IN RE TRECOTHIC MARSH.

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*Dec. 6, 7.
*Dec. 22.

THE DOMINION COTTON MILLS COMPANY..... } APPELLANTS;

AND

THE TRECOTHIC MARSH COMMISSIONERS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Construction of statute—"Marsh Act," R.S.N.S. 1900, *c.* 66, *ss.* 22, 66—*Jurisdiction of marsh commissioners—Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time—Delays occasioned by judge—Legal maxim—Order nunc pro tunc.*

Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings:—

Held, Girouard J. dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void notwithstanding that it was applied for and judgment on the application reserved before the time had expired.

Held, per Taschereau C.J.—That where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by antedating or entering it *nunc pro tunc;* that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners but the appellants were not entitled to it on the merits.

Per Girouard J. (dissenting).—Under the circumstances, the order in this case ought to be treated as having been made upon the date when judgment upon the application was reserved by the judge. Upon the merits, the appeal should be allowed as the commissioners had no jurisdiction in the absence of

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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proper notices as required by the twenty-second section of the "Marsh Act," R.S.N.S. 1900, ch. 66.

Per Davies J.—The statute allows any person aggrieved by the proceedings of the commissioners to remove the same into the Supreme Court by certiorari; the claim for the writ on the ground of jurisdiction was either abandoned or unfounded; and the statutory writ could not issue after the six months had expired.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), setting aside an order made by Mr. Justice Graham, on the application of the appellants, directing that a writ of certiorari should issue to remove into the said court the record and proceedings of the Board of Commissioners for the Trecothic Marsh assessing a rate upon the lands of the appellants for expenses incurred in the drainage and dyking of the marsh.

The rate in question was made by the commissioners under the authority of the "Marsh Act," R.S. N.S., 1900, ch. 66, which gives power to commissioners appointed under its provisions to levy rates for the cost of the works upon the proprietors of lands interested in the drainage and dykes. Section 22 of the Act imposes the condition that, in cases where it is necessary or expedient to borrow money to carry out the works, notice should be given to the proprietors before undertaking the expense. The 74th section provides for a review of the proceedings of the commissioners upon certiorari, on the application of any proprietor considering himself aggrieved, but forbids the granting of any such writ of certiorari except within six months next after the initiation of the proceedings or notice that they are being taken.

The company applied for an order to have the record and proceedings removed into the Supreme Court, by way of certiorari, within the time pre-

(1) 38 N.S. Rep. 23.

scribed, but the judge reserved his judgment upon the application and made the order for the issue of the writ only some days after its expiration. The judgment now appealed from set aside the order upon the merits of the case, holding that the assessment upon the lands of the appellant had been properly imposed. The questions at issue upon the present appeal are stated in the judgments now reported.

W. B. A. Ritchie K.C. and *Sangster* for the appellants.

Newcombe K.C. and *Mellish K.C.* for the respondents.

THE CHIEF JUSTICE.—In this case a majority of the court have come to the conclusion that the appeal be dismissed upon the ground that the order granting the writ of certiorari at the instance of the appellant company was issued after the expiration of six calendar months contrary to section 74 of the Act in question, which decrees that any proprietor aggrieved by any proceeding of a commissioner may remove the same by writ of certiorari into the Supreme Court, but that no such writ shall be granted except within six calendar months next after such proceeding was taken, or the proprietor had notice that it was taken.

I would not dissent from the proposition that, after the six months, the jurisdiction to issue the writ was gone, and that the judge in this case was *functus officio*, if the demand for a certiorari had not been based upon the want of jurisdiction in the commissioners. *Threadgill* v. *Platt*(1); *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*(2); *per* Strong J. in

(1) 71 Fed. Rep. 1.

(2) 128 U.S.R. 258.

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Ontario & Quebec Ry. Co. v. *Marcheterre*(1); *Canadian Mutual Loan and Investment Co.* v. *Lee*(2).

I would also assent to the proposition that the maxim *actus curiae neminem gravabit* cannot be applied so as to confer a jurisdiction that has been expressly taken away by statute. *Cumber* v. *Wane*(3). I also agree that, where the time has expired, a court cannot give itself jurisdiction by antedating its judgment and ordering it to be entered *nunc pro tunc.* That would clearly be overriding the statute and defeating the intention of the law-giver. A court could not so indefinitely extend its jurisdiction in opposition to the law.

I would think in this case, however, that the writ of certiorari was rightly issued on the ground that a statute taking away the writ, like this one does, after the six months, has no application when the judgment or proceedings of an inferior tribunal are impeached, as here, for want of jurisdiction in that tribunal.

I will, however, not dissent from the judgment dismissing the appeal, as I am of opinion that the appellants' grounds of complaint against the assessment in question are unfounded. It is with great hesitation that I would, on a statute of this nature, interfere with the conclusion of the provincial court.

I deem it inexpedient to review here the various questions raised by the appellants as, under the circumstances, any expression of opinion by me thereon would be *obiter.*

The appeal is dismissed with costs.

(1) 17 Can. S.C.R. 141. (2) 34 Can. S.C.R. 224.

(3) 1 Sm. L.C. (11 ed.) 338.

GIROUARD J. (dissenting).

As I understand this appeal two questions present themselves; First: Was the writ of certiorari granted within the prescribed time? 2ndly: Were the commissioners acting within their jurisdiction?

The powers of these commissioners are defined in the "Marsh Act," ch. 66, of the Revised Statutes of Nova Scotia, 1900, which deals with those large and valuable tracts of land in Nova Scotia which have been reclaimed from the sea by means of dykes since the days of the French Acadians. Commissioners were appointed and levied a rate upon the proprietors interested, among others the Dominion Cotton Mills Co., now appellants. They applied for a writ of certiorari under section 74 of the said statute. Sub-section 2 contains, however, the following limitation:

> No such writ shall be granted except within six calendar months next after such proceeding was had or taken, or the proprietor had notice that it was had or taken.

Before the expiration of the six months, the appellants applied for the granting of the writ of certiorari to a judge of the Supreme Court of Nova Scotia, as provided by the Act, but his Lordship took the case *en délibéré* and granted the writ after the six months had expired. No objection was raised in the two courts below, and for the first time it is raised in this court.

I do not look upon it as affecting the jurisdiction of the court of first instance, but as a mere matter of procedure which could be and was in fact waived. At common law, the court of first instance could always issue a writ of certiorari to bring before it the proceedings of an inferior court like that of those commissioners. Its jurisdiction was not created by the "Marsh Act," it was simply limited, and if the parties

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interested do not in proper time take advantage of this limitation they must suffer for it. The majority of this court is of opinion that the objection is well taken, but, with due respect, I cannot accede to that decision. I respectfully submit that it is contrary to the well-settled jurisprudence of this country and of this court. *Attorney-General* v. *Scott*(1); *Couture* v. *Bouchard*(2); *Danaher* v. *Peters*(3); *St. James Election Case*(4); *The Queen* v. *Justices of County of London*(5).

I will content myself with making a short quotation from the decision of this court in *Danaher* v. *Peters*. In that case the statute was imperative, as in this case:

> All applications for a license, etc. *shall* be taken into consideration etc. not later than the first day of April.

It was held that licenses applied for before, but granted after, that period were not invalid. To decide otherwise would be simply a denial of justice. The appellants were within their rights when they applied within the six months, and if the judge chose to keep the case before him after that period, either one day, or several days, or several weeks, or several months, the appellants should not suffer for it, as was held in the *Attorney-General* v. *Scott*(1):

> In a case like this, parties cannot be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the day that the case was taken *en délibéré*.

And, with regard to prescription, I may add that it is suspended from the day the court or judge is duly seized of the subject matter.

(1) 34 Can. S.C.R. 282.
(2) 21 Can. S.C.R. 281.
(3) 17 Can. S.C.R. 44.
(4) 33 Can. S.C.R. 137, at p. 143.
(5) (1893) 2 Q.B. 476.

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Having taken this view of the first question raised I now come to the merits. I am of the opinion that under section 22 of the "Marsh Act," the commissioners could not proceed, as they knew that it would be necessary to borrow money for the purpose of paying for the expenses of the work. The following are the words in the said section, par. 1:

> And in all cases in which the work is such that it will be necessary or expedient to borrow money for the purpose of paying for the expenses of such work, he shall give notice to the proprietors of his intention to execute such work one month before commencing the same.

He is bound, then, to provide the clerk with a description of the proposed work and of the land proposed to be benefited, and an estimate of the cost of the work, and upon that, within a month the proprietors may signify their assent or dissent in writing, and if this is not done the commissioners cannot proceed any further. It is admitted that this condition precedent for the jurisdiction of the commissioners was not complied with, and for that reason the writ of certiorari should be granted, and finally all the proceedings of the said commissioners set aside.

I would, therefore, allow the appeal with costs.

DAVIES J.—While I agree that this appeal must be dismissed on the ground that the certiorari was not granted until after the expiration of the six months prescribed by statute, I do not wish to be considered as expressing any opinion upon the legality or otherwise of the proceedings impeached, excepting in so far as they invoke the question of jurisdiction.

The grounds upon which the application was made were many and various. Two of them only raised the question of jurisdiction. One of these was that the

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lands sought to be taxed were not marsh lands within the meaning of the Act, and the other that the work done for which the rate was levied was done by persons purporting to act as commissioners in charge who had no authority or jurisdiction. On both of these grounds the judge to whom the application was made refused to grant the writ. No appeal was taken from that refusal by the Dominion Cotton Mills Co. The second ground was not argued before us, evidently having been abandoned after the judgment of the Supreme Court of Nova Scotia affirming the decision of the trial judge upon it. The first ground, however, as to the lands not being marsh lands at all was argued by Mr. Ritchie. I do not stop to inquire whether, not having appealed from the refusal of the judge to grant the writ on this ground, the point was open to him upon this appeal. It is sufficient to say that I fully concur with the judgment of the court below upon it approving the decision of the trial judge.

All questions of jurisdiction being removed those remaining were questions of the regularity and justice or otherwise of the proceedings. First, did the 74th section of the Act prohibiting the granting of a writ under the statute after the expiration of six months apply to this application; secondly, if it did not apply, were there merits justifying the granting of the writ under the statute?

On the first point the question whether the legislature intends a provision of a statute to be imperative or directory must depend in each case upon the language used and upon the scope and object of the statute.

Most of the decisions, therefore, on other acts, to which our attention was called, or to which we have

referred, furnish us with little, if any, assistance, and do not affect the decision which I have reached.

The case of *The Queen* v. *Justices of County of London* (1), is perhaps the strongest in respondent's favour. But, as observed by Kay L.J. at p. 496, the section 42, sub-section 13 of the Act there under consideration,

> only incidently mentioned the day before which all appeals should be determined. There is no express enactment that all appeals should be determined before that day nor that any appeal not then determined shall not be determined at all.

The 74th section of the Act, chapter 66 of the Revised Statutes of Nova Scotia, 1900, the meaning of which we have to determine, is as follows:

> 1. If any proprietor is aggrieved by any proceeding of a commissioner or commissioners or of any person purporting to act under the provisions of this chapter, he may remove such proceeding into the Supreme Court by means of a writ of certiorari.
>
> 2. No such writ shall be granted except within six months next after such proceeding was had or taken or the proprietor had notice that it was had or taken.
>
> 3. No such writ shall be granted until the proprietor has given the security required upon issuing writs of certiorari in other cases.
>
> 4. Any proceedings so removed into court may be examined by the court or a judge, and such determination made as is proper.
>
> 5. The court or judge may from time to time remit the proceedings to the commissioner, or other person purporting to act under the provisions of this chapter, for reconsideration, with all necessary directions, and the same shall be so reconsidered.

Here the application for the writ was made before the six months had expired, but the writ was not granted or allowed till after the expiration of the prescribed period.

Complete supervisory powers were by the fourth and fifth sections given to the court or a judge, and the amplest provision made for obtaining a proper deter-

(1) [1893] 2 Q.B. 476.

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mination by the court, for correcting irregularities in the procedure and for protecting the interests of any proprietor who thought himself aggrieved by any proceedings of the commissioners.

But it is obvious that the legislature thought it necessary to impose a time limit upon the exercise of these powers by the court otherwise there would never be finality in the proceedings or that complete confidence which would enable the commissioners to proceed with heavy expenditures or to borrow the necessary capital to carry out contemplated improvements. The sub-section, it will be observed, does not prescribe any time within which the application for the writ must be made, but one after which the writ must not be granted.

Having regard to the whole scope, operation and intention of the Act and of the peremptory and negative words of sub-section 2, I am of opinion (questions of jurisdiction not being involved) that it was not in the power of the judge to grant the writ applied for after the six months had expired.

I would, therefore, dismiss this appeal with costs.

IDINGTON J.—The appellants applied to Mr. Justice Graham of the Supreme Court of Nova Scotia for a writ of certiorari which he granted on the 11th November, 1904, to remove into said court a certain record of a rate made on the 21st of March, 1904, by a Board of Commissioners for Trecothic Marsh purporting to have been made pursuant to power conferred upon them by "The Marsh Act" of Nova Scotia.

Upon appeal to the said court *en banc* the order granting said writ was set aside. From this the appellants have appealed to this court, and amongst other answers made to such appeal is the objection that sec-

tion 74, sub-section 1, of said Act, giving the right to such writ is restricted by sub-section 2, as follows:

> No such writ shall be granted except within six calendar months next after such proceeding was had or taken, or the proprietor had notice that it was had or taken,

and that notice of the rate was given appellants on 30th March, 1904; and, therefore, in either alternative of this sub-section the six months had expired before the writ was actually granted.

It seems that the notice of application for writ was within, and the time named therein for return of the notice was well within, the six months in question.

By reason of the necessary enlargement of the motion it would seem the motion was not heard until the 30th of September, 1904, as appears from the filing of the appellants' affidavits in reply.

It was hardly possible for the learned judge under such circumstances to have heard and considered all the material before him, and now before us, and have given a well-considered judgment in a rather complicated matter within the time.

If the time for judgment granting the writ fell beyond the limit of six months allowed, it seems clear that the appellants have only themselves to blame and cannot shove responsibility for it upon the court.

It seems, therefore, as if the case fell within the line of cases, where the applicant has failed in so many cases, because he had not complied with the terms, that the legislature had prescribed for him, to exercise a right within.

Indeed the appellants would seem to have very little excuse, for they must be taken to have known through their manager and otherwise, I infer, that such expenditure at their door was being made upon these works, as would require from them, as well as

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others, pretty heavy contributions for the work in question, and that money would need to be borrowed to repay such expenditure, and that the whole proceedings were at least highly irregular and possibly beyond the jurisdiction of the commissioners, and that in all probability the commissioners were relying upon that notice and probable knowledge of the appellants, without any very distinct protest or opposition from them.

The initial step, to go on with the work, on a scale that, after repeated failures, must have plainly meant, to ordinary business men, a borrowing of money, made it the duty as soon as that step was placed on record as it was by the commissioners in May, 1902, to object and resist, if they intended ever to do so, the commissioners so proceeding without jurisdiction. That was a proceeding that the appellants could have attacked by means of a writ of certiorari, or other obvious and effective means the law gives those concerned to keep public authorities, such as these commissioners, within the limits fixed by law for the discharge of their duties.

Whether all this and more that was done may amount in law to such acquiescence on the part of appellants as to be an answer to them challenging here or elswhere this burthensome tax I need not inquire or say here.

It seems to be a very complete answer, however, to the case of hardship if that alone could, as it cannot, avail to help in the construction of this statute.

It is to indicate, that in my opinion there is not the slightest reason for such appellants urging that they might have been entitled to claim judgment some time before midnight of the 30th September in a case argued on such date, that I refer to these facts.

The case falls well within the principles laid down by Lord Esher in *The Queen* v. *Justices of County of London*(1), at p. 488. And the giving effect to the objection that appellants were too late does not involve any interpretation of the statute, in such a way as to lead to manifest public mischief, such as Bowen L.J., at p. 492 of the same case submits must, if possible, be avoided in trying to interpret statutes.

The sub-section 2 which I quote above is of the most imperative character possible, and prohibited the granting of the writ, at the time it was done, unless some such principle as the last named judge adverts to, becomes applicable, as I conceive it did not under the facts in this case.

When we consider the scope of the Act, the manifest intention to prevent appeals of any kind, the great importance of avoiding delay and enabling the financial arrangements in such cases to be completed at the earliest possible date, and that the entire working of the Act rests upon the commissioners being kept within the lines of power given them, and so ready a means as the writ of certiorari is expressly given for that purpose, in such wide comprehensive terms, we see the need for the imperative terms of the Act, and need for exacting compliance with them.

If the acts done by the commissioners had not in themselves any efficacy in law and have not acquired efficacy by reason of the acquiescence of the appellants as evidenced by their acts and omissions, then there is less reason to look for another than the plain ordinary meaning of sub-section 2 in order to prevent them producing manifest absurdity or a denial of natural justice.

(1) (1893) 2 Q.B. 476.

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On the other hand if the things complained of were technical rather than going to the root of the matter then no harm done. Maxwell on Statutes, p. 9, says:

> So if an Act provides that convictions shall be made within a certain period after the commission of the offence, a conviction made after the lapse of that period would be bad, although the prosecution had been begun within the time limited, and the case had been adjourned to a day beyond it, with the consent, or even at the instance, of the defendant (*a*). So, when an Act gives to persons aggrieved by an order of justice a certain period after the making of the order for appealing to the Quarter Sessions, it has been held that the time runs from the day on which the order was verbally pronounced, not from the day of its service on the aggrieved person.

What he thus says is borne out by at least two of the cases, *Rex* v. *Bellamy*(1), and *Rex* v. *Tolley*(2).

The more recent case of *Re Nottawasaga and Simcoe*(3) in the Court of Appeal for Ontario, seems much in point as giving effect to the word "shall" under an interpretation Act similar to that governing its use in Nova Scotia legislation and in relation to the action or want of action on the part of a judge relative to the cognate matters of assessment in Ontario.

These authorities seem to go much further than we need to go in the disposal of this appeal.

I think the appeal should be dismissed.

I am in doubt on the question of costs because it seems the point now taken and given effect to was not taken below or here until taken in argument of the appeal though something like it is raised in another sense in respondents' factum.

MACLENNAN J.—I concur in the judgment dismissing the appeal with costs.

(1) 1 B. & C. 500. (2) 3 East 467.

(3) 4 Ont. L.R. 1.

Appeal dismissed with costs.

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Solicitor for the appellants: *H. W. Sangster.*

Solicitor for the respondents: *W. M. Christie.*