The Legal News.

Vol. V. JANUARY 14, 1882. No. 2.

INSANITY AS A DEFENCE.

Some weeks ago, a Mrs. Coleman was tried in New York for the murder of her paramour. As the act could not be denied, the stereotyped defence of insanity was set up, and Chief Justice Davis, in charging the jury, took occasion to expound the law as it bears upon this subject. The judge, it has been supposed, had the Guiteau case in view in the observations made by him on this occasion. A portion of the charge is of interest. "Insanity," he said, is usually spoken of both in common language and in the books as a defence to crime. But it is no defence, because where the insanity recognized by the law exists there can be no crime to defend. An insane person is incapable of crime. He is devoid both in morals and in law of the elements essential to the constitution of crime, and hence is an object of pity and protection and not of punishment. Therefore, whenever it is established that a party accused of crime was at the time of its alleged commission insane within the established rules of the criminal law, he is entitled to acquittal on the ground of innocence because of incapacity to commit the offence, however monstrous his physical act may appear. Both humanity and the law revolt against the conviction and punishment of such a person. But insanity is a condition easily asserted and sometimes altogether too easily accepted. Hence juries, while they should be careful to see to it that no really insane person is found guilty of crime, should be equally careful that no guilty person escapes under an ill-founded pretext of insanity.

"In this State the test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time, and with respect to the act which is the subject of enquiry. This rule is stated by the authorities in different forms, but always in the same substance. In one case it was said, 'the inquiry is always brought down to the single question of capacity to distinguish between right and wrong at the time the act was done.' In the most authoritative of the English cases it is said, 'it must be clearly proved that at the time of committing the offence the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.' And in a very late case in our Court of Appeals a charge in that language was held to present the law correctly to the jury. So you will see, gentlemen of the jury, that in this case the firing by the prisoner of the shot by which the deceased was killed being proved and admitted, the question whether the act was criminal depends upon your finding, as a matter of fact, whether at the time of doing the act the prisoner knew what she was doing, and that she was doing a wrong; or, in other words, did she know that she was shooting the deceased, and that such shooting was a wrongful act? If she did know these things her alleged insanity is not established within the rules of the law, however much you may be convinced that she acted under the intensest emotional excitement, or however fully she believed she was justified in avenging her own wrongs, or however much you may think the deceased was deserving of punishment. 'The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law,' and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, though he perceives the moral quality of his acts as wrong, is unable to control them, and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates and knows. This is substantially the language of the Court of Appeals in the case already referred to. If it were not so every thief to establish his irresponsibility could assert an irresistible impulse to steal, which he had not mental or moral force sufficient to resist, though knowing the wrongful nature of the act; and in every homicide it would only be necessary to assert that anger or hatred or revenge, or an overwhelming desire to redress an injury, or a belief that the killing is for some private or public good, has

produced an irresistible impulse to do a known illegal and wrongful act. Whatever the views of scientists or theorists on the subject of insanity may be, and however great a variety of classification they may adopt, the law in a criminal case brings the whole to the single test—did the person doing the act at that time have sufficient sense to know what he was doing, and that it was wrong to do it? If that be his condition it is of no consequence that he acts under an irresistible influence or an imaginary inspiration in committing the wrong. Emotional insanity, impulsive insanity, inspirational insanity, insanity of the will or of the moral sense all vanish into thin air whenever it appears that the accused knew the difference between right and wrong at the time and in respect of his act. No imaginary inspiration to do a personal and private wrong under a delusion or belief that some great public benefit will flow from it, when the nature of the act done and its probable consequences and that it is in itself wrong are known to the actor, can amount to that insanity which in law disarms the act of criminality. Under such notions of legal insanity life, property and rights, both public and private, would be altogether insecure; and every man who, by brooding over his wrongs, real or imaginary, shall work himself up to an irresistible impulse to avenge himself or his friend or his party, can with impunity become a self-elected judge, jury and executioner in his own case for the redress of his own injuries or of the imaginary wrongs of his friends, his party, or his country. But, happily, gentlemen, that is not the law; and whenever such ideas of insanity are applied to a given case as the law (as too often they have been), crime escapes punishment not through the legal insanity of the accused, but through the emotional insanity of courts and juries."

The jury, with the reluctance to punish murder so often witnessed, found the prisoner guilty of manslaughter in the third degree, that being the lowest offence which they could find under the indictment.

PROVINCIAL RIGHTS.

The speech of the Lieutenant Governor of Ontario, at the opening of the Session, contains the following paragraphs:—

"I congratulate you that recent decisions of the Judicial Committee of the Privy Council have set at rest all questions as to the right of the Provincial Legislature to legislate as our interests may from time to time require on matters of internal trade, and in particular on the law of insurance. Some further provisions seem now necessary in order to render effectual the legislation which had for its object the securing of uniform conditions in fire policies, and I invite your attention to the subject.

"I regret that the right of provinces to property escheated for want of heirs, unanimously maintained by the highest Courts in Ontario and Quebec, and acquiesced in by the Federal Government for several years, has, on an Ontario appeal to the Supreme Court of Canada by the Government in the name of the defendants in a well known case, been negatived by a majority of the judges of the Court. The case in question is but one of several cases of the same kind which have occurred since confederation, and the constitutional question involved is so important, and some of the grounds on which the decision proceeds are of such far-reaching application, that I have lost no time in taking the necessary steps for obtaining a review of the judgment by Her Majesty's Privy Council. There is strong reason for expecting a favorable result."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Dec. 30, 1881.

Before JETTE, J.

COSSITT et al. v. LEMIEUX, & RATTRAY, Petr.

Petition to vacate Sheriff's sale on the ground of an unexpired right of emphyteusis.

1. *Before the coming into force of the Civil Code the obligation of improving the property was not an essential obligation in an emphyteutic lease.*
2. *The principal and distinguishing characteristic of an emphyteusis before the code was the alienation of the property.*
3. *A lease passed in* 1846, *by which the grantor declares "to have leased, demised, granted and to farm let for the space and term of fifty consecutive years" unto "the lessees for themselves, their heirs and assigns" a certain beach pro-*

perty on the River St. Lawrence, and by which the lessees "specially bind, pledge, mortgage and hypothecate" the beach so leased to them for securing the payment of the rent—constitutes an emphyteusis.

4. *If an immoveable charged with an unexpired term of 15 years of the lease above mentioned, be sold by the Sheriff without mention of such charge in the minutes of seizure, and if such charge diminishes the value of the property so much that it is to be presumed that the purchaser would not have bought had he been aware of it—the purchaser who is prevented by notification and protest on the part of the lessee from obtaining possession of the immoveable during such unexpired term, may obtain the vacation of the Sheriff's sale under art. 714 C. C. P.*

On the 3rd November, 1846, the defendant, Claude Lemieux leased a portion of the Windsor Cove property at Point Levis on the River St. Lawrence to James Tibbits and James McKenzie by a lease in the terms above mentioned for the space of 50 years. These *preneurs* subsequently became insolvent, and the unexpired term of the lease passed into different hands, the last purchaser being A.F.A. Knight, who bought the lessees' rights on May 20th, 1872. On November 4th, 1880, a writ of execution was issued out of the Superior Court at Montreal against the lands of the defendant, at the instance of the plaintiffs, under which the property above mentioned was seized and advertised to be sold by the Sheriff of Quebec, on the 22nd January, 1881, on which date it was put up for sale and adjudged to David Rattray the petitioner, for $3,800. Shortly after this adjudication, Knight, who still occupied the property as lessee, served a protest and notification on Rattray, intimating that he (Knight) would retain possession of the property until the 3rd November, 1896, when the above lease would expire. Thereupon Rattray presented a petition to vacate the Sheriff's sale under Arts. 710 and 714, C. C. P., alleging that he would not have bought had he been aware of this lease, which diminished the value of the property by about $2000.

The plaintiffs contested this petition on various grounds, but their principal contention was that the lease of 1846 did not constitute an emphyteusis, and was consequently purged by the *décret*. They urged that the lease in question did not contain any stipulation that the *preneur* should improve the land, without which it could not be held to be an emphyteutic lease; and moreover that the lease did not show any of the distinguishing characteristics of an emphyteusis.

J. A. Bonin, for plaintiffs contesting, cited the following authorities;—C. C. L. C. 567, and Report of Commissioners on do. (3d Report, p. 408); Proudhon, Usufruit, No. 97, pp. 102 et seq.; Nouv. Denizart, Vol. 7, Vo. Emphytéose, p. 538, ss. 1 & 2; Proudhon, Domaine de Propriété, Vol. 2, Nos. 709 & 710; Guyot, Rep. Vol. 6, Vo. Emph. pp. 680 et seq.; Domat, Civ. 1, Tit. 4, sec. 10, Nos. 1 & 9; Argou, Vol. 2, pp. 246 & 249; Nouv. Denizart, Vol. 13, Vo. Emph. p. 280; Lebire & Carteret, Vo. Bail Emph. 2, pp. 453 et seq. § 11 & 15; and p. 456, § 27; Ferrière, Dict. Vol. 1, Vo. Emph. p. 570; Dunod, Prescription, p. 339; Duvergier, Louage, Vol. 3, No. 144, & note 1, p. 136; Laurent, VIII, No. 346; Troplong, Louage, p. 31; Dumoulin sur Paris, § 73, No. 22; Dalloz, 1853-1-145, 1857-1-326, 1861-1-444.

E. Lafleur, for petitioner, argued that as the lease was passed before the code came in force, art. 567 C. C. L. C. did not apply, and that before the code the stipulation of improving the property was not essential to the contract. The essential character of emphyteusis was the transfer of ownership, which was in the present lease implied by the hypothecation of the *fonds* in favour of the lessor. The following authorities were cited for petitioner:—Ancien Denizart, Vo. Emphytéose; Guyot, Répertoire, Vo. Emphytéose *sub. init.; id., ibid.* p. 682, col. 1; *Serres*, Inst. du Droit Français, Liv. III, Tit. 25, § 3, p. 502; Ferrière, Dict. de Droit, Vo. Emphytéose, III°; Vinnius, *Ad Inst.*, Lib. III, Tit. 25, 3; Boutaric, Traité des Droits Seigneuriaux, Ch. XIII, p. 424; *Id., Ad Inst.*, Lib. III, Tit. 25, § 3, p. 486; Loyseau, Déguerpissement, Liv. IV, Ch. 5, No. 6; Henrys (Ed. Bretonnier) T. I, p. 722, col. 2; Le Grand, Coutume du Baillage de Troyes, Tit. IV, art. 67, glose 1, No. 1 (p 200, col. 1); Bcsquet, Dict. Raisonné des Domaines, Vo. Baux Emph., Vol. I, p. 290, col. 2; Nouv. Denizart, Vo. Emph. No. 3; Domat, Liv. I, Tit. 4, Sec. 10, Nos. 1, 2, 3 &c.; Duvergier, Vol. III, pp. 140-1; Rolland de Villargues, Dict. du Dr. Civil, Vol. IV, p. 227, Vo. Emph.;

Lebire & Carteret, Vo. Bail Emph. § 1er; Laurent, Vol. VIII, p. 421; Troplong, Louage, Ch. I, pp. 174–5; De Villeneuve & Gilbert (1791–1850), Vo. Emphytéose, § 2, No. 18, p. 369; *id. ibid.*, § 1, No. 1; Dalloz & Vergé, Codes annotés, append.au Tit. VIII, No. V, Louage Emph. § 1, No. 21; *id. ibid.*, § 3, No. 49; Ledru Rollin, Vo. Emph. Nos. 39, 51, 112; Pepin le Halleur, Hist. de l'Emphytéose, pp. 75–7; Pothier, Traité de l'Hypothèque, Sec. II, § 2.

Petition granted and *décret* annulled.

Lafleur & Sharp, for petitioner.

De Bellefeuille & Bonin, for plaintiffs contesting.

Pelletier & Jodoin, for defendant.

SUPERIOR COURT.

MONTREAL, December 31, 1881.

Before RAINVILLE, J.

LOW v. THE MONTREAL TELEGRAPH CO. et al.

Corporation—Transfer of franchises and special privileges—Action by shareholder.

corporation of a public character such as a Telegraph company, while competent to enter into any agreement for the division of profits or for carrying on its business, cannot legally transfer or divest itself of its franchises or special privileges. Therefore a lease by a Telegraph Company of all its lines for 97 years, at a fixed annual rent, the lessees to have control of the rates for transmission of messages, &c., was held to be illegal notwithstanding a clause in the charter giving the company power to let, convey or otherwise part with their estate, real, personal or mixed.

A shareholder has a right to bring an action in his own name for the rescission of such agreement.

PER CURIAM. The plaintiff complains of the Montreal Telegraph Company and of the Great North-western Telegraph Company of Canada. In his declaration he sets out the act incorporating the Montreal Telegraph Company (10 and 11 Vic., chap. 83), and alleges that under section 6 of this act the affairs of the company were to be administered by a board composed of five directors; that the directors were to fix the rate for the transmission of messages, declare dividends, make by-laws, and appoint officers and employees, &c.; that by a subsequent statute (18 Vic., chap. 207) the privileges of the said company were enlarged and its capital increased to $2,000,000; that on the 17th April last (1881) the said company was doing a very profitable business, and had assets worth three million dollars; that the company has no power to transfer its property and revenues so as to divest it of the right and duty of exercising the franchises conferred upon it by law; that notwithstanding this, the company, by a deed of agreement executed on the 17th August, 1881, illegally transferred for the term of 97 years to the other defendant, the Great North-western Company, all its telegraph lines, offices, instruments, apparatus, &c., the same to be operated in future by the Great North-western Company; said abandonment and transfer being made for the sum of $165,000 per annum, and that the Great Northwestern Company is now in possession of all the lines, &c., of the Montreal Company; that the said agreement is *ultra vires* and an abandonment of the franchises conferred upon the Montreal Telegraph Company, and jeopardizes the existence of its charter. The plaintiff alleges that he is the owner of 51 shares of Montreal Telegraph Company stock, and has been so since the 10th June last (1881); and he prays by his conclusions that the said agreement be declared *ultra vires*, and set aside and annulled; that the Montreal Company be ordered to resume possession of its lines and to operate them, that the Great Northwestern Company be enjoined to cease to operate the lines, and to give up possession thereof to the other defendant; and lastly, that it be ordered to account for the moneys received from said lines.

To this action the Montreal Telegraph Company pleaded, first a demurrer; secondly, two exceptions. By the demurrer the defendant said that the action should be dismissed, 1st, because all the shareholders were not in the cause, and 2ndly, because the action could only be brought in the name of the Attorney-General. I had to dispose of this demurrer; I dismissed it, and I have seen nothing to cause me to change my opinion. To the authorities which I cited in rendering judgment, I will add the following:—

"A court of equity has jurisdiction at the instance of stockholders in a corporation, to restrain the corporation and those who have control and management thereof from acts tending to the destruction of its franchises,

from violation of its charter, from misuse of the corporate powers or property."—2 Abbott's Digest, Vo. Stockholders, No. 39.

"A stockholder in a corporation has a remedy in Chancery against the directors to prevent them from doing acts which would amount to a violation of the charter." 1 Abbott's Digest, Vo. Stockholders, No. 86, p. 777.

And Judge Ramsay, in the case of Molson against the city of Montreal, said:—"Art. 997 of the C.C.P. only lays down a rule of duty for the Attorney-General; but it in no way affects the common law right of each individual to protect himself by action against the wrongdoing of a corporation."

By the first exception the defendant urges grounds invoked in the demurrer, viz., that the plaintiff does not represent the other shareholders, and has no quality to bring the action. The judgment rendered on the demurrer has disposed of these pretensions.

By the second exception, the defendant alleges that among the powers conferred by its charter and amendments are the following:—That it shall legally be capable of purchasing, having and holding for its use, any estate, real, personal or mixed; and of letting, conveying or otherwise parting therewith, for the benefit and on account of the said company, from time to time, as it shall deem necessary or expedient; that under the powers so conferred the defendant constructed and acquired a large extent of telegraphic lines, and at the date of the agreement in question, it was operating these lines and had over 1,000 employees; that within the last ten years the Dominion Company had established a rival line, and it had become impossible for the defendants to operate its lines at a reasonable profit; that in view of this state of things the directors of the company defendant considered the means by which expenses might be reduced, and proposed to lease their lines to the other defendant for a fixed rent; that this arrangement had been ratified by the shareholders of the Montreal Telegraph Company at a special meeting, held 17th August, 1881, by a vote of 23,204 to 1,831; that in pursuance of the resolution adopted at such meeting the agreement in question had been executed; that the operation of the telegraph lines had been continued by the Montreal Telegraph Company and its directors through the other defendant under the control and superintendence of the Montreal Telegraph Company and its board of directors; and in exercise of the powers conferred upon them by their charter, the board of directors of the Montreal Company has, since the agreement in question, increased the rate for the transmission of messages; that the agreement in question has had the effect of putting an end to the opposition of the Dominion Company as the defendant foresaw; that, in fine, the defendant has not acted *ultra vires*.

The other defendant, the Great Northwestern Telegraph Company, has filed similar pleas, *mutatis mutandis*.

While the case was in progress, Messrs. Renfrew, Gilmour and Crawford intervened and alleged that the plaintiff is not the holder in good faith of the shares mentioned in his action, and that he is only a *prête-nom*. The same day the Montreal Telegraph Company, after obtaining leave, filed an amended plea in which it invoked the additional grounds urged by the intervention. The plaintiff contested the intervention, notifying the intervenants of the fact that the defendant had invoked these reasons, so that the contestation on the intervention is now only a question of costs, inasmuch as the reasons assigned by the intervention have to be adjudicated upon by the principal contestation.

The evidence establishes that on the 17th of August, 1881, the plaintiff was the owner of one share in the capital stock of the Montreal Telegraph Company, and had been so since the 10th of June previous, and that on the 17th of August he acquired fifty more shares; that he is acting in the suit in concert with other shareholders who have advanced money for the costs; that he will act more or less according to their wishes, and even admits that if those with whom he is acting intimated a wish that the action should be discontinued, he would do so.

In order to decide the present case we must see what are the rights and powers of the Montreal Telegraph Company, and what are its obligations. The great principle which governs this matter is briefly but clearly expressed in Art. 358 of our Civil Code: "The rights which a "corporation may exercise, besides those speci- "ally conferred by its title, or by the general "laws applicable to its particular kind, are all

"those which are necessary to attain the object "of its creation." What are the rights and powers of the Montreal Telegraph Company? It is empowered by its charter to construct telegraph lines, to erect poles, &c., as its business may require, and the said company shall be in law capable of purchasing, having and holding any estate, real, personal, or mixed, for its use, and of letting, conveying or otherwise parting therewith for its benefit and on its account. Section 1 of the amending Act (18 Vict. c. 207) is in the following terms: "It shall be lawful for the said company, and they shall have power to purchase, receive, have and hold to them and their successors, to and for the use of the company, such real estate in this Province and such only, in addition to that now held by them, as may be necessary for the convenient transaction of the business of the company, and for the erection of buildings for the suitable accommodation of the stations thereof, in this Province, now or hereafter to be established, and for the construction of the line or lines or branches thereof, and for the effectually carrying on the operations of such company, and the same to let, convey, or otherwise depart with, for the benefit and on account of the company, from time to time, as they shall deem expedient."

The general principle laid down as to the powers of corporations is clearly expressed by all the authors, and the rules are stated in Brice, *Ultra Vires*, pp. 66, 67. In rule 5 he says: "Corporations have no capacities or powers other than those indicated in the four previous propositions, and they cannot legally or validly engage in other transactions." He afterwards states (Rule 10): "*Franchises, and special privileges or powers* in the nature of *franchises*, cannot be delegated." And in a note he adds: "This is established beyond dispute. Every capacity of a corporation which can be styled 'special' or a privilege, is given to it for itself, for its own purposes and to be used by itself directly. Any transfer, direct or indirect, to others is altogether void." In rule 13 we find: "Any one corporator may call upon the Courts to restrain the corporation from engaging in any *ultra vires* transaction." And he adds in a note: "This is quite clear whether the transaction be executed or executory." Wherein consist the *franchises* or privileges of a corporation? In the exclusive rights given to it. Even its existence is a franchise. But the exclusive rights granted to it are also *franchises*; and it is an established principle that corporations cannot delegate and transfer to others their special powers and their privileges. "Such a transfer," says Brice, "whether permanently and absolutely, or only for a definite period, is, it has been repeatedly decided, in the absence of statutable powers, illegal." (Brice, p. 521.)

There is little difficulty as to the principle but only as to the application of it to the various transactions which may be entered into. Let us examine, then, the deed between the two companies. By this deed the Great Northwestern Company, styled "contractors," undertakes for the term of ninety-seven years "to work, manage and operate" the system of telegraph owned and heretofore operated by the Montreal Telegraph Company, called "The Company," and to maintain the lines in good order. The contractors are to have the right to use and occupy all the offices, stations, buildings and properties of the company, except the board room and the secretary's room adjacent, and a portion of the vaults; and the contractors are to have the right to sub-let such portion of the company's buildings as are not required for the transaction of its business. But the company may sell or otherwise dispose of the buildings in Montreal and Ottawa which are not used for its business. The contractors are to collect the amounts received for messages and other revenues in the name of the company. It is further stipulated by this agreement that the contractors may, under certain restrictions, have the tariff of rates adjusted. The contractors bind themselves to pay to the company the sum of $165,000 in quarterly instalments, to pay all costs of operating, taxes, &c.; and to fulfil all contracts for which the company was liable. In default of payment within a certain delay, the agreement comes to an end *ipso facto*, and the company resumes possession of its lines, &c., with all the additions and improvements, which is also to take place when the agreement terminates. The Western Union Company intervened as guarantor.

What, then, is the nature of this agreement? Is it a lease, or a hiring of work, or what in English and American books is called a "working or traffic arrangement?" Is there an abandonment or assignment of privileges and franchises? Remark in the first place that the contractors are to pay $165,000 in any case, even if they did not receive a single cent. That, to say the least, is a singular hiring of work! It is the contractors, the persons hired, who are

to pay and the master who is to receive. It is a singular working arrangement where one of the parties may take the lion's share. And it was said at the argument that the contractors were only the mandataries, the agents of the company! But it is a principle that the mandator may at any time revoke the powers of his mandatary. He may expose himself to an action of damages, but that is not the question. It is strictly within his right, C. C. L. C., 1756. "The mandator," says this article, "may at any time revoke the mandate." But can the company here revoke the agreement before the term fixed, even by payment of damages? Evidently not, and the company so well understood this that it stipulated for the revocation of the agreement *ipso facto* in case the contractors failed to pay within a certain delay. If the company were going on its own authority, except in the case provided for, to take possession of the lines, &c, transferred to the Great Northwestern, the latter would easily find means of preventing it.

A great number of authorities and an equal number of decisions have been cited on one side or the other, as to the interpretation of agreements similar to that in question here. I have read with the greatest attention the larger part of the decisions cited, and in every case the question is reduced to this: whether a corporation has ceded its powers or abandoned some of its franchises. By the agreement between the parties here the Montreal Telegraph Company abandoned all its lines, all its stations, all its properties used for the transaction of business and the operation of the lines, and reserved no control over the other company, transferee, which has the right to construct new lines, to repair old ones, to collect charges for transmission of messages, to fix the rates, and this for the term of 97 years. The Montreal Telegraph Company has no longer a right through its directors, as its charter provides, to fix absolutely and without restriction the charges or rates to be taken for the transmission of messages. They can no longer, as the same charter provides, declare dividends out of the profits, and they can no longer make a detailed statement of the business, profits and losses of the company, and, to use the language of Vice-Chancellor Turner, in the case of Great Northern Railway against Eastern Counties Railway, reported in 21 Law J., Chancery, p. 837, "it is impossible to read the agreement between the plaintiffs and the East Anglian Railway Company (in the present case between the Montreal Telegraph Company and the Great Northwestern) without being satisfied that it amounts to an entire delegation to the plaintiffs, (defendants) of all the powers conferred by the charter." Discussing agreements of this nature, Judge Wells, in a case reported in the 115th volume of the Massachusetts Reports, p. 351, said:—"They are not merely contracts by which another party is employed to operate the road on behalf and under the direction and control of the corporation owning the franchise, receiving a share of the profits as compensation. The entire control of the road, with all its franchises, is transferred, the corporation owning it receiving in return only a fixed rent, payable in the form of a dividend to its stockholders.' And Judge Miller in the case of Thomas against Railroad Company, reported in 101 U. S. Rep. pp. 82, 83, after quoting the opinion of English judges, and the various decisions of the English courts, adds:—"The true principle is that where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and power conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this Court by Mr. Justice Campbell" (in the York Maryland Line R. R. & Vincent, 17 How. p. 30.)

To state my opinion on this point, I think in principle a corporation has a right to make any agreement, either for the division of profits or for the working of its business, but so as never to lose control of its rights and privileges, nor to transfer or abandon any of its franchises.

The clause of the Montreal Telegraph Company's charter has been invoked, as well in the original Act 10 and 11 Vict., chap. 83, as in the Act, 18 Vict. chap. 207. This clause would seem to give the Company the right to make a lease and to let, convey, or otherwise part with all its estate real, personal, or mixed; but evidently this clause cannot have the effect of giving the company a right to delegate its privileges and franchises; for, in fact, it cannot let or convey its property except for its benefit and advantage; but that applies to property no longer required for the working of its business, and not to a letting or conveyance which, so to speak, deprives it of its existence as a corporation; for in the state to which the corporation is reduced it has almost ceased to have a moral existence; it is, so to speak, no more than a shadow. As Chancellor Zabriskie says, in the case of Copeland v. The Citizens Gas Co. (61 Barbour's Rep., p. 76):—"It may be considered as settled that a corporation cannot lease or alien any franchise or any property necessary to perform its obligations and duties to the State, without legislative authority. The franchises granted by the State are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants, the state is supposed to regard the character of the grantee. In this case the franchise of maintaining a canal and railroad across public highways and navi-

gable rivers, *of taking tolls and rates of fares fixed by themselves, without control,* are, with others, a material part of the property leased. These cannot be leased or alienated without the consent of the State." And the Court decided that the lease was null, and the action properly brought by a shareholder. And Brice, p 128, says:—"The corporation have the right to alienate; but the alienation *must be in the ordinary course,* and for the purpose of the corporate operations;" and he lays it down as principle that a corporation of a public nature may not so deal with its property as to incapacitate itself from performing its public duties. And the rule applies to strictly private corporations in this sense, that the agreement is *ultra vires* if some of the corporators object. (Brice, p. 130.)

I am, therefore, of opinion that the deed of agreement between the parties is *ultra vires*, and must consequently be set aside. For it is not the name that may be given to a deed which should determine its nature, and the more care has been taken to disguise the effects the more scrupulously should the courts look at the object and determine the consequences. Those who prepared the agreement between the parties in this case probably had before them the agreement questioned in the case of Hinch vs. The Birkenhead, &c., Railway Company, 13 Eng. Law and Eq. Rep., p. 506. Care has been taken to avoid certain clauses which seemed most open to objection, (*e.g.*, the Great Northwestern has been given the right to collect charges in the name of the Montreal Telegraph Company). But the effect and the result of the agreement are similar, and the judgment should be the same.

It has been said that it is in the evident interest of the shareholders of the company that the agreement should be carried out. It is possible. But besides the interest of the shareholders there is that of the public; and if Parliament had wished to give a monopoly to this company to enrich its shareholders at the expense of the public, it would not have granted a charter to the Dominion Company, whose consent has brought about the agreement in question. Besides, the company has not so much to complain of. Its shareholders have received as *bonus* a quarter of the amount of their stock, and good dividends on an augmented capital of two millions. If Parliament thought fit to grant a charter to a second telegraph company, it was because it believed that competition would be for the public advantage. It would be a strange thing to suppose that the State would have created a second corporation to permit them to be fused in a third. Moreover, last session the company endeavored to obtain the powers which it deemed necessary to make the agreement in question. It considered, therefore, that it did not possess these powers. Parliament refused them; therefore, it considered that the company did not possess them, and that to make this agreement, *i.e.*, to let its lines, etc., they were necessary. I cannot give a better interpretation of the law than that which the company itself has given.

There only remains the objection urged by the defence, that the plaintiff is only a *prête-nom*—a tool in the hands of others, and that he is without interest. In the first place it is proved that the plaintiff is the owner of one share since 19th June, 1881, and that he acquired 50 others on the 17th August, the date of the agreement. It is very true that the plaintiff admits he is acting in concert with others (who are proved to be shareholders of the company). But even if they were outsiders, the plaintiff would be none the less a shareholder, and whether he be the holder of one share or of a thousand, what is the difference? Is the interest of a stockholder measured by the amount of his stock? His pecuniary interest may be less considerable, but his legal interest is the same. It may be true that the agreement in question is more profitable, pecuniarily to the shareholders than that the company should continue to work the lines; it may be true that the shares will fall in the market if the agreement is annulled. That is the opinion of Mr. Crawford, a large shareholder, who has been examined as a witness. But the contrary may also prove to be true. There are many surprises in all these transactions. But what has that to do with the legal interest of the plaintiff? He has a right, and he is exercising it. As to his pecuniary interest, he is master of his own acts, and nobody has any right to interfere. If the deed is illegal, the majority cannot bind the minority. I have so held already in a case against the Banque Ville Marie. And if the minority may complain why not a single shareholder? It has been so held in the case of Beman vs. Rufford, 20 L. & Equity Rep. p. 544. Lord Cranworth observed: "Therefore it is that in this, as in many other cases, one shareholder may file a bill on behalf of himself and others; although at a meeting of the company a great many of the shareholders, even the majority, may say that they have sanctioned a different course."

The agreement is consequently declared *ultra vires* and is set aside; The Montreal Telegraph Company is ordered to resume possession of its lines and of all the property transferred to the other defendants, and the Great Northwestern Company is enjoined from any longer using the lines or property illegally transferred to it, and is ordered to re-convey the same to the Montreal Telegraph Company, and also to account for all monies which it may have received for telegraph messages or otherwise under the agreement in question, and the intervention is dismissed with costs.

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