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Jan. 18.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

AND

EMMANUEL ST. LOUIS.....DEFENDANT.

*Prerogative—Res judicata—Chose Jugée—Effect of when pleaded against the Crown.*

The doctrine of *res judicata* may be invoked against the Crown.

INFORMATION to recover certain moneys alleged to have been improperly received by the defendant.

The facts of the case are stated in the reasons for judgment.

The case was tried before the Judge of the Exchequer Court on the 20th, 21st, 22nd, 25th and 26th days of June and on the 3rd, 4th, 5th days of December, 1895, and was argued on the 27th and 28th days of November, 1896.

*B. B. Osler*, Q.C., for the plaintiff:

A judgment in favour of the Crown against a subject is a very different thing from a judgment between subject and subject so far as its operation on the rights of the parties are concerned.

In the very nature of things it is only a method by which the Crown's court advises the Crown as to what is right with reference to the subject's claim. That is all it can amount to. I want to clearly distinguish, in the opening, the position a suppliant is in, upon recovery, from that of any one else. Supposing, for instance, after a judgment of the Court of Exchequer, after an ultimate judgment, a confirmed judgment by the Privy Council, it appeared most con-

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clusively to the law officers of the Crown that the whole thing was founded upon forgery, and that evidence clearly came out, would the Crown be bound? The Crown would simply say, this recommendation of our court is founded upon the material which was before it. We are now asked to pay, but we are asked to pay under circumstances, new circumstances, which, had they been before the court, the order never would have been made.

Are we to look to the law of the Province of Quebec, or are we to look to the law of the Province of Ontario?

[*By the Court:* Is there any evidence where it was signed? It was a contract made by correspondence, was it not? A contract to be performed in the Province of Quebec?]

Yes, the contract was created, according to the pleading, when the tenders were duly accepted by the Department of Railways and Canals for Canada.

[*By the Court:* Up to the present moment we have proceeded upon the view that the case was governed by the law of Quebec?]

Well, we take exception to that. We have not conceded that and we desire to submit to your lordship the proposition that it is governed by the law of England with reference to the position of the Crown, and not by the law of Quebec.

What are we doing here? We are seeking to recover back moneys paid on false pretences; obtained, so to speak, by conspiracy between the contractor and certain employees. We paid the moneys in Ottawa. We issued the cheques there. The Crown in its domicile here in Ottawa was asked to pay.

[*By the Court:* Do you think the Crown is domiciled in Ottawa? Is not its domicile as much in Montreal as Ottawa?]

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Well, the headquarters are here. The place where the Crown transacts its financial business is in Ottawa.

[Mr. *Geoffrion:* What about the French Treaty? We have our laws in the Province of Quebec by treaty, and the Crown must respect them.]

But it is a transaction which takes place in Ottawa and is governed by the law of England.

I rely upon the principle which is best illustrated by the case of *R.* v. *Brisac* (1).

Of course we say that the Crown is not bound by estoppel, or *res judicata*, in any way. We say that the authorities are clear upon that point. The judgment of the Supreme Court in *St. Louis* v. *The Queen* (2) does not preclude us here.

[Mr. *Geoffrion:* The Crown is not bound by laches or estoppel; but that is not the case in regard to a judgment. That is a judicial contract, and the Crown is bound by its contract.]

I submit the position this court is in with reference to the judgment of the Supreme Court is this, that in so far as their lordships have found law, this court is bound by it; in so far as they have found facts, and those facts are identical with the facts on this record, I could not ask your lordship to reverse such facts; but if there are added facts, no matter how trifling, while your lordship cannot reject the facts which have been passed upon by the other court as insufficient, this court has a right to add those facts to the new facts and come to a different conclusion than the Supreme Court. It is perfectly clear that a party in one case may make out merely a case of strong suspicion, almost amounting to proof; and in another he is able to supplement such evidence by circumstances making the proof complete.

(1) 4 East 164.

(2) 25 Can. S. C. R. 649.

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I want to make this further point with reference to the finding of fact by their lordships in the court above. I desire to say that where the judge has taken an erroneous view of the evidence, that is to say, he has stated facts upon which, and from which, he draws a conclusion, but where it is manifest that he is mistaken in stating those facts, then a court is not bound either in law or *ex comitate* to follow that judgment.

Now, in two or three places in the judgment of the court above it is manifest that their lordships were in error as to the facts upon which they were passing, and to that extent this court has to consider how far their conclusions are founded upon manifest error. For instance, an important item in one of the judgments which I will refer to in a moment is the finding of the fact that the suppliant had his original pay-rolls in his possession on which he paid his men, and that he did not produce that original pay-roll because he did not want to show the figures named. Now, that is manifestly and clearly an error. He says that they were produced, these very original pay-rolls, produced in the court, and the only hesitation about producing them was the fact that they did not wish to show just what they had paid their men. Now, how important a fact that is. That these pay-rolls existed, that they were produced, that they were acted upon, that they were shown to the Crown with that limitation. Now, if we analyse the evidence there is enough to show that the judge might naturally have made the mistake, but it is perfectly clear from reference to the evidence that no such document existed; and that one of their lordships was in entire error, and that the document referred to was one of the epitomes of the evidence made at the trial, nothing more. The error which the learned judge made in coming to

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his conclusions, might be and probably was the very turning point of the view that was taken by the court of the evidence.

Mr. Justice Girouard's judgment at page 675 of 25 Can. S. C. R. proceeds in this way:—"But "there is more. During the examination of the appel- "lant on discovery, which is made part of the case, "the appellant was requested to produce his pay-lists. "He has done so, and has placed them in the hands "of the counsel for the Crown, with the understanding "that the prices that he paid to the workmen were not "to be made known, a reservation which was perfectly "legitimate as it was none of the business of the "Crown or of the public to know what the appellant "really paid the men he had contracted to supply to "the Government. It is a very remarkable thing that "we have never heard of the result of this production "by the appellant, and of the comparison which the "respondent had the opportunity to make between the "pay-rolls sent to Ottawa and the pay-lists showing "what was actually paid to the men; and this alone "seems to me a strong presumption that these pay- "rolls must be correct. This fact was established "beyond doubt during the trial."

Now the learned judge is entirely in error, a radical error as to the facts. The pay-roll was a copy of the compilation made at the trial with simply the prices of the contractor put against them; an *ex post facto* compilation, not a compilation upon which the men were paid. Of course if it was the pay-list upon which the men were paid, it should have all the weight given to it which his lordship gives; but there is no such document. My learned friends cannot argue there is such a document. My learned friends cannot argue that his lordship is right in his facts He relies upon a document which was not in evidence. It was one

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of the copies which had not the extension at the Government price, but an extension at the paying price only.

Then I draw attention to an erroneous conclusion by Mr. Justice Taschereau at page 662 :—"The respond- "ent appears to lay some stress on the fact that five "or six of the appellant's time-keepers have been "charged to the Crown as masons or stonecutters. "Now the appellant did that openly and with the "acquiescence of the Government officers. These men "were really in the Government's employ. He paid "even the foremen engaged directly by the Govern- "ment, as appears by Connolly's evidence. The only "fault of the appellant is that he inserted them under "a classification so as to have them covered by the "contract. I cannot see any evidence of fraud in this. "No one with a claim against the Government is to "be called a thief because he may have illegally "charged, in an account of over $200,000 of this intri- "cate nature, a couple of thousand dollars of doubtful "legality. If one claims, say $200,000, but proves "only $190,000, his claim is not to be dismissed *in toto* "because he failed to prove the difference of $10,000, "even if the claim for these $10,000 were tainted with "fraud. Fraud in what is not proved is no defence to "what is proved."

Now, if that conclusion was to prevail, no deduction should have been made by the Supreme Court. But while his lordship came to that conclusion in his judgment, the court did not. The court did not come to that conclusion, because he afterwards says at page 665 :—"The appeal is allowed with costs, but from the "amount claimed by the appellant we have, after "further deliberation, come to the conclusion that the "charges for his copyists and time-keepers are not "covered by the strict letter of his contract and should

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" therefore not be allowed. The parties have not fur-
" nished us with their own figures on this point, and
" I am not satisfied that it is possible for us upon the
" record to ascertain the precise amount of these
" charges, but a sum of $1,800 is, we think, amply
" sufficient to cover them. Judgment will, therefore,
" be entered for $61,842.29, with interest from the
" 2nd of December, 1893, the date of the petition of
" right, and costs." And at page 662 he says: "These
" men were really in the Government's employ. He
" paid even the foreman engaged directly by the
" Government. The appellant did it openly and
" with the acquiescence of the Government officers,
" who knew of it." What Government officer, by the evidence, knew of it?

[Mr. *Emard:* The foreman.]

Who acquiesced in it? Villeneuve. He, by virtue of his being a Government officer during the summer, engaged during the year, is covered with the mantle of Government office all the time that he is receiving the pay of his brother-in-law to act as his time-keeper, and that is the acquiescence of the Government officer that is alluded to there.

Their lordships in the Supreme Court seem to say that the evidence of the Crown's witness, McLeod, was largely based upon his experience as a commissioner on the enquiry before the case came into the courts, and they say that his evidence must be treated as hearsay. But surely that is an error. He founded his evidence upon the examination and range of the work done, upon the plans, specifications, alterations, actual measurements; the false-works as executed are taken in and allowed; and he speaks upon the evidence of the original surveyor and engineer, Papineau, of the quantities. It seems incredible that the conclusion of the Supreme Court could have been reached

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with the evidence that was there before them at the moment of conclusion.

*W. D. Hogg*, Q.C., followed for the plaintiff:

It seems to me that the question of estoppel, or of *res judicata*, is one at the threshold of the enquiry here. This court has decided in two reported cases that the doctrine of estoppel cannot be invoked against the Crown. [Cites *Humphrey* v. *The Queen* (1); *Burroughs* v. *The Queen* (2).

The action here is to recover moneys obtained by fraud or false pretences from the Crown. The cause of action, therefore, does not arise in the Province of Quebec and the case is to be determined by the principles of English law. Even if the case arose within that province, the code is silent concerning the question of *res judicata* as urged against the Crown, and the law of England would, I submit, prevail.

The authorities are clear that estoppels do not bind the Crown, and *res judicata* falls within the classification of estoppel by record. Chitty in his *Prerogatives of the Crown* speaks very precisely upon this point (p. 381):—"The King is not bound by fictions or re-"lations of law; or by estoppels, even though such "estoppels would affect the party through whom the "Crown claims. But this does not prevent the King "from taking advantage of estoppels." In support of this statement of the doctrine, he cites *Coke's Case* (3). [See also *Everest & Strode on Estoppel* (4); *Cababé on Estoppel* (5); *Brooke's Abridgement* (6); *Manning's Exchequer Practice* (7).

As to the right of the Crown to recover back this money improperly paid to the defendant, I cite *Barry* v. *Croskey* (8); *Hill* v. *Lane* (9); *Ramshire* v. *Bolton* (10).

(1) 2 Ex. C. R. 386.
(2) 2 Ex. C. R. 293.
(3) Godbolt 299.
(4) P. 299.
(5) P. 9.
(6) Vol. 10, pp. 432 and 478.
(7) Pp. 106 and 122.
(8) 2 J. & H. 23.
(9) L. R. 11 Eq. 215.
(10) L. R. 8 Eq. 294.

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*J. U. Emard* for the defendant:

The contract was made in Montreal and executed in Montreal. Then the law of the Province of Quebec is the *lex loci solutionis*.

As to the question of *res judicata*, there is no doubt that the several conditions required to constitute *res judicata* exist in this case—conditions that create the defence either at Common Law or under the Civil Code. The Articles of our code which apply to the subject are 1239, 1240 and 1241. Our only enquiry is, whether the three conditions prescribed in the code exist between the two actions? As to the first—identity of persons, there is no doubt about that being fulfilled. As to the second—identity of cause—the action here is based upon the same contract as was the former action, and the issues are the same. As to the third —identity of object—we say that it must be held that the object is substantially the same in both actions. In both the Crown sought to get money alleged to have been improperly received by the contractor. [Cites *St. Louis* v. *The Queen* (1).]

As to the finding of fact in the reasons of judgment in the former case being conclusive against the Crown here, I cite *Taylor on Evidence*, 9th ed. secs. 1695, 1699, 1700, 1701, 1702. We have also the French law to rely on. By French law the reasons are incorporated in the judgment. Not only does the formal judgment contain the enacting part, but also the reasons. [Cites 5 *Marcadé* (sur l'Article 1351 du C. N.) p. 167; 30 *Demolombe*, Nos. 282, 296, 299, 304; 20 *Laurent*, Nos. 30, 45, 46; 5 *Larombière*, Nos. 46, 48, 50, 57, 59, 63; 2 *Mourlon*, Nos. 1619, 1620, 1621, 1623; 11 *Fuzier Herman*, *Repertoire* vo. 'Chose Jugée,' Nos. 213, 227, 228, 251, 253, 259, 260; 8 *Aubry & Rau*, p. 390, No. 769, Note 33; *Code Napoléon*, Art. 1351; *Sirey*, *Codes Annotés*,

(1) 25 Can. S. C. R. 649.

Art. 1851, Nos. 209, 224, 230, 270, 302, 310, 311; *Broom's Legal Maxims* ('Nemo debet bis, &c.') p. 316; 2 *Smith's* L. C., 10 ed. p. 409; C. C. L. C. Art. 6; *Fonseca* v. *Attorney General* (1); *Exchange Bank* v. *The Queen* (1); *Pollock on Contracts*, p. 404, 405; *Addison on Contracts*, p. 509, Nos. 1408, *et seq.*; *Best on Evidence*, p. 268; 5 *Pothier* (par *Bugnet*) p. 113, Nos. 140 *et seq.*; 5 *Larombière*, Nos. 28, 31; 31 *Demolombe*, Nos. 284 *et seq.*]

*C. A. Geoffrion*, Q.C.: The positions we take in this case may be classified thus: (1). That the prerogatives of the Crown do not enable it to disregard a plea of *res judicata*. (2). The record shows that the issue in this case is *chose jugée*. (3). That this being an action *condictio indebiti*, the burden was on the plaintiff to prove its case positively and affirmatively.

The contract was executed—and when I say executed, I mean signed and formed—in the Province of Quebec; and though the money was sent by cheque from Ottawa, the money reached the Province of Quebec and was paid to our client in the Province of Quebec. As the payment took place in the Province of Quebec, where the receipt was given for it, the action *condictio indebiti* must be governed by the law of the place. Now the right has accrued, as far as the civil law is concerned, in the Province of Quebec. Your lordship has already held, in the other case, that it was the law of procedure of the Province of Quebec that was to apply.

When it was attempted by the Crown in their defence in the other case to make a counter-claim, pure and simple, at the conclusion of their plea, a demurrer or objection was taken on our behalf that it could not be properly pleaded. We contended that according to the rules of our Code of Procedure it must be by an incidental demand, or a contra demand and contain

(1) 17 Can. S. C. R. 612-619. (2) 11 A. C. 157.

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all the allegations of a demand. Then in view of this objection the Crown immediately moved to withdraw the counter-claim. It would have been a proper plea, I understand, under the laws of the Province of Ontario, or under the Common Law; but it was not the proper plea according to the laws of the Province of Quebec.

We claim that we have already from this court a decision that it is the law of the Province of Quebec, either as to procedure or as to the rights of the parties, that applies in cases such as this; and the opposite side has agreed and submitted to that, in the way I have just mentioned.

My learned confrère Mr. Osler referred to a reported case, the *Brisac Case* (1), where it was purely and simply a question of jurisdiction, and also jurisdiction as to a criminal offence. It was a case of conspiracy on the high seas and the money was obtained as the result of a conspiracy in London; and it was held, to give jurisdiction to an English court of justice, that it was not necessary that the conspiracy should have taken place where the party is arrested or brought to justice. It was a question of jurisdiction.

In the present case, by virtue of a special statute, this court in Ottawa has jurisdiction all over the Dominion. If this court had not been in existence, for instance, if it had been before the first petition of right Act was passed, the jurisdiction in this case would have to be found within the courts of the different provinces. At that time St. Louis could not have been summoned to Ottawa. Having been unduly paid money in Montreal, the court of first instance would have been in the Province of Quebec.

And we received the authorization upon which the money was paid to us, where? It was a voucher

(1) 4 East 164.

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from the Crown for us to receive our money in Montreal; and it was in Montreal where we gave a receipt for work executed in Montreal, in connection with a contract signed and passed in Montreal.

We claim that we have to look to the law of France as it was at the time of the cession of the country, and I do it, based upon a decision of the Privy Council in the case of the *Exchange Bank of Canada* v. *The Queen* (1), where it is held that the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them.

The *ratio decidendi* of the *Exchange Bank* v. *The Queen* (2) is that the privileges of the Crown known as the "minor prerogatives" are matters falling within the scope of municipal law, and are, therefore, not governed by public law. The Crown is bound by express words or necessary implication in a statute. Our Civil Code is a statute, and Article 6 says that the Crown is bound by every Article in the Code. [Cites C. C. L. C. Arts. 1047 to 1052.] By the laws of the Province of Quebec as soon as the judgment in the prior case was delivered its obligations had to be interpreted by the provisions of the Code. [Cites C. C. L. C. Arts. 1239, 1240, 1241.] Article 1241 of our Code deals with the question of *res judicata*, and under its provisions the Crown is bound by a prior judgment the same as a subject is. The rule that the Crown is not subject to estoppels is grounded very largely on the more elementary principle that the Crown cannot be guilty of laches. In the constitution of the doctrine of *res judicata* the element of laches does not enter. It cannot be said that the Crown was guilty of laches in not having the former judgment in its favour. And so the elements which constitute true estoppels not all being present in *res judicata*, indeed, the most im-

(1) 11 App. Cas. 157. (2) 11 App. Cas. 157.

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portant one, so far as matters affecting the Crown is concerned, that of laches, being omitted, the doctrine cannot be invoked to the prejudice of the defendant's rights in this action.

As to the venue of the action, the Crown has no particular domicile, the realm is its domicile; and whenever the Crown is in controversy with a subject, the legal objections arising between them must be determined by the laws of the particular territory where the cause of action has arisen. Now, under Quebec law, the Crown has no special precedence over the subject when its rights and those of the subject are equal. The ordinary incidents of the law govern the parties in such a case.

I venture to lay down the proposition that a judgment upon a petition of right is a law for the Crown as well as for the subject. The Crown must be bound by the doctrine of *chose jugée* or there would be no end to litigation. [Cites *Marriott* v. *Hampton* (1); C. C. L. C. Art. 505; *Broom's Legal Maxims* (2); *Bournat* v. *Vignon* (3); *Dalloz*: *Codes Annotés*, Art. 1351, Nos. 209, 224, 230, 270, 302.

*The Solicitor-General of Canada* for the plaintiff:

The principle that we contend for is that the rule of law as to *res judicata* which is applicable between subject and subject is not applicable to the Crown. The reason why it should not be applicable to the Crown in a case such as the present one is quite apparent. Take the case, for instance, that Mr. Geoffrion quoted from *Smith's Leading Cases*, where after a party is condemned to pay a certain amount he discovers that he is possessed of a discharge which would go to show he had paid the amount, and that there should be no recovery for it. Take that rule and apply it to

(1) 2 Smith L. C. 409. (2) P. 316.
(3) Sirey, [1839] pt. 1, 119.

the present case, and see what an absurdity would follow. What is the result of the judgment, as my learned friend, Mr. Osler, pointed out, that your lordship has rendered in the other case? The result is that you report to Parliament, substantially, that a certain amount is due by the Crown to Mr. St. Louis. Then it is for Parliament to provide the money necessary to liquidate this obligation, the existence of which has been reported by you. In the interval between the time that you have made this report and the time that Parliament is called upon to provide the funds necessary to pay it, it is discovered that the amount has been paid previously. Would it be argued or contended for one moment that under these conditions Parliament would have the right to pay it, ought to pay it, and would be justified in paying it? Can it be contended for a moment that Parliament could do such a thing as that? That is to say, go to the public exchequer and take out of it moneys to pay a claim that had been already paid before?

I contend that the judgment is not a judgment in the ordinary sense of the word. I assume that it is merely a report. It cannot be considered as a judgment in the ordinary acceptation of the term, because it is a judgment that can only be made effective, that is to say, can only be made payable, by the act of an ultimate body, by the finding of an ultimate body, of the means necessary to liquidate the judgment. As a matter of fact this judgment cannot be payable without the action of Parliament. Parliament will have to provide the money necessary to enable it to do it, because this is the execution of a public work.

Then, as to the question as to which of the laws and systems of law is applicable to the present case, whether that of Ontario or that of Quebec, I will have to point out in a moment that I think there is no

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difference between the two; but if there be a difference, what is the nature of this case? This is an action brought by the Crown practically to recover back from St. Louis a sum of money paid to him by means of a fraudulent conspiracy, substantially between himself and some of the employees of the Government. Where did the cause of action arise? The question here is not as to where the work was done, where the contract under which the money was paid was entered into; the question is, where was the payment made? What was the determining cause of the payment? Where did that determining cause operate? I say that the determining cause was here in Ottawa, where the pay-lists were sent, after having been made; the fact of their reception here was the determining cause for the issue of the cheque for the payment of the money. The cause of action originated at the place where the pay-roll was handed in to the Government in exchange for which the cheque went out. It is not the making of the pay-rolls in Montreal, it is not the signing of them there, it is not the doing of the work; that has absolutely nothing to do with it. It is on the faith of the pay-roll that the cheque issued. If this be the case, the court then will have to apply the well established rule of English law.

Assuming that the matter is one to be governed by the law of the Province of Quebec, what is the law of that province?

My learned friends referred to the case of the *Exchange Bank* v. *The Queen* (1) I may say to your lordship that there is another case, that of *Attorney-General* v. *Monk* (2), where you will see the same question discussed.

In that case the point is argued admirably, but that is not our case. In fact, that case makes in our favour, the *Exchange Bank Case* makes in our favour.

(1) 11 App. Cas. 157. (2) 19 L. C. J. 71.

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In the *Maritime Bank Case* (1), a Privy Council case also, the distinction is drawn between the law of the Province of Quebec and the law of the other provinces, so far as the prerogatives of the Crown are concerned. The *Maritime Bank Case* is a subsequent case to the *Exchange Bank Case*.

There, then, is the principle that we contend for made applicable to Quebec. Of course, the prerogatives of the Crown are the same in Quebec as anywhere within the limits of the Dominion. That is laid down in undoubted terms in that case.

My learned friend says, and your lordship will remember, that the case of the *Exchange Bank* turned entirely upon the true construction to be put upon Section 10 of Article 1994 of the Code, by which the Crown contended they were not bound, and in that contention they were maintained by the Court of Appeal reversing the judgment of the Superior Court.

There is no provision of our Code applicable to the present case, except what my learned friends have been able to gather from Article 6 of the Civil Code.

The Articles of the Civil Code that have an especial bearing on the question of limiting the prerogatives of the Crown, are 2032, 2086, 2211, and 2216.

If I am correct in my statement, that there is nothing affecting this case in the same way as Article 1994, paragraph 10, affected the *Exchange Bank Case*, then comes the operation of the rule I contended for a moment ago, that the prerogative of the Queen, when not limited by statute, is as extensive in all Her Majesty's Colonial possessions as in Great Britain. Then I say that the English law is applicable, and that all the authorities my learned friend has quoted find their application in this case. And to take this case out of the operation of that rule, the rule of the

(1) 11 App. Cas. 437.

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English law, my learned friend has got to rely upon Article 6 of the Civil Code.

If you take this Article, and then read Article 9 of the Code, you will find again the application of the rule that where the law is silent, the general rule as to the prerogatives prevails. Article 9 clearly says, no act of a legislature affects the rights or prerogatives of the Crown unless they are included therein by special enactment.

Mr. *Osler*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 18th, 1897) delivered judgment.

The information is exhibited to recover back from the defendant the sum of $143,881.00 and interest, being parcel of an amount of $220,550.21 paid to him on certain contracts made between him and the Crown, whereby he undertook to furnish labour and stone for the construction of the Wellington Street Bridge and the Grand Trunk Bridge over the Lachine Canal at Montreal, and for the construction of Lock No. 1 of the said canal. The total amount of the claim made by the defendant under such contracts was $284.192.50, of which the Crown paid to the defendant the sum of $220,550.21. For the balance of $63,642.39 the defendant prosecuted a petition of right [*St. Louis* v. *The Queen* (1).] The Crown defended the petition on the ground that the defendant had not in fact furnished labour and material to the amount for which he claimed, and alleged that the pay-lists presented by the suppliant, the defendant here, were improperly and fraudulently prepared, inasmuch as many of them contained the names of large numbers of workmen who were not employed or engaged upon the work of constructing the said bridges, and who were never in

(1) 4 Ex. C. R. 185; 25 Can. S. C. R. 649.

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fact supplied by the suppliant to Her Majesty for the purposes mentioned in the contract. The Crown also asked that an account be taken, and that it have judgment for such an amount as should thereupon appear to have been overpaid to the suppliant. A question having arisen upon the argument as to whether or not the Crown's counter-claim had been sufficiently pleaded, a motion was, after argument and before judgment, made on behalf of the Crown to strike out of the statement in defence so much thereof as set up any counter-claim, but without prejudice to the right of Her Majesty to prosecute an action in respect of such claim. The application was not opposed by counsel for the defendant and was allowed. That left for consideration the question only of the suppliant's right to recover the balance which he claimed. But it is obvious that before he could recover any balance he must establish the fact that he was entitled to what had been paid to him, that also being in issue. The burden of proof was upon the suppliant and I was of opinion on the facts of the case that he had not discharged that burden, and there was judgment in this court for the Crown. An appeal from the judgment of the Exchequer Court was taken by the suppliant to the Supreme Court, and the Crown filed the present information to recover back from the defendant the moneys that were alleged to have been overpaid to him. The issues in this case were in substance the same as those that had been raised in the proceeding by the petition of right. The case came on for hearing on the 20th, 21st, 22nd, 25th, and 26th of June, 1895, and on the 3rd, 4th, and 5th of December, 1895. It was set down for argument on the 9th of December, but on motion of the defendant's counsel the argument was postponed until after the judgment of the Supreme Court should be given in the appeal from the judg-

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ment of this court on the petition of right. That judgment was rendered on the 18th of February, 1896, reversing the finding of the Exchequer Court on the question of fact in issue, and determining in substance that the suppliant had discharged the burden of proof that rested upon him, and that he was entitled to recover from the Crown the sum of $61,842.29, with interest. That finding, it is to be observed, applies to the whole claim, to that part which had been paid as well as to the balance for which the judgment was given. The balance claimed by the suppliant was $63,642.29, the amount allowed $61,842.29, the difference of $1,800.00 being a deduction because certain clerks of the suppliant had been improperly and falsely entered on the pay-lists rendered to the Crown, as foremen or workmen upon the works. The finding of the court was in substance, and must in this action be taken to be, that the suppliant had under his contracts with the Crown, to which reference has been made, supplied labour and material to the value of $284,192.50. After judgment in his favour in the first action the defendant applied to this court, and was given leave, to amend his statement in defence and to set up a plea that the Crown was concluded by that judgment; that the matters in issue here were *res judicata*. The application was made on the 7th of March, 1896, and the amendment on the 18th of that month; and the first question to be determined now is as to whether or not it constitutes a good defence to the further maintenance of this action by the Crown.

It is contended for the Crown that it does not, and that the Crown is entitled to the judgment of the court for the following reasons:—

1. That it is not bound by the former judgment. That the doctrine of *res judicata* cannot, because of the

Crown's prerogatives, be applied against it in any case in which it is a party.

2. That there is in this case additional evidence that the pay-lists on which the defendant was paid are false and not true accounts of the labour he supplied under his contracts with the Crown.

3. That Mr. Justice Taschereau, in his reasons for judgment in the Supreme Court, did not attach sufficient importance to the incident that the defendant had by false entries in his pay-lists obtained payment from the Crown for the services of his own clerks rendered to him.

4. That Mr. Justice Girouard had fallen, it is alleged, into the error of supposing that the pay-lists produced by the defendant on discovery in the former action, were the pay-lists on which the men had actually been paid, and that but for this his judgment might have been in favour of the Crown.

5. That by the order of this court, under which the statement in defence in the former case was amended, and so much thereof as set up any counter-claim struck out, the Crown had leave to prosecute this action without prejudice.

Dealing first with the last objection it is only necessary, I think, to observe that the reservation had reference to the fact that the Crown had set up its counter-demand in the first action, and that it should be permitted to prosecute this action as though that had not been done, and without prejudice from the fact that it had been done. The Crown is therefore in the same position as though no such counter-claim had been set up; but in no better position.

With reference to the 3rd and 4th contentions of the Crown, it is clear that what we have to do with here is the judgment of the court. The reasons given for the judgment are to be looked at, but the question in

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the end is: What was the judgment? What does it decide? One judge may attach too much or too little importance to this fact or that fact, to this incident or to that incident, but that does not invalidate or affect the finding. As Lord Chancellor Halsbury says in *The Universal Stock Exchange* v. *Strachan* (1):—

"One does not adequately discuss the question of "the amount of evidence by taking each part of the "case by itself and dissecting the case and disposing "of this or that piece of the evidence as if it were to be "looked at alone. The whole transaction has to be "looked at."

Taking the evidence as a whole in the case of *St. Louis* v. *The Queen*, (*supra*) I thought that the suppliant had not made out his case. Taking the evidence as a whole, the Supreme Court were of opinion that he had made out his case and was entitled to succeed; and unless the Crown's contention that it is not bound by the principle of *res judicata* should prevail, its action in this case is barred by that finding. The fact that there is in this case further evidence of fraudulent entries in the pay-lists makes no difference, if the Crown is concluded by that finding. It is immaterial whether it is or is not in fact true that the suppliant had supplied labour and material under his contracts with the Crown to the value of $282,392.50; it must now, upon the finding of the Supreme Court, be taken as between the Crown and the defendant to be true, unless, as I have said, the Crown is entitled to succeed upon its first and main contention, that it is not bound by the judgment of the court. With reference to another question discussed, as to whether, notwithstanding that judgment, the Crown may refuse to pay the amount, or any part of the amount, awarded to the suppliant, it would, I think, be improper for me to express any opinion. As

(1) [1896] A. C. 171.

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to that I have no responsibility. If the issues of fact in this action are concluded by the finding of the court of appeal in the former action, my only duty is to give effect to that judgment.

For the Crown it is contended that it is not bound by estoppels, and that the doctrine of *res judicata* is a branch of the law of estoppel. It must be conceded at once that it is well settled law that the Crown is not bound by estoppels; but it is not so clear why or how the principle of *res judicata* came to be considered a part of the law of estoppel. But without entering upon that discussion, the Crown is, I think, bound, and, in that sense, estopped, by the judgment of a competent court in a proceeding to which it is a party, or where the proceeding is *in rem*, whether it is a party or not.

And first that must, I think, be the case on principle. As to that I agree fully with an observation of Mr. Justice Gwynne in his reasons for judgment in *Fonseca* v. *The Attorney-General of Canada* (1), where he says:—

"I can see no sound reason why the Government "of the Dominion should not be bound by the judg- "ment of a court of justice in a suit to which the "Attorney-General, as representing the Government, "was a party defendant, equally as any individual "defendant would be, if the relief prayed by the in- "formation is sought in the same interest and upon "the same grounds as were adjudicated upon by the "judgment in the former suit; and I am not prepared "to admit the proposition that in such case the "Government would not be affected by the judgment "in the former suit to be well founded in law."

In 1875, by the Act 38 Victoria, chapter 12, intituled "An Act to provide for the institution of suits against the Crown by petition of right, and

(1) 17 Can. S. C. R. 619.

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respecting procedure in Crown suits," after reciting that it was expedient to make provision for proceeding by petition of right and to assimilate the proceedings on behalf of the Crown, as nearly as may be, to the course of practice and procedure then in force in actions and suits between subject and subject, a procedure was provided whereby petitions of right might be prosecuted in the superior courts of the several provinces. By the 15th section of the Act it was provided that it should be lawful for the Minister of Finance, and he was thereby required, to pay the amount of any money and costs as to which the judgment or decree, rule or order, should be given or made, that the suppliant in any such petition of right was entitled thereto, and of which judgment or decree, rule or order, the tenor and purport should have been so certified to him, out of any moneys in his hands for the time being legally applicable thereto, or which might thereafter be voted by Parliament for that purpose. In the same year by 38 Victoria, chapter 11, the Supreme Court of Canada and the Exchequer Court of Canada were constituted and established. In the next session of Parliament by the Act 39 Victoria, chapter 27, *The Petition of Right Act*, 1875, was repealed and another Act passed in lieu thereof providing for the prosecution of petitions of right in the Exchequer Court. Both in the Act of 1875 and in that of 1876 there was a provision that nothing should prejudice or limit, otherwise than as therein provided, the rights, privileges, or prerogatives of Her Majesty or Her successors (1); but one of the things provided by the Act, and the main thing provided, was that the subject might, in accordance with the provisions of the Act, maintain an action against the Crown by a petition of right. To that extent the Crown's rights are affected.

(1) 38 Vict. c. 12, sec. 21; 39 Vict. c. 27, s. 19.

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One of the objects of these Acts was to assimilate the proceedings on such petition as nearly as might be to the course of practice and procedure then in force in actions or suits between subject and subject. And it is, I think, fair to infer that it was the intention of Parliament that the ordinary incidents of actions between subject and subject should attach to actions between the Crown and the subject. From the decision of the Exchequer Court there was an appeal to the Supreme Court, and thence, as in other cases, an appeal by leave to Her Majesty in Council. By the Act 50-51 Victoria, chapter 16, intituled "An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown," the jurisdiction of the Exchequer Court was enlarged; and it was given exclusive original jurisdiction in certain cases, and in other cases concurrent jurisdiction with the courts of the several provinces. From its decision, as formerly, there is an appeal to the Supreme Court and thence by leave to Her Majesty in Council. Now, under such circumstances, it appears to me that the procedure established by these Acts, and the remedies thereby given by Parliament, would in a measure be defeated if it were held that a judgment rendered in this court, from which no appeal was taken, or the judgment of the Supreme Court or of the Judicial Committee, on appeal, was not final and conclusive between the parties.

By the old practice a Writ of Error lay on a judgment on an extent to the Exchequer Chamber, and then after the determination of a Writ of Error in the Exchequer Chamber a case might have been taken into the House of Lords; and I can hardly conceive that in a case that had gone to the Exchequer Chamber and to the House of Lords, any one for the Crown would thereafter have contended that the Crown was not

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bound by the decision of the House of Lords upon the question in issue; and there is of course no difference in this respect between the decision of the House of Lords and that of the lower courts from which no appeal is taken. So far as I know, there is no record of any one ever having contended that in such a case the Crown would not be bound. It would, I think, be against public policy and the fair administration of justice to allow the Crown to bring in question again in another proceeding between the same parties, a matter that had been once determined in a court of competent jurisdiction. The principle of *interest reipublicae ut sit finis litium* applies in such a case with no less force than to actions between subject and subject. It is a well established rule of criminal law that the Crown is bound by the judgments of its courts. The pleas of *autrefois acquit* and *autrefois attaint* or *convict* are grounded upon the maxim that a man shall not be brought in danger of his life for one and the same offence more than once. (Hawkins' *Pleas of the Crown*, Vol. II, pp. 515, 524.) The author, at page 515, says:—"From whence it is generally "taken by all the books as an undoubted consequence "that where a man is once found 'not guilty' on an "indictment or appeal free from error, and well com-"menced before any court which had jurisdiction of "the cause he may, by the common law, in all cases "whatsoever plead such acquittal in bar of any sub-"sequent indictment or appeal for the same crime."
The maxim, which on its face bears evidence of a time when most offences were punishable by death, is not, it is needless to say, limited to such offences. It is the assertion in criminal matters of a general principle which in civil proceedings is expressed by the maxim *nemo debet bis vexari pro unâ et eâdem causâ;* and the latter is a statement of one of the two grounds upon

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which the doctrine of *res judicata* rests, "the one public policy, that there should be an end of litigation; the other the hardship on the individual that he should be twice vexed for the same cause." (Broom's *Maxims*, 6th Ed. 318.)

In a proceeding by inquest of office it is the law that if office be found against the King a *melius inquirendum*, or further inquiry under the former commission, may be awarded for the King. "But in good discretion," says Chitty, in his *Prerogatives of the Crown*, at pp. 258, 259, "No *melius inquirendum* shall be "awarded in such case, without sight of some record, "or other pregnant matter for the King to show the "former was mistaken. And by pregnant matter for "the King is meant matter pregnant with evidence "of the King's right. But if the *melius inquirendum* "be found against the King, he is thereby precluded "from having another *melius inquirendum*, for if this "were allowed it would lead to infinity, for by the "same reason that he might have a second he might "have them without end."

The reason that the Crown might have a *melius inquirendum* was that while a subject could traverse an office found the Crown could not. That appears from *Stoughter's Case* (1), where it was determined that if on a *melius inquirendum* office again be found against the King, the King shall not have a new writ of *melius inquirendum*, and for three reasons.

"(1) Because then there would be no end thereof; "but such writs would issue infinitely, and *infinitum* "*in jure reprobatur*; (2) As if a writ of *diem clausit* "*extremum* or *mandamus*, &c., is found against the "King, there shall not be a new writ of *diem clausit* "*extremum* or *mandamus* awarded: so if upon the "*melius* it be found against the King, no *melius* shall

(1) 8 Co. 168 a.

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" be further awarded. (*Vide* 12 Eliz. Dyer (a) 292, the " *melius* is in the nature of the first writ of *diem* " *clausit extremum*) ; (3) If office be found for the King, " the party grieved may traverse it ; and if the traverse " be found against him it makes an end of the busi- " ness. So if it be found for him who tenders the tra- " verse, it shall bind the King as to this matter. And " so when the first office is found against the King, " and the *melius inquirendum* also, the King thereby " is bound from having another *melius inquirendum* for " the same matter."

In the case of *The Attorney-General* v. *Norstedt* (1) decided in the Court of Exchequer in 1816, the question raised was whether or not the Crown was bound by a sale of a vessel under the order of the Instance Court of the Admiralty. An offence had been committed in respect of the ship by virtue of which she became forfeited to the Crown. Subsequently she became derelict and was taken into the port of Scilly, and was sold under a commission of appraisement and sale issued from the High Court of Admiralty, in pursuance of an order of the court to pay the demand of salvage and other expenses. In these proceedings the Procurator-General of the King in his office of Admiralty did not object to the proceedings. The fact that an offence had been committed whereby the vessel had become forfeited to the Crown was not then known. Subsequently, proceedings were taken by the Attorney-General to have the vessel declared forfeited notwithstanding the judicial sale that had taken place; but after full argument it was decided that the Crown was bound by the decision of the Admiralty Court and that its claim to have the ship forfeited was not for this reason well founded. Of course it is to be borne in mind that the proceeding in the Admiralty Court

(1) 3 Price 97.

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was *in rem*, and that such proceedings bind all the world. But the principle established is, I think, the same, namely, that the Crown is bound by the decision of a court of competent jurisdiction; if the decision is *in rem*, whether it is a party or not; if *in personam*, where it is a party. In the case to which I have referred, the Crown, although appearing in its right to claim the ship as derelict, did not appear in its right as claiming the ship as forfeited for an offence committed, and it appears from the judgment of the court, I think, that its decision would have been the same had there been no appearance for the Crown in the Admiralty Court.

The question as to whether or not the principle of *res judicata* is applicable to proceedings in which the Government of the United States is a party, has been considered in the Court of Claims and in the Supreme Court of the United States in a number of cases, and it has been held that the Government is bound by the judgment of a court of competent jurisdiction. In *O'Grady's Case* (1), Mr. Justice Clifford, in delivering the opinion of the Supreme Court, says (at p. 144):

"It is clear that the judgments of this court, "rendered on appeal from the Court of Claims, are "(apart from any Act of Congress to the contrary) "beyond all doubt the final determination of the "matter in controversy; and it is equally certain that "the judgments of the Court of Claims, when no "appeal is taken to this court, are under existing laws "absolutely conclusive of the rights of the parties "unless a new trial is granted by that court, as pro-"vided in the before mentioned Act of Congress."

In *Fendal's Case* (2), Nott, J., in delivering the opinion of the court, says, (pp. 251, 252):

(1) 10 C. C. R. 134. (2) 14 C. C. R. 247.

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While there are cases in which it may be questioned whether the Government will be concluded, like an ordinary corporation, by an estoppel in pais, and while there are varying decisions as to whether the Government will be concluded like an individual by an estoppel by deed (Bigelow on Estoppel, 246, and cases cited), it has never been doubted, so far as we know, that it, like ordinary suitors, is subject to the principle of *res judicata*. By the case of *The United States* v. *The Bank of the Metropolis* (1), it was settled that when the Government becomes a party to commercial paper, it must be held to the same diligence and be bound by the same principles of the law merchant that would govern individuals. In the case of *The United States* v. *The State Bank of Boston* (2), the Supreme Court went still further, and held that the rules of law applicable to individuals are to be applied to the Government in courts of justice, if its sovereignty be in nowise involved. In *Tillon's Case* (3), the Supreme Court conceded in effect that the Government would have been concluded by a former verdict offered in evidence if the court wherein the verdict was rendered had had jurisdiction to render a judgment against the Government on the verdict. In *Lane's Case* (4), the Supreme Court again conceded that a decree against the Government in a Court of Admiralty might conclude it in another suit in another court. And in *O'Grady's Case* (5), the Supreme Court expressly held that a judgment of this court from which no appeal had been taken was conclusive upon the Government, and that the Government could not subsequently assert a lien upon the subject-matter of the former action which by ordinary rules of pleading should have been then asserted as a matter of defence.

The question was discussed as to whether the cause of action in this case arose in the Province of Ontario or in the Province of Quebec, and whether the matters in controversy were to be determined by the law of England or the law of Lower Canada. I have heard nothing in the argument of the case to lead me to conclude that in respect of the principle of the law of *res judicata*, or *chose jugée*, applicable to this case, there is any difference in the law of the two provinces; and I have thought it unnecessary to consider the question as to where, under the facts proved, the cause of action arose.

(1) 15 Pet. 377.
(2) 96 U. S. 30.
(3) 6 Wall. 484, 7 C. C. R. 18.
(4) 8 Wall. 185, 7 C. C. R. 97.
(5) 22 Wall. 641, 10 C. C. R. 134.

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Both upon principle and authority, it seems to me clear that the Crown is in this case bound by the decision of the Supreme Court in the former case, and that the defendant is entitled to judgment upon the plea or defence of *res judicata*.

As to costs, the Crown would be entitled to judgment but for the defence of *res judicata*. It is not necessary to ascertain the amount, but it would in any view of the case be considerable. I am of opinion, therefore, that the costs of all the proceedings prior to the 7th of March, 1896, when the defendant applied to amend his statement in defence, should be given to the Crown, and that all costs subsequent to that date should be allowed to the defendant, and set off against the former; and if the amount of the costs taxable to the Crown exceeds the amount taxable to the defendant, as it is probable it will, the Crown will have judgment for the balance. Either party may apply for further directions.

*Judgment accordingly.*

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitor for defendant: *J. U. Emard.*