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THE QUEEN V. PATTEE.

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(Reported by HENRY O'BRIEN, ESQ., Barrister-at-Law.)

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Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.

A *sci. fa.* to set aside a patent was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained.

Held, 1. That a fiat was necessary.

2. That the Attorney General of Ontario was the proper authority to grant the fiat in such a case.

[Chambers, January 5, 1871.—Mr. Dalton.]

A writ of *sci. fa.* was issued at the instance of John Lough, to set aside a patent, granted on the 12th August, 1870, to Gordon Burleigh Pattee; on the ground that the patent was contrary to law, in that Pattee was not the first and true inventor of the invention, for reasons which it is unnecessary to state at length.

Certain proceedings were taken on this writ, the regularity of which was questioned; and finally the defendant obtained a summons calling on John Lough, the relator in this case, and the Attorney-General for Canada, to show cause why the writ of *sci. fa.* in this cause, and the service thereof, and declaration, and rule to plead, should not be set aside on the ground, amongst others, that no fiat of the Attorney-General for Canada, or of the Attorney-General for Ontario, was filed before the issue of said writ, or at any time since, and that said writ issued without authority, and that all subsequent proceedings in this cause have been had without proper authority therefor; or why all further proceedings in this cause should not be stayed until a fiat or warrant of the Attorney-General shall have been filed authorizing the proceedings in this cause.

R. A. Harrison, Q. C., for the relator, John Lough, showed cause.

S. Richards, Q. C., for the defendant, supported the summons.

C. Robinson, Q. C., appeared for the Attorney-General of the Dominion.

MR. DALTON.—In the opinion which I have come to, it is not necessary to detail minutely the proceedings. I will assume that there has been an appearance in the suit, or what justified the plaintiff in supposing that there was an appearance. As soon as conveniently could be, after discovering that no fiat of the Attorney-General had been obtained, and without any further step in the defence, the defendant has moved to set aside the *scire facias*. I think that, for such a cause, which goes to the authority for the whole proceeding, he has a right to move, at almost any stage, upon first discovering the defect of authority; and I do not imagine that anything would take away that right but the acquiescence of the defendant himself, either express or implied, which must of course be after he had become aware of the want of authority.

There are two important questions:—first, is a fiat necessary? and, secondly, if so, by what authority should it be granted?

Before the statute of Canada, 1869, cap. 11, the books and the actual practice shew that a fiat was necessary. By the Consolidated Act of Canada, cap. 34, the proceedings to be had upon the writ of *scire facias* were directed to be according to the law and practice of the Court of Queen's Bench in England; and Con. Stat. U. C. cap. 21, sec. 14, also makes the fiat necessary. By the English practice, not only is it necessary to the institution of proceedings, but the Attorney-General has the control of the case throughout, and may at any time enter a *nolle prosequi*; Hindmarch, 396.

But Mr. Harrison contends that section 29 of the Act of 1869 supersedes the former statutes and practice, and is now in itself the complete enactment we must look to, as to this remedy by *scire facias*; and it was with this belief that he issued the present writ without a fiat. That section enacts that any person desiring to impeach a patent may obtain a sealed and certified copy of the patent, and of the petition, &c., and may have the same filed in the particular court according to his domicile, which court shall adjudicate on the matter, and decide as to costs; that the patent, &c., shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court, grounded upon such record, may issue for the repeal of the patent for legal cause, if upon proceedings had upon the writ the patent shall be adjudged void.

Now Mr. Harrison contends that this clause supersedes the old law, and gives the absolute right to any person desiring to impeach a patent to issue and proceed upon a *scire facias* without the leave of any one; and he instances several known proceedings where the name of the Queen is used by a private prosecutor as of course.

Mr. Richards, on the other hand, contends that the short terms in which the *scire facias* is mentioned, are used with reference to the known practice as to such a writ, existing at the time when the Act was passed, and that the process is therefore subject to all the old established conditions.

By the use of the name of the Queen, the prosecutor is placed in this position of advantage: he cannot be subjected to a *non-pros.*; he cannot be non-suited; the defendant cannot demur to evidence; it is doubtful whether a bill of exceptions will lie to the charge of the judge; if the defendant obtains judgment, he is not entitled to costs; and—what strikes me as more important still—the prosecutor can go into the box and establish his own case as a witness, but the defendant in a Crown case cannot be examined in his own behalf. When it is considered that this proceeding is very often taken by a person who himself claims the right to the invention in the patent he is attacking, it certainly seems a peculiar state of things that one of the rival claimants can be a witness and the other cannot.

The fiat is not a mere form, then, but a matter of substance; and it is very necessary that some authority should exist to control the exercise of the power which it confers, and to guard against its abuse.