JOHN SHIELDS.....APELLANT; 1882

AND *Dec. 2.

FRANCIS PEAK, *et al*.....RESPONDENTS. 1883

*May. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Judgment on demurrer appealable—3rd section Supreme Court Amendment Act, 1879—38 *Vic. ch.* 16, *sec.* 136—*Construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings—Insolvent Act* 1875, *ss.* 136, 137, *intra vires.*

P. et al., merchants carrying on business in *England*, brought an action for $4,000 on the common counts against *J. S. et al.*, and in order to bring *S. et al.* within the purview of sec. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by *S. et al.*, from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when *S. et al.* made the said purchases they had probable cause for believing themselves to

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

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be unable to meet their engagements and concealed the fact from *P. et al.*, thereby becoming their creditors with intent to defraud *P. et al.*

J. S. (appellant) amongst other pleas, pleaded that the contract out of which the alleged cause of action arose, was made in *England* and not in *Canada*.

To this plea *P. et al.* demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British Subjects resident and domiciled in *Canada* at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875. and amendments thereto.

Held,—(*Taschereau* and *Gwynne*, JJ., dissenting) That although the judgment appealed from was a decision on a demurrer to part of the action only, it is a final judgment in a judicial proceeding within the meaning of the 3rd section of the Supreme Court Amendment Act of 1879. (*Chevallier* v. *Cuvillier* (1) followed).

Per *Ritchie*, C.J., and *Fournier*, J.: 1st. That section 136 of the Insolvent Act of 1875 is *intra vires* of the Parliament of *Canada*.

2nd. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency over which subject-matter the Parliament of *Canada* has power to legislate.

3rd. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in *Canada*, the defendant was not exempt for that reason from liability under the provisions of the 136th section of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed.

Per *Gwynne*, J.: The demurrer does not raise the question whether the sec. 136 of the Insolvent Act of 1875, is or is not *ultra vires* of the Dominion Parliament, for whether it be or not the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore if the appeal be entertained it must be dismissed.

Per *Strong*, *Henry* and *Taschereau*, JJ.: There being nothing either in the language or object of the 136th section of the Insolvent Act to warrant the implication that it was to have any effect out of *Canada*, it must be held not to extend to the purchase of

(1) 4 Can. S. C. R. 605.

goods in *England* by defendant, stated in the second count of the declaration. In this view, it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed.

The court being equally divided the appeal was dismissed without costs.

APPEAL from the judgment of the Court of Appeal for the Province of *Ontario*, dismissing the appeal of the defendants, *James Shields* and *John Shields*, from the judgment of the Court of Common Pleas, ordering judgment to be entered for the plaintiffs on demurrer to the defendants' third plea.

The action was commenced by *Francis Peak*, *William Winch*, *W. Ray*, and *Herman Seidel*, against the said *John Shields* and *James Shields* to recover $4,000.

The first count of the declaration was for goods sold and delivered; and the plaintiffs in addition thereto charged "that the defendants have been guilty of fraud within the meaning of the Insolvent Act of 1875 and the amending acts, in this that the said defendants, on the thirteenth day of March, A.D. 1879, purchased from the plaintiffs on credit goods to the extent in value of seven hundred and twenty-four dollars and sixty-one cents, said goods being parcel of the goods the price of which is sued for herein.

"And on the twenty-ninth day of March, A.D. 1879, the defendant purchased for themselves from the plaintiffs, on credit, goods to the extent in value of two thousand nine hundred and thirty-four dollars and three cents, said goods being parcel of the goods the price of which is sued for herein, the said defendants, on each and every of the said several days on which said purchases were made, knowing or having probable cause for believing themselves to be unable to meet their engagements and concealing the fact from plaintiffs, thereby becoming their creditors with intent to defraud the plaintiffs.

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"And that although the several terms of credit so obtained on the purchase of each of the said several parcels of goods have elapsed, the said defendants have not paid or caused to be paid the debt or debts so incurred or any of them, and the plaintiffs claim four thousand dollars."

To this declaration and for a 3rd plea to the said 2nd count, the defendant *John Shields* said that the contract out of which the alleged cause of action arose was made in the United Kingdom of *Great Britain* and *Ireland*, to wit in *England*, and not within the Dominion of *Canada*.

To this plea the plaintiff demurred; and it was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of *Canada* at the time of the purchase of the goods in question, and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto.

Mr. *J. Bethune*, Q.C., for appellant.

We contend that sec. 136 of the Insolvent Act of 1875 was *ultra vires* of the Parliament of *Canada* if the clause is to be regarded as giving a civil remedy and not creating a criminal offence.

The exclusive jurisdiction to enact laws respecting bankruptcy and insolvency, it is admitted, belongs to the Parliament of *Canada*; however, this must carry with it only such power as may be necessary to wind up the estate, divide it amongst the creditors, and grant or withhold the bankrupt's or insolvent's discharge; it cannot carry with it the power to enact what remedy any particular creditor or creditors may have by actions in the ordinary courts of the province. This latter remedy must be within the competence of the provincial legislature.

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The remedy assumed to be given by sec. 186 is really imprisonment for debt.

Imprisonment for debt, as such, was long ago abolished by the Parliament of the Province of *Canada*, and the Legislature of the Province has never re-enacted it, but, on the contrary, on the revision of the statutes of the Provinces, has declared that it is abolished.

This statute assumes to give a right, in cases within it, to the creditor to take the body of the debtor and keep it in custody for a named period unless the debt and costs due to the creditor be sooner paid.

Manifestly this is not done in the interest of the general body of creditors, but only in favor of the creditor defrauded.

A judgment is to be got by the creditor by an ordinary action. The question whether the defendant was guilty of fraud is to be tried, and if the defendant be found guilty the defendant is to be imprisoned for a term not exceeding two years, unless the debt and costs be sooner paid.

The imprisonment is designed as a means of compelling payment to the creditor. Except that the imprisonment is limited to two years, it is the same kind of imprisonment as that formerly awarded on a Ca. Sa.

It is not said in this section that the discharge of the debtor is to be void. It only enacted that the creditor shall have a new remedy for enforcing payment of his debt.

Assuming that the parliament of *Canada* had not the power to repeal the similar sub-sections of the Insolvent Act of 1864 when it assumed to repeal the whole act, but that this power belonged to the legislature of the Province of *Ontario*, they have been repealed by that legislature by Revised Statutes ch. 67, sec. 4.

This seems to have been overlooked by the learned judges in the court below.

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It is submitted that even, if section 136 be *intra vires* of the parliament of *Canada*, it ought not to be construed to extend to the conduct of persons in *England*, although domiciled in *Canada*.

The intent of parliament was to provide for the conduct of traders while in *Canada*, and parliament did not intend to interfere with the conduct of Canadian citizens while in another country.

But if the statute be wide enough in its language to cover the case of a person domiciled in *Canada* and obtaining the credit referred to while abroad, then it is *ultra vires* on that ground and to that extent. The powers of parliament are to make laws for the peace, order and good government of *Canada*. This, it is submitted, does not extend to make laws respecting the conduct of its citizens while in *England*. Persons domiciled in *Canada* are under the control of English laws while within the kingdom of *Great Britain* and *Ireland*.

If section 136 be a criminal law it cannot apply to the obtaining of the credit in question in *England*; first, because the language of the section ought to be confined to conduct occurring in *Canada*, and secondly, because the parliament of *Canada* cannot enact a criminal law which shall be operative in *England*.

In answer to the objection taken in the respondent's factum that the case is not appealable, I submit that the decision in this court in *Chevalier* v. *Cuvillier* (1) is decisive.

Mr. *Rose*, Q.C., for respondents:

If the fradulent act complained of is a crime, it is congizable in the courts of this province, even though committed in another country. The said courts had conferred upon them common law jurisdiction, by the Imperial Parliament in 1792. The Imperial Parliament

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has power to enact that any offence against its laws, whether committed within or without its jurisdiction, is a crime, and punishable according to its laws whenever the offender is tried within the territorial limits of the British possessions, and the Imperial Parliament conferred upon the Dominion Parliament equal powers as to governing those resident in the dominion. See *Maxwell* on Statutes (1); *Valin* v. *Langlois* (2); *May's* Privileges of Parliament (3).

By the Insolvent Act of 1875, the word "creditor" is defined in sub-section "h" of section 2 to mean,—"Every person to whom the insolvent is indebted,"—and by section 101 foreign creditors are required to be notified of meetings of creditors; and section 136 contains the words, "Concealing the fact from the persons thereby becoming his creditors." Again, "With intent to defraud the persons thereby becoming his creditors." It is submitted, therefore, that the word "creditor" includes "foreign creditors;" and that section 136 expressly declares, that the fraud thereby legislated against is a fraud upon foreign as well as domestic creditors.

In view of the opinions expressed by the learned judges in the *Niagara* Election case (4), in *Valin* v. *Langlois* (5), and in *Cushing* v. *Dupuy* (6), it seems no longer open to question, that if the sections mentioned are enactments respecting "Bankruptcy and Insolvency," or "Criminal Law," then the Dominion Parliament has full power "to interfere if necessary, and modify some of the ordinary rights of property and other civil rights;" and that it is not *ultra vires* of the Dominion Parliament to provide procedure for the administration of its own laws. In dealing with dom-

(1) P. 126.
(2) 3 Can. S. C. R. 16.
(3) P. 39.
(4) 24 (U. C.) C. P. 275 & 279.
(5) 3 Can. S. C. R. 9.
(6) 5 App. Cases 409.

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inion laws, the Dominion Parliament does not recognize provincial limits. It enacts for the Dominion as a whole without territorial distinction, else the anomaly would exist of its being compelled to ask the several local legislatures to assist it in the administration of its own laws.

As to appellant's contention that as the law of *England*, where the contract was made, does not provide a penalty for the wrong in question, the defendants are not liable to a penalty by reason of any legislation in *Canada*: it is laid down in *Story* "On the Conflict of Laws," (1) that the better opinion now established both in *England* and *America* is, that it is of no consequence whether the contract authorizes the arrest or imprisonment of the party in the country where it was made, if there is no exemption of the party from personal liability on the contract; he is still liable to arrest or imprisonment in a suit on it in a foreign country whose laws authorize such a mode of proceeding as a part of the local remedy; and states that in a then recent case in *England*, where the plaintiff and defendant were both foreigners, and the debt was contracted in a country by whose laws the defendant would not have been liable to arrest, application was made to discharge the defendant from arrest on that account, but the court refused the application. Lord *Tenterden*, on that occasion, in delivering the opinion of the court said: "A person suing in this country must take the law as he finds it; he cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer; he is entitled to the same rights which all the subjects of this kingdom are entitled to. *Dela Vega* v. *Vianna* (2). And this doctrine

(1) P. 571. (2) 1 B. & Ad. 284.

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has been confirmed in the case of *Dunn* v. *Lippmann* (1). In the case in question the plaintiffs have instituted their action in a court in the Dominion of *Canada*, and they are, by the laws of that Dominion, debarred from recovering their debt, for under the provisions of the Insolvent Act, the debt is discharged, unless it is one for which the imprisonment of the debtor is permitted. The Act which contains the provisions for discharging such debt, and which Act is invoked against the plaintiffs, also confers a benefit upon them. Invoking the principle of the above reported decision, the respondents are entitled to the advantages which the law intends to confer.

The respondents further submit that there is no final judgment in this case from which the appellant may appeal within the meaning of section 17, of the Supreme and Exchequer Court Act; and refer to the case of *Reid* v. *Ramsay* (2).

Mr. *Bethune*, Q.C., in reply.

RITCHIE, C. J.:

This is a peculiar statutory liability placed on the debtor, to be put forward in an action brought for the recovery of a simple money demand, but which, if sustained, involves serious consequences, to which the insolvent debtor would be in no way liable on the simple money demand. It is therefore quite clear that as against the allegation of such a liability the insolvent must have the right to raise an issue to show that, though he may not be able to answer the money demand, he can answer the charge of fraud, and so relieve himself from the consequences which the statute attaches thereto. I think the declaration clearly shows on its face that the plaintiff in this action seeks

(1) 5 Cl. & F. 1, 13, 14, 15. (2) 2 Can. L. Times 206.

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to bring the defendant within the purview of sec. 136 of the Insolvent Act of 1875, and the plea was intended to meet this claim by shewing that the purchase was made in *England*, and so the debtor did not come within the provisions of the act; and the amendment agreed on, and the dealing of the court, clearly show the issues the parties raised and intended the court should decide were, whether the act was *intra vires*, and, if so, whether to a transaction between the insolvent resident in *Canada* and the creditor resident in *England* the provisions of the act applied?

Bankruptcy alters the ordinary relations of debtors and creditors; its object is to secure a speedy and equitable distribution of the bankrupt's assets, but its object is not confined to this, it has likewise in view the prevention of fraud and bad faith. The honest and unfortunate debtor and honest creditor is dealt with in one way, fraudulent debtors and collusive creditors in a very different manner; and acts as a preventative to fraud and collusion on the one hand, and as an encouragement to honest and cautious trading on the other.

The very first introduction of the Bankrupt Law was by 34 and 35 *Henry VIII.*, ch. 4, which was directed against fraudulent debtors only, who, as expressed in the act:

> Craftily obtaining into their hands great substance of other men's goods, so suddenly flee to parts unknown or keep their houses, not minding to pay, or return to pay any of their creditors, their debts and duties, but at their own wills and pleasures consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience.

By the Imperial Debtors Act of 1869, obtaining credit on false representation, or on false pretence of carrying on business, or fraudulently obtaining credit, &c., were made misdemeanors, and quitting *England* with property which ought to be divided among creditors, a felony.

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So soon as a debtor becomes insolvent and subject to any bankrupt or insolvent law passed by the Dominion Parliament, and proceedings are taken against him and his estate, under the provisions of such enactments, the provincial legislature ceases to have jurisdiction over his civil rights, either in relation to the disposition of his insolvent estate, or in relation to his dealings with his creditors, or their rights or remedies against his person or estate. Legislation on the subject of bankruptcy and insolvency, belonging exclusively to the Dominion Parliament, necessarily involves the exclusive right to deal alike with the rights of the debtor as of his creditor in relation to their dealings.

If the Imperial Debtors Act, 1869, for the punishment of fraudulent debtors, makes certain offences misdemeanors, punishable by imprisonment not exceeding two years, with or without hard labor, and certain other offences are made misdemeanors punishable by imprisonment with hard labor for one year, and the offence of absconding or attempting to abscond from *England* with property divisible among creditors, &c., is made a felony, punishable by imprisonment for two years, with or without hard labor, it would seem strange that the Dominion Parliament, having exclusive jurisdiction over bankruptcy and insolvency and over criminal law, should not have the power to (by way of dealing with a fraudulent debtor and securing the enforcement of the debt) confine a fraudulent insolvent, against whom the debt and the fraud are proved, for two years, unless he discharges the indebtedness.

The insolvency act intended to deal with all the liabilities and estate of the insolvent, recognizing the foreign as well as the domestic creditor, and could never have intended, in legislating against the fraudulent acts of the insolvent in his dealings with his creditors, to distinguish between such acts when com-

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mitted against the home creditor and similar acts committed against creditors abroad, and therefore the term creditors in the clause 136 and 137 refers, in my opinion, to all the insolvent's creditors without distinction. I cannot doubt that secs. 136 and 137 of the Insolvent Act of 1875 are *intra vires* of the Dominion Parliament.

The 136th section enacts that :

> Any person who * * purchases goods on credit * * knowing or believing himself * * to be unable to meet his * * engagements, and concealing, the fact from the person thereby becoming his creditor, with the intent to defraud such person * * and also shall not afterwards have paid or caused to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the court may order, not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

But it is argued that this is a criminal offence, and as such was committed in *England*, and therefore *ultra vires*.

These sections, though of a *quasi* penal character, by no means constituted the acts referred to in them "crimes," in the legal technical sense of that term. In this suit could not the parties be witnesses? The proceeding contemplated by the act is in a civil suit, not in the nature of a prosecution for a crime, but as Attorney General *Cockburn* in *Attorney General* v. *Radloff* (1) expressed it :

> Where the proceeding is conducted with the view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one.

That the legislature was not dealing with this as a crime is clearly deducible from sections 138 and 143 where "offences and penalties" are dealt with, and the

(1) 10 Ex. 84.

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prohibited acts are made misdemeanors by express enactments, and I think *Harrison*, C.J., in dealing with sections 92 and 93 of the Insolvent Act, 1869, substantially the same as 136 and 137 of the Act of 1875, correctly characterized the proceeding in these words:

> The coercive proceeding is in aid of or incident to the civil remedy for the collection of a debt and not at all for the punishment of a criminal.

I have no doubt the parties in this suit, both plaintiff and defendant, could be examined as witnesses, and if at any time after the suit brought, before trial or immediately after, the defendant should pay the debt and costs, the proceedings would end and no imprisonment could be adjudged.

This is, in my opinion, no more a criminal matter than a bill in chancery charging fraud and seeking redress against such fraud.

As to this being matter of civil procedure and *ultra vires* as interfering with property and civil rights, what I have stated in *Valin* v. *Langlois* (1) is an answer to this objection. The right to direct the procedure in civil matters in the provincial courts has reference to the procedure in matters over which the Provincial Legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in cases in which the Dominion Parliament has jurisdiction, and where it has exclusive authority to deal with the subject-matter as it has with the subject of bankruptcy and insolvency. This is also the view taken by the Privy Council in the case of *Dupuy* v. *Cushing* (2). I will only add that I am quite prepared to adopt the conclusion arrived at by the Court of Appeal, and to say that such a provision as the one in question comes fairly

(1) 3 Can. S. C. R. 1. (2) 5 App. Cases 409.

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within the general scope of any law relating to bankruptcy or insolvency.

STRONG, J.:

An objection was taken to the jurisdiction of the court to entertain this appeal, as not being an appeal from a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879. The words of that section are:

> An appeal shall lie from final judgments only in actions, suits, causes, matters, and other judicial proceedings originally instituted in the Superior Court of the Province of *Quebec*, or originally instituted in a Superior Court of Common Law in any of the Provinces of *Canada* other than the Province of *Quebec*.

In the case of *Chevalier* v. *Cuvillier* (1) it was determined that an appeal was well brought where the judgment in the court of original jurisdiction was not final, but was, as in the present case, a judgment on a demurrer to part of the action only; and this decision proceeded upon the ground that the judgment of the Provincial Court of Appeal, from which the appeal to this court was immediately brought, was a final judgment in a judicial proceeding within the meaning of this 3rd section of the Act of 1879. That case is not to be distinguished from the present and is an authority for this appeal.

The pleadings seem to be sufficient to raise the substantial question which was discussed on the argument of the appeal, both in this court and in the court of Appeal. The second count of the declaration is framed, not for the debt, but exclusively upon the statute, for the purpose of alleging the fraud, which section 136 of the Insolvent Act requires the defendant to be charged with before the provision of that section can be applied. It may not have been necessary to have pleaded to this

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charge of fraud, as by the express words of section 137 the court could not act without proof of it, even if no plea had been pleaded. Section 137 seems, however, to imply that the defendant may plead, and, that being so, I see no objection whatever to a plea such as that which has been pleaded to the second count, a plea not containing any answer to the debt, but addressed exclusively to the second count of the declaration, which is confined to the case of fraud.

We are to read the second count of the declaration as amended by the allegation that the defendants were British subjects, domiciled in *Canada* at the time of the purchase of the goods mentioned in the declaration. With this amendment, and taking as I do the second count of the declaration to be confined to the case of fraud and not to be a count for the debt, and reading the plea demurred to as limited to the second count, I think we have before us a perfect record raising the substantial question, which was argued and decided in both the courts below, namely the question: whether section 136 of the Insolvent Act applies to a purchase of goods made by a British subject domiciled in *Canada*, under the circumstances of concealment made punishable as fraudulent by that section, when the purchase is made without the Dominion of *Canada*.

The view which I take of the case does not make it necessary to decide the constitutional question as to the power of Parliament to pass such an enactment as that in question, limited to the territory of the Dominion, the opinion at which I have arrived being formed exclusively on the construction of the clause in question. I may say, however, that I have heard nothing to raise a doubt in my mind as to the constitutional validity of such an enactment, (provided it is construed, as hereafter to be stated as limited to the territory of the Dominion,) under one or other of the

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powers conferred on Parliament by the *British North America Act* of legislation as to criminal law, bankruptcy and insolvency, or trade and commerce, and even if this view is incorrect, and the provision in question cannot be considered a proper exercise of any of these powers of legislating, the opinion of Mr. Justice *Burton* must then be correct, and the similar clause in the Insolvent Act of 1865 be held to be still in force.

The opinion which I have formed, and which accords entirely with that of the Chief Justice of the Common Pleas, proceeds altogether upon the construction of this 136th section, which, interpreted according to well established principles applicable to all statutes, must, in the absence of express words giving it an extra-territorial operation, be read as confined to offences committed within the territory subject to the legislature which enacted it. The statute is clearly penal in its terms, but it does not seem to me to be very material to enquire whether it creates what may strictly be called a criminal offence or not. Had it simply declared that a trader purchasing goods on credit, when he knew himself to be unable to meet his engagements, and concealing that fact from the vendor, should be guilty of a misdemeanor, and liable to the punishment prescribed of imprisonment for not more than two years, there could be no doubt that a new criminal offence would have been created. But supposing the degree and character of the offence by calling it a misdemeanor to have been left out, it would still have been an offence for which the party could only have been tried and convicted on an indictment for a misdemeanor. Then what difference can it make that a special statutory mode of trial is provided for instead of the usual proceeding at common law by indictment? None, that I can see; and the added condition that the party convicted shall in a certain event be entitled to a remis-

sion of the punishment—a sort of statutory pardon —shews that the imprisonment is not intended to be merely by way of execution to enforce payment in the interest of the creditor. What proves this is, that a debtor, after having suffered the full term of imprisonment under a sentence pronounced in pursuance of this enactment, would be liable upon his release to be again imprisoned under a writ of *capias ad satisfaciendum* upon the unsatisfied judgment. I do not, however, think anything depends on this question whether a criminal or even a penal offence was or was not created. The rule of construction which applies, not being restricted to statutes creating offences or inflicting penalties, but being of much wider application, and appropriate to the interpretation of all statutes whereby any legal consequences are attached to the performance of a particular act, the rule to which I allude, and which I think must govern the decision of the present case, is that which establishes that the authority of a statute is not to be extended beyond the territory over which the legislature which enacts it has jurisdiction, unless by express words extra-territorial force is given to it.

In *Jeffreys* v. *Boosy* (1), *Pollock*, C. B., says:

> The Statutes of this realm have no power, are of no force, beyond the dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned or can be necessarily implied.

Sir *Peter Maxwell*, in his work on statutes (2), states this principle of interpretation as follows:

> Another general presumption is that the legislature does not intend to exceed its jurisdiction.
>
> Primarily, the legislation of a country is territorial. The general maxim is that *extra territorium jus dicenti impune non paretur*; or, that *leges extra territorium non obligant*. It is true, this does not compose the whole of the legitimate jurisdiction of a state; for

(1) 4 H. L. C. 939. (2) P. 119.

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it has a right to impose its legislation on its subjects in every part of the world; but in the absence of an intention clearly expressed, or necessarily to be inferred from the language, or from the object or subject-matter of the enactment, the presumption would be that Parliament did not design its statutes to operate on them beyond the territorial limits of the United Kingdom, and they are to be read as if words to that effect had been inserted in them.

And numerous decisions bear out this statement of the law, and show its accuracy beyond dispute.

Rosseter v. *Cahlmann* (1); *The Amalia* (2); *Rose* v. *Himely* (3); *The Zollverein* (4); *Atty. General* v. *Kwok-A-Sing* (5).

In the case of bigamy, under the statute of *James I*, it was held that no indictment lay when the second marriage was solemnized out of the kingdom. And statutes regulating the ceremony of marriage, as Lord *Hardwicke's* Act, were also held to be restricted to the territorial limits of the kingdom. It is said, it is true, that the Parliament of the United Kingdom may make laws binding British subjects without the limits of the British Dominion, provided the intention of the legislation so to give an extra-territorial operation to the statute is apparent, either from express words, or from necessary implication. But this is for the reason that the Parliament of the United Kingdom is a sovereign legislature having unrestricted power over subjects owing allegiance to the Queen in all parts of the world. Can this, however, be said of a colonial legislature which is not in this sense sovereign, but derives its authority to legislate from the delegation of powers by act of the Imperial Parliament? By the 91st section of the *B. N. A. Act* the Parliament of *Canada* is empowered to make laws for the peace, order and good government of *Canada*. Does this warrant the enact-

(1) 8 Exch. 361.
(2) 1 Moo. P. C. N. S. 471.
(3) 4 Cranch 241.
(4) Swab. 96.
(5) L. R. 5 P. C. 179.

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ment of statutes binding British subjects in respect of acts done without the territory of the Dominion, merely because they happened at the time to have a domicile in the Dominion? Or are not such persons, like all other subjects of the Queen, liable to be affected by no legislation regulating their personal conduct without the limits of the Dominion, save such as may be enacted by the Imperial Legislature, the Parliament of the United Kingdom? I think these weighty and important questions would arise and have to be determined in the present case, if we found in the enactment under consideration, either from express words or necessary implication, that it was the intention of the legislature to apply it to traders, domiciled inhabitants of *Canada* making purchases without the Dominion, but as there is not the slightest indication of such a design as respects this 136th section, we are relieved from the obligation of determining such a grave question of constitutional law. I have been unable to find anything distinctly bearing on this question of constitutional power, but in Mr. *Forsyth's* work on Constitutional Law (1) he states that this identical point arose with reference to the power of the Indian Legislature to pass laws binding on native subjects out of *India*, and came before the law officers of the Crown and himself in 1867, (when Sir *Fitzroy Kelly* and Sir *Hugh Cairns*, were respectively attorney and solicitor general,) and they all, with the exception of the Advocate General Sir *R. Phillimore*, thought that "as the extent of the powers of the Legislature of *India* depended upon the authority conferred upon it by acts of Parliament," it was unsafe to hold the Indian Legislature had power to pass such laws. Although, as I have said, we are not now called on to decide this question, it is still not without relevance to the question of construction, since

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it strengthens the presumption that all laws passed by the Parliament of *Canada* are, in the absence of any express language or unavoidable implication to the contrary, intended to be restricted in their operations to the limits of the Dominion.

There being nothing either in the language or object of this 136th section of the Insolvent Act to warrant the implication that it was to have any effect out of *Canada*, the ordinary rule of construction must apply to it, and it must be held not to extend to the purchase of goods in *England* stated in the second count of the declaration. In my opinion, therefore, the judgments of both courts below must be reversed.

FOURNIER, J.:—

I am in favour of dismissing the appeal. I agree entirely with the learned Chief Justice, as also with the reasons given by the judge before whom the case came in the first place, and Mr. Justice *Galt* and C. J. *Sprague*. I believe the enactment of 136th clause is clearly within the powers of the Federal Government, which has unlimited power to legislate upon the matter of insolvency.

HENRY, J.:—

I entirely concur in the judgment just rendered by my brother *Strong*. Although the provision contained in the 136th sec. is found in the Insolvent Act, it is not necessarily connected with the insolvency of any individual. A party need not be insolvent to come within the provisions of the enactment—need not be brought into the Insolvent Court—nor does it appear that it is at all necessary that he should be. Here is a provision separate and distinct altogether from the question of insolvency; although this section is to be found in the Insolvent Act it does not necessarily come under the Insolvent Act at all.

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Looking at that clause, what are the provisions which are applicable to this case? A party who, with intent to defraud, concealed the fact of his being insolvent from his creditors, or who by any false pretences obtains a credit for any loan of money or any part of the price of goods, wares or merchandize, &c, comes within the provision.

In the view I take of this question, I will not question the power of the Legislature to pass that Act, although there may be and have been raised serious doubts as to this provision being within the competency of Parliament. It has been most forcibly shown, whether correctly or not I am not going to say, that is a matter which rests with the Local Legislature. That question, however, I do not undertake to decide, nor do I consider it necessary in the view I take of the position, to do so. This Act was passed by the Parliament of Canada, which, for the purpose of this argument, I admit to be competent to pass it. Now, if a person is guilty of fraud, where is that fraud intended to be committed? It is not to be attributed to this legislature that it intended to punish fraud or felony committed outside of the Dominion. This is a fraud alleged to have been committed in England. If the legislature here had the power, which I doubt, to legislate for the punishment of fraud out of the country, it has not said so. I construe this, then, simply to mean that if a party within the jurisdiction of the Legislature of the Dominion is guilty of obtaining goods from another within that territory with intent to defraud him, and does not pay for them, he is liable. Here then a charge of fraud is made as committed in another country; the non-payment only is charged here. But if a party is not answerable here by the peculiar mode of procedure that is provided for in this section, then, of course, the offence is not com-

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pleted. There is only a portion of it—the failure to pay. Looking at the whole case from the best consideration I have been able to give to it, I cannot come to the conclusion that the Legislature intended a party guilty of fraud in any other country—foreign country (it might have been in the *U. S.* or *Egypt*)—is to be imprisoned here for fraud committed in some other country, and not against any subjects of the Dominion. I think we must construe this section as intended to protect the people over whom the Dominion Parliament had power to legislate and not to include within its terms a provision for the protection of foreigners outside of the Dominion. Further than that, I doubt that the constitutional rights of the Parliament would not go as far as to pass an act, under the peculiar circumstances of this country, to punish a party for fraud committed outside of the Dominion. On these two points, therefore, I am with the appellants and I think the appeal should be allowed.

TASCHEREAU, J.:—

I would have been of opinion with my brother *Gwynne* that no appeal lies in this case, but as the majority of the court hold otherwise, I am of opinion with Mr. Justice *Strong* that section 136 of the act does not apply to acts done out of *Canada*, whether in *England* or in a foreign country, and I doubt very much if the Parliament of *Canada* would have the power to legislate at all on dealings or actions which have taken place outside of *Canada*.

GWYNNE, J.:—

At the argument of this case it was contended by the learned counsel for the respondents, that the case was not appealable to this court, upon the ground that the judgment, which is one in favor of the plaintiffs

upon a demurrer to a plea, which is one only of several pleas, upon all of which, including that demurred to, issues in fact have been joined which are not yet tried, is not a *final* judgment within the meaning of the Act constituting this court, and it was agreed that the argument should proceed subject to this objection. *Chevalier* v. *Cuvillier* (1) was referred to by the learned counsel for the appellant as an authority in support of the appeal, but the demurrer in *Chevalier* v. *Cuvillier* was to a particular specified portion of the claim asserted in the action, and the allowance of the demurrer in such case was undoubtedly a final judgment as to the claim demurred to. Upon that ground I concurred in allowing the appeal in that case, and to that extent, but no further, I consider myself bound by it. The case here is quite different; it is a judgment allowing a demurrer to one of several pleas, upon all of of which "issues" in fact are joined and yet to be tried. Such a judgment decides nothing as to the action or suit in which the plea is pleaded; the action remains still wholly undetermined, and the 9th sec. of 42 *Vict.*, ch. 39, declares that the words "final judgment" to be the subject of appeal means:

> Any judgment, rule, order, or decision, whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

By this language I understand that a judgment, in order to its being appealable to this court, must be one which finally disposes of the whole, or of some specific part, of the subject of the claim in the action, suit or cause, when the point under adjudication arises in an action, suit or cause, or one which finally disposes of the whole, or of some part, of the subject of claim in any matter or judicial proceeding other than an action, suit or cause; a judgment finally determining and conclud-

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ing some matter or judicial proceeding can not be the proceeding itself concluded and determined. The judgment of the court upon the demurrer in this case leaves the action wholly undecided, and, in my judgment, still is, as it has always been considered to be, interlocutory only.

While I am of this opinion, and that this case is not appealable to this court, it may, however, not be amiss to say also that in my opinion the demurrer does not raise the main question which was argued before us, namely, whether sec. 136 of the Insolvent Act of 1875 is or is not *ultra vires* of the Dominion Parliament, for whether it be or be not, the plea is clearly bad for the reasons pointed out by Mr. Justice *Patterson*. The plea confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud and offers no matter whatever in avoidance, or in bar of the action, and the point attempted to be raised is whether the provisions of the 136th section of the Insolvent Act, as to imprisonment of the defendant, can be applied if the issue in fact raised upon the plea shall be found in favor of the plaintiffs. It will be time enough to raise that question when the issues in fact joined upon the pleas in bar of the action shall be found in favor of the plaintiffs. The question is probably raised by a replication to some of the other pleas, although it be not, as I think it is not, by a demurrer to a plea which, while it professes to be pleaded in bar of an action for goods sold and delivered, alleges as the sole ground of such bar that the cause of action arose in *England*. It is obvious that such a plea is no bar to an action for goods sold and delivered, even though it be alleged in the declaration, as it must be in order to obtain the benefit of the provision of the 136th section of the Insolvent Act, that the defendants con-

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tracted the debt under circumstances alleged to be fraudulent within the meaning of the Insolvent Act, that is to say, that the debt was contracted by the defendants when they knew or believed themselves to be in insolvent circumstances, which fact they concealed from the plaintiffs with intent to defraud them. Whether the 136th section of the Insolvent Act be or be not *ultra vires*, such a plea is no plea in bar of the cause of action on the *indebitatus assumpsit* stated in the declaration; and as the question as to the validity of the above section of the Insolvent Act does not, in my opinion, arise upon the demurrer, I express no opinion upon it; but in withholding my opinion upon this point, I must not be understood as intending to convey any expression of a doubt as to its validity; I merely express no opinion upon it, because, I think, the demurrer does not raise the question; and, as I am of opinion that the plea is bad, I concur that, if the appeal be entertained, it must be dismissed.

Appeal dismissed without costs.

Solicitors for appellant: *Bethune, Moss, Falconbridge & Hoyles.*

Solicitors for respondents: *Rose, Macdonald, Merritt & Coatsworth.*

THE BANK OF TORONTO .....APPELLANTS;

AND

ARTHUR M. PERKINS, *es-qual., et al*...RESPONDENTS.

1882

*Nov. 13,14.

1883

*April 30.

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

The Banking Act, 34 *Vic., ch.* 5, *sec.* 40—*Advances on Real Estate.*

B., on the 19th January, 1876, transferred to the Bank of *T*, (appellants) by notarial deed an hypothec on certain real estate in

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