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Feb. 20.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

BENJAMIN LEONARD DEACON, IVER EDBORN, PAUL DOLMAN, SARAH GOODMAN, EXECUTRIX OF THE ESTATE OF JAMES GOODMAN AND AUGUST SWANSON,

DEFENDANTS.

Public lands—Homestead—Jurisdiction of Exchequer Court—Validity of patent—Delivery—"Improvidence"—Judgment creditors—Bonâ fide purchasers.

The defendant, S., an alien, for a number of years was a homestead entrant on land in Manitoba and entitled to a patent therefor under the *Dominion Lands Act*. He refused to make application for the patent, because, until the patent was registered in Manitoba, the land was not subject to the payment of certain taxes, nor to the execution of judgments against such lands. He was induced to consummate the application for patent under threats of the Dominion land-office to cancel his homestead entry, and having taken out his naturalization papers and signing the application, the patent regularly issued and was mailed to him at his post-office address. It was later returned to the land-office because not called for by him. In the meantime a copy of the patent was registered against the land, whereupon the land was sold to satisfy the taxes and judgments, and thus found its way into the hands of innocent purchasers for value. Proceedings were instituted to set aside the patent and subsequent conveyances on the ground that the patent was procured by fraud and improvidently issued.

Held, the Exchequer Court has no power to review or question the validity of the judgments obtained by the creditors in the Provincial courts; that it has jurisdiction, under sec. 94 of the *Dominion Lands Act* (7-8 Edw. VII., 1908, c. 20) and sec. 31 of the *Exchequer Court Act* (R.S.C., 1906, c. 140) to determine the validity of the patent, and to set aside, if need be, the registration of instruments affecting the land in the registration offices of the Province.

2. The patent having been duly issued, in conformity to the provisions of sec. 90 of the *Dominion Lands Act,* physical delivery was not essential to render it operative or effective.

3. Upon the registration of the patent thus issued the judgment creditors of the patentee had the right to treat it as having been regularly issued and to secure a sale of the land in execution of their judgments.

4. Under the evidence adduced, no fraud, error or improvidence was established as would warrant the avoidance of the patent under sec. 94 of the Act; the fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did sign them, does not shew "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes and hinder his judgment creditors.

5. After the land has passed into the hands of third parties, who were innocent purchasers for value, no relief can be granted in violation of their rights.

INFORMATION exhibited by the Attorney-General, asking that *letters-patent* for certain Dominion lands issued to the defendant, August Swanson, on March 24th, 1911, be declared void and be delivered up to be cancelled.

Tried before the Honourable Mr. Justice Audette, at Winnipeg on October 1, 2, and at Ottawa on the 20th November, 1918.

A. J. Andrews, K.C., and *F. M. Burbidge,* for plaintiff.

H. A. Bergman, for defendant, Iver Edborn.

B. L. Deacon, for defendants, Paul Dolman and Sarah Goodman.

W. S. Morrisey, for defendant, Deacon.

AUDETTE, J. (February 20, 1919) delivered judgment.

It is alleged by paragraph 15 of the Information that the Letters Patent for homestead in question granted to Swanson were sent, by mail on April 11, 1911, to his regular post-office; but it is averred that

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such Letters Patent had been issued fraudulently, improvidently and by inadvertence, and that the same should be declared as having never been duly and regularly issued and *delivered so as to vest the said lands in Swanson.* The information further seeks, in the alternative, for a declaration *that if the said patent was issued, the issue of the same was procured by fraud, or that it was inadvertently and improvidently* issued, and that the same should be declared void and should be delivered up to be cancelled—and further, that the alleged sales and mortgages be declared void and of no effect and be set aside.

Now, the facts of the case are intricate, but stripped and freed from all unnecessary details, may be stated as follows:

At the outset it must not be overlooked that the defendant Swanson, the patentee, is not a relator, but is purely and simply a defendant in the case.

Swanson is a Swede who, according to his own statement, came to Canada from Minnesota, U.S., in 1900. Einarson, who has always lived in the neighbouring community of Pine Creek, now Piney, says that when he arrived in the fall of 1899, Swanson was already there, being a squatter on the land in question. Swanson duly signed his application for entry on August 27, 1900, and has performed and completed all the settlement duties that entitle him to his patent. In fact, he had done so many years previous to the issue of his patent, and so became entitled to the same according to the laws and regulations in that behalf made and provided.

Somewhere about 1903, Swanson got into trouble with some of his neighbours. He was arrested on a charge of having maliciously injured cattle belong-

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ing to certain of his neighbours that he caught roaming on his quarter-section, which, at the time, was not fenced. At the trial he was acquitted, or rather discharged. Then he turned around and sued his prosecutors for malicious prosecution, giving the conduct of the action to one Mr. Deacon, a defendant herein, who looked after his case up to a certain stage. Swanson, finding that his action was not being prosecuted as speedily as he desired, took the case out of Mr. Deacon's hands and retained the services of another legal firm who saw the case through, when the action was dismissed with costs against Swanson—the judgment being registered against his quarter-section. Mr. Deacon, in the meantime, failing to get paid for his services, sued for his costs, and obtained a judgment against Swanson, which judgment was registered in like manner.

It is unnecessary for the purposes of this case to go into the details of the cases in which judgments were so obtained in the courts of the Province of Manitoba and afterwards registered against the lands in question. However, in view of the allegations in the information, it is, I think, incumbent upon me to state here that no blame can be attached to Mr. Deacon for his conduct in this matter. The evidence at the trial so thoroughly cleared up the whole matter and exonerated Mr. Deacon from any blame that counsel for the plaintiff was impelled to withdraw averments impugning Mr. Deacon's conduct as made in the information.

It may be mentioned, by the way, that this court has no power to review the judgments rendered in the courts of the Province of Manitoba. The Exchequer Court is not a court of appeal for such Province, and, if Swanson had at any time reason

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to be dissatisfied with these judgments, his recourse was to the courts exercising appellate jurisdiction in that province, and not to the Exchequer Court of Canada. It appears, however, that Swanson took his complaints to the Governor-General of Canada, to the Attorney-General of Canada, and to the Attorney-General of the United States, and even brought the matter before the Grand Jury in Manitoba; but no action seems to have been taken thereunder.

These judgments not being appealed from, stand now in full force and effect, although that question—but for the allegations in that respect in the information—has no occasion to be mentioned, not being a consideration in arriving at the decision of the question involved in this issue.

Furthermore, ever since Swanson became entitled to his patent, he refused to make application therefor; because, until the patent was registered in Manitoba, he was exempt from the payment of certain taxes, and advised his neighbours to that effect, inciting them to follow his example, and thus creating annoyance both to the government and the municipality. The latter, as it appears from the evidence, complained to the government and pressed the issue of the patent.

There is spread on the record a very long and protracted correspondence from which it appears that, for a number of years previous to the issue of the patent, the government was earnestly endeavouring to induce Swanson to make his application for the patent, and going so far as to threaten him with the cancellation of his entry under sec. 26 of the *Domin-*

ion Lands Act, if he failed to do so. Instructions were even given to institute proceedings to that effect and notice of the same was accordingly given to Swanson.

However, after a number of months, even years, had elapsed, Swanson duly signed his application. Under the evidence on record, I have no hesitation in finding that he did personally of his own free will, sign the application. The evidence of the homestead inspector, Lagimodiere, who gave his testimony in a most straightforward and creditable manner, leaves no room for doubt, and besides, the signature on the application for the patent is undoubtedly the same as that which is to be found on Swanson's application for entry and on many other documents on record.

It appears from the evidence, both oral and documentary, that for a very long period instructions were being repeatedly given, by the department, to take Swanson's application for this overdue patent. However, Swanson persistently refused to do so, giving as his reasons for so behaving that he had been in trouble with some of his neighbours at Piney, who had obtained judgment against him, and further that the school trustees were after him for taxes, and that he wanted to delay the issue of the patent to allow him, in the meantime, to get rid of the same. The complaint by the municipal authorities was that Swanson was avoiding the payment of his taxes. (Exhibit 1, F).

Witness Lagimodiere says that he had had instructions at different times to take Swanson's ap-

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plication for the patent, and being, on February 19, 1910, in the Dominion Land Office, at Winnipeg, Swanson, who was quite in good humour, called at the counter and informed him he wanted to make application for his patent. That was some time after he had been threatened with the cancellation of his entry. (See Exhibit 1, A.F.). Lagimodiere, under the instructions of his superior officer, then took the application, filled it up in his own handwriting and had Swanson sign it in his presence. Having said he was not naturalized, Lagimodiere prepared naturalization papers, but when it came to sign these, Swanson demurred and refused to do so.

But for some stress being laid upon the letter of January 26, 1910, (Exhibit 1, A1), in which appears the words, "Swanson refuses to make application "for his patent and it is desired by the department "that you will visit him after seeding next spring, "and do your best to show him his position in the "matter and persuade him to make his application"— I would refrain from making any reference to the same. Obviously that is only a part of the heavy and protracted correspondence relating to the same subject and cannot be construed as intimating that the application could not be taken before the spring. As witness Lagimodiere puts it, that letter would have been considered as optional, of letting Swanson off up to and after seeding; and, moreover, that letter was never communicated to Swanson and therefore is of no effect in his behalf.

There is another important link, in the chain of facts, in that letter of February 21, 1910, (Exhibit 2, F), which reads as follows:

"Warren, Minn., Feb. 21, 1910.

"To the Honourable Homestead Inspector
of Dominion Land,
Winnipeg, Manitoba.

"Dear Sir:—

"I cannot sign those papers that we made out "when I saw you last. If I did, I would sign all my "property away for nothing. It will not be neces- "sary to come to my place until you get a letter in "writing from the Attorney-General of Manitoba "to the fact that he will bring the case up in court "in the King's Bench. If this case is not adjusted "in a reasonable time I will bring it up in court in "Minnesota.

"Yours truly,
"(Sgd.) August Swanson."

"P.O. Piney, Man."

Reference will be hereafter made to this letter.

Subsequently to this date, it having been found out by some one that Swanson had been naturalized and so become a British subject, his naturalization papers found their way into the hands of the department. The evidence does not disclose who so sent them, but the evidence is superabundant as to their legality. While it is of no importance to know how these naturalization papers came into the possession of the department, it is suggested by counsel that Swanson, upon being threatened with cancellation of his homestead entry, and in fear of losing it, sent them himself. This, if true, would operate as a complete estoppel against Swanson.

These naturalization papers having completed the preliminary steps in the application for the patent the same was duly signed and sealed on March 24,

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1911, and I assume, duly registered in the Department of the Interior pursuant to sec. 90 of the *Dominion Lands Act*. The patent was then in due course, according to the practice in that behalf, duly transmitted by mail on April 11, 1911, to Swanson's address, at Pine Valley, Manitoba. But the same was returned sometime in the month of May following, with a memorandum endorsed on the envelope by the postmaster at Pine Valley, that the letter had not been called for, and further stating that Swanson had been away for some time, etc.

However, Dolman having heard that the patent had issued and was at the post-office at Pine Valley, informed his legal adviser of it, who wrote to the department at Ottawa and obtained—in the interval between the mailing and the return of the patent—a copy of the same, which he duly registered against the lands in question.

The patent being thus registered, the land was sold to satisfy the taxes and the judgment creditors, and the property found its way into the hands of a third party—an innocent purchaser for value without notice—who spent and disbursed upon the property in improvements the sum of $2,053.17, inclusive of the purchase price of $1,200. The land was sold in due course at Winnipeg to one Ainsley, who sold afterwards to defendant Deacon, who, in turn, sold to defendant Edborn, who is in possession living on the land, and who when purchasing did not even know Swanson and all that has been mentioned above.[1]

[1] R.S.M., 1913, c. 107, s. 3; *U. S. R. Co. v. Prescott* (1872), 16 Wall. 603.

JURISDICTION.

In approaching the law of the case we are confronted with the question of jurisdiction. It is contended that the Exchequer Court of Canada has no jurisdiction to hear and determine the present case, either under sec. 94 of the *Dominion Lands Act*, or the *Exchequer Court Act*, and that the court has no jurisdiction respecting real property in the province —and for setting aside registration in the registration office—etc., etc.

The King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

We find in *Chitty's Prerogatives*,[1] dealing with actions "by the King and Crown": "In the first place, though his subjects are, in many in- "stances, *under the necessity* of suing in particular "courts, the King has the undoubted privilege of "suing in any court he pleases. . . . The Crown "possesses also the power of causing suits in other "courts to be removed into the Court of Exchequer "where the revenue is concerned, in the event of the "proceeding, or the action touches the profit of the "King, however remotely, and though the King be "not a party thereto. . . . The King is also sup- "posed to be always present in court."

Under sub-sec. 1 of sec. 91 of the *B. N. A. Act*, the Parliament of Canada has the paramount power to legislate with respect to its property, *Burrard Power Co. v. The King*.[2] Under sec. 31 of the *Exchequer Court Act*, the Exchequer Court is given concurrent original jurisdiction by sub-sec. (b), in all cases in

[1] (1820), p. 224.
[2] (1910), 43 Can. S.C.R. 27, 50, 52; [1911] A. C. 87.

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which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent, lease or other instrument respecting lands; and, by sub-sec. (d) of the same section, it has also been given jurisdiction in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. Moreover, the Exchequer Court of Canada comes within the purview of sec. 94 of the *Dominion Lands Act* and is one of the courts "having competent jurisdiction in cases re-"specting real property in the province where the "lands are situate", and this principle and question have been clearly established and decided by the judgment of the Supreme Court of Canada in the case of *Farwell v. The Queen.*[1] See also *Cawthorne v. Campbell;*[2] *The King v. Powell;*[3] and *Williams v. Box.*[4]

Furthermore, as said by Anglin, J., in *Gauthier v. The King,*[5] "Provincial legislation cannot *proprio* "*vigore* take away or abridge any privilege of the "Crown in the right of the Dominion. . . . It does "not at all follow that, because the liability of the "Crown in right of the Dominion is to be deter-"mined by the laws of the province, where the cause "of action arose, that liability is governed by a pro-"vincial statute made applicable to the Crown in "right of the province, since it is by the provincial "law only so far as applicable to it that the liability "of the Crown in right of the Dominion is gov-"erned."

[1] (1894), 22 Can. S.C.R. 553-562; 3 Can. Ex. 271.
[2] (1790), 1 Anst, 205, 218; 145 E.R. 846.
[3] (1910), 13 Can. Ex. 300.
[4] (1910), 44 Can. S.C.R. 1.
[5] (1918), 56 Can. S.C.R. 176, 195; 40 D.L.R. 353 at 365 and 366.

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Therefore, I find the Exchequer Court has full power and jurisdiction to hear and determine the present issue and controversy.

This takes us now to consider whether the patent in question was duly issued, under the circumstances above mentioned, and I find that the patent herein was legally issued, without the formality of its being delivered into the hands of the patentee. It is duly issued when signed and sealed as provided by sec. 90 of the *Dominion Lands Act*. This title is of record in the department and it is therefore by no means necessary that delivery be made before it is completed. Halsbury, 6, p. 479, says: "Grants under "the Great Seal require no delivery and take effect "from the date expressed in the grant." See also *Contois v. Benfield.*[1]

A very large number of authorities can be and have been cited in support of that proposition. *Norton on Deeds,* 2nd Ed., p. 14: "The operation of a "deed is not suspended by the fact that the person "entitled to the benefit of it is ignorant of its exist-"ence."

"Depositing a deed directed to the grantee in the "post-office has been declared to be sufficient deliv-"ery."[2]

See also *Lonabaugh v. United States,*[3] a case much in point, wherein, at p. 480, the following observation is found: "We are of opinion that when, upon "the decision of the proper office, that the citizen "has become entitled to a patent for a portion of the "public lands, such a patent made out in that office

[1] (1875), 25 U.C.C.R. 39, 43.

[2] 13 Cyc. 561; *Doe'd Garnons v. Knight* (1826), 5 B. & C. 671, 108 E. R. 250; *Staple of Eng., Mayor, etc. v. Bk. of Eng.* (1887), 21 Q.B.D. 160, 165; *Gartside v. Silkstone* (1882), 21 Ch. D. 762; *Re Mathers* (1891), 7 Man. L. R. 434.

[3] (1910), 179 Fed. 476.

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"is signed by the President, sealed with the seal of "the General Land Office, countersigned by the re- "corder of the land office, and duly recorded in the "record book kept for that purpose, it becomes a "solemn public act of the Government of the United "States, and *needs no further delivery* or other authentication to make it perfect and valid."[1]

No physical delivery of the patent is essential to make it operative or effective.[2]

Now let us consider whether or not Swanson's patent is open to avoidance under the provisions of sec. 94 of the *Dominion Lands Act,* as having been issued through *fraud,* or *improvidence* or *error.*

Fraud is alleged in the information, but no fraud was attempted to be proved, and as there is never any presumption of fraud, the plaintiff fails on this point.

Can it be contended that there was any error in issuing the patent in the manner it was issued? The patent was issued for the right piece of land, to the entrant for his homestead, the party entitled thereto, upon his own application, long after the expiry of the period fixed by the Act, and after performing all settlement duties and requirements. In fact, under sec. 25 of the Act, he had acquired a right to it, before it was signed and sealed. There certainly was no error.[3]

Was there any improvidence? Where was the improvidence, in the true sense and meaning of the word? Does the charge of improvidence rest on Exhibit 2F, the letter of February 21, 1910, written

[1] *Colorado Coal Co. v. United States* (1887), 123 U.S. 307, 313.
[2] See also *Stark v. Starrs* (1867), 6 Wall. 402; *Benson Mining Co. v. Alta. Mining Co.* (1892), 145 U.S. 428, 431.
[3] 32 Cyc. 1029, 1030; *Simmons v. Wagner* (1879), 101 U.S. 260; *U. S. v. Detroit Lumber Co.* (1906), 200 U.S. 321.

by Swanson, two days after signing his application for the patent and when he refused to sign papers for naturalization? In that letter he says: "I can-"not sign those papers that were made out when I "saw you last. If I did, I would sign all my prop-"erty away for nothing," etc., etc. Can this letter have reference to the application for the patent he had duly signed? I would take it from the ordinary meaning of the words that it would have reference to papers unsigned, to the naturalization papers that Lagimodiere had made out for him to sign, but which he had refused to sign at the time without giving any reason. This letter gives his reason for refusing his patent and also the apparent reason for refusing to sign those naturalization papers; but he was aware that years ago he had signed such papers and did not want to disclose it for fear the patent might issue at once. Did he not wish that to be kept to himself, to disclose it later on if any trouble were to arise in the issue of the patent—his answer being ready that he had long ago complied with all requirements? And at p. 40 of his evidence, speaking of his naturalization papers he denies having known he ever had been naturalized, but he says: "Those papers that "are made out, they can keep them that way when "I get my money and property back." In his letter of May 7, 1915 (Exhibit 1 DQ), he claims protection "as a British subject".

Be all this as it may, surely a letter of this kind could not and would not, under the known circumstances, have justified the staying of the hand of the government in issuing the patent. It was well known and spread upon the record that the government for years, at the request of the municipality claiming its taxes, and in compliance with its duties defined

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in the *Dominion Lands Act*, had been endeavouring to have Swanson make his application. It had repeatedly threatened Swanson with cancellation of his entry, under the provisions of sec. 26, for his persistent neglect to make the application for his patent, when he had been for years entitled to it.

There is nothing new disclosed in the letter (Exhibit 2 F). It is nothing more than a consistent confirmation of the position taken by the patentee in the past. It is the same old characteristic letter following the trend of the past correspondence on the record, showing the obsession of his grievance to which the Crown is absolutely foreign, and in face of which it had been earnestly pressing Swanson to make his application for the patent. Why attach so much importance to this isolated letter, in view of the welter of letters already on record and practically to the same effect? I fail to see. The plaintiff had full notice and knowledge of all the facts in the case when the patent was duly issued.

Moreover, what reliance and credence can be placed upon this letter? Turning to the evidence we find that Swanson himself states he never wrote that letter (Exhibit 2F). He denies that it is his letter, or that he told anyone to write it for him, and he says he never signed it. Then on cross-examination, by counsel for the plaintiff, he adds he must have had somebody to write it—that he signed it—and then at the end he adds he does not recollect anything about the letter. The facts in respect of the writing of that letter instead of being cleared up by the evidence of Swanson are placed in such an obscure and bizarre circumvolution that no reliance can be placed either upon the letter or upon Swanson's evidence in that respect.

There is in that letter (Exhibit 2F), nothing new that was not disclosed before in the long-protracted correspondence which loads the record. That letter was only repeating and maintaining the same position taken from the beginning of his difficulties with his neighbours. All these facts were perfectly well known to the Crown, who, in face of the same, gave repeated instructions to endeavour to have him apply for his patent. The Crown even went further, they gave instructions to institute proceedings to cancel his entry for his want to apply for his patent, relying upon sec. 26 of the Act, and notice given Swanson to that effect.

The Commissioner of the Dominion Lands, heard as a witness, at Ottawa, testified he was unable to say whether the letter was on the Ottawa fyle, in the department, when the patent did issue. But even if that letter were not on fyle when the patent was issued, can that fact, considering all the allegations in the letter as obviously referable to all the circumstances of the case, amount to improvidence in issuing the patent? I must unhesitatingly answer that in the negative.

The term "improvidence", indeed, as defined by the Supreme Court of Canada, in the head note of the case of *Fonseca v. Att'y-Gen'l of Canada*,[1] "as dis-"tinguished from error, applies to cases when the "grant has been to the prejudice of the common-"wealth or the general injury to the public, or when "the rights of any individual in the thing granted "are injuriously affected by the letters patent."

What are the reasons for cancellation asserted by Swanson himself all through his correspondence and evidence, if not in aid of defeating the payment

[1] (1889), 17 Can. S.C.R. 612.

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of his taxes and his judgment creditors, whose claims would be barred by the Manitoba statute of limitations were the whole matter to be reopened.

The hand of the law cannot be extended in relief of the defendant Swanson under the circumstances, and much more so indeed, in violation of the rights of a third party who became the purchaser for value without notice and who has spent a substantial sum of money upon the land in question.[1]

The cancellation or avoidance of a patent cannot be trifled with. The burden of proving by clear testimony, of an unquestionable character, that the patent was granted improvidently wholly rested upon the plaintiff, and such evidence was not given. *Fonseca* case.[2] There is no evidence on the record of such a nature as would justify cancellation.

It is suggested, in the official correspondence fyled as exhibits, that another homestead be given the patentee. It is always open to the Crown, under its benevolence, grace and bounty, to allow Swanson some other quarter-section upon which to enter, the time placed on the original homestead to count—or under any other condition which may appeal to the law officers of the government.

The action is dismissed with costs.

Action dismissed.

Solicitor for plaintiff: *E. L. Newcombe,* K.C.

Solicitors for defendant, Edborn: *Rothwell, Johnson & Co.*

Solicitor for defendant, Deacon: *C. G. Keith.*

Solicitor for defendants, Dolman and Goodman: *D. W. McKerchar.*

[1] *Proctor v. Grant* (1862), 9 Gr. 224; *Cumming v. Forrester* (1820), 2 J. & W. 342; *Stevens v. Cook* (1864), 10 Gr. 415; 32 Cyc. 1057, 1029, 1030; 26 Am. & Eng. Enc. Law, 444; *U. S. v. Stinson* (1905), 197 U.S. 200, 204, 205.

[2] 17 Can. S.C.R. 612 at 652.