CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BEAUHARNOIS.

JOSEPH GEDÉON HORACE BERGERON (RESPONDENT)..... } APPELLANT;

AND

PAUL DESPAROIS (PETITIONER).....RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE BELANGER.

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*Feb. 17, 18.
*Mar. 24.

Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy.

A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78, C.C.

Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence.

APPEAL from a decision of Mr. Justice Belanger dismissing preliminary objections to the petition against the return of the appellant at the election for the House of Commons held on June 23rd, 1896.

The objection filed was that the petition was not properly served, and on the hearing counsel for the

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

appellant was not allowed to cross-examine the bailiff as to the contents of the copy served without producing the document. The facts are fully set out in the judgment.

Foran Q.C. and *Ferguson* Q.C. for the appellant.

Choquet for the respondent.

THE CHIEF JUSTICE and SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Girouard.

GWYNNE J.—With great deference I must say that it appears to me to be much to be regretted that this court has by its judgment in *The Montmagny Case* (1), and in other cases, held that a question as to the regularity of the service of an election petition can be raised by a preliminary objection taken under the 12th section of the Controverted Elections Act, R.S.C. ch. 9. That Act in its fifth section, which is the section authorizing an election petition to be filed and prescribing the persons by whom it may be filed, has in it this enactment:

Pro ..ed always that nothing herein contained shall prevent the sitting ..ember from objecting under section twelve of this Act to *any fur .r proceedings on the petition by reason of* the ineligibility or disqualification of the petitioner or from proving under section 42 that the petitioner was not duly elected.

Then the twelfth section here referred to enacts that within five days after the service of the petition and the accompanying notice the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge *against the petition or the petitioner* or against any further proceedings thereon, and shall in such case, at the same time file a copy thereof for the petitioner, and the court or judge shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner.

Then by the 50th section an appeal is given to this court from the decision of the judge upon such preliminary objections.

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It has always appeared to me that to make such a point of mere practice and procedure a ground of preliminary objection under the 12th section, is to impute to the legislature an intent not warranted by the language and general purview of the Act. By so doing a totally different character is given to the irregularity, if there be irregularity, in the service of an election petition from what attaches to the like objection in the case of the service of a summons in an ordinary action. In the latter case if the objection is successful the only consequence is the setting aside of the service, the action still remains, while being entertained as a preliminary objection under the statute in the case of an election petition the consequence, as decided in *The Montmagny Case* (1), is the absolute dismissal of the petition and the utter impossibility of its being ever tried upon the merits. Now, the 11th section of the Act prescribes that the election petition shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, but the second section of the Act enacts that the several provincial courts in which election petitions may be filed, shall respectively have the same powers, jurisdiction and authority with reference to an election petition, and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction. It cannot, I think, admit of doubt that this enactment invests the provincial courts with complete jurisdiction to adjudicate upon objections calling in question the sufficiency and regularity of the service of an election petition by the mode of proceeding in use in the respective courts in the case of a like objection being taken in an ordinary action pending in such court, and to the same extent fully as in an ordinary suit, and as the judgment upon such a question

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in an ordinary action would not be appealable to this court I can see no reason whatever why such a point of practice in an election petition should be made appealable to this court as it has become by being filed by way of plea in the form of a preliminary objection to an election petition. In an ordinary action after a plea to the merits of the action no objection can be taken calling in question the regularity of the service of a summons, but in an election petition, although by the statute preliminary objections are only presentable after service of the election petition upon the respondent, still he is allowed to plead in writing, filed in court, such an objection, together with others which attack the substance of the petition and the status of the petitioner, and when the objections are brought down to a hearing he may abandon all objections of a substantial character and rest upon the one as to the regularity of the service, as was done in *The Montmagny Case* (1), and in the present. It is difficult, it appears to me, to support this difference in the treatment of a mere point of regularity or irregularity of the service of the document by which proceedings in court are instituted upon any sound principle. In the present case a point of practice which according to the procedure applicable to an ordinary action might have been decided in a week, has already by reason of the delay incident to the appeal given to this court taken seven months to decide. To me I must say it appears to be free from doubt that the legislature never contemplated such a result, and that what may be presented by way of preliminary objections under the Act are only matters of substance calling in question the sufficiency of the petition or the status of the petitioner which are matters of such a nature that being decided in favour of the respond-

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ent pleading them rightfully put an end to all further proceedings upon the petition.

However consistently with cases decided in this court we must treat this objection as a good ground of preliminary objection.

Upon the 6th of August, 1896, the respondent in the election petition, the now appellant, filed the objection now under consideration, together with others, and at the hearing of the objections rested upon the one now under consideration alone. The objection taken is in the form following:

> Fourth, that the said petition was never *regularly* served upon him, the defendant, as required by law.

Now a pleading in this form in any proceeding other than in an election petition and read according to the plain acceptation of the terms used, would be construed to be an admission of service of the petition, but calling in question the regularity of such service, and so construed the burthen of showing the irregularity relied on would be cast upon the party averring it. It is different, however, in an election petition in which case the petitioner is called upon to prove the service to have been regular. The law having been so decided the petitioner produced the return of the bailiff who served the petition which return appeared to be in the form in use in the courts of the province of Quebec in the case of an ordinary action; and the bailiff himself was called who testified that before service he had compared the copy he served on the now appellant with the original petition in the office of the prothonotary. It was objected that the bailiff did not say by whom the accuracy of the copy was certified, and questions put to him upon that point were objected to, the contention being that the defendant who had objected to the regularity of the service should first produce the paper served. Of this opinion was

the learned judge, and as the defendant did not produce that paper he dismissed the preliminary objections. In taking this course the learned judge, in my opinion, acted rightly beyond all question. The evidence of the bailiff was clearly *primâ facie* evidence of the sufficiency of the service, and thereupon it became the duty of the defendant who objected to the service upon the ground of irregularity to show the irregularity upon which he relied, and if that consisted in the absence of a proper certificate to the copy served he could only succeed by producing the copy served.

The appeal must, therefore, be dismissed with costs.

GIROUARD J.—This appeal, as limited at the hearing before us, raises only a question of service of an election petition and other usual papers attached to the same under "The Dominion Controverted Elections Act."

Section 11 of that statute says:

An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed.

There was no special order as to service in this case, and therefore we must follow the rules of practice in the province of Quebec for the service of a writ of summons in civil matters.

The election petition and other papers were served by a bailiff of the Superior Court for Lower Canada:

En laissant de vraies copies duement certifiées des documents originaux ci-dessus mentionnés, lesquels sont produits en cour, en laissant les dites pièces à lui-même, le dit Joseph Gédéon Horace Bergeron, dans la ville de Beauharnois susdite, en parlant à lui-même en personne dans la dite ville.

The appellant complains that this service was not sufficient as no duly certified copies were ever served upon him.

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By article 79 of the Code of Procedure the truth of a bailiff's return can only be contested by improbation, or *inscription en faux*, unless the court orders otherwise; but by article 159 the return of a bailiff, as regards simple service of summons or of notice, may be contested on motion, and without an *inscription en faux*, unless the court otherwise orders. This motion was duly presented to the court by the appellant, and I am willing to admit "granted," although the word *accordé* on the indorsation of it is not certified either by the judge or the prothonotary of the court, and there is nothing in the transcript of the proceedings to show that any order was passed upon the motion.

The appellant was allowed to proceed with the adduction of oral evidence. At the outset, when the bailiff was under examination, he was met by an objection made by the respondent, the nature of which will appear by the following extract from the minutes of the evidence:

Q. La copie de la pétition d'élection avec l'affidavit y annexé, que vous dites dans votre rapport avoir laissée au défendeur le premier d'août dernier, était-elle dûment certifiée comme vraie copie?

Objecté comme illégale en autant que la question tend à prouver le contenu d'un document et le certificat d'icelui par témoin et que cette preuve ne peut être faite sans la production des copies.

Objection maintenue.

Le défendeur excipe respectueusement de la décision de la Cour.

The question was repeated in several forms with the same objection and the same ruling of the trial judge.

In his final judgment on the preliminary objections, the learned judge (Bélanger J.), held that the return of the bailiff was sufficient.

It is contended by the appellant that the service was insufficient, and that the court having refused the question there was no evidence of service.

Article 56 of the Code of procedure says:

Service is affected by leaving with the defendant a copy of the writ of summons, and of the declaration if there is one. The copy must be certified either by the prothonotary or by the attorney for the plaintiff, or by the sheriff, when the service is to be made by him.

It is contended by the appellant that the bailiff had no authority to certify that the copies were "duly certified," and that he should have shown in his return by whom they were actually certified, either by the prothonotary, or by the attorney for the petitioner. However, article 78, which specifies what the return by a bailiff must state, merely requires that he should certify that he has served "a copy." Therefore, the respondent argues that the words "duly certified" were superfluous, and that the bailiff's return was perfect. We have no difficulty in arriving at this conclusion, especially as it was admitted by the appellant's counsel, at the hearing before us, that the bailiff's return in this case was in accordance with the usual practice prevailing in the province of Quebec. The well settled jurisprudence of this court has been not to interfere with matters of mere local practice.

It was still open to the appellant to show that the copies left with him were not "copies." He did not, however, produce the documents served upon him, and without examining as to whether oral evidence was admissible without an express order of the court permitting the same without an *inscription en faux*, and without pronouncing upon the point as to whether such order was given or not, we have come to the conclusion of the trial judge that supposing such order was given, verbal evidence could not be permitted until the documents actually served were produced. These documents are presumed to be in the possession of the appellant, and until it is established that they are either destroyed or lost, no other evidence can be allowed, especially on behalf of the party presumably

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in possession of the same. Article 1204 of the Civil Code of Quebec leaves no doubt on this point.

The proof produced must be the best of which the case in its nature is susceptible. Secondary or inferior proof cannot be received, unless it is first shown that the best or primary proof cannot be produced.

We are unanimously of opinion that the appeal should be dismissed and it is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. K. Elliott.*

Solicitor for the respondent: *F. X. Choquet.*