

1881 LEVI ABRAHAMS..... APPELLANT ;

\*Feb'y. 24.

AND

\*Mar. 3. THE QUEEN..... RESPONDENT.

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

*Indictment—Delegation of authority by Attorney General—32 and 33 Vic., Cap. 29, sec. 28—Obtaining money by false pre'ences.*

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury.

*Montreal, 6th October, 1880.*

"By J. A. Mousseau, Q.C.

L. O. Loranger,

" C. P. Davidson, Q.C.

Atty.-General."

\* Present.—Ritchie, C. J., and Strong, Fournier, Henry, Tasche-reau and Gwynne, JJ.

Messrs. *Mousseau* and *Davidson* were the two counsel authorized to represent the Crown in all the criminal proceedings during the term.

A motion supported by affidavit was made to quash the indictment on the ground, *inter alia*, that the preliminary formalities required by sec. 28 of 32 and 33 *Vic.*, c. 29, had not been observed.

The Chief Justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted, and it was

*Held*, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 and 33 *Vic.*, c. 29, sec. 28, the Attorney General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside.

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**APPEAL** from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), on a case reserved by Sir *A. A. Dorion*, C. J., at the September (1880) term of the said Court (Crown side) sitting at *Montreal*. The following is the reserved case :

“At the last criminal term of the Court of Queen's Bench at *Montreal*, the defendant, *Levi Abrahams*, was indicted for obtaining money by false pretences.

“The indictment contained four distinct counts, as follows :

“The jurors for our lady The Queen upon their oath present that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *Thomas Preddy*, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said *Thomas Preddy*, with intent to defraud ;

“And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of

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September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences did obtain from one *James Heaton*, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said *James Heaton*, with intent to defraud.

“And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *Thomas Preddy*, a certain sum of money, to wit: the sum of ten dollars currency, the property of the said *Thomas Preddy*, with intent to defraud;

“And the jurors aforesaid, upon their oath aforesaid, further present, that *Levi Abrahams*, on the 25th day of September, in the year of our Lord one thousand eight hundred and eighty, at the city of *Montreal*, in the district of *Montreal*, unlawfully, fraudulently and knowingly by false pretences, did obtain from one *James Heaton* a certain sum of money, to wit: the sum of ten dollars currency, the property of the said *James Heaton*, with intent to defraud.

“(Signed) *Schiller & Dansereau*,

“Clerk of the Crown.

“I direct that this indictment be laid before the Grand Jury.

“*Montreal*, 6th October, 1880.

“*L. O. Loranger*,

“Attorney-General.

“By *J. A. Mousseau*, Q.C.

“*C. P. Davidson*, Q.C.

“There was no preliminary examination of the charges before a magistrate, and the indictment was

presented to the grand jury by the only direction which appears on its face, and which is signed:

“ *L. O. Loranger,*

“ Attorney-General.

“ By *J. A. Mousseau, Q.C.*

“ *C. P. Davidson, Q.C.*

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“ The defendant moved to quash the indictment on the following grounds:

“ 1st. Because the defendant was charged with four distinct offences of obtaining money by false pretences, which could not be joined in the same indictment;

“ 2nd. Because the indictment had been preferred, without any of the preliminary formalities required by sec. 28 of the Act 32 and 33 *Vic.*, c. 29, respecting procedure in criminal matters having been observed, and namely that it had not been preferred by the direction of the Attorney General or Solicitor General of the province of *Quebec*, or of a judge of this court, or of any judge of the Superior Court for *Lower Canada*, having jurisdiction, and without any preliminary investigation before a magistrate, and without the prosecutor having been bound by recognizance to prosecute the defendant or give evidence against him, and without the defendant having been committed to stand his trial upon the said charge, or detained in custody, or bound over on recognizance to answer the said indictment.

“ This motion was supported by affidavit; I rejected it, intimating at the time that as I had some doubts, principally on the second objection urged, I would reserve the case, should the defendant be convicted.

“ The defendant was tried on the 26th of October last, and acquitted on the first and second counts, but found guilty on the third and fourth counts, laid in the indictment.

“ The evidence adduced at the trial, was that on the 25th of September last, the defendant sold to *Thomas*

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*Preddy* and *James Heaton*, two persons recently arrived in the country, a pass issued by *The Grand Trunk Railway Company* in favor of *A. Carey*, and one, entitling the said *A. Carey* and another to travel on *The Grand Trunk Railway* from *Montreal* to *Port Huron*, up to the 30th September now last past, and another pass issued by *The Chicago & Grand Trunk Railway Company* in favor of *A. Carey*, and one entitling the said *A. Carey* and another to travel on *The Chicago & Grand Trunk Railway* from *Port Huron* to *Chicago* from date to 27th August, 1880, which last pass was then out of date by effluxion of the time for which it had been issued, he, the defendant, representing to the said *Preddy* and *Heaton*, that these passes were valid and would entitle them to be conveyed from *Montreal* to *Chicago*, by the *Grand Trunk Railway* and by the *Chicago & Grand Trunk Railway* respectively, while it was proved that these passes were of no value to the said *Preddy* and *Heaton*, as the first pass, which was not transferable, could only be used by *A. Carey* and another person travelling with him, and the time for using the second pass had already expired. The price paid for the two passes was twenty dollars, of which ten dollars were of the moneys of *Thomas Preddy*, and ten dollars of the monies of *James Heaton*, the whole amount however being paid through *Preddy*.

“The passes were not shown to *Heaton* and *Preddy* until after they had paid the money, and they were then informed that one of them would have to pass by the name of *A. Carey*, to which no objection was taken; both *Preddy* and *Heaton* swore that they did not understand what this meant, until they read the condition that the passes were not transferable, after leaving defendant's store.

“I reserved the sentence, and the defendant is now on bail to appear before the Court of Queen's Bench, on

the appeal side, and also at the criminal term on the 24th of March next.

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"I now beg to submit, for the consideration of the Court of Queen's Bench, the following questions :

"1st. Whether the Attorney-General could delegate his authority, to direct that the indictment in this case be laid before the grand jury, and whether the direction as given on the indictment, was sufficient to authorize the grand jury to enquire into the charges and report a true bill.

"2nd. Whether if the indictment was improperly laid before the grand jury it should have been quashed on the motion made by the defendant.

"3rd. Whether the several counts could properly be included in the indictment.

"4th. Whether the rulings on the above questions are correct, and whether there was sufficient evidence of false pretences to justify a conviction on the third and fourth counts of the indictment.

"*Montreal*, 30th October, 1880.

"*A. A. Dorion*,  
 "Chief Justice."

The Court of Queen's Bench held that the conviction on the indictment was good, and from this judgment the accused *Levi Abrahams* appealed to the Supreme Court of *Canada*.

Mr. *Doutre*, Q. C., appeared on behalf of the appellant, and Mr. *C. P. Davidson*, Q. C., on behalf of the respondent.

The points and authorities relied on by counsel fully appear in the judgments of the Court of Queen's Bench (1), and in the judgments of the Supreme Court hereinafter given.

RITCHIE, C. J. (after reading the reserved case) :—

In acting under this statute the Attorney or Solicitor-

(1) 1 *Dorion's Q. B. Rep.* 126.

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General or Judge, as the case may be, exercises what is in the nature of a judicial function, he is judicially to decide whether the indictment is proper to be presented to or found by the grand jury, so that, while on the one hand the rights of the public are to be guarded, individuals are to be protected from (as *Cockburn*, C. J., in *Queen v. Bray* (1) says) "the abuse of the right of prosecution, by proceedings instituted either vexatiously or from corrupt or sinister motives;" and the duty of exercising this judicial discretion, when the prosecutor or other person presenting an indictment has not been bound by recognizance to prosecute or give evidence, or where the person accused has not been committed to or detained in custody, or has not been bound by recognizance to appear to answer an indictment to be preferred against him, is vested in the Attorney-General or Solicitor-General or Judge to be by them personally exercised; "the circumstances," as *Cockburn*, C. J., in the same case, says, "under which the direction shall be given, having been left entirely within the discretion of one or other of these officers; and with the exercise of which the court will not interfere." *The Queen v. Heane* (2), shows that where an indictment has been preferred without either of the three conditions mentioned having been performed, the matter may be brought before the court on affidavit after plea pleaded, and the indictment may in the discretion of the court be quashed, or the party on a doubtful case be left to his writ of error.

I think therefore, this being a special statutory power, it must be strictly pursued; the propriety of sending a bill before the grand jury having been confided to the judgment and discretion of the Attorney-General, he cannot extend the provisions of the act and delegate to the judgment and discretion of another the

(1) 3 B. &amp; S. 258.

(2) 4 B. &amp; S. 947.

power which the legislature has authorized him personally to exercise, no power of substitution having been conferred. In the present case it is admitted that the Attorney-General gave no directions with reference to this indictment; that the gentlemen who put the indorsement on the indictment did do so merely because they were representing the crown at the criminal term of the Queen's Bench in *Montreal* under a general authority to conduct the crown business at such term, but without any special authority over or any directions from the Attorney General in reference to this particular indictment. Under these circumstances the indictment in this case, having been presented to and found by the grand jury without any compliance with the provisions of the statute, must be quashed.

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STRONG, FOURNIER and TASCHEREAU, J. J., concurred.

HENRY, J.:—

The prosecution in this case rests entirely upon a statute, and the legislature have thought it proper to declare that an indictment for obtaining money by false pretences, can only be laid before the grand jury by direction of the Attorney-General or Solicitor-General, or upon the authority of a magistrate after a preliminary investigation, or some other person having a judicial function to perform. It is clear that there is no authority in the statute authorizing the Attorney-General to delegate this power to another. In this case there is no evidence of any directions whatever, except the simple fact that the Attorney-General authorized these gentlemen to represent the Crown in criminal prosecutions during the then following term, and on this they prepared this indictment and submitted it to the grand jury. It has been considered that in a certain number of these cases individuals should not be annoyed by the

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abuse of the right of prosecution, and for that reason the legislature has thought proper to allow the Attorney-General, Solicitor-General, or Judge, as the case may be, to judicially decide whether the indictment should be laid before the grand jury. The words of the statute are clear, and I concur with the Chief Justice in holding that the conviction should be set aside.

GWYNNE, J. :—

I entertain no doubt that the true construction of the words in the 28th sec. of 32 and 33 *Vic.*, ch. 29, namely: "Or unless the indictment for such offence is preferred by the direction of the Attorney-General or Solicitor-General for the province," is precisely what the words literally express, namely, that the direction shall be in the particular case made by one of those officers of the government and not by another person, who may be appointed to conduct, for the time being, criminal prosecutions upon the part of the Crown. The intention, I am of opinion, was that cases of the description mentioned in the section should be first enquired into before a magistrate, except in cases of emergency, when the discretion of the Attorney-General, or of the Solicitor-General, as officers responsible to the public, might be substituted. One of the offences mentioned is that of conspiracy, which might be to commit a state offence, and which might require the exercise of much discretion and secrecy of investigation to ensure a conviction, and in such case the public interests might require that the responsible law officers of the Crown should be given a discretion as to preferring or not preferring an indictment. But whether the offence charged be one of this nature, or any other of the misdemeanors mentioned in the section, the intention of the legislature, I have no doubt, was that no indictment for any of those offences should be preferred to or entertained

by a grand jury, unless upon the authority of a magistrate, after a preliminary investigation, or upon the authority and express direction of one of the responsible law officers of the Crown, whose responsibility could not be delegated to another, or upon the authority of a judge of a court having jurisdiction to try the offence.

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Now, in this case, a motion was made to quash the indictment upon the ground of its having been found without any of the prescribed authorities (having been presented to the grand jury upon the authority of the Queen's counsel prosecuting at the court on behalf of the Crown). The indictment ought to have been quashed for the cause assigned, and the court having reserved for the consideration of the Court of Queen's Bench, whether it should or not be quashed, that court should have given judgment to quash it, and the appeal therefore must be allowed.

*Appeal allowed.*

Attorneys for appellant: *Doutre & Joseph.*

Attorney for respondent: *L. O. Loranger.*

