Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of La Banque d'Hochelaga and another v. *Murray and others in certain Consolidated Cases, from the Court of Queen's Bench for Lower Canada; delivered 25th June* 1890.

Present:

LORD CHANCELLOR.
LORD BRAMWELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

This is an appeal from judgments of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), reversing judgments of the Superior Court for Lower Canada, Province of Quebec, District Montreal.

In May 1883 the Appellants, La Banque d'Hochelaga, obtained in the Superior Court a judgment against the Pioneer Beetroot Sugar Company, Limited, for $40,800. 80, with interest and costs, and on or about the 30th May 1883 the said Appellants, under the provisions of the Quebec Statute, 31 Vict., c. 25, issued a writ of execution upon the said judgment, to which, on 25th June 1883, the Sheriff made a return of *nulla bona.*

In the month of June in the same year several actions were commenced by the Appellant Bank, as creditors of the said Company in respect of the said unsatisfied judgment against the Defendants respectively as shareholders of the said

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Company, to recover from them respectively the amounts remaining unpaid upon the shares alleged to be held by them respectively in the above-mentioned Company; and the question in each of the said actions was, whether or not the said Defendants were liable as shareholders in the said Company.

In the case of the Defendant William G. Murray, he denied that he had ever promoted or been party to the incorporation of the said Company, or connected therewith in any way, and alleged that if his name had been used it had been used without his authority and by fraud. He denied that he had ever been treated as a shareholder or member of the Company, or had ever been entered as a shareholder in the books of the Company.

On the 27th July 1883 the said Company was ordered to be wound up, and John Fair was duly appointed liquidator. He afterwards obtained leave to intervene, in order that any amount recovered in the said action might be paid into the hands of the said liquidator, to be distributed, according to law, amongst the creditors of the Company; and in September 1884 the Appellant Thomas Darling was substituted for the said John Fair as intervener in the said cause.

It was enacted by the above-mentioned Statute, 31 Vict., c. 25, Section 1, Clause 6, that the expression "shareholder" or "stockholder" means every subscriber to or holder of stock in the Company, and extends to and includes the personal representatives of the shareholder.

By Section 2 it was enacted that the Lieutenant Governor in Council may by letters patent under the Great Seal grant a charter to any number of persons, not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the Company thereby

created a body corporate and politic for certain purposes therein mentioned, of which the purpose of the said Beetroot Sugar Company was one.

The Company was incorporated by letters patent, issued under the Great Seal of the Province of Quebec, in pursuance of the provisions of the said Act. The letters patent were issued upon a petition presented to His Honour the Lieutenant Governor of Quebec in the names of Gerhard Lomer, the Defendant William G. Murray, the other Defendants, and other persons, stating that they had associated themselves together for the purpose of establishing a Joint Stock Company for the manufacture of sugar from beetroot in the said Province, and that they were desirous of obtaining a Charter by letters patent under the Great Seal of the Province, to constitute themselves and their successors and such other persons as had or might become shareholders a body corporate and politic, that each of them had taken and subscribed the amount of stock set forth therein, and praying that His Honour would be pleased to grant a Charter of Incorporation to them by letters patent, to be issued under the Great Seal of the Province, constituting them and their successors, and such other persons as had or might become shareholders, a body politic and corporate by the name of the "Pioneer Beetroot Sugar Company, Limited," for the purpose and with the capital stock therein mentioned.

The petition was verified by the solemn affirmation of the said Gerhard Lomer, in which he declared that to his knowledge the allegations and averments of the said petition were true, and it was accordingly recited in the letters patent that the said Gerhard Lomer, the Defendants, and the said other persons had by petition represented that they were desirous to be incorporated by the name of the Pioneer Beetroot

Sugar Company, and that the truth and sufficiency of the facts stated in the said petition had been established to the satisfaction of Her Majesty.

It was enacted by Section 51 of the said Act that, save only in any proceeding by *scire facias* or otherwise for direct impeachment thereof, the letters patent or supplementary letters patent themselves or any exemplification or copy thereof under the Great Seal should be conclusive proof of every matter and thing therein set forth.

Parol evidence was given in the actions on the part of the Defendants, but the whole of that evidence was objected to, and a motion was made by the Bank that all parol evidence adduced by the Defendants to contradict their subscription in writing to the capital stock of the said Company, or to contradict the said letters patent or anything mentioned therein, should be declared illegal and be rejected.

In December 1884 the Defendants instituted proceedings for improbation of the said letters patent under Article 154 and following Articles of the Code of Civil Procedure for Lower Canada, with the object of having their names struck out of the said letters patent. That application was dismissed by the Superior Court, and the judgment having been in this respect affirmed by the Court of Queen's Bench, from which there has been no appeal, it is not necessary to consider it further.

In December 1884 the Honourable L. O. Taillon, as Attorney General of the Province of Quebec, filed an information against the said Company and the Appellant Thomas Darling as liquidator thereof and the Bank as *mise en cause*, whereby after alleging, amongst other things, that the above-mentioned letters patent had been obtained by fraudulently suggesting that the Defendants and others had petitioned for the

grant of the same, and were desirous that the same should be granted, and alleging that the Defendants had represented that they could not adequately defend themselves without the benefit of a *scire facias*, he prayed that a writ of *scire facias* should issue and be made known to the said Company, and to the said Thomas Darling in his quality of liquidator of the said Company, and to the said La Banque d'Hochelaga, ordering them and each of them to appear and show anything which they or either or any of them might have or know why the said letters patent should not be declared fraudulent, null, and void, at least in so far as the said Defendants were concerned; and further that the Court being more surely informed of all the premises should then declare by the judgment to be rendered on the said information that the said letters patent were fraudulent, null, and void, at least in so far as the said Defendants were concerned.

A writ of *scire facias* was issued according to the terms of the information.

Thereupon the Company, declaring that they severed in their pleading from the *mis en cause*, demurred to the said information, because, amongst other reasons, the remedy sought to be invoked by the informant, to wit, the process of *scire facias* cannot be applied except to set aside the letters patent themselves, which was not sought to be done in the present case.

The Company also, without waiver of their demurrer, pleaded to the said information, and, amongst other things, alleged that it was specially false that the persons at whose request the said information was issued, that is to say, the Defendants in the said actions, never participated in the application for the issue of the letters patent in question, nor ever subscribed for stock in the said Company, and that, on the

contrary, they and each of them did subscribe unconditionally to the capital stock thereof, and did either themselves or by their duly authorized agent petition for the issue of the said letters patent, and that the same were issued on the faith of the original unconditional subscription of the said persons, which had been transmitted and communicated to the Provincial Secretary or other proper Govermental officer; that the said letters patent were issued on the fifteenth day of July eighteen hundred and eighty, and were published according to law, and that the fact that the same were issued to the corporators mentioned therein was published in the leading daily newspapers then in the city of Montreal, which newspapers were at the time subscribed to or read by the said corporators and each of them; that the persons at whose instance the information was laid were persons of large reputed means, and that the fact of their being known and published as corporators in the said Company contributed largely to the financial standing of the said Company, and was thus an inducement to capitalists to make advances to the said Company.

The action of La Banque against the Defendant William G. Murray, together with the intervention of the said Thomas Darling and the information for the writ of *scire facias*, together with the proceedings in improbation and the motion to reject the evidence above mentioned, were heard in the Superior Court, before the Honourable Mr. Justice Loranger, and in or about June 1886 the learned Judge gave judgment in the said action, granting the motion for the rejection of evidence, and dismissing the application for annulling the letters patent, and ordering the Defendant William G. Murray to pay the amount claimed from him into the hands of the intervener, the liquidator of the said Com-

pany, to be distributed according to law. Similar judgments were delivered in the Superior Court in the other actions.

In March 1887 the Honourable Honoré Mercier, Attorney General for the Province of Quebec, was by order of the Court of Queen's Bench substituted for the Honourable Louis Taillon.

The Defendants and the Attorney General respectively appealed against the said judgments, and the cases, having been consolidated by order of the Court of Queen's Bench, were heard in March 1888, before the Honourable Sir Anthony Aimé Dorion, Knight, Chief Justice, and the Honourable Justices Tessier, Cross, and Church.

The said Court (*dissentiente* Tessier, J.) on the 19th May 1888 gave judgment reversing the judgment of the Superior Court on the information for the *scire facias*, and it was ordered that the letters patent should be repealed, cancelled, and annulled in so far as the Defendants were concerned, and that the names of the Defendants should be struck out of the said letters patent; and the actions of the Appellant Bank against the Defendants were dismissed.

It has been agreed for the purpose of this appeal that the declarations, pleadings, evidence, and judgments in the consolidated cases are the same, *mutatis mutandis*.

Their Lordships concur with the majority of the Judges of the Court of Queen's Bench in their findings of fact, as stated in their reasons. From these it appears that the Defendants were never organized as shareholders, and that no allotment of stock was ever made to them; that they had proposed the formation of a Joint Stock Company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a Government sub-

sidy, without which it was distinctly understood that the Company should not be formed; that the conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders; that the Bank did not lend money on their names, and was, therefore, in no respect led astray by the fact that their names were used without their permission; and furthermore, that the promoters acquiesced in the withdrawal of the Defendants, and at a later period formally approved thereof, and that from the time of their severance from the project the Defendants ceased to be considered or even reputed to be subscribers to the undertaking; that they were never notified of any further proceedings, nor were they ever required to pay any call; that they took no part in any further proceedings, and that their names were never entered in the stock ledger, nor in any book purporting to be kept in conformity with Section 32 of the Statute of Quebec, 31 Vict., cap. 25.

Their Lordships are of opinion that the names of the Defendants were fraudulently inserted in the petition for the letters patent without their sanction or authority, and that the solemn declaration of Gerhard Lomer verifying that petition was false. There was therefore no ground for making them liable except the statements in the letters patent.

By Article 1034 of the Code of Civil Procedure for the Province of Quebec, it is declared that any letters patent granted by the Crown may be declared null and be repealed by the Superior Court:—(1) where such letters patent were obtained by means of some fraudulent suggestion, or (2) where they have been granted by mistake or in ignorance of some material fact.

By Article 1035, all demands for annulling letters patent may be made by suits in the ordinary form or by *scire facias* upon in-

formation brought by Her Majesty's Attorney General or Solicitor General, or other officer duly authorized for that purpose.

By Article 1036 the information is served upon the person who holds or relies upon such letters patent, and is heard, tried, and determined in the same manner as ordinary suits; and by Article 1037 an appeal lies from the final judgment rendered upon the information.

The Court of Queen's Bench annulled the letters patent only so far as the Defendants were concerned, but their Lordships are of opinion that the Code does not in such a case as the present authorize a partial annulment of letters patent. To annul the letters patent as to some only of the members of the corporate body in the present case would be to alter the constitution of the Corporation created thereby. If it could be annulled as to eight or ten of the shareholders, it might be annulled as to all but five, and thus the amount of the capital of the Corporation as intended by Her Majesty to be constituted might be and would be materially diminished. In fact, by such a partial annulment, a Corporation might be created quite contrary to Her Majesty's intention, and such a one as would be incapable of carrying into effect the objects intended by the letters patent.

The facts found show that the grant of the letters patent and the recitals therein were obtained by means of a false and fraudulent suggestion, and are quite sufficient to warrant a total annulment of the letters patent. A material question was, however, raised by the demurrer to the information as to the construction of the prayer of the information and writ of *scire facias*. It was contended that there was no prayer to have the letters patent wholly annulled, and that the information and writ of *scire facias* merely asked for an annulment

so far as the Defendants were concerned. Their Lordships cannot put such a construction upon the words of the prayer. The information does not merely ask to have the letters patent declared fraudulent and void so far as the Defendants are concerned, but to have them declared fraudulent and void, at least in so far as the Defendants are concerned. The words "at least" make a great difference in the meaning. Their Lordships' construction of the prayer is this, that the Court should declare that the letters patent were fraudulent and void, but that if the Court should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the Defendants were concerned.

It would be a great miscarriage of justice if the Defendants should be held conclusively bound by a false recital in the name of Her Majesty in the letters patent obtained by means of a false and fraudulent suggestion, verified by a false affidavit, and should be compelled to pay the unpaid amount of shares for which they were never subscribers, and of which they were never the holders. Her Majesty has the right, under Articles 1034 and 1035 of the Code of Civil Procedure of Lower Canada, to demand, by Her Attorney General, the annulment and repeal of letters patent obtained by means of any fraudulent suggestion. Her Majesty's Attorney General for the Province of Quebec, acting on behalf of Her Majesty, has by a recital in the information declared it to be his duty to protect the Defendants against the unauthorized and fraudulent incorporation of them in the letters patent, and against the fraudulent and mistaken issue of the said letters patent, purporting to incorporate them with others as shareholders in the said Pioneer Beetroot Sugar Company; and he has, in the

opinion of their Lordships, prayed on behalf of Her Majesty to have the letters patent declared fraudulent, null, and void. Their Lordships having decided that the letters patent cannot be partially annulled, are bound to advise Her Majesty to order that they be entirely annulled, and to amend the judgment of the Court of Queen's Bench, on the information for the writ of *scire facias*, in accordance with that view.

The letters patent being annulled, there is an end of the actions at the suit of the Bank and of the interveners against the Defendants as shareholders in the incorporated Company. They are not liable to be sued as shareholders of the Company in consequence of the return of *nulla bona* by the Sheriff to the writ of execution issued upon the judgment recovered by the Bank against the Company as incorporated by the letters patent.

Their Lordships will humbly advise Her Majesty to amend the judgment of the Court of Queen's Bench on the information for the writ of *scire facias*, by ordering the letters patent to be entirely repealed, cancelled, and annulled, instead of ordering them to be partially annulled and repealed as therein specified, and to order the said judgment to be affirmed in all other respects.

Also to affirm the judgment of the Court of Queen's Bench in the several consolidated actions, including those portions of the said judgment which relate to the interventions, and the interveners.

The Appellants must pay the costs of this appeal.