely, with any degree of propriety, be said to have erred in following the decision of a full court of which he is only a single member. *Stare decisis* is a good rule in all cases, but especially in points of practice involving no substance or merit whatever. To countenance an appeal in such a case as the present—involving no question of law, of substance or of merit,

(1) 1 P. R. & D. 89. (2) 19 L. C. Jur. 16.

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

and where no injury whatever is or can be suggested as having been done to the appellant, would be, as it appears to me, not only unprecedented, but calculated to encourage the setting up of frivolous and vexatious objections made for the purpose of defeating or retarding the investigation of a subject in which not the mere interests of a private suitor but those of the public are involved, of frustrating the ends of justice and harrassing petitioners with unnecessary costs.

The respondent below (the now appellant) had the same facility of access as the petitioners had to the voter's list. That was a public document no more in the possession of the one party than of the other, but equally accessible to both, and if the above appellant did not choose to produce it or to offer any evidence of the assertions propounded by him in his preliminary objections, the natural and reasonable conclusion appears to be that it would not have supported his case, for if produced, it must have afforded *primâ facie* evidence of the truth or falsity of his assertions. The appeal which is given to this court from a judgment upon preliminary objections is, as it appears to me, only from a decision affecting the substance and merit of a case, either on some point of law or upon some fact established in evidence, and not upon such a mere point of practice as the question upon whom rests the duty to begin to offer evidence of the matter in issue—a point which is not the subject of appeal when arising in any other court, and which, however erroneous the decision given upon it by the judge trying the issue may be, does not constitute foundation even for a rule for a new trial, unless it be manifestly made to appear that substantial injustice has been the result.

But I am of opinion that the decision appealed from in this case, as well as that of the Court of Review in *Duval* v. *Casgrain*, is in every respect correct. I have

already noticed the fact that these preliminary objections to the status of petitioners are not to be regarded as taking issue upon any averment in the petition. They are not negations of any averments in the petition. They are on the contrary reasons first propounded by the sitting member as reasons why he should not be called upon to give any answer to, or to come to any issue upon, anything contained in the petition; the averments in the preliminary objections are in fact legal affirmations, however negative in form they may be; and in truth, as appears by the answer to them which raises the only issue that is raised upon them, such answer is not even affirmative in form. The answer is, that the preliminary objections are and each of them is untrue and without foundation, and the petitioners expressly deny the same, treating the objections as affirming the legal or substantial affirmative, to which (in order to risk an issue) the petitioners supply the negative.

The contents of the election petition do not, as it appears to me, constitute any part of the issue which is raised by the preliminary objections and the answer thereto. The issue is made up of the preliminary objections affirming the disqualification of the persons who are petitioners in the election petition, and their answer denying the truth of the matters affirmed in the preliminary objections. An election court or judge trying that issue has not, as it seems to me, any occasion, or indeed right, to refer to the election petition to see what averments are made in it. The issue is raised upon the legal affirmative of a grammatical negative contained in the preliminary objections and the denial of such legal affirmative contained in the answer filed to the preliminary objections. Now, in *Amos* v. *Hughes* (1) the plaintiff, in his declaration,

(1) 1 Mood. & Rob. 464.

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

alleged as a breach of contract that the defendant did not emboss certain calico in a workmanlike manner, the defendant pleaded that he did emboss the calico in a workmanlike manner. It was held that the *onus probandi* lay on the plaintiff; his was the legal affirmative although the defendant's was the grammatical one.

Mills v. *Barber*, to which I have already alluded, was a similar case. So in *Soward* v. *Leggatt* (1), in an action for breach of covenant to repair, the declaration alleged that the premises were not kept in repair, to which the defendant pleaded that they were kept in repair, it was held that the *onus probandi* lay on the plaintiff as the asserter of the legal affirmative. So in *Ashby* v. *Bates* (2), in an action by executors on a life policy, the plaintiffs in their declaration averred that the assured was not afflicted with rupture or any other disease at the time of the assurance, to this the defendant pleaded that the assured was suffering from rupture at the time and had concealed the fact. The court held that the declaration involved the substantial or legal affirmative, although it was the plea which was affirmative in form, and the *onus probandi* was held to lie upon the plaintiffs, whose duty therefore it was to begin. *Rolfe*, B., in this case, said that he considered it a sort of scandal to the administration of justice that this question should ever be made *per se* a ground for a new trial; he says that he should have thought it much better if the courts had laid down some general rule that the discretion of the judge trying a case should, upon such a point, be conclusive. He therefore, it is plain, considered the question one of practice merely, but the observations of *Alderson*, B., are quite appropriate to the present case. He says (3):

> The first assertion [upon which the issue arose,] was made by

(1) 7 C. & P. 613.

(2) 15 M. & W. 589.

(3) P. 595.

the plaintiffs. The defendant has contradicted what the plaintiffs affirmed, and the real issue is whether what they affirmed is true—if true it is for the plaintiffs to prove its truth.

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

Now in the case of these preliminary objections in election cases, there being, as I have shown, no issue upon the averments in the petition, but the record of the issue consisting of the averments propounded in the preliminary objections, and of the answer filed thereto, contradicting what was so affirmed, it is plain that the real issue is whether what is affirmed in those objections be true, and the *onus probandi* therefore lies upon the sitting member, the affirmant therein. He plainly is the person who, if no evidence at all were offered, must fail, as having failed to support what he had affirmed, and which the petitioners had only contradicted, so putting him upon proof of what he had asserted. The propriety of this conclusion appears to me to be established beyond question when we consider the formalities prescribed by statute to be observed in the construction of the voters list and its object.

By the 40th sec. of Dominion statute, 37 *Vic.*, ch. 9, it is enacted that, subject to certain exceptions:

All persons qualified to vote at the election of representatives in the House of Assembly of the several provinces composing the Dominion of *Canada*, and no others shall, be entitled to vote at the election of members of the House of Commons of *Canada* for the several electoral districts comprised within such provinces respectively: and all lists of voters made and prepared, and which would according to the laws in force in the said several provinces be used if the election were that of a representative to the House of Assembly of the Province in which the election is held, where such lists are required to be made, shall be the lists of voters which shall be used at the election of members of the House of Commons to be held under the provi ions of this Act.

Now by "*Quebec* Election Act," 38 *Vic.*, ch. 7, sec. 7, it is enacted that no person shall be entitled to vote at the election of a member of the Legislative Assembly of that province unless at the time of

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

voting he be an elector entered as owner, tenant or occupant upon the list of electors in force. Then the most stringent provisions are enacted so as to ensure perfect accuracy in the preparation of the lists.

By section 8 it is enacted, that no person shall be entered upon the list unless he be of the male sex, of full age, and a subject of Her Majesty by birth or naturalization, and not otherwise legally incapacitated, and actually and in good faith owner or occupant of real estate of the estimated value on the valuation roll in force, at the sum of at least $300 in any city municipality, and at $200 in real value, or $20 in annual value, in any other municipality, or be a tenant in good faith, paying an annual rent for real estate of at least $30 in any city municipality, or of at least $20 in any other municipality.

Sec. 11 defines the persons who are disqualified from being on the list.

Sec. 12 to 26 inclusive provide most stringent regulalations for the preparation of the list, among these, by section 19, it is enacted that the secretary-treasurer, whose duty it is to prepare the list, shall certify in duplicate the correctness of the list (when prepared) by his oath to the effect that to the best of his knowledge and belief the list is correct, and that nothing has been inserted therein or omitted therefrom unduly or by fraud, and by sec. 20 it is enacted that one of the duplicates of the list so attested shall be kept in the office of the secretary treasurer at the disposal of and for the information of all persons interested, of which, by sec. 21, public notice shall be given and published in the same manner as notices for municipal purposes in the municipality for which the list has been prepared. Sec. 27 to 40, inclusive, provide for the examination and putting into force of the list. The examination is, by sec. 27, to be made by the council of

the municipality even in the absence of any complaint. By secs. 28 and 29 any person who deems himself aggrieved by being wrongly inserted upon or omitted from the list may complain, or any person on the list may complain of the insertion upon the list of any unqualified person or the omission therefrom of any qualified person, and after investigation of the list and of the complaints relating to it, the council of the municipality may confirm or correct each duplicate of the list; and by section 35 it is enacted that the list shall come into force at the expiration of 30 days following the notice given in virtue of sec. 21, and shall remain in force until the month of March then next, and thereafter until a new list is made and put in force under the authority of the Act, so that when the first list should be made under the Act the municipality could never be without a correct list; and by sec. 37 it is enacted that it should be the duty of the secretary treasurer as as soon as the list should come into force to certify to its correctness and to the time when it came into force, by his certificate at the end of the list, in a form prescribed by the Act; and by the 38th section that one of the duplicates of the list should be kept of record in the archives of the municipality, and the other transmitted to the registrar of the registration division in which the municipality is situate, to be preserved by such officer and remain of record in his office (sec. 40.) Then by sec. 41, as amended by 43 and 44 *Vic.*, ch. 15, it was enacted that: any elector of the electoral division might appeal from any decision of the council confirming, correcting, or amending the list to the judge of the Superior Court of the district within fifteen days following such decision, by means of a petition in which should be briefly set forth the reasons of appeal, and by sec. 48 that the decision of the judge upon any such appeal should be final.

1883

MEGANTIC ELECTION CASE.

Gwynne, J.

Now, after all these formalities prescribed by statute for the preparation of the list by a public officer obliged to swear to its correctness have been complied with, and after the examination of the list by the council of the municipality, and the opportunity given to every elector to complain of the improper insertion upon, or omission from, the list of any person, and to appeal if dissatisfied with the decision of the council to the judge of the Superior Court, it is impossible to arrive at any other conclusion than that the list so prepared, when finally completed and filed of record in the offices appointed for that purpose, is *primâ facie* (if not conclusive) evidence of every thing contained in it; it affords therefore at least *primâ facie* evidence that every person inserted upon it as an elector is in every respect qualified, both as a subject of Her Majesty, and of full age, and having the necessary property qualification, and not otherwise disqualified, for none but such duly qualified persons are permitted to be inserted upon it, and its correctness is guaranteed by the oath of the public officer entrusted with the preparation of it. The maxim *omnia presumuntur rite esse acta* must apply, any other conclusion would make all the stringent regulations enacted by the statute to be observed in the preparation of the list as a useless, solemn farce, and a great waste of time, care, diligence, legal investigation and circumspection. The list, therefore, being *primâ facie* evidence of the due qualification as an elector of every person inserted upon it, the burthen of proving it to be incorrect, after its final completion and becoming matter of record (if it is then at all open to further investigation), must clearly rest upon the person alleging its inaccuracy, and insisting that a person inserted upon it as duly qualified is, for any reason, not qualified and was wrongly placed upon it.

If the allegation be that a petitioner is not qualified

by reason of his name not being on the list, that is clearly a legal affirmative, the burthen of proving which, upon the authority of all the cases, rests upon the party making the allegation, and as the evidence in such a case is the list itself, which is a public document and matter of record, and accessible to the sitting member who makes the allegation equally as to the petitioners who deny it, if the party making the allegation should decline or neglect to produce the only evidence capable of being produced in the given case, he is the party who must fail as neglecting or declining to produce evidence of an allegation made by himself. Here, however, the averment is not that the petitioners are not upon the list, but the averment is put hypothetically, that, if upon it, they are so by fraud, though no fraud is alleged or suggested, and if there had been any fraud alleged, the party alleging it was the party to prove it—of that there can be no doubt. I cannot, therefore, doubt the correctness of the judgment of the learned judge whose decision is appealed from, namely, that the *onus probandi* lay upon the sitting member who had filed the preliminary objections; indeed he might, in my judgment, have well gone further and pronounced the objections to be insufficiently pleaded as vague, uncertain, indefinite, devoid of all the essentials of good, and possessed of many of the vices of bad pleading; but it is not necessary in the view which I have taken to dwell upon this point.

The appeal in my judgment should be dismissed with costs.

Appeal dismissed without costs.

Solicitor for appellant: *Eugene Crepeau.*

Solicitors for respondents: *Irvine* and *Pemberton.*