In re HENRY O'BRIEN.....APPELLANT ; 1888

AND *Mar. 16.

THE QUEEN UPON THE RELATION OF FREDERIC FELITZ (PLAINTIFF). } RESPONDENT ; 1889 *Mar. 18.

AND

WILLIAM H. HOWLAND.....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contempt of court—Constructive contempt—Appeal—Discretion of court—R. S. C. c. 135 s. 27*—Obstructing litigation—Prejudice to suitor—Locus standi.*

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by sec. 27 of the Supreme and Exchequer Courts Act. Taschereau J. dubitante.

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, sub-sec. (*a*) of Supreme and Exchequer Courts Act as a final judgment in an action or suit, but also under sub-sec. (l) of sec. 26 of the same act, as a final judgment " in a matter or other judicial proceeding " within the meaning of said sec. 26.

The adjudication that the appellant, a solicitor and officer of the court and moved against in that quality, has been guilty of a contempt is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court. When the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt.

The alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for the defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given but before the motion was made the notice was countermanded and the appeal abandoned.

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

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Held, that the proceedings in the cause before the master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for contempt he had no *locus standi* and his application should not have been entertained.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of Mr. Justice Proudfoot (2) who held the appellant guilty of contempt in publishing a certain letter in the Toronto Daily Mail.

These proceedings took place in the course of proceedings by *quo warranto* against Howland, a candidate for Mayor of Toronto, by which his qualification for the office was attacked. The matter was heard before a master and the next morning an editorial appeared in the Mail commenting on the proceedings and stating that Howland had made a bad blunder in running for Mayor without being qualified. The appellant was a strong supporter of Howland and chairman of his committee, and he caused to be published in the Mail a few days later the following letter explaining the position, which was the alleged contempt of court :—

To the Editor of the Mail.

SIR,—The many friends of Mr. W. H. Howland must have been gratified (as doubtless he was himself) as well by your timely and heartily expressed suggestion that he should now be returned by acclamation, as by your appropriate remarks on the conduct of those who have been stirring up this litigation. There is one remark, however, which I must ask your indulgence to refer to and explain.

You say Mr. Howland made a bad blunder in running without a proper qualification. It was perhaps natural to assume this on the supposition that the law was correctly expounded last Tuesday. We contend it was not so, but will speak of that hereafter. Mr. Howland's advisers, however, had to take the law as they found it. How then did it stand before the election ?

1. Ever since we have had municipal institutions it has been

(1) 14 Ont. App. R. 184. (2) 11 O. R. 633.

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assumed that a husband properly rated, and whose wife has the necessary property, had the right to vote and qualify in respect of that property. The generally received and acted upon opinion was that the property had under such circumstances the right to representation, and that this right was in the husband. The whole country has acted on this view, and the right has never been questioned until now. It might have been brought up at any time since the Married Woman's Act of 1859, but was not.

2. Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the Howland case. This decision has never been over-ruled, is consistent with common sense, and with the universally accepted opinion on the subject.

Under these circumstances the counsel who advised Mr. Howland that his qualification was sufficient were amply justified in so doing. They did so advise Mr. Howland plainly and distinctly when asked by him. If they were wrong surely the blame should rest on them, and not on the person who had been unhesitatingly advised that he had the qualification required by law.

You may naturally ask: Why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law. But the legislature on both sides of the House, on the matter being presented, at once admitted that the interpretation of Chief Justice Richards was correct and according to the original intention of the legislature, and thereupon declared that to be the case, and removed the apparent difficulty. This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of relying upon a reversal of the late judgment by a higher authority, has determined to go at once to the people, encouraged thereto partly by your own manly utterance on the subject, and by the universal expressions of sympathy and support which he has received.

It may be necessary as a question of costs to appeal from the recent judgment, but that does not now effect the question before the electors.

Yours, etc.,

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Before the publication of this letter the legislature of Ontario, then in session, passed an act declaring the qualification claimed by Howland (one in respect to his wife's property) to be sufficient for the purpose of the election and Howland was again a candidate for the mayoralty; and the intention of this letter was alleged by O'Brien, in the proceedings for contempt, to be to do away with the effect on the electors of the Mail's editorial. After the passing of this declaratory act the solicitors of Mr. Howland in the *quo warranto* proceedings gave notice of abandonment of the appeal which they had contemplated from the judgment of the master.

Subsequent to the service of this notice of abandonment application was made in the *quo warranto* suit to the divisional court for an attachment against O'Brien for contempt of court for publishing the above letter, and he was adjudged guilty of such contempt and ordered to pay the costs of the application to the informant in the suit, the order of the court stating that as no prejudice could then result to the informant from the letter no punishment would be inflicted. This decision was confirmed by the court of appeal, and from the judgment of the latter court this appeal was brought to the Supreme Court of Canada.

Bain Q.C., for the respondent, objects to the hearing of this appeal for want of jurisdiction. *Ashworth* v. *Outram* (1); *McDermott's case* (2); *Jarmain* v. *Chatterton* (3); *Rainy* v. *The Justices of Sierra Leone* (4). See also R. S. C. ch. 135, sec. 27.

S. H. Blake Q. C. for the appellant. This is not the exercise of a judicial discretion unless every judgment of a court is such. *Witt* v. *Corcoran* (5); *Ashworth*

(1) 5 Ch. D. 943.
(2) L. R. 2 P. C. 341.
(3) 20 Ch. D. 493.
(4) 8 Moo. P.C. 54.
(5) 2 Ch. D. 69.

v. *Outram* (1); *Jarmain* v. *Chatterton* (2); *Re Johnson* (3); *Re Wallace* (4); *Re William Arrandale* (5) are cases in which the courts in England entertained appeals in matters of contempt.

The proceedings in the original suit being at an end the informant had no right to make this application; *Metzler* v. *Gounod* (6).

There was no contempt of court in the appellant's letter. *Plating Co.* v. *Farquharson* (7); *Dallas* v. *Ledger* (8).

The master had no jurisdiction to hear the matter as it was connected with an election. *Reg.* v. *Duncan* (9).

The learned counsel referred also to *Lechmere Charlton's case* (10); *Lincoln Election Case* (11); *Reg.* v. *Wilkinson* (12).

Bain Q. C. for the respondent. The proceedings in the original suit could not be abandoned without the order of the court. *Ex parte Turner* (13).

See also *Tichborne* v. *Mostyn* (14); *Daw* v. *Eley* (15).

The order is simply one for payment of costs for which an appeal will not lie.

SIR W. J. RITCHIE C. J.—I am of opinion that the appeal should be allowed with costs.

STRONG J.—In January, 1886, Mr. William Henry Howland was, by a large majority of votes, elected Mayor of Toronto. On the 18th February, 1886, the respondent in the present appeal, Mr. Frederic Felitz, as relator, instituted proceedings in the nature of a

(1) 5 Ch. D. 943.
(2) 20 Ch. D. 493.
(3) 20 Q. B. D. 68.
(4) L. R. 1 P. C. 283.
(5) 3 Moo. P. C. 414.
(6) 30 L. T. N. S. 264.
(7) 17 Ch. D. 49.
(8) 4 Times L. R. 432.
(9) 11 Ont. P. R. 379.
(10) 2 Mylne & C. 339.
(11) 2 Ont. App. R. 353.
(12) 41 U. C. Q. B. 42 at p. 107.
(13) 3 Mont. D. & D. 523 at p. 544.
(14) L. R. 7 Eq. 55 n.
(15) L. R. 7 Eq. 49.

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quo warranto against Mr. Howland to set aside the election upon the ground of want of qualification. This *quo warranto* afterwards, and on the 20th of March, 1886, came on to be heard before the master in chambers who, on the 23rd of March, delivered judgment unseating Mr. Howland. On the 26th of March, 1886, the defendant gave notice of appeal against the judgment of the master to a judge in chambers. On the 29th of March the defendant served the solicitors of the relator with a notice that the notice of appeal previously served was withdrawn and that the appeal was abandoned. On the same 29th of March, 1886, the relator in the *quo warranto* proceeding, the present respondent, Frederic Felitz, served the appellant, Henry O'Brien, Esq., who had acted as solicitor for Mr. Howland in the proceedings to set aside the election and who had also been one of his principal supporters in the contest, with a notice of motion to commit him for contempt of court. This notice of motion was as follows:—

Take notice, that by special leave granted by His Lordship the Chancellor, this court will be moved on behalf of the above named Frederic Felitz on Thursday the 1st day of April, 1886, at the hour of eleven o'clock in the forenoon, or so soon thereafter as counsel can be heard, for an order to commit Henry O'Brien, of the City of Toronto, Esq., solicitor for the above named William H. Howland in this cause, to the common gaol of the county in which he may be found, on the ground that the said Henry O'Brien while such solicitor and while the proceedings in this cause are still pending has been guilty of contempt of this court and for his said contempt of court in writing and publishing and procuring to be published in the issue of the Toronto Daily Mail of Saturday the 27th March, 1886, a letter addressed to the editor of the Mail, with the heading "The Mayor's position explained" and signed "Henry O'Brien".

And that all necessary attachments may be issued for that purpose and for an order that the said Henry O'Brien do pay the costs of this application, or for such other order as to the said court may seem just.

And take notice that on such application will be read the affidavits

of Frederic Felitz and Christopher William Bunting this day filed, and exhibits therein referred to, together with papers and proceedings taken herein.

Dated this 29th day of March, 1886.

Yours, &c.

BAIN, LAIDLAW & Co.

Solicitors for relator.

To Henry O'Brien.

Barrister, Toronto, and to Messrs. Robinson & O'Brien, Solicitors for W. H. Howland.

The notice of countermand of the notice of appeal was accompanied by a letter written and addressed by Messrs. Robinson & O'Brien, the solicitors for Mr. Howland, to the respondent's solicitors, which was as follows:—

68 Church Street, Toronto, March 29th, 1886.

Messrs. BAIN & LAIDLAW, Toronto.

DEAR SIRS,—We have served on you a notice of abandonment of the motion for appeal from Mr. Dalton's judgment herein. It was only given as a matter of form to preserve the right of appeal (if any) as the counsel who were advising in this matter were out of town; but as Mr. Howland has decided (as already publicly announced) his intention not to appeal, but to go again before the electors, and as the question of costs is unimportant, the appeal is now formally abandoned, as the thought of appealing was in effect abandoned when Mr. Howland made his announcement that he would run again.

Yours truly,

ROBINSON & O'BRIEN.

The 15th paragraph of the affidavit filed by the appellant in answer to the notice to commit was in the following words:—

15. That the notice of motion to commit me in this matter was not served until after I had written the letter now shown to me marked with the letter "D" and the notice of abandonment now shown to me and marked with the letter "C" and after such notice had been actually delivered to the solicitors for the applicant in this matter.

The letter "D" here referred to was the letter before set out.

This statement contained in the 15th paragraph of the affidavit is not in any way contradicted.

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It appears from the affidavits filed by the appellant that the publication complained of as a contempt was induced by, and was written and published for, the purpose of explaining an editorial paragraph which appeared in the Mail newspaper of the 24th March. This paragraph was as follows :—

THE MAYORALTY.

It is eminently proper that the occupant of the mayor's chair should be duly qualified according to the requirements of the act; and without doubt Mr. Howland has made a bad blunder in running for the position last January without having the necessary qualifications. Nevertheless there is reason to fear that the suit which terminated yesterday in his being unseated was brought and carried on more for the purpose of tormenting him and putting him to expense than of vindicating the law. What course Mr. Howland intends to pursue we do not know, but there should be no trouble in securing his re-election by acclamation. It is due to him and to the people who chose him for the chief magistracy that no obstacle should be placed in the way of his return.

The letter complained of as being a contempt was, as Mr. O'Brien swears, written on the 26th of March, before the notice of appeal was served, and was published in the Mail newspaper on the 27th of March. It is set forth *in extenso* in the order made on the motion to commit and is in the following words :—

To the Editor of the Mail.

SIR,—The many friends of Mr. W. H. Howland must have been gratified (as doubtless he was himself) as well by your timely and heartily expressed suggestion that he should now be returned by acclamation, as by your appropriate remarks on the conduct of those who have been stirring up this litigation. There is one remark, however, which I must ask your indulgence to refer to and explain.

You say Mr. Howland made a bad blunder in running without a proper qualification. It was perhaps natural to assume this on the supposition that the law was correctly expounded last Tuesday. We contend it was not so, but will speak of that hereafter. Mr. Howland's advisers, however, had to take the law as they found it. How then did it stand before the election ?

1. Ever since we have had municipal institutions it has been assumed that a husband properly rated, and whose wife has the necessary

property, had the right to vote and qualify in respect to that property. The generally received and acted upon opinion was that the property had under such circumstances the right to representation and that this right was in the husband. The whole country has acted on this view, and the right has never been questioned until now. It might have brought up at any time since the Married Woman's Act of 1859 but was not.

2. Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the Howland case. This decision has never been over-ruled, is consistent with common sense and with the universally accepted opinion on the subject.

Under these circumstances the counsel who advised Mr. Howland that his qualification was sufficient were amply justified in so doing. They did so advise Mr. Howland plainly and distinctly when asked by him. If they were wrong surely the blame should rest on them, and not on the person who had been unhesitatingly advised that he had the qualification required by law.

You may naturally ask, why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law. But the legislature on both sides of the House, on the matter being presented, at once admitted that the interpretation of Chief Justice Richards was correct and according to the original intention of the legislature, and thereupon declared that to be the case and removed the apparent difficulty. This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of relying upon a reversal of the late judgment by a higher authority, has determined to go at once to the people, encouraged thereto partly by your own manly utterance on the subject, and by the universal expressions of sympathy and support which he has received.

It may be necessary as a question of costs to appeal from the recent judgment, but that does not now affect the question now before the electors.

Yours, etc.,

HENRY O'BRIEN.

Toronto, 26th March.

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The motion to commit came on to be heard before Mr. Justice Proudfoot on the 13th of April, 1886, and on the 28th of April the learned judge pronounced judgment adjudging the publication of the letter complained of to be a contempt and ordering the appellant to pay the costs of the application. The formal order drawn up was as follows:—

This court finds that the writing and publishing of the letter aforesaid by the said Henry O'Brien was, under the circumstances under which it was written and published, a contempt of this court. But this court having regard to the circumstances appearing in the affidavits, and being of opinion that no prejudice can now result to the relator from the publication of the said letter, doth not see fit to make any order save that the said Henry O'Brien do forthwith pay to the said relator his costs of this application to be taxed.

From this order Mr. O'Brien appealed to the Court of Appeal for Ontario. This court (which was constituted of four judges, viz: the Chief Justice of Ontario and Burton, Patterson and Ferguson JJ.) by a majority of three judges to one affirmed the order of Mr. Justice Proudfoot and dismissed the appeal, the dissenting judge being Mr. Justice Burton. Mr. O'Brien then appealed to this court.

The first question we have to decide is that raised by the respondent as to the jurisdiction of this court to entertain the appeal. This objection presents no difficulty in view of the decisions upon the question of jurisdiction which have already been pronounced here. I am clearly of opinion that we have jurisdiction to entertain the appeal, not only under section 24 sub-section (*a*) of the Supreme and Exchequer Courts Act (R.S.C. cap. 135) but also under sub-section (1) of section 26 of the same act. The Court of Appeal is the highest court of final resort in the Province of Ontario, and the judgment appealed from is a final judgment according to decisions which the court is bound to follow. Further, if it is not a final judgment in "an

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action or suit" it is nevertheless a final judgment "in a matter or other judicial proceeding" within the meaning which decided cases have attached to those words as used in section 26 sub-section (1).

I refer to the following authorities as conclusive against the objection, viz., *Wallace* v. *Bossom* (1): *Wilkins* v. *Geddes* (2); *Lenoir* v. *Ritchie* (3); *Chevalier* v. *Cuvillier* (4); *Shields* v. *Peak* (5): *Shaw* v. *St. Louis* (6); *McKinnon* v. *Kerouack* (7); *Whiting* v. *Hovey* (8).

That the order in question contains an adjudication that the appellant had been guilty of contempt although the word "adjudged" is not used is, I think, too clear to require any observation. The expression "the court finds" is amply sufficient to meet all the requirements as to an adjudication pointed out as regularly essential by Lord Lyndhurst, Chancellor, in *Ex parte Sandau* (9); and I find the equivalent, or perhaps the less distinct, expression of an adjudication "this court is of opinion" in common use in the precedents given in Seton.

Then, it is said that this is merely an appeal on a question of costs. This objection also appears to be wholly untenable. The proceeding to commit for contempt is of a penal and quasi-criminal character. The order complained of contains, in the first place, a distinct adjudication that the appellant has been guilty of a contempt of court, and it then proceeds (waiving other punishment) to inflict what is in substance, if not in form, a penalty or punishment by ordering the appellant to pay the costs. The adjudication that the appellant, a solicitor and officer of the

(1) 2 Can. S. C. R. 488.
(2) 3 Can. S. C. R. 203.
(3) 3 Can. S. C. R. 575.
(4) 4 Can. S. C. R. 605.
(5) 8 Can. S. C. R. 579.
(6) 8 Can. S. C. R. 385.
(7) 8 C. L. J. 36.
(8) 14 Can. S. C. R. 515.
(9) 1 Ph. 605.

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court and moved against in that quality, has been guilty of a contempt is, by itself, an appealable judgment and would have been so even if it had not (as in fact, however it has) been followed by sentence. As Mr. Blake forcibly urged the order under appeal affixes to the appellant, as a professional man, a stigma from which he is entitled to be relieved if he has been found guilty upon insufficient evidence or for insufficient reasons.

Again, by ordering him to pay costs as a consequence of this conviction the court inflicts upon the appellant a punishment which, if not so in name and form is yet in substance and effect, a fine for his contempt. There can be no analogy between an appeal from such an order as this and one from a decree or order in an ordinary case relating to property or private rights which is confined to an adjudication as to costs to be paid by one party to the other.

The authorities to this effect are clear and entirely support what is said on this head in the judgment of Mr. Justice Burton in the court below.

Having thus disposed of the preliminary objections which were raised at the hearing of the appeal we may now proceed to consider the case upon its merits.

Contempts of a court of justice being a court of record, other than those committed in its presence (*sedente curiâ*), have received the name of constructive contempts and may be classed under two entirely distinct and very different heads. In the first place it is held to be a contempt to interfere with the due course of justice by publishing comments or criticisms on pending litigation which may have the effect of influencing the minds of those who will be called upon to decide either upon the facts or the law, jurors or judges, and thus cause prejudice to either of the suitors whose rights are in controversy. Such contempts are, when pro-

ceedings are taken to punish them and restrain their repetition, always in practice brought under the notice of the court by the litigant who considers himself aggrieved by the publication or comment, and the order made usually extends to prohibit a repetition of the offences as well as to punish for the past contempt. In cases of this kind, provided the litigation is still pending, the suitor complaining is considered as having a *locus standi* to institute the proceedings and is recognized by the courts, at least in cases of private litigation, as the proper person to prosecute the proceedings for the contempt. As Mr. Justice Burton has pointed out in his very clear and able judgment, it was a contempt of this class which was complained of by the respondent. The notice of motion indicates this very plainly. The motion of which notice was given was for the committal of the appellant on the ground that he, while solicitor for Mr. Howland and while the proceedings in the cause were still pending, had been guilty of contempt in writing and publishing and procuring to be published in the "Toronto Daily Mail" of Saturday the 27th day of March, 1886, a letter addressed to the editor of the Mail.

It is plain, therefore, that what the respondent complained of was not the contents of the letter *per se*, but the publication of it "while the proceedings in the cause were still pending". This, if the respondent brought himself within the proper conditions, was a matter which he had a sufficient *locus standi* to complain of. There is, however, nothing in the notice of motion from which it is to be inferred that the motion which the respondent proposed to make was not as a party interested and on his own behalf but merely as a champion of public justice, and by way of asserting the dignity of the court by calling for the punishment of a person who had been guilty of contempt in publishing a libel on

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one of its officers, a matter in which the respondent had no greater interest than any other of Her Majesty's subjects. As I shall show hereafter the respondent had no qualification entitling him to constitute himself the prosecutor of a contempt of this latter kind.

Then regarded as a contempt of the first class before defined, that is as one calculated to prejudice the interest of the respondent in litigation in which he was then engaged and which was actually in progress, our first inquiry must be: Was the respondent at the time he served the notice of motion and made the motion to commit in a position which entitled him to the recognition of the court for such a purpose? Before considering this it is important to recall certain dates already mentioned. The master's judgment unseating the mayor was pronounced on the 23rd of March, and the letter which is the subject of complaint was written on the 27th of the same month. Now it is obvious that if no step in the cause had been taken between these two dates, the 23rd and 27th, there would have been no litigation pending which could have been prejudiced by the letter to the newspaper, and consequently the respondent would not have been in a position to complain of that communication as a contempt of court. The master's judgment was final and conclusive unless appealed against within the time limited by statute. If no notice of appeal had been given the case would, on the 29th of March when notice of motion was served, have stood in exactly the same position as an ordinary action at law which had been tried by a jury, and in which the time for moving against the verdict had not expired. On the 26th of March, however, notice of appeal was served. The appellant in the affidavit which he filed in answer to the motion to commit states the reason for serving this notice of appeal to have been that the counsel by whom

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he was advised was absent from Toronto, and being in doubt what to do he gave the notice of appeal, on the last day for so doing, as a matter of precaution and with the intention of abandoning the appeal if it should appear in consultation with counsel that Mr. Howland was qualified to be a candidate under the new act passed by the legislature subsequent to the judgment. All this, however, appears to be quite immaterial. We have the indisputable fact that from the 26th until the morning of the 29th March an appeal was pending. On the 29th, however, and before the notice of motion to commit the appellant was served, a notice countermanding the notice of appeal, and distinctly abandoning it, was delivered to the respondent's solicitors accompanied by the letter from Mr. O'Brien before set out, and which also states that the appeal was abandoned and further gives the reason I have already mentioned as that which had induced the appellant to serve the notice of appeal. It is to be especially observed that this notice and letter were actually served and delivered before the contempt proceedings were initiated by the serving of the notice of motion to commit. The effect of this abandonment of the appeal was, of course, not merely to restore the proceedings to the state they were in prior to the notice of appeal being served, but to preclude all right to appeal and to make the master's judgment from that time absolutely conclusive, and thus finally to terminate the litigation. The case is, therefore, stronger than that of a party, who had obtained a verdict the time for moving against which had not expired, complaining of a publication calculated to interfere with his rights. In the latter case the proceedings might be said to be, in a sense, still pending though dormant for the time, since it would be still within the power of the party against whom the verdict had been found to move for

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a new trial, but here after the notice waiving the appeal the proceedings were finally closed and disposed of in favor of the respondent.

The case of *Dallas* v. *Ledger*, which I have not seen reported anywhere but in the Times Law Reports for the 27th of March, 1888, appears to have been a much stronger case than this, a rule for a new trial having been actually pending, but it was there held by a Divisional Court composed of Mr. Justice Stephen and Mr. Justice Field that an article published by the defendant criticising the verdict and the conduct of the jury generally, in very strong and uncourteous language, was not such an interference with the course of justice as warranted the court in granting a rule *nisi* calling upon the defendant to answer as for a contempt. The learned judges who decided that case must have thought that the article would have been wholly innocuous as regarded the application for a new trial and, indeed, Mr. Justice Stephen points out that it was only material in the contingent event of a new trial being granted, and the case being brought before another jury. In the present case, if the appeal had gone on it is impossible to suppose that this article, having no reference to facts or evidence but to a dry question of law, could have had the slightest influence on the judge in chambers before whom it might have come on appeal. Moreover, when the notice of motion was served all proceedings by way of appeal had been abandoned so that, as I hold, agreeing in that respect entirely with Mr. Justice Burton in the Court of Appeal, the respondent had no *locus standi* entitling him to make the motion which he did treating the letter as a contempt as having a tendency to exercise an undue influence over the regular course of justice, inasmuch as all proceedings had reached a final termination.

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Agreeing again with Mr. Justice Burton I do not think we are called upon to consider whether this letter was a contempt included in another class of such offences against the administration of justice, namely, as containing injurious reflections upon a judicial officer of the court. The respondent has, manifestly, not based his motion on any such ground, and even if he had the matter was one with which he was not concerned if I am right in holding that the proceedings in the *quo warranto* case had terminated, but it was for the court on the publication being brought to its notice, if it considered the letter a contempt, to have interfered *ex officio* and to have itself instituted proceedings calling the appellant to account for his contumacious conduct. Further, I may add that although I admit the letter might have been more courteously worded I, at present, fail to see that it exceeded the bounds of that fair criticism upon the public administration of justice which every one is entitled to write and publish. That the writer was inaccurate in his law, as he manifestly was, for it is beyond doubt that the decision of the learned master was perfectly correct, can make no difference provided his remarks were made in good faith, and that they were so made appears, I think, from the fact that the letter complained of was not a spontaneous communication to the "Mail" by Mr. O'Brien but was an answer to, and was elicited by, certain editorial comments on the mayoralty case contained in a preceding number of the same newspaper. The observations which are said to constitute a contempt have reference, not to facts but exclusively to questions of law. The letter certainly does allege that the learned master had pronounced an erroneous decision, but it does not contain any imputation that such alleged error proceeded from

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any improper motive. The most that can be said against Mr. O'Brien is that in this letter he erroneously stated that Chief Justice Richards had decided the same point of law in a different way from that in which the master had determined it in the mayor's case and, further, that the master's decision was wrong in law. Although I altogether differ from Mr. O'Brien's views of the law I cannot say that in publishing these criticisms under the circumstances stated in his affidavit he was guilty of any contempt of court.

I am of opinion that the appeal must be allowed with costs to the appellant in all the courts.

FOURNIER J. was also of opinion that the appeal should be allowed for the reasons given by Gwynne J.

TASCHEREAU J.—I am not prepared to assent to, or dissent from, the judgment about to be entered. I was doubtful as to our jurisdiction and as to the right of appeal under the Supreme Court Act and more especially under section 27 thereof. I will not, however, unnecessarily delay the judgment. I hope that Parliament will interfere and protect the dignity of the provincial courts by making their decisions in matters of contempt final.

GWYNNE J.—In *McDermott* v. *The Judges of British Guiana* (1), there was no question as to whether or not the publication complained of constituted a contempt of court, and all that the judicial committee there say is :—

Not a single case is to be found where there has been a committal by one of the colonial courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this

(1) L. R. 2 P. C. 363.

committee has ever entertained an appeal against an order of this description.

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But this practice of the judicial committee of the Privy Council, however invariable it be, has no bearing upon the question before us, which is whether or not an appeal lies by law to this court in the present case, a question which must be determined by the statute constituting the court. It may be admitted that an order convicting a party of contempt of court committed in *facie curiæ* may be so drawn as to leave nothing which could be open upon an appeal, and so to exclude an appeal, but in the present case the publication complained of as a contempt of court is set out at large in the order that is appealed from, and a question is raised as to the proper construction to be put upon that publication and whether under the circumstances appearing in the case that publication can in point of law be held to have been a contempt of court.

Now, that an appeal lies in the present case in virtue of the express provisions of the Supreme and Exchequer Courts Act, ch. 135 of the Revised Statutes of Canada, there can be no doubt unless it is excluded by the 27th section of that act which enacts 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.

The contention that an order of a court pronouncing a publication to contain matter which constitutes it a contempt of court, and adjudging the party convicted of such contempt to pay costs to the suitor who made the application to commit the party for such contempt, is an order so made in the exercise of the judicial discretion of the court as to take from the party against whom it is made all right to appeal from it cannot, in my opinion, be for a moment entertained. Whether

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matter published out of court constitutes a contempt of court may involve a question whether it constitutes a defamatory libel upon a judge or other officer of the court, or a question whether it can properly be construed to interfere with the due administration of justice in some pending proceeding, or to be calculated to influence the result of the pending proceedings, which questions of law and fact must need be determined before the accused could be convicted of the offence of contempt of court. Now, whether matter published out of court be or be not a libel upon the court or upon some judge or other officer thereof, or whether it could or not interfere with the due administration of justice in any particular pending proceeding, can never be said to rest in the unquestionable discretion of the court before which a motion for an order to commit is made and to be free from all appeal to a higher tribunal calling in question the correctness of the decision of the court upon its construction and view of the matter published. That the matter published in the present case did not, under the circumstances appearing in the case, justify an adjudication that it constituted a contempt of court was, and still is, the point in issue, and that is an issue which, for its determination, called for a judgment, not rendered in the exercise of an arbitrary discretion of the court to which the question of law was submitted, but rendered in accordance with the principles of law and justice equally as any other point of law in any action, suit or judicial proceeding is submitted, and so equally subject to revision on appeal. The 27th section of the act relates, in my opinion, to matters which the court or a judge may at its or his pleasure decide indifferently one way or the other and not to a matter submitted to judicial enquiry and adjudication as the principles of law and a proper construction of the facts involved

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in the case require. In *Daw* v. *Eley* (1) a motion was made to commit a solicitor, as in the present case, for contempt of court in writing for publication letters tending to influence the result of the suit for one of the parties to which he was solicitor, and Lord Romilly, Master of the Rolls, before whom the motion was made, while adjudicating that the solicitor was guilty of contempt of court in writing the letters, directed that the order should not be enforced for a fortnight for the express purpose of enabling the solicitor to appeal. In *Witt* v. *Corcoran* (2), an order declaring that defendant had committed a breach of an "injunction," but giving no directions except that the defendant should pay the costs of an application to commit him, was appealed against, and it was contended for the plaintiff that no appeal lay for that the order was merely for the payment of costs and that the act under which proceedings were taken provided that there should be no appeal for costs where they are in the discretion of the court, but Lord Justice James giving judgment that an appeal lay, says:—

> There is no discretion as to whether a man has or has not been guilty of something alleged against him. The defendant says he has been guilty of nothing, and if the court had been of that opinion it could not have ordered him to pay the costs any more than it could dismiss a bill and order the defendant to pay the costs of the suit. The court has made an adjudication and as a consequence of that adjudication has ordered the defendant to pay the costs. If the court had thought that no contempt had been committed it could not have ordered the defendant to pay the costs. The defendant must have a right to appeal against the adjudication.

In *Jarmain* v. *Chatterton* (3) an appeal was taken from an order refusing to commit a party for an alleged contempt of court and directing the applicant

(1) L. R. 7 Eq. 49.
(2) 2 Ch. D. 69.
(3) 20 Ch. D. 493.

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for the order of commitment to pay the costs of the application, and it was contended upon the authority of *Ashworth* v. *Outram* (1) that an application to commit for contempt is a matter in the discretion of the judge and that no appeal lay from his refusal to commit, but the Master of the Rolls giving judgment, said :

> It is clear that Lord Justice James never intended in *Ashworth* v. *Outram* to lay down a new rule, and that his words must mean that in the circumstances of that case there was no appeal. The case of *Ashworth* v. *Outram* is not in our way here where a question of right is discussed—where the defendants are asserting that the plaintiffs have no right to what they claim.

And Lord Justice Brett, in the same case, explains *Ashworth* v *Outram* :

> As being a case in which there was no dispute as to the meaning of the order said to have been disobeyed—no dispute as to whether it had been disobeyed or not—but the Vice Chancellor in the circumstances of the case came to the conclusion that he should exercise his discretion indulgently, that is, he merely made the costs of the motion costs in the cause, and there was no appeal as to his construction of the agreement, the appeal was confined to the mode of enforcing an order, and was simply from the discretion of the court ; and the court of appeal said that when an appeal is simply on this ground although the court has jurisdiction on so delicate a matter it will not exercise it ; here the meaning of the order is in dispute, and a considerable question arises whether the Vice Chancellor did not interpret the order in a different way from that in which this court has construed it.

So in the case now before us the questions were and are as to the proper construction of the letter which is charged to have been a contempt of court ; and whether under the circumstances appearing in the case the order of the court below adjudging its publication to have been a contempt of court, and ordering the solicitor of the defendant in the *quo warranto* proceeding to pay to the relator in that proceeding the cost of his application to commit was a proper order to have been

(1) 5 Ch. D. 943.

made, and these are questions that, in my opinion, are proper questions to be submitted to this court by way of appeal from such order.

It is impossible I think to read the case as it is reported in 11th O. R. 633, under the title *Regina ex relatione Felitz* v. *Howland in re O'Brien*, without perceiving that the application to commit O'Brien the solicitor of the defendant Howland for contempt of court in writing and causing to be published the letter in question was made by the relator in the *quo warranto* proceeding instituted by him against the defendant Howland as a matter of right claimed to be vested in him as a suitor in that proceeding, and on the ground that the publication of the letter was, as was contended on his behalf, calculated to prejudice his case, and to interfere with the due administration of justice in the determination of and the adjudication in that proceeding, and that it was so entertained by the divisional court in which the application was made. The contention upon behalf of the relator was that although judgment had been rendered by the master in chambers in the *quo warranto* proceeding which was a final determination of the matter unless appealed from, yet that a notice of appeal from that judgment had been served upon the relator and that after such notice had been served the letter complained of was published and that, therefore, the *quo warranto* proceeding was still pending so as to leave vested in the relator a right to complain that the publication of the letter was calculated to prejudice his case and to interfere with the due administration of justice therein. The judgment of the master in chambers which adjudged that Mr. Howland, the defendant in the *quo warranto* proceeding, had not a legal qualification to warrant his being elected mayor of the City of Toronto was rendered on

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the 23rd March, 1886. On the 26th of March Mr. O'Brien, as solicitor of the defendant, gave a notice of appeal from that judgment. On the 27th March the letter complained of appeared in the Mail, a newspaper published in the city of Toronto. On the 29th of March notice of the abandonment of the appeal was served upon the relator's solicitor, and upon the same day but after the service of such notice the motion to commit was made. All these facts appeared in an affidavit made by Mr O'Brien in answer to the motion, in which affidavit he also stated that the letter complained of was written by way of answer to an article which appeared in the Mail newspaper on the 24th March, which was annexed to his affidavit, and he said that by reason of a statement in that article to the effect that Mr. Howland had made a bad blunder in running for mayor without a qualification, serious injury, as he was informed, was done to Mr. Howland's reputation as a public man and that he, Mr. O'Brien, held it to be his duty, being familiar with the matter, to explain his, Mr. Howland's, position, and he added that his sole object in writing the letter and the only thought in his mind was a desire to correct a misapprehension which had been raised in the public mind by the said article and by certain other statements of a like nature which were apparently intended to try and prevent Mr. Howland from again becoming a candidate as mayor of the city. He further stated in his said affidavit, that upon the 25th of March, after discussion among Mr. Howland's supporters, it was finally decided not to appeal from the judgment, and that instructions to that effect were given to him, and that an announcement of such decision was published in the newspapers that evening and the next morning, and he stated further to the effect that the notice of appeal served by him on the 26th March

was given by him merely as a precautionary measure, as the 26th was the last day upon which such notice could be served, and to keep the matter open until the decision of Mr. Howland and his supporters could be communicated to Mr. Howland's counsel who was then absent from Toronto. He stated further that he wrote the letter complained of on the morning of the 26th March before the notice of appeal was served, and that as it was only written for the purpose and under the circumstances aforesaid, namely, to answer the article published on the 24th March, it did not occur to him to withdraw it in view of any possible contention that the *quo warranto* proceedings could be said to be still pending, and further that when he wrote the letter he believed that his professional connection with the proceedings was in fact at an end, and that he wrote the letter simply as a citizen in the interests of the candidate he had supported at the last election, and intended to support again, and he added that as a matter of fact at such time no proceedings were pending in said *quo warranto* matter. The letter as published contained the following paragraph at the conclusion of an argument wherein he stated his reasons for thinking the judgment which had been rendered to be wrong in point of law :—

This being the case Mr. Howland has decided not to keep matters in abeyance by asking for a stay of proceedings pending appeal, and instead of reversing the late judgment by a higher authority has determined to go at once to the people, encouraged thereto partly by your own manly utterances on the subject, and by the universal expressions of sympathy and support which he has received. It may be necessary as a question of costs to appeal from the recent judgment, but that does not now affect the question before the electors.

The letter he subscribed with his own signature in disavowal of any intention of treating with disrespect the master in chambers who had rendered the judg-

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ment which the letter commented on. Mr. O'Brien's affidavit concluded as follows :—

While I am unable to conclude that in writing the said letter I offended against any rule of this honorable court, or any rule of professional etiquette, or was guilty of disrespect to the learned master, if it should be thought I, in any way, offended in these respects or if there are (unintended by me) any expressions which could in any way indicate that I thought the learned master had not acted with impartiality, I must unfeignedly say that I deeply regret them and desire to withdraw the said letter so far as the same are concerned.

Now the relator's counsel in supporting his motion insisted that the relator was not deprived of his right to make the motion and to press it by reason of notice of abandonment of the appeal having been served before the motion was made, for that the relator's position was to be considered as at the time the letter was published, and that he was entitled to insist upon his rights as they were then, and he contended that the tendency of the publication was to interfere with and to obstruct the due administration of justice in his *quo warranto* proceeding which by reason of the notice of appeal he contended was still pending at the time of the publication of the letter although it had ceased to be so when the motion was first made. In support of this contention he relied upon *Skipworth's Case* (1); *Tichborne* v. *Mostyn* (2); and *Daw* v. *Eley* (3) from which latter case he quoted the following passages as appears by the report of the case (4).

The principle is quite established in all these cases that no person must do anything with a view to pervert the sources of justice, or the proper flow of justice; in fact they ought not to make any publications or to write anything which would induce the court, or which might possibly induce the court or the jury, the tribunal that will have to try the matter to come to any conclusion other than that which is to be derived from the evidence in the cause between

(1) L. R. 9 Q. B. 230.
(2) L. R. 7 Eq. 55. N.
(3) L. R. 7 Eq. 59.
(4) 11 O. R. 635.

parties * * * (1) Gentlemen who are concerned for contending clients in this court, whether solicitor or counsel, should abstain entirely from the merits of these questions in public print.

The context in immediate connection with the last quotation is

> If they do it at all they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of the subject and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant and has the strongest possible interest in his success is, in my opinion, highly reprehensible.

Now all the above cases so relied upon were cases of flagrant attempts to taint and obstruct the due course of the flow of justice by scandalous vituperation of a judge before whom a case was shortly to be tried with a view to endeavoring to prevent his trying the case, and by interested representations of facts in such a manner as to endeavor to obtain a result of legal proceedings not yet tried different from that which should be derived from the evidence in the cause and different from what would follow in the ordinary course. It cannot therefore, I think, admit of a doubt that the motion was made simply in assertion of a legal right vested in the relator in the *quo warranto* proceeding to make it upon the ground that, as he contended, the publication complained of was calculated, and had an evident tendency, to affect the result of the *quo warranto* proceedings to the prejudice of the relator and thereby to obstruct and interfere with the due administration of justice in that proceeding; and that it was upon this ground that the motion was entertained and adjudicated on by the court appears, I think, from the terms of the order which was made upon the motion which, after stating that the motion was made by the relator, and setting out the letter at length, concludes as follows:

(1) L. R. 7 Eq. 61.

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The court finds that the writing and publishing of the letter aforesaid by the said Henry O'Brien was, under the circumstances under which it was written, and published, a contempt of court; but this court having regard to the circumstances appearing in the affidavits and being of opinion that no prejudice can now result to the relator from the publication of the said letter doth not see fit to make any order save that the said Henry O'Brien do forthwith pay to the said relator his costs of this application to be taxed.

The reason for the court arriving at the opinion which is stated in the order—that "no prejudice can now result to the relator" is shown to have been the abandonment of the appeal; so that it appears, I think, to be clear, not only that the motion was made, but that it was entertained and adjudicated upon by the court, as one which the relator as a suitor in a cause pending in court had a vested right in law to make, because of the prejudice to his suit by reason of the tendency which the publication of the letter had to obstruct the due administration of justice in the *quo warranto* proceeding instituted by him, and that it was because of the tendency so to prejudice the relator in the result of that proceeding that the court pronounced the publication to have been a contempt of court, and ordered Mr. O'Brien to pay to the relator the costs of his application. We may therefore, I think, confine ourselves to the consideration of the question whether the publication of the letter can properly be said to have had a tendency to obstruct the flow of justice and to interfere with its due administration to the prejudice of the result of the *quo warranto* proceeding instituted by the relator, and we are, as it appears to me, relieved from determining whether or not there is anything in the manner in which the judgment of the master in chambers is commented upon in the letter which can be said so to transgress the bounds of fair criticism as to justify the letter being adjudged to have been for that reason a contempt of court, for a

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Case (1)there was added to the above a scandalous vituperation of the Chief Justice, with a view to trying to prevent his presiding at the approaching trial, accusing him of having already prejudged the case, and an attack upon the witnesses with a view to prejudicing the trial.

In *Lechmere Charlton's* case (2) the contempt of court consisted in a barrister writing and sending to a master in chancery a letter which contained threats to induce him, in the absence of the opposite party to a matter in litigation before him, to alter the decision at which he was supposed to have arrived and to come to a conclusion favorable to the case advocated by the writer of the letter. In *Littler* v. *Thompson* (3) the publication complained of was an article in a newspaper which alleged that certain affidavits made in support of a motion by the plaintiff for an injunction contained glaring misrepresentations which the writer of the article declared that he believed and hoped would lead to an indictment for perjury. The article also reflected severely upon the conduct of the plaintiff and characterized the chancery proceedings instituted by him as vexatious and unprincipled. Lord Langdale, Master of the Rolls, held that the effect of the publication seemed to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. In *Daw* v. *Eley* (4) the publication complained of entered into a free discussion as to the merits of an invention the novelty and utility of which were the subject of litigation, and the writer spoke with great apparent authority upon the subject, professing to be familiar with all the facts bearing upon the case and to treat the subject as if he was a per-

(1) L. R. 9 Q. B. 230.
(2) 2 Mylne & C. 339.
(3) 2 Beav. 129.
(4) L. R. 7 Eq. 49.

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fectly independent stranger, whereas he was in truth the solicitor of one of the litigating parties whose position the article sustained. Lord Romilly, Master of the Rolls, giving judgment in this case says:—

> In this case the main question to be tried is the novelty of the plaintiff's invention.

Then after quoting largely from the article he adds:

> Can any body doubt that if I were persuaded that the whole of the statements in that letter were true, it would very seriously affect my opinion as to the solidity and originality of Mr. Daw's patent? Then it is to be observed that this is written not by a mere stranger, who might say that he really knew nothing about the cause, but it is written by the solicitor of the gentleman who is opposed to Mr. Daw in this suit; surely that is a very strong feature in the case. He must wish that his client should succeed, and I venture to say that there is no solicitor who would not in the same position feel the same thing, and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which if believed must have a beneficial effect upon his client, and afterwards say: "I had no intention of that sort at all however much I may wish for it." It must be regarded as an endeavor to interfere with the due administration of justice.

This is the case which was mainly relied upon by the relator in support of his motion, yet a case more different from the present it would be difficult to conceive. In all the cases care is taken to point out how the publication complained of in each was calculated to affect the result of a pending suit. Here nothing has been suggested having such a tendency.

There never was any fact whatever in issue. The sole question was one of law, namely. whether the property of the defendant's wife upon which the defenddant had qualified as mayor of the city of Toronto was a good qualification in point of law. The master in chambers rendered judgment that it was not. The matter never could be brought again before him. The point of law which was in litigation was finally determined by his judgment unless it should be reversed

judgment of a court of justice is open to fair comment and criticism which may call in question its soundness in point of law even though it be still open to revision upon appeal. This much, however, may, I think, be said of the letter, that whether the reasoning upon which the soundness of the learned master's judgment was impugned be sound or otherwise, and whether the authorities and references by which the writer essayed to support his argument when properly understood gave weight to his argument or had the contrary effect, the whole tenor of the letter nevertheless appeared upon its face to be, as it was intended to be, an argument calling in question a judgment delivered upon purely legal grounds, and that if a motion to commit the writer of the letter as guilty of contempt of court upon any public grounds, as that the letter contained a very calumnious vituperation or a personal attack upon the integrity of the judge, or as having a tendency to bring him or his judgments into contempt with the public, there could not have been found, I think, in modern times at least, any precedent for entertaining such an application upon such grounds upon like materials ; and certainly none of the authorities which were relied upon by the relator in the present case would have had any application in such a case.

Upon the question, then, as to the prejudice to the relator in the *quo warranto* proceeding instituted by him all the authorities are to the same effect, namely, that any publication, the object of which is, or the evident tendency of which is, though not intended, to bend and pervert the source of justice, or to disturb its free course, as to induce the tribunal having to try a matter in litigation to come to any decision other than that which is to be derived from the evidence in the cause between the parties, is a contempt of court which any suitor whose suit may be prejudiced by such

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publication has an undoubted legal right to bring under the notice of the court and to demand its adjudication thereon.

The matter which in *Tichborne* v. *Mostyn* and *Tichborne* v. *Tichborne* (1) was pronounced to be a contempt of court was an article in a newspaper pronouncing certain affidavits sworn by several persons upon behalf of the claimant in a cause pending in court, but which had not yet been laid before the court, to be in some particulars false, absurd, and worthless, and upon the strength of facts alleged within the knowledge of the writer commenting upon the plaintiff's case unfavorably, and that so freely that the solicitor of the plaintiff filed an affidavit in support of the motion, stating his belief that the article was likely to create a prejudice against the plaintiff and to prevent witnesses from making affidavits. The court then came to the conclusion that the comments in the article had a clear and distinct tendency to direct and sway the mind of the court and jury by whom the case was to be determined. *Onslow's* and *Whalley's Case* (2) was a case of a most open undisguised attempt to interfere with the result of a trial about to take place by prejudicing the minds of the public, from whom the jurors should have to come, by most inflammatory addresses at public meetings, charging several persons alleged to be related to the claimant in that suit of *Tichborne* v. *Tichborne*, (1) who was about to be put upon his trial for perjury committed by him in the suit, with having entered into a conspiracy to deprive him of his legal rights, well knowing him to be the person he represented himself to be and, as such, heir to the Tichborne estates, and endeavoring to influence the public mind in favor of the claimant upon his said approaching trial. While in *Skipworth's*

(1) L. R. 7 Eq. 55 n. (2) L. R. 9 Q. B. 219.

upon appeal, so that Mr. O'Brien's letter, which stated his reasons for thinking the qualification to be good, and the master's judgment to be erroneous, could in no conceivable manner prejudice the relator's case unless the matter of the letter could be construed to have a tendency to interfere with the due administration of justice in a court of appeal in the event of the master's judgment being brought before such a court by appeal; a suggestion that it could have such a tendency as offering by implication a grave insult to that court would seem to partake of a contempt of court more than any thing in the letter complained of, which, as a legal argument, appears to have been, in the opinion of the Court of Appeal for Ontario, exceedingly weak, defective and inconclusive, but whether the argument be weak or strong, the suggestion that this argument, stamped as it was with the infirmity that it expressed merely the legal opinion of the solicitor of the party against whose contention the judgment had been rendered, might have a tendency to taint, obstruct or interfere with the due administration of justice in the court of appeal in the event of the matter being brought before that court is a preposterous proposition for which there is no foundation, and in my opinion it cannot be and should not have been entertained. That it could have no such tendency after abandonment of the appeal of which notice had been served is admitted on the face of the order which is the subject of the present appeal; but if for that reason the letter was innocuous when judgment was given upon the application to commit, it was equally innocuous when the motion was made, for the notice of abandonment had then already been served so that the relator was then deprived of the ground upon which alone he invoked and persistently pressed for the interference of the court, and so the

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language of the Court of Appeal in England in *Plating Co.* v. *Farquharson* (1) becomes most appropriate in the determination of the present case. Lord Justice Cotton there says, with the full concurrence of the Master of the Rolls :—

> Where there is no case for a committal the party moving ought to have no costs to his motion.

And Lord Justice James says :

> That in such cases he would not only not give the party moving his costs, but should be inclined to make him pay costs.

These motions he thought to be a contempt of court in themselves, because they tend to waste the public time.

Now when the relator made the motion in the present case which he subsequently insisted upon, he well knew that he could suffer no possible prejudice from the letter complained of ; the motion therefore was made and persisted in by him vexatiously, in my judgment, and without reasonable cause. I think, therefore, that this appeal should be allowed with costs, and that the order of the Chancery Divisional Court of the Supreme Court of Justice for Ontario now appealed from should be ordered to be discharged and an order in its place be ordered to be issued out of that court refusing the relator's motion with costs.

Appeal allowed with costs.

Solicitors for appellant : *Robinson & O'Brien.*

Solicitors for respondent : *Bain, Laidlaw & Co.*

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(1) 17 Ch. D. 56.