Supreme Court of Canada

St. Louis *v.* The Queen (1896) 25 SCR 649

Date: 1896-02-18

Emmanuel St. Louis (Suppliant)

Appellant

And

Her Majesty The Queen (Respondent)

Respondent

1895: Oct. 11; 1896: Feb. 18.

Present:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Evidence—Presumptions—Omnia prcesumuntur contra spoliatorem.

St. L. filed a petition of right to recover from the Crown the balance alleged to be due on a contract for certain public works. On the hearing it was shown that certain time-books and the original documents from which his accounts had been made up and also his books of account had disappeared. The Judge of the Exchequer Court found as a fact that these books and documents had been destroyed in view of proceedings before a commission appointed some time prior to the filing of the Petition of Right to inquire into the manner in which the works done under the contract had been carried on and he dismissed the petition.

*Held,* reversing the judgment of the Exchequer Court, that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent and to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule *omnia prcesumuntur contra spoliatorem* did not justify the learned judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial showing instead that the accounts would have been corroborated.

Appeal from a decision of the Exchequer Court of Canada[[1]](#footnote-2), dismissing the suppliant's petition of right.

The suppliant claimed payment of $63,642.29 as the balance remaining on a larger amount, due in virtue of several contracts between himself and the Department of Railways and Canals for the Dominion of Canada,

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for stone for the construction of a new Grand Trunk Railway bridge on the Lachine Canal, and for labour required upon Wellington bridge, the Grand Trunk bridge, and lock no. 1 on the Lachine Canal in Montreal.

These contracts in the first instance were formed by accepted tenders made by the appellant, addressed to the Department of Railways and Canals; but during the execution of the contracts modifications were made.

The main defence raised by the Crown, and the one which was principally relied on at the trial, was the fraudulent preparation by the appellant of the pay-lists of the men.

The work on the bridges was, of necessity, required to be performed in the winter season, before the opening of navigation on the Lachine Canal, and was performed, and the men and teams supplied by the appellant, between the months of January and the middle of June, 1893, under the direction of the superintending engineer and the superintendent of the Lachine Canal.

The method adopted by the appellant in keeping a record of the men and teams which he sent upon the works, was by keeping the time of these men and teams in time-books and time-sheets, for which purpose timekeepers were employed. The time-books and time-sheets were, at the close of each day's work, handed into the office of the appellant, and a book-keeper and several assistants were employed by the appellant in making up pay-lists or accounts of the men's time, at the prices mentioned in the contracts above referred to. These pay-lists or accounts, when completed for a period of a fortnight or other period at which they were made up, were taken to the government officers in charge of the work, who certified them, after which they were sent to the Department of Railways and Canals at Ottawa for payment. The department

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employed a time-keeper, whose duty it was to check over the pay-lists and keep, a record and check upon the time of the men employed.

The total amount of the pay-lists of the appellant amounted to the sum of $284,192.50, in which is included a small sum for stone but with respect to which no question arises.

Of this total amount the Crown paid $220,550.21, but refused to pay the balance of $63,642.29, alleging that the appellant had, during the greater part of the time the works were in progress, improperly and fraudulently inserted the names of workmen who were not in fact employed or engaged on the work; and also that a large amount of time of men and teams that were employed had been fraudulently added to the pay-lists, whereby the amounts appearing on the pay-lists were greatly in excess of what was really due to the appellant.

The appellant's evidence, taken upon discovery, disclosed the facts, that prior to a sitting of a commission, which was appointed by the Dominion Government in May, 1893, to investigate and report upon the building of the bridges, he had burnt and destroyed all his books of account, bank pass-books, cheques and the original time-books and time-sheets relating to the contracts in this matter, so that none of the original books and papers were available for evidence at the trial.

The Exchequer Court judgment was to the effect that on account of the presumptions arising against the suppliant through his voluntary and wilful destruction of the evidence, he was not entitled to any portion of the relief sought by his petition.

*Geoffrion* Q.C. and *Emard* for the appellant. The evidence will show that the suppliant has proved every item of his claim and is entitled to recover unless fraud can be shown.

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There is nothing to justify the finding of the learned Judge of the Exchequer Court that the books were destroyed with the object of embarrassing the commission.

The suppliant was not obliged to keep any books as he would be in France.

The rule *omnia prœsumuntur contra spoliatorem* is not one *de juris et de jure.* The presumptions under it are only of fact arising from the evidence and do not make evidence. See arts. 1204, 1227, 1238 C. C.; arts. 1330, 1331 C. N.; arts. 15, 17, Code Com.; Dal.[[2]](#footnote-3); Marcadé[[3]](#footnote-4).

The destruction in this case at the most would only operate to let in secondary evidence. Art. 1239 C. C.; Best on Evidence[[4]](#footnote-5); *Cartier* v. *Troy Lumber Co.[[5]](#footnote-6)*; *Bott* v. *Wood[[6]](#footnote-7)*.

*Osier* Q.C. and *Hogg* Q.C. for the respondent. The finding that the books were destroyed in view of the commission must be accepted on appeal and justify the presumptions made against the suppliant. *Hunter* v. *Lauder[[7]](#footnote-8)*; *Attorney General* v. *Dean of Windsor[[8]](#footnote-9)*; *Harris* v. *Rosenberg[[9]](#footnote-10)*; *Joannes* v. *Bennett[[10]](#footnote-11)*.

The learned counsel dealt with the evidence, claiming that it showed fraud on the suppliant's part.

TASCHEREAU J.—I would allow this appeal. I think that the court below has carried too far the consequences of the rule *omnia prœsumuntur contra spoliatorem[[11]](#footnote-12)*. The destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed

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it, but that presumption may be rebutted. Now, here the presumption raised by the destruction of papers and books by St. Louis, not unsatisfactorily explained, could not be better rebutted than by proving, as he has done in the clearest manner, that they would, if forthcoming, conclusively establish his claim. Michaud, his head clerk, swears positively, and his evidence not only stands uncontradicted but is fully corroborated, that the appellant's accounts as sent to the government were taken faithfully from the books that have been destroyed. Coughlin, a government time-keeper, swears to the correctness of the pay-lists concerning the work done at the Wellington bridge, to which he more particularly attended, and as to the other works Villeneuve, the head time-keeper, explains the system which was followed so as to keep a faithful and correct account of all the men's time. These men would go to the wicket in the morning and call their respective numbers which he, Villeneuve, would put down, and they would then go to the works; and during the day, three or four times a day, he or his assistants would go on the works and call out their numbers again, and note their presence at or absence from the works, and then transcribe these notes in the book kept by him (Villeneuve) for that purpose. From this book some one from the appellant's office would come and take a copy so as to have a duplicate of the time-keeping at the head-office," which would be a means of keeping the appellant informed and at the same time be a check on the time-keeper. At pay-day, money would come from the appellant's office ready, prepared in envelopes for each man, and the head timekeeper would see that such pay in each case corresponded with his own book. The assistant time-keepers, Drolet, Beaudry and McEwan, testify as to the correctness of the returns made by them as such to the head

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timekeeper, and the copyists, Beaudry, McEwan, Stanton, Proulx and Archambault certify to the correctness of the work they performed in making up the several accounts. Michaud, the head clerk, who was also pay-master for the appellant, swears that he has taken care that all the work done by the above named clerks in preparing the accounts and pay-lists should be done correctly, and that he himself paid all the money for the labour which is charged on the pay-lists in presence of Kennedy, or Coughlin, the government officers. That each and every one of the men returned on the time-lists have been paid by St. Louis there is therefore complete evidence of. And that evidence must be given effect to if all these witnesses have not conspired to commit perjury, a proposition which the Crown itself would not be justified in advancing, and upon which the court below did not rely to reach a conclusion adverse to the appellant's claim.

The witness Villeneuve, whose evidence is so important in the case, is, or was when examined, a permanent officer of the government, and at the special request of the superintending engineer he was allowed, in the interest of the government, by the department at Ottawa, to continue to act as time-keeper after the opening of the navigation up to the 14th May. Now, the superintending engineer had seen him every day on the works in the performance of his duties, so that this request to continue Villeneuve's services amounts to a direct approval by the government head officer of the way in which he, Villeneuve, had performed his services, if anything more in that sense was required than this officer's signature at the foot of each list, certifying to their correctness. If, as the Crown contends, he has no personal knowledge of the correctness of what he certified, he unquestionably personally knew Villeneuve, and how he had performed his duties and

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how far he could trust him. And this high officer, nor any other officer of the government, it is but just to say, cannot be, under the evidence adduced, and is not, charged with fraud.

The whole of the Crown's attempt to resist the claim seems to be based on a vague idea that there must have been fraud in connection with this work, because it greatly exceeded the original estimates of its officers of what it should actually have cost, and it is mainly to prove this that a number of witnesses have been examined on its behalf. Now it may be questioned if this, of itself, carries with it the least *indicia* of fraud. There are not many public works, not only in this country, but all through the world, I may say perhaps, that do not cost a great deal more than the estimate first made thereof. But assuming that it may give rise to suspicion, the Crown in this case would have to necessarily connect the appellant with the fraud, if any there has been. Now he had nothing whatever to do with the works, nor any control over the men he supplied. That is conceded. As far as he was concerned the men he sent to the government may have been perfectly useless, or 100 per cent more in number than was necessary. And further, he may have made 100 per cent profit on each of the men he so sent. That clearly would be perfectly legitimate.

And then, was it possible for him better to rebut any presumption of fraud than by proving that he had duly himself paid every one of the men he charges to the government for the time each of them worked, as appearing by the time lists in evidence, where they each of them answered to their names on the works in presence of the government officers, on each pay day?

If the appellant had not received anything on his contract, and was claiming here the whole amount of $284,192.50, as per his pay-lists duly certified by the

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government officers, would his claim be dismissed *in toto* because he destroyed his books? That is what the respondent would contend for. Now that cannot be. The destruction of the books entitled the respondent to put the appellant on the strict proof of each and every item of his claim, but for each and every item duly proved the appellant is entitled to recover. And the evidence is all one way. Every item of the $284,192.50 has been proved by the best available evidence, and that is conclusive.

I have assumed that the books and documents destroyed by the appellant all had connection with his present claim and would have been evidence if they had not been destroyed. But, as far as I can make out, none of these books, with the exception of the original time-books-kept on the works themselves, could at all have any bearing on this issue. And as to these time-books, it is in evidence that they were always destroyed after: having been recopied in the office. And, that this is so is made evident in the case by the respondent whose own time-books kept by its own officers have also been destroyed and could not be produced. As to cheque books and bank pass-books, they would have thrown no light on the case, as it is in evidence that the appellant who had other large contracts going on at the same time as this one used to draw indiscriminately on his bankers for the funds wanted for all his contracts.

And then, the respondent could have got all the information that they ever could have had from these bank books by examining the bank officers and the bankers' books; the appellant gave the names of his bankers. As to the original pay-lists he had these in his hands when examined on discovery. Mr. Justice Girouard will refer more fully to this part of the case.

A man named Doheny under very suspicious circumstances was brought into the witness box by the

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Crown, to prove that he, Doheny, had counted the stonecutters at Kennedy's request, and that according to his returns the appellant charged to the government, from the 20th March to the 29th of April, 2,281 more men than he, Doheny, had counted on the works. Now, leaving aside the glaring unreliability of this witness, and the negligent and careless manner in which it is evident at the very inspection of the little book he produced as his voucher that he must have fulfilled his duties as time-keeper, the fact remains proved that whatever the men he sent to the works did, or wherever they were sent to work, he, the appellant, paid these 2,281 men on the works. And he gives the name of each and every one of them. If the Crown had been able to corroborate Doheny's evidence by bringing, if not all, at least a few of these 2,281 men to prove that it was not true that the appellant had engaged them, and had duly paid them, it would undoubtedly have been done. They charged fraud; on them was the *onus probandi* of that charge, and under the circumstances the appellant is justified in asking us to infer from its not having been done that it could not be done, and consequently, that whatever may be the explanation of this discrepancy between these Doheny's lists and the appellant's lists during that period of the works, the fact remains uncontradicted that each and every one of these 2,281 men answered to their names on the works and were duly paid by the appellant the time charged in the lists. And it is in evidence that in some instances he actually charged to the government less men than the government's own time-keepers returned. That is not consistent with the fraudulent system of dealing in the matter that the respondent would charge him with. As to Kennedy, the special overseer of the works, the respondent has not thought fit to examine him. Why, does not appear. It seems to me that, under

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the circumstances, it is open to the appellant to contend that this should be taken as an admission that he, Kennedy, would, not contradict the appellant's statement under oath, nor the evidence of Michaud, Connolly, Villeneuve and others, that each and every one of the men returned in his lists to the government had been supplied at his, Kennedy's, request, and had been paid by the appellant in Kennedy's or Coughlin's presence and with their sanction. He, Kennedy, certified to the correctness of all of the appellant's returns to the government, and he, as directly in charge of the works, was in a position not to be imposed upon by the appellant's lists had those lists been to any extent incorrect.

And were it only to corroborate Doheny's evidence, had it been possible for him to do so, their not calling Kennedy throws an unfavourable light on the respondent's case. A witness of that kind, so willingly keeping back evidence to thrust it at the appellant at the decisive moment, needs all the corroboration that could be got, it seems to me. He would say he acted in the public interest, I presume. I have my doubts about that, to say the least.

However, it may very well be that he did really not see more men on the works than what he returned. It is in evidence that it was impossible for him to ascertain how many were there at a given date in the way he says he tried to do it. The three works, the Wellington bridge, the Grand Trunk bridge and lock no. 1, were all three government works near one another, going on at the same time, with orders to hurry it at any cost, even benight and Sunday work. The appellant supplied the labour for the three works and the prices were the same for the three, so that it must have often happened, and there is evidence of it, that men that are charged to one may have worked part of the time on the other; it was immaterial to the

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government whether they were put down on one list or the other, and they were actually often shifted from one of the works to the other in a way that could not be checked by the time-keepers. This may partly explain the discrepancy between Doheny's little book and the appellant's lists; for we have unquestionable evidence from himself on this record, that during the only period to which a reliable test can be applied to its accuracy the result is very unfavourable indeed to his little book.

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| --- | --- | --- |
| On the 6th May, | St. Louis charges | 38 |
|  | Doheny's book | 20 |
| 7th May, | Sunday, no return by Doheny. |  |
| 8th May, | St. Louis charges | 44 |
|  | Doheny's book | 24 |
| 9th May, | St. Louis charges | 45 |
|  | Doheny's book | 27 |
| 10th May, | St. Louis charges | 46 |
|  | Doheny's book | 28 |
| 11th May, | St. Louis charges | 39 |
|  | Doheny's book | 28 |
| 12th May, | St. Louis charges | 45 |
|  | Doheny's book | 29 |
| 13th May, | St. Louis charges | 43 |
|  | Doheny's book | 29 |
| 15th May, | St. Louis charges | 32 |
|  | Doheny's book | 21 |
| 16th May, | St. Louis charges | 34 |
|  | Doheny's book | 22 |
| 17th May, | St. Louis charges | 35 |
|  | Doheny's book | 25 |

Now, which of these two sets of figures is, upon the evidence, the accurate one, leaving aside the direct testimony of Michaud, Villeneuve and others. Michael Doheny himself gives the answer. At the foot of St. Louis' lists returning his number of men as per the

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above sheets with, in addition, the name of each and every man, he, Doheny, under his own signature, certified them "to be correct in all details and particulars," Signed "M. Doheny, time-checker, and James Davin, clerk and time-keeper." He, Doheny, as time-checker, thus himself subsequently certifying, when given each man's name in detail, that his own figures were wrong and his little book, whatever may be the cause of it, not to be trusted or relied upon. And curious to note, this list he so certifies to as correct in all details and particulars has his own name down for $8 on Sunday the 7th, though according to his little book, if it was to be relied upon, he did not work on that day, another striking illustration of the unreliability of the little book. Now if, during the only period that a test of its reliability can be traced in this record, that book is proved to be so deficient, upon what ground would the respondent ask us to see it in a more favourable light, or to give any weight at all to it, for the preceding period of forty or forty-five days that it assumes to cover? The inference is all the other way, it seems to me.

I notice in the appellant's factum a reference to the contention raised in paragraphs 6 and 7 of the statement of defence, as to the difference between skilled labourers and common or good labourers for pick and shovel. That point, however, I assume, has been abandoned by the respondent as no reference whatever is made to it in the judgment of the Exchequer Court, nor in the factum upon this appeal. And I do not see how the respondent could ever have expected to make anything against the appellant's claim out of this difference between these two classes of labourers, as whether from oversight, or from any other causes the contract of the appellant covered only skilled labourers. And from the 25th of January to the 15th of March,

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the men he sent, all and every one of them, actually worked as skilled labourers and were accepted as such by all of the government officers, Parent, the superintending engineer; Kennedy, the overseer in charge of the works; Desbarats, the engineer of the works. Not one of these government officers, not one of the foremen, ever uttered a word of complaint against the kind of labourers that the appellant was supplying under his contract to supply skilled labourers. And if in March the appellant willingly agreed to classify his men in two classes at the instance of the government, his readiness to give up, even for the past, a right which the strict letter of his contract gave him, rather tends to show his good faith in the matter than otherwise.

The respondent concedes, 1st, that all the labour for this work was to be supplied by the appellant; 2nd, that all the labour required under the original contract was skilled labour; 3rd, that all the men he supplied up to the 15th March were accepted by the officers in charge. It necessarily follows that all the men he supplied were skilled labourers.

And there is not a word of evidence to the contrary. Nay, more, after having accepted these labourers as skilled labourers, and employed them as such, the Crown would hardly have been admitted now to contend that they were not the labourers provided for by the contract.

The Crown, I may remark here, has abandoned its contentions as to the appellant's charges for overtime and night work. The sums charged for stone sold and delivered are also admitted by the Crown upon this appeal.

There are some items of the appellant's charges, as steam derricks, blacksmiths, steam derrick engineers that are not covered by the contract. However, those

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special men and articles must have been called for by the government officers in charge of the works, and the government duly ratified their employ and the charges therefor not only by their own officers on the works certifying to them, but by knowingly paying for them in Ottawa without objection. I did not understand the respondent to make any point on this.

The respondent 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 government 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 intricate 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.

Assuming that the appellant would not be entitled, according to the strict letter of the contract, to have these sums charged to the government, the only result would be that that amount would have to be deducted. But it is such an insignificant small sum that the respondent has not insisted upon that. It was only insisted upon as evidence of fraud, and as such, in my opinion, it entirely fails to support such a grave

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charge. There was no *covin* in it. It was done with the full knowledge of the government head-officers.

I have alluded to the respondent's contention, based on the presumption from the destruction of the books, and to the complete proof to rebut that presumption that the appellant has brought forward. But in addition to that proof, and in aid of it, is there not another presumption that must not be lost sight of, the presumption that all these witnesses have deposed to the truth? Can a court of justice brand such a number of respectable citizens with the stigma of perjury because the appellant has chosen to destroy his books, or because the government has itself neglected to have the men's time accurately taken? Such would be what the respondent's contentions amount to.

I have also alluded to the fact that beyond the large excess of the cost of the works over the original estimate, or what it has been proved they should have cost, there is not a title of reliable evidence in the case to justify any suspicion of fraudulent dealings in the matter by the appellant. Now this excess of cost, I may further remark, is not confined to the appellant's share of the works. It is in evidence that the part of the works with which he, the appellant, had nothing whatever to do had been estimated by the government engineer at $32,997, whilst their actual cost has been $156,932, or more than over four times the estimate, that is to say, more than the difference between the actual cost of the appellant's share of the works and the estimate thereof. This shows clearly that the alterations made to the work by the government must have more than doubled the cost thereof as sworn to by their own officer, Parent. However, this is immaterial. The fact that the cost may have been a great deal heavier than was ever anticipated is no reason not to pay the appellant. He is not responsible for it. He never supplied a single man

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that was not asked for by the government officers. And it is impossible from the evidence on the record, if credence is to be given to his witnesses, that a single hour's work has been charged to the government that he has not supplied and himself paid for. And were it necessary in this case, the government might perhaps find in the record evidence that should induce them to look elsewhere than to the appellant for the reasons of the heavy cost of these works. Besides the important alterations in the plans ordered from headquarters, the season of the year during which the works had to be done, the fact that the men had often to work in very severe weather and in ice and snow, the very short time allowed to do such a large amount of work, the necessary confusion and loss of time arising from the fact of at times as many as 1,000 men a day, and a large number at night, working in a comparatively limited space, and this under the control of parties who had not the least pecuniary interest to lessen the expenses, it appears on the record, by a letter from Schreiber, the chief engineer at Ottawa, of the 24th of February, 1893, to Parent, the superintending engineer in Montreal that, *ab initio,* the appellant complained that the skilled labour he supplied was thrown idle two or three days in the week. However, I repeat it that does not in this case concern the appellant.

Mention is made by some of the witnesses of a certain commission in connection with these works. Thereis no direct evidence in the record of such a commission, except an answer of the witness McLeod in which he states that he was the chairman thereof. What was its purport, its duties, and when such a commission was appointed the evidence does not disclose. However, this is immaterial, except that 1 notice that McLeod's evidence in this case seems to be based to a great extent on the knowledge he acquired as chairman

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of that commission, and as such is altogether illegal. The only other reference to this commission that need be made is in regard to the statement made by the respondents in their factum that the appellant had destroyed his books in view of that commission. I can see in the case no evidence to support this statement.

I see in the appeal book a translation of the French depositions. That is not required on appeals to this court. Such translations are not only unnecessary, they are dangerous. These should not have appeared in the appeal book, and the registrar is ordered to put the cost of the printing thereof against the appellant who is responsible for it.

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 therefore not be allowed. The parties have not furnished 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.

GWYNNE J.—I agree in thinking that the learned judge of the Exchequer Court in arriving at the conclusion at which he has arrived in his judgment has carried the maxim, *omnia praesumuntur contra spoliator em* beyond what is warranted in law upon the evidence which has been adduced. That evidence, unless it be false, seems to exclude all necessity of applying the maxim in the present case. The learned judge does not appear to have formed his judgment upon the

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opinion entertained by him upon the credibility of the several witnesses examined before him, nor yet upon a balancing of the weight to be attached to the evidence of the respective witnesses.

If, as the learned judge says, he was of opinion that the fair deduction to be drawn from the destruction by the appellant of the papers, &c., destroyed by him would be to show that the pay-lists upon which he makes his present demand and which he furnished to the government, and upon which he was paid what has been paid to him, did not constitute true and just accounts of the labour supplied under his contract, then those papers if forthcoming would of necessity prove that not only one but several of the witnesses who have given their testimony were perjured, and yet we have no hint in the learned judge's judgment that such an imputation has any other foundation upon which to rest save only this assumption.

This surely is not a presumption which is warranted by the maxim.

In the absence of the papers destroyed the case must be determined upon the evidence which is forthcoming, and for the reasons given in the judgment of my brother Girouard I concur that this appeal must be allowed.

SEDGEWICK and KING J J. concurred in the judgment of Mr. Justice Girouard.

GIROUARD J.—I fully concur in the opinion of Mr. Justice Taschereau. I quite agree with him that the judgment appealed from is erroneous, both as to facts and law. His elaborate review of the case will relieve me from the necessity of making any extended remarks on my own account, and in the observations I intend to offer I propose to deal only with the questions

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involved in the destruction of the books and papers of the appellant, which seems to be the basis of the judgment.

The maxim *omnia praesumuntur contra spoliatorem* comes down to us from the Romans who applied it, with a good deal of severity, because every business man was supposed to keep regular records of his affairs, at least a ledger or codex; but it is remarkable that the blotter or *Adversaria* had no legal value, not being admissible as evidence in courts of justice, and no one was obliged to keep it beyond one month. If a plaintiff, trader or not, refused to produce his *Codex* or other papers in his possession relating to any claim, his action was rejected purely and simply, the plaintiff being then held to have been guilty of fraud upon the defendant *Doli exceptione summoveri poterat* L. L. 5 and 8, *Code de Edendo.* The modern nations, even those governed by the principles of the Roman law, have not been willing to go so far in the application of the maxim, except in matters of international concern. 1 Greenleaf[[12]](#footnote-13); 1 Taylor[[13]](#footnote-14). The Institutes of Justinian by Sandars[[14]](#footnote-15); 2 Toubeau 61; Duranton[[15]](#footnote-16); 8 Toullier[[16]](#footnote-17). Domat, perhaps the most accurate interpreter of the Roman law as accepted in old France, says[[17]](#footnote-18):

Ainsi, une partie ne peut exiger de l'autre qu'elle produise ou représente une pièce, dont cette partie ne veut de sa part faire aucun usage; mais il dépend de sa bonne foi de représenter ou de retenir les pièces dont la communication lui est demandée. Et on n'est obligé de produire que celles sur lesquelles on fonde son droit. Que si dans le refus de représenter une pièce, il y avait quelque juste soupçon de mauvaise foi, comme si un créancier qui demanderait des intérêts ou des arrérages d'une rente, refusait de représenter son livre-journa], où le débiteur prétendrait qu'il serait fait mention de ses paiements, il dépendrait de la prudence du juge d'ordonner sur ce refus ce que les circonstances pourraient demander.

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In modern France, under the Code of Commerce, which requires the keeping of certain books by merchants and traders, their non-production does not constitute a bar to the action, but merely a presumption which justifies the court, according to circumstances, in accepting any other evidence, and even to take the oath of the party injured. Code de Commerce, art. 17. The rule is probably the same for a non-trader, party to a suit, refusing to produce his books or papers, although the point seems to be somewhat doubted by some jurists. C. N. art. 1331; 13 Duranton[[18]](#footnote-19); 8 Toullier[[19]](#footnote-20); 5 Marcadé[[20]](#footnote-21); 19 Laurent[[21]](#footnote-22); 2 Fremy-Ligneville 104; Gilbert sur Sirey[[22]](#footnote-23). The Civil Code of Lower Canada, art. 1227, is similar to the article 1331 of the Code Napoleon. Consequently, with regard to the default by the appellant in not producing his books and papers, it is of little importance to know whether this case is a commercial one or not.

But the appellant cannot seriously contend that this is not a case of a commercial nature. The appellant styles himself "contractor," both in his petition of right and in his evidence on discovery; one of the principal objects of his business is to secure contracts like the present one; he admits, and it is proved, that the present transaction gave him large profits; but whether it did or not, it cannot be denied that he was speculating upon the hiring of workmen, and that an operation of that nature is an act of commerce, just as much as the purchase of wares and goods for resale. Masse[[23]](#footnote-24); Boisel[[24]](#footnote-25); 1 Pardessus[[25]](#footnote-26); 1 Namur[[26]](#footnote-27).

Art. 1206 of the Civil Code reads thus:

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The rules declared in this chapter (ch. 9), unless expressly or by their nature limited, apply in commercial as well as in other matters.

When no provision is found in this Code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.

In chapter 9 of the Code will be found certain rules respecting presumptions in matters of evidence. They are laid down in arts. 1238 to 1242; they correspond to arts. 1349 to 1353 of the Code Napoleon, though perhaps different in some respects, especially with regard to presumptions *juri*s *et de jure.* For the purposes of this case it is not necessary to examine these differences, as the presumption arising out of the suppression or destruction of papers is not a presumption *juris et de jure.*

It results clearly from the articles of the Code that there are two kinds of presumptions, those which are legal and those which are not (art. 1238). The first are always established by law (art. 1239) and the second are defined by the court or judge according to the circumstances of each case (art. 1242). Legal presumptions can always be contradicted, except:

When on the ground of such presumption the law annuls certain instruments or disallows a suit, unless the law has reserved the right of making proof to the contrary, and saving what is provided with respect to the oaths or judicial admissions of a party. Art. 1240.

The other presumptions are those which are not established by law, but merely result from the facts left to the discretion and judgment of the court, (art. 1242.) The corresponding articles of the Code Napoleon limit this discretionary power to the cases of *présomptions graves, précises et concordantes* or, as the English version of the Code of Louisiana, (art. 2288,) expresses it, "presumptions must be weighty, precise and consistent." The framers of our Code rightly considered that these minor rules were matters of doctrine and judicial inference, rather than of positive legislation (1st Rep. 30); but undoubtedly they would be followed

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in the application of art. 1242, for they are almost as ancient as courts of justice. L'art de Procéder en Justice, by Lassere[[27]](#footnote-28); Danty sur Boiçeau, 243; Pothier[[28]](#footnote-29); 5 Marcadé 218; Menochius[[29]](#footnote-30); Bédarride[[30]](#footnote-31); Carrier[[31]](#footnote-32).

I am of opinion that these articles of the Quebec Code settle the point under consideration without having recourse to the laws of England. The Code has nowhere declared that the destruction of documentary evidence, or the refusal to produce the same, whether they be books or other papers, constitutes a legal presumption against the party so destroying or refusing to produce the same. This presumption is not one of law, but of fact left to the determination of the trial judge or jury, according to the circumstances of each case.

What are the facts in the present instance? The appellant has burnt his books and all his papers, except those relating to the firms of Berger, St. Louis & Cousineau, and St. Louis Brothers, and the pay-lists and rolls produced at the trial. He had done so long before the institution of the present action, at a time when he did not have any cause to suspect that the government would contest his claim. He has himself stated that if he had had any reason to entertain any such suspicion, or that his books and other papers would have been required for the purposes of this suit, he would not have destroyed them.

The Crown has assumed that he has destroyed them for the purpose of avoiding the investigation intended to be made by the commission which was appointed in the spring of 1893. By referring to the pages of the printed case indicated in page 6 of the respondent's

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factum I have not been able to find any proof of this assertion, but were it true it would appear that this destruction was made by the appellant merely to prevent the public from becoming acquainted with his affairs, and not in view of this suit, or to prevent the Crown from verifying the accounts presented by the appellant as being correct or not.

It is very hard to understand how the appellant could have had this alleged fraudulent purpose, at least with regard to the destruction of the books of account, when it is known that these books did not contain a single entry having reference to his contract with the government, a fact which is proved beyond doubt by his book-keeper, Michaud, whose credibility is not even doubted by the learned judge who rendered the judgment of the Exchequer Court.

But, says the respondent, the appellant has also destroyed the original time records. It appears that they were written in pencil on the premises by the various time-keepers on small books or pads, or even sometimes on flying sheets; they were finally delivered to the book-keeper Michaud, for the purpose of preparing the pay-lists or rolls; afterwards they became of no value, or of so little use that Davin and Doheny, two of the timekeepers of the government under Coughlin, the head time-keeper, appointed by the government, and Coughlin himself, have admitted in their testimony that they did not know what became of theirs. One of Coughlin's time books was produced by the respondent, but it covers only a short period, from the 26th January to the 4th February, 1893, and so far it fully confirms the payrolls rendered to the government.

It is in evidence that these little time books and sheets were for the most part destroyed immediately or shortly after the pay-lists were prepared, as being

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mere blotters or "notes," and of no use after the pay-lists were compiled. Coughlin says:

Once it was entered from the pass book to the sheet there was no further attention paid to the book.

Davin says:

Q. What have you done with your time book?—A. I was looking for it. I had it in our own house, but I was looking it up and I couldn't find it; it is round the house some place.

Q. But did you look for it before you came here?—A. Yes.

McEwan, one of the appellant's assistant timekeepers, says:

Q. When you reported, you say you reported from a pad?—A. Yes. Q. Did you leave the whole pad, or detach the leaf?—A. I detached the leaf. After we had reported to Mr. Villeneuve I detached the leaf and threw it away.

Beaudry, another assistant time-keeper of appellant, says:

Q. Quelles notes preniez-vous?—R. Je prenais mes notes sur un bloc, sur un "pad."

Q. Et puis?***—***R. Ensuite, je remettais ces notes soit à M. Villeneuve, soit au commis de M. St. Louis, qui venait à l'office pour prendre le temps.

Q. Est-ce que vous remettiez à ces gens la feuille du "pad" détachée ou si vous faisiez rapport verbalement?—R. Quelques fois je remettais la feuille détachée et d'autres fois je dictais ce que j'avais sur ma feuille.

Q. Lorsque vous dictiez vos informations, que faisiez-vous du "pad" sur lequel vous aviez pris vos notes, ce jour-là?—R. Je le détruisais, monsieur.

Drolet, another assistant time-keeper, says:

Q. Aviez-vous en votre possession du papier, des livres ou autres-documents sur lesquels vous pouviez prendre des notes du ternes des hommes?—R. Je prenais mes notes sur des feuilles de papier.

Q. Après que vous aviez ainsi fait votre rapport à M. Villeneuve, que faisiez-vous du livre ou de la feuille de papier sur laquelle vous aviez pris vos notes?—R. Je la déchirais.

The appellant in his examination on discovery says, speaking of the time books, that is, as explained by Michaud and Villeneuve, the books kept by the latter

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from his own notes and mainly from the returns of his assistants, and their duplicates made by Michaud principally from the reports of Villeneuve:

Q. Those time books, after the lists were made, were done away with, you say?—A. Yes.

Q. Immediately after the lists were made up?—A. Generally, yes. I cannot state immediately, but not more than a few days.

Q. At all events, a few days after the lists were made up you destroyed those books?—A. Yes; generally.

Q. Was that your general practice, or was it applicable to this case only?—A. No. I copied from my documents so as not to get mixed up with the court-house works and other works that I was working at with three or four hundred men. I did not want them mixed up.

Michaud, referring to the final destruction of the books and papers, says:

Q. Then this is the first burn; this selection was the first lot for a burn?—A. Well, for the books it is the first, but for the time books not the first.

Q. This is the first burn that you have had, so that you are establishing a custom now, this is the first of the custom?—A. Well, of course, when I said that, I meant especially the time books.

The appellant had reason to apprehend that the blotters, partly destroyed or lost, could not but bring trouble to himself, and it is not surprising that he should have destroyed what remained of them with his books of account, some time in May, 1893, shortly before the sitting of the so-called commission. He was naturally confident that the pay-lists or rolls which he had preserved, based as they were upon those blotters, signed by the officers of the government in charge of the works, were the best evidence he could produce. The appellant is not in the position of a plaintiff who has wilfully destroyed his best evidence and asked to be allowed to give secondary evidence, a course which would be sanctioned by no court of justice, nor is it proved that the plaintiff destroyed the best evidence.

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The trial judge was willing to accept the pay-rolls as correct with regard to the Wellington bridge, because, with regard to that work, the time was kept by Coughlin and his assistants; but it is in evidence that Michaud, the book-keeper, made these pay-rolls for the Wellington bridge from the blotters of Ooughlin and his assistants, just as he made them with regard to the Grand Trunk bridge and lock no. 1, and the stonecutters and masons from the blotters of Villeneuve and his assistants, not appointed, it is true, by the government, but acting as such with the knowledge and sanction of all the officers of the government in charge of the works. Villeneuve and his assistants swore positively that the time kept by them was correctly kept and delivered to Michaud, and the latter and his assistants likewise swore that the time books and sheets were correctly copied in the pay-lists and pay-rolls filed. I am therefore at a loss to understand why Michaud's statement based upon pay-lists made by him from the missing blotters of Ooughlin should be accepted, and those made from the destroyed blotters of Villeneuve rejected.

These pay-lists and rolls contain the names of all the labourers and the number of hours each of them worked. They were prepared in the office of the appellant in several parts; one part was sent every fortnight by the local authorities of the Lachine Canal to the Department of Railways and Canals in Ottawa, similar to another part which the appellant kept, with this difference, that the one sent to Ottawa was extended according to the prices of the contract and the one kept by the appellant contained only the price actually paid by him to the men. The appellant kept duplicates of all these pay-lists or rolls, the duplicates of the ones sent to Ottawa being signed by the government officers

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in charge of the works, which are filed as a *primâ facie* case.

Thus, every fortnight, the respondent had the names of the labourers and the time that was charged by the appellant, and long before the trial and the issue of the commission had full opportunity to ascertain whether these pay-rolls were false or fictitious, or even beyond expectation. No surprise was even expressed at the accounts rendered. At any time, even during the trial, it was an easy thing to examine a few of the workmen, and find out the actual state of facts. In the absence of that evidence there is every reason to believe that the pay-rolls were correct, supported as they are by the direct and positive testimony of all the time-keepers and of Michaud and his assistants, who prepared the fists from their returns.

But there is more. During the examination of the appellant 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. Michaud again produced these pay-sheets of the appellant; a few of the items were examined and

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compared with the pay-rolls remitted to the government, and were found correct. Being finally asked by Mr. Osier Q.C., for the Crown: "Then these pay-rolls (referring to appellant's pay-lists) correspond with the government pay-rolls?" Michaud answers: "Yes, sir."

All these facts were proved at the trial, and I cannot understand how any presumption can exist that the blotters or time books, sheets or memoranda were destroyed for the purpose of preventing the verification of the accounts rendered to the government, or that, if produced, they would show that the pay-rolls rendered to the government were not correct. I believe that, under the circumstances, it was the duty of the trial judge, in accordance with art. 1242 C.C., to decide that the destruction of the books and papers of the appellant created no presumption against him, and that even if it did it had been removed by the positive evidence he has adduced.

It is contended by the respondent that the presumption arising from the destruction of the books' and papers is not one of those to be left to the discretion of the judge under the Code; that in commercial matters, according to the English rules of evidence to be followed under art. 1206 of the Code, there is a well-known legal maxim *omnia praesumuntur contra spoliatorem,* which is a bar to the action of the appellant.

Let us now see whether the English law supports this contention. The factum for the Crown, quoting Lawson, a recent American writer on Presumptive Evidence, ed. 1886, states that the rule is as follows: "Where the spoliator is the claimant, the fact of spoliation alone raises a presumption against his claim." The learned judge of the Exchequer Court has quoted no authority in support of his judgment, but in reading his notes that would seem to be the rule adopted by him. He says:

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If we had the time books and other original material from which the pay-lists were compiled, it would of course be a simple matter to see whether the pay-lists were correct or not.

And he concludes:

The fair presumption to draw from this wilful destruction of the evidence is, I think, that if such evidence were accessible, it would show that the pay-lists which the suppliant has furnished to the government and upon which he makes his present demand, do not constitute true and just accounts of the labour he supplied to the Crown under his contract. The rule of law that justifies such a presumption is, I think, a most wholesome one, especially where the destruction of evidence is accomplished with the deliberation and thoroughness that distinguishes the present one. The petition will be dismissed with costs.

Why punish the appellant for the innocent doings of the time-keepers, who alone and without any suggestion from the appellant have destroyed the so-called original material, or at least the greatest portion of it, as mere waste paper? How could the learned judge come to such a conclusion in the face of the clearest evidence that the pay-lists or rolls were made correctly from the blotters, that is the little time books, pads, sheets and memoranda kept by the head time-keepers and their assistants? The presumption, if any there was, disappears before this additional and express evidence.

The learned judge does not seem to doubt the credibility of all these witnesses. The appellant is not charged by him with any conspiracy or collusion with the time-keepers, or the government officers. They are not even suspected of dishonesty. He remarks:

In these circumstances, he (the appellant) had called so far as was possible all the time-keepers and clerks who were engaged in compiling the lists to testify that they had done their work honestly and faithfully. There may be a question, though none was raised, how far, in such a case as this, such evidence is admissible for the purposes for which it is tendered. But whether admissible or not, the evidence was of necessity of a general character, not touching or directly supporting particular items in the accounts, and cannot, I think, be

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accepted as excluding all chances of fraud, and as being conclusive of the correctness of such accounts.

The question is not whether there are chances of fraud, but whether as a matter of fact there was fraud in the preparation of the pay-lists from the time books and blotters missing. I have no doubt in my mind that the evidence repels any idea of fraud.

As to the reproach that the evidence was of a general character, it seems to me that it was as precise and direct as the nature of the case would permit. What evidence can be more positive than the testimony of the book-keeper and time-keepers and their assistants, who swear that the labour supplied by the appellant is as stated in the detailed pay-lists and rolls produced, and that the appellant paid for the amount of that labour. His proof, considered independently of the written certificates of the officers in charge, is as direct and precise as it possibly can be, and nothing more is required under the English rules of evidence or article 1204 of the Quebec Code.

With regard to the English jurisprudence, the counsel for the respondent has quoted one English decision; he has relied especially upon American precedents, and no doubt in a case like this, they are entitled to much weight and consideration, although not binding. *Attorney General for Quebec* v. *The Queen Ins. Co.[[32]](#footnote-33)*; *Bank of Toronto* v. *Lambe[[33]](#footnote-34)*. It is remarkable, however, that nearly all the American authorities cited by the Crown, if not all, do not sustain respondent's contention. True in rule 25, Lawson lays down that the fact of spoliation standing alone may defeat a claim; but on the next page, in rule 26, he adds:

But the presumption in disfavour of a spoliator does not arise where the document concealed or destroyed is otherwise proved in the case, or the spoliation is open and for cause.

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Lawson quotes *Butt* v. *Wood[[34]](#footnote-35)*, also relied upon by the respondent, where it was said:

Where there is express and positive evidence there is no place for presumption or inference. It is only in reference to the contents of a paper destroyed or withheld that the maxim can have application, and where the contents are proved there is no occasion for resort to the maxim.

The writer might have quoted more of the opinion of the court in *Bolt* v. *Wood* (1). At another page, the court said:

It is too broad and indefinite in saying that everything may be presumed against the destroyer of the will.

His case evidently must be less favourable than that of the destroyer of his own papers. However, the learned judge, Campbell J., finally observes:

The principle of the maxim *omnia prœsumuntur in odium spoliatoris,* as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance, and therefore slight evidence of the contents of the instrument will usually in such a case be sufficient. There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence, and should be regarded as mere matter of inference in weighing the effect of evidence in its own nature applicable to the subject in dispute.

On page 156, Lawson quotes a decision of the Supreme Court of Indiana in *Thompson* v. *Thompson[[35]](#footnote-36)*, decided in appeal in 185 7, which is interesting, especially as it is quoted by the respondent as one of the authorities in her favour. The quotation is as follows:

It is undoubtedly true that a party who destroys the evidence by which his claim or title may be impeached raises a strong presumption against the validity of his claim, and if the plaintiff destroyed papers of the estate, and especially receipts for taxes, which are important documents, involving in many instances the validity of a title, he committed a great wrong; but yet the presumption against him would not be of that

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conclusive character indicated by the destruction. The jury were told in effect that if the plaintiff destroyed any papers of the deceased the defendant was entitled to a verdict. The law of nations as recognized in continental Europe, under certain circumstances, raises a conclusive presumption against the spoliator of papers indicating the national character of a vessel; but even that rule does not ordinarily prevail in England and the United States.

While reviewing the American jurisprudence, it will not be out of place to point out a few more cases, especially one or two relied upon by the respondent. The first in point is *Askew* v. *Odenheimer[[36]](#footnote-37)*, decided in 1831 by the United States Circuit Court. It was a strong case of fraud by a partner against his co-partner. The court carried the doctrine *contra spoliator em* almost to its extreme limit, though perhaps not too far under the special circumstances of the case. Yet the following language is remarkable:

These cases fully establish the principle that in cases of fraud, suppression and spoliation, the oath of the party injured is evidence, but not conclusive; the court must judge of the weight it is entitled to under all the circumstances of the case.

The mere circumstance of a party having destroyed or suppressed a deed, book or paper, will not induce a court of equity to decree a penalty against him to deprive him of what may be his just right, to dispense with such secondary proof of the existence and contents of the paper which has been so suppressed or destroyed as may be in the power of the party injured to produce, or to give a decree in his favour without some proof.

In *McReynolds* v. *McCord[[37]](#footnote-38)*, decided in 1837 by the Supreme Court of Pennsylvania, the rule is thus laid down at pages 290 and 291:

Everything is to be presumed *in odium spoliatoris,* and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission of subsequent evidence of its contents \* \* But before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been. The presumption in favour of innocence which arises wherever there is room for it,

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xcludes intendment that a paper destroyed by a man in a confidential relation was of value to any one. There are few men who have not papers which it would be not only innocent but prudent to destroy.

In *Life and Fire Insurance Co.* v. *The Mechanic Fire Insurance Co. of New York[[38]](#footnote-39)*, Sutherland J., for the Supreme Court of New York, said:

There is not a particle of evidence that the defendants ever actually received any portion of this money. It is said, however, that this fact would have appeared if the books called for had been produced, and that the judge erred in not charging the jury that the refusal of the defendants to produce those books afforded presumptive or *primâ facie* evidence of that fact. I do not understand the rule to be that a party has a right to infer, from the refusal of his adversary to produce books or papers which may have been called for, that if produced they would establish the fact which he alleges they would prove. The rule is this: The party in such a case may give secondary or parol proof of the contents of such books or papers if they are shown or admitted to be in the possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence.

This ruling was re-affirmed by the Supreme Court of the United States in *Hanson* v. *Eustace[[39]](#footnote-40)*.

The respondent has also referred us to *Joannes* v. *Bennett[[40]](#footnote-41)*, decided in appeal in 1862 by the Supreme Court of Massachusetts, but here again the decision of the court does support the contention. Bigelow C.J., for the court said:

A person who has wilfully destroyed the higher and better evidence ought not to be permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud, which arises from the act of a voluntary destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case.

Pothier, Obligations no. 815, *Merwin* v. *Ward[[41]](#footnote-42)*, and *Duvall* v. *Peach[[42]](#footnote-43)*, may be also quoted in support of this rule.

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The case of St. Louis is not a parallel one; he has not destroyed his primary or "higher and better evidence" which is before us. He has merely destroyed papers he could not offer in evidence, and which could not be produced at the trial without the consent of the adverse party.

An American decision quoted by the appellant may well be noticed here; I refer to the case of *Carrier* v. *The Troy Lumber Company[[43]](#footnote-44)*, decided in appeal in 1891 by the Supreme Court of Illinois. Mr. Justice Wilkin said for the court at page 539:

It will not be seriously contended that a party is to be treated as a "spoilator of evidence" merely because he does not produce books and papers which he could only offer in evidence by consent of his adversary or because some fact might be developed on the trial which would render them competent. It was said in *Merwin* v. *Ward[[44]](#footnote-45)*, "Where a party has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him. But this rule does not apply to such documents as a party has no right to give in evidence without the consent of his adversary."

While I am not prepared to accept this doctrine in its broad terms and without some reservation, I am ready to admit that it has much force in the present instance.

If we direct our attention more particularly to the jurisprudence of England, where merchants, as in the United States and in this country, are not forced *to* keep books except to avoid certain penalties under the bankrupt laws, we find precisely the same rules of law. It must be remarked that cases of this kind, where parties to a suit stand accused or guilty of withholding or destroying papers or documents which are or may be used in evidence, are not as frequent in England as in the United States, and it is not surprising

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that the decisions are not so numerous and do not present as many illustrations of the maxim. The Canadian reports present no case of that description, except one or two in Ontario relating to the election or revenue laws, which can hardly be considered as applicable to a suit like the present one, yet they do not disagree with the English decisions. *Attorney General* v. *Halliday[[45]](#footnote-46)*; *Hunter* v. *Lauder[[46]](#footnote-47)*. See also *Ockley* v. *Masson[[47]](#footnote-48)*.

*Armory* v. *Delamirie,* reported in 1 Strange 504, and decided in 1721, has been considered as the leading English case on the subject[[48]](#footnote-49), although I must confess it does not seem to be quite in point. The plaintiff, a chimney-sweep boy, found a jewel and carried it to the defendant's shop, who was a goldsmith, to know what it was. The stones in the jewel were taken out, and upon a suit in trover by the boy Chief Justice Pratt directed the jury, and I believe properly so – in fact his direction has been followed in *Lvpton* v. *hite[[49]](#footnote-50)*, 1808, and *Mortimer* v. *Cradock[[50]](#footnote-51)*, 1843—that unless defendant did produce the jewel they should presume the strongest against him and make the value of the best jewels the measure of their damage, which they accordingly did. The goldsmith was therefore in the position of a thief, which is the true position of the "spoliator" or "spoiler," and he can hardly be compared to the destroyer of his own property. The appellant is not even in the position of a legatee or heir at law who has destroyed a will or paper of a deceased person, or of a partner who has done away with the books of his firm, or of an agent who has removed the books showing his transactions on behalf of his principal. The appellant is his own master; he has taken nothing

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from the respondent; and I cannot understand how the maxim *contra spoliatorem* can generally be applied to a party who withholds or destroys his own papers.

One of the earliest cases reported is, I believe, *Roe* v. *Harvey[[51]](#footnote-52)*, rendered by the Court of King's Bench in 1769, when Lord Mansfield presided over that court. He first laid down "that in this action, the plaintiff cannot recover, but upon the strength of his own title," which he had refused to produce. This ruling might be perfectly correct; in fact it is in accord with *Joannes* v. *Bennett[[52]](#footnote-53)* and other cases quoted above. Mr. Justice Yates, who dissented, thought that "the plaintiff's counsel was not obliged to produce this deed; no man can be obliged to produce evidence against himself. The only consequence of notice to produce it would have been the admitting inferior evidence." Mr. Justice Aston, who was also the trial judge, said: "I thought the refusing to produce the deed was a want of fairness, and that the plaintiff had not made a complete title without it." Mr. Justice Willes thought likewise that "the title of the plaintiff was not complete, the deed not being produced." Lord Mansfield concluded by observing "that in civil causes, the court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption to the jury."

No exception has been taken to the decision of the court; but the doctrine laid down by Lord Mansfield has been attacked by eminent jurists and is no longer accepted as law, if it ever was.

It was vigorously assailed as early as in 1806 by Sir William D. Evans, in his notes to Pothier's Obligations, vol. 2, pp. 169, 337, quoted with approbation by Mr. Best in his learned treatise on Evidence. He considers that the language of Lord Mansfield means that

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"the refusal to produce was regarded as a presumption of something fatal in the contents," and he concludes:

That a party shall be actually forced to produce the evidence so as to be punished for refusal is a proposition totally unwarranted by authority, and I suppose that is not what was meant by the expressions above quoted, and what is said respecting leaving the refusal as a presumption to the jury should be received with considerable qualification; for it cannot be admitted that such a presumption should stand instead of all other evidence, and supply the total deficiency of proof.

Even if the doctrine of Lord Mansfield is as severe as it appears to be, the presumption which he draws from the suppression of evidence, and it cannot be regarded in a more favourable light than the destruction of evidence, has been entirely removed in the case of the appellant by positive and clear evidence to the contrary.

But the doctrine goes too far and is contradicted by a long array of decisions. Chief Justice Holt held in 1701, that "if a man destroys a thing that is designed to be evidence against him a small matter will supply it." And therefore, the defendant having torn his own note, signed by him, a copy was admitted to be good evidence[[53]](#footnote-54).

The next case is that of Sir Edward Seymour, 1711[[54]](#footnote-55). There the defendant was withholding the title of the plaintiff, who, in consequence, was allowed to prove the contents of the deed by witnesses. A similar decision was rendered in 1718 in *Young* v. *Holmes[[55]](#footnote-56)*.

The case of *Cow per* v. *Earl Cow per,* 1734[[56]](#footnote-57), is an important one. The Master of the Rolls (Sir Joseph Jekyl), after a careful review of all the decisions to date, said:

There have been no cases at law, and these are all the material ones that I have heard cited in equity; but though there may have been others, the names of which I cannot at present recollect, yet do I not remember or believe that there has been any one where there was not

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some proof made of the existence of the deed or writing supposed to be suppressed or destroyed.

Then comes *Saltern* v. *Melhuish* 1754[[57]](#footnote-58), where Lord Hardwicke said:

All cases for relief against spoliation come in a favourable light; but notwithstanding the rule, that things are to be taken *in odium spoliatoris,* yet it ought to have no other consequence but this, that where the contents of the deed destroyed are proved the party shall have the same benefit as he would if the deed itself was produced. This I lay down as a principle.

In *Cooper* v. *Gibbons,* 1813[[58]](#footnote-59), Gribbs J. said:

The non-production of the plaintiff's books, after a notice to produce them, merely entitled the defendant to give parol evidence of their contents.

In *Lawson* v. *Sherwood,* 1816[[59]](#footnote-60), Lord Ellenborough said:

Nor can I infer due notice (notice of dishonour of a bill of exchange) from the non-production of the letter; the only consequence is that you may give parol evidence of it.

In *Barker* v. *Ray,* 1826[[60]](#footnote-61), Lord Eldon observed:

To say that once you prove spoliation you will take it for granted that the contents of the thing spoliated are what they have been alleged to be may be, in a great many instances, going a great length.

In *Bate* v. *Kinsey,* 1834[[61]](#footnote-62), Lord Lyndhurst said:

It is said that the deed was in court, and that parol evidence of its contents ought to have been admitted. It is not, however, even suggested that the defendant was prepared with any other secondary evidence.

Alderson B.:

I do not give my assent to the case of *Roe* v. *Harvey[[62]](#footnote-63)*.

The next case is *Braithwaite* v. *Coleman[[63]](#footnote-64)*,decided in 1835 by the Court of King's Bench. The court differed on the application of the principle; it is thus referred to in 1 Smith L. C. 6th Am. ed. at page 539:

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It was an action by the endorsee against the drawer, and the only evidence of notice of dishonour was the following statement made by the defendant: "I have several good defences to the action; in the first place the letter" (containing the notice of dishonour) "was not sent to me in time." A notice to produce the letter had been given, but it was not produced. Lord Denman C.J. thought that as the defendant withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would appear to have been in time. But Littledale, Patterson and Coleridge JJ. thought that the letter might have been dated on the proper day, but sent by private band, or in some way in which it would not have arrived in proper time; and that the defendant would not be bound to produce a letter which on the face of it might make against him, and which he might not have evidence to explain, and a rule for a new trial was made absolute.

Then comes C*urlewis* v. *Corfield* in1841[[64]](#footnote-65), where a letter was shown to have been sent to the defendant the day after dishonour of a bill of exchange, and the defendant, an attorney, afterwards raised the objection of the want of due presentment, but not want of notice. The jury were warranted in inferring that the letter contained due notice of dishonour. Lord Denman C.J. said:

The notice to produce, not complied with, must have some effect. To that is added the conversation of the plaintiff's attorney in which the defendant placed his defence on a different ground from that of omission to give notice of dishonour. The case therefore is like *Wilkins* v. *Jadis[[65]](#footnote-66)*.

Patterson J.:

Notice was given to produce that letter and it was not produced. These facts alone would not be sufficient, but then comes the conversation of the defendant with Richards; and the whole evidence forms a case that might properly go to the jury.

Williams and Coleridge JJ. concurred.

The last case I have been able to collect is *The Attorney General* v. *The Dean and Cartons of Windsor* in 1858[[66]](#footnote-67), the only English case quoted by the respondent. The Master of the Rolls (Sir John Romilly) referring to the suppression unexplained of a deed, said:

The next question urged, and which seems, from the reign of James I. to have been always urged by the Dean and Canons as their

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principal ground of defence, is whether the deed of Elizabeth was executed by the Dean and Canons, and if not, whether it had any binding force as against them. If I thought that such execution of the deed was material it would be difficult, in the state of the evidence before me as to the existence of this deed, to hold that it was not executed by the Dean and Canons. It is plain that they had the original in their possession, executed at least by the Queen, and that they made a copy of it in their books. Evidence is always to be taken most strongly as against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle, although it exonerates the present members from blame in that respect. It is true, it is urged, that this deed is lost, and that nothing of wilful suppression is to be presumed against the predecessors of the present corporation, and yet the circumstances undoubtedly require an explanation, which they cannot now receive.

This decision is in accordance with *Crisp* v. *Andersen[[67]](#footnote-68)*, where it was held that if a man withhold an agreement under which he is chargeable it is presumed to have been properly stamped. But suppose the Dean and Canons of Windsor had established that in fact their predecessors had refused to accept the trust created by the deed of Queen Elizabeth, can it be supposed that the Master of the Rolls would have applied the presumption against this evidence? The presumption would have been removed just as it was in *Crowther* v. *Solomons[[68]](#footnote-69)*, and *The Marine Investment Co.* v. *Haviside[[69]](#footnote-70)*, where, reaffirming *Crisp* v. *Anderson* (1), the court held, however, that the presumption of the document being regularly stamped as against the spoliator, was rebutted by the evidence that it had been inspected a short time before the trial and that it was not stamped.

To these decisions a few may be added from old digests:—Petersdorff's Abridgement[[70]](#footnote-71):

Presumptions are not proofs; they stand instead of proof until the contrary is established.

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Comyn's Digest[[71]](#footnote-72):

On refusal to produce an instrument after notice secondary evidence is admissible.

2 T.R. 201; Id. p. 430:

A copy or proof of the contents has been allowed when a deed was ***i*** embezzled or detained by the other party. 1 Keb. 12; 3 Keb. 2.

Tidd's Practice[[72]](#footnote-73):

On a notice to produce books of account, if they are not produced this circumstance affords no legal ground for any inference respecting their contents, but merely entitles the opposite party to prove their contents by parol evidence.

See also 3 Blackstone[[73]](#footnote-74); Smith, L. O.[[74]](#footnote-75); Broom, Legal Maxims[[75]](#footnote-76); Taylor on Evidence[[76]](#footnote-77); Starkie on Evidence[[77]](#footnote-78); Best on Evidence[[78]](#footnote-79);. Phillips on Evidence[[79]](#footnote-80); Stephen[[80]](#footnote-81).

Great stress has been laid upon the cost of the works as compared with the original estimate. Explanations are not wanted for this result, which Mr. Justice Taschereau has incidentally noticed. To my mind this fact creates no presumption against the appellant, and is of no importance in the appreciation of the evidence.

I have not alluded to the memorandum book of Doheny. Mr. Justice Taschereau has done full justice to this branch of the case. I agree with him that his evidence is utterly unreliable.

Taking this view of the law and facts of the case, I have come to the conclusion that under both the Quebec Code and the English law the appellant cannot be regarded as a spoliator, and that even if he could he

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has fully rebutted the presumption resulting from that alleged fact by express and positive evidence to the contrary. The appeal should be allowed with costs and judgment entered for the full amount of the payrolls rendered to the respondent, less the charges made for the services of the clerks and time-keepers, the whole as directed by Mr. Justice Taschereau.

Appeal allowed with costs.

Solicitor for the appellant: J. U. Emard.

Solicitor for the respondent: W D. Hogg.

1. 4 Ex. C.R. 185. [↑](#footnote-ref-2)
2. Vo. Obligation no. 4238. [↑](#footnote-ref-3)
3. Droit Comm. vol. 4 no. 2471. [↑](#footnote-ref-4)
4. Par. 1234. [↑](#footnote-ref-5)
5. 138 Ill. 533. [↑](#footnote-ref-6)
6. 56 Miss. 136. [↑](#footnote-ref-7)
7. 8 U. C. L. J. (N.S.) 17. [↑](#footnote-ref-8)
8. 24 Beav. 679. [↑](#footnote-ref-9)
9. 43 Conn. 227. [↑](#footnote-ref-10)
10. 5 Allen (Mass.) 169. [↑](#footnote-ref-11)
11. See per Lord Eldon in *Barker v.Ray,* 2 Russ. 63; and Best on Evidence, par 414. [↑](#footnote-ref-12)
12. Par. 31. [↑](#footnote-ref-13)
13. Ed. 1878, par. 107. [↑](#footnote-ref-14)
14. Ed. 1878, p. 358. [↑](#footnote-ref-15)
15. 4 Contrats 315. [↑](#footnote-ref-16)
16. No. 404. [↑](#footnote-ref-17)
17. Remy's ed. vol. 2, p. 178. [↑](#footnote-ref-18)
18. Pp. 210 to 213. [↑](#footnote-ref-19)
19. No. 404. [↑](#footnote-ref-20)
20. Sur. art. 1331. [↑](#footnote-ref-21)
21. No. 355. [↑](#footnote-ref-22)
22. 3rd ed. 1883, art. 1331. [↑](#footnote-ref-23)
23. No. 20. [↑](#footnote-ref-24)
24. No. 39. [↑](#footnote-ref-25)
25. No. 36. [↑](#footnote-ref-26)
26. P. 42 and authorities quoted at page 43 in note 1. [↑](#footnote-ref-27)
27. Ed. 1680, pp. 87-96.Z [↑](#footnote-ref-28)
28. Obli., n. 849. [↑](#footnote-ref-29)
29. *De Prces.,* lib. 1. [↑](#footnote-ref-30)
30. 1 Dol et Fraude, 243-249. [↑](#footnote-ref-31)
31. Obli., n. 448. [↑](#footnote-ref-32)
32. 3 App. Cas. 1090. [↑](#footnote-ref-33)
33. 12 App. Cas. 575. [↑](#footnote-ref-34)
34. 56 Miss. 136. [↑](#footnote-ref-35)
35. 9 Ind. 323. [↑](#footnote-ref-36)
36. 1 Baldwin 389. [↑](#footnote-ref-37)
37. 6 Watts 288. [↑](#footnote-ref-38)
38. 7 Wend. 31. [↑](#footnote-ref-39)
39. 2 How. 653. [↑](#footnote-ref-40)
40. 5 Allen (Mass.) 169. [↑](#footnote-ref-41)
41. 15 Conn. 377. [↑](#footnote-ref-42)
42. 1 Gill (Md.) 172. [↑](#footnote-ref-43)
43. 138 III. 533. [↑](#footnote-ref-44)
44. 15 Conn. 377. [↑](#footnote-ref-45)
45. 26 U.C.Q.B. 397. [↑](#footnote-ref-46)
46. 8 U.C. L.J.(N.S.) 17. [↑](#footnote-ref-47)
47. 6 Ont. App. R. 108. [↑](#footnote-ref-48)
48. 1 Smith, L.C. 9 ed. 385: Shirley, L.C. 4 ed. 401. [↑](#footnote-ref-49)
49. 15 Ves. 439. [↑](#footnote-ref-50)
50. 12 L. J. (C. P.) 166. [↑](#footnote-ref-51)
51. 4 Burr. 2484. [↑](#footnote-ref-52)
52. 5 Allen (Mass.) 169. [↑](#footnote-ref-53)
53. Anon. 1 Ld. Raym. 731. [↑](#footnote-ref-54)
54. 10 Mod. 8. [↑](#footnote-ref-55)
55. 1 Strange 70. [↑](#footnote-ref-56)
56. 2 P. Wm. 719. [↑](#footnote-ref-57)
57. 1 Ambler 249. [↑](#footnote-ref-58)
58. 3 Camp. 363. [↑](#footnote-ref-59)
59. 1 Starkie 315. [↑](#footnote-ref-60)
60. 2 Kuss. 73. [↑](#footnote-ref-61)
61. 1 Or. M. & R. 43. [↑](#footnote-ref-62)
62. 4 Burr. 2484. [↑](#footnote-ref-63)
63. 4 Nev. & Man. 654. [↑](#footnote-ref-64)
64. 1 Q.B. 814. [↑](#footnote-ref-65)
65. 1 M. & Robb 41. [↑](#footnote-ref-66)
66. 24 Beav. 706. [↑](#footnote-ref-67)
67. 1 Stark 35. [↑](#footnote-ref-68)
68. 6 C.B. 758. [↑](#footnote-ref-69)
69. L. R. 5 ILL.-624. [↑](#footnote-ref-70)
70. Vo. evidence, p. 170. [↑](#footnote-ref-71)
71. Vol. 1, Testmoigne, p. 436. [↑](#footnote-ref-72)
72. Ed. 1821, p. 835. [↑](#footnote-ref-73)
73. Ed. 1830, p. 371. [↑](#footnote-ref-74)
74. Am. ed. 1868, pp. 589 to 592. [↑](#footnote-ref-75)
75. 5th Am. ed. p. 633. [↑](#footnote-ref-76)
76. Ed. 1895, par. 116, 117. [↑](#footnote-ref-77)
77. 5th Am. ed. p. 667, no. 748-756. [↑](#footnote-ref-78)
78. Ed. 1893, p. 373. [↑](#footnote-ref-79)
79. Ed. 1849, vo. 2 p. 222, vo. 5 p. 424. [↑](#footnote-ref-80)
80. Digest of the Law of Evidence, ed. 1895, p. 77. [↑](#footnote-ref-81)