DAME M. SUSAN FORSYTH.....APPELLANT; 1887

AND *Nov. 3.

GEORGE BURY.....RESPONDENT. 1888

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *June 14.

Judgment in licitation—Binding on parties to it—Constitutionality of an act of incorporation— When its validity can be questioned and by whom.

The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to G. B. (plaintiff) $16,578.66, for his share, as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth.

The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti Company was a nullity, because the act incorporating the company was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti Company, was not valid.

The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by the appellant prior to judgment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent.

Held, affirming the judgment of the court below, Ritchie C. J. and Gwynne J. dissenting, that as Dame C. Langan had herself recognized the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution, raise the constitutional question as to the validity of the act of the Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration.

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*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Gwynne JJ.

(Mr. Justice Henry was present at the argument but died before the delivery of the judgment.)

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court in favor of the appellant.

The proceedings in this case arose out of the sale by licitation of the Island of Anticosti. The respondent claiming to be entitled to one-sixth part of the Island of Anticosti, in common with others, instituted proceedings against P. Leslie *et al.*, in order to have the whole island sold by licitation. The appellant intervened in the proceedings and subsequently by order of the court the property was ordered to be sold, and there was a judgment homologating the report of distribution of moneys levied, viz., $101,000, with the exception of the $13,136.45 awarded to the respondent as being the purchaser from the Island of Anticosti Company of two-twelfths undivided shares of the island which the said Anticosti company had previously bought from Dame Charlotte Langan, widow of the late Henry George Forsyth.

The appellant is the daughter and the testamentary executrix of the said Dame Charlotte Langan, the vendor, and was collocated on her intervention for the sum of $24,902.40, as being the owner of $\frac{1}{4}$th undivided share, but contested the collocation in favor of Bury for different reasons, the principal being that the act incorporating the said Anticosti Company was null, void and *ultra vires*, and that consequently the said company could neither buy nor sell said property and that the deeds of sale of her mother, Charlotte Langan, to the Anticosti Company and of the Anticosti Company to the respondent Bury were also null and void.

The act incorporating the company is 35 Vic. ch. 115 (D.) and the principal clauses relied on as being *ultra vires* of the Dominion Parliament are stated at length in the judgment of the Chief Justice hereinafter given (1).

(1) See p. 547.

The following are the material facts relating to the sale of the two-twelfths claimed by the respondent:—

On the 11th September, 1874, the late Dame Charlotte Langan, widow of Henry G. Forsyth by William Langan Forsyth, acting as the attorney of his mother, under deed passed before Andrews, notary, became party to a deed by which she declared that she sold to the Anticosti Company, represented by William Langan Forsyth, one-sixth of the Island of Anticosti, and the price of such sale was stated to be $250,000 of the company's stock, fully paid up, and to be transferred to the vendor.

On the 9th December, 1875, Mrs. Forsyth signed a declaration, stating that she had received from her son, W. L. Forsyth, payment and compensation in full for her right to one-sixth of the island mentioned in the deed of the 11th September, and, on the 4th of January following another deed of sale was passed, by which W. L. Forsyth, who stated that he was his mother's attorney, sold to the company one-sixth of the island for the sum of $250,000, with a declaration that this new deed should be considered as being only a ratification of that of the 11th September, 1874. The said W. L. Forsyth further declared, on his mother's behalf, that the latter had received from him due compensation for the consideration of the sale of the 11th September, as appeared by the receipt above mentioned, and that the company was to allot to W. L. Forsyth $250,000 of paid up stock and be thus freed from the payment of the price of sale.

On the 1st February, 1881, "a special general meeting of the shareholders of the Anticosti Company" was held and a proposal was made by Mr. Bury the respondent to purchase one-sixth of the island for $1,000. This offer was, on the motion of the secretary, Mr. Forsyth, accepted, and Mr. Forsyth was author-

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ized to sign, as secretary, a deed of sale. Subsequently, on the 23rd of the same month, another "special general meeting," consisting of four persons was held. This meeting elected five directors, to whom Bury's offer was again submitted, and who accepted the offer and authorized "the proper officers to sign the deed of sale." On the 16th March following Peter S. Murphy, as president of the Anticosti Company, and W. L. Forsyth, as its secretary, signed a deed of sale, transferring the one-sixth of the island to Mr. Bury for $1,000.

Kerr Q.C. for appellant contended: 1st. that in so far as the act of incorporation by the Dominion Parliament granted them, the Island Anticosti Company, the power of acquiring and utilizing a property wholly situated within the province of Quebec, for the purpose of clearing and cultivating the same, the said act was *ultra vires* of the Parliament of Canada, such matters being of a purely local interest, affecting property and civil rights in the province of Quebec, and consequently if the company had not the power to purchase, its pretended deeds of purchase were null and void, and the same argument applied to the sale made by the company to the respondent.

See *L'Union St. Jacques de Montreal* v. *Belisle* (1); *Dow* v. *Black* (2); *Smith* v. *Merchants' Bank* (3).

If an absolute nullity the objection could be alleged by the appellant, as it might have been by her *auteur*.

2nd, that even if the company was legally incorporated the facts proved in evidence show that the whole transaction was a fraud, and the title being simulated and fraudulent the respondent never became the owner of the sixth, for which he was collocated, and the appellant was entitled to be collocated therefor as testamentary executrix of Mrs. Forsyth.

(1) L. R. 6 P. C. 31. (2) L. R. 6 P. C. 272.
(3) 28 Grant 629.

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Laflamme Q.C. and *David* for respondent, contended that the proceedings having taken place under arts. 919, 933-939 of the code of procedure, to which proceedings the appellant was a party, she could not at this late stage raise any question as to the status of the respondent or as to the constitutionality of the act of incorporation. As regards the appellant and respondent, the judgment in licitation had acquired the force of *res judicata*. On the question of constitutionality of the act of incorporation, the learned counsel referred to *Abbott* v. *Fraser* (1); *Colonial Building Association* v. *Loranger* (2); Grant on Corporations (3); *Lemoine* v. *Lionais* (4); Fisher & Harrison's Digest (5); Morawetz on Corporations (6); *L'Union Navigation Company* v. *Rascony* (7).

SIR W. J. RITCHIE C.J.—The Island of Anticosti having been sold by licitation for the sum of $101,000.00, this amount was deposited and the distribution thereof proceeded with amongst the owners according to their respective shares.

The report of distribution allotted to George Bury $16,578.66 for his share as owner of one-sixth of the island which he appeared to have acquired from the Island of Anticosti Company.

Susan Forsyth contested this collocation, and the Superior Court, sitting at Murray Bay, maintained the contestation, declaring that Bury had never been owner of the one-sixth which he claimed and that, consequently, he was not entitled to any portion of the price of sale.

An appeal having been taken from this judgment to the Court or Queen's Bench, it was reversed, and it

(1) 20 L. C Jur. 197.
(2) 7 Legal News 10.
(3) P. 1000.
(4) 6 Rev. Leg. 123.
(5) P. 1992.
(6) Pp. 49-50.
(7) 20 L. C. J. 306.

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was decided, Mr. Justice Tessier dissenting, that Bury had really been owner of one-sixth and was entitled to be collocated for that portion of the proceeds.

It is from this judgment that the appeal to this court is taken.

By 35 Vic. cap. 115 the Island of Anticosti Company was incorporated by the Dominion Parliament so far as it was within the province of parliament to grant the powers conferred.

The 1st section names the persons incorporated.

2nd. The said company shall have power to purchase from the proprietors thereof the whole of the Island of Anticosti, with all the rights, title, privileges and interest of the said proprietors in and to the same; and upon the completion of such purchase and the transfer of the same, the property therein shall be vested in the said company; It shall be lawful for the said company to colonise the said island, and to sell or lease the whole or any part of the said island from time to time, upon such terms as to them may seem proper,—and this in so far as it is within the province of the Parliament of Canada to grant such powers.

3rd. The company may also acquire by purchase, lease or otherwise, and may hold absolutely or conditionally any other lands, tenements, real or immoveable estate, not exceeding in yearly value ten thousand dollars, for the convenient conducting and management of their business, and may sell, alienate, let, lease and dispose of the same from time to time, and may acquire others in their stead, not exceeding at any time the value aforesaid,—in so far as it is within the province of the Parliament of Canada to grant such powers.

4th. The company may carry on all such operations as may be found necessary to develop the resources of the Island in respect of agriculture, forests. fisheries, mineral deposits of gold, silver, copper, iron and other metals or ores, and of coal, peat, plumbago, and salt springs, and shell marl, the opening up and working of quarries of slate, limestone, sandstone, grindstone, marble or other economic minerals or mineral substances, and to wash, dress, smelt and otherwise prepare and manufacture such articles for sale, in so far as it is within the province of the Parliament of Canada to grant such powers.

And by the 10th. When and as soon as one-tenth of the said capital stock shall have been subscribed as aforesaid, and ten per centum of the amount so subscribed paid in, the provisional directors or a majority of them may call a meeting of the shareholders at such

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time and place as they shall think proper, giving at least two weeks notice in the *Canada Gazette*, and in one or more newspapers published in the city of Montreal; at which general meeting and at the annual general meetings of the company thereafter, a board of directors shall be elected, consisting of not less than five nor more than thirteen, as may be prescribed by the by-laws (of the provisional or other directors) in force at the time of such election; but they shall not be authorised to commence operations under this act until at least fifty thousand dollars shall have been paid in.

This Dominion act, so far as it professes to confer the right to purchase the Island of Anticosti, in the Province of Quebec, and to sell or lease the same, is, in my opinion, clearly *ultra vires* of the Dominion parliament. It is for a provincial object, and affecting property and civil rights in the Province of Quebec alone; the legislative right to incorporate such a company belongs to the Provincial Legislature, under the British North America Act.

The company, then, having no legal existence to enable them to purchase, hold or sell the land, the answer to the plaintiff's contention simply is: If the Dominion act is *ultra vires* the alleged company never was incorporated in reference to provincial objects, or in connection with property and civil rights in the province; therefore, there was no charter to be violated, nor any charter into the validity of which it is necessary to inquire. The existence of this company is not questioned collaterally, but directly, in this case, the plaintiff claiming by, through and under the alleged corporation which, as shown, should have no existence as such. I think that Judge Routhier was right in holding that the company, assuming it had a legal existence for some purposes, could take nothing under the alleged deeds from Mrs. Forsyth, by her attorney, of the 14th of September, 1875, and the 4th of January, 1876, to the Island of Anticosti Company, and the company could convey nothing to the plaintiffs under the deed of the 16th of June, 1881, between the company

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and George Bury; or, in other words, the company never bought because it had no right to buy, and never sold because it had no right to sell, and, therefore, the company acquired no title and could convey none, and, consequently, Bury had no *locus standi* to be collocated as claimed.

If the act of incorporation is not *ultra vires*, I am of opinion there never was any valid organization of the company to enable it to transact business, it not having complied with the provisions of the 10th section of the act of incorporation, and if this had been shown I am inclined to agree with Mr. Justice Tessier that the sale of the 11th of September by W. L Forsyth, as attorney for his mother, to himself as representing the Anticosti company, was not a valid execution of the power and was bad on its face.

I am, therefore, of opinion that George Bury has no right to the collocation No. 11 of $6,578, but that this collocation should be made in favor of the appellant Maria Susan Forsyth. The judgment of the Superior Court reserved to the interested parties whatever recourse they might have for the recovery of all sums paid in virtue of the deed of the 4th of January, 1876. This judgment, I think, should be affirmed. The appeal must be allowed and this judgment affirmed.

STRONG J.—This action was instituted by the respondent as one of several co-owners of the island of Anticosti for the licitation of the property, and the appellant being, also, the owner of a share in the island was a defendant in the action. The appellant pleaded no plea or defence raising any question as to the validity of the plaintiff's title, either by challenging the constitutional validity of the charter granted to the Anticosti company (the plaintiff's immediate *auteurs*), or by impeaching the legality of the organi-

zation of the company under the provisions of the charter, but allowed a judgment ordering the licitation of the property to be rendered *sub silentio*. Pursuant to judgment thus rendered, the property was sold and the purchase money lodged in court. Thereupon the prothonotary made his report of distribution of the monies thus arising from the sale by which he collocated the parties to the action for their respective shares.

The appellant Mrs. Forsyth has contested this collocation so far as relates to the monies allowed to the respondent by an opposition, in which she attacks the respondent's title to the share of the property which he claimed in the action, and has thus for the first time raised the questions which have been argued on this appeal.

Whilst I entirely concur that if we can now enter into the merits our judgment ought to be in favor of the appellant, I am nevertheless of the opinion that by her own omission to raise the objections she now insists upon in the proper manner and at the proper time, that is by plea or defence before judgment, the appellant has precluded herself from insisting on the matters she has raised by her opposition.

By allowing a judgment for licitation to pass without objection the appellant must be considered as having admitted that the respondent's title, derived from the common *auteur* of herself and the respondent, was valid, and that the respondent's conclusions taken in the action and granted by the judgment were well founded.

I was convinced by the argument of the learned counsel for the appellant that the charter of the Anticosti company was *ultra vires* of the Dominion, and, also that the company had no authority to acquire the

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property which the respondent claims to have derived from them, or to take any proceedings in prosecution of the enterprise for which they were incorporated until the amount of share capital, prescribed by the 10th section of the act of incorporation, ($250,000) should have been in good faith subscribed for and ten per cent. thereon actually and *bonâ fide* paid up, neither of which pre-requisities was, it is clear upon the evidence, ever complied with. It is, therefore, with very great regret that I am compelled to give effect to the objection that it is now too late for the appellant to raise the contentions she has insisted on by her opposition.

Between these parties, however, the matter is concluded and the appellant is bound by the principle of *res judicata* from raising the questions which are put forward by this appeal, and which have been already referred to.

It was argued that *res judicata* should have been pleaded in answer to the appellant's opposition and that the respondent having failed so to plead is not now entitled to avail himself of it. I cannot agree to this. By the record in the principal action now before us, and forming part of the record in appeal, the appellant's recognition of the plaintiff's title which was the foundation of all the proceedings in licitation is manifest. Under these circumstances it is impossible to go behind the judgment ordering the sale without doing great injustice, not only to the respondent, but also to the other parties to the cause interested in maintaining the judgment and the proceedings had pursuant to its terms.

The objection to which I feel bound to give effect is, therefore, not a matter of narrow technical procedure, but one founded on substantial justice and universally recognized in practice.

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In courts proceeding according to English law, land may be ordered to be sold at the instance of one of several co-owners, instead of being partitioned, provided the necessity for a sale is established. In such a case if the land were sold and the purchase money paid into court an objection then raised for the first time that the plaintiff in the action at whose instance the sale had been ordered had no title, would be considered altogether too late and would not be listened to for a moment. If we were now to allow this appeal we should, therefore, not merely be relaxing salutary rules of procedure, but actually impugning principles upon which the validity of titles may depend. My conclusion is that the appeal must be dismissed with costs.

FOURNIER, J.—La contestation en cette cause s'élève sur la distribution des argents provenant de la vente de l'Ile d'Anticosti, dont l'intimé était propriétaire pour deux douzièmes, qu'il avait acquis par acte notarié, le 16 mars 1881, de la Compagnie d'Anticosti incorporée par acte du parlement fédéral. Cette dernière avait acquis ces deux douzièmes de Dame Charlotte Langan, veuve de feu H. G. Forsyth, maintenant représentée en cette cause par l'appelante. La dite Dame Langan agissait à l'acte de vente du 4 janvier 1876 par le ministère de son procureur, William Langan Forsyth. Ces divers actes comportent tous qu'ils étaient faits pour bonne et valable considération.

La principale raison de la contestation de cette collocation est que l'acte d'incorporation de la Compagnie d'Anticosti est inconstitutionnel et nul comme *ultra vires* du parlement fédéral, et qu'en conséquence la dite compagnie ne pouvait acheter ni vendre des immeubles dans la province de Québec, et que la vente faite à l'intimé était nulle.

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La contestation contient aussi des allégations de fraude et d'irrégularité dans les procédés de la dite compagnie, qui paraissent n'avoir guère occupé l'attention des deux cours appelées à juger ce litige.

La prétention d'illégalité de la constitution de la compagnie a été admise par la cour Supérieure et rejetée par la cour du Banc de la Reine, dont l'un des considérants est :

That the Anticosti Company has been incorporated by an Act of the parliament of Canada, passed in the thirty-fifth year of Her Majesty's reign, ch. 115, and considering that the said Act, in so far as it created the said company a body corporate, and attributed to it certain of the powers thereby conferred, was not *ultra vires*.

A l'appui de ce considérant de la cour du Banc de la Reine on peut citer les décisions du Conseil Privé dans la cause du *Colonial Building and Investment Co.* v. *Loranger* (1), et celle dans la cause de *Ross* v. *Canada Agricultural Ins. Co.* (2).

La première question que soulève cette contestation n'est pas celle de la constitutionalité de l'incorporation de la Compagnie d'Anticosti, mais bien plutôt celle de savoir si après en avoir plusieurs fois reconnu l'existance de la façon la plus formelle, l'appelante peut encore être reçue à la mettre en doute.

Le but de la demande en licitation intentée par Bury était d'amener à vente par licitation la propriété de l'Ile d'Anticosti appartenant aux divers propriétaires mentionnés dans la procédure, et d'en partager le prix de vente conformément aux droits de chacun des divers propriétaires. Il est incontestable qu'à une telle action on ne peut mettre en cause que ceux qui ont des droits certains à une part quelconque dans l'immeuble à liciter. Lorsque le demandeur Bury a pris son action contre madame Forsyth, co-propriétaire de l'Ile d'Anticosti, pour l'amener à liciter et partager avec lui et les autres propriétaires, l'île en question, le premier devoir de

(1) 7 Legal News 10. (2) 5 Legal News 23.

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madame Forsyth était d'entamer immédiatement (*in limine*) la contestation avec Bury sur ses droits de propriété. Elle était obligée de refuser de laisser poursuivre cette licitation, si elle ne lui reconnaissait pas sa qualité de co-propriétaire. Au lieu de cela, elle laisse la procédure poursuivre son cours et prend part à un grand nombre d'actes de procédure, bâsés sur la qualité de co-propriétaire prise par Bury. Chacun de ses actes est une reconnaissance de sa part des droits de Bury. Enfin, le 22 septembre 1882, jugement est rendu sur la demande de Bury, à laquelle madame Forsyth est partie en cause, ordonnant la licitation de l'Ile d'Anticosti, reconnaissant ainsi les droits de propriété de Bury, qui sont consacrés par le jugement.

Ce jugement ordonnant la licitation est un de ces interlocutoires qui ont un caractère de finalité qui oblige la partie qui peut avoir à s'en plaindre, à en appeler, afin de l'empêcher d'obtenir la force de *chose jugée*. Elle n'a fait aucun procédé pour attaquer ce jugement passé depuis longtemps en force de chose jugée et devenu partant inattaquable.

Ce n'est que le 5 janvier 1885, plus de deux ans et trois mois après le jugement du 22 septembre 1882, ordonnant la vente de la propriété, que Dame Susan Forsyth, fille et représentante légale de Dame Charlotte Langan, épouse de H. G. Forsyth, présente pour la première fois une contestation des droits de Bury, sous la forme d'une contestation à la collocation n° 11 du rapport de distribution. C'est dans cette contestation, faite longtemps après la vente de la propriété et lorsque le prix de vente est devant la cour, pour distribution, qu'elle attaque la validité de l'acte du 16 mai 1881, vente par la Compagnie d'Anticosti à Bury et celui de juin 1876, par lequel la dite Dame H. G. Forsyth, représentée par l'appelante, vendait à Bury par le ministère de son procureur W. L. Forsyth, partie (deux

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douzièmes) de l'Ile d'Anticosti. Elle soulève aussi la question de la légalité ou la constitutionalité de l'acte d'incorporation de la dite compagnie. Elle plaide simulation des actes en question, non considération, fraude, etc., etc.

Tous ces faits qui sont antérieurs à l'action en licitation, s'ils étaient fondés auraient dû faire le sujet d'une contestation à l'action en licitation et faire rejeter les prétentions de Bury à une partie de cette propriété. Ils ne peuvent plus être plaidés contre un jugement passé en force de chose jugée. Le rapport de distribution n'est que l'exécution de ce jugement qui ne pouvait être attaqué que par l'appelante, ou par un tiers qui n'y aurait pas été partie. L'appelante ne le peut pas parce qu'elle représente à titre universel Charlotte Langan, sa mère, partie à l'action et aux actes attaqués.

Il est de plus évident que si Dame Charlotte Langan n'a pas opposé ces défenses dans le temps voulu, c'est qu'elle les a tacitement abandonnées. Elle n'a pas voulu, sans doute par un sentiment de dignité personnelle et par esprit de justice envers celui qui a le plus contribué à donner une valeur considérable à une propriété qui n'avait été jusque-là pour elle et sa famille qu'une source de dépenses inutiles,—elle n'a pas voulu, dis-je, lui contester des droits qu'il avait acquis de la Compagnie d'Anticosti à laquelle elle les avait vendus. Mais un motif légal encore plus puissant a dû aussi l'empêcher d'attaquer les droits de Bury, c'est que par rapport à elle il n'était qu'un tiers-acquéreur de bonne foi, et comme tel il n'était nullement responsable en loi des torts qu'elle avait pu subir dans ses transactions avec la dite Compagnie d'Anticosti. Ce n'est qu'à cette dernière qu'elle pouvait s'adresser pour les faire réparer. L'appelante n'a pas plus de droit que sa mère d'opposer ces moyens de nullité, parce qu'elle est sa représentante à titre uni-

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versel et qu'en loi elle est considérée comme la même personne. De plus, en supposant qu'elle eût fait une preuve suffisante pour invalider les actes qu'elle impugne, elle ne pourrait en obtenir la nullité parce qu'elle ne l'a pas demandée par les conclusions de sa contestation. La cour ne pouvant pas, dans tous les cas, adjuger au-delà de sa demande. Indépendamment de ce défaut de conclusion insurmontable, elle n'offre pas de rendre les diverses considérations reçues, et ne peut en conséquence être reçue à demander la nullité de ces actes sans se déclarer elle-même prête à faire raison à Bury de ses avances.

Ces arguments, fondés en droit et appuyés sur les faits de la cause, me semblent suffisants pour faire rejeter cette contestation.

Je ne crois pas qu'il soit utile pour la décision de cette cause d'entrer dans plus de considérations que ne l'a fait la cour du Banc de la Reine au sujet de la constitutionalité de l'acte d'incorporation de la compagnie, mais je crois qu'il est important de ne pas perdre de vue le fait que cette question n'a été aussi soulevée qu'après le jugement de licitation, c'est-à-dire plus de deux ans et trois mois après la mise en cause de la dite compagnie conjointement avec la mère de l'appelante. C'est après avoir plaidé côte à côte pendant plus de deux ans comme parties au même procès que l'appelante s'imagine de soulever cette question, lorsqu'il ne s'agit plus que d'exécuter le jugement. En effet, la compagnie a été mise en cause dès le début de l'action, comme on peut le voir à la première page du dossier, dans l'énonciation des qualités des parties. Après l'avoir considérée comme corps légal pendant deux ans, il est trop tard maintenant pour lui nier son son existance. Cette prétention est contraire à la doctrine bien établie par les autorités dans le factum de l'intimé :

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The contracts made with third parties by corporations existing in virtue of a statute apparently good, and even by corporations existing *de facto*, must be held good and valid (1).

En outre, les nombreux acquiescements qui ont eu lieu par les divers actes de procédure dans le cours de l'action empêchent l'appelante de revenir sur cette question. Pour ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the formal judgment of the Court of Queen's Bench in the 5th and 6th *considérants* thereof. The maxim *quem de evictione tenet actio, eumdem agentem repellit exceptio* determines this case.

As to the constitutional question raised by the appellant we cannot determine it. We simply say she cannot raise it.

GWYNNE J.—With the greatest deference for the opinion of my learned brothers who have pronounced judgment dismissing the present appeal, I cannot see that the grounds upon which they proceed, as I understand them, are open upon the record before us on this appeal.

In an action instituted by the respondent claiming to be entitled to one-sixth part of the Island of Anticosti against Patrick Leslie and others, defendants, and the present appellant as *intervenante*, the respondent obtained a decree in licitation for sale of the island under article 1562 C.C. Accordingly the sale by licitation took place and the sum of $101,000 was deposited in court to abide the result of the report of distribution. By that report the sum of $16,578, as representing the proportionate value of the said one-sixth part of the island, was allotted to George Bury, the above respondent.

(1) Morawetz on Corporations at p. 138.

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The appellant contested this collocation, claiming herself to be entitled to the one-sixth part of the island which was claimed by the respondent. The contestant in her opposition pleaded that the said George Bury was in no way entitled to be collocated, as aforesaid, because that he never was at any time the owner or proprietor of the said one-sixth part of the island, and she alleged divers matters which she relied upon as rendering utterly null and void the deeds under which he claimed and she averred title to the said one-sixth part in herself by a title derived from the late Dame Charlotte Forsyth, in her life time the owner of the said one-sixth part.

The respondent contested this opposition by pleading the title under which he claimed as derived from the same Dame Charlotte Forsyth through the Anticosti Company, a company incorporated by an act of the Dominion Parliament, and which company, as the respondent contended, were vendees of the said Dame Charlotte Forsyth and vendors to the respondent for value.

Upon the pleadings issues were joined and the only question thereby raised was as to the validity of the title of the respondent to the said one-sixth part in view of the objections pleaded by the opposant to the validity of the title.

Assuming the deeds, under which he claimed, to have been invalid for the reasons alleged by the opposant or any of them, there was no dispute as to the title of the opposant the now appellant.

The Superior Court in the District of Saguenay maintained that the respondent, George Bury, never had acquired any title in or to the said one-sixth part of the island in question, supporting one of the grounds of objection taken by the opposant, namely, that the Dominion Act incorporating the Anticosti Company was *ultra vires* and for that reason null and void.

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The Court of Queen's Bench of the district of Quebec, the appeal side, reversed this judgment, and rendered judgment in favor of the respondent upon the ground that he was, as the court adjudged him to be, a *bonâ fide* purchaser for value from the Anticosti Company, and that as against him the appellant having, as the court adjudged her to have, recognized the existence of the company and its right to acquire and sell the said property, cannot now contend that the company had no right to purchase or to sell the said one-sixth part, and for the reason, further, that whether or not the said Anticosti Company had a right to acquire and possess the said property the sale which the said late Dame Forsyth made to the said company of one-sixth part of the said island was a sufficient authority to the said company to convey to a *bonâ fide* purchaser the right and interest which she had in the said one-sixth part, and by the sale which the company made to the respondent of the said one-sixth part he has acquired a good and valid title to the same, and is entitled to be collocated out of the proceeds of the sale of the island for the value of the said one-sixth part less his proportion of the cost of the sale of the island.

Upon an appeal from this judgment the questions presented for our consideration, as it appears to me, are:—

1st. Can this judgment of the Court of Appeal of the district of Quebec be maintained in view of the only issues which are joined by the respondent's contestation of the appellant's opposition to the collocation in favor of the respondent appearing in the report of distribution and upon which issues the litigants themselves have been content to rest the case which they have submitted to the court for its adjudication? In other words, was the court justified in adjudging the appellant to be estopped from insisting upon the de-

fects in the respondent's title which she had pleaded in her opposition, in the absence of any pleading upon the record alleging the existence of any facts upon which such estoppel could be and was rested?

2nd. If the opposant was not estopped from insisting upon the defects in the respondent's title which she had pleaded in her opposition, then we have to determine and adjudicate upon the issues joined as to those defects.

The record, as it stands, contains no pleading setting up the existence of any facts which raise any question of the estoppel adjudged by the court. In the absence of such a pleading the judgment of the Court of Appeal of the Province of Quebec cannot, in my opinion, be maintained, and I must say, moreover, that I fail to see any facts in the case which, if pleaded, would have been, in my opinion, sufficient to support that estoppel.

But it is objected, although no such objection appears upon the record, that the only proper time to take the objections which have been taken by the appellant to the respondent's title was in the action in licitation. Why they must have been taken there, in order to be effectually taken, I fail to see, and I have not heard any reason suggested, which is, to my mind, satisfactory why they might not be taken equally well and effectually, as they have been taken, upon the record before us.

The appellant herself was interested in the island and in the proceeds to arise from any sale which might be made thereof quite independently of her claim to the one-sixth part, which the respondent also claimed, and she appears to have been quite content that the sale should take place under the direction of the court on the proceeds being deposited in court, to abide the determination of the court upon the question being raised upon the report of distribution as to the parties

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entitled to the proceeds, and in what proportions they should be found to be entitled.

I confess that the mode in which the question of title has been raised upon the present record, appears to me to be the most convenient and most natural mode for raising the questions under the circumstances of the case. However, the suggestion of this objection is but another form of raising a question of estoppel against the right of the opposant to have the issues joined between her and the respondent adjudicated upon by the court, for which I can see no justification either upon principle or authority in the absence of any pleading suggesting facts upon which the estoppel could be rested and submitting the question of estoppel to the court. If this mode of proceeding can be sanctioned, then, as it appears to me, the issues joined upon the record as it stands are a mere delusion. For these reasons I cannot see that we have anything to do upon this appeal but to adjudicate upon the validity of the respondent's title as pleaded by himself, in view of the objections taken to it by the opposant, and of the facts offered in evidence by the respective parties in relation to such objections, in fact to adjudicate upon the issues as raised by the parties themselves and upon which they have been respectively content to rest the case which they have submitted to the court for its adjudication.

And now as to those issues: If it were necessary to the determination of the present case to decide whether the Dominion Act 35 Vic. ch. 115, intituled an act to incorporate the Anticosti Company was or not *intra vires* of the Dominion Parliament I should be, as at present advised, of opinion that it is *intra vires*, but as in the view which I take a decision upon that point is not necessary to the determination of the case now before us, I need not state my reasons for the

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opinion I entertain upon that point.

If the plaintiff Bury had never acquired the interest which he claims to have acquired in the undivided one-sixth part of the Island of Anticosti of which the late Dame Charlotte Forsyth in her life time was seized, and if the question now before us had arisen between Dame Charlotte in her life time, or since her death between the present opposant and the Anticosti Company, I can see nothing in the case which could estop the late Dame Charlotte in the one case, or the present opposant in the other, from asserting their right to recover, and from recovering, the $16,578.06 in contestation.

It is clear from the evidence that the late Dame Charlotte never received anything from the company for the alleged transfer to the company of her one-sixth share in the island, and that the company not only never in point of fact paid anything for the one-sixth interest in question, but that they never were in a position to pay anything for it, or to acquire it under the provisions of their act of incorporation, for the company never had succeeded in procuring stock to be in good faith taken to the amount of ten per cent. on the sum of $2,500,000 named in the act as the capital stock of the company, and of having $12,500.00 of such stock actually paid in, both of which things, namely, the subscription of ten per cent. upon the capital stock of the company and the actual payment of $12,500 thereof were by the act made conditions precedent to the company's commencing any operations, even that of the election of directors by the shareholders.

Until such ten per cent. should be subscribed and such sum of $12,500 should be actually paid in, the powers of the provisional directors named in the act were limited to opening stock books and procuring

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stock to be subscribed, and such provisional directors were, by the act, made the only persons having control of the affairs of the company. It appears, however, that certain persons, some of whom had subscribed for shares in good faith, but not to the amount of ten per cent. required by the act, and at a time when not more than about 80 shares, more or less, of $100 each, had been *bonâ fide* subscribed, and before $12,500, or indeed it would seem before one hundredth part of that amount had actually been paid upon stock subscribed, went through the form in 1875 of electing a board of directors. Yet, it plainly appears, that in 1876, by reason of the company having wholly failed to procure the requisite amount of ten per centum of the capital stock, or anything more than the above number of eighty shares or thereabouts, to be subscribed in good faith, it became, to all intents and purposes, and was deemed by the persons who had subscribed in good faith, to be defunct and abandoned, and they never took any further interest therein.

Under these circumstances it appears to be free from doubt that if the question was now before us between the late Dame Charlotte, if she were living, or, since her death, between the present opposant and the company, the latter would have no claim whatever to the amount in question, or any part thereof, but that Dame Charlotte in the one case, and the present opposant in the other, would be entitled to the money. The only question therefore which, it appears to me, remains is: Can the plaintiff Bury, under the circumstances as appearing in evidence attending his procuring the execution of the instrument under which he claims, be in any better position? The answer to which must be, in my opinion, decidedly in the negative; for the contrivance to which he was party by which a fictitious board of directors was pretended to be elected by per-

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sons who never were *bonâ fide* shareholders in the company, but had become nominally shareholders, and for the sole purpose of assisting Bury in procuring the execution of the instrument under which he claims in consideration of $1,000 paid by him to Wm. D. Forsyth was a transaction, so fraudulent in its nature that Bury, a party to that transaction, never could be regarded in a court of justice as a purchaser for value and in good faith, even if the company had legally acquired the beneficial interest of the late Dame Charlotte Forsyth in the land which, for the reasons already stated, they had not.

In my opinion the appeal should be allowed with costs, and the appellant should be collocated in the place of the respondent for the said sum of $16,578.56.

Appeal dismissed with costs (1).

Solicitors for appellants: *Pemberton & Languedoc.*

Solicitors for respondent: *Longprè & David.*

(1) Application for leave to appeal was made to the Judicial Committee of the Privy Council in this case and refused.—*Canadian Gazette*, vol. xi. p. 418.