1893
*Oct. 18.
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THE ATTORNEY GENERAL FOR CANADA (PLAINTIFF)..... APPELLANT ;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Constitutional law—British North America Act, secs.* 65, 92—*The pardoning power of Lieutenant Governors*—51 *Vic. ch.* 5 (O)—*Act respecting the executive administration of the laws of the Province—Provincial penal legislation.*

The Local Legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact. B. N. A. Act, sec. 92, ss. 15.

The Lieutenant Governor of a province is as much the representative of Her Majesty the Queen for all purposes of provincial Government as the Governor General himself is for all purposes of the Dominion Government.

Inasmuch as the act 51 Vic. ch. 5 (O) declares that in matters *within the jurisdiction* of the Legislature of the province all powers etc., which were vested in or exercisable by the Governors or Lieutenant Governors of the several provinces before Confederation shall be vested in and exercisable by the Lieutenant Governor of this Province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vic. ch. 5 (O), it is impossible to say that the powers *to be* exercised by the said act by the Lieutenant Governor are unconstitutional.

*Quære:* Is the power of conferring by legislation upon the representative of the crown, such as a Colonial Governor, the prerogative of pardoning in the Imperial Parliament only or, if not, in what legislature does it reside ?

Gwynne J. dissenting was of opinion that 51 Vic. ch. 5. (O), is *ultra vires* of the Provincial Legislature.

APPEAL from a judgment of the Court of Appeal for Ontario (1) confirming the order and judgment of

*PRESENT :—Sir Henry Strong C.J. and Fournier, Taschereau, Gwynne and King JJ.

(1) 19 Ont App. R. 31.

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the Chancery Division of the High Court of Justice for Ontario (1) declaring that it was within the power of the Legislature of Ontario to pass the act 51 Victoria, chapter 5, intituled "An Act respecting the Executive Administration of Laws of this Province," and each and every section thereof.

This action was brought under section 52 (2) of the Judicature Act (R. S. O. c. 44), for a declaration touching the validity of the statute of Ontario passed in 1888 (51 Vict. ch. 5) entitled "An Act respecting the Executive Administration of the Laws of this Province." The following is the statement of claim filed in the case:—

"1. The Attorney General for the Dominion of Canada alleges that the act of the Legislative Assembly of the Province of Ontario, 51 Victoria, chapter 5, entitled: 'An Act respecting the Executive Administration of Laws of this Province,' is invalid and of no force or effect, inasmuch as it was beyond the power of the said legislature to pass such statute."

2. "The said Attorney General states that the said statute purports to confer upon the Lieutenant Governor, or the administrator for the time being of the said province, powers, authorities and functions beyond those conferred upon the said Lieutenant Governor or administrator by the British North America Act, and beyond those which it is within the power of the said Legislative Assembly to confer."

3. "It purports also to include in such powers so conferred the right of commuting and remitting sentences for offences against the laws of the province or offences over which the legislative authority of the province extends, and is in this respect beyond the power and authority of the said Legislative Assembly to enact."

(1) 20 O. R. 222.

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"4. The said statute is in contravention of the limitation imposed upon the said legislature by the exception contained in section 92 of the British North America Act, as regards the office of Lieutenant Governor."

"5. The said statute purposes either to declare the meaning of or to amend the British North America Act in the matters thereby dealt with and is in either case beyond the competence of the said legislature."

The Attorney General of Ontario demurred on the ground that the act was *intra vires.*

*Robinson* Q.C. and *Lefroy* for the appellant: The statute having been passed became the subject of certain correspondence between the two Governments, and this correspondence was before the Court of Chancery on the argument, as well as certain other documents which are printed, and these documents we have agreed should be put before this court.

This being a case of public character a very full abstract of the argument before the Chancery Division, is given in 20 O. R. 222. Before the Court of Appeal the case was again argued at length, and the argument on the other side, having been taken down in shorthand, my learned friend, Mr. Blake, has had it printed in the form of a pamphlet. We have ours printed also, and we would suggest, with the consent of my learned friend, that without repeating these arguments in detail we hand into court these printed pamphlets, repeating here only the main propositions on both sides, which will have the effect of curtailing very much our present argument. The case is, moreover, of that character that we cannot add anything very new, with this exception, that we find it necessary to say a few words on the late decision by the Privy Council, in 1892, since the argument in the Court of Appeal, of *The Liquidators of the Maritime Bank*

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v. *The Receiver General of New Brunswick* (1), which my learned friend conceives has advanced his argument very far, and renders a great part of it unnecessary by confirming the position of the province.

The learned counsel then contended that all prerogative powers and functions, not specifically bestowed by the British North America Act upon the Governor General or the Lieutenant Governors, remain, as is expressly stated by sec. 9 of that act, vested in the Queen, and can only be delegated by her through the usual channel of commissions and instructions. He also quoted as part of his argument the view adopted by the Minister of Justice in recommending the disallowance of the Quebec Act, 49 & 50 Vict. c. 98, respecting the executive power, in which he states: "The office of Lieutenant Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof is excepted from the powers conferred upon the legislatures of the provinces, and is exclusively vested in the Parliament of Canada. In the opinion of the undersigned, it is immaterial whether a legislature by an act seeks to add or take from the rights, powers or authorities, which, by virtue of his office, a Lieutenant Governor exercises. In either case it is legislation respecting his office (2).

The learned counsel further contended that the act of the Ontario legislature, now in question, was clearly *ultra vires* because it assumed to legislate upon all prerogative powers, no matter how high and sovereign a character, so far as such powers had their operation in or had respect to the matters placed within the legislative jurisdiction of the provinces by sec. 92 of the British North America Act. He pointed out that the powers contained in commissions and

(1) [1892] A.C. 437.

(2) Hodgins' Reports of Ministers of Justice, vol. 2, p. 58. *See also* pp. 201, 202.

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instructions to Governors and Lieutenant Governors were almost exclusively of a high, sovereign and fundamental character, and not what have been called minor prerogatives. The learned counsel contended that the fact that such prerogatives might in their exercise and operation touch the subjects placed within the exclusive legislative jurisdiction of the Provincial legislatures, did not bring the prerogative powers themselves within that jurisdiction, and that under what has been called the general law of the Empire, colonial legislatures have no right to legislate with regard to them, and that, therefore, the Ontario legislature had no power whatever "thus to enact." In support of these contentions the learned counsel relied on the points of argument advanced in the Court of Appeal for Ontario.

During the argument reference was also made to the instructions now received by the Governors General, and it was contended that the power of pardon there given must be exclusive and cannot co-exist in the Lieutenant Governors of the provinces, unless by delegation from the Governor General under the powers in that respect conferred upon him.

The learned counsel then referred to the case of the *Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick* (1), and contended that that case left the question involved in the present case unaffected, citing the passage in which the Judicial Committee state that the provisions of the British North America Act: "Nowhere profess to curtail in any respect the rights and privileges of the crown or to disturb the relation then existing between the Sovereign and the provinces." He contended that though that case, no doubt, decides that in matters of Provincial Government the Lieutenant Governor

(1) [1892] A.C. 437.

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is as much the direct representative of Her Majesty as the Governor General is in matters of Dominion Government, yet the fact remains that both Governors General and Lieutenant Governors only represent the Queen in a modified manner. The degree to which in either case they represent her depends upon the provisions of the British North America Act on the one hand, and the powers delegated by commissions and instructions on the other hand (1).

*E. Blake* Q.C., [*Æmilius Irving* Q.C. with him] for the respondent.—I may conveniently open my argument by referring to that authority to which my learned friends have referred, and which they think does not add much to the position of the province. I would ask your Lordships to consider what the case of the *Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick* (2), does establish, not in the way of stating any new views but as placing in a proper light the position of the province with reference to legislative powers. It appears to me that in that case their Lordships of the Judicial Committee had concluded to make a definite statement of their view of the position of the province, and to place their decision upon a broad and clear view of the result of the previous decisions affecting the rights of the different provinces of the Dominion. There is nothing said in that case at all inconsistent with the decision of this court from which it was an appeal. On the contrary, the decision was affirmative of the view of this court as to the prerogative of the Lieutenant Governor.

The judgment in the case referred to at page 441 of the report [1892], A.C., begins by pointing out that "the appellants did not impeach the authority of the cases of *The Queen* v. *The Bank of Nova Scotia* (3), and

(1) See also report of argument in 20 O. R. pp. 224 *et seq.*

(2) [1892] A.C. 437.

(3) 11 Can. S. C. R. 1.

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*Exchange Bank of Canada* v. *The Queen* (1); and they also conceded that until the passing of the British North America Act, 1867, there was precisely the same relation between the crown and the Dominion. But they maintain that the effect of the statute has been to sever all connection between the crown and the provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions." In respect to this contention, their Lordships used this language: "for these propositions, which contain the sum and substance of the argument addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority." Then there is the authoritative statement that the British North America Act does not "disturb the relation then existing between the Sovereign and the provinces. The object of the act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented and trusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues, which had previously belonged to the provinces; so that the Dominion Government should be vested with such powers, property and revenues, as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But in so far as regards those matters, which by section 92 are

(1) 11 App. Cas. 157.

specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the act." This language is important because there will be found in a subsequent part of the judgment an indication of what will necessarily follow from the idea that the Queen was not present as a part of the Provincial legislature in their legislative acts, and it follows, in the opinion of their Lordships, as a necessary proposition that she was present. Their Lordships say, at page 443 of their report: "It would require very express language, such as is not to be found in the act of 1867, to warrant the inference that the Imperial legislature meant to vest in the provinces of Canada, the right of exercising supreme legislative powers in which the British Sovereign was to have no share." And again, in speaking of the objection that the Lieutenant Governor of the province is not appointed directly by Her Majesty, but by the Governor General who has also the power of dismissal, their Lordships say: "The act of the Governor General and his Council, in making the appointment is, within the meaning of the statute, the act of the crown; and a Lieutenant Governor when appointed is as much the representative of Her Majesty, for all purposes of Provincial Government, as the Governor General himself is for all purposes of Dominion Government." So you have there a general declaration that the executive powers are divided, and that that part which is necessary for the due performance of the functions of the Provincial Government remains with the province. Then their Lordships in the case in question, after stating, as I have said, that the legislature of each province of Canada is as supreme as it was before the passing of the act, cite from the now historic case of

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*Hodge* v. *The Queen* (1), and then go on to say in reference to the Legislature of New Brunswick, which was in question in that case *Maritime Bank* v. *Receiver General* (2), that "it derives no authority from Canada, and its status is in no way analogous to that of a municipal administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of the word; and within the limits assigned by section 92 of the act of 1867, these powers are exclusive and supreme." They then go on to say, as I have before said, that the British North America Act should contain very express language (which it does not contain) to deprive the province of its prerogative. What was supposed to be obiter in *Théberge* v. *Landry* (3), is the deliberate opinion of the Privy Council in this case, namely, that the Queen is a party to provincial legislation.

In that case of the *Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick* (2) we find in the judgment the following passage:

> If the Act had not committed to the Governor General the power of appointing and removing Lieutenant Governors there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor General and not the Queen, whose viceroy he is, became the sovereign authority of the province, whenever the Act of 1867 came into operation. But the argument ignores the fact that by section 58 the appointment of a Provincial Governor is made by the 'Governor General in Council by instrument under the Great Seal of Canada,' or in other words by the executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown,

and then follows what I have already read on this point.

Then the judgment proceeds to discuss the point as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign,

(1) 9 App. Cas. 117. (2) [1892] A. C. 442.
(3) 2 App. Cas. 102.

which their Lordships say appears to be practically settled by previous decisions of the Judicial Committee, referring particularly to *Attorney General of Ontario* v. *Mercer* (1), *St. Catharines Milling Co.* v. *The Queen* (2), and *Attorney General of British Columbia* v. *Attorney General of Canada* (3), and the judgment closes as follows:

> Seeing that the successive decisions of this Board in the case of Territorial Revenues are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues, which are not territorial.

That is important as giving us at last an interpretation on which we can rely for the construction of this case.

[The learned counsel then proceeded to submit the points of argument relied on in the Court of Appeal (4).]

THE CHIEF JUSTICE:—The 15th subsection of section 92 of the British North America Act and the decision in the case of *Hodge* v. *The Queen* (5) preclude the possibility of any doubt as to the right of Provincial legislatures to impose punishments by fine and imprisonment as sanctions for laws which they had power to enact.

The case of *The Receiver General of New Brunswick* v. *The Liquidators of the Maritime Bank* (6) definitively established that a Provincial Lieutenant Governor appointed by the Governor General under the Great Seal of the Dominion, pursuant to the provisions of the British North America Act, represents the Queen.

(1) 8 App. Cas. 767.
(2) 14 App. Cas. 46.
(3) 14 App. Cas. 295.
(4) See report of argument 20 O. R. pp. 229 *et seq.* and a verbatim report filed with the appeal book.
(5) 9 App. Cas. 117.
(6) [1892] A. C. 437.

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The Chief Justice.

The 65th section of the British North America Act, which continues to the Lieutenant Governors of the Provinces such statutory powers as to confederation as had previously been vested in the Lieutenant Governors so far as the same are capable of being exercised after the union, does not appear to me to have any material bearing, as the prerogative of pardoning exercised by the Lieutenant Governor before confederation was not derived from any statute.

Had I been compelled to decide the substantial question argued before this court, I should have had no hesitation in holding that "the power of commuting and remitting sentences" mentioned in the second section of the Provincial act in question, was nothing less than the power to pardon.

By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's Dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot however in any way exclude the power and authority of the crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's Dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon in express terms, either by the commission under the Great Seal, or in the instructions communicated to them by the crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of

years, I should have thought that it at least implied that in the opinion of the law officers of the crown, an authority on such a point second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial Governor, and could only be executed by such an officer, in the absence of legislative authority, under powers expressly conferred by the crown.

The next question, and one which was argued on this appeal, and which, if we were compelled to decide all the questions presented we should have been obliged to pronounce upon, is one of the greatest importance, not a question of construction arising in any way upon the British North America Act, but one involving a great principle of the general constitutional law of the Empire. That question is: In what legislature does the power of conferring this prerogative of pardoning by legislation upon a representative of the crown such as a colonial Governor, reside? Is it possessed by any colonial Legislature, including in that term under our system of Federal Government as well the Dominion Parliament as a Provincial legislature, or is it confined to the Imperial Parliament? That the crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be well recognised constitutional canon. Upon this point of the locality of the legislative power to interfere with the Royal prerogative, I should have thought that the case of *Cushing* v. *Dupuy* (1) and *Re Marois* (2), decided by the judicial committee with reference to the jurisdiction of a colonial legislature to limit appeals to the Queen in Council, would, if not direct authorities, have had at least a very material application to the present question. The judgments

(1) 5 App. Cas. 412. (2) 15 Moo. P.C. 189.

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delivered in the Supreme Court of Victoria in the case of *Chun Teeong Toy* v. *Musgrove* (1) might also have afforded us great assistance. If it had been necessary to decide this last question, I should have desired further argument in order that the opinions of the learned judges who decided the Australian case and the authorities which with great industry and research they appear to have brought together might be fully discussed, for that case was not referred to in the argument, having been brought to our notice by the learned counsel for the appellant since the hearing of the appeal.

I have made the foregoing observations in order that the attention of counsel may be directed to the points I have indicated should the case be brought before us again in some other form. At present I do not intend to decide any of these questions for I am of opinion that we must dispose of this appeal upon the same ground as that taken in the judgment of Mr. Justice Osler.

This is an action instituted under the jurisdiction given by section 52, subsec. 2, of the Ontario Judicature Act which is as follows:—

> The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney General for the Dominion or the Attorney General of this Province for a declaration as to the validity of any statute or any provision in any statute of this legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said court.

The Attorney General of the Dominion by his statement of claim asks for a declaration as to the validity of the statute under consideration and every section thereof.

Whatever may have been the proper determination of this question, if the statute had been absolute in

(1) 14 Vict. L. R. 349.

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its terms, it seems to be impossible to say that an enactment which on its face is expressly made subject to a condition that the legislature has power to enact it can be *ultra vires*. The effect of such a proviso necessarily is that the act is by its very terms to be treated as an absolute nullity if beyond the competence of the legislature; it is therefore impossible to say that there has been any excess of jurisdiction.

The appeal must be dismissed.

FOURNIER J.—Cette action a été portée pour faire déclarer que l'acte 51 Vict., ch. 5, est *ultra vires* des pouvoirs de la législature d'Ontario. La réponse du procureur-général d'Ontario, contenue dans son *demurrer* est suffisante pour faire repousser la prétention énoncée dans la demande. Cet acte n'a pas pour but de faire fixer l'interprétation de l'Acte de l'Amérique Britannique du Nord, ou de l'amender, en quoi que ce soit, au delà des pouvoirs qui appartiennent à la dite législature. Elle s'en est exprimée de la manière la plus positive par la déclaration, plusieurs fois répétée dans cet acte, qu'elle n'a statué qu'en autant que comme province elle avait le pouvoir de le faire, et sans intervenir avec les pouvoirs réservés au parlement fédéral.

Lorsque la législature a déclaré qu'elle n'a l'intention de donner effet à sa législation qu'en autant qu'elle a le pouvoir de le faire et surtout lorsqu'il ne s'agit pas d'en faire l'application à un cas particulier, il est évident que la demande d'une déclaration d'inconstitutionalité de cette législation est prématurée. Il me semble que pour adopter un tel procédé on aurait dû attendre qu'il se fut présenté un cas dans lequel cet acte fut invoqué. Jusque là, il me semble qu'on ne peut demander à la cour de faire une déclaration affirmant ce que la législature s'est abstenue de déclarer. Ce qui a été ainsi déclaré provisoirement ou à titre

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d'essai peut ne pas être d'une grande utilité, mais était dans les limites de pouvoirs de la législature. Ainsi que l'a fait observer l'honorable chancelier Boyd dans son savant jugement sur cette cause :

> And, again, if the section operates on nothing it may be innocuous, but it is not unconstitutional. We are not called upon by analysis or criticism of plausible powers and functions which may be embraced in the words used to discriminate as to what are within or what without the scope of the enactment; any particular case is to be dealt with as and when it arises.

En conséquence je suis d'avis que l'action demandant une déclaration que l'acte en question est inconstitutionnel doit être renvoyée et le jugement de la cour d'appel confirmé.

TASCHEREAU J.—I am not sure if we have jurisdiction over this appeal. If not quashed, however, it must be dismissed. There is nothing in it, and I would have dismissed it at the conclusion of the appellant's argument without calling on the respondent. I would have thought that after the decision of the Privy Council in the *Maritime Bank* case (1), the appeal would have been abandoned. If it was thought expedient to have a judgment finally settling the questions raised, the case should have been directly brought to the Privy Council. Constitutional questions cannot be finally determined in this court. They never have been, and can never be under the present system.

GWYNNE J.—The act of the Ontario legislature which is under consideration, viz., 51 Vic. ch. 5 is, to say the least, peculiar in its frame and embarrassing and the argument in support of its constitutionality has failed to bring conviction to my mind. The first section of the act purports to enact ("so far as the legislature has power thus to enact") that all powers,

(1) [1892] A. C. 437.

authorities and functions which were vested in, or exercisable by the Governor or Lieutenant Governor of any of the several provinces now forming part of the Dominion of Canada under commission, instructions or otherwise, at, or before, the passing of the British North America Act in respect of like matters as the matters by that act placed within the jurisdiction of the legislature of the Province shall be vested in and exercisable by the Lieutenant Governor of the Province of Ontario. What may have been the powers, authorities, and functions thus intended to be vested in the Lieutenant Governor of the Province of Ontario the section does not indicate; but it must be construed as treating them to have been powers, authorities and functions which had been exercised in virtue of some special authority emanating directly from the crown empowering a Governor or Lieutenant Governor of some or one of the old provinces upon some occasions or occasion to exercise some Royal Prerogative in some manner, and the power, authority or function so authorized to have been executed by such Governor or Lieutenant Governor must have been other than, and in excess of, the powers, authorities and functions vested in the Lieutenant Governors of Ontario and Quebec by sec. 65 of the British North America Act.

Now the legislatures of the provinces have no jurisdiction to enact laws in relation to any matter not coming within the classes of subjects enumerated in sec. 92 of that act and among such subjects there is not one, in my opinion, which includes the matters purported to be enacted by the first section of the act under consideration; but, on the contrary, so to extend the powers, authority and functions of the Lieutenant Governor of Ontario beyond those expressly vested in him by the constitutional act is, in my opinion, a violation of the terms of the first item of sec. 92 of that

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act which vests in the legislature jurisdiction to amend from time to time the constitution of the province save and except "as regards the office of lieutenant governor." An act which purports to vest in a Lieutenant Governor of the Province the Royal Prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the constitution of the province as regards the office of lieutenant governor. Then it is argued that even if this is a correct construction of the first section and so that it cannot be held to be *intra vires*, still, by reason of the above formula used in the statute, that section cannot be adjudged to be *ultra vires*. The argument being: If the legislature has power to enact as it has enacted in the first section that section is *intra vires*; but if the legislature had not the power so to enact, the section cannot be *ultra vires* by reason of the saving effect of the formula, "so far as the legislature has power thus to enact." Thus an act of a Provincial legislature which under the shadow of such a formula deals with a subject clearly not within the jurisdiction of the provincial legislature to legislate upon, must, according to the argument, be suffered to remain upon the statute book as an act of the legislature, for what purpose it is difficult to conceive. Thus if an act of a provincial legislature should, under the cover of the formula "as far as the legislature has power thus to enact" enact and declare that within the province no offence should be punishable with death but that every offence heretofore so punishable should be punished by imprisonment in a common jail for such period as to the court or judges pronouncing the sentence should seem fit, such an act according to the argument could not be adjudged to be *ultra vires* but must be suffered to remain on the statute book as an act of the legis-

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lature. It clearly cannot be said to be *intra vires*, and I confess to be unable to see how an act which is not *intra vires* can be anything else than *ultra vires*.

The argument has failed as I have said to bring conviction to my mind. I think that the use of such a formula cannot divest the court of power to pronounce an act to be *ultra vires* if the subject matter dealt with be not within the jurisdiction of the legislature to legislate upon; that is to say if an act of a provincial legislature deals in any way with such a subject matter the act not being *intra vires* must be *ultra vires*. A provincial legislature having no jurisdiction to pass any act in relation to a matter not coming within the classes of subjects enumerated in sec. 92 of the British North America Act, if they pass an act in relation to any such matter that is an act beyond their jurisdiction to enact that is to say, is *ultra vires*, notwithstanding that such a formula as the above is used. The act under consideration, while it contains the above formula, proceeds to legislate upon a subject matter upon which, as I think, it had no jurisdiction to legislate; the formula used does not divest the act of its character of being an act of the legislature nor can it make the subject with which it proceeds to deal to be within its jurisdiction if in point of law it is not. This first section then of the act under consideration is the legislative act of a legislature having no jurisdiction over the subject matter with which the section professes to deal, and being so it is in my opinion *ultra vires*.

Then as to the 2nd section. If that section had been framed so as to enact that the lieutenant governor should have the power of commuting and remitting sentences passed under the authority of item 15 of sec. 92 of the British North America Act, there would have been I apprehend no objection raised to such an enactment; but the second section does nothing of the kind.

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It professes to proceed solely upon the basis of the first section being *intra vires*. It professes not to give to the lieutenant governor power to commute or remit the offences in the second section mentioned independently of the power purported to be conferred by the first section. It enacts as follows:

2. *The preceding section shall be deemed to include* the power of commuting and remitting sentences for offences against the laws of this province or offences over which the legislative authority of the province extends.

This mode of framing the section conveys the intention of the legislature to have been that it is only under the preceding section that the power mentioned in the second section is vested in and can be exercised by the lieutenant governor. If then the preceding section be *ultra vires* nothing remains to support the provisions of the second section. But, further, the second section purports to declare that the preceding section and the powers thereby purported to be conferred shall be deemed *to include* the power of commuting and remitting sentences not only for offences over which the legislative authority of the province extends, that is to say those mentioned in item 15 of sec. 92 of the British North America Act, but also "for offences against the laws of this province." Such offences were always misdemeanours at common law and now by sec. 138 of the Criminal Code are indictable offences unless some penalty or other mode of punishment is expressly provided by law, so that this second sec. of the act under consideration purports that the powers professed to be vested in the Lieutenant Governor of Ontario by the 1st section shall *include* the power of commuting and remitting sentences passed in certain cases by the courts in the exercise of their criminal jurisdiction a matter clearly not within the jurisdiction of the pro-

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vincial legislature to legislate upon, and therefore *ultra vires.*

I am of opinion therefore that the contention of the learned Attorney General of Canada is well founded and that the act must be declared to be *ultra vires.*

KING J. was of opinion that the appeal should be dismissed.

*Appeal dismissed with costs.* Gwynne J.

Solicitor for appellant: *J. A. Macdonell.*

Solicitor for respondent: *Æmilius Irving Q.C.*