

JOHN V. ELLIS APPELLANT; 1892
AND *Nov. 15.
HER MAJESTY THE QUEEN RESPONDENT. 1893
ON APPEAL FROM THE SUPREME COURT OF NEW *Feb. 20
BRUNSWICK.

Appeal—Jurisdiction—Criminal proceeding—Contempt of court—Final judgment—R. S. C. c. 135 s. 68.

Contempt of court is a criminal proceeding and unless it comes within sec. 68 of the Sup. Court Act an appeal does not lie to this court from a judgment in proceedings therefor. *O'Shea v. O'Shea* (15 P. D. 59) followed; *In re O'Brien* (16 Can. S. C. R. 197) referred to.

In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought.

APPEAL from a decision of the Supreme Court of New Brunswick (1) adjudging the appellant guilty of contempt of court but deferring sentence.

After the decision of this court in *Ellis v. Baird* (2), the proceedings against the appellant were continued in the Supreme Court of New Brunswick and on report of the clerk of the court, who had been appointed to administer interrogatories to the appellant, containing the answers to such interrogatories the court adjudged him guilty of contempt, but sentence was deferred to admit of an appeal on a bond being given conditional for the appearance of the appellant to receive sentence. From this judgment of the Supreme Court of New Brunswick the present appeal was brought.

Currey for the respondent took a preliminary objection to the jurisdiction of the court to hear the appeal

*PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 28 N. B. Rep. 497.

(2) 16 Can. S. C. R. 147.

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on the ground that contempt of court such as that in the present case is a criminal proceeding from which an appeal would not lie, citing *O'Shea v. O'Shea* (1); *Short & Mellor's Crown Practice* (2); *Oswald on Contempt* (3); *Cox v. Hakes* (4).

*Weldon Q.C. contra.*

Judgment was reserved on the question of jurisdiction and argument on the merits postponed until it was disposed of.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of New Brunswick in a proceeding the object of which was to punish the appellant for contempt of court. This proceeding was initiated by a *rule nisi* granted in Easter Term 1887 in the words following :

EASTER TERM, A.D. 1887.

It is ordered that John V. Ellis, the editor and principal publisher and proprietor of the "Saint John Globe" newspaper, a newspaper printed and published in the City of Saint John, at the next Trinity Term of this honourable court do show cause why an attachment should not be issued against him, or why he should not be committed for contempt of this honourable court for writing, printing and publishing in the issue of the said "Saint John Globe" newspaper on the tenth day of March last an article under the caption of "The Queen's Election," and for writing, printing and publishing in the issue of said newspaper of the eleventh day of March last another article under the caption of "Government by Fraud," and for writing, printing and publishing in the issue of said newspaper of the twelfth day of March last another article under the caption of "Queen's County," and wherein are comments, reflections and innuendoes on the applicant George F. Baird on an order of His Honour Mr. Justice Tuck, one of the justices of this honourable court, made on application of George F. Baird for an order *nisi* for a writ of prohibition to prohibit James Steadman, Esquire, the judge of the Queen's County Court, from further proceeding with or to make a recount or final addition of the votes given for said George F. Baird and one George G. King at the election held on the twenty-second day

(1) 15 P. D. 59.

(2) P. 511.

(3) Pp. 5, 19 and 55.

(4) 15 App. Cas. 506.

of February last of a member to represent the electoral district of Queen's County, in the Province of New Brunswick, in the House of Commons of Canada, and on His Honour Mr. Justice Tuck; and in which said articles the said John V. Ellis has been guilty of a contempt of this honourable court in scandalizing this honourable court, and particularly His Honour Mr. Justice Tuck, one of the justices thereof, in calumniating and vilifying said applicant George F. Baird, and in commenting on the matters of said election, said recount, and said order nisi for a writ of prohibition in a manner calculated to prejudice and that does prejudice the public before the hearing and judicial decision of said matters, and so as is calculated to prevent said applicant George F. Baird from obtaining a fair and impartial disposal of said matters.

Upon reading the said articles in the newspapers aforesaid, and upon reading the affidavit of George F. Baird, and upon motion of Mr. L. A. Currey.

By the Court.

(Sgd.) T. CARLETON ALLEN,

*Clerk of the Crown.*

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This rule was made absolute in Hilary Term 1888. Thereupon regular proceedings according to the established procedure in contempt matters was taken. An attachment was issued upon which the appellant was arrested and brought into court, whereupon he gave bail. Thereafter interrogatories were administered, and exceptions to those interrogatories having been taken and in some instances allowed, and further answers having been put in by the appellant, a final hearing was had, and on the 13th day of August, 1889, the court found the appellant to be guilty of contempt. No other judgment or sentence was, however, pronounced or passed. The minutes of the court of the 13th August, 1889, are set forth in the appeal book as follows:

Tuesday, 13th August.

PRESENT: Allen C. J., and Fraser J.

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Allen C.J., reads judgment of self and reads judgment of Palmer J.

Fraser J., reads his judgment; also reads judgment of King J.

Wetmore and Tuck JJ., no part.

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Defendant found guilty of contempt. Sentence postponed until he has had an opportunity to appeal on entering into a recognizance to appear and receive sentence on the first day of Hilary Term next.

Mr. McLean for defendant asks that the sentence be pronounced and that the execution be stayed until appeal is decided.

Allen C.J. The court is not prepared to pass any sentence; they have not considered it at all.

Mr. Ellis appeared with his sureties and entered into a recognizance to appear and receive sentence on the first day of Hilary Term next.

From the foregoing minute it appears that the judges were unanimous in the conclusion at which the court arrived.

On the hearing of the appeal before this court a preliminary objection to the jurisdiction was taken. It was said that this was a criminal matter in which this court had no jurisdiction to entertain an appeal.

That a proceeding for contempt is a criminal matter seems to be now well established by authority. By the English Judicature Act (1), it is enacted "that no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign."

In the case of *O'Shea v. O'Shea* (2) a fine had been imposed by the Queen's Bench Division upon the publisher of a newspaper for a contempt of court in publishing comments upon the proceedings in a divorce action. The party upon whom the fine had been inflicted appealed to the Court of Appeal and the preliminary objection to the jurisdiction was taken that a contempt proceeding such as that in question was a criminal matter in which no appeal would lie. The Court of Appeal, although it had previously entertained, heard,

(1) 36 & 37 V. c. 66, s. 47.

(2) 15 P. D. 59.

and adjudicated upon an appeal in a similar case *The Queen v. Jordan* (1) gave effect to the objection.

In the case of *O'Shea v. O'Shea* (2) it was pointed out in the judgment of the court that there exists a distinction between proceedings in civil contempts, which include proceedings to enforce obedience to orders or writs made or issued in civil actions or matters, and proceedings for criminal contempts the object of which is not enforcement of writs, rules or orders, but the punishment of contumacious behaviour. In the late case of the *Queen v. Barnardo* (3), an appeal from an order granting an attachment for non-return to a writ of *habeas corpus* was entertained, the distinction being taken that the original proceeding was not for a punitive purpose, and the same jurisdiction was exercised by the House of Lords in the case of *Barnardo v. Ford* (4).

There can be no doubt, upon the authority of *O'Shea v. O'Shea* (2), that the case now before us is a criminal matter within the definition of such a proceeding given in that case.

Next we have to inquire what is the limit of the jurisdiction of this court in criminal causes or matters. It is to be premised that this jurisdiction depends entirely on statutory enactments. By the 23rd section of the Supreme and Exchequer Courts Act (Revised Statutes of Canada, ch. 135) it is enacted "that the Supreme Court shall have, hold and exercise an appellate civil and criminal jurisdiction within and throughout Canada." This general provision is not, however, intended as a definition of the jurisdiction of the court in criminal cases so as to indicate that it has jurisdiction in all criminal cases; the definition of the jurisdiction is left to subsequent clauses of the act. Thus

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(1) 36 W. R. 797.

(2) 15 P. D. 59.

(3) 23 Q.B.D. 305.

(4) [1892] A.C. 326.

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by section 25 of the same act it is enacted that the court shall have jurisdiction in criminal cases as thereinafter provided. By sections 68 and 69 of the act it was enacted as follows:—

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68. Any person convicted of any indictable offence before any court of *Oyer and Terminer* or Gaol Delivery, or before the Court of Queen's Bench in the Province of Quebec on its Crown side, or before any other superior court having criminal jurisdiction whose conviction has been affirmed by any court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper province within fifteen days after such affirmance. 38 V. c. 11. s. 49.

69. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned unless otherwise ordered by the Supreme Court. 38 V. c. 11, s. 50.

These sections, 68 and 69, were, however, repealed by sec. 2 of 50 & 51 Vic. c. 50, and by the first section of the same act, 50 & 51 Vic. c. 50, the same provisions were in terms re-enacted. The jurisdiction of this court in criminal cases is, therefore, now wholly dependent upon and limited by this section 268 of the Criminal Procedure Act. It is manifest that the present appeal does not come within the terms of this enactment. It is questionable whether the contempt of which the appellant has been convicted is an indictable offence, and moreover the court below were unanimous in their opinions. The conclusion is therefore unavoidable that, the English authority before quoted having established that a proceeding of this

kind to punish for a contempt of court is a criminal matter, this court has no jurisdiction to entertain the appeal.

In the case of *O'Brien v. The Queen* (1) this objection was not taken. The jurisdiction there was considered to be dependent on section 24 of the Supreme and Exchequer Courts Act, which confers a right of appeal from all final judgments, and moreover, had the objection been there taken, it could scarcely have prevailed in the face of the decision of the English Court of Appeal, already referred to, in the case of *The Queen v. Jordan* (2), in which the jurisdiction had been assumed and exercised, and which was then the governing authority upon the point, the case of *O'Shea v. O'Shea* (3) not having been decided until some time after the judgment in the case of *O'Brien v. The Queen* (1) had been delivered. Further, assuming that contempt of court is an indictable offence, the case of *O'Brien v. The Queen* (1) was a proper subject of appeal since the judges of the court below were not unanimous.

My brother Patterson has called my attention to a further objection to the present appeal which, in my opinion, is also insuperable. The record appears to be defective. No final judgment has ever been pronounced by the Supreme Court of New Brunswick. All we have before us in the nature of a judgment consists of an extract of the minutes of that court of the 13th of August, 1889, already set forth, in which appears an entry in these words: "defendant found guilty of contempt." This is clearly not a judgment, so that even if in other respects the appeal was admissible this objection would be fatal to it upon the record now before the court.

The appeal must be quashed.

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(1) 16 Can. S.C.R. 197.

(2) 36 W.R. 797.

(3) 15 P. D. 59.

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FOURNIER J.—Le présent appel est interjeté d'un jugement de la Cour Suprême du Nouveau-Brunswick, déclarant l'appelant coupable de mépris de cour pour avoir publié dans le *Globe* de *St. John, N.-B.*, certains articles contenant des assertions injurieuses contre la conduite de l'honorable juge Tuck, dans l'exercice de ses fonctions comme juge de la dite Cour Suprême.

Les faits qui ont amené la publication de ces articles sont en résumé comme suit : Aux élections générales de 1887, M. Baird et George G. King furent mis en nomination comme candidats pour l'élection d'un député pour représenter le comté de Queens dans la Chambre des Communes du Canada. Il y eut votation. A l'ouverture des boîtes de scrutin, le jour de la proclamation, l'officier-rapporteur constata que George G. King avait 1,191 votes, et le dit George F. Baird, 1,130. L'officier-rapporteur au lieu de déclarer élu George G. King, qui avait la majorité des votes, déclara que le dit King n'avait pas été légalement mis en nomination, et que le dit George F. Baird, qui avait la minorité des voix, était dûment élu membre pour représenter le comté de Queens dans la Chambre des Communes.

La raison de cette décision donnée par l'officier-rapporteur est, que bien que la nomination de M. King fût conforme aux dispositions de l'acte des élections, et que le dépôt de \$200 exigé par la loi lui eût été payé et qu'il en eût donné reçu, cependant ce paiement ne lui avait pas été fait par l'agent nommé du dit King.

Sur la demande d'un décompte des bulletins faite à James Steadman, juge de comté pour le dit district électoral, le dit juge fixa vendredi, le 11 mars, à 10 heures A.M. au palais de justice à Gagetown, comme le jour et le lieu où se ferait l'examen des bulletins et l'addition finale des votes donnés à la dite élection.

Le neuf de mars à la demande de G. F. Baird, l'honorable juge Tuck émit un ordre *nisi* ordonnant au juge Stead-

man, à George G. King et à T. Medley Wetmore, pour-
 suivant le décompte, de montrer cause pourquoi un
 bref de prohibition n'émanerait pas pour défendre au
 juge Steadman de procéder au décompte des bulletins
 et à l'addition finale des votes et à donner un certificat
 du résultat.

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Le juge Steadman se conformant à la loi ouvrit sa cour au jour et lieu indiqués, considérait que le juge Tuck n'avait aucune juridiction pour intervenir dans cette affaire, et que l'acte des élections lui imposait l'ordre de procéder, mais il fût empêché de remplir son devoir par le refus de l'officier-rapporteur de produire les bulletins.

Cette intervention extraordinaire de la part du juge Tuck causa beaucoup d'excitation dans le public et donna lieu, les jours suivants, à la publication dans le *Globe* de *St-John*, des articles qui ont servi de base à la demande d'arrestation de l'appelant pour mépris de cour.

Dans le terme de la Saint-Hilaire cette demande fut accordée. Mais un appel de cette décision ayant été interjeté à la Cour Suprême du Canada, l'appel fut mis hors de cour parce qu'il n'y avait pas eu de jugement final prononcé. Plus tard, après l'interrogatoire de l'appelant et après les incidents qui s'en suivirent, la cour déclara le 13 août 1889 que l'appelant était coupable de mépris de cour.

Ce dernier jugement est maintenant porté en appel devant cette cour. L'intimé prétendant que cette cour n'a pas juridiction pour entendre cette cause, l'audition de la cause n'a en conséquence eu lieu que sur la question de savoir s'il y avait appel à cette cour dans le cas d'une condamnation pour mépris de cour. L'audition sur le mérite de la cause n'a pas eu lieu, de sorte que la cour n'a maintenant à s'occuper que de la question de juridiction.

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Cette question d'appel en matière de mépris de cour a déjà été décidée par cette cour, *In re O'Brien* (1) dans laquelle cette cour a déclaré ce qui suit :—

"The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the Province, not only under sec. 24, subsec. (a) of the Supreme and Exchequer Courts Act, as a final judgment in an action or suit, but also under subsec. (1) of sec. 26 of the same Act, as a final judgment in "a matter or other judicial proceeding" within the meaning of sec. 26."

L'intimé prétend aussi qu'un jugement pour mépris de cour, n'étant rendu par la cour que dans l'exercice de son pouvoir discrétionnaire, est déclaré sans appel par la sec. 27, ch. 135. Cette prétention a aussi été avancée dans la même cause. *In re O'Brien* (1), et a été également rejetée ; voir les autorités au même vol. des rapports de la Cour Suprême, pp. 215, 216 *et seq.* Il serait inutile de revenir sur ce point.

La principale objection de l'intimé est que le mépris de cour étant une offense d'une nature criminelle et la sentence de la cour ayant été prononcée à l'unanimité, il n'y a pas d'appel.

Avant d'entrer dans la considération de cette question il faut, je crois, remonter à l'origine de la cause, afin de s'assurer du droit de l'honorable juge Tuck d'interrompre les procédés de l'élection de Queens par l'émission d'un bref de prohibition, et du droit de la Cour Suprême du Nouveau-Brunswick de juger la question de mépris de cour soulevée contre l'appelant à l'occasion de ses articles publiés dans le *St. John Globe*, attaquant la conduite de l'honorable juge Tuck pour l'émission de ce bref.

Comme il a été dit plus haut, le juge Steadman se préparait à procéder, en vertu de la loi électorale, au décompte des bulletins qu'il avait ordonné sur demande à cet effet, lorsque le bref de prohibition lui fut signifié.

(1) 16 Can. S.C.R. 197.

Il ne put y procéder, parce que l'officier-rapporteur, auquel le bref avait aussi été signifié, refusa de produire les bulletins et déclara élu celui des deux candidats qui avait la minorité des votes. Ce procédé était inouï, et jamais jusque là, une élection parlementaire avait été interrompue par une pareille procédure. La conduite de l'honorable juge Tuck en accordant cette procédure était-elle légale ? La Cour Suprême du Nouveau-Brunswick a soutenu la position qu'il avait prise, et a confirmé la sentence qu'elle avait rendue pour mépris de cour. Je suis forcé à regret de dire que je considère sur ce sujet l'opinion de l'honorable juge Tuck, et celle de la cour, comme également erronées, contraires à la loi et aux décisions des plus hauts tribunaux.

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Ce n'est que depuis un temps comparativement assez récent, que la décision des élections contestées, autrefois exclusivement laissée à la juridiction du parlement, a été attribuée aux tribunaux civils, dans le but d'arriver plus promptement à une solution satisfaisante sur les questions au sujet du droit de siéger en chambre. Ce n'était nullement l'intention du législateur de soumettre les procédés en matière de contestation d'élections aux règles qui régissent ordinairement les procédures des cours en matière civile, ni de les soumettre à la revision de ces cours par appel ou par les moyens des brefs de prérogative. Au contraire, toute la procédure à suivre en pareils cas, est tracée en détail d'une manière toute spéciale, et l'on ne peut aller chercher les règles de ces décisions que dans les Statuts qui ont créé cette juridiction, dans les principes constitutionnels, et dans la jurisprudence anglaise au sujet des élections contestées. Cette juridiction est toute spéciale, et n'est point soumise aux règles ordinaires des cours, bien qu'elle soit administrée par les juges qui composent ces cours.

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Cependant une opinion toute contraire a été maintenue par l'honorable juge Tuck et la Cour Suprême du Nouveau-Brunswick.

L'honorable juge en chef Allen dans son opinion s'exprime ainsi au sujet du pouvoir des juges d'émettre des ordres pour bref de prohibition (1) —

There can be no doubt about the general power of this court to grant writs of prohibition to restrain inferior courts from proceeding in matters over which they have no jurisdiction, or where, having jurisdiction, they are attempting to proceed irregularly or improperly. In hearing the application for a prohibition against the judge of the County Court of Queen's, and in granting the rule *nisi* calling upon him to show cause why a prohibition should not issue, Mr. Justice Tuck was acting in his judicial capacity as a judge of this court, and charges made against him, alleging that he was actuated by dishonest and corrupt motives in granting the order which he did, were calculated to interfere with the proper administration of justice, and to bring the proceedings of this court into contempt.

L'honorable Juge Palmer s'est exprimé d'une manière plus formelle sur cette question. Faisant allusion au jugement qu'il a donné sur l'application pour mépris de cour, il a ajouté (2) :

I, however, then gave no opinion whether this court had power to restrain any of the courts created by the Controverted Elections Act from exercising powers which the law did not give them, although I can see no reason why such courts should not be restrained. They are the creation of statutes and have only such power as the statutes gave them, and I think should not be at liberty to usurp any other, and that with regard to them this court is not relieved of its duty to see that they together with all other courts do not exceed their jurisdiction, but I am met with the *dicta* of a very eminent judge in the Centre Wellington Case (3), that prohibition would not lie to such court..... However, one of the judges does say that prohibition does not lie to such courts; but after the most careful consideration, I came to the conclusion on the argument of that point before us in another case that it does lie, and it would be my opinion in the absence of direct authority.

Ainsi, d'après l'honorable juge, dont l'opinion a été adoptée par ses collègues, les procédures en matières d'élections sont soumises au contrôle des cours provinciales. On va voir par les citations ci-après, des déci-

(1) 28 N. B. Rep. 521.

(2) 28 N. B. Rep. 535.

(3) 44 U. C. Q. B. 132.

sions du Conseil privé que cette doctrine est contraire à celle qu'il a promulguée dans les causes de *Valin v Langlois* (1) et dans celle de *Théberge v Landry* (2). Sur le caractère exclusif de la législation fédérale au sujet des élections voir le langage du Conseil privé dans la cause de *Valin v. Langlois* (1). Au parlement fédéral seul appartient la législation au sujet des causes d'élections.

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In the present case their Lordships find that the subject matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament, is beyond all doubt placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1847, to which reference has been made; upon that point no controversy is raised.

On ne pourrait affirmer plus positivement le principe que la juridiction en ces matières appartient exclusivement au parlement et à la législation fédérale et n'est pas soumise comme le prétend l'honorable juge Palmer au contrôle des cours provinciales.

Les deux actes de Québec de 1872 et 1875, concernant les contestations d'élections à l'Assemblée législative ont été aussi soumis à la considération du Conseil privé dans la cause de *Théberge v Landry* (2). On sait que par ces deux actes, de même que par les actes fédéraux les contestations d'élections à l'Assemblée législative ont été déferées aux tribunaux. Les principes généraux de ces mesures sont les mêmes et elles ne diffèrent que dans les détails. Lord Cairns en parlant de ces deux actes de Québec, s'exprime ainsi :—

These two acts of Parliament, the Acts of 1872, 1875, are acts peculiar in their character; they are not constituting or providing for the decision of mere ordinary civil rights; they are acts creating an entirely new, and up to that time an unknown, jurisdiction which, up to that time, had existed in the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that

(1) 5 App. Cas. 115.
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(2) 2 App. Cas. 102.

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should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and specially known..... The object which the legislature had in view was to have a decision of the Superior Court, which once arrived at should be for all purposes conclusive.

Fourrier J. But there is a further consideration which arises upon this Act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council.

Now the subject matter, as has been said, of the Legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belongs to the Legislative Assembly, no longer belongs to the Superior Court which the Legislative Assembly had put in its place, but belongs to the Crown in Council, with the advice of the Crown at home, to be determined without reference whether to the judgment of the Legislative Assembly, or of that Court which the legislative assembly had substituted in its place.

Si, comme le dit Lord Cairns dans son jugement, la législature en créant cette juridiction si spéciale avait pour but d'arriver promptement à une décision finale et de faire connaître distinctement le plus tôt possible la composition de la chambre, rien ne serait plus contraire à son intention que d'admettre que la procédure pourrait à tout instant en être interrompue et prolongée par le recours au bref de prohibition ou à d'autres procédures des droits civils ordinaires. Il est clair que l'admission de telles procédures est tout-à-fait illégale comme contraire à l'esprit de la loi.

Avant que la juridiction du parlement sur les élections contestées ait été déferée aux tribunaux, elle était exercée par la Chambre ou ses comités avec la plus scru-

puleuse attention dans le but de maintenir ses droits et privilèges au sujet des élections à l'abri de l'influence de la couronne. Ce serait un résultat extraordinaire, si les lois passées pour mettre la protection de ces droits et privilèges sous la garde d'une cour spécialement créée par le parlement pour cet objet, pouvaient être interprétées de manière à en remettre la décision à toutes les vicissitudes et les longueurs des procédés civils ordinaires. Tel ne peut être le cas ainsi qu'il a été décidé par l'honorable juge en chef d'Ontario *in re Centre Wellington Election* (1) à propos de la demande d'un mandamus pour obliger un juge de comté de faire le décompte des votes en vertu de la 14 Vict. ch. 6, sec. 14. Dans le cas actuel, il est vrai qu'il s'agit d'un bref de prohibition, mais il y a les mêmes raisons de décider que les cours n'ont point de juridiction pour l'accorder. Sur l'effet du changement dans le mode de contester les élections, l'honorable juge en chef s'exprime ainsi (2).—

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I am satisfied that the legislation which has provided a new mode of trial of controverted elections, transferring such trial from the House to the Judiciary, has in no way affected the question now before us, and that we have to deal with it as if this important change had never taken place.

The House retains all powers that it has not expressly given up.

When a petition is presented for an undue return, or complaining of no return, it has to be decided by the judges; and in the course of such inquiry the regularity of proceedings, and the conduct of officials entrusted with the execution of the writs of election, may come in question, just as such matters might have been questioned before the election committee under the old system. But I fail altogether to see what power has been given to a court of law to interpose by *mandamus* or prohibition so as to affect to regulate the proceedings of such officials in the execution of their duties under the election law.

If we can legally do what is asked here, we could with equal right affect to regulate the multitudinous duties prescribed to various persons in the conduct of the election, from the receipt of the writ by the returning officer till its return.

I think we have no such power.

(1) 44 U.C. Q.B. 132.

(2) P. 141.

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The argument was based on the alleged general right of this court to order any person to perform a clearly defined statutable duty.

La demande du bref de mandamus fut en conséquence rejetée.

Pour les mêmes raisons la demande du bref de prohibition adressée à l'honorable Juge Tuck aurait dû être rejetée.

De toutes ces autorités, il faut nécessairement conclure que l'honorable juge Tuck n'avait absolument aucune autorité pour l'émission du bref de prohibition ; qu'en conséquence il n'agissait pas judiciairement lorsqu'il a donné l'ordre qui a interrompu les procédés du décompte des bulletins.

La Cour Suprême du Nouveau-Brunswick dans ses procédés pour *contempt* contre l'appelant au sujet de ses articles dans le *St. John Globe*, à propos de l'intervention du juge Tuck l'a au contraire considéré comme ayant agi judiciairement et a, en conséquence, déclaré l'appelant coupable de mépris de cour. Le but de son appel est de faire relever cette condamnation. L'intimé lui répond que nous n'avons pas de juridiction.

Notre juridiction, il est vrai, n'est pas aussi étendue que celle du Conseil privé de Sa Majesté, qui, par l'acte 3 et 4 Guil. 4, ch. 41 a pouvoir par la sec. 3, d'entendre :—

All appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act, or any law, statute, or custom, may be brought before Her Majesty in Council, from or in respect of the determination, sentence, rule or order of any Court Judge, or judicial officer, &c., &c., shall from and after the passing of this Act be referred by Her Majesty to the Judicial Committee of Her Privy Council.

Ces termes sont tellement généraux qu'ils comprennent certainement les appels pour mépris de cour. C'est en vertu d'une règle de cour que l'appelant a été condamné et il est certain que par cette clause l'appel est donné.

Mais notre juridiction n'est pas aussi étendue. Par la 23e sec. de l'acte de la Cour Suprême cette cour a juridiction d'appel en matière civile et criminelle dans tout le Canada. Cette juridiction est définie et limitée par les clausés suivantes :—

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Appeals in New Trials. Appeal in case of conviction of an indictable offence.—Proceedings thereupon.—When appeal shall not be allowed.

268. Any person convicted of any indictable offence, or whose conviction has been affirmed before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's bench in the Province of Quebec, on its Crown Side, or before any other Superior Court having criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction ; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction, or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect ; provided that no such appeal shall be allowed if the Court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney-General for the proper Province, within fifteen days after such affirmance :

When appeal must be brought to hearing.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance take place, or the session next thereafter, if the said Court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court.

Dans la jurisprudence anglaise le mépris de cour est mis au rang des offenses criminelles et, si on a adopté pour sa répression le mode sommaire de procéder par *attachment*, ce n'est pas parce qu'il ne pourrait pas être poursuivi par la voie de l'indictement, mais uniquement parce que ce mode est plus prompt que la voie ordinaire. Dans la cause de *O'Shea v O'Shea* (1) pour mépris de cour du même genre que celui dont il s'agit l'appel a été refusé sur le principe que l'offense étant

(1) 15 P. D. 59.

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criminelle la cause ne pouvait être portée en appel. Cette décision est conforme à la sec. 47 de l'Acte de judicature de 1873 (36 & 37 Vic., ch. 66), qui déclare comme suit :—

Fournier J. No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th & 12th years of Her Majesty's Reign.

Il est clair que la Cour d'Appel n'avait pas de juridiction dans ce cas-là, mais la décision confirme le principe que le mépris de cour est considéré comme une offense criminelle.

L'appel à notre cour dans ce cas n'est pas prescrit de la même manière que par l'acte de judicature anglais; au contraire il est positivement accordé mais à une condition. C'est celle d'un dissentement d'opinion dans la cour qui a décidé en première instance. Dans la cause *re O'Brien* citée ci-dessus nous avons entretenu l'appel parce que la condition d'un dissentiment d'opinion dans la cour qui avait rendu le jugement, se trouvait exister. Dans celle-ci, les juges ayant été unanimes dans leur jugement nous ne pouvons intervenir. Nous sommes sans juridiction. C'est pour ce seul motif que je suis d'avis que l'appel soit rejeté (quashed).

TASCHEREAU J.—I concur in the reason assigned by the Chief Justice for quashing this appeal, but would be disposed to give the respondent costs.

GWYNNE J. concurred in the judgment quashing the appeal.

PATTERSON J.—At a parliamentary election for Queen's County in New Brunswick, held in February, 1887, the candidates were George F. Baird and George G. King.

King received the larger number of votes, but the returning officer, holding that King's nomination was not legal, declared Baird duly elected.

A recount of ballots was applied for and an appointment was made by the judge of the County Court for proceeding with the recount.

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Thereupon Baird obtained from a judge of the Supreme Court of New Brunswick an order *nisi* calling upon the County Court judge, and King and the applicant for the recount, to show cause before the Supreme Court why a writ of prohibition should not issue to prohibit further proceedings with the said recount, and in the meantime staying such further proceedings.

Before the order *nisi* was returnable certain articles appeared in a newspaper edited by the appellant Ellis which were alleged by Baird to be calculated to prejudice his application for the writ of prohibition. He accordingly obtained from the Supreme Court of New Brunswick, on the crown side, a rule *nisi* calling upon Ellis to show cause why an attachment should not be issued against him, or why he should not be committed for contempt of the Supreme Court for writing, printing and publishing those articles.

The rule *nisi* was issued in Easter Term, 1887, and was made absolute in Hilary Term, 1888, a writ of attachment being issued on the sixteenth of February, 1888.

After execution of the writ of attachment interrogatories were exhibited on the part of Baird and were, after various delays, answered by Ellis who was finally adjudged guilty of the contempt charged against him by the judgment of the Supreme Court, pronounced on the thirteenth of August, 1889, from which the present appeal is brought.

In contemplation of this appeal the court below suspended the pronouncing of sentence on the appellant,

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but required him to have his appeal ready for hearing at the October sittings of this court in 1889. He complied with that condition and is not to be prejudiced by the fact that the case has stood over from sittings to sittings for three full years and has not yet been heard except upon the question of our jurisdiction to entertain the appeal.

That is the only question now to be decided and I think it should be decided against the appellant.

The contempt of which the appellant has been pronounced guilty is a criminal offence.

I need not cite authority for that proposition beyond a reference to the opinion certified to Her Majesty by the Judicial Committee of the Privy Council in *In re Pollard* (1), and to the recent case of *O'Shea v. O'Shea* (2).

Now what is our jurisdiction in criminal cases?

We must find the answer to this question in the Supreme and Exchequer Courts Act (3), the sections more particularly bearing upon it being 24, 25 and 68.

Section 24 declares that an appeal shall lie to the Supreme Court in several cases which are enumerated and distinguished by letters of the alphabet from *a* to *g*.

Article (*a*) is wide enough in its terms to include criminal cases—specifying all final judgments of the court of final resort in any province of Canada whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court—but I do not construe it as intended to include criminal cases. I think it is intended to include only civil cases. The articles (*b*) to (*f*) obviously refer to proceedings in civil cases only. Article (*g*) specified judgments in cases of proceedings for or upon a writ of *habeas corpus*, but with the express

(1) L. R. 2 P. C. 106, 120.

(2) 15 P. D. 59.

(3) R. S. C. c. 135.

qualification "not arising out of a criminal charge," and the same qualification applies to *certiorari* and prohibition which were introduced by a late amendment of the clause (1).

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Then section 25 declares that "the court shall also have jurisdiction,—(a) in appeals in criminal cases as hereinafter provided"—The reference is to section 68 under the heading "appeals in criminal cases." That section, as will be noticed when I read it, is not simply an extension of the right to appeal to cases which for some reason, as *e.g.* because they do not originate in a superior court, could not come within the language of article (a) of section 24. It is, as I think obvious, intended to embrace the whole jurisdiction of the court in appeals in criminal cases. Let us read the section :

Patterson J.
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APPEALS IN CRIMINAL CASES.

68. Any person convicted of any indictable offence before any court of *Oyer and Terminer* or Goal Delivery, or before the Court of Queen's Bench in the Province of Quebec on its Crown side, or before any other superior court having criminal jurisdiction, whose conviction has been affirmed by any court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction ; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect ; Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper Province within fifteen days after such affirmance.

That section 24 does not apply to give an appeal in indictable cases is very manifest when we consider that under its terms the crown, as well as the person convicted, would be entitled to appeal, which would be inconsistent with section 68.

(1) 54 & 55 V. c. 25 s. 2.

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But it may be argued that while indictable offences come under section 68 alone, the construction of section 24 is affected by section 68 only with respect to that one class of cases, and that those dealt with in a summary manner, like contempt of court, may still follow the general rule and be appealable in the same way as a civil case.

Such a contention would, in my judgment, misinterpret the statute.

I have noticed the qualification of the right to appeal in cases of *habeas corpus*, *certiorari* and prohibition, or, more properly, the care taken, by expressly excluding applications arising out of a criminal charge, to guard against the idea that section 24 includes criminal cases. I have pointed out that section 25, giving an appeal in criminal cases as provided for by section 68, does so as something that is not given by section 24, and that that appeal, limited as it is to cases where the affirmance of the conviction has not been unanimous, is given to the convict only, and not to the crown or to the prosecutor. There is no indication of intention that in any criminal case there shall be a larger right of appeal, or an appeal in any criminal case that does not fulfil the conditions of section 68.

The case of *O'Shea v. O'Shea* (1) touches this aspect of the statute. Section 47 of the Judicature Act, 1873, enacted that no appeal should lie from any judgment of the high court "in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th and 12th years of Her Majesty's reign."

The contempt of court charged in that case was of the same character as that charged in the case before us, and it was held that the fact of the charge being in

(1) 15 P. D. 59.

"a criminal cause or matter," excluded the appeal, no attempt being made to confine the operation of section 47 to cases in which, under the act referred to in that section, a question might be reserved for the consideration of the judges.

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I think the objection to our jurisdiction to hear any appeal in a criminal case, except under section 68, is well taken.

That objection is fatal to this appeal, but independently of it the appeal is not one which, in my opinion, we can entertain.

There is no formal judgment before us, and none has been drawn up.

We have a report of the opinions expressed by judges in the court below, and we have the following extract from the clerk's minute book:—

*Tuesday, 13th August.*

PRESENT:—Allen C. J. and Fraser J.

THE QUEEN *v.* JOHN V. ELLIS *re* GEORGE F. BAIRD.

Allen C. J. reads judgment of self and reads judgment of Palmer J.

Fraser J. reads his judgment; also reads judgment of King J.

Wetmore and Tuck JJ. no part.

Defendant found guilty of contempt. Sentence postponed until he has had an opportunity to appeal on entering into a recognizance to appear and receive sentence on the first day of Hilary Term next.

Mr. McLean for defendant asks that the sentence be pronounced and that execution be stayed until appeal is decided.

Allen C. J.: The court is not prepared to pass any sentence; they have not considered it at all.

Mr. Ellis appeared with his sureties and entered into a recognizance to appear and receive sentence on the first day of Hilary Term next.

The vague memorandum that the defendant was "found guilty of contempt" may be sufficient, together with the papers in the hands of the clerk, to enable that officer to prepare a formal adjudication, but by itself it is merely a vague memorandum. I apprehend, however, that without what is called the sentence no *final* judgment can be drawn up.

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The proceeding by attachment, followed by interrogatories, is concisely and satisfactorily explained in Stephens's Commentaries (1), where, as we may note in passing, the method of making a defendant answer on oath to a criminal charge, which is not agreeable to the genius of the common law in any other instance, is said to have been derived through the medium of the courts of equity. Referring to the answering of interrogatories the commentator says:—

If the party can clear himself on oath he is discharged ; but if perjured may be prosecuted for the perjury. If he confesses the contempt the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment.

In an earlier part of the treatise (2) it was shown that

All courts of record are the King's Courts in right of his crown and royal dignity ; and therefore every court of record has authority to fine and imprison for contempt of its authority ; while, on the other hand, the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record.

The power of the court is thus to award a punishment for the contempt, and that power has not in this case been exercised. The finding that a contempt has been committed may be an essential preliminary to the exercise of the power to punish, but it is only a preliminary or interlocutory step towards the final judgment and the general rule governing our jurisdiction confines it to final judgments.

In the case *In re Wallace* (3), which was an appeal from an order of the Supreme Court of Nova Scotia awarding a punishment for contempt of court, the judicial committee agreed that a contempt had been committed which it was hardly possible for the court not to take cognizance of, but allowed the appeal on the ground that the punishment awarded was not appropriate. So in the present case, if we should agree with

(1) Vol. IV., p. 352.

(2) Vol. III., p. 383.

(3) L.R. 1 P.C. 283.

the learned judges who considered the appellant guilty of contempt, and therefore should dismiss this appeal, it would be open to the appellant, or indeed to the respondent (on the hypothesis of the case being appealable under section 24), to appeal again after the final order awarding the punishment.

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Then there is a further consideration.

The power to punish for contempt is a discretionary power. That was expressly so decided by our ultimate court of appeal in *McDermott v. The Judges of British Guiana* (1) and it is shown by many other cases, among which are *Ashworth v. Outram* (2) and *Jarmain v. Chatterton* (3).

An appellate court will be slow to interfere with a decision made in the exercise of the discretion of the court of first instance, but such decisions may nevertheless be appealable. That depends on the extent of the jurisdiction of the appellate court. Whether, as a matter of policy, a person aggrieved by an order to commit for contempt, or by the refusal to make such an order, ought to have an appeal, or perhaps a series of appeals, is an abstract question which does not now call for consideration and is not within our province.

What is our jurisdiction?

Section 27 (4) declares that no appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same.

This applies, in my opinion, to an order to commit for contempt.

There is no good reason for reading the section as intended to except orders which cannot come within any of the enabling sections, or as referring only to orders made as matters of practice in the course of an

(1) L.R. 2 P.C. 341.

(2) 5 Ch. D. 943.

(3) 20 Ch. D. 493.

(4) R. S. C. c. 135.

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action, such *e.g.* as an order to put off a trial, or to amend a pleading, or to produce documents, which last mentioned order was held by Malins V. C. in *Lane v. Gray* (1) to be discretionary.

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The wider scope of the language is shown by the latter part of the section which declares that the exception shall not include certain things which are made appealable by section 24 (e), viz., decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court.

On all these grounds I am of opinion that we should quash the appeal.

*Appeal quashed with costs.*

Solicitors for appellant: *Weldon & McLean.*

Solicitor for respondent: *L. A. Currey.*