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## THE VALUE OF TRIAL BY JURY.

Mr. Justice Stephen, in his new History of the Criminal Law, enters into a comparison of French and English criminal procedure. His lordship then makes some observations on "the positive value of trial by jury as practised and understood in England." He says:—

"It is perhaps the most popular of all our institutions, and has certainly been made the subject of a kind and degree of eulogy which no institution can possibly deserve. All exaggeration apart, what is its true value?

"It may be regarded in several different lights.

"The first question is, Are juries just? The second, Are they intelligent enough for the duties they have to perform? The third, What are the collateral advantages of the institution? Upon each of these points it is necessary to compare juries to judges sitting without juries, for the choice lies between these two tribunals. Our experience of trials by judges without juries, in criminal as well as in civil cases, has, in the last two generations become very extensive. In the first place, the judges of the Chancery Division of the High Court are continually called upon to determine questions of fact which in many instances are exactly like those that are determined in criminal cases; as, for instance, where fraud is alleged as a ground for setting a transaction aside. The same is true of the county court judges and of the courts of summary jurisdiction, which have extensive powers of fine and imprisonment. Applications to the judges of the Queen's Bench Division sometimes involve the determination of similar questions. I have, for instance, known a case in which the decision of the question whether a father should be deprived of the custody of his child depended upon the question whether he had committed a crime, which question was tried and determined by a judge without a jury. The trial of civil cases without juries has also become a matter of everyday occurrence. Finally, in British India, trial by a judge alone is in all criminal cases the rule, and trial by jury the rare exception.

"There is a considerable difference in the manner in which cases are tried by judges sitting alone. In cases tried without a jury by a judge of the High Court, notes are taken just as if the case was tried by a jury; and in the case of an appeal, they are forwarded to the Court of Appeal for their information. If serious criminal cases were to be tried by judges without juries, I think that notes should be taken both by the judge, and, in capital cases, by a shorthand writer as well; and I think the judge should give his reasons for his decision, and that if he did not give them in writing they should be taken down by a shorthand writer, and read and corrected by the judge. In such cases I think there should be an appeal both on the law and on the facts to the Court for Crown Cases Reserved, or whatever Court might be substituted for it. In comparing trial by jury with trial by a judge without a jury, I assume the establishment of such a form of trial as this.

"First, then, as to the comparative justice to be expected of trials by jury and trials by a judge without a jury. Trial by a judge without a jury may, I think, be made, practically speaking, completely just in almost every case. At all events, the securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury.

"1. The judge is one known man, holding a conspicuous position before the public, and open to censure and, in extreme cases, to punishment if he does wrong: the jury are twelve unknown men. Whilst the trial is proceeding they form a group just large enough to destroy even the appearance of individual responsibility. When the trial is over they sink back into the crowd from whence they came, and cannot be distinguished from it. The most unjust verdict throws no discredit on any person who joined in it, for as soon as it is pronounced he returns to obscurity.

"2. Juries give no reasons, but judges do in some cases, and ought to be made to do so formally in all cases if juries were dispensed with. This in itself is a security of the highest value for the justice of a decision. An unskilled person may no doubt give bad reasons for a sound conclusion, but it is nearly impossible for the most highly skilled person to give good reasons for a bad conclusion; and the attempt to do so

would imply a determination to be unjust which would be most uncommon.

"3. From the nature of the case there can be no appeal in cases of trial by jury, though there may be a new trial. There can be an appeal where the trial is by a single judge.

"This may not, at first sight, be obvious, but it is a consequence of the circumstance that a jury cannot give their reasons. An appeal, properly so called, implies a judgment on the part of the Court appealed from and an argument to show that it decided wrongly, which cannot be unless the reasons of the decision are known. If an appeal proper lay from the decision of a jury, and if it took the form of a re-hearing before a court of judges, trial by jury might as well be abolished.

"4. Experience has proved that the decisions of single judges are usually recognized as just. There are very few complaints of the decisions either of magistrates or county court judges on the ground of injustice. I never heard of a complaint of injustice in a trial by a judge of the High Court without a jury. Arbitrations, in which the arbitrator gives no reason and is subject to no appeal, are not only common but are on the increase. This would scarcely be the case if confidence were not felt in the justice of arbitrators.

"As to juries, experience no doubt has shown, and does continually show, that their verdicts also are just in the very great majority of instances, but I am bound to say I think that the exceptions are more numerous than in the case of trials by judges without juries.

"In cases of strong prejudice juries are frequently unjust, and are capable of erring on the side either of undue convictions or of undue acquittals. They are also capable of being intimidated, as the experience of Ireland has abundantly shown. Intimidation has never been systematically practised in England in modern times, but I believe it would be just as easy and just as effective here as it has been shown to be in Ireland. Under the Plantagenets, and down to the establishment of the Court of Star Chamber, trial by jury was so weak in England as to cause something like a general paralysis of the administration of justice. Under Charles II. it was a blind and cruel system. During part of the reign of George III. it was, to say the least, quite as severe as the severest judge without a jury could have been. The revolutionary tribunal during the Reign of Terror tried by a jury.

"There are no doubt some things to be set against this. It is often said in delicate terms that some degree of injustice is a good thing. The phrases in which this sentiment is conveyed are to the effect that it may sometimes be desirable that the strict execution of the law should be mitigated by popular sentiment, of which juries are considered to be the representatives. Whether it is a greater evil that a bad law should be executed strictly or capriciously is perhaps disputable, but it admits of no doubt that laws unfit to be strictly executed ought to be repealed or modified. Parts of the criminal law were no doubt formerly cruel and otherwise objectionable. I can understand, though I do not share, the sentiment which admires juries who perjured themselves by affirming a five pound note to be worth less than forty shillings in order to avoid a capital conviction, or who refused to give effect to the old law of libel; but these are things of the past. I know of no part of our existing law which requires to be put in force capriciously. I see, for instance, no advantage in acquittals in the face of clear evidence for bribery, or for sending ships to sea in a dangerous condition, or for libels on private persons who happen to be disreputable and unpopular, or for frauds committed upon moneylenders, or for crimes committed by pretty women under affecting circumstances. * * *

"The next point to consider is the comparative wisdom or intelligence of judges and juries. I think that a judge ought to be, and that he usually is, a man of far greater intelligence, better education, and more force of mind, than any individual member of the juries which he has to charge, but it must be remembered that there is a great difference between jury and jury. The force and effect of evidence can hardly be tested better than by the impression which it makes on a group of persons large enough to secure its being looked at from many different points of view and by people of different habits of mind. But this advantage is obtained only when all the jurors listen to the whole of the evidence; and it continually happens that several of them are half asleep, or listen mechanically, or think about something else, and that when the verdict is considered they follow the lead of any member of

the jury who chooses to take the lead. Again, as to experience, it is very unlikely that any judge should have greater experience of the kind required upon a criminal trial than all the twelve men in the jury box put together, unless indeed they are unusually stupid. A really good special jury will usually consist of, or as a rule contain, men in every respect as competent to judge of the effect of evidence as any judge, and the probability that they or some of them will possess experience bearing on the case which has not come in the judge's way is considerable. I think that as far as skill and intelligence go it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe, rare exceptions excepted, that a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyse, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days. Jurors almost never take notes, and most of them would only confuse themselves by any attempt to do so, and I strongly suspect that a large proportion of them would, if examined openly at the end of a trial as to the different matters which they had heard in the course of it, be found to be in a state of hopeless confusion and bewilderment. I should be far from saying this of good special juries, but I think that the habit of flattering and encouraging the poor, and asserting that that they are just as sensible and capable of performing judicial and political functions as those who from their infancy have had the advantages of leisure, education and wealth, has led to views as to the persons qualified to be jurors which may be very mischievous. I think that, in all criminal cases of any considerable difficulty or importance, there ought to be at least a power to summon special juries. In short, I think a good judge and a good special jury form as strong a tribunal as can be had, but I think a judge without a jury would be a stronger tribunal than a judge and an average common jury.

"There is a third point of view from which trial by jury must be considered, namely, its collateral advantages, and these, I think, are not only incontestable in themselves, but are of such importance that I should be sorry to see any considerable change in the system, though I am alive to its defects. They are these :—

"In the first place, though I do not think that trial by jury really is more just than trial by a judge without a jury would be, it is generally considered to be so, and not unnaturally. Though the judges are, and are known to be, independent of the executive Government, it is naturally felt that their sympathies are likely to be on the side of authority. The public at large feel more sympathy with jurymen than they do with judges, and accept their verdicts with much less hesitation and distrust than they would feel towards judgments however ably written or expressed.

"In the next place, trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.

"Lastly, though I am, as every judge must be, a prejudiced witness on the subject, I think that the position in which trial by jury places the judge is one in which such powers as he possesses can be most effectually used for the public service. It is hardly necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community. It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner. If a judge sums up for a conviction and the jury convicts, they share the responsibility with him and confirm his views by their verdict; and the same may be said if they follow his suggestion in acquitting. If they acquit when he suggests a conviction, he is spared from what is always a painful task—that of determining on the sentence to be passed. If they convict when he suggests an acquittal, he can, if he is

decidedly of opinion that the prisoner is innocent, in practically all cases, procure a pardon; I think he ought to have a legal right to direct a new trial. On the other hand, he may not unfrequently feel that the jury have done substantial justice in overlooking some deficiency or weakness in the legal proof of the case, which had occurred to his mind, and in this case the result is that, without any default on his part, a criminal meets his deserts, although the proof against him may not quite come up to the legal standard. I remember a case many years ago in which a surgeon was convicted of manslaughter for causing the death of a woman in delivering her of a child. The judge (the late Baron Alderson) summed up strongly for an acquittal, remarking on the slightness of the evidence that the man was drunk at the time; but the jury convicted him, well knowing that he was a notorious and habitual drunkard.

"For these reasons, the institution of trial by jury is so very pleasant to judges that they may probably be prejudiced in its favour. I think, however, that the institution does place the judge in the position in which, with a view to the public interest, he ought to be placed—that of a guide and adviser to those who are ultimately to decide, and a moderator in the struggle on the result of which they are to give their decision. The interposition of a man, whose duty it is to do equal justice to all, between the actual combatants and the actual judges of the result of the combat, gives to the whole proceedings the air of gravity, dignity, and humanity, which ought to be, and usually is, characteristic of an English court, and which ought to make every such court a school of truth, justice, and virtue. In short, if trial by jury is looked at from the political and moral point of view, everything is to be said in its favour, and nothing can be said against it. Whatever defects it may have might be effectually removed by having more highly qualified jurors. I think that to be on the jury list ought to be regarded as an honour and distinction. It is an office at least as important as, say, that of guardians of the poor, and I think that if arrangements were made for the comfort of jurors, and for the payment of their expenses when on duty, men of standing and consideration might be willing and even desirous to fill the position."

## NOTES OF CASES.

### SUPERIOR COURT.

MONTREAL, July 9, 1883.

*Before* TORRANCE, J.

HATTON v. SENECAL.

SENECAL v. HIBBARD.

*Contract—Default—Delivery of bonds.*

*Where S. transferred to H. his interest under a contract in consideration of the delivery to him of certain railway bonds, and S. afterwards repudiated this transfer, and himself collected the claim so transferred, but still retained the bonds, held, that H. was entitled to recover the bonds or to be paid their face value, with interest coupons, etc.*

The demand of the plaintiff was, as transferree of Ashley Hibbard, to recover 35 bonds of the Montreal, Chambly & Sorel Railway company, of the par value of $1000 each, or the sum of $35,000, with interest from 2nd January, 1874.

The declaration set forth an agreement, dated 17th Oct., 1872, between the company and Sénécal, by which the contract between them was cancelled for the consideration of 25 per cent. of the Government subsidy to be drawn by Sénécal; that on the 15th May, 1875, Senecal, in consideration of the delivery to him of 35 of said bonds, transferred to Hibbard all his interest in the contract of 17th Oct., 1872; that Sénécal afterwards, in 1877, repudiated the transfer of 15th May, 1875, alleging that the same had been cancelled, and claimed from the Government said 25 per cent.; that afterwards on the 22nd November, 1877, he transferred his claim under the agreement of 17th October, 1872, to Isidore Hurteau, who obtained payment from the Government on the 5th Nov., 1879, of $20,742.74; that the defendant, notwithstanding said repudiation and cancellation, retained said bonds and sold and disposed of them for his own benefit; that on the 26th January, 1882, Hibbard sold and assigned, for value, the bonds and coupons to the plaintiff; and said assignment was served upon Sénécal on the 2nd May, 1882.

The plea of Sénécal admitted the agreement of the 17th October, 1872, and the receipt of the bonds from Hibbard on the 15th May, 1875, and the order on the company on the 19th May, for the payment to Hibbard of 25 per cent. of the

subsidy, with the understanding, he alleged, that they would be paid or exchanged for debentures of other solvent companies in the course of the month; that in April, 1876, Hibbard having transferred to defendant, Sénécal, his contract for the construction of the Montreal, Portland & Boston Railroad company, gave up the receipt of the 15th May, and the order of the 19th May, and in this way retroceded his rights under the deed of 17th Oct., 1872, that it was then agreed that Sénécal should keep the debentures in question in consideration of certain advances made by him to Hibbard, and in the event of the sale of the bonds, he should render an account to Hibbard, of the proceeds of the sale, compensating the claims he had against Hibbard, against the proceeds of the bonds; that the value of the bonds was merely nominal, and the company was insolvent; that plaintiff was only a *prête-nom*.

This plea was amended at the trial on the 1st June, in the following way: He (Sénécal) alleged further that in 1880 and 1881, he sold 20 of the bonds for 10 cents in the dollar, equal to $2,000; that Hibbard was further indebted in the sum of $1,500 for advances made to him; and another sum of $679.36, being principal and interest of two *bons*, one of $362.50, made 1st December, 1874, and the other for $100, made 18th January, 1877; that Hibbard was further indebted in the amount of the judgments, namely, $1,979.49. One of these judgments was for $666.10, besides interest and costs, in the case of Gill against the said Railroad company and Hibbard, of which Sénécal was now proprietor, having paid it before the institution of this action; the other judgment was at the suit of the Merchants Bank against said Company and Hibbard and Sénécal for $593.07, and interest and costs, and had been paid by Sénécal, with subrogation of the Bank's rights against Hibbard; that Hibbard owed Sénécal a further sum of $4,000 for advances which Sénécal could not detail, but Hibbard, and he prayed compensation against plaintiff's demand if anything was due.

Per Curiam. Dealing first with the plea of compensation, there is no proof of the transfer of the judgments, and the signification of the transfer to Hibbard before his transfer to the plaintiff. There is no legal proof of the *bons*, which are unstamped and prescribed, and which Hibbard denies that he owes.

Next, we come to the proof of the ownership of Hibbard in the bonds. The plea as amended admits accountability, and the receipt of 15th May, 1875, and the order of the 19th May upon the company for the 25 per cent., made by Sénécal, and his subsequent transferring the claim under the deed of 17th Oct., 1872, to Hurteau; and the payment to Hurteau by the Government and the verbal evidence of Hibbard sufficiently explain the position of the defendant as regards the 35 bonds. They had to be accounted for to Hibbard or his assignee, the plaintiff. As to the price paid by Mr. Hatton, we need not deal with that question. The proof is that the plaintiff is owner.

As to the amount of the condemnation, it should be for the par value, if the bonds are not returned. The value of these bonds is very uncertain and fluctuates greatly. They may have a value greatly in excess of the par value, though that does not appear here. The possession of them may give the holder the control of the road. The court cannot therefore arbitrarily reduce them to ten or twenty cents in the dollar, and if they are of so little value it will be easy for the defendant to replace them. The action of Sénécal against Hibbard is dismissed, recourse reserved.

The judgment is as follows:—

"The Court, etc.

"Considering that the defendant Louis A. Sénécal hath failed to make satisfactory proof of the allegations of his amended plea, doth overrule the same;

"Considering that the evidence of record establishes that the said L. A. Sénécal, having received from the defendant Hibbard the 35 bonds of the Montreal, Chambly & Sorel Railway Company of the par value of $1000 each, numbered 0454—0488, and bearing date the 2nd January, 1874, and bearing interest from the said date, was bound to return the same to him, or his assignee, or to account for the same, as admitted by his amended plea;

"Considering that the delivery to him of said 35 bonds was based upon his abandonment to the defendant Ashley Hibbard, of the 25 per cent. of the Government subsidy under the receipt of date 15th May, 1875, and the order upon the Railroad Company of the 19th May, 1875, and that said Louis A. Sénécal subsequently dealt with the said subsidy as being still his

property under the deed of date 17th October, 1872, and received payment of the same through his *cessionnaire* the said Isidore Hurteau;

"Considering that plaintiff hath proved that the said Ashley Hibbard transferred to him his claim to principal and interest in said bonds by the transfer *sous seing privé* of date 26th January, 1882, then duly signified to defendant L. A. Sénécal;

"Doth condemn the said defendant Louis A. Sénécal to deliver over to the said plaintiff within fifteen days from this date the said 35 bonds, with all interest coupons, as delivered to the said defendant, and on his default of so doing within the said delay, the Court doth condemn the defendant to pay and satisfy to the plaintiff the sum of $35,000, with interest thereon from the 2nd January, 1874, date of the said bonds, together with interest on the amount of each coupon from the date when the same became due and exigible respectively, to wit, on the sum of $1,050, being the aggregate amount of 35 coupons due every half year, from the 2nd days of July and January in each and every year respectively, commencing on the 2nd day of July, 1874 until paid, and costs of suit, *distraits* to Messrs. Hatton & Nicols, attorneys for plaintiff;

"And on the merits of the cause No. 161, seeing that the said L. A. Sénécal hath failed to establish that he was entitled to the conclusions of his declaration in the said cause, doth dismiss said action No. 161, with costs against the said L. A. Sénecal, distraits to Messrs. Robertson, Ritchie & Fleet, attorneys for defendant Hibbard, reserving to said defendant, Sénécal, any recourse which he may have or pretend against said Ashley Hibbard as defendant in the two causes, No. 2226, in the Superior Court, Montreal, Gill against the Montreal, Portland & Boston Railway Company, and Ashley Hibbard, and No. 1771 of the Superior Court, Richelieu, The Merchants Bank of Canada against the said Montreal, Portland & Boston Railway Company, Ashley Hibbard, and L. A. Sénécal."

*Hatton & Nicolls*, for plaintiff.

*S. Bethune, Q.C.*, counsel.

*Lacoste & Co.*, for defendant, Sénécal.

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## SUPERIOR COURT.

MONTREAL, July 9, 1883.

*Before* PAPINEAU, J.

MOLSON v. HON. J. A. CHAPLEAU AND W. W. LYNCH.

*Railway Commissioner—Action.*

*The Commissioner of Railways under the Quebec Railway Act, 1880, being a member of the Executive Council of the Province, represents the sovereign authority, and cannot be impleaded before the civil courts of the Province for an act performed by him in the discharge of his duties as such Commissioner.*

PAPINEAU, J. Le demandeur, contre qui ont été adoptés des procédés en expropriation de certains terrains sous l'opération de l'acte des chemins de fer de Québec, 1880, poursuit l'Hon. J. A. Chapleau et l'Hon. W. W. Lynch, le premier comme ex-commissaire et le second comme commissaire en office des chemins de fer de la Province de Québec, ainsi que Messieurs Simard, notaire, Hutchison, architecte, et Brown, écr., qui ont agi comme arbitres dans l'instance en expropriation, afin de faire annuler la sentence arbitrale, et de faire ordonner qu'il soit fait de nouveaux procédés en expropriation.

Les défendeurs l'Hon. Chapleau et l'Hon. Lynch font une exception déclinatoire, disant qu'ils sont mal à propos assignés devant cette cour.

1o. Parce qu'ils sont poursuivis en leur qualité de commissaires des chemins de fer de Québec seulement, et comme tels, ils ne sont sujets à la jurisdiction de cette cour, hors des cas de malversation et de délits dont il n'est pas question dans la cause.

2o. Parce qu'en cette qualité, ils sont membres du Conseil Exécutif et aviseurs du chef de l'État le Lieutenant-Gouverneur de la Province, et que comme tels ils ne sont que les mandataires du Gouvernement et responsables au Lieutenant-Gouverneur et à la Législature seulement.

3o. Qu'il ressort de la déclaration du demandeur, que c'est au nom de Sa Majesté notre Souveraine, que ces deux défendeurs ont accompli les actes dont se plaint le demandeur, et qu'ils ne peuvent être amenés devant cette cour pour des actes dans lesquels ils n ont été que les aviseurs et mandataires de Sa Majesté.

Le demandeur répond à cette exception déclinatoire, que ces deux défendeurs n'ont pas agi au nom de Sa Majesté dans les circonstances relatées dans sa déclaration; que ces deux défendeurs ayant été, le premier initiateur et, le second, continuateur des procédés en expropriation qui ont donné lieu à la présente poursuite, sont *justiciables* de cette cour sous les circonstances déroulées dans la demande, qui n'est que le résultat des procédés commencées par le dit Hon. Chapleau, et un incident de ces procédés devenu nécessaire pour les terminer convenablement.

Il est établi par l'exhibit No. 10 du demandeur (produit dans le dossier No. 1,245 entre les mêmes parties,) que les procédés en expropriation ont été commencées par le dit Hon. J. A. Chapleau *es qualité*, au nom de Sa Majesté.

Les défendeurs ont cité à l'appui de leurs prétentions la cause de *Church & Middlemiss*, 21 Jurist, 319; *Gidley* v. *Palmerston*, 3 Brd. et Bingh. Rep. p. 286; 1 Todd, Parliamentary Government, p. 299 et suiv., et p. 302; *Dickson* v. *Combermere*, Finlayson, vol. 3; Broom, Constitutional Law, p. 241 et p. 617; *Unwin* v.

*Woolseley*, 1 Durnford & East Rep. p. 674; Idem, *Macheath* v. *Haldimand*, p. 180; *Church & Middlemiss*, 19 L. C. Jurist, pp. 253 et 266; Révue Critique, p. 369 et suiv., *L'Hôtel Dieu* v. *Le Conseil d'Agriculture* et les autoritées citées (cet article est de D. Girouard;) *Mercer & Le Procureur Général d'Ontario*, 3 vol. Rapports Cour Suprême, Canada.

Le demandeur soutient que les précédents cités ne sont pas applicables à la présente cause pour plusieurs raisons. 1o. Parce que dans les causes de *Haldimand & Palmerston* les défendeurs étaient poursuivis personnellement pour des actes faits en leur qualité d'agents de Sa Majesté, pendant que dans la présente cause les défendeurs Chapleau et Lynch sont poursuivis non personnellement mais comme commissaires, et pour des actes par eux faits en cette qualité, et qu'ils sont une quasi corporation. 2o. Parce que Haldimand et Palmerston étaient réellement les représentants de Sa Majesté, pendant que les Hons. Chapleau et Lynch ne l'étaient pas. Que Sa Majesté la Reine est bien personnellement et par son représentant le Gouverneur-Général, une partie intégrante du Parlement fédéral, mais qu'elle n'est pas personnellement ni par son représentant dans la législature de la Province de Québec. Que cette exclusion intentionnelle de Sa Majesté du Gouvernement local des provinces qui composent l'Union formée en vertu de l'Acte de l'Amérique Britannique du Nord de 1867, saute aux yeux de tout lecteur attentif de cet Acte du Parlement Impérial. Ainsi dans le 3e et le 4e paragraphes du préambule de cette acte, il est question, non pas d'une fédération des anciennes provinces, mais purement et simplement de l'Union des provinces; la section 3e parle d'une seule puissance; la 4e que "l'Union sera effectuée;" "l'Union sera déclarée un fait accompli;" et la 5e, le Canada sera divisé en quatre provinces, dénommées Ontario, Québec, Nouvelle-Ecosse et Nouveau-Brunswick. "La Puissance" est une création nouvelle de la loi, et elle est divisée en quatre provinces au moment de sa création.

S'agit-il de la distribution des pouvoirs? Sec. 9: "A la Reine continueront d'être et sont par le présent attribués le gouvernement et le pouvoir exécutif du Canada." Sec. 10: "Le chef de l'exécutif, qu'il se nomme Gouverneur-Général ou administrateur, administre au nom de la Reine. Son conseil est dénommé le Conseil Privé de la Reine pour le Canada." (Sect. 11.) En un mot, toutes les sections de cette article 3 jusqu'à la 16 inclusivement démontrent la Reine comme conservant à l'égard du Canada les attributs de la souveraineté.

S'agit-il du pouvoir législatif? L'article 4, comprenant la Sec. 17 et les suivantes attribuent ce pouvoir à un Parlement composé de la Reine, du Sénat et des Communes. Quel contraste quand on descend à la part de pouvoir faite à chaque province par l'art. 5, "Constitutions provinciales," pouvoir exécutif. La Reine s'efface, se retire. Sec. 58: Il y aura pour chaque province, un officier appelé lieutenant-gouverneur, lequel sera nommé par le gouverneur-général en conseil par instrument sous le grand sceau du Canada. Ce n'est pas un député comme le gouverneur-général peut en nommer dans les circonstances prévues dans la sec. 14. C'est un simple officier; son conseil, nommé par lui, se compose des officiers suivants: le procureur-général, le secrétaire et régistraire de la province, le trésorier, le commissaire des terres de la couronne, le commissaire d'agriculture et des travaux publics, et dans la province de Québec, l'orateur du conseil législatif et le solliciteur-général. Si on passe au "Pouvoir Législatif" on n'y retrouve pas d'avantage la Reine, ni son représentant, ni même un parlement. Sec. 71: "Il y aura, pour Québec, une législature composée du lieutenant-gouverneur et de deux chambres appelées le conseil législatif de Québec et l'assemblée législative de Québec." A proprement parler ce n'est plus qu'une grande municipalité.

Un bill est-il passé dans les chambres du parlement, c'est le gouverneur-général qui le sanctionne ou refuse de le sanctionner au nom de la Reine, ou le réserve à sa sanction personnelle (Sect. 55 et 56.) Une législature provinciale a-t-elle passé une loi, la sanction, le refus de sanction et la réserve ne sont plus au nom de la Reine, mais du gouverneur-général et par le lieutenant-gouverneur. Sect. 90.

Les pouvoirs législatifs sont distribués de manière à donner les pouvoirs généraux et indéterminés en termes très compréhensifs au parlement du Canada; au contraire, les pouvoirs laissés aux législatures provinciales sont particuliers et en termes beaucoup moins compréhensifs (Sect. 91 et 92.)

Enfin, lorsque l'acte impériale s'occupe de ce qui doit être fait par le lieutenant-gouverneur, le nom de Sa Majesté n'apparait que deux fois. C'est pour la nomination et le remplacement des conseillers législatifs (Sect. 72 et 75,) et la convocation des chambres que le lieutenant-gouverneur fait au nom de Sa Majesté (Sect. 82.) On dit ceci doit être par inadvertence, et cette supposition est fondée sur ce que ces expressions ne sont applicables qu'à la province d'Ontario et à celle de Québec; quant à la convocation des chambres pour la Nouvelle-Ecosse et le Nouveau-Brunswick il n'en est pas ainsi.

Il suit donc de tout cela, dit le demandeur, que Sa Majesté ne formant pas partie des législatures provinciales, et le statut n'ayant pas conféré au lieutenant-gouverneur les prérogatives de Sa Majesté en termes exprès, elles restent tout entières dans la personne de Sa Majesté, et ne peuvent être exercées par les lieutenants-gouverneurs; les membres du conseil exécutif provincial ne peuvent se dire représentants de Sa Majesté et comme tels non justiciables de cette cour.

Le demandeur reconnait que le défendeur Chapleau a fait son premier procédé en expro-

priation au nom de Sa Majesté. Mais le demandeur prétend que c'est sans droit et il ajoute avec raison, il ne suffit pas à un homme de se dire représentant de Sa Majesté pour l'être réellement.

Examinons la première raison du demandeur. Les défendeurs Chapleau et Lynch ne sont pas poursuivis personnellement, mais comme commissaires. Personnellement les Hons. Chapleau et Lynch n'ont aucun intérêt dans la cause. Leur qualité de commissaires implique un commettant au nom duquel ils agissent. Si ce commettant est la Reine, elle ne peut être poursuivie devant ce tribunal. Si, au contraire, le commettant est un particulier, les particuliers ne peuvent ester en jugement qu'en leur nom personnel, si ce n'est dans les cas expressément prévus par la loi. S'ils sont une corporation, ce ne peut être qu'une corporation politique, car ils forment partie du gouvernement exécutif; ils sont les conseillers de Sa Majesté, et alors ils sont régis par le droit public et ne peuvent être assignés devant ce tribunal que dans les cas prévus expressément par la loi.

La seconde raison c'est que la Reine ne forme pas partie du gouvernement exécutif ni de la législature des provinces dont elle s'est évidemment retirée d'après l'ensemble de l'acte de l'Amérique Britannique de 1867: que le lieutenant-gouverneur ne la représente pas, mais représente le gouverneur-général, et les ministres du lieutenant-gouverneur ne sont pas représentants de la Reine.

On a dit avec raison que la Reine ne peut céder aucune de ses prérogatives excepté par une loi et en termes exprès. De même et avec plus de raison encore on peut dire que la Reine ne peut cesser d'être la personnification de l'autorité souveraine, dans aucune partie de l'empire sans une loi du parlement impérial ou un traité en termes explicites à cette effet. Car du moment où ce n'est plus elle qui personnifie l'autorité souveraine dans une province quelconque de l'empire, cette province n'est plus partie intégrante de cet empire. Or, si la Reine s'est retirée, par le pacte fédéral, et de la législature et de l'exécutif des provinces, et que les lieutenants-gouverneurs ne sont pas ses représentants, ou n'exercent pas en son nom et à sa place l'autorité qu'ils exercent, ces provinces ne sont plus parties intégrantes de l'empire. Les pouvoirs attribués aux législatures provinciales leur sont attribués à l'exclusion du parlement fédéral; il en est de même du pouvoir exécutif. Un certain nombre de ces pouvoirs sont des droits de souveraineté qui ne peuvent être exercés que par le souverain ou par ses représentants en son nom. Tels sont la législation sur la propriété et le droit civil tout entier, l'administration de la justice, la constitution des tribunaux tant civils que criminels, etc. Ou les lieutenants gouverneurs et les législateurs agissent en leur propre nom (alors ils sont indépendants de Sa Majesté,) ou ils le font au nom de Sa Majesté, et alors ils sont ses représentants.

S'il est juste de dire que Sa Majesté en personne ne forme partie des législatures provinciales et des gouvernements provinciaux, il est également juste de dire qu'elle en fait partie par représentation. Car elle ne peut cesser d'en faire partie personnellement ou par représentation sans cesser d'être souveraine de ces provinces. Les représentants de la Souveraine ne peuvent pas plus être traduits devant les tribunaux qu'elle-même, excepté quand et comme elle le permet. Ce n'est pas par inadvertence que la loi prescrit au lieutenant-gouverneur de choisir les conseillers législatifs et de convoquer les chambres au nom de Sa Majesté. C'est conforme à la nature même de la constitution anglaise, dont les nôtres ne sont que des images.

Mais, dit le demandeur, je suis cité en justice par l'Hon. Chapleau, le procédé commencé contre moi est irrégulier; j'ai droit de le faire déclarer tel; je cite à mon tour ceux qui m'ont appelé en justice et sous les mêmes noms et qualités; je ne fais que continuer le procédé commencé. C'est vrai jusqu'à un certain point; mais il ne faut pas oublier que si l'autorité souveraine a le droit d'agir contre les particuliers de toutes les manières connues pour les individus entre eux, ces derniers ne peuvent agir contre l'autorité souveraine que de la manière permise par celle-ci.

J'emploie intentionnellement les mots autorité souveraine, parce que les mêmes principes prévalent et doivent prévaloir dans tous les Etats, qu'ils soient monarchiques ou démocratiques.

Le demandeur a soutenu que le Canada n'est pas une fédération, mais une union de provinces en une seule puissance avec de grandes municipalités relevant d'elle. Les termes mêmes du préambule de l'Acte font voir que s'il y a une Union, elle est fédérale: "Considérant que les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le désir de *contracter* une union *fédérale*," etc., Sa Majesté et son parlement ont fait l'Acte de 1867 pour réaliser ce désir. Aussi les provinces ont concédé à la Puissance une grande partie des pouvoirs qui leur appartenaient au moment de l'union. Mais elles ont gardés des pouvoirs qui leur appartiennent à l'exclusion de la Puissance qu'elles ont voulu former et pour laquelle elles ont exprimé le désir de *contracter* leur union. Le Parlement Impérial n'agit que pour donner effet au contrat, dont les conditions avaient été arrêtées dans les conférences des délégués des provinces. L'Acte impérial n'est que le contrat solennel établissant les conventions arrêtées par les provinces dans les conférences qui ont précédé la Confédération; il doit donc être interprété sans perdre de vue ce fait historique.

L'exception déclinatoire est maintenue avec dépens.

Action dismissed.

*R. A. Ramsay*, for the plaintiff.

*DeBellefeuille & Bonin*, for the defendants.