REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

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JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

The Honorable WILLIAM JOHNSTONE RITCHIE, C.J.

" " SAMUEL HENRY STRONG, J.

" " TÉLÉSPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZÉAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable JAMES MACDONALD, Q. C.

ERRATA.

Page	*Line*	*For*	*Read*
176	note	F. & G.	F. & F.
209	last line	Ch. 18.	Ch. 13.
444	note (4)	519.	578.

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OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

C.

D.

CONTROVERTED ELECTION OF THE COUNTY OF MONTMORENCY.

1879
*June 9.
*Oct. 28.

P. V. VALIN.....APPELLANT;

AND

JEAN LANGLOIS.....RESPONDENT.

Dominion Parliament, plenary powers of legislation of—The Dominion Controverted Elections Act, 1874—*Jurisdiction of Provincial Superior Courts—Power of Dominion Parliament to alter or add to civil rights—Procedure—British North America Act, secs.* 18, 41, 91, *sub-secs.* 13 *&* 14 *of sec.* 92, *and secs.* 101 *&* 129—*Dominion Court.*

The Dominion Parliament, by "*The Dominion Controverted Elections Act*, 1874," imposed on the Provincial Superior Courts and the Judges thereof the duty of trying controverted elections of members of the House of Commons.

After the General Election of 1878, the Respondent fyled an election petition in the Superior Court for *Lower Canada* against the return of the Appellant as the duly elected member for the electoral district of *Montmorency* for the House of Commons. The Appellant objected to the jurisdiction of the Court, held by *Meredith*, C. J., on the ground that "*The Dominion Controverted Elections Act*, 1874," was *ultra vires*.

Held, affirming the judgment of *Meredith*, C. J., 1st. That "*The Dominion Controverted Elections Act*, 1874," is not *ultra vires* of the Dominion Parliament, and whether the Act established a Dominion Court or not, the Dominion Parliament had a perfect right to give to the Superior Courts of the respective Provinces and the Judges thereof the power, and impose upon them the duty, of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.; Strong, J., though present at the argument, was absent from illness when judgment was delivered.

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and established Courts to discharge the duties assigned to them by that Act, in any particular invade the rights of the Local Legislatures.

2. That upon the abandonment by the House of Commons of the jurisdiction exercised over controverted elections, without express legislation thereon, the power of dealing therewith would fall, *ipso facto*, within the jurisdiction of the Superior Courts of the Provinces by virtue of the inherent original jurisdiction of such Courts over civil rights.

3. That the Dominion Parliament has the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada*.

4. That the exclusive power of legislation given to Provincial Legislatures by sub-sec. 14 of sec. 92 *B. N. A. Act* over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures.

5. Per *Ritchie*, C. J., and *Taschereau* and *Gwynne*, J. J., that "*The Dominion Controverted Election Act*, 1874," established, as the Act of 1873 did, as respects elections, a Dominion Court.

APPEAL from a judgment rendered by *Meredith*, C. J., (1) in the Superior Court for *Lower Canada*, District of *Quebec*, dismissing the preliminary objections of the Appellant to an election petition brought by the Respondent under the *Dominion Controverted Elections Act*, 1874, against the return of the Appellant, as member of the House of Commons for the electoral District of *Montmorency*.

The main question which arose on the preliminary objections, and on this appeal, was, whether the Dominion Parliament could legally impose on the Superior Court of the Province of *Quebec*, and the Judges thereof, the duty of trying Controverted Elections of members of the House of Commons.

Mr. *Pelletier*, Q. C., for Appellant:—

The *Dominion Controverted Elections Act of* 1874 did not create a Dominion tribunal, but invested with new

(1) 5 Q. L. R. 1.

attributes the Superior Court of the Province of *Quebec* and its Judges. The federal principle has for its end to preserve and protect the autonomy of the provinces, and the *British North America Act* has enumerated the rights and duties of every one of them. By the 92nd section of that Act, in each province, the Legislature has an unlimited authority and a power beyond control to make laws in relation to the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts. If so, the Federal Parliament cannot add to, take from, or extend the jurisdiction of provincial tribunals. All the Judges agree on this point. *Wilson*, J., in the *Niagara case* (1) holds that "The Dominion Parliament has not the power to enlarge or diminish the jurisdiction of the Provincial Courts." *Meredith*, C. J., in this case says: "I do not question the proposition, that under the Act of Confederation, the Dominion Parliament cannot enlarge the jurisdiction of the Provincial Courts." *Stuart*, J., in the case of *Belanger* v. *Caron* (2), says: "There can be no doubt that the Dominion Parliament is prohibited from making laws in relation to any Court of this Province, and in relation to the administration of justice by it." *Casault*, J., in the case of *Guay* v. *Blanchet* (3), says: "To concede to the Federal Parliament the power to make the Provincial tribunals, for federal objects, federal courts, is to acknowledge that it has the right to determine the questions to be litigated, and the jurisdiction, and the manner in which the Courts are to exercise it."

McCord, J., in the *Bellechasse case* (4) held that the Parliament of *Canada* has no power to extend the jurisdiction of the Superior Court of the Province of *Quebec*.

(1) 29 U. C. C. P. 238.
(2) 5 Q. L. R. 19.
(3) 5 Q. L. R. 43.
(4) Not reported.

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Now, the Superior Court of the Province of *Quebec* owes its existence to an Act of the Province of *Quebec*, and its jurisdiction is such as the *Code of Procedure* established, and is circumscribed by the limits of the Province. There is nothing to show that this Court ever had before Confederation the power to try an election petition, and under sec. 92, No. 14, of the *British North America Act*, the Provincial Legislatures have no authority to legislate upon the subject of controverted elections for the House of Commons. This power exists in the Dominion Parliament, but if the Dominion Parliament has no power to give to the Superior Court the jurisdiction of the Circuit or of other Courts, on what principle can they give to such a Court, whose maintenance and organization are exclusively under the control of the Provincial Legislature, the exclusive jurisdiction which has always belonged to the House of Commons of pronouncing upon the validity of the election of its members? Suppose the Provincial Legislature had abolished the Superior Court immediately after the passing of this Act, would the Superior Court still be said to exist under this Act? A tribunal exists only when its judgments and decisions are invested with an authority which allows them to compel their execution. The judgment of the Superior Court is not valid outside of the limits of the Province, and unless this Act extends the jurisdiction of that Court beyond the territorial limits of the Province, the Court is powerless to decree that a member has not the right to sit in the House of Commons. I submit that the Dominion Parliament has not the power of extending the jurisdiction of a Provincial Court, and that an election petition against the return of a member for the House of Commons can only be tried by a Dominion Court.

It is also contended, a new court was created. Where do we find the elements constituting such a Court?

Is it because the Act refers the petitions to the *Superior Court*, which exists already? Is it in the fact that the Court is presided over by a judge holding no commission, but already appointed to hold the Superior Court, or because the officers directed to act are the officers of the Superior Court, provincial employees, over whom the Federal Government has no control? On the contrary, is it not evident that it was not the intention to create a new tribunal; as Mr. Justice *McCord* says, in the case of *Deslauriers* v. *Larue*, *in re* The Controverted Election of *Bellechasse* (1): "That the *Dominion Controverted Elections Act* 1874 does not intend to create a Dominion Court is apparent from the fact that it repeals the *Controverted Elections Act*, 1873, which did create a Dominion Court, and that, instead of substituting other provisions for the same purpose, it provides by section 3, that an election petition shall be tried by a provincial court *as if such petition were an ordinary cause* within its jurisdiction. From the difference between the two statutes, it is evident, not only that the Federal Parliament in passing the later one did not intend to create an additional court, as it had the power to do under section 101 of the *British North America Act*, but that it actually intended to *not* create one.

See also Mr. Justice *Wilson's* judgment in the *Niagara* case (2).

By the Act of 1873 the Judge, as an individual, was charged to try Controverted Elections, but the Act of 1874 says it is the Superior Court which is to try elections.

By section 30 of the Dominion Act, the Court is to report to the Speaker the result of the trial. What jurisdiction can he exercise to determine as to the right to a seat in a parliament held in another Province? Then

(1) Not reported. (2) 29 U. C. C. P. 288.

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we have the 11th and 13th secs. of the Act as to fixing the time and place of trial, all of which proves sufficiently that it was the intention of the Parliament to give this Court the additional jurisdiction to try election petitions.

It is said, that under the 4th section a special tribunal has been created, from the fact that it is called "Court of Record." Supposing that such be the case, that tribunal would be imperfect; for the petition would be presented before the ordinary Superior Court, and in virtue of sections 11 and 13, the Superior Court only could fix the trial. This section, moreover, is only the reproduction of sec. 29 of 31 and 32 V., c. 125, and it was never contended there that these words had made a new or distinct tribunal of the Court of Common Pleas. It is the special Court, which the Judge presides over during the trial, which section 48 constitutes a Court of Record. The Courts to which Parliament has referred the Controverted Elections are still Provincial Courts. The provisions of this section have not deprived them of their character.

See Judge *Casault's* judgment on this point in *Guay* v. *Blanchet* (1).

Appellant further contends that the contestation of an election does not constitute a civil right and form *de plano* part of the jurisdiction of the civil courts of the Province of *Quebec*, and does not involve any civil plea, cause or matter, or any right, remedy, or action of a civil nature, such as contemplated by the laws from which the Superior Courts and the Judges thereof derive their jurisdiction.

It is a political right which the Respondent is praying the Court to have enforced; viz., that the Appellant be declared by the Court to be the legal representa-

(1) 5 Q. L. R. 49.

tive of the electors of the constituency of *Montmorency*. This surely is not a civil but a political matter.

The learned counsel referred to the judgments of *McCord*, J., in the *Bellechasse* case (not reported), and of *Casault*, J., in the *Levis* case (1), and commented at length on the cases therein cited in support of this branch of his argument; concluded by contending that, even if the Superior Courts had power to decide controverted elections on account of their original jurisdiction, that power would be in a latent state, since the Dominion Parliament cannot frame rules of procedure for Provincial Courts.

Mr. *Langlois*, Q. C., (the Respondent):—

The first case I will rely upon is the case of *Bruneau* v. *Massue* (2). In that case *Dorion*, C. J., said that the "Judges as citizen were bound to perform all the duties which are imposed upon them by either the Dominion or the Local Legislature, provided neither Legislature had exceeded the limits of its legislative power." I contend that the only answer Judges can give to Parliament is, that all their time is taken up in the discharge of the administration of justice, and they are unable to execute their laws, but they can't say to parliament "you have no right to call upon us to carry out your laws." But when, as in this case, the Judge says: "I voluntarily execute powers given to me by an authority who has exclusive legislative power over the subject matter," I cannot see how it can be expected that this Court will say, this Judge wants to exercise a power he has no right to exercise.

As to the first objection, that the *Controverted Elections Act of* 1874 does not create a Dominion Court. I admit that it does not specifically say that the Superior

(1) 5 Q. L. R. 43. (2) 23 L. C. Jur. 60.

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Court will be a Dominion Court, but indirectly such a Court has been created under sec. 48. It is true it is the only section which says it is a Court of Record, but that is sufficient. It cannot be denied that the Dominion Parliament had the right to say that certain persons should perform the duties of trying election petitions. Now, this is all that has been done, for it is easy to ascertain who are the Judges of the Superior Courts, and, if so, they are empowered to act by this Statute, and they can do so constitutionally. As to the Dominion Parliament having no authority to enlarge the jurisdiction of Provincial Courts, I contend that giving to these judges the right to try election petitions does not enlarge their jurisdiction. The fact of a Judge of a Court exercising judicial powers in virtue of a Statute which the legislative body had power to pass, does not enlarge the jurisdiction of that Court. If so, any legislation on insolvency, and other matters exclusively under the control of the Dominion Parliament, would be enlarging the jurisdiction of the Courts, who are bound to administer the laws of the Dominion Parliament, as well as the laws of the Provincial Legislatures.

Whether you call petitioning against the return of a member exercising a political or civil right, it is immaterial. The only distinction in law matters is between civil and criminal matters. There is no political matter in law as distinguished from civil or criminal matters.

The last objection is that which has reference to the jurisdiction of the Dominion Parliament over procedure. I submit that if the Dominion Parliament has the right to legislate who shall try election petitions, the procedure must follow the whole subject. The exclusive power of the Provincial Legislatures as to the regulation of *procedure* can only extend to matters over which they have exclusive authority, viz., over civil matters,

and certainly not matters over which the Dominion Parliament has exclusive legislative power, such as procedure in regard to insolvency.

It was also said, that certain sections of the Act show that the duties assigned are to be performed by the Court, and not by the Judge. The answer to this objection is to be found in sec. 3 of the Act, which declares that the expression the Court means any one of the Judges of the Court, and it may be well to remark that all the duties imposed may be discharged by one single Judge. The election cases of *Montreal Centre* (1), and of *Argenteuil* (2) were also relied upon.

THE CHIEF JUSTICE:

This is an appeal from the judgment of Mr. Chief Justice *Meredith*, dismissing the preliminary objections of the Appellant, and declaring "*The Dominion Controverted Elections Act*, 1874," to be not *ultra vires* of the Dominion Parliament; and the correctness of this determination is the only question now in controversy.

This, if not the most important, is one of the most important questions that can come before this court, inasmuch as it involves, in an eminent degree, the respective legislative rights and powers of the Dominion Parliament and the Local Legislatures, and its logical conclusion and effect must extend far beyond the question now at issue. In view of the great diversity of judicial opinion that has characterized the decisions of the provincial tribunals in some provinces, and the judges in all, while it would seem to justify the wisdom of the Dominion Parliament, in providing for the establishment of a Court of Appeal such as this, where such diversity shall be considered and an authoritative declaration of the law be enunciated, so it enhances the

(1) 20 L. C. Jur. 77. (2) 20 L. C. Jur. 88.

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responsibility of those called on in the midst of such conflict of opinion to declare authoritatively the principles by which both federal and local legislation are governed.

Previously to Confederation, the Governor or Lieutenant-Governor, Council and Assembly in the respective Provinces of *Canada, Nova Scotia* and *New Brunswick*, formed a legislative body of the Province, subordinate, indeed, to the Parliament of the Mother Country, and subject to its control, but, with this restriction, having the same power to make laws binding within the Province that the Imperial Parliament has in the Mother Country; and the propriety and necessity of such enactments were within the competency of the Legislature alone to determine. As the House of Commons in *England* exercised sole jurisdiction over all matters connected with controverted elections, except so far as they may have restrained themselves by statutory restrictions, the several Houses of Assembly always claimed and exercised in like manner the exclusive right to deal with, and be the sole judges of, election matters, unless restrained in like manner, and this claim, or the exercise of it, I have never heard disputed; on the contrary, it is expressly recognized as existing in the Legislative Assemblies by the Privy Council in *Théberge vs. Landry* (1). When the Provinces of *Canada, Nova Scotia* and *New Brunswick* sought "to be "federally united into one Dominion, under the Crown "of the United Kingdom of *Great Britain* and "*Ireland*, with a constitution similar in principles "to that of the United Kingdom," it became absolutely necessary that there should be a distribution of legislative powers, and so we find the exclusive powers of the Provincial Legislatures very

(1.) L. R. 2 App. Cas. 102.

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specially limited and defined, while legislative authority is given to the Parliament of *Canada* to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by the act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is declared that, notwithstanding anything in the act, the exclusive legislative authority of the Dominion of *Canada* shall extend to all matters coming within the classes of subjects next thereinafter enumerated. It will be observed, that of the classes of subjects thus enumerated, either in respect to the powers of the Provincial Legislatures, or those of the Parliament of *Canada*, there is not the slightest allusion, direct or indirect, to the rights and privileges of Parliament, or of the Local Legislatures, or to the election of Members of Parliament, or of the Houses of Assembly, or the trial of controverted elections, or proceedings incident thereto. The reason of this is very easily found in the Statute, and is simply that, before these specific powers of legislation were conferred on Parliament and on the Local Legislatures, all matters connected with the constitution of Parliament and the Provincial Constitutions had been duly provided for, separate and distinct from the distribution of legislative powers, and, of course, over-riding the powers so distributed; for, until Parliament and the Local Legislatures were duly constituted, no legislative powers, if conferred, could be exercised.

Thus, we find that, immediately after declaring that there shall be one Parliament of *Canada*, consisting of the Queen, Senate and the House of Commons, the Imperial Act provides for the privileges of those Houses in these terms:—

The privileges, immunities and powers to be held, enjoyed and

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exercised by the Senate and by the House of Commons and by the Members thereof, respectively, shall be such as are from time to time defined by the Act of the Parliament of *Canada*, but so that the same shall never exceed those at the passing of this Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of *Great Britain* and *Ireland*, and by the Members thereof.

And, after declaring what the constitution of the House of Commons shall be, and defining the electoral districts of the four Provinces, it makes provision for the continuance of existing election laws, until Parliament of *Canada* otherwise provides, in these words:—

Until the Parliament of *Canada* otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters, or any of them, namely:—The qualifications and disqualifications of persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such Members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which the elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of Members, and the execution of new writs in case of seats vacated otherwise than by dissolution, —shall respectively apply to elections of Members to serve in the House of Commons for the same several Provinces (1).

And by the 31 Vic., Cap. 23, it is enacted that:

The Senate and the House of Commons, respectively, and the Members thereof, respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as at the time of the passing of the *British North America Act*, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of *Great Britain* and *Ireland*, and by the Members thereof, so far as the same are consistent with and not repugnant to the said Act, such privileges, &c. shall be deemed part of the General and Public Law of *Canada*, and it shall not be necessary to plead the same, but the same shall, in all courts in *Canada*, and by and before all judges, be taken notice of judicially.

In *England*, as is well known, before 1770, contro-

(1) B.N.A. Act, sec. 41.

verted elections were tried and determined by the whole House of Commons, or, for a time, by special committees, and by committees of privileges and elections. This was succeeded by the *Grenville* Act, the principle of which was to select committees for the trial of election petitions by lot. This Act, in 1773, was made perpetual, but not without the expression of very strong opinions against the limitations imposed by it upon the privileges of Parliament (1).

In 1839, an act passed (Sir *Robert Peel's* Act) establishing a new system upon different principles, and it was not till 1868, after Confederation, that the jurisdiction of the House of Commons, in the trial of controverted elections, was transferred by statute to the courts of law. Very much the same course of procedure, up to and after the time of Confederation, prevailed in some, if not all of the Provinces.

But in 1873 the Dominion Parliament passed an Act to make better provision respecting election petitions and matters relating to controverted elections and Members of the House of Commons, and established Election Courts, the judges of which were to be judges of Supreme or Superior Courts of the Provinces, provided the Lieutenant Governors of the Provinces, respectively, should, by order made by and with the advice and consent of the Executive Council thereof, have authorized and required such judges to perform the duties thereby assigned to them, the intervention of the Legislature not being required, or, apparently, deemed necessary. This Act was repealed by the 37 Vic., cap. 10, "An Act to make better provision for the trial of Controverted Elections of Members of the House of Commons, and respecting matters connected therewith." This last Act, it is now contended, is *ultra vires*. The constitutionality of the Act of 1873, though

(1) 17 Par't Hist. 1071; L'd Campbell's Chrs. Vol. 6, p. 98.

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questioned, as I understand, by one judge in *Quebec*, is, I believe, admitted, by all those who now think the Act of 1874 *ultra vires*, to have been *intra vires*, of the Dominion Parliament.

In determining this question of *ultra vires* too little consideration has, I think, been given to the constitution of the Dominion, by which the legislative power of the Local Assemblies, is limited and confined to the subjects specifically assigned to them, while all other legislative powers, including what is specially assigned to the Dominion Parliament, is conferred on that Parliament; differing in this respect entirely from the constitution of the *United States of America*, under which the State Legislatures retained all the powers of legislation which were not expressly taken away. This distinction, in my opinion, renders inapplicable those American authorities, which appear to have had so much weight with some of the learned judges who have discussed this question. And, as a consequence, too much importance has, I humbly think, been attached to section 101, which provides for the establishment of any additional courts for the better administration of the laws of *Canada*, and to sub-sections 13 and 14 of section 92, which vest in the Provincial Legislatures the exclusive powers as to property and civil rights in the Provinces, and "the administration "of justice in the Provinces, including the constitution, "maintenance and organization of Provincial Courts, "both of civil and of criminal jurisdiction, and includ- "ing procedure in civil matters in those courts."

The establishment of additional courts for the better administration of the laws of *Canada* was primarily, I think, intended to apply, when deemed necessary and expedient, rather to the general laws of the Dominion than to matters connected with the privileges, immunities and powers of the Senate and House of

Commons, though, of course, those might, incidentally, if so provided, come within the jurisdiction of such tribunals; that the property and civil rights referred to were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, of which the first two items in the enumeration of the classes of subjects to which the exclusive legislation of the Parliament of Canada extends are illustrations, viz.:—1. "The public debt and property;" 2. "The regulation of trade and commerce;" to say nothing of "beacons, buoys, light houses, &c., "navigation and shipping," "bills of exchange and promissory notes," and many others directly affecting property and civil rights; that neither this, nor the right to organize Provincial Courts by the Provincial Legislatures was intended in any way to interfere with, or give to such Provincial Legislatures, any right to restrict or limit the powers in other parts of the Statute conferred on the Dominion Parliament; that the right to direct the procedure in civil matters in those courts had reference to the procedure in matters over which the Provincial Legislature had power to give those Courts jurisdiction, and did not, in any way, interfere with, or restrict, the right and power of the Dominion Parliament to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject matter; or take from the existing courts the duty of administering the laws of the land; and that the power of the Local Legislatures was to be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the Local Legislatures are in this sense subor-

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dinate to the right of the Dominion Parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the Local Legislatures; and, therefore, the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada.*

It is, I think, to section 91, in reference to the legislative authority of the Parliament of *Canada*, and to sections 18 and 41, conferring privileges on the Senate and House of Commons, and legislative power over the trial of controverted elections and proceedings incident thereto, that we must look, to ascertain whether the Parliament of the Dominion, in enacting the 37 Vic. cap. 10, exceeded its powers, because, I think, all the other sections conferring legislative powers must be read as subordinate thereto, and because I cannot discover that any of the other provisions apply, or were intended to apply, to the particular subject matter thus legislated on, and which, I think, it was intended should be alone dealt with by the Dominion Parliament in any manner it might deem most expedient for the peace, order and good government of *Canada.* I think that the *British North America Act* vests in the Dominion Parliament plenary power of legislation, in no way limited or circumscribed, and as large, and of the same nature and extent, as the Parliament of *Great Britain*, by whom the power to legislate was conferred, itself had. The Parliament of *Great Britain* clearly intended to divest itself of all legislative power over this subject matter, and it is equally clear, that what it so divested itself of, it conferred wholly and exclusively on the Parliament of the Dominion.

The Parliament of *Great Britain*, with reference to

the power and privileges of the Parliament of the Dominion of *Canada*, and with reference to the trial of controverted elections, has made the Parliament of the Dominion an independent and supreme Parliament, and given to it power to legislate on those subjects in like manner as the Parliament of *England* could itself legislate on them. It is a constitutional grant of privileges and powers which cannot be restricted or taken away except by the authority which conferred it, and any power given to the Local Legislatures must be subordinate thereto.

The case of the *Queen* vs. *Burah* (1) enunciates a principle very applicable to this case. The marginal note is :

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally ; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

And Lord *Selborne*, delivering the judgment of the Privy Council, said :

But their Lordships are of opinion that the doctrine of the majority of the court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done in legislation is within the general scope of the

(1.) L.R. 3 App. cases 904.

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affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Whether, therefore, the Act of 1874 established a Dominion Election Court or not, I think the Parliament of the Dominion, in legislating on this matter, on which they alone in the Dominion could legislate, had a perfect right, if in its wisdom it deemed it expedient so to do, to confer on the Provincial Courts power and authority to deal with the subject matter as Parliament should enact; that the legislation, being within the legislative power conferred on them by the Imperial Parliament, their enactments in reference thereto became the law of the land, which the Queen's Courts were bound to administer.

I am at a loss to discover how the conferring of this jurisdiction on the Judges of the Supreme and Superior Courts, and on those Courts, in any way interferes with or affects, directly or indirectly, the autonomy of the Provinces, or the right of the Local Legislatures to deal with such property and civil rights in the Provinces, and the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in such civil matters in those courts, as the Local Legislatures have a right to deal with, reading, of course, those matters so to be dealt with, as subject and subordinate to the superior powers and authority of the Dominion Parliament over all subjects not assigned exclusively to the Legislatures of the Provinces, of which subjects pre-eminently prominent as beyond the jurisdiction or control of the Local Legislatures, stand the privileges, immunities and powers to be held, enjoyed and exercised by the

Senate and by the House of Commons, and by the Members thereof, respectively, and all rights connected with the qualifications and disqualifications of persons to sit or vote as Members of the House of Commons, the voters at the election of such Members, the Returning Officers, the proceedings at elections, and the trial of controverted elections, and all proceedings incident thereto.

Transferring this new and this peculiar jurisdiction vested in the House of Commons to the Supreme and Superior Courts, in other words, substituting those courts in place of the House of Commons in relation to these matters, with which the Local Legislatures have nothing whatever to do, can in no way, that I can perceive, militate against, or derogate from, the right of the Local Legislatures to make laws in relation to all subjects or matters exclusively reserved to them. Nor can I discover that, in so substituting the Judges of the Supreme and Superior Courts, the Parliament of the Dominion has in any way transcended its legislative powers. These courts are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, existed at Confederation, and were continued with all laws in force, "as if the union had not been made," by the 129th sec. of the *British North America Act*, and subject, as therein expressly provided, "to be repealed, abolished or altered by the Parliament of *Canada*, or by the Legislatures of the respective Provinces, according to the authority of the Parliament, or of that Legislature, under this Act."

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They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, provided always, such laws are within the scope of their respective legislative powers.

If it is *ultra vires* for the Dominion Parliament to give these courts jurisdiction over this matter, which is peculiarly subject to the legislative power of the Dominion Parliament, must not the same principle apply to all matters which are in like manner exclusively within the legislative power of the Dominion Parliament; and, if so, would it not follow, that in no such case could the Dominion Parliament invoke the powers of these courts to carry out their enactments in the manner they, having the legislative right to do so, may think it just and expedient to prescribe. If so, would it not leave the legislation of the Dominion a dead lettter till Parliament should establish courts throughout the Dominion for the special administration of the laws enacted by the Parliament of *Canada*: a state of things, I will venture to assume, never contemplated by the framers of the *British North America Act*, and an idea to which, I humbly think, the Act gives no countenance; on the contrary, the very section authorizing the establishment by Parliament of such courts, speaks only of them as "additional courts for the better "administration of the laws of *Canada*." It cannot, I think, be supposed for a moment that the Imperial Parliament contemplated that until an Appellate Court, or such additional courts, were established, all or any of the laws of *Canada* enacted by the Parliament of *Canada*, in relation to matters exclusively confided to that Parliament, were to remain unadministered for want of any tribunals in the Dominion competent to take cognizance of them.

Whether, then, this Act is to be treated as declaring

the courts named Dominion Election Courts, or whether it is to be treated as merely conferring on particular courts already organized a new and peculiar jurisdiction, is a matter, to my mind, of no great importance, as I think, while they have clearly the power of establishing a new Dominion Court, they have likewise the power, when legislating within their jurisdiction, to require the established courts of the respective Provinces, and the judges thereof, who are appointed by the Dominion, paid out of the treasury of the Dominion, and removeable only by address of the House of Commons and Senate of the Parliament of the Dominion, to enforce their legislation.

If the Dominion Parliament cannot pass this Act, this startling anomaly would be produced, that, though with respect to the rights and privileges of Parliament the Dominion of *Canada* are invested with the same powers as at the passing of the Act pertained to the Parliament of *Great Britain*, and though exclusive jurisdiction over, and the exclusive right to provide for, the trial of controverted elections is specially conferred on the Dominion Parliament, and though the constitution of the Dominion is to be similar to that of *Great Britain*, there are, in connection with these privileges and these elections, matters with which there is no legislative power in the country to deal; for it is very clear that, as there is no pretence for saying that the Local Legislatures have any legislative power or authority over the subject-matters dealt with by the Act, so nothing the Local Legislatures might say or do could affect the question, and, therefore, however desirable, it might be universally admitted, that just such a tribunal for settling these questions should be established in the very terms of this Act, the Dominion would be in this extraordinary position, that no legislation in the Dominion could accomplish it, for the simple reason that,

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if legislated on, as has been done by the Dominion Parliament, the legislation would be *ultra vires*; any legislation by the Local Legislatures would, if possible, be even more objectionable, they not having a shadow of right to interfere with the rights and privileges of Parliament, or the election of Members to serve therein, or to establish any tribunal whatever to deal with or affect either, as the whole and sole legislative power to intermeddle or deal with such rights and with elections and controverted elections is conferred on and vested in the Dominion Parliament alone.

To hold that no new jurisdiction, or mode of procedure, can be imposed on the Provincial Courts by the Dominion Parliament, in its legislation on subjects exclusively within its legislative power, is to neutralize, if not to destroy, that power and to paralyze the legislation of Parliament. The Statutes of Parliament, from its first session to the last, show that such an idea has never been entertained by those who took the most active part in the establishment of Confederation, and who had most to do with framing the *British North America Act*, the large majority of whom sat in the first Parliament. A reference to that legislation will also show what a serious effect and what unreasonable consequences would flow from its adoption.

There is scarcely an Act, relating to any of the great public interests of the country which have been legislated on since Confederation, that must not in part be held *ultra vires* if this doctrine is well founded, for in almost all these Acts provisions are to be found, not only vesting jurisdiction in the Provincial Courts, but also regulating, in many instances and particulars, the procedure in such matters in those courts, as a reference to a number I shall cite will abundantly show.

In the first session of the Dominion Parliament, in the Act respecting Customs, 31 Vic., cap. 6, by sec,

100, all penalties and forfeitures relating to the Customs or to Trade and Navigation, unless other provision be made for the recovery thereof, are to be sued for by the Attorney-General, or in the name or names of some officer of Customs, or other person thereunto authorized by the Governor-in-Council, and if the prosecution be brought before any County Court or Circuit Court it shall be heard and determined in a summary manner upon information filed in such court. And by other sections, special provisions are made for the mode of procedure in reference to cases of this description, as also for the protection of the officers, entirely different from the procedure in ordinary civil cases.

So also by the Act respecting the Inland Revenue, 31 Vic., cap. 8, provisions are made for the protection of the officers of the Inland Revenue, whereby the proceedings in the Provincial Courts are restrained and regulated. And by 31 Vic., c. 10, for regulating the Postal Service, the enactments of the Acts respecting Customs, more especially for the protection of officers, are extended and applied to officers employed in the Post Office.

And in the Public Works Act, 31 Vic., cap. 12, sec. 48, all costs in awards made by the arbitrators under that Act, where the award is in favor of the claimant, shall be taxed by the proper officer of the Court of Queen's Bench, Supreme Court or Common Pleas, in the Provinces of *Ontario*, *Nova Scotia* and *New Brunswick*, and, in *Quebec*, by a Judge of the Superior Court.

So by the 31st Vic., cap. 15, sec. 7, of the Act to prevent unlawful training to the use of arms, provision is made for the protection of Justices and others acting under this Act, which regulates in a very special manner the procedure in all courts where such actions may be brought.

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So by the 31st Vic., cap. 17, an Act for the settlement of the affairs of the Bank of Upper Canada, authority was given to the Court of Chancery, or a Judge thereof, to make orders and directions with reference to the trust therein referred to.

So by the 31st Vic., cap. 23, an Act to define the privileges, &c., of the Senate and House of Commons, and to give necessary protection to persons employed in the publication of parliamentary papers, provision is made on certificate of Speaker of either House for the immediate stay of, and putting a final end to, all civil or criminal proceedings in any court in *Canada*.

So under the Trade Mark and Designs Act, 1868, in case any person not being the lawful proprietor of a design be registered as proprietor thereof, the rightful owner is authorized to institute an action in the Superior Court in *Quebec*, in the Court of Queen's Bench in *Ontario*, and in the Supreme Courts of *Nova Scotia* and *New Brunswick*, and the course of procedure is pointed out and specially regulated.

So under 31 Vic., cap. 61, respecting fishing by foreign vessels, special provisions are made for the protection of officers by regulating the issuing of writs, and otherwise regulating the proceedings in informations and suits brought under the Act.

So with respect to the Act relating to aliens and naturalization, 31 Vic., cap. 66, duties are imposed on the Judges of any Court of Record in *Canada*, and on the Provincial Courts therein named, as to admitting and confirming aliens in all the rights and privileges of British birth, and directing the mode of procedure in such cases.

So by the Railway Act, 1868, 31 Vic., cap. 68, sec. 15, the duty of appointing arbitrators is imposed on a Judge of one of the Superior Courts in the Province in which the place giving rise to the disagreement is situated.

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So, also, by sub-section 13 as to ordering notices, and by sec. 15 as to appointing sworn surveyors; 19 as to taxing costs; 22, appointing, on death of arbitrator, another; 24 and 25, vesting in Judge the summary power of determining the validity of any cause of disqualification urged against arbitrator; 27 and 28, power to Judge to issue warrant to Sheriff to put company in possession of land under award or agreement; and in many other matters in said Act quite distinct from the jurisdiction aud procedure in ordinary civil cases.

32 and 33 Vic., cap. 11, patents for inventions: Provision is made for actions for infringement and impeachment of a patent, and for power of courts and procedure and pleading in such cases.

And notably, with respect to insolvency, by the first Insolvent Act, 1869, and Act in amendment thereof of 1870, summary jurisdiction is given to judges and courts, and appeals to judges and from judges to courts, and Provincial Courts are clothed with powers, and modes of procedure are given them, which the Local Legislatures could have no right to confer, as they have no right to legislate on the subject matter of insolvency, And in *Ontario* the judges of the Superior Courts of Common Law and of the Court of Chancery, or any five of them, of whom the Chief Justice of *Ontario,* or the Chancellor, or the Chief Justice of the Common Pleas shall be one, are required to make and settle such forms, rules and regulations as shall be followed in the proceedings in Chancery. And in *Nova Scotia* an entirely new jurisdiction is given in insolvency to the Probate Courts or judges of probate, which they never in any way before possessed.

And as to banks and banking, 34 Vic., cap. 5., jurisdiction in a summary manner is given to the Superior Courts of Law and Equity to adjudicate as to the parties

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legally entitled to shares, and the mode of procedure is there pointed out.

And as to the Public Lands of the Dominion, 35 Vic., cap. 23, a summary remedy is given to a judge of any court, having competent jurisdiction in cases respecting real estate, to grant an order which shall have the force of a writ of *Hab. Fac. Pos.*, upon proof to his satisfaction that land forfeited should properly revert to the Crown, to deliver up the same, &c., and the mode of procedure is provided by the Act.

37 Vic., cap. 45, Inspection of Staple Articles, as to actions or suits against any person for anything done in pursuance of this Act, limitations and restrictions are imposed and directions given as to procedure before and at trial and on giving judgment.

I do not, of course, put forward this legislation as in itself in any way determining, or even as confirmatory of the right of the Dominion Parliament so to legislate, for it is too clear that if they do not possess the legislative power, neither the exercise nor the continued exercise of a power not belonging to them could confer it or make their legislation binding. But I put forward these Acts as illustrative of the powerlessness, or perhaps I should rather say helplessness, of the Dominion Parliament, if they have not the right to legislate without control in the most full and ample manner over all matters specially or generally confided to them by the Imperial Parliament, and over which all must admit they have sole control, without being met by so effectual an obstruction, in giving effect to such legislation, as by closing the Queen's Courts against the administration of laws so enacted by and under the authority of the Parliament of *Great Britain*, by virtue of which the Dominion and Provincial constitutions now exist, and also as illustrative of the utter want in the Dominion, if the Dominion Parliament does not

possess it, of any legislative power to meet emergencies requiring legislative control in matters so unequivocally affecting the peace, good order and government of *Canada*, so clearly taken from the Provincial Assemblies and confided to the Parliament and Government of *Canada*.

But I have had no great difficulty in arriving at the conclusion that this Act substantially establishes, as the Act of 1873 did, as respects elections, a Dominion Court, though it utilizes for that purpose the Provincial Courts and their Judges. In considering the *British North America Act*, in the view just presented, as also the Dominion Act on the point to be now discussed, the following extract from the judgment of *Turner*, L. J., in *Hawkins* vs *Gathercole* (1) may not be inapplicable here. He says:

> But, in construing Acts of Parliament, the words which are used are not alone to be regarded; regard must also be had to the intent and meaning of the legislature. The rule on this subject is well expressed in the case of *Stradling* vs. *Morgan* in *Plowden's* Reports, in which case it is said at page 204: "The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular." And, after referring to several cases, the report contains the following remarkable passage, at page 205: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they

(1) 6 De G., M. & G. at p. 20.

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have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The same doctrine is to be found in *Eyston* vs. *Studd* and the note appended to it, also in *Plowden* (1), and many other cases. The passages to which I have referred, I have selected as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us, we have, therefore, to consider, not merely the words of the Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign meaning and extraneous circumstances, so far as they can justly be considered to throw light upon the subject.

In seeking to discover the intention of the Dominion Parliament, if Parliament had no power to add to the jurisdiction of a Provincial Court, or in any way interfere with its procedure, one is struck at the outset with the strong, if not irresistible, inference that this raises, that the intentions of Parliament must have been to establish an independent tribunal in the nature of a Dominion Court, and not to add to the jurisdiction, or affect the procedure, of Provincial Courts, because, it must, I think, be assumed that Parliament intended to do what they have a right to do to legislate legally and effectively, rather than that they intended to do what they had no right to do, and which, if they did do, must necessarily be void and of no effect; and having established a Court by the Act of 1873, which it seems to be admitted is *intra vires*, is it reasonable to suppose that Parliament would repeal a valid enactment, and for the accomplishment of substantially the same object, substitute in its place a law beyond their powers to enact, and which, therefore, could be nothing but a dead letter on the Statute Book. But, as for the reasons I have stated, I think, even if a distinct and independent court is not created, the Act is not beyond the power of Parliament, I cannot invoke

(1.) Pp. 459, 465.

this inference, as it appears to me those holding the contrary opinion might and should do.

But, independent of all this, the Act seems to contain within itself everything necessary to constitute a court.

The jurisdiction is special and peculiar, distinct from, and independent of, any power or authority with which any of the courts, or the judges referred to in it, were previously clothed. The act conferring this jurisdiction provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the exercise of the ordinary jurisdiction and procedure of the courts.

The rights which are to be determined through the instrumentality of this new jurisdiction are political, rather than civil rights, within the usual meaning of that term, or within the meaning of that term as used in the *British North America Act*, which, as I have said, applies, in my opinion, to mere limited civil rights, and thus we find them treated in the case of *Théberge vs. Landry*(1), which was an application to the Privy Council for special leave to appeal from the decision of the Superior Court of *Quebec*, under the Controverted Election Act, 1875, declaring an election void, which was refused.

The Lord Chancellor in that case speaks of the *Quebec* Controverted Election Acts thus:

> These two Acts of Parliament, the Acts of 1872–75, are Acts peculiar in their character. They are not acts constituting or providing for the decision of mere ordinary civil rights, they are acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony, for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petitions, and determining the *status* of those who claimed to be Members of the Legislative

(1) L. R. 2 App. cas. 102.

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Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

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

The object of the Act of 1873 and that of 1874 was the same, the recitals in both are precisely alike, and the provisions are in many respects substantially the same. That object was to establish and substitute entirely new tribunals for the trial of Election Petitions, in lieu of the committees theretofore dealing with such matters, and both Acts alike contained all provisions necessary, not only to give such new tribunals full jurisdiction, but also all necessary and suitable provisions to enable them, and the judges thereof, effectually to exercise such jurisdiction, not only with reference to the principles, but also to the rules and practice by which they should be governed and act in dealing with election petitions. The object of the two Acts being then precisely the same, the accomplishment of the desired result being by instrumentalities substantially

much the same, if, as I understand it is, generally conceded, by those that hold the Act of 1874 *ultra vires*, that the Act of 1873 established an independent Dominion Court, and was within the power of the Dominion Parliament, I am somewhat at a loss to understand how it can be said that the tribunals established by the Act of 1874 are not equally within the power of the Dominion Parliament.

The judges cannot sit in controverted election matters under the general jurisdiction of their respective courts, for those courts have no jurisdiction in such cases, and therefore, in discharging the duties imposed by this Act, they do not, and cannot do so as judges of the respective courts to which they belong, but they act as Election Judges appointed by and under the Act, outside of and distinct from the jurisdiction they exercise in their respective Provincial Courts, which is left untouched by this Act.

Without relying too much on the Statute of 1873, which, though a repealed statute, being *in pari materiâ* with that of 1874, might properly be referred to for the purpose of construing the latter (1), I think a careful and critical examination of the Act of 1874 will exhibit an evident intention that, as the first did, so does the last establish an independent Dominion Election Court.

This is more especially noticeable with reference to the enactments under the headings "interpretation

(1) See *Exparte Copeland*, 2 De G. M. & G. 920, where Lord Justice *Knight Bruce* says: "Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act. Lord *Mansfield*, in the case of *The King* v. *Loxdale* thus lays down the rules. 'Where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.'" 1 Burr. 44.

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"clauses," "procedure," "jurisdiction and rules of court," "reception and jurisdiction of the judge," "witnesses," and the provision as to who may practice as agent or attorney, or as counsel in such courts in the case of such petitions, and all matters relating thereto before the court or judge. I will only notice more particularly some of them. 1st. The power given to make rules. It provides that the judges of the several courts in each Province, respectively, or a majority, which, in *Ontario*, would include the judges of the Court of Error and Appeal, Queen's Bench, Common Pleas and Court of Chancery, shall make such rules, and until such rules are made, "the principles, practice and rules on which "petitions touching the election of Members of the "House of Commons in *England* are, at the passing "of this Act, dealt with, shall be observed, &c." 2nd. As to the reception, expenses and jurisdiction of the judge. The judge is to be received not as a judge of the Superior Court in that character, but as a judge of the Election Court, in like manner as if he were about to hold a sitting at *nisi prius*, or a sitting of the Provincial Court of which he is a member, showing that the Legislature did not contemplate that he was then actually about to sit as a member of the Provincial Court, but as being about to try an election petition, and when about to do this he is to be treated as if he were about to hold a sitting of the Provincial Court of which he is a member, and when his powers in such a trial, and in other proceedings under this Act, are defined, he is not treated simply as a judge of one of the Superior Courts upon whom, as such, further jurisdiction is conferred, but similar powers, as such judge, are given him in the court held by him, and that court so held by him is declared to be a Court of Record, indicating, I think, very clearly, that the court was treated by the Legislature as distinct from a Provincial Court, and required this

statutory declaration to make it a Court of Record, and that the judge was not to be considered as then acting as a judge of a Provincial Court, nor the trial as a trial in such a court. The words of the clause are these (1):

On the trial of an Election Petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of one of the Superior Courts of Law or Equity for the Province in which such election was held, sitting in term, or presiding at the trial of an ordinary civil suit, and the Court held by him for such trial shall be a Court of Record.

So, in like manner, are the witnesses treated as being subpœnaed, sworn and treated, not as being actually within the jurisdiction of the Provincial Courts, but section 49 declares that they

Shall be subpœnaed and sworn in the same manner, as nearly as circumstances will admit, as in cases within the jurisdiction of the Superior Courts of Law or Equity in the same Province; and shall be subject to the same penalties for perjury.

So, again, in the provision made for regulating the persons entitled to practice as attorneys or barristers before the tribunal thus established, such tribunal is very clearly distinguished from the Provincial Courts The clause is this (2):

Any person who, according to the law of the Province in which the petition is to be tried, is entitled to practice as an attorney at law or Solicitor, before the Superior Courts of such Province, and who is not a Member of the House of Commons, may practice as attorney or agent, and any person, who, according to such law, is entitled to practice as a barrister at law, or advocate, before such Courts, and who is not a member of the House of Commons, may practice as Counsel, in the case of such petition, and all matters relating thereto, before the Court or Judge in such Province.

Reading these special provisions in connection with the Act of 1873, and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that that Parliament intended

(1) Sec. 48. (2) Sec. 67.

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to establish Dominion Tribunals exceptional in their jurisdiction, perfect in their procedure, and with all materials for exercising such jurisdiction, and having nothing in common with the Provincial Courts; that these judges and courts were merely utilized outside their respective jurisdictions for giving full effect to these statutory tribunals to deal with this purely Dominion matter.

An objection has been suggested by a learned judge, for whose opinion I have the very highest respect, and which has been treated as of much force by another learned judge of a different Province, and on that account I will notice it. It is said that, if this is a court distinct from the courts of which the judges are primarily members, the judges have never been appointed thereto by the Crown, nor sworn as judges thereof, and therefore they are not judges of this new tribunal, if, as such, it exists. But, in my humble opinion, there is no force in this objection. The judges require no new appointment from the Crown, they are Statutory Judges in Controverted Election matters by virtue of an express enactment by competent legislative authority. The statute make the judges for the time being of the Provincial Courts judges of these peculiar and special courts. The Crown has assented to that statute, therefore they are judges by virtue of the law of the Dominion, and with the Royal sanction and approval. As to their not being sworn, the statute has not provided they should be sworn. If, being sworn judges already, the Legislature was willing to entrust them with the power conferred by this Act, without requiring them to be sworn anew, how does this invalidate the Act, and how can the judges refuse to discharge the duties thus by law imposed on them, because, it may be, the Parliament might, or ought to have gone further and required the judges to be

specially sworn faithfully to discharge these special duties. Under the law of 1873, the judges in all the Provinces acted in what, it is admitted, were new Dominion Courts, without being specially appointed or sworn, the statute not requiring either, and I have yet to learn that their proceedings on that account ever have been or ever could be questioned.

As, then, I can see no reasons why the Dominion Parliament should not delegate to the Judges of the several Provinces, individually, or collectively, or both, whom they appoint and pay, and can by address remove, power to determine controverted elections, the doing of which, not being inconsistent, or in any way in conflict with their duties as judges of their respective courts, but, on the contrary, as shown by the present legislation of all the Provinces, in reference to controverted elections in the Local Legislatures, in so acting they are most suitable and proper tribunals, and as the Imperial Parliament has left it to the Parliament of *Canada* to provide for the trial of controverted elections and proceedings incident thereto, and they have discharged this duty by the Statute of 1874, utilizing existing judicial officers and established courts, by engrafting on, or establishing independent of, those courts throughout their respective Provinces tribunals eminently qualified to discharge the important duties assigned to them, they have not, in so doing, in my opinion, in any particular invaded the rights of the Local Legislatures, or brought the new jurisdiction, or the procedure under it, in any way in conflict with the jurisdiction or procedure of any of the courts of the Provinces; and therefore the Dominion Parliament, in enacting the Act of 1874, have not, in my opinion, exceeded the express power conferred on them to provide for the trial of controverted elections and proceedings incident thereto; and, therefore, I think this appeal must

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be dismissed with costs, and the case remitted to the court below, to be proceeded with according to the due course of law.

FOURNIER, J:

L'unique question soumise par le présent appel est de savoir, si le parlement fédéral avait le pouvoir de passer l'acte des élections contestées de 1874.

Cette question dont on ne peut exagérer l'importance a été très savamment discutée et décidée en sens inverse par les différentes cours provinciales devant lesquelles elle a été portée.

Les raisons données de part et d'autre sont exposées avec les plus grands développements, et sont certainement dignes de toute l'attention possible ; mais après la revue si complète qui en a été faite par l'honorable juge en chef, il n'y aurait aucune utilité à les résumer ici de nouveau. Pour cette raison je me contenterai de donner succinctement les principaux motifs qui m'ont fait adopter la même conclusion que mes honorables collègues.

C'est en 1873, que le Parlement fédéral exerçant, pour la première fois, le pouvoir qui lui est conféré par la section 41me de l'acte de l'*Amériqne Britannique du Nord*, de législater sur le sujet des élections contestées a adopté et consacré par le statut 36 Vict., ch. 28, le principe de référer au pouvoir judiciaire la décision des élections contestées qui, jusqu'alors, avaient été décidées par les chambres ou leurs comités à l'exclusion des tribunaux ordinaires. La loi dont la légalité est attaquée en cette cause a révoqué le premier statut, en conservant toutefois le principe de la référence au pouvoir judiciaire ainsi qu'un grand nombre de ses autres dispositions.

Plusieurs des honorables juges appelés à décider cette

question sont entrés dans un examen critique très détaillé des principales dispositions de ces deux lois, afin de prouver que la première (celle de 1873) était constitutionnelle en créant une cour spéciale d'élection, en vertu de l'article 101 de l'acte de l'*Amérique Britannique du Nord*, tandis que la seconde est inconstitutionnelle en assumant le pouvoir d'étendre la juridiction de certaines cours provinciales à la décision des élections contestées,—sujet qui n'était pas auparavant de leur compétence.

Je ne crois pas devoir entrer dans l'examen des raisons invoquées pour établir cette différence ; non plus que dans l'examen de cette autre question de savoir, si l'acte de 1874 ne constitue pas, comme celui de 1873, une cour fédérale, et que partant la loi, se trouvant dans les limites du pouvoir accordé au Parlement Fédéral par l'article 101, de créer des tribunaux additionnels, cette loi doit en conséquence être déclarée constitutionnelle.

Il me suffira de dire que, si la proposition que le gouvernement fédéral ne peut imposer de nouveaux devoirs aux cours et aux juges existant lors de la Confédération est correcte, ces deux actes sont exposés aux mêmes objections, car dans l'un et l'autre les tribunaux provinciaux et le personnel qui les compose sont soumis à l'accomplissement de nouveaux devoirs. Il importe peu pour la décision de la véritable contestation soulevée dans ce débat, que les nouveaux devoirs judiciaires soient imposés aux juges et aux cours dans un cas, comme par l'acte de 1873, sous la dénomination de cour d'élection ; ou qu'ils le soient dans l'autre, comme par l'acte de 1874, aux cours provinciales et aux juges sous les dénominations par lesquelles ils sont désignés dans les lois provinciales qui leur ont donné l'existence. Au fond la question est toujours la même, car que l'on prenne les juges collectivement comme cour, ou en leur qualité individuelle de membres de la cour, il faut tou-

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jours en venir à la question de savoir quel pouvoir a le parlement fédéral de leur imposer de nouveaux devoirs.

Aussi la question se réduit-elle pour moi, simplement à savoir si le parlement fédéral a le pouvoir qui lui a été si emphatiquement et si énergiquement nié par certains honorables juges dont je respecte infiniment l'opinion, d'imposer de nouveaux devoirs aux juges et aux tribunaux provinciaux et même d'étendre leur juridiction s'il en est besoin. Je regrette d'avoir à dire que j'entretiens sur ce sujet une opinion diamétralement opposée à la leur.

Si je n'hésite pas à faire cette déclaration, c'est qu'un nombre encore plus considérable d'honorables juges ont adopté cette manière de voir qui, du reste, me semble d'accord avec l'esprit et la lettre de la constitution

Si la proposition que j'émets plus haut n'était pas correcte, il s'ensuivrait nécessairement que les auteurs de la Confédération auraient omis de créer, pour l'exécution des lois fédérales, un pouvoir judiciaire co-existant avec le nouvel ordre de choses

Cependant, comme nous l'indique le préambule de l'acte de l'*Amérique Britannique du Nord*, leur premier devoir était de doter l'union fédérale des provinces d'*une constitution reposant sur les mêmes principes que celle du Royaume-Uni*. Un des éléments essentiels de la constitution britannique, comme de tout gouvernement régulier, c'est la création d'un pouvoir judiciaire qui forme, avec les pouvoirs législatif et exécutif, les trois éléments indispensables de tout gouvernement. Ont-ils commis une faute d'une aussi haute gravité, pouvant avoir de si funestes conséquences sur leur œuvre, que celle de n'avoir pas pensé à la création d'un pouvoir judiciaire ? D'après certaines opinions, cette étrange omission aurait été faite, et il y aurait eu ainsi entre le 1er juillet 1867, époque à laquelle l'acte de l'*Amérique du Nord* est entré

en force, et la réunion du parlement fédéral en novembre 1867 un interrègne de quatre mois pendant lequel il ne se serait pas trouvé un seul tribunal compétent pour faire exécuter les lois fédérales.

Cependant, dès l'instant que la nouvelle constitution est entrée en force, le gouvernement fédéral devenait propriétaire de toutes les propriétés publiques énumérées dans la cédule 3 de l'acte de l'*Amérique Britannique du Nord*, en même temps qu'il était chargé par la 122e section de l'exécution des lois de douanes, d'accise et par la 41e sec. des lois électorales qui demeuraient en force.

Il se serait donc, dans ce cas, trouvé dans l'impossibilité soit de protéger ses propriétés, soit de collecter les revenus, l'accès aux tribunaux provinciaux lui étant interdit.

Mais on répond à cet argument en alléguant qu'une aussi grande faute n'a pas été commise, que bien au contraire, par l'acticle 101, le gouvernement du Canada est investi du pouvoir de créer une cour d'appel et des tribunaux additionnels pour la meilleure administration de ses lois, que des pouvoirs suffisants sous ce rapport lui ont été donnés précisément parce que le pouvoir exclusif d'organiser des tribunaux pour les provinces était réservé aux législatures,—qu'ainsi les deux gouvernements ont chacun leurs attributions particulières et exclusives pour la création de tribunaux. L'article 101 ne justifie pas cette conclusion, il n'établit pas dans le présent un pouvoir judiciaire—il ne donne que la faculté d'établir, suivant les besoins et les circonstances, une cour d'appel et des tribunaux *additionnels* pour la *meilleure administration* de ses lois. D'après les termes de cette section il en existait donc déjà pour l'exécution des lois fédérales, puisque cette faculté n'est donnée que pour être exercée lorsque *l'occasion le requerra*, comme dit

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l'article, c'est-à-dire dans le cas ou les tribunaux existant deviendraient, pour une raison ou pour une autre, incapables de faire exécuter les lois fédérales. Si cette section n'admettait pas l'existence d'un pouvoir judiciaire fédéral, elle eut été autrement rédigée ; il était aussi facile de décréter de suite l'existence d'une cour d'appel ou de tout autre tribunal, que d'en permettre la création dans l'avenir. Si la chose n'a pas été faite c'est sans doute parceque on reconnaissait que le pouvoir judiciaire dont on conservait l'existence par la section 129 pourrait encore suffire aux besoins du pays pour longtemps, et on laissait prudemment à l'avenir le soin d'exercer le pouvoir de créer de nouveaux tribunaux suivant les circonstances. Ce n'est certainement pas sur la section 101, qui n'accorde qu'un pouvoir facultatif, qu'on peut s'appuyer pour prouver que les auteurs de la Confédération ont crée un pouvoir judiciaire qui pouvait répondre aux besoins immédiats de la Confédération. C'est par d'autres sections que l'organisation judiciaire a été effectivement établie et complétée, de manière à entrer en existence en même temps que l'acte constitutionnel lui-même.

Cette organisation résulte de diverses dispositions de l'acte de l'A. B. N. auxquelles je ferai allusion après avoir mentionné celles sur lesquelles on s'appuie le plus fortement pour en contester l'existence.

Les adversaires de la constitutionalité de la loi en question fondent leurs principaux arguments sur les sous-ss. 13 et 14 de la s. 92 attribuant exclusivement aux législatures la juridiction sur " La propriété et les " droits civils dans la province, et l'administration de la " justice dans la province y compris la création, le main- " tien et l'organisation de tribunaux de justice pour la " province, ayant juridiction civile et criminelle, y com- " pris la procédure en matières civiles dans ces tribu- " naux."

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J'admets sans hésitation le contrôle exclusif des législatures sur ces deux catégories de sujets. A elles seules appartient sans doute le droit de régler les droits civils *dans la province*, comme l'organisation de tribunaux de justice *pour la province;* et le parlement fédéral commettrait certainement un excès de pouvoir s'il législatait sur ces matières *pour la province.* Mais s'en suit-il nécessairement que ce dernier n'a aucune juridiction sur les droits civils ne concernant que la Puissance en général, de même que sur l'organisation et le maintien des tribunaux en autant que la Puissance y est intéressée. Y a-t-il pour celle-ci dans les deux paragraphes une exclusion absolue de toute juridiction ? Je ne le pense pas. Il me semble, au contraire, que les termes mêmes s'opposent à une interprétation aussi restrictive. En effet, les mots *pour la province* ajoutés à la suite des pouvoirs donnés sur les droits civils et l'organisation des tribunaux, restreignent bien pour les législatures, l'exercice de ces pouvoirs aux limites de la province, mais ne comportent pas l'exclusion de l'exercice par le parlement fédéral d'une juridiction semblable sur les diverses catégories de droits civils qui lui sont attribués. Rien n'est plus clair ni plus certain que les législatures n'ont pas une juridiction complète sur les droits civils. Si tel était le cas, les termes *droits civils*, comprenant par opposition au droit criminel tous les droits dont un sujet peut jouir, il s'en suivrait que les provinces auraient une juridiction illimitée sur tout ce qui ne dépendrait pas du droit criminel. La distinction que l'on a voulu faire entre les droits civils et les droits politiques n'est fondée sur aucune autorité positive. Les termes *droits politiques* n'ont pas dans le droit anglais une signification consacrée par la loi ou par les décisions judiciaires. Pour exprimer la même idée Blackstone emploie indifféremment les mots *liberté civile* ou *liberté politique.* Sa sub-division des *droits*

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en quatre catégories n'a pas d'autre raison que celle d'en faciliter l'exposition, comme il le dit : " in order to " consider them with any tolerable ease and perspicuity, " it will be necessary to distribute them methodically " under proper heads." La décision du Conseil Privé dans la cause de *Landry vs. Théberge* (1) n'a pas établi non plus, comme on le prétend, une distinction entre les droits civils et les droits politiques. Lord *Cairns* dit, en parlant des deux lois de *Québec* sur les élections contestées, qu'elles n'avaient pas pour objet de pourvoir à la décision de droits civils ordinaires (*of mere ordinary civil rights*) ; et il qualifie aussi cette législation comme extrêmement particulière, (*extremely peculiar*), mais il ne dit pas qu'elle a pour objet de statuer sur les droits politiques comme sujet distinct des droits civils. Il ne fait même pas usage des mots *droits politiques* dans son jugement. Le langage qu'il tient à ce sujet est conforme à ce que dit Blackstone au sujet de sa division des *rights*. Pour achever de démontrer que les termes *droits civils*, dans le paragraphe 13, ne peuvent avoir la signification étendue qu'on veut leur donner, il suffit de rappeler que la banqueroute et la faillite, les brevets d'invention et de découverte, les droits d'auteurs, le mariage et le divorce et beaucoup d'autres sujets qui, sans nul doute, sont compris dans les termes génériques de droits civils, sont cependant exclusivement du ressort du parlement fédéral.

Il serait donc plus correct de dire, que le pouvoir législatif au sujet *des droits civils* a été partagé entre le parlement fédéral et les législatures, que de conclure qu'il est en entier du domaine exclusif de ces dernières. Je ne puis pour ces raisons voir dans le paragraphe 13 d'obstacles à l'exercice de la juridiction assumée par le parlement fédéral.

(1) L. R. 2 App. Cases 268.

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Le paragraphe 14 concernant l'organisation des tribunaux et la procédure n'a pas non plus l'effet d'enlever au parlement fédéral toute juridiction sur les tribunaux provinciaux.

L'on a comparé la position des provinces dans la Confédération Canadienne à celle des Etats dans l'Union Américaine, pour en conclure que les provinces ont une indépendance aussi complète que celle des Etats, et que le gouvernement fédéral ne peut exercer aucun pouvoir quelconque sur les tribunaux provinciaux, pas plus que ne pourrait le faire le Congrès aux Etats-Unis à l'égard des tribunaux d'Etats. S'il y a sous beaucoup de rapports analogie entre les deux constitutions, il n'y en a certainement aucune dans le mode adopté pour la distribution du pouvoir législatif. Dans la constitution américaine, on a adopté à cet égard un principe tout à fait opposé à celui qui a été suivi dans l'acte de l'A. B. N.

Les Etats en consentant à entrer dans l'Union Américaine, ont conservé leur position d'Etats souverains et indépendants, sous la déduction seulement des pouvoirs qu'ils ont spécialement délégués au Congrès. On a fait ici précisément l'inverse. Le parlement impérial, qui a organisé l'état de chose actuel, a jugé à propos de ne donner aux provinces que des attributions définies et limitées, laissant au gouvernement fédéral, moins les attributions réservées, l'exercice de tous les pouvoirs de la souveraineté compatibles avec l'état colonial. Ceci est évident d'après la sec. 91.

En effet, à part du pouvoir exclusif sur les sujets mentionnés dans les 29 paragraphes de l'article 91, le gouvernement fédéral est en outre revêtu d'une autorité souveraine sur tout ce qui n'a pas été spécialement abandonné aux législatures. Le commencement de l'article s'exprime ainsi sur ce sujet: "Il sera loisible à "la Reine, de l'avis et du consentement du Sénat et de

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"la Chambre des Communes, de faire des lois pour la "paix, l'ordre et le bon gouvernement du Canada, rela- "tivement à toutes les *matières ne tombant* pas dans les "catégories de sujets par le présent acte exclusivement "assignés aux législatures des provinces; mais pour "plus de garantie, sans toutefois restreindre la généralité "des termes ci-haut employés dans cette section, il est "par le présent déclaré que (nonobstant toute disposi- "tion contraire énoncée dans le présent acte) l'autorité "législative exclusive du parlement du Canada s'étend "à toutes les matières tombant dans les catégories de "sujets ci-dessous énumérés." (Suivent les 29 paragra- phes énonçant ces divers sujets.)

Il est évident d'après ce texte que les attributions du parlement fédéral sont de deux sortes, les unes définies et énumérées dans les 29 paragraphes, les autres indé- finies et consistant dans le pouvoir de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, et n'ayant pas d'autres limites ou restrictions que celles contenues dans les 16 paragraphes de l'article 92.

Comme il n'était guère possible de faire une énumé- ration complète de tous les pouvoirs et, sans doute, pour parer à de graves inconvénients, on s'est servi dans la rédaction de notre constitution, comme dans celle des Etats-Unis, d'un langage général contenant en principe les pouvoirs conférés, laissant à la législation future la tâche d'en compléter les détails. Pour l'interprétation de cet article on peut faire application des observations suivantes (1):

In the opinion which was delivered, the Court observed that the constitution unavoidably dealt in general language, and did not enter nto a minute specification of powers, or declare the means by which those powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model

(1) 1 Kent's Comm: p. 389

the exercise of its powers, as its own wisdom and the public interest would require.

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Mais le langage de l'article 91, si général qu'il soit, est amplement suffisant pour conférer le pouvoir qui a été exercé, à moins qu'on ne prouve qu'en cela il a été commis une infraction aux attributions spéciales des provinces.

Mais, bien au contraire, il est admis de toute part que le sujet qui fait la matière de la loi attaquée n'est pas de la compétence des législatures. D'après la nature du sujet, comme d'après la disposition contenue dans la sec. 41, toute juridiction est interdite aux législatures concernant les contestations d'élections fédérales. Ainsi l'argument basé sur le fait que les législatures ont le pouvoir exclusif de régler la procédure ne peut avoir aucune valeur en face de la sec. 41 qui confère spécialement au parlement fédéral le droit non-seulement de statuer sur les contestations d'élections, mais encore celui d'en régler les procédures, *et les procédures y incidentes*, dit cet article. Aucune législature ne pouvant émettre la prétention de régler la procédure à cet égard, il n'y a donc pas eu dans ce cas usurpation de pouvoirs par la loi en question. Ce point me semble si clairement établi par le texte de la section que je ne le crois pas susceptible d'être mis en doute.

Indépendamment de la sec. 91, suffisante suivant moi, pour justifier la passation de la loi attaquée, il y a encore la sec. 129 qui donne en termes formels au gouvernement fédéral les pouvoirs les plus étendus sur les tribunaux en existence, savoir, ceux de les *révoquer*, *abolir* ou *modifier*.

Sec. 129. Sauf toute disposition contraire prescrite par le présent acte, toutes les lois en force en Canada, dans la Nouvelle-Ecosse ou le Nouveau-Brunswick, lors de l'union, tous les tribunaux de juridiction civile et criminelle, toutes les commissions, pouvoirs et autorités ayant force légale, et tous les officiers judiciaires, administratifs et ministériels en existence dans les provinces à l'époque de l'union

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continueront d'exister dans les provinces d'Ontario, de Québec, de la Nouvelle-Ecosse et du Nouveau-Brunswick respectivement, comme si l'union n'avait pas eu lieu ; mais ils pourront, néanmoins, (sauf les cas prévus par des actes du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature, en vertu du présent acte.

Pouvait-on employer un langage plus fort et plus complet pour donner juridiction sur ces tribunaux ? Je ne le pense pas. L'effet de cette section, à laquelle ils doivent leur existence actuelle, est évidemment de les soumettre au pouvoir législatif du gouvernemen- fédéral tout aussi bien, il est vrai, qu'à celui du gout vernement local, et de les rendre de fait, communs à ces deux gouvernements pour l'administration des lois par eux adoptées dans les limites de leurs pouvoirs respectifs.

Puisqu'ils sont sujets à la condition de pouvoir être révoqués, abolis ou modifiés par l'un ou l'autre de ces gouvernements, ces tribunaux ne sont donc pas, comme on l'a affirmé si positivement, assujétis uniquement à l'autorité des législatures locales. Les termes de cette section ne permettent pas de doute sur le pouvoir du parlement fédéral d'imposer de nouveaux devoirs aux juges et aux tribunaux, puis- qu'il a le pouvoir de les révoquer, abolir, ou modifier, "*conformément à l'autorité du parlement en vertu du présent acte.*" C'est sans doute à cause du pouvoir ainsi réservé qu'on a attribué au gouvernement fédéral par les sections 96 et 106 la nomination des juges et le paiement de leur salaire, s'ils eussent dû être au service exclusif des gouvernements locaux on aurait laissé à ceux-ci le choix et le paiement du salaire d'officiers auxquels le gouvernement fédéral ne pouvait imposer aucun devoir.

Ainsi chaque fois que le parlement fédéral passe une

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loi sur un sujet qui est de sa compétence, imposant aux juges ou aux cours de nouveaux devoirs, il exerce le pouvoir qu'il a par cette section de modifier les tribunaux, et cette loi doit recevoir son exécution tout aussi bien que celles des gouvernements locaux, dont les pouvoirs sur les tribunaux, en vertu de cette section, ne diffèrent point de ceux du parlement, à l'exception seulement que chacun d'eux ne peut les exercer que dans les limites de ses attributions spéciales. Ils sont enfin les tribunaux de Sa Majesté chargés de faire exécuter toutes les lois auxquelles elle a donné sa sanction en vertu de la nouvelle constitution.

La Cour Supérieure de la province de Québec, désignée dans la loi en question comme l'une de celles auxquelles la juridiction contestée est conférée, étant en existence lors de la Confédération est en conséquence devenue comme toutes les autres, sujette à subir les modifications que le gouvernement fédéral pourrait juger convenable de lui imposer. En serait-il de même à l'égard d'une cour créée depuis ? C'est une autre question ; et comme elle ne peut pas être soulevée dans cette cause, je ne crois pas devoir m'en occuper.

Partant du point de vue que j'ai adopté, il ne m'a pas semblé nécessaire non plus de m'occuper de la question, de savoir si, en outre des dispositions de l'acte de l'Amérique Britannique du Nord, les cours de première instance n'ont pas, comme attribution inhérente à leur constitution, une juridiction suffisante pour décider des contestations d'élections dans le cas où le parlement, au lieu d'adopter la loi actuelle, eut simplement renoncé à l'exercice de sa juridiction exclusive sur ce sujet. J'ai limité mes observations à la seule question de savoir s'il n'a pas de fait le pouvoir de conférer cette juridiction aux cours provinciales. Trouvant dans les dispositions de l'acte de l'Amérique Britannique du Nord, citées plus haut, une complète

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justification du pouvoir exercé, je n'ai pas cru devoir aller plus loin.

De ce qui précède, je conclus: 1o. que les paragraphes 13 et 14 de la section 92 n'ont pas l'effet d'enlever au parlement fédéral la juridiction qu'il a exercée en adoptant la loi en question; 2o. que les pouvoirs généraux de la section 91 et ceux de la section 41 sont suffisants pour autoriser cette législation; 3o. que la section 129 lui donne le droit de faire exécuter par les cours provinciales la loi dont il s'agit, aussi bien que toutes les autres lois fédérales adoptées dans les limites de ses attributions.

[TRANSLATED.]

FOURNIER, J. :—

The sole question submitted by the present appeal is, whether the Federal Parliament had the power to pass the Controverted Elections Act of 1874.

This question, the importance of which it is impossible to exaggerate, has been very learnedly discussed, and decided in different ways by the several Provincial Courts before whom it has been raised.

The reasons given on both sides are set out with the greatest fulness, and are certainly worthy of every possible consideration; but, after the thorough review of them by the Chief Justice, there would be no advantage in giving another summary of them here. For this reason I shall content myself with giving briefly the principal reasons which have made me adopt the same conclusion as that of my honorable colleagues.

It was in 1873 that the Federal Parliament, exercising, for the first time, the power conferred on it by the 41st section of the *British North America Act* to legislate on the subject of contested elections, adopted and established by Statute 36 Vic., c. 28, the principle of referring to the judicial power the decision of contested elections,

which, until then, had been decided by the Houses of Parliament, or their committees, to the exclusion of the ordinary tribunals. The law, the legality of which is attacked in this case, although it has revoked the first statute, retains the principle of reference to the judicial power, as well as a large number of its other provisions.

Several of the honorable judges called on to decide this question have entered into a very detailed critical examination of the principal provisions of these two laws, in order to prove that the first (that of 1873) was constitutional in creating a special Election Court, in virtue of Article 101 of the *British North America Act*, while the second is unconstitutional, in assuming the power to extend the jurisdiction of certain Provincial Courts to the decision of contested elections, a subject matter with which they were not before competent to deal.

I do not think it necessary to enter into an examination of the reasons brought forward to establish this distinction; nor into an examination of this other question, namely, whether the Act of 1874 did not constitute, as did that of 1873, a Federal Court, and, in consequence thereof, the law being *ultra vires* of the power given to the Federal Parliament by sec. 101, of creating additional tribunals, should be declared constitutional.

It is sufficient for me to say that, if the proposition that the Federal Government cannot impose new duties on the courts and judges existing at the time of Confederation is correct, these two Acts are open to the same objections, for in both, the provincial tribunals and the *personnel* which compose them, have the performance of new duties devolved on them. It matters little, for the decision of the real issue raised in this discussion, whether the new judicial duties have been

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imposed on judges and on courts in one case, as has been done by the Act of 1873, under the denomination of an Election Court, or whether, in the other case, such duties have been imposed, as has been done by the Act of 1874, on provincial courts and on judges under the names by which they are designated in the provincial laws which have given them existence. The question, nevertheless, remains the same, for whether the judges are taken collectively as a court, or in their quality of individual members of the court, it always comes back to the question as to whether the Federal Parliament had the power to impose upon them new duties.

Thus, the question seems to me to be reduced simply to one whether the Federal Parliament has the power, which has been so emphatically and energetically denied to it by some honorable judges, whose opinion I greatly respect, to impose new duties on provincial judges and tribunals, and even to extend their jurisdiction, if necessary. I regret to be obliged to say that on this subject I entertain an opinion diametrically opposed to theirs.

If I do not hesitate to make this declaration it is because a still larger number of honorable judges have adopted this view, which, besides, seems to me in accord with the spirit and letter of the constitution.

If the proposition which I have above laid down be not correct, it necessarily follows that the authors of Confederation have omitted to create, for the execution of federal laws, a judicial power co-existing with the new order of things.

The preamble of the *British North America Act* indicates, however, that their first duty was to endow the federal union of the Provinces with a constitution based on the same principles as that of the United Kingdom. One of the essential elements of the British Constitution, as of every regular government, is the

creation of a judicial power, such power and the legislative and executive powers forming the three indispensable elements of every government. Have they committed a mistake of such a very grave nature as never to have thought of the creation of a judicial power? In the opinion of some, this strange omission was made, and thus there existed between the 1st of July, 1867, when the *British North America Act* came into force, and the meeting of the Federal Parliament, in November, 1867, an interregnum of four months, during which time there could not be found a single tribunal competent to execute the federal laws.

Notwithstanding this, from the moment the new constitution came into force, the Federal Government became proprietor of all the public properties enumerated in Schedule 3 of the *British North America Act*, at the same time that it became charged with the execution of the laws relating to customs and excise, and, by the 41st section, of the electoral laws which remained in force. It would have found itself, therefore, during such interregnum, under the impossibility either of protecting its properties or of collecting its revenues, recourse to the Provincial Courts being forbidden.

But this argument is answered by alleging that such a great mistake has not been committed; that, on the contrary, by section 101, the Government of *Canada* is invested with the power of creating a Court of Appeal and additional tribunals for the better administration of its laws; that ample powers in this respect were given to it, precisely because the exclusive power of organizing tribunals for the Provinces was reserved to the Legislatures, and that thus the two governments have each their peculiar and exclusive rights of creating tribunals.

In my opinion section 101 does not justify this conclusion. It does not in terms establish a judicial power;

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it only gives the right to establish, as circumstances and requirements might demand, a Court of Appeal and *additional* tribunals for the *better execution* of the laws. According to the terms of this section there were tribunals already existing for the execution of federal laws, since this power is given to be exercised only "from time to time," in the words of the section, that is to say, in the event of the existing tribunals becoming, for any reason, incapable of executing the federal laws. If this section was not intended to recognize the existence of a federal judicial power, it would have been differently drawn—it would have been just as easy to have directed the immediate creation of a court of appeal, or of any other tribunal, as to have allowed their creation at some future time. If this was not done, it was, doubtless, because the judicial power, whose existence was preserved by sec. 129, was recognized as being still sufficient for the requirements of the country for a long time, and the power to create new tribunals was prudently left to be exercised in the future according to circumstances. Certainly sec. 101, which gives only an optional power, cannot be relied on to prove that the authors of Confederation created a judicial power suitable to the immediate needs of Confederation. It is by other sections that a judicial organization has been effectively established and completed, in such a manner as to come into existence at the same time as the constitutional act itself.

This organization depends upon various provisions of the *British North America Act*, to which I shall allude, after having mentioned those on which reliance is most strongly placed for contesting its existence.

The opponents of the constitutionality of the law in question found their principal arguments on sub-sections 13 and 14 of section 92, giving to the legislatures exclusive jurisdiction over "property and civil rights in the

province," and "the administration of justice in the province," including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

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I admit, without hesitation, the exclusive control of the legislatures over these two classes of subjects. To them alone belongs, without doubt, the right of regulating civil rights *in the province*, as well as the organization of courts of justice *for the province*, and the Federal Parliament would certainly exceed its power if it were to legislate on these matters for the province. But does it necessarily follow that the latter has no jurisdiction over civil rights which concern only the Dominion in general, as well as over the organization and maintenance of courts in so far as the Dominion is interested? Do these two paragraphs contain an absolute exclusion of all jurisdiction in the Dominion Parliament? I do not think so. It seems to me, on the contrary, that these very terms are opposed to an interpretation so restricted. In fact, the words "in the province," following the enumeration of the powers given over civil rights, and the organization of courts, effectually confine the exercise of these powers to the limits of the Province, but do not go so far as to exclude the exercise by the Federal Parliament of a similar jurisdiction over the different classes of civil rights which are confided to it. Nothing is clearer nor more certain than that the legislatures have not a complete jurisdiction over civil rights. If such were the case the term "civil rights," comprehending, in opposition to the criminal law (*droit criminel*), all the rights which a subject can enjoy, it would follow that the provinces would have an unlimited jurisdiction over everything not belonging to the criminal law. The distinction which some have wished to make between civil rights

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and political rights is not founded on any positive authority. The term "political rights" has not in English jurisprudence (*droit anglais*) a technical meaning established either by law or by judicial decisions. To express the same idea, *Blackstone* uses, indifferently, the words "civil liberty" or "political liberty." His subdivision of rights into four classes was for no other reason than to facilitate the discussion of them; as he puts it: "in order to consider them with any tolerable ease and perspecuity it will be necessary to distribute them methodically under proper heads." Neither has the decision of the Privy Council in the cause of *Landry v. Théberge* (1) established, as is pretended, a distinction between civil rights and political rights. Lord *Cairns* says, in speaking of the two laws of *Quebec*, relating to contested elections, that their object was not to provide for the decision of "mere ordinary civil rights," and he describes also this legislation as "extremely peculiar," but he does not say that its object was to legislate on political rights as a subject distinct from civil rights. He does not even make use of the words "political rights" in his judgment. The language which he makes use of on the subject is in conformity with what *Blackstone* says on the subject of the division of rights. To show conclusively that the term "civil rights," in sub-section 13, cannot have the extensive meaning which it is desired to give it, it is sufficient to recall to mind that bankruptcy and insolvency, patents of invention and discovery, the rights of authors, marriage and divorce, and many other subjects, which, without any doubt, are comprised in the general term "civil rights," are, notwithstanding, exclusively within the jurisdiction of the Federal Parliament.

It would, therefore, be more correct to say that the legislative power over the subject of "civil rights" has

(1) L.R. 2 App. cases 268.

been divided between the Federal Parliament and the legislatures, than to conclude that it is wholly within the exclusive domain of the latter. I cannot, for these reasons, see in sub-section 13, obstacles to the exercise of the jurisdiction assumed by the Federal Parliament.

Nor has sub-section 14, concerning the organization of courts and procedure, the effect of depriving the Federal Parliament of all jurisdiction over provincial Courts.

The position of the provinces in the Canadian Confederation has been compared with that of the *United States* in the American Union, in order to draw therefrom the conclusion that the provinces have an independence as complete as that of the *States*, and that the Federal Government cannot exercise any right whatever over Provincial Courts, any more than could the Congress of the *United States*, with respect to the courts of the *States*. If there be, in many respects, an analogy between the two countries, there is certainly none whatever in the mode adopted for the distribution of the legislative power. In the American Constitution a principle altogether opposed to that which has been followed in the *British North America Act* has been adopted. The *States*, in consenting to enter the American Union, preserved their position of sovereign and independent States, under the limitation only of the powers specially delegated to Congress. Here precisely the reverse has been done. The Imperial Parliament, which has created the existing state of things, has judged it right to give to the provinces only defined and limited powers, leaving to the Federal Government, after deducting the powers thus reserved, the exercise of all the powers of sovereignty compatible with the Colonial state. This is evident from section 91. In fact, besides the exclusive power over the subjects mentioned in the 29th sub-section of section 91, the Federal

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Government is, in addition, invested with a sovereign authority over everything which has not been specially ceded to the legislatures. The beginning of the section expresses itself thus on the subject:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared, that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated.

(Then follow the 29 sub-sections setting forth the different subjects.)

It is evident, according to this section, that the powers of the Federal Parliament are of two kinds, the one defined and enumerated in the 29 sub-sections, the other undefined and consisting of the power to make laws for the peace, order and good government of *Canada*, and having no other limits or restrictions than those contained in the 16 sub-sections of section 92.

As it was scarcely possible to make a complete enumeration of all the powers, and, no doubt, to avoid grave inconveniences, use was made in drawing our Constitution, as in that of the *United States*, of general language, containing in principle the conferred powers, leaving to future legislation the task of completing the details. To interpret this section the following observations can be applied:—

In the opinion which was delivered, the court observed that the Constitution unavoidably dealt in general language, and did not enter into a minute specification of powers, or declare the means by which those powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the Constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the

exercise of its powers as its own wisdom and the public interest would require (1).

But the language of section 91, general though it may be, is amply sufficient to confer the power which has been exercised; at any rate, in the absence of proof that in doing so there has been committed an infringement on the special powers of the provinces. But, on the contrary, it is admitted on all sides that the subject matter of the law which is attacked is not within the jurisdiction of the legislatures. From the nature of the subject, as well as by the provisions of sec. 41, all jurisdiction over contested federal elections is denied to the legislatures. Thus the argument based on the fact that the legislatures have the exclusive power of regulating procedure can have no weight in face of sec. 41, which confers specially on the Federal Parliament the right not only to legislate respecting contested elections, but, in addition, that of regulating their procedure, "and proceedings incident thereto," says the section. No legislature being able to set up the pretension of a right to regulate the procedure with respect to this matter, three is then in this case no usurpation of powers by the law in question. This point seems to me so clearly established by the wording of the section that I do not believe it susceptible of doubt.

Independently of section 41, sufficient, in my opinion, to justify the passing of the law which has been called in question, there is, besides, section 129, which gives in formal terms to the Federal Government the most extensive powers over the courts in existence, namely, those of *repealing*, *abolishing* or *altering* them.

Except as otherwise provided by this Act, all laws in force in *Canada*, *Nova Scotia* or *New Brunswick* at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and minis-

(1) 1 Kent's Com. p. 389.

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terial, existing therein at the union, shall continue in *Ontario, Quebec, Nova Scotia and New Brunswick*, respectively, as if the union had not been made; subject, nevertheless, (except with respect to such as are reached by, or exist under Acts of the Parliament of *Great Britain*, or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be repealed, abolished or altered by the Parliament of *Canada*, or by the legislature of the respective Province, according to the authority of the Parliament, or of that legislature under this Act.

Could stronger or fuller language be used to give jurisdiction over these courts? I think not. The effect of this section, to which they owe their very existence, is evidently to place them under the legislative power of the Federal Government as well as, it is true, under that of the Local Government, and to make them, in fact, common to both these governments for the administration of the laws adopted by them within the limits of their respective powers.

Since they are subject to the condition of being repealed, abolished or altered by either of these governments, these courts are not, therefore, as has been asserted so positively, subject solely to the authority of the Local Legislatures. The terms of this section leave no doubt as to the power of the Federal Government to impose new duties on the judges and courts, since it has the power of repealing, abolishing, or altering them "according to the authority of the Parliament..... under this Act." It is, no doubt, on account of this reserved authority that the Federal Government was given by sections 96 and 100 the appointment of the judges, and was charged with the payment of their salaries. If they were to remain under the exclusive control of the Local Legislatures, and not subject to the performance of any duties which might be imposed by the Dominion Parliament, their appointment and the payment of their salary would most likely have been left to the Local Government.

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Thus each time the Federal Parliament passes a law on a matter within its jurisdiction, imposing on the judges or on the courts new duties, it exercises the power given it by this section of altering the courts, and this law should be executed as fully as those of the local governments, whose powers over the courts, in virtue of this section, do not differ from those of Parliament, with the sole exception that each of them can exercise these powers only within the limits of its special powers (*attributions spéciales*). The Courts are, in fine, the tribunals of Her Majesty, charged with the execution of all the laws to which she has given her sanction in virtue of the new Constitution.

The Superior Court of the Province of *Quebec*, designated in the law in question as one of those on which the contested jurisdiction is conferred, being in existence at the time of Confederation, became, in consequence, like all the others, liable to undergo the alterations which the Federal Government might think right to impose on it. Would it be the same with respect to a court created since? That is another question, and as it cannot be raised in this cause, I do not think it necessary to consider it. Nor, taking the view which I have adopted, has it seemed to me necessary to consider the question whether, outside of the provisions of the *British North America Act*, the courts of original jurisdiction have not, as an inherent element of their Constitution, sufficient jurisdiction to decide contested elections in the event of Parliament, instead of adopting the existing law, having simply abandoned the exercise of its exclusive jurisdiction over this subject. I have limited my observations to the sole question as to whether it had not, in fact, the power to confer this jurisdiction on provincial courts. Finding in the provisions of the *British North America Act*, above

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cited, a complete justification of the power exercised, I have not thought it necessary to go further.

From what precedes, I draw these conclusions: 1st. That paragraphs 13 and 14 of section 92 have not the effect of depriving the Federal Parliament of the jurisdiction which it has exercised in adopting the law in question. 2nd. That the general powers of section 91 and those of section 41 are sufficient to authorize this legislation. 3rd. That section 129 gives it the right to require the provincial courts to execute the law in question, as well as the other federal laws adopted within the limits of its powers.

HENRY, J:

The determination of the issue raised by the preliminary objection in this case, to the authority of the learned judge who presided at the trial of the petition, touching and questioning, as it does, the power of the Parliament of *Canada* to pass the act under which that trial was being had, being most important, demanded and has received my most diligent study and consideration. I have carefully read and weighed all the judgments upon the subject delivered in *Ontario*, *Quebec* and *New Brunswick*, as well as the several statutes bearing upon it, and will endeavor, briefly, to give the conclusion at which I have arrived.

After mature consideration of the legitimate sources from which the power to try the merits of an election petition against the return of a Member of the House of Commons, which is now questioned, is derived, I have arrived at the conclusion that much has been written, many arguments used, positions taken, and theories advanced that are wholly unnecessary.

Arguments have been advanced from premises which do not exist, the determination of which cannot affect

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those that do, and upon which latter alone we are bound to decide. Some learned judges contend for the existence of an inherent power in Imperial and Provincial Courts to try such petitions, and that that power always existed though in a latent condition; being controlled in *England* by the assertion of the House of Commons of its exclusive jurisdiction which, by degrees, became universally acknowledged as the law of the land, as being within the law and custom of Parliament; and, in the several Provinces of the Dominion, by the assumption of a similar jurisdiction, and by statutes at different times passed. That, so existing, but its exercise prevented, it would assert itself at any moment when the controlling power was removed by legislative enactment. By other learned judges the correctness of this theory is disputed, and lengthy and exhaustive arguments are advanced to establish the position that such a jurisdiction or power never existed. I do not think the settlement of that controversy at all necessary in the present case. In considering the issue before us we are not driven to draw analogies in regard to the courts in *England*, and those of the several united Provinces, when we have sufficient otherwise upon which to base our judgment. It will be sufficient for us, and I think we are bound, to rest it on the statutes immediately applicable to the issue before us.

We have, in the united Provinces, a written constitution embraced in the Imperial Statute, passed in 1867, for the object of uniting them. That statute contains the germs and distribution of the legislative functions and powers to be exercised in the general Parliament and the Provincial Legislatures, and to it we are irresistibly turned for guidance and direction.

In framing that Act, one of the first considerations would be, and no doubt was, to prevent, if possible,

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conflict in legislation, as between the general and local legislatures; but no one can read it without seeing, from the necessarily peculiar distribution of the legislative powers, the difficulty of doing so. The present case is a proof of it, as appears by the antagonistic judgments given in relation to the question at issue. I cannot better exhibit the difficulty just referred to, and the opportunity offered by the necessarily peculiar provisions for the distribution of legislative powers to raise a question of conflict, than by a reference to the matter of "civil rights." I need not define here what may be included by that comprehensive term. It is sufficient for my present purpose to claim that a large portion of the "civil rights" are, legitimately and without question, affected, controlled and guarded by Dominion legislation, which interferes with and excludes local legislation on many branches of "civil rights," although by the distribution of legislative powers "civil rights in the Province" is, by sub.-sec. 14 of section 92, awarded specially to the Local Legislatures.

There is but a small minority of the subjects given expressly to the Dominion Parliament that do not affect "civil rights within the Province," and its whole legislation in respect of them is clearly an authorized invasion of the powers of local legislation conferred by the general term "civil rights in the Province." The whole purview of the act, with a proper consideration of its objects, is evidence of its policy to limit local legislation to those "civil rights in the Province," not included specially or otherwise in the powers given to the Dominion Parliament.

In the construction of one part of the Act, it is not less our duty than our privilege to take into consideration every part of it, and when an apparent conflict is presented, we are bound to give weight to arguments drawn from a due appreciation of the objects which

are apparent on the face of it, and, if possible, so to construe it as to give effect to all its provisions, and not so as to leave, unnecessarily, some of them inoperative.

The opening clause of section 91 of the *British North America Act*, 1867, provides that: "It shall be lawful "for the Queen, by and with the advice and consent of "the Senate and House of Commons, to make laws for the "peace, order and good government of Canada, in rela- "tion to all matters not coming within the classes of "subjects by this Act assigned exclusively to the Legis- "latures of the Provinces." This is followed by a declaration that the annexed statement of powers should not restrict the general provision of the clause.

Had there been no limitation in this clause, the power "to make laws for the peace, order and good govern- "ment of Canada" would have embraced every subject of legislation that could be presented, but there being a limitation, it is necessary to ascertain the nature and extent of it. It withholds from Parliament the right to legislate "in regard to matters coming within the classes of subjects *by this Act* assigned *exclusively* to the legislatures of the Provinces." It will be observed that the words of this clause "by this Act" do not refer us specifically to section 92 or its provisions, but generally to the Act, to ascertain what is "exclusively" awarded to the Local Legislatures. We must look at the *whole Act*, and apply the result as the proper deduction from the otherwise comprehensive and unlimited powers given by the clause to the Parliament of Canada.

Taking, then, the Act, and considering it in all its objects and bearings, what are the necessary deductions to be made for those matters *exclusively* given by it to the Local Legislatures—for it is only such as have been so *exclusively* given that form the exception.

Sub-section 13 of section 92 gives to the Local

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Legislatures the exclusive right to legislate in regard to "Property and civil rights in the Province," and sub-section 14 "The administration of justice in the "Province," including "the Constitution, maintenance "and organization of Provincial Courts, both of civil "and criminal jurisdiction, and including procedure in "civil matters in those courts."

What, then, does the term civil rights *in the Province* include. This, I take it, would, if not controlled and limited by other provisions of the Act, include every question of civil rights arising between individuals in each Province, but no one could reasonably contend that legislation on the subjects of "The regulation of trade and commerce," Navigation and shipping," Bills of exchange," "Weights and Measures," "Interest," "Legal tender," "Bankruptcy and insolvency," and many others, including "Marriage and divorce," by the local authorities, would not, taking the whole Act, be *ultra vires*, although otherwise coming within the scope and comprehension of the provision "Civil rights within the Province."

Legislation by the Dominion Parliament on such subjects is legitimate and binding, and the Provincial Courts are bound to determine the "civil rights of parties" in the Province solely by it. I make these references to explain why, in my view, we should not construe the first clause of sec. 91, merely by sub-sections 13 and 14 of section 92, but by the whole purview and object of the Act.

Being so guided, what are the local legislative powers under sections 13 and 14? Deducting the indirect and incidental powers of legislation given by the Act to Parliament, the Local Legislatures have the *exclusive* right to legislate only in regard to the remainder. The question here, then, is, to which of the two Legislatures is given the power of legislating as to

the trial of contested elections? In reply, let me say that that subject is not only given to Parliament, but excluded from the powers of the Local Legislatures. It is a subject, therefore, the latter cannot touch. It is not questioned but that Parliament has the power of dealing generally with the whole subject. It has that, not only under the provisions of the first clause of section 91, before cited, but by section 129 of the Imperial Act, which provides for the continuance of all laws, etc., existing at the union, "subject, nevertheless, * * * * to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Provinces, *according to the authority of the Parliament, or of that Legislature under this Act.*"

By the terms of the clause just cited, all laws were continued in force, but in regard to the trial of contested elections to the House of Commons there was no statutory provision applicable, although such had previously existed in the several united Provinces. The first preamble to the Act is as follows: "Whereas, the Provinces "of *Canada, Nova Scotia* and *New Brunswick* have ex- "pressed their desire to be federally united into one "Dominion under the Crown of the United Kingdom "of *Great Britain* and *Ireland*, with a constitution "similar in principle to that of the United Kingdom;" and the third preamble alleges the expediency of providing for "the constitution of the legislative authority "in the Dominion." The conclusion is irresistible, from the suggestions contained in the preambles just referred to, and from the whole scope and meaning of the Act, that it was intended to leave no subject requiring legislation unprovided for; and that in the powers given all should be included; and, in the distribution, either Parliament or the Local Legislatures should deal with every subject. This consideration is

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of value when dealing with the present and other cases of a similar kind.

The question here is, however, not strictly one of a conflict of legislation, for, as to it, the Parliament alone has legislated; nor is it claimed, that with reference to the subject-matter in question, any Local Legislature could deal; nor, in reference to the general subject, that any legislative prerogative of the Local Legislatures has been invaded. The right of the Parliament to deal with the general subject of the trial of contested elections is admitted; but it is objected, that in so dealing with it as to give to the Provincial Courts power to try them, and in framing the procedure, it has trenched on the prerogatives of the Local Legislatures to which were committed the right to deal with "civil rights in the Province," and "the ad-"ministration of justice in the Province, including the "constitution, maintenance and organization of Pro-"vincial Courts."

To determine the point it becomes necessary, first, to ascertain the true meaning of the two sub-sections 13 and 14.

First, then, as to "civil rights." We are told in some of the judgments to which I have referred that the rights involved in contested elections are not *civil* but *political* ones, and a judgment of the Privy Council is cited in support of that doctrine.

The answer I give to that proposition is that, although in *France*, in the *United States* and other countries, political rights are, in some regards, looked upon as differing from ordinary civil rights, there is no such distinction ordained in *England*, where "civil rights" covers and includes those which the learned judges call political only. I have read the judgment of the Privy Council referred to, and can find in it no warrant for the allegation made in regard to it. "Political"

rights are not mentioned as such, but the judgment is founded on the denial of the right of the Sovereign to review the judgment of a court under local statutes substituting it, in the trial of contested elections, for the committee of the Legislative Assembly; and vesting in that court a "*very peculiar jurisdiction*, which, up to "that time, had existed in the Legislative Assembly." The judgment, so far from distinguishing between political and civil rights, refers to those involved as civil rights, but not "*ordinary* civil rights."

The right of the Local Legislatures to legislate as to civil rights, as I have before stated, is subordinated to those civil rights not affected by Dominion powers of legislation and to those *in the Province*, and not including matters of a *general* character.

The 14th section gives local authority to deal with "administration of justice *in the Province*," which I construe to mean the power of legislating for the administration of justice in the Province in regard to the subjects given by the Act, and, to that extent only, to provide for "the constitution, maintenance and organization of Provincial Courts," including the procedure necessary for the administration of justice in reference to those and kindred subjects. I have not failed to notice the comprehensiveness of the provision, including as it does *procedure* in civil matters in those courts. These words, I hold, must be considered with the context and with the objects and other provisions of the Act, and common sense and reason suggest how inartificial and incomplete the legislation must be that would confer unlimited power on the Dominion Parliament to deal with a subject such as the trial of contested elections, and leave the necessary *procedure* to give effect to its legislation to Local Legislatures which one or more might not enact at all, or in such a way as to be useless, or by such measures as would, in one Province, be essentially dif-

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ferent from those in others. To contend that such was intended by the Act would, in my opinion, be a libel on the intelligence of the British Parliament. Although the contention against the right of the Dominion Parliament to provide for the procedure in contested election cases would apparently involve the absurdity I have just stated, such a position could not arise; for, in cases where the machinery in the Provincial Courts is defective for the trial of contested elections, the Local Legislature has clearly no power to supply it. The right, therefore, to provide for the *procedure* in contested election cases is a necessary adjunct to the right to legislate at all in respect to them.

Parliament, then, having, as I have endeavoured to maintain, plenary powers over the whole subject, had it the power to impose on the Provincial Courts the duty of trying contested elections?

Section 129 of the Imperial Act, before mentioned, provides for the continuance of laws as existing at the union. The only law then existing in regard to the trials of contested elections, resulted from the inherent parliamentary right of the House of Commons to deal with them. No statute had then been passed to delegate the authority to a committee of the House or any other court. The right of the House of Commons to receive petitions against the returns of its Members, and deal with them, was, nevertheless, as effectual as any statute could have made it, and was such a law as, under the provisions of the latter clause of the section, might "be repealed, abolished, or altered by the Parliament of Canada." By the provisions of that section, as well as by the first clause of section 91 and section 41, the Dominion Parliament derived full authority to deal with the trial of contested elections. When having so dealt with the subject, no person, high or low, can violate its legislation. Every one is bound by its provisions and pre-

scriptions, unless, indeed, they conflict withthe Imperial Act, by usurping the powers of the Local Legislatures. I have shown that the Local Legislatures have no power over the subject, and therefore in that respect no such usurpation nor conflict could arise; but the contention is, that as the constitution, maintenance and organization of Provincial Courts with the procedure therein in civil matters is given by sub-section 14 of section 92, the Dominion Parliament cannot, directly or indirectly, add to their functions or duties, or in any way add to the scope of their jurisdiction. I cannot draw any such conclusion from the Imperial Act. In the legislation as to the large majority of the subjects comprised in the 29 specifically and unquestionably given by section 91 to the Dominion Parliament, the power is found of directly adding to the functions, duties and jurisdiction of those courts; and, as the power to legislate in regard to contested elections is just as fully given by the Imperial Act, why should any distinction be drawn or attempted? The only difference that I can discover is in the *manner* in which the power has been given, while none appears in substance.

If, in one case, the power exists why not in the other? If there is no *incompatibility* in the Provincial Courts in the one case, and none has been found or suggested, I am at a loss to discover why there should be any in the other. The Local Legislatures, even had they the power, have intervened no prohibitory legislation. The courts entertain, and adjudicate on, all matters presented to them under the common law and local statutes, and until it is shown that, whilst so doing, the additional duty of trying contested elections is incompatible with their other duties and obligations, I have no difficulty in arriving at the conclusion that they are equally authorized, as well as bound, by the provisions of the

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Dominion Acts, which are, in this case, objected to as *ultra vires*.

The Dominion Parliament, in the exercise of its plenary powers, had the right to impose the duty in question, the exercise of which, as far as I have been able to discover, does not in the slightest degree trench upon the legislative rights of the Local Legislatures, or conflict with the position of those courts in relation to their duties in regard to the other subjects, which by the constitution the Local Legislatures can impose on them.

By this conclusion effect is given to the spirit and, I think, also, the letter of the Imperial Statute in question, which a contrary one would not give. I do not forget that under the Imperial Statute the Dominion Parliament might establish independent tribunals for the trials of election contests, as was done on one occasion in *Nova Scotia*, under the Act of 1873, but, although I acted as one of the judges of the special court at that time, I was not insensible to the objections which might be raised to such a tribunal, appointed *ad hoc* by the Government of the day to try the merits of a contest between a Government supporter and an opponent. To give public satisfaction in such, as in all other cases, the judicial tribunal must be free even from the slightest suspicion of weakness or bias. I have been gratified to witness the success that has been achieved in this respect from the transfer to the ordinary legal tribunals in *England*, and in this country, of the trial of election contests; but, at the same time, would not give my sanction to an Act which is *ultra vires*. I am glad, therefore, to be able to decide that the one in question is not so, and, consequently, I am of the opinion the appeal herein should not be allowed, and that the judgment herein of the learned Chief Justice of the Superior Court of *Quebec* should be affirmed with costs.

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TASCHEREAU, J:

Upon the Respondent's motion to quash this appeal, I am of opinion that the appeal lies, and that this motion must be dismissed. The preliminary objections would, if allowed, have been final and conclusive, and have put an end to the petition, and the appeal has been duly filed before the Act of last Session came into force (1). So that, under section ten of the said Act, the appeal stands, and the motion to quash must be dismissed.

Upon the abstract question submitted to us in this case, whether the Dominion Controverted Elections Act of 1874 is *ultra vires* or not, I am of opinion that the said Act is not *ultra vires*. This question has been so fully and ably discussed, not only by my brother judges who have just delivered their opinions, but also in the Provincial Courts by so many of the learned judges thereof, that any attempt on my part to review all the points raised in the different causes where the question has been mooted, would not, I feel, throw any new light on the subject, and could not but be as tedious as of doubtful usefulness. I will therefore give as briefly as possible the reasons upon which I base my opinion that the said Dominion Controverted Elections Act of 1874 is constitutional.

It is admitted, and is beyond doubt, that the Parliament of *Canada* has the exclusive power of legislation over Dominion controverted elections. By the *lex Parliamentaria*, as well as by the 41st, 91st and 92nd sections of the *British North America Act*, this power is as complete as if it was specially and by name contained in the enumeration of the federal powers of section 91, just as promissory notes, Insolvency, &c., are. It is also admitted that if this Act of 1874, like

(1) 42 Vic., chap. 39 D.

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the one of 1873, has created a new Dominion Court in each Province for the trial of controverted elections, its legality is unimpeachable. The learned chief justice of the Superior Court of the Province of *Quebec*, whose judgment is now submitted to us, has declared the Act constitutional, and within the powers of the Dominion Parliament, chiefly, as it appears to me, upon the ground that such a new Dominion Court is virtually created thereby. The Appellant contends that such is not the case, and that it is upon the Provincial Superior Courts as they are established, that this Act imposes the duties of trying the Dominion controverted elections. He contends that Parliament had not the power to do this, and has thereby encroached upon the privileges of the Provincial Legislatures, to whom alone, he alleges, is given, by the *British North America Act*, the right to legislate upon the administration of justice, and the constitution, maintenance and organization of Provincial Courts. I will not consider whether or not the Controverted Elections Act creates a new court in each Province for the trial of election petitions; for me, the question is of no importance, as I am of opinion that Parliament had the right to impose this duty upon the Provincial Courts as they exist. I say that if it has created new courts, the act is constitutional, and this is admitted; but I go further, and I distinctly base my judgment on the question upon this broader ground, that, admitting for the sake of argument, that it has not created new courts, but has given these trials to the Provincial Courts, as they are constituted, it had the power to do so.

Great stress is laid by the Appellant, in support of his contention, on the 101st section of the *British North America Act*, by which the Dominion power is authorized to create additional courts for the better administration of the laws of the Dominion. But I do not

see how that clause can be construed as restricting in any way the rights which the Dominion power has under the other parts of the Act. This right to create courts, it seems to me, is only a discretionary power, to be exercised when thought needful or necessary, but not at all obligatory on the Dominion. It does not follow that because it has the right to create new courts, it cannot have resort to the courts already established, for the execution of its laws. The Dominion from 1867 to 1875 did not exercise that power, except in 1873, as regards controverted elections. Yet, can it be pretended, that from 1867 to 1875 there were no tribunals to execute each and everyone of the Dominion laws. I venture to think, that if the Imperial authority had had the intention to free the local courts from all federal authority in the manner contended for by the Appellant they would not have left the Dominion for a single instant without its tribunals, and would have created federal courts by the B. N A. Act itself, or they would, at least, have commanded the creation of these courts, and not left it as a mere discretionary power. I do not see more force in the Appellant's contention that, because in 1873 Parliament created a special tribunal for the trial of election petitions, it has granted that such a course was necessary, and admitted that it had not the right to impose this duty on the Provincial Courts. This, it seems to me, is not an argument at all on the question. First. I do not see such an admission in the fact of creating a new court. It might do so, without admitting that it was obliged to do so, and then, admitting that there was such an admission, supposing the admission even to have been in clear and unequivocal terms, I do not see what effect it could have on my judgment in this case. An interpretation by the Parliament of Canada of the B.N. A. Act is surely not binding on this, or on any court of justice. It is for the

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judicial power to decide whether the interpretation put on the Constitutional Act by either the Parliament of the Dominion or the Legislatures of the Provinces is correct or not, and it is so whether they read the law as granting them a right, or read it as refusing them such a right. I do not see how a court of justice can admit its right to say that the Parliament was wrong in assuming a certain power, and at the same time draw an inference that the Parliament had not this or any other power, simply because it denied to itself that power. In either case, whether the Parliament was right or wrong, is to be decided by the courts of justice.

Now, as to the question itself:

In my opinion, for the administration of its laws, Parliament can either have recourse to the Provincial Courts already in existence, or create new courts, as it chooses. But, says the Appellant, the administration of justice, including the constitution, maintenance and organization of Provincial Courts, in virtue of section 92 sub-section 14, of the B. N. A. Act, is vested in the exclusive powers of the Provincial Legislatures, and under that section, the Dominion Parliament cannot in any way increase or decrease, give or take away from, or in any manner interfere with the jurisdiction of the Provincial Courts. This, in my opinion, is a radically and entirely false and erroneous interpretation of this sub-section 14 of section 92 of the Act, and I think that it is an interpretation altogether opposed to the other parts as well as to the spirit of the Act, and which, if it was to prevail, would lead to serious consequences; I think that to decide that the Federal Parliament can never or in any way add to or take from the jurisdiction of the Provincial Courts, would be curtailing its powers to an extent, perhaps, not thought of by the Appellant, and that it would destroy, in a very large measure, the rights and privileges which are given to the federal power by

sections 91 and 101 of the Act. I take, for one instance, the criminal law. The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance and organization of courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy.

Yet, would not that be altering, diminishing, in fact, taking away all the Provincial Criminal Court's jurisdiction?

Could not the Parliament, as it has done, declare that such and such offences shall be triable before the Courts of Quarter Sessions, or that such and such offences shall be triable only before the Superior Courts of Criminal Jurisdiction? Can it not alter these laws and say, for instance, no larceny under ten pounds shall be tried at Quarter Sessions? Is this mere procedure? Does not that affect the jurisdiction of the courts? Cannot Parliament, as it has done, authorize, in certain cases, a change of venue, and say, for instance, that an offence otherwise triable at *Quebec* shall be tried at *Montreal*? How to do so, is procedure, but the change of venue itself, the taking away from one court the right it had to try such offence, the giving to another court the right to try such offence, does not that affect jurisdiction? Cannot Parliament enact that such an offence heretofore indictable shall hereafter be tried under the Magistrate's summary jurisdiction? or take away from the Magistrate's jurisdiction whatever offence it pleases? Surely all this would affect jurisdiction. Yet, I think that Parliament has the right to so legislate and order; —and, as it has been remarked by Mr. Justice

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Johnston, in *Ryan vs. Devlin*, (1) the Parliament can add a new offence to the criminal laws, and leave the trial of it to the Provincial Courts. It has done so by the Post-Office Acts, by the Banking Acts, by the Railway and Customs Acts, by the *Blake* Act, by the Criminal Acts of 1869, and various other Acts, and it had the right to do so. It had the right, and it has done so, to make corrupt practices, under the Election Act, indictable offences, and to enact that such offences should not be triable at Quarter Sessions. It may amend all these laws, and, for instance, say that such corrupt practices will be triable at Quarter Sessions. But, says the Appellant, Parliament has all these powers because it has complete and exclusive jurisdiction over criminal law and procedure in criminal matters. But, may I ask him, is not its jurisdiction over the House of Commons controverted elections and all proceedings incident thereto as complete and exclusive ? And, if I pass to the civil laws, that is to say, other laws than the criminal laws, I see in the B. N. A. Act many instances where Parliament can alter the jurisdiction of the Provincial Civil Courts. For instance, I am of opinion, that Parliament can take away from the Provincial Courts all jurisdiction over bankruptcy and insolvency, and give that jurisdiction to Bankruptcy Courts established by such Parliament ; I also think it clear, that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the Provincial Courts. But, I hold that it has the power to do so *quoad all matters within its authority*. So it has the power, and it has done so by the Public Works Acts, to enact that the monies due on

(1) 20 L. C. J. 84.

expropriations by the Crown shall be deposited in the Provincial Courts, and to order and regulate how these courts are to distribute such monies. I read sub-sect. 14 of sect. 92 of the B. N. A. Act as having no bearing on the jurisdiction of the courts in the matters not left to the Provincial Legislatures. Strictly speaking and read by itself, without reference to the other parts of the Act, it may not clearly be so restricted, but, if the Appellant's contention was to prevail and his interpretation received, the powers of the Federal Parliament under sections 41, 91, 101 and others of the Act, would not be so complete as, I believe, the Imperial authority has intended them to be. The authority of the federal power, it seems to me, over the matters left under its control is exclusive, full and absolute, whilst, as regards, at least, some of the matters left to the Provincial Legislatures by sect. 92, the authority of these Legislatures cannot be construed to be as full and exclusive, when, by such construction the federal power over matters specially left under its control would be lessened, restrained or impaired. For example, civil rights, by the letter of sub-sect. 13 of sect. 92, are put under the exclusive power of the Local Legislatures, yet this cannot be construed to mean "all civil rights," but only those which are not put under the federal authority by the other parts of the Act.

So, the administration of justice is given to the Provinces, it is true, but that cannot be understood to mean all and everything concerning the administration of justice. Parliament, for instance, has the right, as I have said, to establish a Bankruptcy Court for a Province, yet, that would concern the administration of justice in such Province.

If, for instance, this Controverted Election Act had been passed before Confederation, if, when the Confederation Act came into force, the courts had had the trial of the House of Commons elections, can it be

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pretended that Parliament would not have the power to take away that jurisdiction from the Provincial Courts and give it to the House of Commons itself, or to any special court created under sect. 101 of the Act? Yet, would that not be interfering with the administration of justice, or with the courts in the Provinces? Certainly, it would. But, *quoad* a matter put under its authority, and in that way, Parliament has such a right. And sect. 129 of the B. N. A. Act puts it beyond doubt, in my opinion, when it says that all Courts of civil and criminal jurisdiction in *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*, existing at the union, can be abolished or altered by the Parliament of *Canada* or by the legislature of the respective Province, according to the authority of the Parliament or of that legislature, under the Act.

The clause, it is true, says: "except as otherwise provided by this Act," but I fail to see where it is otherwise provided by the Act so as to affect the question now before us. A distinction is made by the Appellant, which seems to me to arise from a confusion or misconstruction of terms. The learned chief justice, whose judgment is now before this court, is of opinion, that had the House of Commons simply resigned its jurisdiction over controverted elections, without substituting any court in its place for trying such elections, the Civil Courts would have been *de facto* invested with complete jurisdiction over these election petitions. I entirely agree with this opinion. The Superior Court for the Province of *Quebec*, for instance, having superior original jurisdiction over all civil pleas, causes and matters (1) would have had, in that case, to try these petitions. "But," says the Appellant, "that could not be, because the right to sit in the House of Commons is a political right; it is not a civil right; it does not fall

(1) C. S. L. C. Ch. 78.

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under civil law." The answer to this is, it seems to me, easily found. The *Quebec* Statute does not say that the Superior Court has jurisdiction only in matters falling under the civil law, but it says that it has jurisdiction over all civil pleas, causes and matters *whatsoever*, using clearly, as well remarked by Chief Justice *Meredith* in this case, the terms "civil pleas, causes and matters" in contradistinction with criminal pleas, causes and matters.

It can surely not be pretended that an election petition is a criminal plea, cause or matter. Then, it is a civil plea, cause or matter. It must be the one or the other. I do not see why the Appellant speaks of civil law. He cannot find that word once in sect. 92 of the B.N.A. Act, defining the powers of the Provincial legislatures. I doubt if it can be found in the whole Act. Civil rights is the word used. Well, civil rights, sometimes with us called the liberties of the subject, do not all arise from the civil law. For instance, the right of the subject accused of a crime to be tried by his peers is a civil right, yet the exercise of that right falls under the criminal, not the civil law. So, a political right, whatever the Appellant means by these words, is a civil right, though not an ordinary civil right. It is a civil right, springing from the public or the constitutional law.

The civil law does not include all the civil rights of the subject, whilst the civil rights of a subject include, amongst others, the civil law, the right to be governed by that law. But, enough about civil rights and civil law; they have, it seems to me, very little to do with the case supposed, which, I take it, depends on what is meant by the civil jurisdiction of the Superior Court. Now, I repeat it, when the Quebec Statute gives jurisdiction to the Superior Court over all civil pleas, causes and matters *whatsoever*, it intends to give it jurisdiction

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over all cases where the means taken to recover or obtain justice is not a criminal proceeding, or a procedure under the criminal law of the land. And, I say it again, an election petition is not such a criminal law proceeding. It seems, therefore, to me clear that, had Parliament abandoned its privileges over controverted elections, without referring them specially to any court, they would have fallen on the civil courts of ordinary jurisdiction, because the trial of a political right on an election petitions is a civil plea, cause or matter, just as much as the trial on a controverted municipal election, for instance, for a municipal election, like an election for the House of Commons, is not a part of the civil law.

By renouncing its privileges over the controverted elections of its members, which, it is granted, they had a right to do, the House of Commons has made of election petitions and of the trial of these controverted elections, an ordinary civil plea, cause or matter, which it would always have been had it not been for these privileges The Appellant sees another objection to the proposition, that, without special legislation upon the mere giving up of these privileges by the House of Commons, the civil courts would have had to try the election petitions. He says that it would have been impossible for the courts of justice in that case to execute their judgments. That does not seem to me to be an argument. If the House of Commons, even now, chose to disobey a judgment of an election court, I do not see how the court could enforce its judgment ; of course, it cannot be presumed that the House of Commons will act against the law, but the presumption would have been the same, for what would, in that case, have been the law ?

The last contention of the Appellant is based upon the words of sub-section 14 of the 92nd section of the B. N. A. Act, which give to the Provincial Legislatures

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the exclusive control over procedure in civil matters in the Provincial Courts. Upon this, I have nothing to add to what has been said in this case by the learned Chief Justice of the *Quebec* Superior Court, who held that these words must be understood to mean procedure in civil matters *within* the *powers of the Provincial Legislatures.* Section 41 of the Act specially gives to the federal authority the right to legislate upon the controverted elections of the House of Commons, and the *proceedings incident thereto.* Thus, the laws made by Parliament on the proceedings on election petitions are binding on the Provincial Courts. They cannot be deemed to be an interference with the powers of the Provincial Legislatures, since these legislatures have no power, no control over these proceedings, or the procedure on these petitions.

For all these reasons, I am of opinion, that the judgment appealed from, declaring the Controverted Elections Act of 1874 constitutional, is right, and that this appeal must be dismissed with costs. I need hardly say that if, in my remarks, I appear to have had the Province of *Quebec* more particularly in view, it is because the case submitted to us comes from that province, but my remarks on the B N. A. Act must be taken as applying generally to all the provinces.

I have only one word to add. It has been said, that, if this Act is constitutional, the control of the Local Legislatures over the Provincial Courts is reduced to a very small compass. Well, in the first place, I do not think so; then, I may call the attention of those who should be inclined to think too much of the powers of the local legislatures, under our Constitutional Act over the Courts of Justice, to the fact that, by simply refusing to name and pay the judges, the federal authority can, when it pleases, virtually

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abolish any of the Superior Courts in any of the Provinces, or can control any changes in the constitution and organization of these courts which the Local Legislatures would be inclined to enact as regards the number of their judges. Yet, by the strict letter of subsect. 14 of sect. 92 of the B. N. A. Act the constitution and organization of these courts is put under the exclusive power of these Local Legislatures. This, again, shows that this clause cannot be read by itself, and that, for a sound interpretation of its terms, the whole Act must be taken into consideration.

GWYNNE, J.:

I concur in the opinion of the learned Chief Justice *Meredith*, to the effect that the 13th and 48th sections of the act constitute the court for trial of the election petitions a separate and distinct court from the courts of superior jurisdiction in the provinces. The 67th section of the act supports this view, and by force of the 3rd section, which declares that in the act, and for the purposes thereof, the expression "the court" shall mean, not only the courts of superior jurisdiction afternamed, but also "any of the judges thereof," whenever a judge sits in a matter arising under the act, he sits as a court constituted by the act; but it is by no means necessary, as it appears to me, for the determination of this case, that these points should be established so to be.

It cannot, in my opinion, admit of a doubt, that the Dominion Parliament can, in respect of all matters within their control, impose judicial duties upon the judges of the superior courts in the several provinces in excess of those exercised by them in the discharge of their ordinary functions, and their so doing constitutes no invasion of the rights of the local legislatures.

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I am of opinion, also, that it is incorrect to speak of the transfer by the Dominion Parliament of the right to hear and determine all questions arising upon election petitions to the courts of superior original civil jurisdiction, existing in the several provinces, as constituting an enlargement of the jurisdiction of those courts, in the sense of being an interference with the special jurisdiction given by the *British North America Act* to the local legislatures to constitute and organize provincial courts. Such transfer is but the adding an additional subject to those entertained by the courts in the exercise of their ordinary jurisdiction, and which subject, the exclusive jurisdiction of the House of Commons over it being removed, fell naturally within the competency of courts of superior and original civil jurisdiction to entertain, from the very nature of their institution as courts of original jurisdiction. And, finally, I am of opinion, that the prescribing the manner in which the jurisdiction so transferred shall be exercised, that is to say, prescribing the procedure to be adopted, constitutes no invasion of, nor any interference whatever with, the powers and jurisdiction conferred by the *British North America Act* upon the local legislatures.

Upon these latter points I should not have thought it necessary to add anything to what fell from me in the *Niagara case*, in the Court of Common Pleas, in *Ontario* (1), if it was not for the disapproval of that judgment expressed by several of the learned judges in the other provinces, before whom the same question has arisen. The objections urged to that judgment are, that the trial of an election petition is not a civil matter at all, that the rights thereby brought in question are not civil rights at all, that, in contradistinction, they are purely political rights and matters. That the Courts of superior original civil jurisdiction, even in *England*, would

(1) 29 U. C. C. P. 268.

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not have competency to entertain or assume jurisdiction in these mattters, as was suggested in the judgment they would have, if the Parliament had passed an act merely abandoning, on behalf of the House of Commons, the exclusive jurisdiction it had asserted and maintained over the subject matter.

With the greatest respect for the opinions of those learned judges with whom I have the misfortune to differ, I am unable to see that a right is less a civil right, because it is connected with that particular part of our civil polity which relates to the protection of the citizen in his rights arising out of our system of parliamentary representation. "The right to offer oneself as a candidate—the right to be placed on the voters' list—the right to vote—the right, in fact, to enjoy political rights," are all admitted, in one of the judgments to which I refer, to be civil rights, and so, I presume, the wrongful assertion of, or the interference with the rightful exercise of any of these rights is a civil wrong.

If the right to offer oneself as a candidate be a civil right, the right of a qualified candidate to exclude a disqualified one must surely be equally so, and so must, likewise, be the right to exclude a person from voting who has not the legal qualification, or, having it, has corruptly sold it. For my part, I cannot permit myself to doubt that to return, as elected, a person not qualified by law, or who has not, in fact, had a majority of legal votes, is a civil wrong, or that, *ex converso*, the right of a legally qualified candidate to enjoy the fruits of his candidature and to take the position to which he has been legally elected, and to call in question all illegal votes, and to exclude from the position to which he has legally been elected a person who has wrongfully been returned as elected, is a civil right; and these are the rights which form the subject of enquiry upon an elec-

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tion petition. But it is said that we are concluded by authority, and that the Privy Council in *England*, by their judgment in *Landry vs. Théberge* (1), has clearly and fully pronounced these rights to be political and not civil.

There is nothing in that case, in my judgment, to support this contention. The question there was, whether the *Quebec* Controverted Elections Acts, of 1872 and 1875, which enacted that judgment upon the trial of controverted elections rendered by the authorities to which those acts transferred the right of trying such cases should not be susceptible of appeal, ousted the prerogative jurisdiction of the Privy Council in appeal? And the court held that the appeal was well taken away, upon the ground that, as these acts dealt not with mere ordinary civil rights and privileges, but with rights and privileges of a peculiar character, namely, the rights and privileges, not only of candidates, but of electors and of members of the Legislative Assembly, which rights have always, in every colony, following the example of the Mother Country, been jealousy guarded by the Legislative Assembly in complete independence of the Crown, it was quite competent for the legislature to delegate the authority formerly exclusively exercised by the Legislative Assembly to Her Majesty's courts of civil jurisdiction, or to any of the judges thereof, to the exclusion of all appeal to the Crown in Council, the court saying :

> It would be singular if the determination of these cases in the last resort should no longer belong to the Legislative Assembly, nor to the court which the Legislative Assembly had put in its place, but belonged to the Crown in Council.

There is not a word here about the rights dealt with not being "civil rights," nor anything from which it can be collected that the Privy Council was of opinion

(1) L. R. 2 App. Cases 102.

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they were not. There is no contrast whatever made or alluded to, as between "civil" and "political" rights, but there is, as it appears to me, a contrast plainly enough drawn between mere ordinary civil rights, as to which a question could fairly arise as to the power of a provincial legislature to exclude the right of appeal, and those peculiar civil rights over which the Legislative Assembly, in imitation of the British House of Commons, has asserted and maintained exclusive control in complete independence of the Crown, which exclusive control it was held to be competent for the Legislature to delegate, and to assert for the substituted authority equal independence of the Crown.

The Parliament, having transferred this subject, over which the House of Commons formerly exercised exclusive control, to the cognizance of civil tribunals, seem to me, if it were necessary to appeal to such an argument, to indicate that they entertained no doubt that the rights over which control was so transferred were civil rights, for it is the pride of our constitution to keep our civil courts, and the judges thereof, aloof from all interference in political subjects and discussions, and it is scarcely to be conceived that the parliament would transfer the investigation of those rights from the political to a civil tribunal, if it had thought that the subject matter placed under the cognizance of the civil tribunal did not involve any enquiry into civil rights.

In support of the proposition, that courts of original jurisdiction, even those courts in *England*, could not assume or exercise jurisdiction of the rights in question, even though Parliament should, by an Act of Parliament, merely abandon and disavow all exclusive and every jurisdiction of the House of Commons over the subject matter, *Rowland's* manual of the constitution has been referred to. The following extract, however,

from that work, in which the author gives an account of the manner in which the exclusive control of the House of Commons was assumed, asserted and vindicated, until it became embodied in the constitution, seems to me to lead rather to a contrary conclusion. He says at pp. 203-4-5 :

The power to decide in controverted elections was exercised by the Crown up to the reign of *James First.* In his first Parliament the Commons entered into a contest with him, asserting their own right to decide upon election returns. *James* convoked the Parliament by a Royal Proclamation, in which he admonished the electors that the Knights for the counties should be selected out of the principal Knights or gentlemen of sufficient ability, and for Burgesses that choice he made of men of sufficiency and discretion. He commanded that express care be taken that there be not chosen any bankrupts or outlawed, but such only as were taxed to the subsidies and had ordinarily paid and satisfied them. That sheriffs do not direct any precepts to ruined and decayed boroughs, and that the inhabitants of cities and boroughs do not seal any blanks, leaving to others to insert the names, but do make open and free elections according to law. He notified that all returns should be brought into chancery, there to be filed of record, and if any be found contrary to the proclamation they were to be rejected as unlawful and insufficient, and the city or borough was to be fined for the same, and if it be found that they had committed any gross or wilful default or contempt in their election return or certificate, that then their liberties were to be seized into his hands and forfeited. If any person take upon himself the place of a knight, citizen or burgess, not being duly elected, returned and sworn, then every person so offending to be fined and imprisoned for the same.

The Commons lost no time after the meeting of Parliament in questioning the right assumed by the king in his proclamation to have the returns of members decided in chancery.

Sir *Francis Goodwin* was elected for *Bucks*, but his return was refused by the Clerk of the Crown because he was outlawed. On a second election Sir *J. Fortescue* was elected. A motion was made in the House that a return be examined and *Goodwin* be received as member. The Clerk of the Crown attended at the bar by order of the House with the return, and the House resolved, after debate, that *Goodwin* was lawfully elected and returned. The Clerk of the Crown was ordered to file the first return, and *Goodwin* took the oath of supremacy and his seat.

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The Lords desired a conference which the Commons declined, and sent a message that in no sort should they give account to the Lords of their proceedings.

The Lords replied that, acquainting His Majesty with the return, His Highness conceived himself engaged and touched in honor that there might be some conference of it between the two Houses. Upon this message, so extraordinary and unexpected, the House appointed a committee to consider what should be delivered to His Majesty, and through the Speaker, the House represented to the King that the Sheriff was no judge of the outlawry, neither could take notice it was the same man; and, therefore, could not properly return him outlawed. The King reminded the Commons that he had no purpose to impeach their privilege. The difficulty was, after considerable discussion, solved, on a conference held in the King's presence, and, by his command, with the judges, who, conceding that the Commons was a court of record and judge of returns, although not exclusively of the chancery, suggested that both *Goodwin* and *Fortescue* should be set aside, and a new writ be issued.

This compromise was joyfully accepted by the Commons, and no attempt was afterwards made to dispute their exclusive jurisdiction over the returns of their members.

Now, the House of Commons, having in this manner, as a court of record, and as a compromise with the King's courts, acquired the jurisdiction it assumed, until in 1770, by the *Grenville Act*, the jurisdiction was conferred by the legislature upon a committee of 11 members, can it be doubted that, if the British Parliament should pass an act of Parliament, whereby, upon behalf of, and in the name of the House of Commons, it should abandon, abjure and disavow, all further control over the return of its members, the right to enquire into those returns would revert to the King's courts?

With great deference, I think there can be no doubt that it would, and I am of opinion that, under a like act of the Dominion Parliament, the courts of superior original jurisdiction in the several provinces of the Dominion would, from the nature of their institution as courts of original jurisdiction, have the like power, and therefore these courts had competency to accept cognizance of the matter.

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In fine, I entertain no doubt that the right to enquire into the legality of the returns of members of the House of Commons, not relating to a matter over which any jurisdiction is conferred upon the local legislatures, but to civil rights, which, by the constitution, were wholly under the exclusive jurisdiction of the House of Commons, it was competent for Parliament to transfer to the civil tribunals in the several provinces, having superior original jurisdiction, cognizance of all rights arising out of election petitions, and that so doing constitutes no invasion of, or encroachment whatever upon, the rights conferred upon the local legislatures, and that, inasmuch as parliament may transfer such cognizance absolutely, it may do so qualifiedly, or *sub modo*, by defining the mode in which the cognizance shall be exercised, which, by prescribing the mode of procedure, is what has been done. Neither is such prescribing of the mode of procedure an invasion of, or encroachment upon, the rights of the local legislatures, for the 14th sub-section of sec. 92 of the *British North America Act* must plainly be read as conferring upon the local legislatures the right to prescribe procedure in civil matters, only in respect of these matters, which, by the 13th subsection, were placed under the exclusive control of the local legislatures.

To hold that the local legislatures could prescribe, or in any respect interfere with, the *manner* in which a *matter* over which they have no jurisdiction whatever, shall be conducted or enquired into, involves, in my opinion, a manifest contradiction in terms. I am of opinion, therefore, that the act is not in any particular *ultra vires*, and that the appeal, which calls in question its validity, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for Appellant: *H. Cyrias Pelletier.*

Solicitor for Respondant: *Jean Langlois.*

1879
*June 9.
*Nov. 10.

CONTROVERTED ELECTION OF THE COUNTY OF MONTMORENCY.

P. V. VALIN.....APPELLANT;

AND

J. LANGLOIS.....RESPONDENT.

The Dominion Controverted Elections Act, 1874—*Sec.* 8, *sub-sec.* 2—*Cross-petition, delay for presenting.*

V. (the appellant), the sitting member, against whom an election petition had been fyled by *L.* (the respondent), an unsuccessful candidate, presented a cross-petition under the 8th sec., sub-sec. 2, of the *Dominion Controverted Election Act*, 1874, alleging that *L.* was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not fyled within thirty days after the publication in the *Canada Gazette* of the return to the writ of election by the Clerk of the Crown in Chancery, but within the delay mentioned in the last part of said sub-sec. 2, sec. 8, viz.: fifteen days after the service of the petition upon *V.*, complaining of his election and return.

The cross-petition was met by a preliminary objection, maintained by *Meredith*, C. J., alleging that it was fyled too late.

Held, on appeal, that the sitting member cannot file a cross-petition, within the delay of fifteen days mentioned in the last part of said sub-sec. 2 of sec. 8, against a person who was a candidate and is a petitioner.

Per *Fournier*, *Taschereau* and *Gwynne*, J.J., that the said extra delay of fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return. (*Henry*, J., dissenting.)

APPEAL from the judgment of *Meredith*, C. J., of the Superior Court for the Province of *Quebec*, main-

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

taining the preliminary objections to the cross-petition of the appellant. The appellant (the sitting member), in his cross-petition, alleged that the respondent, the petitioner against him, was a candidate at the same election, and was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election.

The cross-petition was not served within the thirty days mentioned at the beginning of sub-sec. 2 of sec. 8 of the *Dominion Controverted Elections Act*, 1874, hereinafter given at length in the judgment of his Lordship the Chief Justice, but was served within the fifteen days mentioned towards the end of the same sub-section.

Mr. *Pelletier*, Q. C., for appellant, contended that the delay of fifteen days for presenting a cross petition expired only fifteen days after the day of the service of the petition on the sitting member.

Mr. *Langlois*, Q. C., *contra*, contended that the fifteen days allowed by sub. sec. 2 of sec. 8, was an extra delay allowed only when the petition alleged corrupt practices *after* the *return*, and the cross-petition in this case was "an election petition" coming within the general rule in sec. 8, as to the delay of 30 days.

THE CHIEF JUSTICE:—

This was an appeal from the decision of Chief Justice *Meredith*, on the preliminary objections, rejecting the cross-petition of sitting member.

By the *Dominion Controverted Elections Act*, 1874, 37 *Vic.*, c. 10, sub. sec. 2 of sec. 8, it is provided that:

The petition must be presented not later than thirty days after the day of publication in the *Canada Gazette* of the receipt of the return to the writ of election by the Clerk of the Crown in Chancery; unless it questions the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or other

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act of bribery to have been committed by any member, or on his account, or with his privity, since the time of such return, in pursuance, or in furtherance of such corrupt practice, in which case the petition may be presented at any time within thirty days after the date of such payment or act so committed; and in case any such petition is presented, the sitting member, whose election and return is petitioned against may, not later than fifteen days after service of such petition against his election and return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election, who was not returned and *who is not a petitioner*, and on whose behalf the seat is not claimed.

The sitting member seeks to file a cross-petition within these fifteen days against a person who was a candidate, but who is a petitioner, complaining of unlawful and corrupt acts by such candidate. This is in direct opposition to the statute, which provides that the sitting member can only file *such* a petition against a candidate "who," *inter alia*, "is not a petitioner." I think, therefore, on this ground alone, without expressing any opinion on the other point raised, that the learned Chief Justice was right in allowing the preliminary objection; and that this appeal should be quashed, with costs.

STRONG, J., gave an oral judgment, stating his reasons for holding that the judgment of the Court below should be affirmed.

FOURNIER, J.:—

For the reasons given by the learned Chief Justice *Meredith* of the Court below, I am of opinion that the preliminary objections should be maintained, and this appeal dismissed with costs.

HENRY, J.:—

The petitioner in this case is the sitting member for the County of *Montmorency*, in the Province of *Quebec*, and against his return a petition had been presented by

the respondent, and was in process of trial when the appellant's petition was served and filed. In the respondent's petition the seat was not claimed.

The latter clause of sub-section 2 of sec. 8 of the *Controverted Election Act*, 1874, in reference to the filing of a counter petition, is as follows: "And in case any such petition" (meaning the petition against the return of the sitting member) "is presented, the sitting member, whose election and return is petitioned against, may, not later than fifteen days after the service of such petition against his election and return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election who was not returned, and who is not a petitioner, and on whose behalf the seat is not claimed."

Without that provision no such petition could be legally filed; and, as by the provision of the clause, the right to file it is contingent and conditional on its being done not later than fifteen days after the service of the petition against the return, the right to file it ceases by the effluxion of that time. The appellant's petition was filed before the expiration of the fifteen days; and an objection to it is taken, on the ground that it should have been filed within thirty days, as prescribed by the opening clause of that section.

A right to present a petition against a candidate who has not been returned for any unlawful act, "by which he is alleged to have become disqualified to sit in the House of Commons, at any election held after the passing of this Act," is given by section seven; but the time at which, and under what circumstances, is not there given or stated. The time for presenting a petition against the return of a member is limited in sub-section two to thirty days.

No evidence of corrupt practices at an election can be received on the trial of a petition complaining of an

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undue election and return, unless the seat be claimed by or on behalf of another candidate—either by statute or common law; but when the seat is claimed, recriminatory evidence may, under both, be given to prevent a candidate guilty of corrupt practices from obtaining the seat, and to disqualify him subsequently. Section 66 makes the statutable provision for such evidence.

Parliament has, however, gone further, and in subsection 2, after limiting the time for the presentation of the election petition to 30 days after the publication of the receipt of the return to the election writ, and providing for an allegation of corrupt practices, specifically alleging payment by a member after the return in pursuance of such corrupt practices, and limiting the time for the presentation of a petition in such a case to 30 days after the date of such payment, is found a provision as follows:—

> And in case any such petition is presented, the sitting member, whose election and return is petitioned against, may, not later than fifteen days after service of such petition against his election and return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election who was not returned, and who is not a petitioner, and on whose behalf the seat is not claimed.

It is necessary, in view of the decision appealed against, which dismissed the petition that we should construe this latter clause; for it is upon that construction the parties rely, and upon which our judgment should be based. I differ with the learned Chief Justice of the Superior Court of *Quebec*, who limited the operation of this clause to the case of bribery by a payment after the return. I am of opinion that the true construction of the section can be obtained only by reading that clause parenthetically as a provision for a petition in a case not otherwise provided for, and allowing merely a further time for the presentation of it. The section first limits the time for the presentation of an ordinary election petition, but to meet a specific offence extends that

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time. The petition in both cases is against the election and return; but the provision for the specific offence allows a further time for its presentation.

The concluding clause of the section must, in my opinion, include both cases, that in the case of an ordinary election as well as that in the case specially provided for. The latter clause of the section commences thus: "And in case *any* such petition is presented, the sitting member, whose election and return is petitioned against, may, &c."

We must construe any doubtful words in a clause, not only by the section in which they are found, but by the whole Act, and its obvious scope and meaning. What do, then, the words "*any* such petition against a sitting member" mean? Clearly, to my mind, *any* petition against the election and return of a sitting member. Why should a sitting member, petitioned against for the specific offence, have the right to initiate a proceeding to disqualify another candidate that a party petitioned against independently of it should not have or exercise? Or why should a candidate guilty of corrupt practices escape merely because the petition against the sitting member is not for bribery by payment after the return? The object of the legislation was to disqualify an unsuccessful candidate guilty of corrupt practices at an election, and that object would fail to be carried out in any but an exceptional and rare case, if I am wrong in my construction of the provision. I think the object of the legislation is patent on the face of the provision, and that the meaning and application of the terms used are abundantly plain and pointed to support my contention.

A difficulty of a more serious nature is, however, found in arriving at the proper construction of the last clause of the section as affecting at all the position of the respondent in this case, as well as in reference to the

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time in which the petition against him should have been presented, or what, indeed, is of much more consequence, whether the provision in it is at all applicable to the case of the respondent. If it be, then it appears to me quite plain, that the time limited is fifteen days after service of the petition against the sitting member. The peculiar wording of the clause being somewhat involved, there is some difficulty in ascertaining what is intended by it. The petition must be against "any candidate at the same election *who has not been returned*, and *who is not a petitioner, and on whose behalf the seat is not claimed.*" What we have to consider is, whether the clause contains *two* or *three* propositions. The first is the condition that the party petitioned against under it was a candidate, and not returned. That proposition is affirmatively settled, and the uncertainty arises as to the remaining provision. Had the respondent in this case *claimed* the seat, no counter-petition would have been necessary or permitted. What, then, did the legislature mean by the words "and who is not a petitioner, and on whose behalf the seat is not claimed." In construing them we must consider that in the absence of any petition claiming the seat, no enquiry could otherwise be had as to charges of corrupt practices against an unsuccessful candidate, and the provision in the clause was for the institution of an enquiry in cases where the seat was not claimed either in a petition of an unsuccessful candidate, or of others, against the election and return of a sitting member. The main object and intention of the clause, I take it, was to disqualify a candidate found guilty of corrupt practices at the same election, and I think we should construe a clause like this one, so as to give effect to the obvious intentions of the Legislature and not so as to defeat them. If, then, the mere fact of his being a petitioner would prevent any inquiry as to cor-

rupt practices by him, which would not be the case if the election and return of the sitting member were petitioned against by others, a great anomaly would appear in the legislation on the subject, and all the guilty unsuccessful candidate would have to do to prevent inquiry would be to present a petition in his own name against the sitting member. If such a petition were presented by others, no one could contend that an inquiry could not be had into charges of corrupt practices against any unsuccessful candidate at the same election, and in that case why should the mere presentation of a petition against a sitting member by any such unsuccessful candidate shield him from an inquiry, by not claiming the seat, which would be legitimate if such a petition were presented by others. I cannot conclude that any such anomaly was intended, nor do I think a reasonable construction of the words will necessarily establish it. I think the words "and on whose behalf the seat is not claimed" are copulative, and, therefore, apply as well to a petitioner who does not claim the seat himself as to other petitioners, who do not claim the seat on his behalf. I think, for the reasons given, the clause may, and should, be read as if in these words: "and who is not a petitioner claiming the seat, or one on whose behalf the seat is claimed by others." The object in view is clearly to permit the presentation of the petition in any case where the seat is not claimed, and, in my opinion, it applies as forcibly to a case where the seat is not claimed by the petitioner on his own behalf, as well as where the seat is claimed on his behalf by others. The words "on whose behalf" would include the one case as well as the other.

For these reasons, I think, the petition against the respondent was provided for and covered by the clause in question, and that the limitation of time for presenting it was fifteen days from the service of the petition

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on the sitting member. I, consequently, am of opinion the judgment appealed from should be reversed and the appeal allowed with costs.

TASCHEREAU, J.: —

It seems to me that the judgment appealed from in this case is right. *Valin's* petition is against *Langlois*, the petitioner in first instance against him, *Valin*. And on referring to the latter part of sect. 8, sub-sect. 2, of the *Controverted Elections Act of* 1874, I see that the petition therein allowed to be presented after the usual delay of thirty days is a petition against a candidate *who is not a petitioner*. *Langlois* is a petitioner, so that this part of the clause does not sustain *Valin's* contentions. Then, it seems to me, that this enactment, allowing a petition to be presented after the thirty days mentioned in the first part of the clause, applies only to petitions based upon corrupt practices, or upon an illegal payment made since the return to the writ of election. A reference to the French version of the statute clears any doubt which the English version leaves in my mind upon this point.

I see that this enactment, allowing a sitting member to present in certain cases a petition after the usual 30 days against a candidate *not returned*, and *who is not a petitioner*, and *on whose behalf the seat is not claimed*, is not in the Imperial Statute, 31-32 *Vic.*, c. 125, sec. 6, sub-sc. 2. I fail to see why it has been introduced in our statute. It may lead to queer results. Now, in this case, for instance, even supposing that *Langlois* had petitioned after the usual 30 days against *Valin*, the sitting member, for acts committed by *Valin* since the return, *Valin*, as I read the statute, could not have petitioned within fifteen days after against *Langlois;* because *Langlois*

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was a petitioner, and it is only against a candidate not returned, on whose behalf the seat is not claimed, and *who is not a petitioner*, that this counter petition is allowed. A counter petition, it seems to be, yet, it must not be against the first petitioner! Of course, I can understand that, if the seat is not claimed, the sitting member has no interest in contending that his adversary was guilty of corrupt practices, and that such contention could be no answer to the petition demanding the annulling of the election. But why allow to the sitting member a petition against his adversary, provided that such adversary is not a petitioner, is what I can't understand. Why, in this case, for instance, if the election was attacked for acts commited since the return, deny to *Valin* his right of petition against *Langlois*, because *Langlois* is the petitioner against him, and, if another person had been first petitioner instead of *Langlois*, grant to *Valin* the right to petition against *Langlois*? Why give it in one case and not in the other? *Langlois* does not claim the seat, and, in any case, when the seat is not claimed, this counter petition should not be allowed. It is not allowed in *England*, and, in my opinion, this new enactment in our statute might be advantageously stricken out. Any candidate, not returned, guilty of corrupt practices, may be sued for the penalties enacted by the Act, and if found guilty will be disqualified.

The respondent's motion to quash the appeal must, I think, be dismissed. The appeal, in this case, had been allowed and duly filed before the fifteenth of May last, when the *Supreme Court amendment Act* of last Session came into force, and, under the tenth section of the Act, the appeal lies.

GWYNNE, J.:—

I entirely concur in the judgment of the learned

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Chief Justice of the Superior Court in *Quebec* in this case. A petition, complaining of an undue return, may be presented within thirty days after the day of publication in the *Canada Gazette* of the receipt of the return of the writ of election. Such petition may be presented by a candidate, or by any person having had a right to vote at the election. So, likewise, within the same period, a petition complaining of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, may be presented by the returned candidate, or by any other candidate, or by any person having had the right to vote. If the petition is filed against the sitting member by another candidate, or by a person entitled to vote, and the seat is claimed for a candidate not returned, whether he be the petitioning candidate or not, then charges of corrupt acts, committed by the candidate for whom the seat is claimed, may be entered into upon the trial of the petition against the sitting member, without any cross-petition being filed by the sitting member ; but, if seat is not claimed for a candidate not returned, whether the petitioner be himself a candidate, or only a person entitled to have voted, no enquiry can take place as to any corrupt practices committed by a candidate not returned, unless a petition be filed charging corrupt practices against such candidate within the thirty days after the publication in the Gazette of the result of the election; save only, that in case a petition be presented after the thirty days, as it may be, if it alleges a payment of money or other act of bribery to have been committed by any member or on his account, or with his privity, since the time of such return, in pursuance of corrupt practices, (in which case, the petition may be presented at any time within 30 days after the date of such payment, &c.) ; and, in that case, the

sitting member, whose return is petitioned against, may, within 15 days after service upon him of such petition, file a petition complaining of any corrupt practice committed by any candidate at the same election for whom the seat is not claimed, and who is not himself a petitioner.

The object of this provision would seem to be to make provision that, when a friend of a candidate, who had been guilty of corrupt practices, should, under the circumstances stated, file a petition which might result in disqualifying the sitting member, the candidate, in whose interest the petition was filed, should, if guilty of corrupt practices, be himself also exposed to the same disqualification to become a candidate at the election to take place upon the removal of the sitting member. The petition of the sitting member here is against the person who is the petitioner against his return; and the present respondent was a defeated candidate, who filed his petition against the sitting member within the thirty days. He, therefore, is clearly not a person against whom, under this provision of the Act, a petition can be filed within fifteen days after service of the petition on the sitting member, unless it shall be also within the original thirty days after the publication in the Gazette.

Appeal dismissed with costs.

Solicitor for Appellant: *H. Cyrias Pelletier.*

Solicitor for Respondent: *Jean Langlois.*

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*Jan'y 22.

*April 15.

PHILO D. BROWNE, *et al*.....APPELLANTS;

AND

CHARLES A. PINSONEAULT, *et al*.....RESPONDENTS.

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

Lease, cancellation of—Rendering of Account—Art. 19, *C. C. P. L. C.*

S. on the 1st August, 1868, transferred to Appellants (Plaintiffs,) as trustees of *S's.* creditors, his interest in an unexpired lease he had of a certain hotel in *Montreal*, known as the *Bonaventure* building, and in the furniture. On 1st April, 1870, *A. P.*, the proprietor, after cancelling, with the consent of all concerned, the several leases of the said building and premises, gave a lease direct for a term of ten years to one *G.*, at $6,000 a year, of the building, and also of the furniture belonging to *S's.* creditors, and on the same day by a notarial deed, "*agreement* and *accord*," *A. P.* promised and agreed to pay to Appellants, as trustees of *S's.* creditors, whatever he would receive from the tenant beyond $5,000 a year. In February, 1873, the premises were burned, with a large proportion of the furniture, and Appellants received $3,223 for insurance on fixtures and furniture, and $791, being the proceeds of sale of the balance of the furniture saved. The lease with *G.* was then cancelled, and *A. P.*, after expending a large amount to repair the building, leased the premises to *L. P. & Co.* for $6,000 a year from October, 1873. Appellants thereupon, as trustees of *S's.* creditors, sued Respondents representing *A. P.*, and called upon them to render an account of the amount received from *L. P. & Co.* above $5,000 a year. The Superior Court of *Montreal* held that Appellants were entitled to what *A. P.* had received from *L. P. & Co.* beyond $5,000; and on appeal to the Court of Queen's Bench, (appeal side,) this judgment was reversed.

Held,—Affirming the judgment of the Court of Queen's Bench (appeal side,) that the lease to *G.* terminated by a *force majeure*, and

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*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

that the obligation of *A. P.* to pay Appellants the sum of $1,000 out of the said rent of $6,000 ceased with the said lease.

2. That the fact of Appellants having alleged themselves in their declaration to be the "duly named trustees of *S's.* creditors," did not give them the right to bring the present action for *S's.* creditors, the action, if any, belonging to the individual creditors of *S.* under Art. 19, *C. C. P. L. C.*

APPEAL from a judgment of the Court of Queen's Bench, (appeal side), Province of *Quebec*, rendered on the 22nd June, 1877.

The facts of the case are the following :—

On the 10th February, 1866, *Mr. Pinsoneault* leased a building in the City of *Montreal*, known as the *Bonaventure* building, to *Thomas L. Steele* for 7 years from 1st May, 1866, that is to say, up to the 1st May 1873, at the rate of $3,250 a year, and on the 1st November, 1868, two years afterwards, this lease was extended for another period of seven years, from the 1st May, 1873, that is to say, up to the 1st May, 1880, the rent stipulated for the extended term being $5,000. On the 1st August, 1868, *Steele*, who had made improvements, transferred his interest under the above lease and in the furniture to the appellants, *P. D. Brown*, *Alexander Holmes*, *John Barry and Henry Millen*, "acting as "Trustees for and on behalf of divers firms and persons, "creditors of the said *Thomas L. Steele*, under a certain "paper writing or memorandum of agreement made "and entered into by and between the said *Thomas L.* "*Steele*, and his creditors, and hereunto annexed," to secure a sum of about $14,000.

The appellants thereupon, in their capacity of Trustees, sublet the premises to parties who, by reason of various assignments, were, on the 1st April, 1870, represented by one *Oviatt*. By notarial agreement of 1st April, 1870, the late *Alfred Pinsoneault* and appellants consented to cancel and set aside all the above mentioned leases, and consented that the hotel and furniture, (except the

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billiard tables,) should be leased by *Pinsoneault* to one *F. Gerriken*, from 1st April, 1870, to 1st May, 1880, at an annual rent of $6,000. To this agreement *Mr. Oviatt* intervened, and consented to the cancellation of the leases, and to the new lease to *Gerriken*. The subtenants also intervened and consented to the arrangement.

On the same date, 1st April, 1870, *Pinsoneault* leased the hotel and property to *Gerriken* for the time above mentioned, ten years and one month, from 1st April, 1870, at an annual rent of $6,000, payable quarterly, and on the same day a notarial compromise or *transaction*, called *acte d'accord*, was also passed between the late *Pinsoneault* and the appellants.

This *acte d'accord*, after reciting that it had been agreed that the old leases should be cancelled and that a new lease of the building and of the furniture belonging to the Estate *Steele* should be granted to *Gerriken* for ten years at $6,000 a year, *Mr. Pinsoneault* to pay over to the Estate *Steele*, the difference between the rent under the old and that under the new lease, proceeds as follows :—

"Now these presents, and I the said Notary, witness, "that the said party of the *first* part agrees with the "said party of the *second* part, that the said *Alfred* "*Pinsoneault* will pay over and account for to the said "parties of the second part the difference between the "said rental, so payable by the said *Thomas L. Steele* "($5,000), and the amount of rental payable hereunder "($6,000), by even and equal quarterly payments after "the first day of May next, on which day one month's "rent becomes due, the proportion whereof is to be "handed over to the said parties of the second part, as "soon as received by the said *Alfred Pinsoneault*, im- "mediately on receipt thereof by the said *Alfred Pin-* "*soneault* from the *then tenant or tenants of said*

"*premises.*" * * * * It is further agreed that, upon "the expiration *of the said lease to the said Frederick* "*Gerriken*, the said *Alfred Pinsoneault* shall deliver over "to the said parties of the second part the several articles "of furniture mentioned in the said lease in the state "and condition in which they then shall be found to "be, and the said parties of the second part hereby "acknowledge to have received from the said *Alfred* "*Pinsoneault* the sum of twelve hundred and seventy-"three dollars and fourteen cents in advance of the "proportion of the said several instalments so to be-"come payable to the parties hereto of the second part "hereunder, which said amount is to be deducted from "the first payments which shall fall due to them here-"under, and the same shall bear interest at the rate of "*seven per centum per annum* until fully paid."

The building was partially destroyed by fire on the 17th March, 1873, and a large portion of furniture was burnt. On the 27 April, 1873, the furniture and effects remaining after the fire were sold by auction, and the proceeds, viz : $791, were paid to *Steele's* Trustees.

The appellants claimed from the Insurance Companies about 5,000. They obtained $3,223 by way of compromise, for loss on the improvements made by *Steele* and for loss of rental.

On the 29th August, 1873, Mr. *Pinsoneault* caused a notarial protest to be served on the appellants. This protest, after reciting the main facts of the case, the fire, the receipt by the appellants of the proceeds of the sale of what remained of the furniture, proceeds as follows:

"That the said improvements in said hotel had been "insured by the said Trustees and representatives "of the said Estate *Steele*, who agreed, *after* the *said fire*, "to hand over the amount of said insurance to the said "*Alfred Pinsoneault*, to enable him to replace the said

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" improvements in their original condition before the " fire.

" Wherefore, I, the said Notary, at the request afore- " said, and speaking as aforesaid, do hereby notify the " said Trustees and representatives of the said Estate " of the said *Thomas L. Steele* that unless, within fifteen " days from the date hereof, they put in the hotel furni- " ture of the same description and nature as that " belonging to them and which was in the said hotel " before the fire as aforesaid, and unless they pay him, " the said *Alfred Pinsoneault*, an amount sufficient to " place the said improvements in the same condition " in which they were before the fire, he will consider " the arrangements between them at an end and act " accordingly."

The appellants took no notice of this protest.

Subsequently, on the 2nd September, 1873, *Pinsoneault* brought an action against *Gerriken* to have the lease declared resiliated on account of the fire, and the following admission was fyled in this case;

" That, in the action of *Pinsoneault* vs. *Gerriken en* " *résiliation* of lease, *Gerriken* pleaded that the lease " was already destroyed from the date and by the effect " of the fire, whereupon *Pinsoneault* prayed *acte* that " he was free to consider lease resiliated for the future, " which *acte* was granted to him by the Court."

Mr. *Pinsoneault* expended after the fire, $10,292, and on 3rd Oct., 1873, gave a lease to *Linton, Popham & Co.*, for seven years for $6,000 a year. The appellants received their proportion of what *Pinsoneault* had been paid up to the time of the fire.

The action was brought in the Superior Court, *Montreal*, by the Appellants, *Philo. D. Browne, et al*, acting in their quality of Trustees duly named of the creditors of *Thomas L. Steele*, against the Respondents, children and legal representatives of the late

Alfred Pinsoneault, to enforce the notarial contract (*acte d'accord*) entered into between the appellants *esqualité* and their late father, and claimed an account from the respondents for the rent by them, or their *auteur*, received from *Gerriken* and from *Cooper, Linton and Popham*, the tenants occupying the building in question during the period extending from the 1st February, 1873, to the 1st May, 1875.

The respondents pleaded that under the *acte d'accord Mr. Pinsoneault's* liability was to terminate with the lease to *Gerriken*, and that the appellants treated the fire as having terminated that lease, by having received the proceeds of what remained of the *Steele* furniture, and by claiming from the Insurance Company and compromising with them for the insurance on the improvements and on the rental, which amounts they retained and refused to give up to *Mr. Pinsoneault*, although called upon to do so by the notarial protest of the 29th day of August, 1873, and they concluded that they are not liable to account for any rent from and after the date of the fire.

After issue joined, the appellants, on the 10th May, 1875, brought an incidental or supplementary demand, setting up that the respondents themselves had been paid by the new tenants, *Linton & Co.*, under the lease, additional rent, making in all $6,000 for the whole year, from the 1st May, 1874, to the 1st May, 1875, taking conclusions to the same effect as in the principal action.

To this supplementary demand the respondents pleaded the same plea precisely as in the principal action.

On the 23 November, 1875, judgment was rendered in the Superior Court (*Johnson*, J.) holding the respondents liable to account for any rent received from *Gerriken* by the late *Alfred Pinsoneault* between the 1st

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February and the 1st May, 1874, and liable, also, for the proportion of rent received by themselves from *Linton & Co.*, from 1st May, 1874, till the 1st May, 1875, and condemning respondents to render an account of said rents within fifteen days of the date of the judgment, and in default thereof, to pay the sum of $1,000, which was the proportion of rent coming to appellants from the amount paid by *Linton & Co.*, to respondents.

No account was rendered by respondents, and on the certificate thereof, the case was inscribed on the principal and on the incidental demand. On 31st January, 1876 the final judgment was rendered against respondents for $1,000, the proportion of rent coming to appellants on the whole sum of $6,000 received from *Linton & Co.*, as rent from 1st May, 1874, to 1st May, 1875.

On appeal to the Court of Queen's Bench for *Lower Canada* (appeal side) this judgment was reversed, and the appellants (plaintiffs) thereupon appealed to this Court.

Mr. *Robertson*, Q. C. for Appellants:—

The *acte d'accord* contains no such condition as is set up in the plea, namely, that *Pinsoneault* was to pay over the $1,000 to the 1st May, 1880, "on condition "that the lease to the said *Gerriken* should continue in "force for that period of time."

There is no evidence of record to show the lease to *Gerriken* from *Pinsoneault* was cancelled by judgment of the Superior Court.

The plea alleges *Gerriken* took an action in the Superior Court, under the No. 7, to have the lease resiliated, which action is still pending, and that *Pinsoneault* brought an action *en resiliation* and in damages, under the No. 2,705, which is still pending. The admission (No. 4) admits that *Pinsoneault* took an action in August, 1831, under the No. 1,731, for the

resiliation of the lease, and admission No. 11, that *Gerriken* took his action *en resiliation* at the time mentioned in the plea, but no copy of judgment *en resiliation* was fyled, and no proof of resiliation whatever was produced, nor even alleged in the pleadings; nor is there anything to support the statement in the third *considérant* of the judgment of the Court of Queen's Bench that the lease to *Gerriken* was "annulled by judgment "of the Superior Court." Nor is there any proof before this Court when, or in what action, such judgment in resiliation was rendered; nor whether it was for the *force majeure* assumed in the judgment now appealed from, or for non-payment of rent, or for the reason set up in the plea, namely, "that the premises were "becoming damaged."

A resiliation, brought about by *Pinsoneault* and *Gerriken*, voluntarily, on the day after the lease, or by reason of actions instituted 18 months after it, to which the now appellants were not parties, should not bind the appellants, or free the now respondents, from their obligation to hand over the proportion of rent received from *Linton & Co.*, under the new lease.

If a *force majeure* prevented rent from accruing from the date of the fire down to the 1st May, 1874, *Pinsoneault* and the appellants must suffer proportionally; but when the premises were repaired, and rent began to run under the lease to *Linton & Co.*, the obligation to hand over to appellants their proportion continued in force.

By the *acte d'accord Pinsoneault* was to pay over "the difference between the said rentals of $5,000 and $6,000," and this was to be paid immediately on receipt thereof by the said *Alfred Pinsoneault* from the then tenant or tenants of the said premises.

It was not stipulated as a condition that, if *Gerriken* ceased to be tenant, the appellants' rights should cease,

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and *Pinsoneault* be entitled to the whole rent. The consideration given by the now appellants to *Pinsoneault* extended over the whole period of the long lease, and so the agreement to pay over the proportion of rent must be held to extend over the same period. Hence the importance of this appeal, which will practically decide the right of the appellants to obtain $1,000 per annum during the whole period of the long lease.

The notice served on the appellants, of the 9th August, 1873, by the Notary *Philips*, was to the effect that if they "did not put in the hotel furniture of the "same description and nature as that belonging to them "and which was in the said hotel before the fire, and "unless they pay him, the said *Alfred Pinsoneault*, an "amount sufficient to place the said improvements in "the same condition in which they were before the fire, "he will consider the arrangements between them at "an end, and act accordingly, and will hold them liable "and responsible for all costs."

Messrs. *Linton & Cooper's* lease, as appears by its terms, was for a boot and shoe manufactory, and *Pinsoneault's* consent to fit up and have it used as such factory must be held as clearly shown by the lease itself. To demand of the appellants to put into such a factory the furniture of an hotel would be wholly useless, if not absurd. Both *Pinsoneault* and the now Appellants must he held to have acquiesced in the lease to *Linton & Cooper* for a factory. The rent was equal to that paid when the premises were used as an hotel; the risk of fire and cost of insurance were less, and the notice as to putting in furniture must be held as waived by the subsequent appropriation of the premises to the purposes of a factory.

Mr. *Barnard*, Q. C., for Respondents:

The first point is: whether, under words "tenant or

tenants" in the *acte d'accord*, it can be held that "tenants" include those who would occupy after *Gerriken's* lease should come to an end.

The *acte d'accord* speaks of a lease to *Frederick Gerriken*, and shows intention to confine agreement to that lease. The words "or tenants" is used because there were sub-tenants, and this explanation reconciles these words with the whole terms of the lease. "At expiration of lease," means expiration of lease to *Gerriken*.

The words "from the then tenant or tenants" mean *Gerriken* and his sub-tenants. *Pinsoneault* made nothing out of this arrangement.

The conduct of the parties immediately after the fire shows how both parties understood it. The $1,000 was the consideration for the improvements made and for furniture. The Trustees took away their furniture when lease to *Gerriken* was at an end by fire. They also took the insurance money which represented their improvements.

It has been stated this contract came to an end in a manner unforeseen by the parties, and the dissenting judge thought the Court could deal with the matter in the same way the parties might have done, if they had foreseen the event. But then the Estate *Steele* should have restored *Pinsoneault* to his original position, and this they refused to do.

Action was badly brought. No action *pro socio* for account can be brought unless the Plaintiff himself offers an account.

Pepin v. *Christin* (1); *McDonald* v. *Miller* (2); *Miller* v. *Smith* (3).

Appellants contend there was no evidence that lease was resiliated by *force majeure*, or resiliated at all. But there is no doubt the lease has been resiliated,

(1) 3 L. C. Jur. 119. (2) 8 L. C. R. 214.
(3) 10 L. C. R. 304.

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and the Plaintiffs have so treated it in their proceedings, and that lease was at an end was assumed by both parties.

The 8th admission by the parties is to the following effect: That in the action of *Pinsoneault* v. *Gerriken en resiliation* of lease *acte* was granted to *Pinsoneault* by the Court that he was free to consider the lease resiliated, as the lease had been destroyed by the effect of the fire.

The only complication as to this part of the case is that Mr. *Gerriken* also brought an action against *Pinsoneault* asking for the resiliation of the lease, and judgment on that action was also rendered on the same day, by the same judge, who appears to have been puzzled by the fact that while the parties both asked for the same thing, each contested the action of the other.

The result, however, of the two actions was that the lease was resiliated from the date of *Gerriken's* demand, and judgment for rent up to that time was given in favor of Mr. *Pinsoneault*, whose claim for damages, however, was rejected. The conclusion arrived at was based, it seems, on the view taken by the judge of the law as to the effect of a fire. Had the whole building been destroyed, the lease would have been resiliated *de facto* without any action being necessary. But as the building was only partially destroyed, an action was necessary, and the tenant must pay his rent up to the date of his demand, although he proved that the damages done had absolutely rendered the premises uninhabitable.

Under any circumstances, the action of the Appellants, as brought, should have been dismissed, because, under our law, no one can sue *par procureur*. *Code of Procedure*, art. 19. Here the action, if any, belongs to the individual creditors of *Steele*.

Mr. *Robertson*, Q. C., in reply:

If *Pinsoneault* could lease the property at all

for $6,000, my client has a right to claim his share. There is no condition in the written contract that he would cease to be entitled to his share the moment the lease to *Gerriken* terminated. The reason that Plaintiffs sued *as Trustees* of *Steele's* creditors is because *Pinsoneault*, by the *acte d'accord*, agreed to account to them as such Trustees.

The judgment of the Court was delivered by TASCHEREAU, J.:—

This action is based upon a certain *acte d'accord*, passed on the 1st April, 1870, between the late *Alfred Pinsoneault*, of the one part, and the Plaintiffs, present Appellants, acting in their quality of Trustees of *Thomas L. Steele*, of the other part, and calls upon the Defendants, present Respondents, as the legal representatives of the said *Alfred Pinsoneault*, to render an account, and pay over certain rents received, and which, it is alleged, the said *Pinsoneault* had agreed to pay over to the Appellants by the said *acte d'accord*.

In the Superior Court, the Plaintiffs obtained a judgment against the Defendants, but in the Court of Queen's Bench this judgment was reversed and the Plaintiffs' action dismissed with costs. The Plaintiffs now appeal to this Court from the judgment of the Court of Queen's Bench.

I am of opinion that the appeal must be dismissed. The Plaintiffs sue "in their quality of Trustees duly named of the creditors of *Thomas L. Steele*." The rule with us, contained in art. 19 of, the *Code of Procedure*, is that no one can sue *par procureur*. Of course, in certain cases, when specially authorized by law to do so, Trustees of certain public bodies may sue and appear before the courts as such. So can an assignee, under the Insolvency Acts. But here the Plaintiffs

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have no such standing. They are merely the attornies of *Thomas L. Steele's* creditors. It is true that *Pinsoneault* passed the deed of April, 1870, with them, acting in their quality of such Trustees. But that does not give them the right to appear as such before a court of justice. It is not, because in a deed *A* appears as attorney of *B*, that he may, on that deed, sue as such attorney. In this very deed of April, 1870, *Honoré Cotté* appeared as attorney of the late *Pinsoneault*, who was absent. It could not be pretended that *Cotté* could sue the Appellants on that deed, in his said quality of attorney. For the same reason, the Appellants cannot sue *Pinsoneault*, or his representatives, on this deed, in their quality of Trustees of *Steele's* creditors. Upon this ground alone the Plaintiffs' action cannot stand.

But I go further, and say that, on the merits of the case, the Plaintiffs' action was rightly dismissed. I fully concur in the remarks which the learned Chief Justice of the Court of Queen's Bench made at the rendering of the judgment in the court below. It appears that on the 10th February, 1866, *Pinsoneault* leased a building called the *Bonaventure* building, or *St. James' Hotel*, to *Thomas L. Steele* for seven years, from 1st May, 1866, at the rate of $3,250 a year, and that on the 7th March, 1868, this lease was extended for another period of seven years, that is to say, up to the 1st May, 1880, the rent for these last seven years being $5,000. In 1868, *Steele* transferred his interest in the said lease to the Plaintiffs, acting as Trustees for his, *Steele's*, creditors. In 1870, the Plaintiffs and *Pinsoneault* passed the *acte d'accord* in question. By this deed the lease of November 1st, 1868, of this building, until the first of May, 1880, was cancelled, and a fresh lease of it made by *Pinsoneault* to one *Gerriken* for the unexpired term, that is to say, up to

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the first May, 1880, at the rate of $6,000 a year. It was agreed that the fixtures and furniture then in the building should remain during *Gerriken's* lease. *Pinsoneault* agreed to pay to the Plaintiffs whatever he should receive from the tenant beyond $5,000 a year. In 1873 this building was burnt, with a large portion of the furniture. *Pinsoneault* received his insurance on his property, and the Plaintiffs received $3,223 for insurance on furniture, as well as another sum of $791, by the sale of furniture, saved from the fire. The lease to *Gerriken* was terminated by the said fire, and was subsequently annulled by a judgment of the Superior Court. *Pinsoneault* expended $10,292 in repairing the building, and leased it to *Linton, Popham & Co.*, for $6,000 a year, from October, 1873. The Plaintiffs have received their proportion of what *Pinsoneault* had been paid up to the time of the fire, but now claim an account of what he has received since the fire, both from *Gerriken* and from *Linton, Popham & Co., above* $5,000 a year. To the Plaintiffs' demand, the Defendants have pleaded that they have received nothing from *Gerriken* since the fire, and that, the lease to *Gerriken* having terminated by the fire, the Plaintiffs were not entitled to any portion of the monies received by them, the Defendants, since.

I think that the Plantiffs, under the circumstances, have no claim against the Defendants. They have received over $4,000 for the furniture and fixtures which were in the building at the time of the fire. Though summoned to do so, they refused to replace in the said building an amount of furniture equal to that which stood therein before the fire. They have treated the lease to *Gerriken* as terminated by the fire. I do not see how they can now claim from the defendants $1,000 a year on a property on which *Pinsoneault* has expended $2,000 more than he received to secure a new tenant. *Pinsoneault* has

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taken back his property, the Plaintiffs their furniture, and the contract between the parties has been put an end to by a contingency not provided for.

I am of opinion the appeal should be dismissed with costs.

Appeal dissmissed with costs.

Solicitors for Appellants: *A. & W. Robertson.*

Solicitor for Respondents: *Edmund Barnard.*

JOHN P. LAWLESS.....APPELLANT; 1879.

AND *Jan. 22.

JAMES SULLIVAN, *et al*.....RESPONDENTS. *April 15.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Taxes—Foreign corporation—Branch Bank—"Income," as distinguished from "Net Profits"—31 *Vic., Chap.* 3, *sec.* 4 (*N. B.*)

L., manager of the Bank of B. N. A., a foreign banking corporation, having a branch in the city of *Saint John*, derived from such business during the fiscal year of 1875 an income of $46,000, but, during the same period, sustained losses in its business beyond that amount. The Bank, having made no gain from said business, disputed the corporation's authority to assess them under 22 *Vic.*, c. 37, 31 *Vic.*, c. 36, and 34 *Vic.* c. 18, on an income of $46,000.

Held: That under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*, foreign banking corporations doing business in *Saint John* are liable to be taxed on the gross income received by them during the fiscal year; and that *L.* had been properly assessed. (*Henry*, J., dissenting.)

APPEAL from the decision of the Supreme Court of the Province of *New Brunswick* pronounced on a question submitted to that court under a special case.

Special case stated for the opinion of the court:

"1st. The Bank of *British North America* now is, and in, and prior and subsequent to the year 1875, was a corporation established in *London, England*, out of the limits of the Province of *New Brunswick*.

"2nd. The said bank, in and prior to said year 1875, had, and has since had, and now has an office or place

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, and Taschereau, J. J.

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of business within the city of *Saint John*, in the Province of *New Brunswick*.

"3rd. In and prior to said year 1875, *Thomas Maclellan* was the Manager of the said bank in the said city of *Saint John*, and carried on for said bank within the said city the business of banking by discounting notes and buying and selling exchange.

"4th. *John P. Lawless* is now the Manager of said bank in the said city of *Saint John*, and carries on business for said Bank within said city.

"5th. The fiscal year of the said bank, preceding the making up of the annual assessment for the city of *Saint John* for the present year 1876, commenced on the first day of January and ended on the 31st day of December, in the year 1875, both days inclusive.

"6th. The said bank, during the said fiscal year, sustained losses from the business transacted by it within the said city during said fiscal year, and on the whole year's business of the said fiscal year the said bank, in consequence of said losses, made no gain or profit, and none was made or received by or for said bank during said fiscal year.

"7th. But for the losses made by the bank in said fiscal year, arising during that year out of the business of the said bank within the said city, the income derived from such business in said year would have amounted to forty-six thousand dollars; but the losses sustained by said bank on its business in said city during said fiscal year exceeded that amount, and left the bank a heavy loser on its business of said year within said city.

"8th. The above-named *James Sullivan*, *John Wilson*, and *Uriah Drake* are assessors of taxes for the city of *Saint John* for the present year.

"9th. The said assessors have assessed the said *John P. Lawless*, as Manager of said bank, in the present year

in the sum of one thousand seven hundred and twenty-five dollars, for taxes claimed by the said assessors, to be payable by the said bank on forty-six thousand dollars income during the said fiscal year.

"10th. The bank claim that the income on which the bank is liable to be assessed is the gain, if any, received by said bank from the whole business of the fiscal year, and that as the losses of the business in the said city of said fiscal year exceeded all the profits which the bank, but for said losses, would have made, the bank, in fact, made no gain from said business within said city during said fiscal year, and therefore received no income from said business, and are not liable to be assessed as aforesaid.

11th. It is agreed between the assessors and the said *John P. Lawless*, as Manager of the said bank, to submit to the court the question whether, upon the facts as above stated, the bank or its manager are, or are not, liable to be assessed as aforesaid in the said sum of one thousand seven hundred and twenty-five dollars, under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*. If the court find in the affirmative, the assessment is to stand; if in the negative, the said assessment is to be set aside, altered or varied, so as to make it conform to the decision of the Court upon the question submitted."

The Supreme Court of *New Brunswick*, Judge *Fisher* dissenting, decided in the affirmative.

Mr. *Weldon*, Q. C., for Appellant:—

The 12th section of the Assessment Act, 1859, provides that rates are to be levied and raised by an equal rate upon the value of the real estate situate in the city, and upon the personal estate of the inhabitants wheresoever the same may be, and also upon the amount of income or emolument derived from any office, place,

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occupation, profession, or employment whatsoever within the Province, and not from real or personal estate, of the inhabitants of the said city, including persons made or declared to be residents or inhabitants by any Act or Acts of Assembly now or hereafter to be in force relating to the imposition of rates, and also upon the capital stock, income or other thing of joint stock companies or corporations as hereinafter provided.

The 14th section provides that all joint stock companies or corporations shall be assessed under this Act in like manner as individuals.

The 15th section provides that the agent or manager of any joint stock company or corporation, established abroad or out of the limits of this Province, who shall carry on business for such company in the city of *Saint John*, shall be rated and assessed in like manner as any inhabitant upon the amount of income received by him as such agent.

The last section was subsequently repealed and new provisions enacted by 31 *Vic.*, c. 36, sec. 4, and 34 *Vic.*, c. 18.

The word "income" means gain from property, labor and skill; so defined in *Imperial* and *Worcester's* dictionaries.

But we have an interpretation given to the term "income," by the Legislature in Act 38 *Vic.*, c. 6.

If the contention of Respondents is right, then nothing could be deducted, not even expenditures, and the agent would be taxed in his representative capacity, and also taxed on that portion being his salary in his personal capacity.

It is said that, because the agents of fire insurance companies are to make returns of the net profits, etc., therefore the return to be made by other companies of "income," must mean something different from "net

profits," and that, because it is to mean something different, it must mean all the receipts without reference to expenditures; but the circumstance is overlooked that fire insurance companies are not to be assessed upon their whole income, but only on part, and this affords an explanation of the return required of fire insurance companies, viz., "of the net profits, etc.," because it is by this return that the assessors are to determine what is to be deemed the income of that portion of the business which is made ratable.

Mr. *Kaye*, Q. C., followed on the part of the Appellant:—

The meaning of the terms used by the Legislature has to be ascertained.

The first term is the word "income." This word has a well understood meaning, and as applied to the business of a year, it can have but one meaning, viz.: *the gain on the whole year's business.* It is what the business has *gained* at the end of the year over what it had at the beginning. In this case the bank has to make a return of "the income for the fiscal year." What is the meaning of the *fiscal year*. It means that then the bank could ascertain the balance of profit earned.

All moneys necessarily paid in earning the salary or profit are to be deducted before ascertaining the income. You cannot take the capital to make the income. An agent could not return that he had made any income when he had actually used part of the capital. This is the ordinary meaning of the word "income." If you take the meaning of the word "income" as meaning all the money that *comes in* without regard to what goes out, then, as regards a bank, you deprive the word of meaning. But, if you say the word "income" means the "profit that comes in," then this, having to be ascertained at the end of fiscal year, must be the balance

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remaining after deducting what has been paid out. If the word used is not ambiguous,—and the word "income" is not, before you can limit or control it you must have express words for that purpose.

While there may be gross profits and net profits, there cannot be *gross income* and *net income* of a year.

Local banks are taxed on nominal capital; foreign banks on their profits.

How are we to determine whether it is a disadvantage to the local bank to be taxed on its capital? It may be an advantage in some years. At any rate, we have no figures upon which to base any argument, or to arrive at any result. We must, therefore, come back to the terms used by the Legislature in the Statute. The word "*income*" must mean the *gain* made by the bank and returned to the head office as such, at the end of the fiscal year. If the word is plain, is there anything in the proviso which cuts down the meaning. The words *net profits* are not used to distinguish that term from "income," but for a different object, viz., to limit the taxation on insurance companies to a portion of its business. Because, in the proviso, "net profits" is used, is it to be argued that the word "income" means gross income, a term which is never used?

Mr. *Thomson*, Q. C., for Respondents:—

The 15th section of the Act of 1859 (22 *Vic.*, cap. 37,) declares that "The agent or manager of any joint stock company or corporation established abroad, or out of the limits of this Province, who shall carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed *in like manner* as any inhabitant, upon the *amount of income* received by him as such agent." "*Like manner*" does not limit the mode or system of taxation; they are equivalent to "likewise."

The return is to be of "the whole amount of income received during the fiscal year." If the agent had returned that he had received *no income*, he would have committed perjury. The words "whole amount of income" cannot be synonymous with "net profits." The word "whole" excludes the idea of *net*.

But the proviso to 15th section clearly shows that the Legislature knew the difference between *income* and *net income*. They used "income," not as synonymous with, but as designedly contra-distinguished from "net profits."

Sec. 4, 31st *Vic.*, c. 26, did not re-enact the proviso as to insurance companies. As this was, no doubt, an oversight by which insurance companies were likely to suffer, the Legislature passed the Act of 1871 (34 *Vic.*, c. 18), which, after reciting that *doubts had arisen* whether under the wording of the fourth section of the Act of 1868 (31 *Vic.*, c. 38), "so far as the same relates to agents or managers of *fire and marine insurance companies, established abroad or out of the limits of the Province*, who shall carry on business within the city of *Saint John*," &c., enacted that the fourth section of 31 *Vic.*, c. 38, should not be applicable to such companies; and by section two such managers or agents were declared to be assessable on "net profits." Thus, again, the Legislature made a clear distinction between "income" and "net profits," and made such distinction *in favor of insurance companies only*.

Mr. *Weldon* says, according to our contention, the manager would be taxed twice. But is this different from the position of the Bank of *New Brunswick?* But this point has never been raised, and is not part of the special case.

Attention has been called to 38 *Vic.*, c. 36, 1875, in which it is alleged that a definition has been given to the word "*income*," which suits their views. I submit it

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does not; but I submit we have nothing to do with this Act. It relates to the Province, except *Saint John*. But the definition of word "income" in this Act (annual profits or gain) does not carry us any further.

I contend the word "income" means income without deducting expenditure. *Cooley* on Taxation (1), and cases there cited; *Attorney General* v. *Black* (2); *The Queen* v. *The Commissioners of the Port of Southampton, &c.* (3).

These Appellants do not pay upon their capital; and, if they succeed in their contention they would pay no taxes at all, although receiving the benefit of all municipal regulations. It is said, however, that their clerks pay on their income; but so do the clerks of the local banks. Where they can tax the *corpus*, they do so; where they cannot get at the *corpus*, they tax the income; and they tax the gross income because they believe it to represent the amount of capital employed. The term "income" ordinarily signifies gross income. You cannot interpret it, as if the word *net* or *clear* was before it. But when the Legislature uses the words "whole amount of income," and also words "net profits," it makes it clear that the word cannot be so interpreted.

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

THE CHIEF JUSTICE:—

The Bank of *British North America*, a corporation established in *London, England*, out of the limits of the Province of *New Brunswick*, carried on, through its Manager, in the city of *Saint John*, the business of banking.

The fiscal year of the said bank, preceding the mak-

(1) P. 160. (2) L. R. 6 Exch. 78.
(3) L. R. 4 H. L. 449.

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ing up of the annual assessment for the city of *Saint John* for the year 1876, commenced on the first day of January and ended on the 31st day of December, 1875, both days inclusive. The bank during such fiscal year sustained losses from the business transacted within said city during such fiscal year, and on the whole year's business, and in consequence of such losses made no gain or profit. But for such losses the income derived from the business of that year would have amounted to $46,000, but the losses sustained during that year exceeded that amount, and left the bank a heavy loser on the business of the year.

Plaintiffs were the assessors of taxes for the city of *Saint John* for the year 1876, and, as such, assessed the Defendant, as Manager of said bank, in the sum of $1,725, for taxes claimed by said assessors to be payable by the bank on $46,000 income during the said fiscal year. The bank claims that the income on which the bank is liable to be assessed is the gain, if any, received by the bank from the whole business of the fiscal year, and that, as the losses exceeded all the profits which the bank, but for such losses, would have made, the bank, in fact, made no gain, and so received no income from its business, and, therefore, are not liable to be assessed. The case agreed on by the parties submits to the court, as the only case for its determination, whether on these facts the bank or its Manager are, or are not, liable to be assessed in said sum of $1,725, under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*, and it was agreed that "if the court find in the affirmative the assessment is to stand, if in the negative, the said assessment is to be set aside, altered or varied, so as to make it conform to the decision of the court upon the question submitted."

This case was argued before the Supreme Court of *New Brunswick*, and that court decided that the Defen-

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dant, as Manager, was liable to be assessed $1,725 for taxes, as claimed by the assessors to be payable by said bank on $46,000 income during the fiscal year of said bank, preceding the making up of the annual assessment for the said city for the year 1876, under said Acts of Assembly, and the assessment as stated was to stand.

From this decision the Plaintiffs now appeal.

The Statutes of the Province of *New Brunswick*, by virtue of which assessments are made in the city of *Saint John*, are the 22 *Vic.*, c. 37, intituled "An Act relating to the levying, assessing and collecting of rates in the city of *Saint John*," and the 31 *Vic.*, c. 36, and the 34 *Vic.*, c. 18, in addition and amendment thereof. The first principle we find put forward, in the Act of 1859, as the basis of taxation, is equality,—"all rates levied or imposed upon the said city shall be raised by an equal rate" upon the value of the real estate situate within the city; upon the personal estate of the inhabitants wherever the same may be; upon the amount of income or emolument derived from any place, occupation, profession, or employment whatsoever within the province; but not from real or personal estate; and, as to all local joint stock companies or corporations, upon the capital stock, income or other thing of such joint stock companies or corporations; and as to joint stock companies or corporations established abroad, or out of the limits of the province, the agent or manager, who shall carry on business for any such company or corporation in the city of *Saint John*, shall be rated and assessed, in like manner as any inhabitant, upon the amount of income received by him as such agent; and such agent, when required, is to furnish a true and correct statement in writing, under oath, setting forth "the whole amount of income received in the city of *Saint John* during the fiscal year of the company, preceding the making up of the annual assessment." With respect to insurance companies

abroad, the assessment is to be taken on a three year's average of the yearly "net profits" on insurance of property within the city; and the agents are to furnish the assessors with a statement in writing of the aggregate of such "net profits" for the three years next preceding that in which the assessment is to be made.

In this and in the subsequent acts, when any departure from the principle of an equal rate is permitted, the exemptions are specially provided for, as in sec. 14 of the 22 *Vic.*, c. 37, which declares that "nothing shall render liable to assessment the real or personal estate, income or other thing of the city corporation, or of any religious, charitable or literary institution." And so in sec. 16 of the 22 *Vic.*, c. 37, and sec. 5 of 31 *Vic.*, c. 36, which relieve stockholders of any joint stock company or corporation from liability to be rated, in respect of any property or income derived from such company or corporation; and as in the 14th sec. of 31 *Vic.*, c. 36, which provides "that nothing in the Act shall extend to authorize any assessment on any person or agent for the freight or earning of any vessel, steamboat or ship entering or clearing the port of *Saint John*." So also in the 6th sec. of the 34 *Vic.*, c. 8, which wholly exempts life assurance companies or associations doing business in the city of *Saint John*, or their agents or managers, from taxation in said city. In each of these Acts we have a very clear distinction indicated between "the whole amount of income" in the case of non-resident corporations generally, and "the net profits" or "net proceeds," as the term is in the 5th sec. of the 34 *Vic.*, c. 18, on insurance of property within the city by assurance companies established abroad. This Act of 1859, though added to and amended by the 31 *Vic.*, c. 36, is not interfered with as to the equality required to be observed in levying the rates, and though sec. 15 is repealed, sec. 4 of 31 *Vic.*, c. 36, enacted in lieu thereof,

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in like manner declares that corporations established abroad, or out of the limits of the province shall be rated and assessed on the income received, and to enable the assessors to rate such companies or corporations, the manager is in like manner to furnish under oath in writing the *whole* amount of income received during the fiscal year, as in the Act of 1859. In this Act of 31 *Vic.* there is no reference to insurance companies, and, as the whole of section 15 of the Act of 1859 was repealed, the proviso contained in it in their favor was also repealed. This was evidently not intended by the Legislature, and to make this apparent the 34 *Vic.*, c. 18, was passed. This Act, after reciting that doubts had arisen as to the construction to be put upon the 4th sec. of the 31 *Vic.*, c. 36, so far as the same relates to the agents or managers of fire and marine insurance companies established abroad, or out of the limits of the province, who shall carry on business within the city of *Saint John*, or who shall have an office or place of business within the city for such companies, and that it was desirable that such doubts should be removed, proceeds to enact that the said fourth section shall not apply to agents of any fire or marine insurance companies so established, and so carrying on business, but that such agent or manager should be rated and assessed in like manner as any inhabitant, upon the amount of *net profits* made by him, as such agent, from premiums received on all insurances effected by him, in case of fire insurance, on property situate within the limits of the city, and, in case of marine insurances, wherever the subject matter of insurance may be; and, when required by the assessors, such agent is to furnish to them, within 30 days, a true and correct statement in writing under oath, setting forth "the whole amount of *net profits*" made by such company within the city of *Saint John*, from such premiums so received during

the fiscal year preceding the making up of the annual assessment.

Here we see the principle of a three years' average abandoned, and the assessment confined to "the net profits of the fiscal year preceding the making up of the annual assessment," as distinguished from "the whole amount of income" received for all other companies and corporations, during the fiscal year preceding the making up of the annual assessment. Now, if all outside companies and corporations were to be assessed only on net profits, what doubts could arise as to marine associations, or what necessity for any new enactment as to them, as they are to be assessed on all the business they do within the city of *Saint John*, wherever the subject matter of insurances may be. Inferentially, then, we have this enactment recognizing a clear distinction between "the whole amount of *income*" and "the whole amount of *net profits*."

Now, it is important to see how joint stock companies or corporations, other than those established abroad, or out of the limits of the Province, are dealt with.

By the 14 sec. of the 22 *Vic.*, c. 37,

All joint stock companies or corporations shall be assessed in like manner as individuals, and for the purpose of such assessment, the president, or any agent or manager of such joint stock company or corporation, *shall be deemed to be owner of the real and personal estate, capital, stock and assets of such company or corporation*, and shall be *dealt with*, and may be proceeded against accordingly; the principal place of carrying on the business and operations of any such company or corporation shall be deemed to be the place of inhabitancy of such company or corporation, and of such president, agent or manager, and such president, agent or manager shall, in regard to the real and personal estate, income or other thing of such company or corporation, be assessed separately and distinctly from any other assessment to which he may be liable, &c."

And, as we have seen, the individual stockholders are exempt in respect thereof. Under this section, it is clear that the real and personal estate, capital stock

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and assets of all corporations are liable to assessment, wholly irrespective of their gains or losses during the fiscal year. Their losses may have equalled or exceeded their gains, but that would not exempt them from taxation, for the law makes no distinction in the assessment on real and personal estate, whether it is actually productive or not; on the contrary, it is declared by sec. 12 of 22 *Vic.*, c. 37, that—

> For the purposes of this Act, the value of all real and personal estate and joint stocks, shall be deemed and taken to be, and shall be put down at one-fifth of the actual worth thereof as nearly as the same may be ascertained (1).

If foreign banks, then, can do business in the city of *Saint John*, and their losses, when made, are to exempt them, in whole or in part, from taxation, what a large pecuniary advantage is conferred on them over the domestic corporations, and how entirely in their case is ignored the legislative declaration that all rates levied and imposed in the city shall be raised by an equal rate. While, therefore, not only local banks and all other local corporations are taxed, wholly irrespective of profits, and whether the business of the fiscal year was profitable or otherwise, but likewise all resident inhabitants are thus taxed on all real and personal estate and joint stock, without reference to productiveness or unproductiveness, upon what principle of equality or uniformity in the taxation can foreign banks ask to be assessed only on "net profits," and to be exempt from all taxation in those years when their business may happen not to furnish any *net profits*, while the actual value of the property of every other home corporation and every citizen bears its equal share of the city burthens. While perfect equality in the imposition of taxes cannot, perhaps, be always expected, and while we cannot look for such a perfect

(1) See *Exparte the Bank of New Brunswick*, 1 Pugsley 265.

system of taxation as will not, under certain circumstances, produce unequal results, and, perhaps, injustice, we may fairly infer the Legislature contemplated equality and uniformity so far as practicable; and, I think, on the face of these acts, we have indicated a policy of equality and justice, and, as far as possible, a uniform rate on all property of the same description, and not such invidious exemptions and favoritism as would be the result if the defendants' contention should prevail; and when exemptions are claimed, and that this policy has been departed from, we have a right to expect that an intention so to exempt would be made apparent by clear and unambiguous language, as we have seen has been done in the cases before referred to; and, without such a clear indication of the will of the Legislature, I do not think a legal construction should be adopted that will compel one corporation or person, or one subject of taxation, directly to contribute, while other corporations or persons, and other subjects of taxation of precisely the same class, are entirely exempt.

I look on this tax as, in effect, a tax upon the capital of the bank employed in the city, as it would not be fair to tax the whole capital of the mother Bank, and it might be very difficult, if not impossible, to fix the amount of capital employed by the branch bank or agency, which may fluctuate from week to week.

The Legislature, not being able to get at the amount of capital to be taxed, appear to have adopted the principle of taking the gross income, as the basis for computing the tax, as showing the volume of business transacted during the year, and, as it were, approximately representing the capital employed generally throughout the fiscal year, thereby practically taxing the property or assets of the bank by the income derived therefrom, and thereby compelling these foreign corporations to con-

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tribute to municipal expenditure, and so bear their fair share for the valuable privileges they enjoy, and place them on an equal footing, as near as may be, with domestic institutions of a similar character. I cannot bring myself to think, that the Legislature ever contemplated that though private individuals and all local corporations should contribute to the municipal burthens, regardless of gain or loss, foreign banks alone should be a privileged class, and though enjoying, in common with similar home institutions, the protection and advantages derivable from municipal expenditure, they should, at seasons of depression, when *net profits* may not be earned, but when funds are generally most needed, escape all municipal burthens.

In another point of view, this tax as imposed may, I think, be said to be more in the nature of a franchise than a property tax. One peculiarity of taxes of this description is that they depend on the amount of business transacted, and the extent to which they have exercised the privileges granted in their charter without reference to the value of their property. Numerous instances of this description of tax are to be found in the American reports and works on taxation, such as a tax on the amount of deposits in lieu of all other taxes. But, apart from all this, I think the tax is imposed by the express language of the Statute.

By the 12th sec. of the 22 *Vic.*, cap. 87, it is declared that:

> All rates levied or imposed upon the said city shall be raised by an equal rate upon the value of the real estate situate in the city or district to be taxed, and upon the personal estate of the inhabitants wherever the same may be, and also upon the amount of income or emolument derived from any office, place, occupation, profession or employment whatsoever within the Province, and not from real or personal estate of the inhabitants of the said city, including persons made or declared to be residents or inhabitants by any Act or Acts of Assembly now or hereafter to be in force relating to the imposi-

tions of rates, and also upon the capital stock, income, or other thing of joint stock companies or corporations as hereinafter provided.

By the 15th sec. repealed by 31 *Vic.*, c. 36, which substitutes other provisions:

The agent or manager of any joint stock company or corporation established abroad or out of the limits of this Province, who shall carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed in like manner as any inhabitant upon the amount of income received by him as such agent; and for the purpose of enabling the assessors to rate such company or corporation, the said agent or manager shall, when required in writing by the assessors so to do, furnish to them a true and correct statement in writing under oath, setting forth *the whole amount of income* received in the city of *Saint John* during the fiscal year, (of said companies) preceding the making up of the annual assesssment. * * * For the purposes of this section the agent or manager shall be deemed the owner of such income and shall be dealt with accordingly.

Provided, however, that the assessment on Insurance Companies, or the agent or manager of any Insurance Company established abroad, shall be taken on a three years' average of the *yearly net profits* on insurance of property situate within the said city, or for the whole period for which they may have been doing business in said city, not exceeding three years, such average to be obtained as follows, &c. * *

Provided further, that life insurance companies or their agencies shall be free from assessment under this Act.

Section 16, repealed by 31 *Vic.*, c. 36, sec. 5, enacted that:

No stockholder of any joint stock company or corporation liable to be rated under this Act shall be assessed in respect of any property or income derived from such company or corporation.

It has been very strongly and very ingeniously contended by the learned counsel for the appellant that the term "income" is not to be interpreted as meaning the gross income or receipts by the agent, but the gain or emolument derived by the agent during the year from the whole business of his principal in the city. That the term "income" has acquired a technical meaning, and is used to signify "gain or profit," and that this is also the popular meaning of the word "income."

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I think the term "whole income" must be construed to mean the gross income or revenue received by the bank on the business of the fiscal year preceding the assessment; or, in other words, the total amount the bank earned without reference to any outgoings; that the words "whole income" must be read in their ordinary meaning, as the whole incomings of the bank as opposed to net profits, net earnings, net income, clear income, or clear gain. The Legislature has in this Statute clearly distinguished between whole income and net profits, and has so clearly used those terms as contra-distinguished, that to read them as synonymous words would be quite unjustifiable.

The income of the bank is its discounts, interest, premium on exchange, &c., and this is earned when received, and forms the income of the bank. If the bank makes bad debts on any business or transactions of the current year, or operations entered into in past years, that is a loss *pro tanto* of capital. This they may make up by borrowing money, or by calls on the stockholders, or so much of the lost capital may be replaced from "income," but it was in either case the capital invested that was really lost, not the income. In making up a profit and loss account the bank would necessarily be debited with all interest paid, losses made, expenses incurred, or disbursements, in fact all "outgoings," and credited with all interest, earnings or gains, and the balance would be the net loss, or the net profit, of the year, but certainly would not be the "income" of the year.

The income, if applied to make up loss of capital by unfortunate investments, fire, or other causes, would be in effect an addition to capital, to be again employed as capital in the business of the bank. As was held in *Forder* v. *Handyside* (1), where defendants, who were

(1) L. R. 1 Ex. Div. 233.

assessed on the net profits, had, in accordance with the articles of association, set apart a sum of money for depreciation of buildings, fixed plant and machinery, and claimed, in making a return of the annual profits or gains, to deduct this amount, as the amount written off for depreciation of buildings, fixed plant and machinery; and, though a majority of the Commissioners were of opinion that persons in trade were equitably entitled to write off from their profits each year a sum for depreciation, and that the amount claimed was fair and reasonable, and decided in favor of the defendants, on a case stated for the opinion of the Court, it was held that such a deduction was contrary to the Statute, as the amount set aside was, in effect, an addition to capital.

In *Regina* v. *Commissioners of the Port of Southampton* (1), *Bramwell*, J., said:

It turns on the meaning of the word "income" in sec. 124 of 6 *Wm.* 4, c. cxxix. Does it mean all or four-fifths of what the Defendant received from the sources therein mentioned? I cannot reason myself into a doubt on the subject, though I must entertain much in deference to the opinion of those who think differently. "Income" is that which comes in, not that which comes in less an outgoing. The fifth the Defendants were liable to pay to the Plaintiffs was an "outgoing," not a diminution of income.

And Lord *Chelmsford* says:

It appears to me the word "income" here means the total amount of the rates and duties receivable by the Commissioners, without regard to any outgoings to which it may be subject.

And, after stating reasons that had been assigned, says:

One can hardly suppose that these considerations were at all in the view of the Legislature, and led to the use of the word "income" *in a different sense from its ordinary meaning.*

And in *Angell & Ames* (2):

The moneyed corporations of the State of *New York*, deriving income and profit, are liable to taxation on the capital, and it is held

(1) L. R. 4 H. L. 472. (2) 3rd ed., sec. 454.

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that, in ascertaining the sum to be inserted in the assessment roll, no regard is to be had, either to accumulations or losses, but only to the amount of capital stock paid in and secured to be paid, and that the word "income" means that which is received from the investment of capital, without reference to outgoing expenses; and the term *profits* means gain made upon any investment when both receipts and payments are taken into account.

Where a moneyed corporation is liable to be assessed on the whole nominal amount paid in and secured to be paid (after deducting statutory exemptions,) no deduction is to be made for losses of capital, nor for debts due.

Burroughs on taxation (1):

"Income." The gross revenue of an individual, whether it arises from rents of real estate, interest on money loaned, dividends on stocks, or compensation for personal services rendered in any trade, profession, or occupation, constitutes his "*income.*" * * * But such tax is never imposed upon all persons, nor upon the gross income, it is usually upon the annual income of persons, in excess of a certain amount, allowing deductions of various kinds.

Burroughs on taxation (2):

Where the tax is imposed on the annual *net* earning or income of a corporation, the income, after deducting necessary expenses, is the amount to be taxed; that portion of income devoted to repayment of capital is included as a part of the income and liable to the tax. A tax on net earnings or income, is on the product of business, deducting expenses only; no allowance is made for capital exhausted or waste of capital in business. But if the tax be upon "profits or income," it will not be construed to mean *net* profits or income.

A good deal of stress was laid on the words of the Statute, which says that corporations are to be assessed in like manner as any inhabitant. I think this provision "in like manner as any inhabitant" must be read as fixing merely the liability to be rated and assessed, and the liability being so established, then the law declares how the tax is to be levied, and makes provisions in reference thereto wholly different from those applicable to inhabitants. Whereas, if the words "in like manner" were to be held to apply,

(1) P. 159, sec. 82. (2) P. 161, sec. 82.

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not only to the liability, but to the mode of levying the rate or assessment, then the clause should have terminated at the word "inhabitant," otherwise this incongruity would arise, that while in one part of the clause it is provided that joint stock company shall be rated and assessed in like manner as any inhabitant, the subsequent part of the section provides an entirely different mode, and whereby the assessment is to be on the *whole amount of income* received, a term entirely distinct from that used in reference to inhabitants.

In view of the policy of the act and the wording of the act, on principle and on authority, I think the decision of the majority of the Judges of the Court below was correct; that the Defendants have no cause to complain, and that the appeal should be dismissed with costs.

STRONG, J., concurred with the Chief Justice.

FOURNIER, J.:—

La question soulevée par le *special case* soumis du consentement des deux parties pour la décision de la Cour Inférieure, était de savoir si la Banque *British North America*, corporation établie à l'étranger, mais ayant un bureau d'affaires dans la cité de *St. John, N. B.*, peut être, d'après le "*St John City* Assessment Act 1859" et ses amendements, taxée sur le total de son revenu, ou seulement sur le montant des profits nets, réalisés après déduction faite des pertes subies durant l'année.

La 1ère sec. de l'acte ci-dessus cité impose à la Corporation de la cité de *St. John* l'obligation de fixer chaque année, pas plus tard que le 1er avril, le montant qu'il sera nécessaire de prélever pour les besoins de la cité pendant l'année.

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La 12ème sec. déclare que la taxe dans la cité de *St. John* sera répartie d'après un taux égal: 1o. Sur la valeur de la propriété mobilière et immoblière; 2o. Sur le montant du revenu ou émoluments de tout office, place ou occupation, etc.; 3o. Sur le capital, revenu ou autres propriétés des compagnies à fonds social ou corporations tel que ci-après pourvu. Pour les fins du prélèvement de ces taxes, la valeur de la propriété foncière est fixée au $\frac{1}{5}$ de sa valeur *actuelle* (réelle).

La 14ème sec. déclare que les compagnies à fonds social seront cotisées de la même manière que les individus. (*in like manner as individuals.*)

La 15ème sec. déclare que l'agent ou gérant d'une compagnie à fonds social ou corporation établie à l'étranger, ou en dehors des limites de la province, faisant affaires pour telle compagnie ou corporation dans la cité de *St. John*, sera cotisé de la même manière que tout autre habitant sur le montant du revenu par lui perçu en sa qualité d'agent,

Shall be rated and assessed *in like manner* as any inhabitant upon the amount of income received by him as such agent.

La même section oblige les représentants de ces institutions à donner aux cotiseurs, s'ils en sont requis, un état correct et sous serment du montant total du revenu perçu dans la cité de *St. John*, durant la dernière année fiscale, précédant la confection du rôle annuel de cotisation.

Un proviso déclare que les compagnies d'assurances ne seront cotisées que d'après une moyenne des profits nets réalisés sur les affaires faites dans la cité pendant les trois dernières années. Le même proviso exempte les compagnies d'assurance sur la vie et leurs agences des taxes imposées par cet acte.

La sec. 16, exempte de taxes les parts des actionnaires dans les compagnies cotisées en vertu de cet acte.

La 15ème sec. de l'*Assessment Act* de 1859 qui avait

défini les différents modes de taxer les compagnies mentionnées plus haut, a été révoquée par la 31 Vict., ch. 36, sec. 4. Mais cette dernière section, qui comprend de nouvelles catégories de personnes et de sociétés, qui ne l'étaient pas dans la section révoquée, conserve dans leur entier les dispositions de la dite section 15, quant aux institutions étrangères faisant affaires dans la dite cité de *St. John*. La seule innovation est que le mot *income*, y est employé comme s'appliquant à toutes les compagnies indistinctement, omettant les mots *net profits*, qui dans la sec. 15 devaient servir de bâse pour l'imposition de la taxe sur les compagnies d'assurances.

L'obligation de fournir un état sous serment, s'il est requis, de tout le revenu perçu par les agents des compagnies étrangères est restée la même.

L'omission dans la sec. 4 ci-dessus citée de la distinction faite dans la sec. 15, entre les compagnies taxées d'après leur revenu, et celles qui ne l'étaient que d'après le montant des profits nets, ayant donné lieu de douter si les compagnies d'assurances jouissaient encore du privilége spécial que leur avait accordé la sec. 15, le statut 34 Vict., ch. 18, fut passé pour mettre fin à ces doutes. La 1ère sec. déclare que la sec. 4 de 31 Vict., ch. 36, qui avait donné lieu à ces doutes ne s'appliquera pas aux agents des compagnies d'assurance maritime et contre le feu établies à l'étranger ou en dehors de la province, faisant affaires dans la cité de *St. John*, ou qui auront un bureau d'affaires dans la dite cité pour telles compagnies.

La 2ème sec. remet les agents de ces compagnies dans la position que leur avait faite la sec. 15 (de l'acte de 1859), en déclarant qu'ils seront sujets comme tout autre habitant, *in like manner as any inhabitant*, à être cotisés sur le montant des profits nets, ("upon the "amount of net profits made by them") sur les propriétés

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assurées dans les limites de la cité. On est donc revenu aux dispositions de la sec. 15, concernant la distinction entre les compagnies d'assurance et les autres compagnies ou corporations étrangères. La sec. 4 qui établit cette distinction doit être considérée comme une interprétation législative des expressions *whole income* et *net profits* qui font le sujet de la difficulté en cette cause.

Les citations précédentes font voir que la législature a clairement établi différentes catégories de compagnies ou corporations, à l'égard de chacune desquelles elle a fait des dispositions spéciales quant au mode de les taxer, savoir: 1o. Les compagnies à fonds social ou corporations provinciales ayant un bureau d'affaires dans la cité de *St. John*, qui doivent être taxées (sec. 2) d'après le montant de leur capital; 2o. Les compagnies établies à l'étranger ou en dehors de la province faisant affaires dans la cité de *St. John*, qui doivent être taxées d'après la sec. 15, sur leur revenu, dont elles doivent déclarer le total aux cotiseurs; 3o. Les assurances maritimes et contre le feu taxées d'après un proviso de la même section sur le montant des *profits nets*, réalisés sur les propriétés assurées dans les limites de la cité; 4o. Les assurances sur la vie que le même proviso exempte de toutes taxes.

La distinction entre les divers modes de taxer ces différentes institutions, les unes sur le capital, comme les compagnies ou corporations incorporées dans la province, les autres d'après le montant de leur revenu entier, et d'autres enfin d'après le montant de leurs profits nets, ne pouvait pas être faite d'une manière plus claire et plus précise. Les mots "*whole income*" et "*net profits*" comportent en eux-mêmes un sens très clair et qui ne me paraît pas susceptible de laisser aucun doute sur l'intention de la législature. Ils me paraissent avoir été employés à dessein pour signifier

des choses différentes, et ils doivent ici recevoir la signification que leur ont donnée les statuts cités plus haut qui de plus sont conformes à la définition de ces deux expresssions donnée par *Cooley* on taxation (1) :

Income means that which comes in and is received from any business or investment of capital without reference to the outgoing expenditure. *Profits*, on the other hand, are understood to mean the net gain of any business or investment, taking into account both receipts and payments. Income as applied to the affairs of individuals, expresses the same idea that *revenue* does when applied to the affairs of government. *People* v. *Supervisors of Niagara* (1).

L'Appelant a prétendu que les expressions *in like manner as any other inhabitant*, signifiaient que la taxe imposée sur les compagnies serait la même que celle prélevée sur le revenu des individus,—que le revenu défini, d'après la sec. 12, 22 Vict., 37, comme suit : *Income or emolument derived from any office, place, occupation, profession or employment in the Province*, doit s'entendre seulement du revenu net, déduction faite des dépenses et pertes. Cette définition ne définit rien. En employant les mots *income or emolument* comme synonymes, elle laisse subsister la difficulté de savoir si, pour les fins de la taxe, il faut dans l'estimation des revenus d'une place ou d'un office en déduire les dépenses. Elle ne peut par conséquent servir de bâse à un argument pour résoudre cette difficulté puisqu'elle y est sujette elle-même. On ne peut non plus s'appuyer sur la définition du mot *income* donné dans l'*Assessment Act* de 1875, car cet acte concerne la province du N. B., et ne peut servir à l'interprétation des statuts spéciaux concernant la cité de *St. John*. Il faudrait pour cela y trouver une disposition spéciale qui n'existe pas.

Au contraire de la prétention de l'Appelant, je crois que les termes *in like manner as any other inhabitant*

(1) P. 160. (2) 4 Hill 20, affirmed 7 Hill, 504.

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n'ont été introduits que pour signifier que les compagnies ou corporations seraient, comme les individus, soumis à l'obligation de payer les taxes, et nullement pour déclarer que le même taux ou mode de taxer serait applicable dans les deux cas. Ceci me paraît résulter clairement de la sec. 12, déclarant que les compagnies ou corporations seraient taxées *as hereinafter provided.* C'est donc aux dispositions spéciales sur ce sujet, qu'il faut référer pour connaître quel est le mode établi quant aux compagnies ou corporations. Ces dispositions particulières, citées plus haut, font voir que les compagnies étrangères sont soumises à un mode particulier qui consiste à prélever la taxe sur le total de leur revenu.

Une interprétation donnant à ces corporations le bénéfice de l'exemption de payer des taxes, tandis que les banques provinciales y seraient soumises, se trouverait en opposition directe avec la 12ème clause de l'acte ci-dessus cité déclarant que la taxe sera imposée d'une manière égale—"*equal rate.*" Ne pouvant pas connaître au juste le montant du capital employé par les banques étrangères dans leurs agences locales autrement que par le revenu qu'elles en retirent, c'est sans doute pour arriver à ne taxer que le montant du capital employé dans ces agences que la loi les oblige à déclarer leur "*whole income,*" pour servir de bâse à la taxe. De cette manière elles sont atteintes comme les autres banques—et comme elles, taxées dans le cas de profit comme dans le cas de pertes, sur le capital employé dans les agences locales. En adoptant cette interprétation, l'égalité et la justice, conformément au principe exprimé dans la sec 12, sont observées à l'égard d'institutions du même genre, qu'elles soient d'origines provinciales ou étrangères.

Les raisons ci-dessus exposées me paraissant suffisantes pour résoudre la question soumise, je ne crois

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pas devoir entrer dans de plus amples considérations pour justifier la conclusion à laquelle j'en suis venu, savoir : que dans le cas actuel la Banque *British North America* a été légalement taxée sur le montant entier de son revenu, au lieu de ne l'être que sur le montant de ses profits nets.

HENRY, J. :—

The Appellant is agent and manager of the Bank of *British North America*, at the city of *Saint John, N. B.*, and as such was rated under certain assessment acts relating to the said city. By a majority judgment of the Supreme Court of *New Brunswick*, to which he had recourse, the tax upon him was decided to be legal, and from that judgment he appealed to this Court. We have, therefore, to consider the matter as presented by the acts in question, and decide as to his liability to be rated under them.

By sec. 12 of 22 *Vic.*, cap. 37 :

All rates levied or imposed upon the said city shall be raised by an equal rate upon the value of all real estate situate in the city or district to be taxed, and upon the personal estate of the inhabitants wherever the same may be, and also upon the amount of income or emolument derived from any office, place, occupation, profession or employment whatsoever within the Province, except from real or personal estate of the inhabitants of the said city, and, also, upon the capital stock, income, or other thing of joint stock companies or corporations *as hereinafter provided.* * * * And for the purposes of this act, the value of all real and personal estate shall be put down at one-fifth the actual worth thereof, as nearly as can be ascertained.

Section 14 provides that :

All joint stock companies, or corporations, shall be assessed under this act *in like manner as individuals.*

By section 15 :

The agent or manager of any joint stock company or corporation established abroad or out of the limits of this Province, who shall

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carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed *in like manner as any inhabitant* [which means *to the same extent*] upon the amount of the income received by him as such agent,

With a provision that:

The said agent or manager shall, when required in writing by the assessors so to do, furnish to them a true and correct statement under oath setting forth the whole amount of income received in the city of *Saint John*, during the fiscal year of said companies preceding the making of the annual assessments. * * * Provided, however, that the assessment on insurance companies, or the agent or manager of any insurance company established abroad, shall be taken on a three years' average of the yearly net profits on insurance of property situated within the said city, or for the whole period they may have been doing business in said city, not exceeding three years.

By virtue, then, of those Acts the assessment was based on a rate of one-fifth the ascertained value of all real estate in the city, and upon personal estate of inhabitants, wherever the same might be, and of stock of resident joint stock companies or corporations. In the view I take of this case, depending as it does upon the construction to be put on sec. 4 of 31 *Vic.*, cap. 36, taken in connection with the repealed sec. 15 of 22 *Vic.*, c. 37 and 34 *Vic.*, c. 18, it matters not what rates the Legislature imposed upon resident joint stock companies or corporations; but I refer to the fact in passing; and it may be useful to remember that such is the case when discussing the argument founded on the inequality in the rate in years when the *net* income of non-resident companies or corporations, as it is termed, should be nothing, or very much too small, to equal the taxes paid by resident companies or corporations when rated on a different basis. We have not, from any evidence before us, the means to determine in that way what the Legislature meant when using the term "income," and, if we had, the Legislature has forbidden us to do it. By sections 14 and 15 of 22 *Vic.*, c. 37, the Legislature has directed that the resident,

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as well as the non-resident corporations, shall be rated as individuals, the former on one-fifth of the value of their capital stock, and the latter on their income. I feel, therefore, wholly unauthorized, because forbidden, to inquire into any alleged inequality of taxation as between the resident and non-resident companies or corporations. That was a matter for the Legislature and not for us. If, indeed, there could be any doubt as to the meaning of the words, or if there was no provision assimilating the assessment on non-resident companies or corporations, we then, but only then, would be, not only allowed, but bound to draw an argument as to the meaning and effect of the term "income," when used and applied in reference to non-resident companies or corporations which are rated on a principle different from that applied to resident ones. When the Legislature says the non-resident companies or corporations shall be rated in like manner as individuals, upon what theory of construction or evidence can I say it did not mean so, and that a different principle should be interposed or substituted? For these reasons, I cannot feel authorized to found my judgment upon definitions founded on principles applicable to companies or corporations, when inapplicable to the cases of individuals. I consider, therefore, my duty is to ascertain the intentions of the Legislature when applying the term "income" *to an individual*, and upon that proposition to a great extent my judgment is founded.

To arrive at a result we must ascertain how the term "income" is used in regard to an individual.

The 12th sec. of 22 *Vic.*, c. 37, under which the tax is imposed, employs the words, "and also upon the amount of income or emolument derived from any office, place, occupation, profession, or employment whatsoever within the Province," excepting income or

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emolument from real or personal estate of the inhabitants of the city.

That "income," when employed as it is in the section, is made synonymous with "emolument" is an undeniable proposition, which needs no authorities or arguments to sustain. "Income" cannot, therefore, be deemed to mean anything which "emolument" cannot, in the fair and ordinary acceptation of the term, apply to.

What then is the meaning of "emolument" in its usual and ordinary acceptation. It comes from the participle (*emolumentum*) of the latin verb *emolo*, *molo* to grind, *originally* meaning toll taken for grinding. It is now, according to the *Imperial* Dictionary and other reliable authorities, understood: "1. The *profit* arising from office or employment—that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit, advantage, gains in general;" and according to the same dictionary, "emolumental" means "producing profit, useful, profitable, advantageous." According to *Webster's* dictionary emolument means: "1. The *profit* arising from office or employment—that which is received as a compensation for services, or that which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit, advantage, gain in general—that which promotes the public or private good. 'Emolumental,' producing *profit*, useful, profitable, advantageous." "Emolument" is thus, in the *first* definition in both authorities cited, declared to be "the *profit* arising from office or employment," and not merely the gross amount of salary, fees or perquisites, but the balance remaining after deduction of the necessary expenses paid out in earning the salary, fees or perquisites.

In support of the principle just stated, I can confidently refer to the Imperial Income Tax Statute, 16th and 17th

Vic., cap. 34. It is intituled "An Act for granting to Her Majesty duties on profits arising from property, professions, trades and offices," and in the heading of each page it is called "Income Tax." Sec. 2, schedule E, provides that "every public office or employment of profit" shall be charged. Sec 51, however, provides for the reduction "in respect of any public office or employment, where the person exercising the same is necessarily obliged to incur the same" of the expenses of travelling, or of keeping and maintaining a horse, or otherwise "to lay out and expend money wholly and necessarily in the performance of the duties of his office or employment." The true meaning of the term *emoluments*, as applied to such an office or employment, either with or without any provision, such as in the last section contained, is that which would include only the balance remaining after the deduction of such necessary expenses. Schedule "D" imposes the tax in respect of annual *profits* or *gains* "from any profession, trade, employment or vocation." Sec. 50 provides for assessing *doubtful debts* due to any person, but in cases of insolvency only the amount of dividend likely to be received on any such debt. In making the returns provided for by the Act of the "profits or gains," the question of *doubtful* debts is provided, and, while really *bad* debts would be deducted in the estimate, persons making returns would have to charge themselves with the *doubtful* ones. This, then, is the principle of the Imperial "Income" Tax, and, under it, only the "profits" or "gains," after deducting bad debts, are taxed. It is the sound principle, for otherwise it would be a tax on *capital* and not on "income," and while a tax on capital, and to be paid out of it, no one could contend it would be derived from "emoluments," which, according to every authority, means "profits, advantages, gains in general."

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I have said that "Income" and "Emoluments" are employed in the section in question as synonymous, and being so used we are constrained so to apply the first term, when employed in any subsequent section of the same act. "Income," however, has a well understood meaning, and in the absence of any legislative construction that meaning must be given to the term. According to *Webster's* dictionary "Income" is "that gain which proceeds from labour, business, or property of any kind." * * * "The *profits* of commerce or of occupation." "Income is often used synonymously with revenue, but *income* is more generally applied to the 'gain' of private persons," and the same definition is given verbatim in the *Imperial* dictionary. In *Richardson's* dictionary it is stated to be the *profit* or *emolument*, the revenue coming in. Thus, for a stated period, income is, therefore, the *profit* or emolument derived from any commercial business or occupation for that whole period, and not for any portion of it, and not for any portion of the business but from the whole of it. If an individual, in the earlier part of the prescribed period should lose, say, a thousand dollars, but during the remaining part gains an equal sum, could it be said his profits, or income, or emoluments, from the business would be a thousand dollars? I maintain that, where there is no profit during the period, the fund on which the tax is directed to be levied is not in existence, and the tax is, in such a case, levied on capital. Such I cannot hold to have been the intention of the Legislature. The case states that the profits fell far short of the losses on the business *for the year*, and we must not, therefore, inquire further how either arose or occurred. The exact position is admitted by the case.

The 4th sec. of the 31st *Vic.*, cap. 36, which repeals the 15th sec. of 22nd *Vic.*, cap. 37, includes, with the agents of joint stock companies and corporations, "any

other person or persons, whether incorporated or not, doing business out of the Province, who shall carry on business within the city of *Saint John*, or who shall have an office or place of business in the city of *Saint John* for any such company, corporation, person or persons," and provides that all such agents "shall be rated and assessed *in like manner as any inhabitant* upon the amount of *income* received by him for the same as such agent." The agents of companies and corporations are, then, put on the same footing as agents of a branch of a mercantile house or manufacturer, doing business out of the Province. I hold that a construction inapplicable to the agent of such mercantile house or manufacturer would be just as inapplicable to companies or corporations. The Legislature has thought fit to direct that the latter should be taxed by the same language as the former, and I feel constrained to declare it to be so, irrespective altogether of the policy involved, feeling bound to leave that question where constitutional right places it.

Suppose, then, the case of the agency of a mercantile house or manufacturer, whose head quarters were in *Montreal*, being established at *Saint John*. A shipment of goods is made from *Montreal* of the value of $5,000, and the whole lost at sea or destroyed by fire, either *en route*, or after arrival at *Saint John*. Subsequently other shipments are made, and profit from them is realized of $4,000, and thus stood the profit and loss account of the agency at the end of the fiscal year. What would be the legitimate reply at head quarters to an inquiry as to the "income" derived from the agency, and what would be the reply to such an inquiry at head quarters anywhere under such circumstances? We (or I, as the case might be), derived no income from the agency, but sustained a loss of capital to the extent of $1,000. Would any one contend that, if the result was the same

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in regard to business carried on by a resident individual, he should be rated on the *income* of $4,000? I presume no one would attempt to impose such a rate, and although the Legislature expressly directs that the agents of non-resident companies, corporations, and "other person and persons" having agencies in *Saint John*, shall be taxed *in like manner as resident individuals*, we are asked to decide otherwise, in the face of the legislative provisions assimilating them in language the most plain and explicit, and in respect to the meaning of which there should be no doubt. Every person supplying fishermen, we know to be engaged in a precarious business from various causes; not the least of which is the bad debts they contract. A merchant, then, who is often paid in the produce of the sea, and makes a profit on its sale and on the goods supplied of, say, $3,000, but by loss of property and bad debts at the end of the fiscal year finds his assets $2,000 short of the capital employed, what would his income from the business be? And how long could he live on such income? When we hear of a person in business "living beyond his income," what do we infer? Why, that he is living beyond the *profits* of his business from which his support is derived, and that he is, consequently, either drawing upon the capital, or running into debt. That is the universal, and, I think, well understood application of the term, and as such should be applied. The case would be the same in respect of a person deriving his means of livelihood from a salary, fees, or perquisites, and the same answer would apply to both.

We are, however, referred to a proviso in the same section, by which agents of insurance companies are to be assessed on "a three years' average of the yearly *net profits*," and we are asked, therefore, to conclude that the Legislature did not use "income" as synonymous with,

but as designedly opposed to, net profits. In support, however, of that proposition the act itself furnishes no proof. I have, I hope, sufficiently shown that "income," as applied to the commercial transactions of a resident individual, does not mean the mere nominal profits of goods sold in great part on credit, and never paid for, or even for profits on cash sales, but to the balance of profit and loss in all departments of his business during the prescribed period, and that the Legislature so intended when the same principle was applied to the agents of "companies, corporations, or other person or persons." If such be the proper construction, then "income" and "net profits" mean exactly the same thing. The argument, at best, is but begging the question, because one must first establish the fact of the difference between "income" and "net profits" of a trade or business before he can say the Legislature did not use the terms synonymously. The Legislature in an Act, as well as an individual in a letter or other document, may in one place use a different term to express the same idea as is intended by a different term in another, and the mere fact cannot by itself be evidence for construction.

We are required to hold that "income," in relation to banks, must necessarily apply to and include the amount realized from discounts and other loans and premiums, or profits received from exchange, but (independent of the peculiar way the matter as to the profits and losses is stated in this case) why should the construction stop there? Why should it not include the income, that is all that *comes in* from every source? The answer is, that it only should be applied to what *comes in* as *profits*. To give weight to that argument, or rather to found it, the term *profits* must be invoked, and that to be *equitable* must not be *one sided*. It would be unjust to charge a bank with the nominal *profits* on one side of its account with an individual, when the whole would

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show they were only *nominal*, because, not only such nominal profits, but a portion of its capital, had been lost by the insolvency of its debtor, or in some other way; and, were the dealings of the bank in question all before us, I have little doubt that no small portion of what constitutes the $29,000 of profits would be found of that character. I make these remarks in passing, but not under the conviction that they are at all necessary in the general view I take of the case, in regard to the assimilating provisions of the several governing sections under consideration. Sec. 16 of the Act of 1859 exempts from taxation the property or income of a stockholder derived from his company or corporation. The only income he could derive would be in the shape of dividends, and those dividends would depend upon the state of the profit and loss account at the end of the fiscal year. The "income," in that case, could only come from *profits* after deducting all losses. How, then, can any one say that, instead of taxing the *profits* only in the case of the individual stockholder, by using the word "income," the Legislature, employing the same term, intended it to have a different application in respect of the whole of the stockholders *collectively*. In a word, that it should mean *profits* in the one case, and not in the other.

It is also contended, that the return of the "whole amount of income" required by the agent, as provided for by the two Acts, in case of non-resident companies, &c., shows that the term "income" must be taken to mean income without deduction of losses. "Income" *per se* is as comprehensive, when used as it is in the Statutes, as "whole amount of income." If the direction to the agent was merely to return a statement of the "income," a statement of a part only would not be a compliance with the direction. If, indeed, the Statute spoke antecedently of two different defined kinds of

income, or from different sources, and for some object it was necessary to have a return as to both, I could easily see that the words "whole amount" would have a significance and object wholly absent from the circumstances arising under the terms of the sections in question. It may be taken, in my opinion, as a caution and warning to agents to leave nothing out of their returns; but cannot, I think, to extend the meaning or application of the term "income" in the preceding part of that section, or to "income or emoluments" in section 12; and to give to the expression in question the application sought would, in my view, be overstraining the true meaning of the language of the provision, and, therefore, in opposition to the intentions of the Legislature as found by the words used.

On the argument we were referred by the counsel of the Respondents to an American work (*Burroughs* on Taxation, 161.) I can find nothing in that work, or the cases therein referred to, to strengthen the contention that an individual in commercial business can be taxed under the term "income," or even a corporation, for anything beyond the net profits of the business. At page 160 that author says: "A declared dividend will furnish the measure of tax on income," and refers to a case, *Atlantic and Ohio Telegraph Company* v. *Commonwealth*. (1). I have referred to that judgment which, as the judgment of the Supreme Court of Pennsylvania, was, in 1870, delivered by *Thomson*, C. J., who says:

> By whomsoever the stock is held, the measure of the tax is upon the dividends declared.

And again:

> When a dividend is declared, that gives the measure and furnishes the rule for the tax.

The same author at the same page says:

(1) 66 Penn. S. R. 57.

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A profit on the investment or capital of the corporation is the measure of the tax, whether paid as dividends to stockholders or going to increase the capital,

and cited a case, *Commonwealth* v. *Pittsburgh, &c., R R. C.* (1). I have read that case, and the judgment fully sustains the doctrine laid down. It was delivered in 1873, and quotes with approval what I have quoted from the judgment reported in 66 Penn. S. R. 57 ; and the Judge adds that :

> When a corporation has actually made dividends from its profits or property without formally declaring them by adding them to the stock of the shareholders, or where it has declared dividends and returned them, whether earned or not, the sum thus added to the stock of shareholders, or the sum declared and set apart to him, becomes the measure of the tax. The legislative intent being to make the profit transferred by the corporation to its shareholders from its treasury or property the measure of the taxation of its capital.

I have also carefully examined the cases cited by the author, referred to and can find none in conflict with the position I have taken. I have likewise examined all the other American and the English cases cited, with the same result. At page 159, *Burroughs* says :

> A tax upon all persons in proportion to their income is said to be the most equitable mode of taxation ; but such tax *is never imposed upon all persons, nor upon the gross income*—it is usually upon the annual income of certain persons in excess of a certain amount, allowing deductions of various kinds.

I have already said that, if any individual made a loss on his year's business instead of a gain, a tax on his gross revenue or earnings would indeed be, not on income, but on capital. According to all writers on political economy the gross revenue of an individual comprehends the whole annual produce of his land or labour ; the net revenue, what remains free to him after deducting the expense of maintaining his fixed and circulating capital ; or what, without encroaching upon

(1) 74 Penn. S. R. 85.

his capital, he can place in his stock, or spend upon his subsistence, conveniences, or amusements. His real wealth is in proportion not to his gross but to his net revenue. His "income" is, therefore, what he can add to his stock, or spend. So, in my judgment, should it be held under the Statutes in question in this case.

In *McCulloch's* edition of *Smith's* Wealth of Nations (1) the learned and philosophical writer says:

> The private revenue of individuals arises ultimately from three sources, rent, profit, wages. Every tax must finally be paid from some one or other of those three different sorts of revenue, or from all of them indifferently.

At p. 392—

> These (taxes) must be paid indifferently from whatever revenue the contributors may possess—from the rent of their land, from the *profits* of their stock, or from the wages of their labour.

I have shown that "income" in its well understood sense, as commonly used, means the annual profits of commercial business. I have shown the unjustness of any other construction, either as applicable to individuals or corporations, and, also, by the reference to the acknowledged authority on political economy just quoted, that to tax income regardless of the result of profit and loss would be against every equitable principle; and by the provisions of the Imperial "Income" Tax the Parliament of *Great Britain* has, by express provision, given a legislative construction of that term which excludes the construction of the Statutes in question asked for by the Respondents. I cannot construe sec. 15 of 22 *Vic.*, cap. 37, or sec. 4 of 36 *Vic.*, cap. 36, by the provisions of sec. 14 of the former, for by it a different mode of assessment is provided, and it cannot help in the work of the construction of the term "income" used in them, or in section 12 of the same Act. Section 14 is wholly independent of the sections 4 and 15 of the Acts mentioned, and they are equally

(1) Library ed., p. 371.

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so of it. The Legislature settled the policy of a different character for assessments under each, and we must construe each as if the other, or others, never existed. If it was the intention of the Legislature that the agents of non-resident companies, corporations, or persons should be taxed when their losses for the prescribed period exceeded their receipts in the shape of nominal profits or earnings, the language should, and I think would, have been much more explicit. If such was meant the legislation should have clearly shown it. Statutes for assessment are required to be plain and free from reasonable doubt. Except in very exceptionally bad times such as, not only in *Canada* but nearly all over the world, have been experienced for two or three years past, banks, as a general rule, always declare a dividend annually or semi-annually. Such, no doubt, was the case when the acts in question were passed. We can readily assume, therefore, that the circumstance of a bank being unable to declare a dividend was one not likely to be provided for, because unusual. We should not, therefore, construe such legislation as now under consideration from the position of a bank a year or two ago, which, from heavy losses at a time of unexampled depression, and when bankruptcy was so universal, makes large losses instead of profits during the prescribed period. The position being a very exceptional one, arising from the unusual general depression and consequent bankruptcy, we should not take it as one likely to be foreseen or provided for. I think it safer so to consider it than to make such an exceptional position the test for the construction of Acts passed so long before—under wholly different circumstances. By the provision in question the non-resident banks might pay some years more than the resident. I maintain that the tax in question, requiring payment out of capital and not from income or profits, would be against every

sound principle; and being so, I have no right to assume that in any case would the Legislature impose such a tax. It may be said that, even in such a case, the agent of a non-resident bank should pay some tax, and it is a reasonable one. That question is, however, I hold, not for us but the Legislature, and because it has not made provision for such a tax furnishes no reason why we should, by a false construction, confirm a levy the Statutes do not warrant. The rules for the construction of Statutes are pretty well understood, and I will, therefore, only refer to some of those quoted in the factum of the Respondents.

"If the words of a statute are plain they must be strictly followed, but if *they are ambiguous*, the whole context must be looked to for their explanation" (1). I think the words of sections 4, 12 and 15 are *per se* quite plain and easy of application, and, therefore, we are not permitted to consider "the whole context."

Words must be construed according to the plain ordinary meaning and in the largest ordinary sense which, according to the common use of language, belongs to them (2). In construing the words "emolument" and "income," I have done so according to their plain ordinary meaning, and that which according to the common use of language belongs to them.

"It is the duty of all Courts to confine themselves to the words of the Legislature, *nothing adding thereto, nothing diminishing* (3)." We must not import into an act a condition or qualification we don't find there. I have been solely guided by the words of the Legislature, and feel bound to be so, apart from the considera-

(1) Dwarris 196.

(2) Per Tindal, C. J., in *Hughs* v. *Overseers of Chatham*, 5 M. & G., at page 80; and per Maule, J., in *Borodaile* v. *Hunter*, 5 M. & G. 651; *Maillard* v. *Lawrence*, 16 Howard 260.

(3) Per Tindal, C. J., in *Everett* v. *Wells*, 2 Scott N. C. 531.

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tion of consequences or results, which I would not be justified in considering where "the words are plain" and convey definite ideas.

Entertaining such views, my judgment must be that the appeal should be allowed and the judgment below reversed.

TASCHEREAU, J., concurred with the Chief Justice and *Fournier*, J.

Appeal dismissed with costs.

Solicitor for appellant: *J. J. Kaye.*

Solicitor for respondents: *B. Lester Peters.*

THE GREAT WESTERN RAILWAY COMPANY OF CANADA..... } APPELLANTS; 1879 *Jan. 22, 23 *April 16.

AND

JAMES HENRY BROWN..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Railway Crossing—Collision—Air-brakes.—Failure to comply with Consolidated Statutes, Chapter 66, Sections 142, 143—Negligence—Damage.

The Grand Trunk Railway crosses the Great Western Railway, about a mile east of the city of *London*, on a level crossing. On the 19th June, 1876, a Grand Trunk train, on which Plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal-man who was in charge of the crossing, and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, Appellants' train which had not been stopped, owing to the accidental bursting of a tube in *air*-brakes, ran into the Grand Trunk train and injured Plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way.

C. S. C., cap. 66, sec. 142, (Rev. Stats. Ont., cap. 165, sec. 90) enacts that "every Railway Company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear."

Sec. 143, enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes."

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*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, and Taschereau, J. J.

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Held,—That the Appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way.

That there was no evidence of contributory neligence on the part of the Grand Trunk Railway, as they had brought their train to a full stop, and only proceeded to cross Appellants' track, when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company.

APPEAL from the decision of the Court of Appeal for *Ontario*, dismissing the appeal of the defendants (appellants) to the said Court of Appeal from the decision of the Court of Queen's Bench of the said Province, rendered on the sixth day of February, 1877, discharging the rule *nisi* whereby the plaintiff (respondent) was ordered to show cause why the verdict obtained in the said cause should not be set aside and a verdict entered for the defendants.

The declaration in this cause alleged that: "Defendants so negligently and unskilfully drove and managed an engine, and a train of carriages attached, along a certain railway which the Plaintiff was then lawfully crossing in a certain railway carriage; that the said engine and train of carriages were driven and struck against the said railway carriage in which the Plaintiff was then lawfully crossing the said railway, as aforesaid, whereby the Plaintiff was thrown down and wounded, and sustained severe spinal injuries, and was permanently disabled, and was prevented from attending to his business for a long time, and incurred expense for surgical and medical attendance."

Plea: Not guilty by statute.

The main facts of the case are as follows: The Grand Trunk Railway crosses the Great Western Railway on the level near the City of *London*, *Ont.* On June 19th, 1876, a Grand Trunk train, of which Plaintiff was conductor, and a Great Western train, were approaching the

crossing; the G. T. R., the plaintiffs', train stopped at the semaphore until signaled to proceed; it then advanced, and when crossing defendants' line of railway it was run into by defendants' train, on account of the accidental bursting of one of the *air brakes* which were applied from twenty to thirty yards distant from the semaphore, a distance too short to enable the driver to stop the train with the ordinary brakes, when applied. The evidence given at the trial is reviewed at length in the judgments on this appeal.

The case was tried at the *Middlesex* Fall Assizes, 1876, before *Burton*, J., without a jury, and the learned judge found a verdict for the Plaintiff, and assessed the damages at $1,000.

Mr. *Bethune*, Q. C., for Appellants:

The declaration is not framed to present, nor was the evidence at the trial directed to support or to meet, a complaint for the non-performance of statutable provisions.

It is not charged that Defendants acted contrary to an Act of Parliament, or that they acted contrary to law; the charge is negligence and unskilfulness, from both of which they claim to be acquitted. *Blamires* v. *Lancashire and Yorkshire Railway Company* (1).

Even if charged in the declaration as the foundation of the action, it does not entitle the Plaintiff to recover.

The G. T. R. train was bound by the statute to stop three minutes, and if Plaintiff, who was conductor of that train, had obeyed the law he would have been safe, and the accident would not have happened.

Winckler v. *G. W. R.* (2). *Shields* v. *G. T. R.* (3); *Graham* v. *G. W. R.* (4).

(1) L. R. 8 Ex. 283.
(2) 18 U. C. C. P. 250.
(3) 7 U. C. C. P. 111.
(4) 41 U. C. Q. B. 324.

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It is the collision which is the cause of the action, and we say it would not have happened if you were not negligent. You have been in *pari delicto*, for you have not shown that you so behaved as not to cause the accident. The statute does not impose any penalty for negligence, it imposes a duty, and I charge you with the breach of a statutory duty which has caused the accident. The act, Appellants contend, is a complex one, and the accident results as much from the act of one railway as from the act of the other.

As to the question of negligence, the Appellants were provided with the best known apparatus for bringing their train to a stop, and that is all the law requires. These brakes had been used for three years, and at this crossing they had always been known to answer the purpose. The same air-brake had been used twenty-six times successfully on this very trip, and this case should be decided by the experience up to the time of the accident. The bursting of the pipe which caused the injury was not and could not be known before, for it seems to have taken place after the speed of the train had been partially slackened by the brakes, and, therefore, was an accident against which the Appellant could not, by the use of ordinary precautions, provide.

Speed is one of the objects aimed at in railway travelling, and railway companies are justified in adopting improvements which have a tendency to effect this object; and the Appellants contend that when they adopt such improvements, after they have been tested and approved by skilled persons, competent to judge and recommend after long use, they are not guilty of negligence because an accident occurs in the giving way of some parts of the machinery which they could not foresee or prevent.

The learned counsel relied on the following authorities: *Blyth* v. *The Birmingham Water Works Company*

(1); *Redhead* v. *The Midland Railway Company* (2); *Wyborn* v. *The Great Northern Railway Company* (3); *Daniel* v. *The Directors of R. M. R. Co.* (4); *Crafter* v. *The Met. R. Co.* (5); *Wharton* on negligence (6).

Mr. *Rock*, Q. C., for Respondent :—

It is contended that the declaration of the Plaintiff is sufficient. *Anderson* v. *The Northern Railway Co.* (7) is a case in point. The failure to comply with statutable provisions is evidence of negligence. A declaration based on the general ground of negligence is sufficient. See *Shearman & Radfield* on negligence (8).

There is no evidence of contributory negligence on the part of the Plaintiff; on the contrary, there is evidence that the G. T. R. stopped, and only proceeded when signaled to proceed by the officer in charge of the semaphore.

Appellants were bound to stop the train, before passing the crossing, for at least three minutes, and not to proceed until signaled so to do; this was not done, as they did not apply the air-brakes in time. One of their own servants says that twenty-five yards west of the semaphore they were going at the rate of twenty-five miles an hour; the only reason they did not stop was because the distance was too short; in that they were guilty of negligence.

Air-brakes, such as used by Appellants on their train, do become defective, and when the Appellants found that the air-brakes had become defective, they should have applied the hand-brakes on said train, which they did not do, and had they done so immediately after the bursting of the air-brakes, as they were in duty bound

(1) 11 Ex. 781.
(2) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.
(3) 1 F. & F. 162.
(4) L. R. 5 H. L. 45.
(5) L. R. 1 C. P. 300.
(6) Secs. 32, 300, 635, 822 *et seq.*
(7) 25 U. C. C. P. 301.
(8) Sec. 16, p. 16.

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to do, the collision whereby the Respondent was injured would have been avoided.

It was also the duty of the Appellants to use the best known and safest appliances for the stopping of their trains, and it was shown in evidence, as is the fact, that had the ordinary hand-brakes been relied upon on the occasion when the collision occurred, the accident would not have happened, but the Appellants, in trusting to the air-brakes, instead of making use of the hand-brakes, which are safer and more reliable, were guilty of negligence.

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

THE CHIEF JUSTICE:

The Grand Trunk Railway crosses the Great Western Railway about a mile east of the city of *London*, on a level crossing. The facts in this case are very few, and, there are no contradictions.

At the crossing, and where this accident happened an employee of the Great Western was in charge, and whose duties (he says) "are to signal trains for both companies for the crossing, and attend to the switch." He likewise says, "my duty is, if two trains come at one time, to show the stop signal to the Trunk, the Great Western having the right of road then, but when they do not come together it is first come first served." And he further says, "the Grand Trunk train came first on that day, and it, of course, had the right to pass first. * * I signaled the conductor of the Grand Trunk to come on." He also says, "the Grand Trunk train was going at the regular and usual rate of speed in crossing that place." And *Bell*, the driver of the Great Western train, says:

Last September I was driver of the train that ran into the Grand Trunk train. As I approached the crossing it was my duty to stop, and I endeavoured to stop by applying the air-brakes. * * *

When I put on the brakes they pulled me considerably for a little time. Then I found out the air was gone, and I reversed the engine and whistled "on brakes." I could not say whether the brakes were applied. I believe the pipe produced is the pipe of the engine that burst that day. * * * The consequence of the defect was that I could not stop my train before getting to the crossing, and I went into the Grand Trunk train. * * * We had other brakes on the train—the ordinary hand-brakes. I have regular brakesmen —the same number as if we did not have the air brakes—two on each train.

And in answer to the question: "If these air-brakes are so perfect, why do you have ordinary brakesmen?" he answers:

They require brakesmen to look after the train, handle baggage, give signals, *and apply the other brakes*, if anything should go wrong with anything about the train. * * We have the same number of brakesmen and the same hand-brakes that we had before. * * We did not stop the train with the ordinary brakesmen, *because the distance was too short.* We tried. It was my duty to stop at the semaphore. I always stop at the semaphore. I tried to stop that day before I was motioned by *Mapstall.* I tried to stop before I got to the same place; I could not say at what distance from it: it might be 20 or 30 yards. When I discovered that the air was gone from the brakes, I was a little over 200 yards from the junction. I was going at 30 miles an hour when I first shut off steam. That would be about half a mile from the semaphore. I applied the brake after I shut off steam. * * I whistled "down brakes" when I was a little over 200 yards from the junction. *The train might be going* 25 *miles an hour then.* The only reason I can give why we did not *stop the train is that the distance was too short.*

The conductor of the Great Western Railway says: "The brakesmen did all they could and applied the brakes, but could not stop the train." And in the course of his examination the following occurs:

His Lordship: Do you consider it safe to apply the air-brakes so near the junction, when you see the result now, that the brakesmen, when called upon afterwards, were not able to prevent the collision?

Witness: We naturally supposed that the air-brake would stop the train.

Question: In point of fact, there is no security in applying the air-brake so near the junction?

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Answer: No, not if they burst, of course, there is not.

Examination resumed: We do not expect them to give out. We used the same brakes from Suspension Bridge to Dorchester, and fetched the train up at every station; and the same brake was used twelve months before.

His Lordship: If the ordinary brake had been used in time this accident could not have occurred, but if you trust to the air-brake, and choose to put it on so near the crossing, an accident is unavoidable should the air-brakes fail.

Witness: The same accident would have occurred the other way, suppose the hand-brakes gave out. The hand-brakes are affected just in the same way as others. I have often broken the chain, brake-rods, the rims, and the dogs of the brakes, and different parts of the car connected with them. They all give out.

Question: But in that case it is only one part of the brake that gives way?

Answer: Nothing that is made but what will break and wear.

On cross-examination, he says:

* * * If we had had to depend on the ordinary brakes and brakesmen to stop the train, they would have been called sooner that day than if the air-brakes had not been there. * * If there had been no air-brakes, and the ordinary brakes had not given out, the train could have been stopped. I have known air-brakes become defective since this accident occurred. I could not say how many times. I paid no particular attention to keep an account of the different ones. When I am on a train and a defect occurs, I report it to the parties who are supposed to remedy it. I have known of one or two defects in air-brakes. It is rather an unusual occurrence. It does not occur often, but it does occur. *I have known defects occurring on the road at least as often as once a week.* I will not say oftener. I do not mean a breakage in them, *but the ordinary wear of the rubber.* And not only with regard to the rubber pipes, but to the iron pipes under the bodies of the cars. We have ordinary brakes on all trains, and on all passenger cars as well as all freight cars; *the same as we had before the air-brakes were introduced. The ordinary brakes are for the purpose of stopping the train.* If it had not been for the defect in the pipe, the train would have stopped before we reached the semaphore. I reported this affair to the proper quarter when it occurred. I have had occasion to report some defects in the air-brakes on my train since then. The trains were stopped when I discovered the defects. If the pipes

are defective and the air is applied, the brakes do not work at all.

By His Lordship: There are regulations about brakesmen being on hand to apply the brakes if called for. They are supposed to be ready on the platform.

Question: If the air-brakes were applied, as they were in this instance, so near the crossing, then, although the brakesmen were at their posts, they would not be able to prevent an accident?

Answer: No, certainly not. The engineer has to use his judgment in approaching crossings and stations.

By Mr. Beecher: I have known a similar burst to this to occur on one of my trains from the ordinary pressure. It has occurred three different times. When I speak of something going wrong once a week, I mean that the parts of the air-brake break and wear with the ordinary working of the train—not only the rubber pipes, but the iron rods, and so on. The air-brake acts upon the wheels by means of the same brakes as the hand-brakes. The ordinary brake, just like this, is liable to get out of repair.

By Mr. Rock: In cases of breakages, sometimes the outside will indicate it beforehand by rubbing and chafing, and sometimes not. I have several times known breakages take place by virtue of which the air would escape, and still there was nothing externally to indicate anything wrong. The only test in cases of that kind would be to apply the air. Here there was no escape of air twelve minutes before.

Gillean, a brakesman on the Great Western says:

I was a brakesman on the train that had this collision on June 19th last. I remember hearing the brakes whistled "on" when we were between the semaphore and the Grand Trunk crossing, about 40 or 50 yards west of the semaphore. I was standing between the parlor car and the coach, on the platform outside. I instantly applied the brakes. I applied one just as tight as I could, and was applying the other when we struck. I did all I could.

On cross-examination:

If we had put on the hand-brakes where he tried his air-brakes, then the train would have come to a full stop before we came to the semaphore.

Henry Childs, the car superintendent of the Great

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Western, in answer to this question: "In coming up to a crossing this way, is it not manifestly unsafe to apply the air brakes unless it is done earlier than in this instance?" says, "It seems from this accident to be so."

On cross-examination, he says:

If the tube had not broken there was no need of the brake being applied sooner. If it had been applied, and they found anything was the matter, they could have stopped the train with the ordinary brakes.

Then follows this question:

Therefore it would have been better to have applied it sooner? *Answer:* Certainly. * * * These brakes have been in use three years—we had experimented with them about a year before that—since then we have always had brakesmen on trains, the same as before.

As to air brakes, *Bell* says:

They were quite effective when we last stopped, and held first-rate—there was nothing defective. The brakes were examined at Suspension Bridge, and also at *Hamilton*, they always are. * * * We examine the wheels at *Paris*, but not the air-brakes. * * * The air-brake has been in use for three years, and this is the first accident that has happened to it, I believe.

Cook, the fireman, says:

I was fireman on the train with the last witness (*Bell*), I heard what he said about the air-brakes on that train, and that there was nothing wrong with them all the way to *Dorchester*. That is correct. The thing that caused the trouble was a burst like that in the tube produced. There was nothing to warn us that there was anything wrong with it—we usually put the air on at the Bridge, and a man goes round to see if there is any leak of air, and if there is any he changes the pipe.

Newman, car examiner of the Great Western Railway, says he examined the air brakes at the bridge, and found their condition perfect. There was nothing, whatever, in any part of them to indicate anything wrong. "I examined every link—the link between the engine and the next car, and between every other car."

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Haskin, car examiner at *Hamilton*, says:

I examined the train that this accident happened to. On that morning I examined the air-brake to every car. I will not be certain that the driver put on a pressure of air, but I examined the brakes, and found every one good. Nothing to indicate anything wrong.

Cross-examined by Mr. Rock: The most effective method of testing these brakes is by the air from the engine. I cannot say that they were examined that way on that morning, but as a rule they generally are. They are not always tested that way at *Hamilton*, unless there is any defect. The driver would know of any defect by the air escaping and the brake not doing its work. These brakes do get defective sometimes. They must be renewed. They will wear out. They do not frequently get defective. We renew them when they do. We will run two or three months without any defect. Sometimes it is a less time—a month or two months. I have not known a defect in less than a month. I have not frequently known them to occur at intervals of a month. We might have had two or three pipes get defective in the course of two or three months, or in the course of six months. The defects we find are where the tube has been rubbed, and where the air perforates through. It only perforates where there has been a defective part. I have known that to be the case within the last six months. They are to be always relied on, unless any of them burst. Certainly, sometimes they do burst. I have known them to burst during the last year. I cannot say how many times. I do not think half-a-dozen times. Probably as many as three or four times. They would then become inoperative and useless. The ordinary brakesmen are carried in case of accident. Nothing is perfect. My opinion is that the ordinary brakesmen are carried because these brakes are not perfect occasionally. I do not know that as a fact. I do not know anything about the stoppage of trains. I suppose trains with these brakes will sometimes run nearer a station without endeavouring to stop than with the ordinary brake. I cannot tell whereabouts on the road air-brakes have proved defective. Defects generally occur by the pipes bursting and the air escaping.

Childs, car superintendent G. W. R.: "I have known the pipes sent in to me for repairs when burst, perhaps once in six weeks or two months, not very frequently."

This evidence shows conclusively, that the Grand Trunk train was lawfully crossing the Great Western track, and was in no way whatever to blame for this

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accident. As to any idea that the Grand Trunk train did not stop three minutes, and therefore was guilty of contributory neligence, I can only say, the evidence is, that the Grand Trunk train was brought to a full stop, and did not move till the officer in charge, a servant of the Great Western, lowered the semaphore, and invited and authorized the Grand Trunk train to proceed. I cannot find a syllable in the evidence, showing that there was not the most rigid and exact compliance with the law; so I have no hesitation in saying that, in my opinion, the Grand Trunk did not in any way contribute thereto. It was unquestionably the duty of the Great Western to come to a full stop before coming to the junction, under the common law liability, as it likewise was their statutory duty.

Revised Statutes of *Ontario*, Cap. 165, page 1539, sec. 90:—

> Every railway company shall station an officer at every point on their line crossed on a level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof that the way is clear.—C. S. C., Cap. 66, s. 142.
>
> Sec. 91:—Every locomotive, or railway engine, or train of cars on any railway shall, before it crosses the track of any other railway on a level, be *stopped* for *at least* the space of three minutes.—C. S. C., Cap. 66, s. 143.

They did not do so. The air-brakes gave out, and when the hand-brakes were whistled on, the distance was too short for the hand-brakes to pull the train up, and they ran into the Grand Trunk. The simple question is, was there anything to justify or excuse the Great Western in not stopping? Had they stopped, of course there would have been no collision. Were they, then, prevented from stopping, and so discharging their common law and statutory duty by *vis major*, or inevitable or unavoidable accident? or could they, by providing suitable means, or by the proper use of means within their control and at their disposal, have accom-

plished what it was their duty to do, and was the accident the result of such means not being provided or used? The Great Western was supplied with air-brakes and hand-brakes, and brakesmen to work the brakes, being all the brakeage power, as far as the evidence shows, or that I can assume, used on railway cars, and so no blame can attach to them for not providing the necessary means of coming to a full stop. If the collision took place by *vis major*, or by reason of an accident happening to that power which could not have been foreseen, and against which no reasonable care, skill, or foresight, could have provided, then the case would, no doubt, free the Great Western from legal liability for the consequences of such an inevitable and unavoidable accident. But that cannot be called an unavoidable accident which might have been avoided by more caution. While the evidence very clearly shows, on the one hand, that the air brake apparatus is a most useful and valuable invention, and a most powerful and effective means of controlling and bringing up quickly a train, it is, on the other hand, very liable to become defective, and does frequently burst and become useless, and that, too, without the fault of those in charge, and notwithstanding constant and rigid examination, from latent defects not externally visible or capable of detection, as well as from chafing or other causes which may be visible and capable of detection. And in this very case, the car superintendent says he could not perceive, on examination of the burst tube, any flaw at the hole which would indicate a weakness; and though he cut a slit in it to see if there was anything rotten or defective, he found nothing; and says that one of these pipes bursting would prevent the stopping of the whole train, so that the train would then necessarily be

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entirely out of all human control, unless, indeed, there were other means which could be resorted to.

It does appear to me it would be simple madness to run a train, under ordinary circumstances, without reference to any exceptional case such as this, dependent alone on the air apparatus; and that this is so is best evidenced by the fact that, notwithstanding the power and value of these air-brakes and the great expense at which they are attached, the ordinary hand-brakes and brakesmen are retained as before the introduction of the air-brake, and stringent rules are made requiring the brakesmen to be at their posts on the platform ready in case of necessity; that is, I presume, in the event of the air-brakes giving out to supply its place by the use of the hand-brake. But of what possible advantage could it be to have the ordinary brakes, or rules requiring brakesmen to be ready to work them, if, when called into requisition, the rate of speed is so great, or the distance so short, that they cannot be worked effectively. It is hardly possible to conceive a point on a railway requiring greater care and caution in approaching it than when two railways cross and trains are continually running on both.

It was the imperative duty of the driver of the Great Western to bring his train to a full stop, and, knowing how great a risk there was of a disastrous collision, and knowing, as he ought to have known, how liable air-brakes are to get out of order, from latent and other defects, he was bound to have taken every precaution which care and foresight could dictate, and to have relied on all his resources, and have resorted to them, and placed himself and his train at a sufficiently early period, in a position to make them available in case of an emergency. He should, in my opinion, have acted on the assumption that when he came to the crossing a train would be passing on the other track, for he could

not know that this would not be the case, and he should, therefore, have exercised a degree of care, precaution and diligence proportioned to the probable, or even possible, impending danger.

In view of the double means of stopping the train with which it was provided, and in view of the liability of air-brakes to burst and become useless, the Great Western train, in my opinion, should not have run so close to the semaphore, and at such a rate of speed that, if one of the means available failed, the other would be practically useless, but that the speed of the train should have been slackened and the air-brakes applied, more particularly at such a dangerous spot, at such a distance from the semaphore, as, in the event of their failing, would have enabled recourse to have been had to the hand-brakes; and that running the train so fast and so close to the semaphore as to render inoperative any stopping power which might have been obtained from the hand-brakes, before taking any steps to put the train under control, was negligence, wholly independent of any statute.

I cannot help declaring that, in view of the risk and danger attendant on a train crossing a railway track when not entitled to do so, and the probable consequences of a collision so dreadful to contemplate, I think it was most rash and hazardous, and, in view of the law, a most unjustifiable act for the driver of the Great Western train to approach within half a mile of such a crossing at the rate of thirty miles an hour, and not attempt to obtain control of his train till within twenty or thirty yards, or sixty, or ninety, from the semaphore where it was his duty to stop, and that his train should be going twenty-five miles an hour when he was only a little over two hundred yards from the junction and whistled "down brakes." This very fact of the conductor whistling on brakes shows that it was to the

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hand-brakes he looked in the event of the air-brakes not working; but what possible use was his calling for help from the hand-brakes when his rate of speed was so great, and he had allowed his train to be in such close contiguity to the crossing that they were powerless to respond to his call? Instead of taking every possible care and precaution that judgment, skill and foresight could suggest to comply with the law, they appear to have taken the least possible precaution, or rather no extra precaution at all. They did not put themselves out of the way in the least to obey the law; on the contrary, having two means of fulfilling their duty and bringing their train to a stand, they approach so near the junction and at such a rate of speed, that their primary means failing, their auxiliary means are useless, and they are helpless to fulfil either the common law or their statutory duty, but appear to have shaved as close as it was possible to do if they had had the most absolute certainty that the air-brakes could not give out.

It cannot be denied that the requirements of the law could have been complied with, simply at the expense of delay, and that, too, but trifling. Defendants had provided the means necessary to enable them to do as the law directed, but they chose to put it out of their power to use them. The statute imposed on Appellants the duty to stop, if it were possible, and stop they were bound to do, regardless of delay or inconvenience; they cannot be allowed to say, or to act, as if they said: "We'll try to stop if it does not delay us beyond the shortest possible time, or inconvenience us too much."

It is as well, once for all, to let railway people know that, however desirable speed may be, speed must give way to safety in all cases where speed and safety are incompatible, and that every provision which the law has made for the safety and security of life and pro-

perty must be respected and complied with, irrespective of delay, inconvenience or expense.

If courts of law should countenance so reckless a disregard of available precautions and means for avoiding collisions as existed in this case, and thereby sanction such a disregard of so wise, and wholesome, and necessary a statutory provision, for the protection of life and property, they would, not only set themselves in opposition to the wise policy of the law, but would encourage speed at the risk of safety, and recklessness and carelessness, where the public safety demands the utmost care and caution. While we ought to be careful not to impose any undue burdens or duties on railway companies, we are bound to see that those imposed by Act of Parliament are respected and fulfilled, and that there be no breach of any statutory duty.

I do not think authorities are required to support the view I have taken of this case, but as there are several which, I think, bear directly on the case, I will cite them: *Blamires v. Lanc. & Yorkshire Ry. Co.* (1) shows that in an action for negligence it is right to use the statute as evidence of what should have been done.

In *Williams v. Gt. Western Railway Co.* (2):

The defendants' line crossed a public foot-path on the level, but the defendants had not erected any gate or stile, as provided by 8 and 9 *Vic.*, cap. 20 sec. 61.

The plaintiff, a child, four years and a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train.

Held, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence.

The ground taken here was that this was an unexplained accident.

On the other side it was contended, that there was ample evidence of negligence, none of the precautions

(1) L. R. 8 Ex. 283.

(2) L. R. 9 Ex. 157.

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prescribed by 8 and 9 *Vic.*, cap. 20, s.s. 47, 61, and 26 and 27 *Vic.*, cap. 92, sec. 6, having been observed; that the only question was whether that negligence could be reasonably connected with the accident.

Kelly, C. B., adopted that view. He says:

The questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident. As to the first point it is impossible to imagine a case where negligence is more clearly made out or more inexcusable. There was a clear statutory duty to have gates on both sides of the carriage way * * * and it was equally required for the protection of the public, that a gate or stile should be placed at each side of the railway. Both those duties were left unperformed; this was clearly negligence.

Pollock, B., after saying no doubt there was a non-performance of what was enjoined by the Act of Parliament, says:

It is not for us to speculate on what was the precise intention of the Legislature when they required that there should be a gate or stile on a foot-path crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Amphlett, B., says:

We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence.

Cockburn, C. J., in *Stokes v. Eastern Railway Company* (1), says:

Lastly, even assuming that the accident was not *caused* by negligence of the company's servants, might it have been prevented or mitigated by a better use of brake-power? It is not to be disputed, because the universal practice of railway companies is an acknowledgment of its necessity, as a matter of proper caution and care, that brake-power ought to be used. Are you of opinion that the absence of a second brake-van, or the not putting the single one in the rear, was negligence on the part of the company? You must consider the questions as practical men; and if you think there was a neglect of what might fairly and reasonably have been expected

(1) 2 F. & G. 691; quoted by Mellor, J., in *Redhead v. Midland Railway Company*, L. R. 2 Q. B. 429.

from the railway company for the protection of a train, that would be negligence.

Fry, J., in *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St. Katherine Docks Company* (1), says:

Therefore, I think that if the case had stood simply on the common law liability of the defendants for negligence, I should have had great difficulty in concluding that there was any such liability. The flood of November, 1875, being, in my judgment, what, in the contemplation of law, is called an act of God.

But I do not think that this case is to be determined upon the defendant's common law liability; and for this reason: The defendants did not choose to rely on their common law right to use their land as they might think fit. They chose to go to Parliament for powers to authorize them to some extent, apparently, to do what they might have done without those powers. They take a power to construct and to maintain a dock upon their land, and taking that power and acting upon it, they must, in my judgment, subject themselves to the conditions which Parliament has imposed upon the exercise of that power. They cannot afterwards fall back upon the question of what was reasonable care, if Parliament have in any particular respect laid down what they are to do. The question, therefore, which I have to determine, comes, in my opinion, to this: have Parliament laid down anything which takes the place of the common law liability to use reasonable care? have they, in short, defined the height at which the bank of the dock is to be maintained? If they have, I do not think that the Defendants can say, we will be judged by our own common law liability, or by our statutory liability, as we may think fit. To allow them to do so would obviously be unfair, for this reason, that if they perform their statutory obligation, they are harmless in all cases, even if that liability is less than the common law liability, whereas if they perform even less than the statutory obligation, they might contend that, if the common law obligation reached to a less extent, they would be harmless also. I think they must stand or fall by their statutory liability. In some cases, this will enure to their benefit; in other cases, it will enure to their injury. But, whether it be for or against them, it becomes, in my opinion, the rule by which their negligence or care is to be tried. * * * I hold therefore, that the statute imposed on the defendant company, an obligation to maintain the upper surface of the bank, which was to retain the water in their dock at a level of four feet above trinity high-

(1) L. R. 9 Ch. D. 503.

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water mark. It is conceded that they did not so maintain it. The result in my opinion, is, that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence.

HENRY, J.:

This is an action brought by the Respondent to recover damages from the Appellant company, for injuries received by him, arising from a collision between a train of that company with one of the Grand Trunk Railway, of which he was then conductor.

It is a special action on the case for negligence of the servant or servants of the Respondents, and, as such, is alleged in the declaration.

The defence, by the only plea of the Respondent, is "not guilty."

At the time of the collision, the train of the Grand Trunk Company was in motion on the crossing, about a mile east of *London*. The crossing of the two lines of railway at that point is a level one. The question of contributory negligence was raised by the allegation that the Plaintiff's train should have waited longer at the semaphore before running upon the crossing. The Appellant, however, failed to prove that such was the case, and, by all the statements in evidence, we are to conclude that the Respondent waited there the prescribed time. The semaphore is regulated and controlled by an employee of the Appellant, and the signal to proceed was given to the Respondent before he advanced his train. His train was therefore legally in the position it occupied when the collision occurred.

Redfield on Railways (1) says:

The subject of railway crossings on a level with the highway has been before alluded to, as one demanding the grave consideration of the legislatures of the several states. It always causes a most pain ful sense of peril, especially where there is any considerable travel

(1.) 1 Vol., p. 566.

on the highway, and is followed by many painful scenes of mutilation and death, under circumstances more distressing, if possible, than even accidents, so destructive sometimes of railway passengers.

In a case which he cites, *Bradly v. The Boston and Maine Railway* (1), where the plaintiff was injured at a railway crossing by collision with an engine, it was held that "where the statute required at such points certain specified signals, the compliance with the requirements of the statute will not excuse the company from the use of care and prudence in other respects." And he says:

> But when the statute requires certain precautions against accidents, and its requirements are disregarded, the party suffering damage is not entitled to recover, if he was himself guilty of negligence which contributed to the damage.

This position, as a general proposition, no one will doubt. He proceeds thus:

> If the wrong on the part of the Defendant is so wanton and gross as to imply a willingness to inflict the injury, Plaintiff may recover, notwithstanding his own ordinary neglect. And this is always to be attributed to Defendant, if he might have avoided injuring Plaintiff, notwithstanding his own negligence.

The application of the doctrine last quoted to this case amounts to this, that if the Respondent's train, when the collision took place, was even wrongfully on the crossing, the Appellants' conductor or driver might have avoided the collision, by using the ordinary and necessary care and prudence, but which, from the evidence, I hold, he did not use.

Wharton, in his treatise on negligence (2), says:

> Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former, even though the statute gives no special remedy. In this case applies the maxim *ubi jus ibi remedium.*

It is in evidence, that the two trains pass the crossing about the same time—sometimes one, at other times the

(1) 2 Cushing 529. (2) S. 443.

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other train crosses first, according to the time of arrival at the point, as regulated between the two companies. There is therefore greater danger of loss to life and property by a collision than when a train passes a public road, and more care and circumspection are required to be used by the conductors of each train. Both trains appear to have been three or four minutes behind time, and there was therefore the more necessity for each to beware of the consequences of a collision by running into the one which happened to be ahead and then on the crossing. The conductor of the Appellants' train should therefore have approached the crossing with the greatest care and caution, instead of which he approached the semaphore, at which he was required to stop, within a few yards, at the rate of twenty-five or thirty miles an hour, trusting alone to the air-brakes, without any provision made for the use of the hand-brakes, in case of an accident to the air-brake. It was therefore such reckless management as, under the circumstances, should subject the Appellants to make good any resulting damage. The hand-brake men were not at their posts, and so much time elapsed after the breaking of the air-brake before even one of them put on the brake that the train was not stopped in time to prevent the collision, although, from the evidence, we are justified in concluding that, had the hand-brakes been instantly applied when the air-brake gave out, the train might have been stopped in time to prevent the collision.

It was contended on the argument, that as the air brake, when in good order, is superior in its action to hand brakes, and more promptly efficient, the accident occurring to it, preventing its use at a critical time, by which the train runs on unchecked, and an injury thereby occasioned, the company would not be responsible therefor. The ruling principle in such cases is of universal application; and that is, that the company

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must use all the well-known and recognized appliances to prevent the occurrence of injuries, and if they trust to one only where others are as commonly used and considered necessary for safety, and damage results, the company is responsible for it. It appears from the evidence, that although air-brakes are more prompt, and even more effective in every way, they cannot be at all times solely relied on. They are useful, no doubt, in the general working of a train, but it would be wrong to trust to them alone when approaching the crossing of another train due there about the same time, at the rate of twenty-five or thirty miles an hour. It is proved that the pipes or tubes often burst ; and there is no absolute security to be felt in them from even a recent test of those some time in use—the material of which they are made wears out by use, and the pressure they will bear depends upon the strength of their weakest part. In use they are, I presume, liable to injury of different kinds, which, at a given point, may weaken them, and experience of such tubes shows that no mere inspection can be relied on. They may have been recently tested, but that seems to afford little or no security, as they may become weakened by the very means used to test them. Whether the reasons I advance be sound or not we have evidence of the fact that they often give out when least expected. I think, therefore, that trusting to them alone, at a juncture such as in the present case, was wholly unjustifiable, and that when the conductor takes the responsibility of trusting to them alone, his company should have the responsibility of making good any resulting damage. There are many other facts proved that show culpable negligence, but it is unnecessary to refer more particularly to what the evidence discloses. The declaration is for negligence, generally, and the breach of statutory provisions, as shown in this case, in consequence of which

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injury or damage ensues, is sufficient to entitle the Respondent to recover. There is no question as to the amount of damages. I have no doubt that the Respondent is entitled to our judgment. I think, therefore, the appeal should be dismissed, and the judgment below affirmed with costs.

STRONG, FOURNIER and TASCHEREAU, J. J., concurred.

Appeal dismissed with costs.

Solicitor for appellants: *Samuel Barker.*

Solicitor for respondent: *Warren Rock.*

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*Jan. 24.

*April 15.

JULIUS PETER BILLINGTON.....APPELLANT;

AND

THE PROVINCIAL INSURANCE COMPANY OF CANADA..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Existing Insurance—Notice to agent—Application and policy.

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' Company, through one *S.*, their agent at *D.*, authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed *S.* that there were other insurances on the property, but not knowing *the amount* that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. *S.* failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

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office at *T.*, making no mention of the insurance in the Gore Mutual. The Company accepted the risk, and, in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the Company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the Company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

Held: That as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the Company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), which reversed the judgment of the Court of Chancery for *Ontario* (2), pronouncing a decree in favor of the plaintiff.

Action on a policy begun in the Court of Queen's Bench, but subsequently transferred, by an order made in Chambers under the administration of Justice Act, 1873, to the Court of Chancery.

Plaintiff declared on a policy, dated the 9th February, 1875, which, he alleges, was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to to explain the rights and obligations of the parties thereto in all cases not therein otherwise specially providedfor, where by defendants insured plaintiff against loss by fire, not exceeding $6,000, on property described as agricultural machinery in pro-

(1) 2 App. Rep. Ont. 158. (2) 24 Grant 299.

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cess of construction, finished and unfinished, owned by the plaintiff, and contained in a two-story stone building, with a one-story frame addition, covered with shingles laid in mortar, occupied by the plaintiff as an agricultural implement manufactory, situated on the west side of *Cross* street, in the town of *Dundas*, in the county of *Wentworth*, from the sixth day of February, A. D. 1875, at twelve o'clock, noon, unto the sixth day of April, A. D. 1875, at twelve o'clock, noon; that the plaintiff was interested in the said machinery to the amount insured; that after the making of the said policy, and whilst it was in force, the said machinery was destroyed by fire, whereby plaintiff suffered damage and loss to the amount so insured, and that all conditions were fulfilled and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action, and nothing happened or was done to prevent him from maintaining the same; yet the plaintiff had not been paid.

To this declaration defendants pleaded:

1st. Policy not their deed.

2nd. That it was provided by policy and the conditions endorsed thereon, that the representations made in the application for insurance should and would contain a just, full and true value of the property insured, so far as the same were known to the said plaintiff; and that if any material fact or circumstance should not have been fairly represented, then the policy should and would cease, and be of no further effect. That *the representations in the application for said insurance were contrary to said stipulation and agreement.* There was misrepresentation as to value.

3rd. Alleged that it was further provided, that in case plaintiff should, at the time of effecting said insurance, have any other insurance against loss by fire on the said insured property, and not notified to the defend-

ants and mentioned in, or endorsed upon, the said policy, then the said insurance should and would be void; defendants averred that at the time of effecting said insurance the said property was insured for the sum of one thousand dollars in the Gore Mutual Insurance Company, which fact was not notified to the defendants and mentioned in or endorsed upon the said policy, according to the condition in that behalf, whereby the said policy was void.

4th Alleged provision by conditions for particular account of loss, and until such proofs &c., produced, loss should not be payable.

5th. Alleged that by policy and conditions endorsed, plaintiff should procure certificate, and, under hand of a magistrate most contiguous &c., &c., and no such certificate was procured.

6th. That by policy and conditions, if any fraud or false swearing in proofs, plaintiff should forfeit all claims. Fraud and false swearing as to amount of loss, and so all claim under policy forfeited.

7th. Property not burnt or destroyed as alleged.

Issue by plaintiff.

There was a second count added at trial by leave of Mr. Justice *Burton* with allegation of insurance of $1,000 in the Gore District Mutual Insurance Company, of which the defendants had notice before and at the time they effected the said risk; and the defendants agreed to accept the said risk and to insure the plaintiff's said property, having such knowledge as aforesaid, and to mention the same in the said policy, or have the same endorsed thereon; and defendants, by mistake, omitted to mention the existence of the said policy in the said Gore District Mutual Insurance Company in the said policy, or to endorse the same thereon, which the plaintiff had no knowledge of until after the said stock was so burnt, damaged and destroyed as aforesaid; and

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the said policy or contract of insurance ought to be reformed and amended by the mention therein of the existence of the said policy in the Gore District Mutual Insurance Company of $1,000; and all conditions &c., as in first count.

Defendants pleaded at trial to second count:

First. Defendants had no notice of the said policy of insurance of $1,000; nor did the defendants by mistake omit to mention the said policy of $1,000 in the policy of the defendants, or to endorse the same thereon; and the said policy of the defendants ought not to be reformed as in the said count mentioned.

And for a second plea, the defendants set out two of the conditions mentioned and referred to in the said policy of the defendants in the said count mentioned, and subject to which the said policy was made and entered into by the plaintiff and defendants, as follows: "Notice of all previous insurance upon the property insured by the Company shall be given to them and endorsed on this policy, or otherwise acknowledged by the Company in writing at or before the time of their making insurance thereon, otherwise the policy subscribed by the Company shall be of no effect; and the applicant shall be bound by his representations on making his insurance; and if the agent of the Company makes the application for the insured, he shall be considered the *agent* of the insured *and not of the company;*" and that the plaintiff made his application for the said insurance through one *R. W. Suter*, the agent of the defendants at *Dundas*, and that the said application was in writing, and was forwarded to the defendants at their head office in *Toronto;* and the policy was issued thereon; that application contained no statement or mention of the said policy of $1,000 in the Gore District Mutual Insurance Company; nor had the defendants or their Directors, or any of the officers of

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the Company at the head office, any knowledge or notice of the said last-mentioned policy, before or at the time of the making of the said application or of the said policy of the defendants, although the plaintiff had communicated the existence of the said policy of $1,000 to the said *R. W. Suter* at the time he made his said application for insurance to the defendants; but the said *R. W. Suter* had no authority from the defendants to change, or vary, or waive the said conditions; and the said *R. W. Suter* did not give the defendants any notice thereof, nor had the defendants any notice or knowledge thereof, unless the notice to *Suter* was a sufficient notice to them, which they denied; that immediately after the said application of the plaintiff the said policy of the defendants was made and delivered to the plaintiff, and he was fully aware and had the means of knowing that the said policy of $1,000 was not endorsed by the defendants on the said policy, nor otherwise acknowledged by the defendants in writing, and that the plaintiff has been guilty of laches in not seeking sooner to reform the said policy; and defendants say that the conditions on the said policy were made expressly with the intention of preventing fraud and collusion between the insured and the agents of the Company, by requiring the knowledge of the Company to be evidenced in writing; and if applications are made for insurance by an agent of the defendants, he should be considered the agent of the insured and not of the defendants as to the said application; and that they were not bound by the notice to or knowledge of the said *Suter*, without the acknowledgment of the defendants endorsed on the policy or otherwise expressed in writing; and that the said policy of $1,000 was not omitted to be endorsed on the policy of the defendants, or otherwise

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acknowledged in writing, through any error or mistake of the defendants.

Equitable replication added at the trial by leave of Mr. Justice *Burton*, sets out the condition referred to in third plea:

"Notice of all previous insurances upon the property assured by the Company shall be given to them, and endorsed on this policy, or otherwise acknowledged by the Company in writing, at or before the time of their making assurances thereon, otherwise the policy subscribed by this Company shall be of no effect; plaintiff says he made application for the insurance, for which the policy made by the defendants in the declaration mentioned was issued, to an agent of the defendants authorized to receive applications for insurance and the payment of the premiums, and to grant interim receipts on behalf of the defendants; and plaintiff says that in and at the time of the making of the said application, he informed and notified the said agent of the defendants of the existence of the insurance in the Gore District Mutual Insurance Company, in the said plea mentioned, and instructed the said agent to have the same endorsed on the said policy or otherwise acknowledged by the defendants in writing, when the same should be made, which the said agent undertook to do; and the defendants omitted or neglected to have the existence of the said other insurance endorsed on the said policy, or otherwise acknowledged in writing; and before the said policy was delivered to the plaintiff, the said loss occurred; and the plaintiff had no notice until after the happening of the said loss that the existence of the said insurance was not endorsed on the said policy, or otherwise acknowledged in writing."

Rejoinder to equitable replication re-affirms the two conditions as to notice of all previous insurances, as to

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agent of the Company being considered agent of assured and not of Company; re-affirms statement of application being made through *Suter*, agent of defendants, in writing, and forwarded to head office, and policy issued thereon; that application contained no statement of the $1000 policy in the Gore District Mutual Company, &c., as in the plea, although the plaintiff had communicated the existence of the said policy of $1,000 to *Suter* at the time he made his said application for insurance to the defendants; *Suter* had no authority from the defendants to change or vary, or waive the said conditions, and did not give the defendants any notice thereof.

The application in this case was in writing, dated 6th February, 1875, for insurance to amount of $6000 for two months, from 6th February, 1875, to 6th April, 1875, on agricultural machinery. 3 per cent per annum, $2\frac{1}{100}$ two months.

The facts of the case are fully set out in the judgment of the Chief Justice.

Vice-Chancellor *Proudfoot* pronounced a decree in favor of the plaintiff, which was reversed on appeal by the Appeal Court for *Ontario*.

Mr. *Bethune*, Q. C., for appellants:

The defence in this case rests only upon the fact that an insurance of $3000 in the Gore Mutual was not disclosed to the respondents, and that the local agent had power to bind the Company no more than thirty days. It cannot be said that there was not a valid contract of insurance between the plaintiff and the defendants by the verbal application, the payment of the required premium, and the issuing of the interim receipt. This contract was continued by the respondents, for within thirty days they issued in favor of the appellant a certificate or short form policy. The Court

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must, therefore, read this certificate as if the words—"The non-delivery of a policy within the time specified "is to be taken, with or without notice, as absolute and "incontrovertible evidence of the rejection of *this con-* "*tract* of insurance by the said board," were not there. The legal effect of the issuing of a certificate or short form policy was only the continuation of the contract commenced by the interim receipt. Under that contract, all that was necessary was, that the agent should be notified—not necessarily in writing—what other insurances existed on the property, and the evidence clearly shows that *Suter*, who was also agent of the Gore Insurance Company, was duly notified of the existing insurance in that Company. A notice to the agent is equivalent to a notice to the Company. See *Hendrickson* v. *The Queen Insurance Company* (1). Moreover, before the issue of the policy a notice in writing was sent to the Company of the existence of that insurance with the proof papers. The Company, then, having full knowledge of the double insurance complained of, issued the policy upon which this action is brought, thereby electing to confirm the contract of insurance made by the interim receipt. They elected to and did retain the premium, and, having done so, and issued the policy in consideration therefor, they ought, the plaintiff submits, to issue a binding policy. *Collett* v. *Morrison* (2) ; *Jones* v. *Provincial Insurance Company* (3). Up to the issue of the long policy the contract of insurance was not under seal, and a parole waiver would be good even at Common Law.

See *The Canada Landed Credit Co.* v. *The Canada Agricultural Co.* (4). If the sixth condition was broken they waived it ; *Sherman* v. *Madison Mut. Ins. Co.* (5) ; *Brady* v. *Western Ass. Co.* (6).

(1) 31 U. C. Q. B. 547.
(2) 9 Hare 175.
(3) 16 U. C. Q. B. 477.
(4) 17 Grant 418.
(5) 5 Bennett's Ins. cases 812.
(6) 17 U. C. C. P. 599.

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The appellants are even entitled to recover within the terms of the policy, for the conditions of the policy are only to be resorted to in cases not otherwise specially provided for. Now, in this policy provision is made for endorsing other insurances on the policy, and if the insurance in the Gore was not endorsed on the long policy, it was no fault of appellants, but that of respondents' agent; for he was duly notified of all existing insurances when he issued the interim receipt. See *Peoria Mar. & Fire Ins. Co.* v. *Hall* (1); *Insurance Co.* v. *Wilkinson* (2); *Wyld* v. *The Liverpool L. & G. Ins. Co.* (3). Appellants further contend there was no double interest, as the interest of assured in the Gore policy was assigned when the application was made to the respondents. It was a transfer of a policy in a mutual company, which made the mortgagee a member of the mutual company.

Mr. *Osler*, Q. C., followed on the part of the appellants:—

The whole contract is contained in the original provisional receipt; it does not embody any other document; it does not refer to the application, except for the description of the insured property; it provides for a continuation of the contract *as made*, if accepted, *not* for its alteration. No written notice of existing assurance is thereby required; the notice required by the *nota bene* was given at the time.

The contract was, perhaps, voidable, but the action of the directors is evidence that the contract was not rejected, and they could not make, within the 30 days, a new and more limited and conditional contract. In *Penley* v. *Beacon* (4) evidence was given in order to show that outside of the interim receipt the contract was

(1) 12 Mich. 214.
(2) 13 Wallace 222.
(3) 23 Grant 442.
(4) 7 Grant 130.

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valid. The short form policy was issued by the company for their convenience, and I contend that the endorsement is not necessary on short form policies, for the conditions say: "On this (long form) policy" and not on the short form policy. There being no change made in the contract by the short date policy, no change was made up to the date of the fire, and the loss should be payable as upon an unconditional insurance. The Court below say there were two distinct contracts, and that by the second contract a notice in writing was necessary. Appellants contend that the application and interim receipt and certificate are but the one contract, and that notice in writing is only necessary when the further assurance is put on after the contract was completed.

They cited, also, *Tough* v. *The Provincial Ins. Co.* (1) and *Royal Ins. Co.* v. *Knapp et al* (2).

Mr. *Boyd*, Q. C., (Mr. *Lyon* with him) for respondents:—

When the plaintiff made his application for insurance, he was aware that information was required by the Company as to other insurances existing on the machinery in question. This is expressly asked by the eleventh query to be answered by the applicant, and he answers it by mentioning: "Hastings Mutual, $2,000; Canada Mutual, $3,000." As a matter of fact, there was a further insurance in Gore District Mutual Insurance Company effected by *Billington*, as to which no information is communicated in the application to the Company.

The interim receipt is provisional, and the moment the Company issue a policy, the agent is out of the question. The basis of the contract is the application,

(1) 20 L. C. Jur. 169. (2) 11 L. C. Jur. 1.

and the Company accepted the risk on the footing of what was disclosed in the application, and the applicant agrees that it shall form part, and be a condition of the insurance contract. That a short date policy was issued cannot alter the case, for it is tantamount to the long policy, and refers to all the conditions of the long policy, of which assured admits cognizance. It is true, *Billington* says he never received the certificate; then he finds himself in this dilemma. If he never received the short form policy, he has no *locus standi* here at all, for the interim receipt provides that, unless it be followed within thirty days, the insurance shall be void, but if he did receive it, he is bound by all the conditions in that policy, and one of the conditions is that all notices of further insurances shall be in writing.

In this case there is no evidence that either *Suter* or *Billington* knew before the fire what amount of insurance was to be mentioned, nor can it be said that the Company had knowledge or notice of this fact? There was no material mistake which would warrant a reformation of the policy, no distinct oral agreement, as in *Wyld* v. *Liverpool L. & G. Insurance Company* (1). They cited *Richardson* v. *Maine Insurance Company* (2); *Cooper* v. *Farmer's Mutual* (3); *Hawke* v. *Niagara District Insurance Company* (4).

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

The contract is provisional, it is true, but it refers to the application, and the application does not exclude any verbal evidence. The answer to the eleventh query ought to be treated as if there was no answer at all. The fact that there is evidence that we gave the

(1) 1 S. C. Can. R. 604
(2) 46 Maine 394.
(3) 50 Penn. S. R. 307.
(4) 23 Grant 147, 149.

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agent of the Company all the information necessary is sufficient.

The judgment of the Court was delivered by

THE CHIEF JUSTICE :—

The pleadings present the plaintiff in a somewhat anomalous position before the Court. In his declaration he sets out a contract of insurance against fire, as made between defendants and himself, and avers a loss by fire of the property insured to the amount insured, and alleges that all conditions were fulfilled, and that all things happened, and all times elapsed, necessary to entitle him to maintain this action, and that nothing happened, or was done, to prevent him from maintaining the same, and claimed the $6,000 insured; and, having taken issue on defendants' pleas, went down to trial, but, on the trial, changes his ground entirely, and, by the time we reach the end of the new pleadings, we find the case wholly changed. In the first added count, the plaintiff says he had other insurance on the property, of which defendant had notice, and agreed to insure having such knowledge, and to mention the same on the policy, and have the same endorsed thereon; but, he says, defendants, by mistake, omitted to mention in or endorse same on policy, and of which he, plaintiff, had no knowledge until after the fire, and, therefore, he says, the policy or contract ought to be reformed and amended by the mention therein of the existence of such other insurance; and an equitable replication to defendants' third plea, which sets up that there was other insurance not notified to defendants and mentioned in or endorsed on policy, whereby policy was void, after setting out the condition of the policy, avers that plaintiff made application for the insurance to defendants' agent, authorized to receive applications for insurance and the payment of premiums, and to

grant interim receipts on defendants' behalf; that at the time of application, plaintiff informed the agent of the existence of this insurance, and mentioned and instructed him to have same endorsed, or otherwise acknowledged by defendants in writing, which agent undertook to do, and defendants omitted or neglected to have same done; and before policy was delivered, loss occurred, and plaintiff had no notice until after loss that same was not done.

In plaintiff's application for insurance, dated 6th February, 1875, of "Questions to be answered by the applicant," in answer to question 11: "What insurance is effected on the property now to be insured, and with what companies? Answer: "Hastings Mutual, $2,000; Canadian Mutual, $3,000." And, at the end of the queries, follows this:

"And lastly, it is expressly agreed on the part of the Applicant that this Application and Survey, as well as the Diagram of the premises herewith, *shall form part and be a condition of this Insurance Contract.* The Company is not to be held liable for any loss or damage by fire caused by locomtive engines, unless special insured against."

On this application the agent granted a provisional receipt in the following form:

"PROVINCIAL INSURANCE COMPANY OF CANADA.

"HEAD OFFICE, TORONTO.

"*Agent's Office, 7th February*, 187

"*Provisional Receipt No.*

"Received from of Post Office the sum of dollars, being the premium for an insurance to the extent of dollars on the property described in application of this date, numbered subject, however, to the approval of the Board of Directors in *Toronto*,

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who shall have power to cancel this contract at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above Post Office; and it is hereby mutually agreed that, unless this receipt *be followed by a policy within the said thirty days from this date, the contract of insurance shall wholly cease and determine; and all liability on the part of the Company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors.* In either event, the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time which the said property was insured.

"AGENT.

"N. B.—Any existing assurance on the property *must be notified at the issuing of this receipt*, or the contract is *void*. Please read this receipt in order to make yourself acquainted with its terms."

And the Company say they subsequently issued a "Short Policy," as it is termed, in this form:—

"PROVINCIAL INSURANCE COMPANY OF CANADA.

"HEAD OFFICE, TORONTO, ONTARIO.

"*Certificate of Fire Insurance, for a term not exceeding three months.*

"TORONTO, 19th February, 1875.

"No. 2081.

"This certifies that Messrs. *J. Eastwood & Co.*, of *Hamilton*, have insured under, and subject *to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance*, the sum of eight hundred dollars on paper hangings, in bales and in cases in bond in the Grand Trunk Freight Sheds, in *Hamilton*, as per application No. 68,838, for one

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month, to wit, from the 18th day of February, 1875, to the 18th day of March, 1875, at noon; amount, $800, premium $2. 40; which premium is hereby acknowledged to have been received. Loss (if any) payable to

" (Signed,) A. HARVEY,

" *Manager.*"

" NOTE.—This Certificate of Insurance will, in the event of loss, be replaced by a policy, if required."

Plaintiff says he never received any such instrument; in fact, in his evidence, repudiates any knowledge of it. But he says, after the fire he applied for, and the Company issued a policy, that on which the plaintiff originally declared.

If there was no short policy, plaintiff is clearly out of Court. Unless followed by a policy within 30 days from date of the provisional receipt, the insurance, by the terms of the receipt, wholly ceased, and, without any " short " policy on which to base it, the long policy, issued after the 30 days and after the fire, if of any force or effect at all, must necessarily be an entirely new and distinct contract, as to which there could be no pretence for saying any conditions should be expunged, or into which, it could be contended, any new provisions should be incorporated. Notwithstanding, however, what plaintiff says, the evidence shows a short policy was issued, whether it ever reached plaintiff or not, and, no doubt, would bind the Company from the moment they issued it and put it *en route* for plaintiff, though he may never have received it. This, though immaterial, as the Company do not deny the issue of the short policy, and have substituted the long policy sued on, shows how very loosely and with almost reckless indifference plaintiff treated this insurance, and may perhaps account for the manner he acted in reference to the application, as we shall see; for if, as he says, he never did receive the short policy, and never

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had any intimation that it had been issued,—as the thirty days named in the receipt expired thirty days after the 7th February, which would be the 9th or 10th of March,—he must, from that time till the issue of the policy after the fire, have been under the impression that he was wholly uninsured by defendants, and it is not easy to understand upon what principle he applied for and expected a policy, for by the terms of his agreement, as contained in the provisional receipt, the non-delivery of a short or long policy within the 30 days from the date of the receipt is made absolute and incontrovertible evidence of the rejection of the contract of insurance, and the contract of insurance under the provisional receipt wholly ceased and determined, and all liability of the Company was at an end. But, assuming, as I think we must, that a short policy was issued, I think the evidence shows that, while both the agent *Suter* and *Billington* knew there was insurance in the Gore on the premises, neither actually knew whether any of it was on the stock. *Suter* says positively:—

> At the date of application I was not aware of it (that the property was insured in the *Gore*). I knew there was existing insurances on the property, but I was not aware there was in the Gore Mutual.

And again:

> I was well aware there was a policy in the Gore Mutual on the premises, but neither Mr. *Billington* nor I knew that the Gore policy covered the stock.

And Mr. *Billington* says:—

> I spoke particularly of the Gore Mutual, and we could not find it (the policy) We knew there was a policy existing, and I thought there was a part on stock, but I did not know what part.

Mr. *Billington* appears to have been anxious to have had any insurance that was on the stock mentioned in the application, and was even willing to have had the whole amount of the $3,000 inserted as on stock,

though he knew that sum was not on stock. The contract certainly contemplates a true statement in this particular. It is not necessary to enquire whether, had he done this, it would have helped him, for it was not done, evidently, with *Billington's* knowledge and acquiescence. Instead of providing himself with the information necessary to enable him properly to fill up his application, he appears to have signed an application in blank, or partly in blank, for the greater part was filled in by the brother of the agent, at the agent's place of business, in the absence of the plaintiff, who trusted to the agent to obtain for him the amount, if any, of the insurance actually on the stock in the Gore Mutual and have it inserted in the application, which the agent never did, and could not do, because he never obtained the necessary information.

The answer to the question in the application was written by the brother of the agent; the agent says his handwriting stops at the word "unfinished," which is in the description of the property, at the first line of the application following the heading. That question was:—

> What insurance is effected on the property now to be insured, and with what company? Hastings Mutual, $2,000; Canadian Mutual, $3,000.

Billington was quite alive to the necessity of transmitting a statement of all other insurances to the Company, and appears to have known full well the consequences of not doing so, for he says, in answer to the question:—

> I suppose you knew the effect of concealing these particulars? Yes. Q. You knew the effect that it would have on your policy? I thought it would vitiate policy.

If *Billington* chose to trust to *Suter* to obtain the information for him, and he failed to do so, how can this effect the Company? Instead of getting himself

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the precise information required to enable him to make a proper application, as was his interest and his duty to the Company, he trusts to *Suter* to get it for him. Surely, he must take the consequences of any neglect on *Suter's* part. He says:—

> I supposed every thing was satisfactory or he would let me know. He took my money and I supposed the thing was all right.

In other words, he trusted *Suter* to do for him what he ought to have done for himself, and, too late, discovers he has trusted to a broken reed.

In all this, *Suter* was in no way representing the Company in any matter within the scope of his authority or duty; he was acting solely for *Billington's* accommodation. The plaintiff, evidently under the impression that the insurance in the Gore partially covered the stock, and knowing the necessity of putting a true statement in reference thereto in his application, gives an incomplete application to the agent, and relies upon his ascertaining the facts for him, not for the Company, as to this insurance, and putting the information so to be obtained in the application before transmitting it. The agent or friend, without ascertaining the state of the Gore's insurance, transmits the application filled up by his brother, in which no reference is made to the Gore's insurance. The Company, acting on the application so transmitted (after being pressed by the agent), apparently, somewhat reluctantly issue the short policy. It is very clear that, as between *Billington* and the agent, the latter should have obtained the information as he promised, and which he said was accessible to him, or he should have notified *Billington*, but he did neither.

Without obtaining this information, it is equally clear that neither plaintiff nor the agent were in the position to fill in a proper application, for neither knew for a certainty that there was really any insurance on stock

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in the Gore, though plaintiff thought there was, but neither knew how much, and, therefore, neither could fully and truthfully fill in the application.

Had *Billington* been desirous of repudiating any contract based on this application, I can well understand how he might, with much force, contend that the agent transmitted an application he had never authorized him to send. But if, on the contrary, he is desirous of availing himself of a contract, based on the application so sent, I am at a loss to understand how he can accept the contract, and say it was based on any mistake or error on the part of the Company, and that they should have inserted in the policy the amount of an insurance, of which both the assured and the agent were ignorant, and which does not appear to have been ascertained by either of them till after the fire occurred and the Gore policy was found.

The insurance under the provisional receipt was clearly superseded by the short policy, and by the terms of that contract must the plaintiff be bound if he claims to be insured at all. How can he claim to have the policy reformed and a new contract made.

The agent's power to bind the Company by a contract of insurance was limited to the provisional contract. If no certificate or short term policy was issued, this contract was unquestionably at an end at the expiration of 30 days. If a certificate was issued by Company and accepted by plaintiff, that became the contract between them, and, by the terms of that contract, both parties are bound. The insurance under this certificate was made subject to all the conditions of defendants' policies, "of which the assured admits cognizance."

The condition as to other insurance was not complied with, and, according to the terms of the contract, the insurance was at an end.

I can discover nothing whatever to justify any Court

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in saying that the defendants ever agreed to insure plaintiff on any other terms or conditions than were contained in the original receipt during the time that was in force, or than were contained in the subsequent certificate of insurance, or the policy by which it was afterwards replaced, or that the plaintiff ever expected to be insured on any exceptional terms ; or that, so far as the Company is concerned, there was any mistake in the terms of this contract; or that the Company were ever asked or expected by the plaintiff to alter, vary, expunge, or waive, any one of the conditions contained in their policies.

In my opinion, the whole trouble has arisen from no fault or default on the part of the Company, but from plaintiff's relying on others to do for him what he should have done for himself, or that he should have taken care to see that those he entrusted had done as they promised.

As I can discover no omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake, and, therefore, nothing to reform, I think the appeal should be dismissed with costs of appeal.

Appeal dismissed with costs.

Solicitors for appellants : *Osler, Gwynne & Teetzel.*

Solicitors for respondent : *Murray, Barwick & Lyon.*

MARTIN I. WILKINS.....APPELLANT; 1879

AND

THOMAS O. GEDDES.....RESPONDENT.

*Jan'y 20.
*April 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

37 *Vic.*, *c.* 13—*Interest on deposit in Court—Officer of Court not entitled to interest, if received by him—Summary jurisdiction of Court over its officers—Order of Court upon its own officer, when obtained by a third party, is a final order appealable under sec.* 11 *of* 38 *Vic.*, *c.* 11.

Under 31 *Vic.*, c. 12, and 37 *Vic.*, c. 13, the Minister of Public Works of the Dominion of *Canada* appropriated to the use of the Dominion certain lands in *Yarmouth* County, known as "*Bunker Island.*" In accordance with said Acts, on the 2nd April, A. D. 1875, he paid into the hands of *W.*, prothonotary at *Halifax*, the sum of $6,180 as compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of *Nova Scotia*, to one *A.*, as owner, to one *G.*, as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of *W.*, the prothonotary of the Court, for some time, *H.*, attorney for *G.*, applied to the Supreme Court for an order of the Court calling upon *W.*, the prothonotary, to pay over the interest upon *G.*'s proportion of the moneys, which interest (*H.* was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. *W.* resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the Court, for interest, but did not deny that interest had been received by him. A rule *nisi* was granted by the Court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held: 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

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the Court. That, in ordering the prothonotary to pay over the interest received by him, the Court was simply exercising the summary jurisdiction which each of the Superior Courts has over all its immediate officers. (*Fournier* and *Henry*, J.J., dissenting.)

2. That the order appealed from, being a decision on an application by a third party to the Court, was appealable under the 11th sec. of 38 *Vic.*, c. 11. (*Fournier* J., dissenting, and *Taschereau*, J., *dubitante.*)

THIS was an appeal at the instance of *Martin I. Wilkins*, Prothonotary of the Supreme Court of *Nova Scotia*, at *Halifax*, from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule *nisi* of that Court as follows:—

"IN THE SUPREME COURT, 1878.

"*Halifax, SS.*

"IN RE BUNKER'S ISLAND.

"On argument of the rule *nisi* herein, calling upon *Martin I. Wilkins*, the prothonotary of this honorable Court, at *Halifax*, to pay over to *Thomas O. Geddes* the interest upon money of the said *Geddes*, paid into the hands of the said prothonotary, under and by virtue of Chapter 13 of the Acts of the Dominion, A. D. 1874, and on motion of counsel:—

"It is hereby ordered that said *Martin I. Wilkins* do forthwith, upon being served with a copy of this order, pay to said *Thomas O. Geddes*, or his attorney, the sum of two hundred and sixty dollars and twenty-eight cents, being the amount of said interest at four per centum per annum during the period said moneys were in his hands and invested in the banks.

"And that said *Thomas O. Geddes* do thereupon pay the said prothonotary the sum of twenty-six dollars and two cents, being ten per centum upon said interest accruing upon the principal sum, the latter sum being payable to said prothonotary as a commission for handling the principal sum, and in full for such service.

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"Dated at *Halifax* this 15th day of May, A.D. 1878.

"On motion of Mr. *C. S. Harrington* of counsel with *Geddes*.

"By the Court,

"(Sgd.) "M. I. WILKINS,

"*Prothonotary*."

The facts as agreed upon by the parties are shortly as follows:—

In the year 1875 the Minister of Public Works for the Dominion of *Canada* appropriated certain lands in the County of *Yarmouth* for public purposes, under the provisions of the Dominion Satutes, 31 *Vic.*, c. 12, and 37 *Vic.*, c. 13, in amendment thereof, and paid to the said prothonotary of the said Supreme Court of *Nova Scotia*, at *Halifax*, on the second day of April, A.D. 1875, as required by the said Acts, the sum of six thousand one hundred and eighty dollars.

This sum was paid at several times by order of the Supreme Court of *Nova Scotia* to the parties entitled, less the sum of ten dollars, now in the hands of the said prothonotary, for disposition as the Court might order.

In consequence of some dispute between the claimants of the funds deposited, the money was not withdrawn immediately, but remained in the custody and under the control of the prothonotary for the time set out in the following affidavit:—

"I, *Charles Harrington*, of the City and County of *Halifax*, Esquire, do make oath, and say as follows:

"1st. I say that under and by virtue of an Act of the Parliament of *Canada*, passed in the year 1874, the Minister of Public Works of the Dominion of *Canada* appropriated to the uses of this Dominion certain lands in the County of *Yarmouth*, known as *Bunker's Island*. That by virtue of the authority vested in him by said Act, he did, on the thirteenth day of April, A.D. 1875,

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pay into the hands of *Martin I. Wilkins*, Esq., prothonotary of this honorable Court, the sum of six thousand one hundred and eighty dollars as compensation money, and interest, to be thereafter appropriated according to law among the several owners of the said island, and an order or notice, in compliance with sec. 2 of said Act, was then published, calling upon all parties interested to appear and prove their title to the money aforesaid.

"2nd. I say that proceedings were thereupon taken by *Ebenezer E. Archibald*, the owner of the land, and *Thomas O. Geddes*, a mortgagee, to procure payment out of the fund in Court, but no money was actually paid out of said fund by said prothonotary until on or about the twenty-seventh day of March, A.D. 1876, on which date the sum of five thousand five hundred and fifty-five dollars was paid as follows:

For Thos. O. Geddes.....	$3,451.78
For E. E. Archibald.....	2,103.22
	$5,555.00

the above being the amount due said *Archibald* for his fee simple, and the undisputed amount due said *Geddes* upon his mortgage.

"That from the date last above mentioned until on or about the 22nd day of August, A.D. 1877, the balance of six hundred and twenty dollars remained in the hands of the said *Martin I. Wilkins*, and on that date the further sum of four hundred and ninety dollars was paid to said *Thomas O. Geddes* by order of His Lordship the Chief Justice. I crave leave to refer to the original papers on file herein, from which the facts above set out will more fully appear.

"3rd. Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank upon deposit receipt by the prothonotary afore-

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said, and I pray an order of this Honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him."

The prothonotary resisted the application, and the question raised on this appeal was whether, for the period during which this money was deposited with the prothonotary, he was liable to pay interest on the amount at the rate of four per cent. per annum.

Mr. *Cockburn*, Q. C., for Appellant:

On the question of jurisdiction see *Kent's* Commen. (1); *Osborn* v. *U S. Bank* (2); *Citizens' Bank of Steubenville* v. *Wright* (3); *Weston* v. *The City Council of Charleston* (4).

On the merits, I contend that if the fact that any interest on the money deposited by the Minister had been received by the prothonotary, were established by legal evidence, which it was not, such interest would not be held by him to the use of Respondent, but to the use of the Minister, who alone could demand an account of it, and the Supreme Court of *Nova Scotia* had no power or authority to decide that the officer held such interest, to the use of Respondent, nor had they any power to order him to pay it to the Respondent, who was a mortgagee who had been paid off.

All we know is, that the Appellant is called upon to pay a sum of money to the Respondent, with whom he had no privity.

If the Respondent had any legal or equitable claim against the prothonotary, for interest on the moneys deposited, or money had and received in any other manner to his use, he should have enforced his demand

(1) Vol. 1, pp. 316, 317 & 326, note b.
(2) 9 Wheaton 819.
(3) 6 Ohio 338; 5 Wheaton appendix p. 16.
(4) 2 Peters 463.

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by an action at law or in equity, and the Supreme Court and its Judges have no power, under the Statute, to determine on a summary application, whether he has such claim or not.

Moreover, there are facts alleged upon which the judgment proceeds which do not exist at all. There is no evidence where the money was deposited and what interest was received. This case, on principle, should have been treated as a suit at law between the Respondent and the Appellant, and it was the duty of the Respondent to establish his case by evidence. The burden was upon him, and the prothonotary was under no obligation to deny facts that had not been so established, and the Court had no right to assume, in the absence of such denial, that the facts were as set forth in the judgment. See *Brown* v. *Southwise* (1).

Appellant also contends, that the Court has no power to order any further interest to be paid than the Statute directs; and by virtue of the Statute the parties are entitled to no more than six months' interest under any circumstances, except only in the case of the delay of the order beyond that term, being occasioned by the default of the minister.

When moneys are paid in under these Statutes, the officer with whom it is deposited is not required to invest them at interest, and he has no right to lend them, but is bound to keep and pay them out when ordered to do so under the Statutes. *Attorney General* v. *Lind* (2).

Mr. *Haliburton*, Q. C., for Respondent :—

This was not a "final judgment" in "a case," which, under the Supreme Court Act, can be a subject of appeal to this Court. The application is only an interlocutory proceeding, and it is an order of the Court to its

(1) 3 Bro. Ch. C. 107. (2) 6 Price 287.

own officer *in re Bunker's Island.* Reference was made to *In re Freeman et al* (1), and *Conkling's* Treatise on *U. S.* Courts (2). In this case, if the prothonotary had any reason to object to the compensation awarded him, he should have filed a petition of right. *Crawford et al* v. *Attorney General* (3). Now, the rule ordered that whatever money he had received, he was to account for it; and what does he do, he answers that he was not bound to pay interest. I submit that even in the case of a trustee, if he is charged with interest, the *onus* of proving he has not received it, remains upon him. But there is a distinction to be drawn between a public officer and an ordinary party. No official can retain as a perquisite any interest received by him on public monies in his hands. This is conclusively established by *Lonsdale* v. *Church* (4); see also *Attorney General* v. *Hoseason* (5); *DeBolt* v. *Trustees of Cincinnati Township* (6).

Mr. *Cockburn*, Q. C., in reply:—

The case of *Lonsdale* v. *Church* is a case in which the officer had not the money forthcoming. Here the money was paid promptly. If the Respondent is entitled to interest, it should be paid by the Crown, and not by the officer who has had the risk of safely keeping the money.

The Appellant does not come here in conflict with the Court, but only says that the Respondent has failed utterly to prove anything against him.

THE CHIEF JUSTICE:—

(After stating the facts as agreed upon by the parties.)

By 31 *Vic.* c. 12, sec. 2, and sub-sec. 2 of sec. 2, 37 *Vic.*, c. 18, the Minister of Public Works is authorized to pay

(1) 2 Grant E. & A. 109.
(2) Pp. 30 & 34.
(3) 7 Price 79.
(4) 3 Bro. Ch. C. 43.
(5) 6 Price 312.
(6) 7 Ohio R. 239.

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compensation money, or award, into the office of one of the Superior Courts for the Province, in which the lands are situate (with interest thereon for six months), subject to the claims of all persons seeking compensation, all which claims are to be received and adjudged upon by the Court, and the Court shall make such order for the distribution, payment, or investment of the compensation, and for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of the Act and to law shall appertain.

By virtue of these Acts the Minister of Public Works appropriated to the use of the Dominion certain lands in *Yarmouth* County, known as *Bunker's Island*, and, in accordance with the Acts, paid, on the 2nd April, 1875, into the office of the prothonotary, at *Halifax*, the now Appellant, $6,180, as compensation and interest to be thereafter appropriated among the owners of this island. On the 27th March, 1876, $3,451.78 was paid to *T. O. Geddes*, mortgagee of the island, and $2,103.22 to *Archibald*, the owner. From 27th March, 1876, to 22nd August, 1877, the balance of $670 remained in the hands of the prothonotary, when the further sum of $490 was paid *Geddes*, by the order of the Chief Justice, to whom the master's report had been referred for a final decision, and a further sum of $106.50, as interest over and above the amount already paid in, was ordered to be paid by the Minister of Public Works to the prothonotary, and by which order, after appropriating certain sums to parties interested in said island, the prothonotary was directed to pay balance then in his hands to *Geddes*.

The legal custodian of this money was the Court. The money was by the Statute paid into "the office of one of the Superior Courts for the Province in which the lands are situate," to be distributed by order of the Court, after receiving and adjudicating on all claims

thereto, and they were also bound, not only to make such order for the distribution, payment, or investment of the compensation, but also "for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of this Act and to law, shall appertain." The prothonotary of the Court, as the officer of the Court in charge of the office of the Court, was, no doubt, the person to receive it, but he had no personal interest in the money, and no right to use the money for his own personal gain or benefit, nor in or to any money that money produced had he any right or title, nor had he any legal control over it, beyond taking charge of it as an officer of the Court, as he would have of any paper, document, or record deposited or fyled in the office of the Court; and had he allowed the money to remain in the office of the Court, and kept it in the office with the same care that he was bound to keep the valuable records and other deposits of the Court, he would have discharged his duty, and no other or greater obligation was imposed on him. The applicant's contention in this case is, that the money being thus in his hands, as the mere ministerial custodian of the Court, he, instead of allowing the money to remain in the office, deposited it, no doubt for greater safety, in a bank where interest was allowed on deposits, and he now claims from the Court that so much of such interest as accrued from his portion of the amount deposited belongs to him, on the ground that the income belongs to the *corpus*, and must go with it to the proprietor; that it does not belong to the Court, in whose custody the law placed the principal, still less to the ministerial officer of the Court, who had simply legally the physical custody as the officer of the Court, subject to the order of the Court. I think it appertains to right and justice and to law, that to whomsoever the money deposited in

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the bank belongs, to him belongs the interest that money earned.

The applicant, by affidavit, applied to the Court in these words:

Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank, upon deposit receipt, by the prothonotary aforesaid, and I pray an order of this honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him.

Whereupon the Court granted in these terms the rule *nisi*, on which the rule absolute now appealed from was based:

On reading the affidavit of *C. S. Harrington*, sworn on the second day of March, A.D., 1878, the papers on file herein, and on motion of counsel, it is hereby ordered—

That *Martin I. Wilkins*, the prothonotary at *Halifax*, do pay to *Thomas O. Geddes*, or his attorney, interest upon the money of said *Thomas O. Geddes* paid into the hands of said *Martin I. Wilkins*, as prothonotary, aforesaid, in the above matter, at the rate of four per centum per annum, or whatever other rate of interest the said prothonotary may have received upon the said money from the time said money was paid into his hands until the time at which the same was paid out to *Thomas O. Geddes*, aforesaid, deducting from said interest whatever allowance, if any, the Court shall award said *Martin I. Wilkins* (as a commission for receiving and paying out the same) from money of said *Geddes*, unless cause to the contrary be shewn before this honorable Court on Friday, 29th day of March, A. D. 1878, at eleven o'clock in the forenoon.

Halifax, March 25, A. D. 1878.

This was no more nor less than the Court practically calling upon its officer to inform the Court, whether the information the applicant had received was correct, and intimating that any interest received belonged, not to the Court or its officer, but to the owner of the fund, and assuming the rate of interest to be four per cent., intimating to him that rate as the amount to be paid, or, if not the correct amount, "whatever other rate of

interest the said prothonotary may have received upon the said money from the time the said money was paid into his hands until the time at which the same was paid out" to *Geddes*, deducting from said interest whatever allowance the Court should award as a commission to the prothonotary. On service of this rule, I think it was the duty of the prothonotary, clearly and unequivocally, to have informed the Court what he, as the officer, had done with the money deposited in the Court; that the burthen of such a disclosure rested entirely with him; what had been done with the money might, or might not, be within the knowledge of the Court, but it certainly was most peculiarly within the knowledge of the prothonotary. If the amount had remained in the office as it was deposited, he should have said so; if it had not, he should have said so, and should have minutely detailed to the Court every particular connected with the money from the time it came into the office till the time it passed into the hands of the respective proprietors. All information in respect thereof being property of the Court, and not the private property of the officer to be given the Court, or withheld, as he might think would best serve his private interests. Instead, however, of so dealing with the Court, he resists the application on an affidavit, in which, after in section 1 stating the amount deposited, and the amount paid out under order of the Court, and in sec. 2 stating what he gathers from the papers on file as to this deposit, the prothonotary concludes that the parties must have been paid the price of their land and interest, and, therefore, he says, it is to be presumed that Mr. *Geddes* and his attorney have not alleged that he has not received the full amount of his claim.

It is very clear that the applicant does not complain that he has not received the full amount of his claim, but his complaint is that he has not received the interest

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which the amount of his claim produced. In sec. 3 the prothonotary puts forward what he considers his duty to be in these words:—

3rd. I do not receive money deposited on any condition, express or implied, that I am to pay interest for the use of the same, as it is not paid to me for my benefit or advantage, but for the convenience of the depositor, and my duty requires me to keep and pay it to those who are legally entitled to take it out of Court. I am neither bound to pay interest on money deposited with me, nor am I bound to invest it at interest for the depositor.

And in section 4 he complains of the injustice of a Provincial Statute not making proper compensation to persons keeping money for other persons in two cases, and claims it, by implication, authorizes compensation in other cases. In section 5 he says, his commission on money deposited is still open for arrangement; and, in sections 6, 7 and 8 he says:

6th. Money so deposited is not paid to me at my request, nor am I a voluntary bailee or depository in respect of it, but I am compelled to accept and take the risk of keeping it until it is called for, and know of no principle, legal or equitable, on which I can be called upon either to pay interest, invest at interest, or account for interest on money so forced upon me.

7th. Mr. *Geddes* has no legal claim on me that I am aware of for any money received by me to his use, and if he supposes that he has such claim the courts of justice are open to him and he can there enforce his rights.

8th. I do not think that Mr. *Geddes*, or any other person, can legally call on me to state how I deal with money deposited with me. My duty requires me to keep it and pay it out to those who are legally entitled to demand it. I have so kept and disposed of the money in question, and Mr. *Geddes* has no right to enquire how I employed, or whether I employed the money, or simply kept it locked up in my money box, which are entirely at my own discretion.

And closes his affidavit with section 9 in these words:

9th. I do not believe that Mr. *Geddes* has a claim for any amount from any person in respect of his land, and I consider this motion a mere speculation to try and obtain money to which he has no just or legal claim.

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And this is the only cause he shows against this rule *nisi*. I do not think it can be denied that the case was brought forward and dealt with in a somewhat loose and not altogether satisfactory manner. There are, no doubt, facts put forward in the judgment of the Court which are not to be found in the affidavits, but reading the affidavits before the Court, and especially that of the Defendants, I think we are bound to assume, that no point was raised, or controversy had, as to the fact of the money having been in the bank at interest, or that the rate claimed was too high, but that the whole controversy was as to the prothonotary's right to retain the interest, and as to the right of the Court to interfere in the matter. And the reason is very obvious ; for, if the money had never been in the bank, then the report to the Court of that fact by the prothonotary would have instantly answered the application ; so, again, if the prothonotary had raised the question that that fact was not sufficiently before the Court, all the Court would have had to do would be to allow the officer to state whether the money had remained in the office, or had been deposited, and, if the latter, on what terms. Nobody, I think, can doubt that the Court had sufficient jurisdiction and power over its officer to compel this. But the substantial and only material question raised was, that the applicant's money had, while subject to the control of the Court, produced interest, which he claims, and the way in which the prothonotary met the case relieves it from difficulty. Mr. *Wilkins* appears to think that, as the money was deposited in the office of the Court, and he was the officer in charge, he could do with it as he pleased, and was not liable to account to anyone for what he did with it, so long as he had the exact amount deposited forthcoming to answer any order the Court might make in reference to it ; in other words, for the time being, it was, as it were, his own

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private business, and for his conduct in reference to which he was accountable, neither to the owner of the money, nor to the Court. In this mode of putting the case, the officer lost sight of his position, and assumed the functions of the Court. Instead of dictating to the Court in an affidavit what his duties and rights were, he should, I think, have frankly put forward the facts, and then, upon those facts, have asked the Court to decide.

If he had never received any interest, all he had to do was to say so, and there the matter must have ended. If 4 per cent. was more than he actually received, all he had to do was to say how much he received, and the applicant could get no more. He raises no issue of fact, he does not deny that the money was deposited in the bank on interest, nor that that interest was as much as 4 per cent. per annum. Can anybody read this affidavit in any other light than as admitting, by irresistible implication, or inference, that he did deposit the money in the bank at a rate of interest not less than 4 per cent., and that he considered and believed (I have no doubt honestly, though, I think, very erroneously,) that what he so received, he was entitled to retain, either by way of compensation, or because, so long as he had the money forthcoming to respond to any order of the Court made in reference thereto, no one had any right to inquire what he did with the money, and if he invested or deposited, whereby gain or interest accrued from it, such increase was his private emolument, as to which he was not accountable to any person. In all which contentions, I humbly think, he was most unequivocally wrong. The question of compensation cannot in any way affect this case. If he is entitled to more than the Court have awarded him, he must make an application in the proper form and to the proper quarter, he cannot take charge of the deposits in the

Court, and, in defiance of the Court, hold the same till what he may consider his just claims are satisfied.

Nor can he treat the money deposited in the Court in any way as his private property, or make out of it on his own account any personal gain, profit, or emolument; if deposited for convenience or safe-keeping in a bank, whether by order of the Court, or by act of the officer, and interest is thereby earned, such interest goes with the principal, and must be accounted for to the owner as his property, as much as the principal from which it was derived; it being, so much fruit, so much increase on the money, and must follow the ownership of the money and go to the proprietor.

Under ordinary circumstances between party and party, when a person, not expressly a trustee, has dealt with another's money, the law raises a trust by implication, and, though he invests the money without the assent of the owner, he is held a trustee for the owner's benefit (1).

The law is too clear to be disputed that any interest made by an agent by the use of the principal's money belongs to the latter, and it is laid down in a general rule by *Story* on Agency adopted by the Court of Queen's Bench in *Morison* v. *Thompson* (2), that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, are to be for the benefit of his employers. And in *Paley* "On Principal and Agent" (3), it is said:—

> And not only interest, but every other sort of profit or advantage clandestinely derived by an agent from dealing or speculating with his principals' effects, is the property of the latter, and must be accounted for. So that if an agent who has purchased goods according to order, sell them again to advantage, with a view of appropriating

(1) See *Docker* v. *Soames* 2 M. & K. 664. (2) L. R. 9 Q. B. 480.
(3) P. 51.

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the gain to himself, although he should have answered the loss if any, yet his employer is entitled to the profits.

And Lord *Cockburn*, in *Morison* v. *Thompson*, after citing these authorities, adds:

> In our judgment, the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment, or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profit so made has reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.

If this is so between individuals, it is scarcely necessary to say what must be the duty of an officer of the Court to the Court, and of the officer and of the Court to the party. The duty of the prothonotary was clear to account to the court for all profits made out of this money, or which the money earned for itself on deposit in the bank, and which came to his hands as prothonotary. The duty of the Court was clear to order the payment of such earnings or profits to the applicant, and the duty of the prothonotary was to pay over the amount as absolutely belonging to the applicant.

While the officer of the Court can never be permitted to make any profit to himself, by using or investing the funds deposited in Court to be disposed of by the Court, he would clearly be exempt from any loss occurring to those funds while in his charge as an officer of the Court, unless, indeed, he has been guilty of negligence, malversation or fraud. If he performs his duty, he may claim indemnity from all personal loss. This is no new doctrine; it is equally applicable to trustees, agents, guardians and wards, and such like relations.

This is not to be treated in any way as a suit between party and party; there is no suit about it. It is simply

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the exercise of the summary jurisdiction which each of the Superior Courts has over all its own immediate officers. It has nothing to do directly with the distribution of compensation money deposited under the Statute. It is an application to the Court outside, and independent of the distribution, though, it is true, growing out of the amount apportioned. It is an application by a party, to whom a portion of the amount deposited has been awarded, for the payment to him out of Court of money which the amount awarded him earned, while under the control of the Court, as interest from the bank, where it had been deposited for safe keeping, which interest so earned, the applicant claims, belongs to the principal, and so inured to his benefit as owner of the *corpus* from whence the interest proceeded; and, therefore, the applicant seeks an order from the Court to its officer to pay over to him the amount. In principle, the application is precisely similar to an application to the Court for an order for the payment of interest, supposing the money had been deposited in the bank on interest by order of the Court. If this money had been deposited in the bank of deposit of the Court, as it would have been in accordance with the practice in *New Brunswick*, to the credit of the cause or matter in which it was paid in, subject to the order of the Court, no difficulty would ever have arisen. Though not done by order of the Court, it was done by the officer of the Court. Surely this cannot legally take from the owner of the money the produce of the money and give it to an officer of the Court, who can pretend to no interest in the money, nor any control over it beyond what the Court may authorize him to exercise.

STRONG, J.:—

I am of opinion, that we have jurisdiction to entertain

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this appeal, as an appeal from a final rule or order (1), though I have had some doubt on this point. There are many cases reported in the Privy Council reports, and referred to in Mr. *Macpherson's* book on the practice of the Judicial Committee, which show that an appeal does not lie from rules or orders made by Colonial and East Indian Courts—from which the Privy Council possesses an appellate jurisdiction defined by the charters establishing such Courts, in the same terms as that possessed by this Court—where such rules and orders are made upon their own officers.

The rule or order is regarded, in such cases, rather as a command or direction by the Court to its own ministerial officer, than a judicial determination or decision. I find, however, in all these cases, that the Court acted of its own motion, and there was no third party invoking the exercise of its jurisdiction; and this distinction, in my judgment, makes the principle I have referred to inapplicable in the present case; for there being here a party making a claim upon the prothonotary, the order of the Court was strictly a judicial decision or determination, whilst in the cases I have referred to, the Court, *ex mero motu* making an order upon its own officer, was acting rather as a party exercising superior authority over its subordinate, than as a judicial tribunal deciding between adverse and contesting parties. For these reasons we are, I think, bound to entertain the appeal, as being "a decision, rule, or order" coming within the express words of section 11 of the Supreme Court Act.

The objection raised by the Appellant, to the jurisdiction of the Supreme Court of *Nova Scotia* to make the order, is entirely unfounded. The Appellant says, that the order is not authorized by the Statute (2) under which the money was paid into

(1) Supreme and Exchequer Court Act, sec. 11.

(2) 37 Vic., cap. 13.

Court. The answer is, that the order is not made in exercise of any jurisdiction conferred by the Statute, but in exercise of that large and most salutary summary jurisdiction which all courts of justice possess over their own officers.

The prothonotary of the Supreme Court was, in contemplation of equity, a trustee of the money paid into Court, and any profit made by him by the use of the money belonged to the persons who should prove to be entitled to it, who could, without any doubt, have compelled the Appellant to account for the interest in the usual manner in which parties are made to account in Courts of Equity. This, however, did not interfere with the summary jurisdiction of the Court over the Appellant, as its officer, and if he did, in fact, receive interest, the Court, in ordering him to account for it, most properly exercised a jurisdiction upon the existence of which this Court ought not to cast a shadow of doubt.

Then, it is contended, that the evidence was insufficient to show that any interest was, in fact, received by the Appellant. The evidence might, perhaps, have been made stronger, but I agree with the Chief Justice, that it was at least sufficient to warrant the Court in calling upon the prothonotary to answer it, and, upon his refusal to admit or deny the fact of interest having been received by him, to make the presumption against him upon which the Court acted. Mr. *Harrington*, who, it appears, from the consent paper filed and printed in the case, was the attorney for *Archibald* and *Geddes*, the owner and mortgagee of the land, swears, that, to his information and belief, the money paid into Court was placed in the bank by the Appellant "upon deposit receipt;" and he prays for an order for the payment of a proportion of the interest to *Geddes*. I think this necessarily implied that the money had been deposited on interest, and, when the Court were

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put at arms length by their own officer, who thought fit to place himself in an attitude of defiance towards them, they acted neither erroneously nor rigorously in treating the money as having been deposited at 4 per cent., and the time of deposit as being co-extensive with the period during which the money remained in Court. Strictly speaking, the more regular and satisfactory course would have been for the Court to have made a preliminary rule or order upon the prothonotary to answer specially as to the fact of his having received any, and what amount of interest. But, as the Appellant has chosen to dispute the power of the Court to order him to pay interest, and has chosen to withhold all information as to the fact of his having received any interest, he cannot have been prejudiced by the course which the Court pursued in making an order against him upon the statement contained in Mr. *Harrington's* affidavit.

Upon one other point I had some doubt. I think *Geddes*, the Repondent, was not entitled to be paid anything more than the amount which was strictly due to him upon his mortgage for principal and interest, together with his costs. The claim of a mortgagee is always so limited. The fund in Court represented the land, and as the mortgagee would not, in any event, have been entitled to any of the fruits or profits of the land, as he would have been held accountable if he had gone into possession, so neither is he entitled to the fruits or profits produced or gained by the investment or employment of the fund into which the land has been converted by the paramount authority of the law. The Statute expressly provides that the fund paid into Court "shall stand in the stead of such lands or property" (1).

Any interest received by the Appellant, beyond the

(1) 37 *Vic.*, c. 13 sec. 1.

amount due to *Geddes* on his mortgage, would, therefore, have been properly payable to *Archibald*, the owner of the equity of redemption.

I cannot, however, satisfactorily ascertain that *Geddes* received more than was due to him in respect of his mortgage debt, interest and costs, although some of the figures would lead one to suppose that he has received something more. The amount of principal secured by the mortgage, as distinguished from interest, is not, however, anywhere distinctly stated in the case, and, as it is the duty of an Appellate Court to assume the decision of the Court below to be right, in so far as it is not demonstrated to be erroneous, more especially as regards a point not comprised in the Appellant's objections to the judgment appealed from, I cannot say that the order appealed from was in this respect wrong.

I am of opinion that the appeal should be dismissed with costs.

HENRY, J.:—

The appeal in this case was taken from a rule of the Supreme Court of *Nova Scotia*, founded on an affidavit made by *Charles Sydney Harrington*, of *Halifax*, Esquire, setting forth that under the *Dominion Act*, 1874, cap. 13, the sum of $6,180 was, on the 13th day of April, 1875, paid by the Minister to the Appellant, prothonotary of that Court, for certain lands in the County of *Yarmouth*, known as *Bunker's Island*, appropriated for the uses of the Dominion; that delay took place in the decision of the Court as to the parties entitled to a distribution of that sum; and that no money was paid out until the 27th March, 1876, when the sum of $5,555.00 was paid to the Respondent for an amount then due on the mortgage he held of the lands in question, and to one *E. E. Archibald*, as owner; and that a further sum of four hundred and ninety

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dollars was, on the 22nd of August, paid to the said Respondent, thus leaving $140 still remaining of the $6,180 in the hands of the Appellant. The affidavit craves leave to refer to the original papers on file and concludes thus: "Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank upon deposit by the prothonotary aforesaid, and I pray an order of this honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him."

Upon this affidavit the following rule *nisi* was granted *In re Bunker's Island*:—[His Lordship read the rule *nisi* (1).]

This is not a rule calling upon the officer to account to the Court, but an independent procedure to recover money from him in the same way as would have been adopted against one not the officer It is not for the Court to control its officer, but to control money under the terms of the Act, and so we should treat it. The affidavit does not state that there was any balance of the $6,180 remaining in the Appellant's hands, nor is the rule to pay any such balance, but interest, which it is alleged accrued upon it for an indefinite term, and to be subsequently ascertained as the result of some future enquiry, as to the fact of his ever having received any interest, and to what amount, and to deduct from the amount so ascertained whatever allowance the Court should award him as a commission. The Respondent showed cause against the rule, and, by his affidavit, shows conclusively that he paid out, under the order of the Court, all he received, except $10, subject to the order of the Court. I need not refer further to it than to say that it contains no acknowledgment *that he ever deposited the money in any bank*, or *received interest on any part of the sum deposited with him.*

(1) See p. 212.

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He is, however, adjudged to pay interest at the rate of four per cent. for every day the money remained in his possession, awaiting the orders of the Court. The Court, I admit, has power over its own officers, and may, by summary process, order the payment of any sum actually in such officer's hands, in any case wherein money is paid into Court, and over which the Court has control, but that is far from this case, as, I think, I shall hereafter show.

Under the provisions of the Acts the Court has a prescribed and limited control. By sec. 2 of c. 13 of 37 *Vic.*, under which Act the money for the lands in question and interest is required to be paid to the prothonotary, and over the amount so paid in, the Court has control. By the concluding clause of that section, it is enacted that—

> The Court shall make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested as to right and justice, and according to the provisions of this Act and to law shall appertain.

As soon as it appeared to the Court necessary, it might have, therefore, ordered the whole amount to be invested, or when, by its judgment, a party became entitled to any portion of it, the Court could have ordered it to be invested, and if the investment became a bad one through the failure of a bank or otherwise, the prothonotary would be held harmless in having obeyed the order of the Court under the provision, but without that the prothonotary would have invested at his peril, and would, in case of failure, be liable to make good the loss. Besides, the prothonotary was required to have the amount always ready to be paid at any moment the Court ordered him to pay it out. No order for the investment was made, and the prothonotary had, therefore, to keep the money safely under his immediate control. He was under no obligation to invest it, but might, for safe keeping, at his own risk, either

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keep it locked up in his safe, or deposit, *on call*, in a bank. If there had been, under the circumstances, a legal obligation on the prothonotary to invest, as is sometimes the case with executors, trustees and others, and he did not do so, he would have failed in his duty, and might properly be charged with the loss of interest occasioned thereby. The case, however, of a public officer who receives money that the Court may, at any moment, call upon him to pay over, is very, and essentially different. The money is not under his control, but that of the Court, and, therefore, he is under no legal obligation to invest. If he did so in this case and a loss was incurred, it would be his, and not the Respondent's. In the case of an executor or trustee it would be very different, for, if the latter made a reasonably good investment in the interest of heirs, legatees, or *cestui que* trusts, the loss would be theirs, not his. In the one case, the prothonotary would guarantee the investment, but, in the other, the executor or trustee would not. In the one case, the profits arising from the investment would go to those whose risk they were at; but, in this case, the Respondent claims profits when running no risk from the party at whose risk the investment undoubtedly would be.

Before remarking on other parts of the case, it is proper to test the mode of procedure in it.

There was, previously to the proceedings herein, a matter before the Court, but was that matter still open to the jurisdiction of the Court? As I before stated, and as section 2 provides, the Court had summary jurisdiction only over the amount actually shown to have been paid to the Prothonotary under that Act. The case agreed upon has this statement:—

> The contention on the part of the Respondent, and sustained by the Court, is, that for the period during which this money was deposited with the Prothonotary, he is liable to pay interest on the amount at the rate of four per cent. per annum.

And

The question was raised by the said rule *nisi* granted on the 25th March, A. D. 1878, which was made absolute on the 1st day of April, 1878, and from that judgment this appeal is taken by the said *Martin I. Wilkins* the Prothonotary.

It is, therefore, patent that the application is not, either for any part of the money paid into the hands of the Prothonotary, or for the proceeds of any investment ordered by the Court. How, then, or by what authority could the Court, by such a procedure, make any such order? It is true the Appellant is an officer of the Court, but could it by such procedure investigate a tailor's or shoemaker's bill against him, and order him to make payment? There is not the scintilla of evidence, as I shall show, that he ever received any interest on the money, or ever invested it, and if there was, it was not money paid into his hands, under the Act, and, therefore, not under the summary control of the Court, and heading the affidavits and rules "*In re Bunker's Island*" could not give it jurisdiction.

Section 13 of cap. 94, *R. S. of Nova Scotia*, 4th series, under title 23 "of Procedure in Civil Cases," and which chapter is entitled "of Pleadings and Practice in the Supreme Court," and under the heading "Pleadings," it is enacted that "all personal actions shall be commenced by Writ of Summons or Replevin." If, therefore, the Appellant had in his hands any money to the use of the Respondent, that question could only be legitimately tried by an action for money had and received, and the Respondent could only recover if he proved money in the Appellant's hands. In that case it would not be sufficient to get some one to swear that he was *informed and verily believed* "that the sum was placed in the bank upon deposit receipt." No Judge, worthy of his position, would permit such evidence at all, for it is mere hearsay. Besides, it proves nothing, if the statement were true, for it contains no allegation that it

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was on interest. The mere statement that it was "upon deposit receipt" does not necessarily prove that it was on interest, for, if a deposit is made on call, as the money in this case would likely be, if at all, it does not necessarily follow that the bank would pay any interest. But the rule *nisi* asks for interest for *the whole period* at *four per cent.*, and the rule absolute appealed from gives it without the deduction of even one day.

I can see no evidence to sustain such a case, and the Plaintiff in it should, under evidence on a trial, and would, no doubt, be non-suited by any Judge in *Nova Scotia*. The affidavit says he was informed and believes the money to have been placed in the bank. There are in *Halifax* several banks—to which of them does "the bank" point. There was no evidence before the Court what any bank paid on deposits, and I know of no legislation by which the rate should be fixed by that of the Bank of *Nova Scotia*, as by the judgment appealed from appears to have been done; nor am I aware of any rule of evidence, or any other, by which a Court can, or is required to, take judicial notice of the rates paid by the banks from time to time, or any of them; and what evidence is there to show that the bank rate in April, 1875, referred to as the proper rate in the judgment, was the proper rate in March, 1876, or August, 1877, when the several payments were made by the Appellant.

If, again, it was the duty of the prothonotary to have invested the money on interest, and he failed to do it, he could be made answerable by a proper suit. The judgment, too, mistates the statement in the affidavit of *C. S. Harrington*, which alleges that he, in that affidavit, stated "that the amount was placed in the bank upon deposit receipt," when the affidavit states only "*that he was informed and verily believed*" that such was the case. I am at a loss how the Court

got the information as to the particular usage of the banks, unless from personal enquiry, and that would be but hearsay evidence, and not receivable. I feel bound in this case, as well as in any other, to uphold the rules of evidence which the wisdom of centuries has approved for the safety of every civil right, and, independent of the question of jurisdiction, arising from the incorrect procedure, I feel bound to say the evidence to sustain the rules is totally insufficient. The applicant for a rule *nisi* is bound to make out by statements in his affidavits a *primâ facie* case, and he cannot otherwise succeed, unless his opponent, in answering, supplies any material deficiency in them. That deficiency which I have pointed out is in no way supplied by the Appellant's affidavit. The judgment, then, is not founded on evidence, but on some other ground not known to, or acknowledged by, the law. It, therefore, in my opinion, cannot stand.

The learned Chief Justice of *Nova Scotia*, acting by consent instead of the Court, made, in 1877, the "distribution" of the whole sum, except "$625 to meet *Parr's* demand, if established, and costs." He, however, states his belief that *Parr* had no claim, and the Respondent, in August of that year, received out of that balance $490, and $125 were by order paid to the master who investigated the rival claims, which left, as the Appellant states, but $10 of the sum paid into his hands. He closes his judgment of distribution in these words: "In strict justice, a large share, perhaps, of the costs ought to fall on *Parr*, but I content myself with deciding that he shall pay to *Archibald* forty-five dollars, being about one-third of the master's fees, which *will close the transaction.*" The Court, therefore, by His Lordship the Chief Justice, "closed the transaction," which simply means, made the distribution and did everything the Statute authorized or permitted the Court to do. I

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feel bound, therefore, to hold the power of the Court under the Statute was executed, and, being so, it could not further deal summarily with any matter with respect to, or arising out of it, and that for the settlement of any other claims or demands, the party making them should have done so by an action. There are other objections that might be taken to the judgment, but I have stated sufficient, in my opinion, to set it aside. I, therefore, think the appeal should be allowed, and the judgment of the Court below reversed.

FOURNIER, J., concurred with *Henry*, J.

TASCHEREAU, J.:—

In this case, I have strong doubts as to the jurisdiction of this Court to hear and determine the appeal. It seems to me that an order by a Court of Justice upon one of its officers does not fall under the provisions of sections 11 and 17 of the *Supreme Court Act*, and is not an appealable case. However, the majority of the Court hold that the appeal lies.

By the 37th *Vic.*, ch. 13 D., sections 1, 2 and 3, it is enacted that any compensation money for lands taken or acquired by the Minister of Public Works under the 31st *Vic.*, ch. 12, shall stand in the stead of such lands, and that such money may be deposited by the Minister of Public Works in the office of one of the Superior Courts of the Province in which the lands are situate. The Court, after hearing the parties interested, is empowered "to make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of this Act and to law shall appertain."

In April, 1875, a sum of $6,180 was deposited in the hands of the Prothonotary of the Supreme Court of

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Nova Scotia in virtue of the said Act. This sum has been distributed by the Court, and the only question now is about the interest on it. Upon a rule obtained by the Respondent, the Prothonotary has been condemned by the Supreme Court of *Nova Scotia* to pay the interest on that sum at the rate of four per cent. per annum, and from this judgment the prothonotary appeals to this Court.

I am of opinion his appeal should be dismissed. One of his contentions is that the Respondent should have proceeded against him by an action at law or in equity, and that the Court could not determine the matter upon a rule. He might as well have pretended the same thing for the whole of the six thousand dollars, and have kept the money till a judgment against him upon a regular action had intervened. Has it ever been pretended that a Sheriff, a prothonotary or any other officer having monies in his hands to be distributed by the Court, must be regularly sued and condemned in an ordinary action before he has to pay it? Such is the contention of the Appellant.

Another of the reasons urged by the Appellant is that the Court below had not the power to order him to pay this interest, and that the Statute does not provide for it. The words of the Statute are to me very clear. It enacts that the Court shall make such order for the distribution, payment, or *investment* of the monies, as to right and justice, and according to law, shall appertain. Does not that give to the Court the most ample powers possible over these monies? How can the Appellant pretend, as he does, that he, alone, was to decide about the investment of this sum; that this was at his sole discretion?

The only question in the case upon which I, at first, had any doubts, is about the amount of the interest, four per cent., to which he has been condemned, and

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how the Court below could come to establish this amount, or any amount, against him without evidence of any kind about it. But a reference to the case has satisfied me that, upon this ground also, Appellant must fail. What was the issue between the parties in the Court below? The Respondent's counsel, upon an affidavit that he was informed and verily believed that the Appellant had received interest from the bank on the said sum of $6,180, obtained a rule *nisi* ordering the Appellant to pay him interest upon his monies, at the rate of four per centum per annum, or whatever rate he, the Appellant, might have received. Upon the return of this rule, what does the Appellant say? He does not deny having received interest upon the monies in his hands, but he merely alleges that he is not bonnd to pay such interest. No issue of facts is raised by him; there is not a word from him denying that he has received such interest. Upon this the Court takes his affidavit as an admission of the facts alleged against him, and rightly so, it seems to me. This was not an ordinary case between party and party, but a Court of Justice dealing with its own officer. I am thoroughly satisfied that, if the Appellant had not received interest at four per centum per annum, he would have said so in his affidavit. He only raised a question of law, and, upon that question of law, the Court properly held that he had no more right to appropriate to himself the interest than the capital. In the absence of evidence of the amount of interest by him received, and upon his refusing to inform the Court what was that amount, a fact within his own knowledge, he might even have been condemned to pay the legal interest, six per cent. per annum.

I am of opinion this appeal should be dismissed with costs. *Appeal dismissed with costs.*

Solicitor for appellant: *Samuel G. Rigby.*

Solicitor for respondent: *C. S. Harrington.*

MARY JANE McCORKILL..... .....APPELLANT;

AND

EDMOND C. KNIGHT .....RESPONDENT.

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*Jan. 31.
*Feb'y. 1.
*May 7.

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

Opposition to seizure of real estate—Prescription—Renunciation, effect of, under Art. 1379 *C. C. L. C.; Art.* 2191 *C. C. L. C.; Art.* 632 *C. P. L. C.*

In January, 1856, *R. McC.* sold certain real estate to *J. McC.*, his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to property of her husband, *J. C. A.* After the latter's death in 1866, *J. McC.*, before a notary, renounced to the *communauté de biens* which subsisted between her and her late husband. *E. C. K.*, a judgment creditor of *R. McC.*, seized the said real estate as belonging to the vacant estate of the said *R. McC.*, deceased. *J. McC.* opposed the sale, on the ground that the seizure was made *super non domino et possidente*, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. *E. C. K.* contested this opposition, on the ground that *J. McC.'s* title was bad in law, and simulated and fraudulent, and that there was no possession.

Held: That by her renunciation to the *communauté de biens*, which subsisted between her and her late husband at the date of the deed of January, 1856, *J. McC.* divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was *super non domino et non possidente.*

APPEAL from a judgment rendered in the Court of Queen's Bench for *Lower Canada* (appeal side), at *Montreal*, confirming a judgment of the Superior Court

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there, dismissing an opposition fyled by the appellant to the sale of certain lots in the village of *West Farnham*, seized as belonging to the defendant *esqualité*, that is, as curator to the vacant estate of the late *Robert McCorkill*.

The respondent, in the capacity of curator to the vacant estate of the late *Seneca Paige*, having obtained judgment against *Edward Donahue*, as curator to the vacant estate of the late *Robert McCorkill*, caused twelve lots of land to be seized, as belonging to the estate of the said *Robert McCorkill*, in the village of *Farnham*, in execution of the said judgment.

The action in which judgment was sought to be executed was instituted in the year 1857 by *Edward Finlay*, and continued by respondent as curator to the vacant estate of the late *Seneca Paige*, against *Robert McCorkill*, then of *West Farnham*, upon two promissory notes, amounting to $730, one for $400, due in November, 1855, and the other for $370, due in November, 1856.

The appellant, widow of the late *John C. Allsopp*, and sister of *Rorbert McCorkill*, claimed, by *opposition a fin d'annuler*, the lots seized, on the following grounds:

1. The seizure was null as made *super non domino et non possidente*; that neither *McCorkill*, nor *Donahue*, as curator, had ever been in possession of any of the lots since the date of the plaintiff's alleged title of debt.

2. That for more than twenty years she (the opposant) had been openly, peaceably, and uninterruptedly in possession, use and occupation of all the said lots as proprietor, and setting up a notarial deed from *Robert McCorkill* to the opposant, duly authorized by her husband, and a party to the deed of date the 2nd January, 1856, before notaries, to her, then the wife of *John C Allsopp*, of *West Farnham*, and by him duly authorized, of certain immovable property, including the lots seized,

which are now village lots, and part of the north quarter of No. 42 in the fourth range of *Farnham*, and of No. 44 in the fourth range of *Farnham*, included in the deed of sale.

3. That she was entitled to claim the emplacements as her property by prescription, and had, since the date of her deed, paid all assessments and taxes on the lots, and leased and occupied them.

The contestation of the opposition alleged, *inter alia:*

That, at the time of the institution of said action, *Robert McCorkill* was in possession, *animo domini*, of all the property seized, and that he died in possession of the same, *animo domini;* that as soon as *Robert McCorkill* was sued by the executors of *Seneca Paige*, he organized, with the opposant, a general system of fraudulent transactions, with the object of divesting himself of all he possessed and vesting his sister, the opposant, with fraudulent, fictitious and simulated titles to his own property, acquiring, moreover, property in her name, but with his own resources, and passing in her name titles to debts due to him, the whole with the fraudulent intent of preventing his creditors from collecting any debt from him—amongst others that of the plaintiff; that the deed of 22nd January, 1856, was one and the principal of the fraudulent transactions above mentioned; that even if the said deed should have the character mentioned in the opposition, it would be null and void, inasmuch as the said *Robert McCorkill* would have thereby divested himself of all his property, in fraud of the late *Seneca Paige*, and would have rendered the recovery of the debt mentioned in the writ of execution impossible; that all the enunciations contained in the said deed were false, and so falsely made, in order to give to said deed some apparent legality, which otherwise it would not possess even *primâ facie;* that the opposant falsely styled herself as separated as to

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property from her husband, and as *marchande publique*, while in reality she was *commune en biens* with her husband, and did no kind of trade or business in her own name; that, as *commune en biens*, she had no legal status to acquire property; that the said deed purports that the price or consideration money had been by her paid in full, while, in fact, she had not paid anything, and has never paid anything, as she has herself admitted in the inventory by her made after the death of her husband on the 11th January, 1866; that, notwithstanding the said deed (22nd January, 1856), *Robert McCorkill* continued to possess all the property described therein up to the time of his death, which took place in 1874, and to draw all the benefits thereof, acting as proprietor, as in fact he was, making sales of portions of the same; that several years after the said deed, to wit, on the 27th September, 1859, the said *Robert McCorkill* borrowed a large sum of money from the Trust and Loan Company, and mortgaged, as his own property, most, if not all, of the real estate described in the said deed of 22nd January, 1856; and in 1860, when it served his purpose, he applied for and obtained a ratification of title to the said real estate, without any opposition on the part of the opposant; that the opposant well knowing the nullity of the said deed (22nd January, 1856), and that she could not hold thereunder, contrived another fraudulent state of things, by which she supposed that the said deed might have the effect of passing the property to the community between her husband and herself,—and in the inventory by her made, as aforesaid, she declared the said property, or parts thereof, as being owned by said community—and, for the same fraudulent objects, she afterwards renounced the said community, and contrived, with the said *Robert McCorkill*, other fraudulent means of vesting herself with some apparent title to the same; that her

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husband, the said *John C. Allsopp*, at the time of his death, had no near relative in the vicinity of his residence, having left one sister, *Anna Maria Allsopp*, living at *Cap Santé*, in the district of *Quebec*, and a brother living in *California;* that the said *Robert McCorkill*, representing the estate of the said *J. C. Allsopp* as vacant, obtained his appointment as curator to such pretended vacant estate, and afterwards, to wit, by deed of assignment passed before *M. Clément*, N. P., on the 14th December, 1867, the said *Robert McCorkill ès-qualité*, acting in conjunction with *Cyrille Tessier*, a pretended attorney, by substitution of power of attorney given, in the first instance, by *James Carleton Allsopp*, in *California*, to Rev. *N. Godbault*, to sell his rights as heir to *Henry Quetton de St. George*, of *Cap Santé*, did pretend to sell to said opposant all the rights of the said curator and of the said *James Carleton Allsopp* in the estate of the said *John Charles Allsopp;* that the said deed bears on its face the evidence of its fraudulent character and of its nullity; that the fact of one heir being a party to such deed destroyed the theory of the estate being vacant; that *Robert McCorkill* and the opposant concealed the condition of the estate, in order to obtain the said assignment for a trifle, mentioning only two pieces of ground and pretending to acquire the whole under general expressions; that if, as alleged in the said inventory, the sale of January, 1856, vested in the community, the whole of the property seized would have formed part of the estate of *John Charles Allsopp;* that *James C. Allsopp* never gave power to Rev. *N. Godbault* to sell his rights to any one else than *Henry Quetton de St. George*, and the said Rev. *N. Godbault* never gave power to said *Cyrille Tessier* to sell the same to any person but *Henry Quetton de St. George;* that supposing the said property to have vested in *John Charles Allsopp* (opposant's husband) by the deed of January,

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1856, opposant would have acquired no right by virtue of the assignment of the 14th December, 1867—first, because *Robert McCorkill* was not curator to the vacant estate of *John C. Allsopp*, and if he were curator he never was authorized to sell, and *Cyrille Tessier* had no power whatever to sell to opposant.

Wherefore the said plaintiffs prayed that the said deed of the twenty-second January, 1856, be declared fraudulent and void, and that the said opposition be dismissed with costs *distraits*.

A *défense au fonds en fait* was also fyled.

The appellant, in answer to the contestation, denied the allegations of fraud, and set up that the opposant was not responsible for, nor was she aware of, the alleged fraudulent practices of the said late *Robert McCorkill*, &c.; denied the alleged possession of the said *Robert McCorkill* of the lots at the time of his death, &c.

Appellant also alleged that in case the plaintiff were desirous of setting aside, or availing himself of any illegality in said deed of 1856 to said opposant, or the assignment to the said *McCorkill*, in his said quality, or of the alleged want of authority in *Cyrille Tessier* to make the alleged sale, and to plead, as he does, the rights of *Henri Quetton de St. George*, and to allege, or prove, the nullity of the power of attorney by *James Carleton Allsopp* to the Rev. *N. Godbault*, he (the said plaintiff) was bound to have shown interest in himself, or in the said *Paige*, to do so, and should *have brought all parties interested into Court*, and taken a suit to have the same set aside.

That the plaintiff could not obtain any resiliation of the deed, nor could he by general allegations of an organization to defraud on behalf of said *McCorkill*, extending over fifteen years subsequent to the institution of said suit, and previous to the said judgment in favor of plaintiff, bind the opposant, or prove fraud on

her part at the date of the deed set up in her opposition, or obtain the dismissal of her opposition.

That in fact the said *McCorkill* was considered by the opposant a good and correct man of business, and frequently acted on behalf of the opposant, generally without any formal legal authority; that it was not until long after his death that the said opposant was made aware that he had mortgaged any part of the property of the opposant, or treated it as his, or had become bound to the Trust and Loan Company, under the loan in general terms alleged in said contestation.

That any acts of fraud or improper conduct on behalf of said *McCorkill* could not be held as inculpating the opposant without the clearest evidence of complicity on the part of the opposant, which complicity opposant denied, alleging, moreover, that the said now defendant, as curator to said *McCorkill*, failed, or neglected, to urge the defence of the said *Robert McCorkill* in this cause, or to prove the receipts fyled thereon, or to show the said notes sued on by the plaintiff to have been paid and compensated, and declined to authorize the proceeding with the defence, or to sanction the attorney of the deceased defendant proceeding with said defence.

That the contestation of said opposition was contrived between the now plaintiff and defendant, to obtain possession unjustly of the lots seized in this cause, and to injure the said opposant.

Conclusion to dismiss contestation.

General replication to the *défense en fait*.

The case was inscribed for hearing and enquête at the same time, and a large number of witnesses were examined to show who was the *bonâ fide* possessor of the lots, and to prove that at the time of the deed to the opposant, *Robert McCorkill* was insolvent.

The deeds mentioned in the pleadings were fyled as exhibits, besides which several receipts signed by the

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Secretary Treasurer of *West Farnham*, certifying that the property stood in the books of that municipality in opposant's name since 1863. There were also other notarial deeds filed, *inter alia*:

Exhibit P.—"*Renunciation* par *Dame Mary Jane McCorkill* à la *communauté de biens* qui existe entre elle et feu *John C. Allsopp*, son épouse, copie, *P. Beriau*, N. P., 2 avril, 1866."

Exhibit Q.—"Authorization to renounce Estate *John C. Allsopp*, 7th April, 1866; *J. Rainville*, N. P."

The Superior Court for *Lower Canada*, sitting in and for the district of *Montreal*, rendered judgment on the 30th December, 1876, holding that the renunciation by the opposant to the *communauté de biens* that subsisted at the date of the deed of January, 1856, invoked by the opposant, disseized her and destroyed the claim made by her opposition, and destroyed also her claim made by prescription.

The Court of Queen's Bench (appeal side) affirmed the judgment, on the ground that opposant's title was simulated and fraudulent, and that having suffered her vendor to act as proprietor, and to be the reputed possessor *animo domini*, she could not maintain her opposition, though she had done some acts of possession.

Mr. *Robertson*, Q. C., for appellant:—

The possession by the opposant of the lots seized at the time of the seizure and for many years prior to it, is established beyond any reasonable doubt. The following authorities, on which the appellant relies, clearly establish that a seizure of real property in the possession of a third party is a nullity. See Arts. 632 & 634 *C. P. L. C.*; *Pothier* (1); *Lee* v. *Taylor* (2); *Atkinson* v. *Atkinson* (3); *Waring* v. *Zuntz* (4).

(1) Pro. Civ. p. 156.
(2) Robertson's Dig. p. 471.
(3) 15 Louis. R. 491.
(4) 16 Louis. R. 49.

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In addition to this, on the face of the deed of 1856, all the rights of *Robert McCorkill* in the property sold, passed out of him, unless fraud is made out.

This deed is manifestly what our code calls a translatory title, a title competent to convey the land; and such a deed, followed by twenty years open possession, by payment by opposant of all dues and assessments since the date of the deed, by possession at the date of the seizure, and without proof of fraud or bad faith, or proof of any possession whatever on the part of the defendant, is submitted as sufficient base for the prescription pleaded by the opposant.

The plaintiff, by his contestation, takes the ground, first, that the deed of 1856 conveyed nothing to anybody, but was a fraudulent instrument got up to defeat the action of the curator to the estate of *Paige*, and that this fraud was participated in by the appellant. Next, that if anything was conveyed to the appellant, she renounced it by renouncing to the community; and thirdly, that by the renunciation the lands went to the heirs of *John C. Allsopp*, whose residences and names are given in the contestation.

Now, whatever may be the rights of her late husband's estate in the land, the respondent cannot urge these rights, nor set aside the deed attacked, while no person is of record to protect the estate. The question as to the necessity of a substantive action revocatory is not decided upon by the judgment of the Superior Court appealed from; but the whole cause is made to turn upon the renunciation of the appellant, as depriving her of any right to fyle an opposition such as produced in this cause.

The renunication was registered in the Registry Office *subsequent to the seizure* of the lots in question, as appears by contestant's exhibit P. There is nothing to show who caused the registration to be made; the effects

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of the renunciation were not directly raised in the pleadings; nor the rights of the estate or the heirs of the husband, in consequence of the renunciation; nor its effects on the rights of the appellant under her marriage contract.

The learned counsel then reviewed the evidence, arguing that the proof of the alleged fraud on the part of the appellant had failed, and that there was no evidence of record to show *déconfiture* in 1856 or in 1873, and cited the following authorities:

Cummings v. *Smith* (1); *McGinnis* v. *Cartier* (2); *Lacroix* v. *Moreau* (3); *Ferrière, dic. de droit* (4); *Guyot*, rep. (5); *Abat* v. *Penny* (6); *Demolombe* (7); *Mayrand* v. *Salvas* (8); *Bédaride de la Fraude* (9); *Lemoine* v. *Lionnais* (10).

Mr. *Doutre*, Q. C., and Mr. *Haliburton*, Q. C., for respondent:

The opposant bases her right of ownership to the lots seized on the deed of January, 1856. In this deed she falsely assumed the qualities of a wife separated as to property, for by her contract of marriage she is proven to be *commune en biens*. This fact alone is sufficient to prove that the deed was simulated and fraudulent. But we have a further proof, for at the death of her husband, in 1866, she, by a notarial deed, declares that she renounces to the *communauté de biens*, which subsisted between her and her late husband.

The vice which lay at the beginning of this transaction is still existent. *Pothier* de la Possession (11); *Chardon* du Dol (12). Even if she had acquired some interest under the deed of 1856, the moment she re-

(1) 10 L. C. R. 122.
(2) L. C. L. J. (Kirby) 66.
(3) 15 L. C. R. 485.
(4) Vo. déconfiture.
(5) Vo. déconfiture.
(6) 19 Louis. R. 289.
(7) T. 25, No. 175.
(8) 6 Rev. Legale p. 60.
(9) No. 1427.
(10) 2 L. C. L. J. (Kirby) 163.
(11) Nos. 17, 18, 30, 31, 33.
(12) Vol. 2, pp. 362, 368.

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nounced, all rights acquired were abandoned, and she could not, by law, touch a single article belonging to the estate; and if she had sufficient possession since then, she could not avail herself of that possession. See Art. 2191 *C. C. L. C.* Her possession is coupled with a title which is vicious, and having invoked no other title than that deed, the opposition should have been dismissed without further enquiry when it was ascertained that she was *commune en biens*, and had renounced the community.

The learned counsel further contended that it was manifest, from the evidence, the deeds relied on by appellant were simulated and fraudulent, and that she had never been *bonâ fide* proprietor of the lots, and never legally possessed them; and cited *Hans dit Chaussé* v. *D'Orsonnens* and *D'Orsonnens*, opposant (1); *Chardon* du Dol (2); *Domat* (3).

Mr. *Robertson*, Q. C., in reply:

If the deed cannot be attacked for fraud, it is a valid deed, and the property ceased to be owned by *Robert McCorkill*. If the renunciation had the effect of giving rights to other parties to the deed, they should be brought into the case. It is manifest the seizure was made *super non domino et non possidente*, and consequently is null.

THE CHIEF JUSTICE:—

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*May 7.

The opposant opposes the seizure in this case, and asks to have the same declared irregular, illegal and null, and that the same may be set aside, and she maintained in her possession, and be declared to be, in so

(1) 15 L. C. Jur. 193. (2) Vol. 2, No. 202.
(3) S. 2177—2209.

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far as regards the plaintiff, proprietor of the lands seized in this cause, on the ground that the lands so seized belonged to her by good and valid titles, long before and at the date of the issuing of the writ of execution in this cause, and long before even the existence of the alleged title of debt in the declaration of said plaintiff, and in the judgment rendered in the cause mentioned; and the title in the opposant is alleged as follows: "That by deed of transfer in due form of law, made on the 22nd January, 1856, before *C. Morin* and colleague, public notaries, at *Farnham*, *Robert McCorkill*, Esq., then of *St. Romuald de Farnham*, for divers, good and valid considerations, causes, matters and things in said deed mentioned, bargained, sold, assigned and transferred to the said opposant, thereto present and accepting, and thereto duly and specially authorized by the said *John C. Allsopp*, her husband then living, and party to said deed, the property, lands, tenements and hereditaments in said deed described," which description covers the land in question.

This property, though professing to be conveyed to the opposant as *mrachande publique*, wife of *John Charles Allsopp*, and from him separated as to property, *separée quant aux biens*, was not so, as she was *commune en biens* with her husband, as appears by his contract of marriage, and an inventory made by her after the death of her husband on the 11th Jan., 1866, whereby she declared the said properties, or parts thereof, as being owned by the said community, and on the 2nd April, 1866, the opposant renounced the *communauté de biens*. Having thus destroyed her title and possession, I think she has no *locus standi* to contest this seizure. I carefully refrain from the expression of any opinion on the validity of the deed from *McCorkill* to the opposant, or of the validity of the seizure as against any parties who have a right to contest it on the ground

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the property was not the property of the judgment debtor, or that the judgment debtor was not in possession *animo domini*.

FOURNIER J.

La présente contestation, soulevée au moyen d'une opposition *afin d'annuler*, origine des faits suivants :

Le 16 octobre 1875, jugement contre *Donahue*, curateur à la succession vacante de feu *Robert McCorkill*, pour la somme de $700.00, montant de deux billets par lui souscrits, l'un le 8 novembre 1854, et l'autre le 18 décembre 1855, en faveur de *Seneca Paige* dont la succession, aussi vacante, est représentée en cette cause par l'Intimé en sa qualité de curateur.

Le 5 novembre suivant, en exécution de ce jugement, douze immeubles décrits au procès-verbal de saisie sont saisis sur *Donahue*, en sa qualité de curateur, comme appartenant à la succession de feu *Robert McCorkill*.

L'Appelante en cette cause (opposante en Cour inférieure) demande, pour deux raisons principales, la nullité de cette saisie, savoir : 1o. que ni *McCorkill*, ni *Donahue*, curateur à sa succession vacante, n'ont jamais eu possession des immeubles saisis ; 2o. que depuis au-delà de vingt ans, elle a toujours été elle-même en possession ouverte, paisible et publique des dits immeubles, en vertu d'un acte de vente que lui en avait consenti *Robert McCorkill*, son frère, le 22 janvier 1856, et enregistré le 4 mars 1860.

L'Intimé *Knight*, comme curateur à la succession vacante de feu *Seneca Paige*, a contesté cette opposition : 1o. par une défense *au fonds en fait* niant toutes les allégations de l'opposition ; 2o. par une *exception péremptoire*, dans laquelle il allègue que la vente invoquée par l'opposante (acte de vente du 22 janvier 1856) a été faite

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en fraude des droits de *Paige*, comme créanciers antérieurs à la dite vente. Il allègue aussi simulation et fausseté des déclarations contenues dans le dit acte de vente, et de plus, que *McCorkill* a toujours conservé la possession des dits immeubles *animo domini*, qu'il les avait hypothéqués en faveur de la Compagnie "*Upper Canada Trust and Loan Company*", que l'Appelante agissait au dit acte comme femme séparée de biens, tandis que de fait elle était commune en biens et ne pouvait conséquemment acheter que pour le bénéfice de la communauté; il ajoute encore qu'elle n'a point payé le prix de son acquisition.

Après avoir opposé ces divers moyens de défense, l'Intimé cite ensuite un autre titre en vertu duquel l'opposante aurait pu, si elle l'eût jugé à propos fonder aussi sa réclamation aux propriétés dont il s'agit, c'est l'acte de vente du 14 décembre 1867, consenti à l'opposante par *R. McCorkill*, en qualité de curateur à la succession vacante de *John Charles Allsopp*, conjointement avec *Cyrille Tessier*, agissant au dit acte comme procureur substitué de *James C. Allsopp*, frère et l'un des héritiers de *John C. Allsopp*. Divers moyens de nullité sont invoqués contre cet acte.

L'*exception* se termine par une conclusion demandant seulement la nullité de l'acte de vente du 22 janvier 1856.

L'opposante a répondu à ce plaidoyer, par une dénégation spéciale des faits allégués, en ajoutant que tous ceux qui sont survenus après l'institution de l'action de *Edward Finley et al vs. McCorkill* et le règlement de la succession de *John Charles Allsopp*, son mari, en supposant qu'ils fussent prouvés, n'établissent aucune participation de sa part à la fraude de *McCorkill*, et ne constituent pas un motif suffisant pour mettre de côté son titre et sa prescription *Grounds for setting aside the said deed and title of the opposant, or title given by prescription as alleged in the said opposition.*

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Elle allègue aussi que pour attaquer son acte de vente du 22 janvier 1856, et l'acte du 14 décembre 1867, il était nécessaire de mettre en cause toutes les parties intéressées, ou bien prendre une action directe pour les faire annuler.

On a vu plus haut que l'appelante n'a fondé son opposition que sur l'acte de vente du 22 janvier 1856, et sur la prescription qu'elle prétend lui être acquise. Cependant l'Intimé, dans son *exception*, cite de plus la cession du 14 décembre 1867, qu'il déclare entachée de nullité et de fraude, mais sans prendre aucune conclusion à cet égard, se bornant seulement à demander la nullité de l'acte du 22 janvier 1856.

La contestation telle que soulevée par les plaidoiries ne repose donc que sur la validité de ce dernier acte, la prescription invoquée par l'opposante et la nécessité de mettre en cause les autres parties intéressées avant de pouvoir faire prononcer la nullité de l'acte du 22 janvier 1856.

Après une assez longue enquête sur les allégations respectives des parties, la cour inférieure a, par son jugement du 30 décembre 1876, renvoyé l'opposition, se fondant uniquement sur le défaut d'intérêt ou de qualité chez l'opposante pour attaquer la saisie faite en cette cause.

Ce jugement a été confirmé par la majorité de la Cour du Banc de la Reine, en appel, mais principalement pour le motif que la vente faite à l'opposante était simulée et faite en fraude des droits de *Seneca Paige*, créancier de *McCorkill*.

Etait-il nécessaire d'aller plus loin que ne l'a fait la Cour de première instance ? Je ne le pense pas ; car s'il est vrai que l'opposante a perdu l'intérêt qu'elle pouvait avoir acquis en vertu de l'acte de vente de 1856, et qu'elle n'a aucune qualité pour représenter ceux qui peuvent y avoir un intérêt, elle manquerait évidem-

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ment, dans ce cas, d'un élément indispensable pour lui donner droit de s'immiscer dans la présente contestation.

Quelle est, en effet, sous ce rapport, la position elle de l'opposante? En supposant qu'elle ait acq des droits en vertu de l'acte de vente du 22 janvier 1856, les a-t-elle conservés? On a vu plus haut qu'elle avait fait l'acquisition des propriétés en question en sa qualité de femme *séparée de biens*, agissant avec l'autorisation de son mari. Mais il est clair qu'elle n'avait pas cette qualité, puisque son contrat de mariage, produit en cette cause, établit qu'au contraire, elle était commune en biens. Elle n'a en conséquence pu acquérir pour elle-même personnellement, et si son acte d'acquisition a quelque valeur légale, c'est à la communauté qu'il doit profiter, puisque par le parag. 3 de l'art. 1272, la communauté se compose entre autres choses " de tous " les immeubles acquis pendant le mariage."

Après avoir fait, le 11 janvier 1866, un inventaire des biens composant la communauté qui avait existé entre elle et son mari, dans lequel elle prend sa véritable qualité de commune en biens, ne croyant pas qu'il lui serait avantageux d'accepter cette communauté, l'appelant y a, plus tard, savoir, le 2 avril 1866, renoncé par acte authentique, devant Bériau, N.P.

Depuis cette renonciation, l'appelant a-t-elle pu, d'après la loi, conserver un droit quelconque sur les biens de la communauté? Il est certain que non. D'après l'art. 1379, Code Civil,

La femme qui renonce ne peut prétendre aucune part dans les biens de la communauté, pas même dans le mobilier qui y est entré de son chef.

La femme par sa renonciation (à la communauté) perd toute espèce de droits sur les biens qui la composent: les biens restent en totalité au mari ou à ses héritiers (1).

Depuis sa renonciation, l'appelante n'ayant absolu-

(1) Duranton, vol. 14, No. 507.

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ment aucun droit aux immeubles de la communauté, dont ceux saisis en cette cause font partie, il me semble parfaitement inutile de discuter la validité de l'acte du 22 janvier 1856, ni le caractère de la possession de l'opposante pendant l'existence de la communauté. Lors même que sa possession, (ce que je suis loin d'admettre), aurait été une possession légale pour le bénéfice de la communauté, cette possession, comme son titre à ces mêmes propriétés en qualité de commune en biens, a complètement disparu par l'effet de sa renonciation. Elle n'a eu depuis cette époque qu'une simple détention qui ne pouvait servir de base à la prescription qui exige une possession *animo domini*, ni lui faire acquérir aucun autre droit quelconque. Il n'est resté chez elle ni possession, ni droits de propriété, et par conséquent aucun intérêt à s'opposer à la saisie des dits immeubles.

Pour ces motifs seulement, et d'accord avec l'honorable juge qui a rendu le jugement en cour de première instance, je suis d'avis que le jugement doit être confirmé avec dépens.

HENRY, J., concurred.

TASCHEREAU, J.:—

T[illegible]eems to me a clear case. In 1856, during her ma[illegible] with *John Allsopp*, *Jane McCorkill*, the appellant, bought the lands seized in this case. She was in community with her husband. Consequently, these lands fell into the community (1). *Allsopp*, her husband, died in 1865. In 1866 she renounced the community. "The wife who renounces cannot claim any share in the property of the community," says art. 1379 of the *Civil Code*. Yet, it is upon that deed of purchase of 1856, and upon that deed alone, that she now claims these lands by her opposition. She alleges and contends that

(1) Arts. 1272, 1275, C. C. L. C.

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she is in possession of them *animo domini*, and that the seizure of these lands made upon the defendant is null. But the only title that she invokes, to sustain this allegation and to qualify her possession, is a title which, at the most, would give her only one half of these lands, and to which half she has renounced. This disposes of her opposition, and that is all we have to adjudicate upon in this case. It may be that the seizure is null; it may be that the heirs *Allsopp* can have it set aside; but we have in this case nothing to do with all this. All we have to determine is, whether *Jane McCorkill*, the appellant, has proved that these lands are in her possession as proprietor in virtue of the deed of 1856. I have shown that she is not. By the renunciation to the community which existed between her and her husband, she has divested herself of any rights to these lands. *Allsopp's* heirs, at his death, and by this renunciation, in the very terms of art. 607 of the *Civil Code*, were then seized of these lands by law alone. In them vested the legal possession. The appellant detains the lands, it may be, but she has not the legal possession of them.

I do not wish it to be understood that I consider the sale of 1856 as valid; far from it; but I deem it unnecessary to go into this point, and merely say that, supposing it to be valid, the appellant has now no right to these lands under it. She may have established that the defendant is not proprietor of the lands seized, but, at the same time, it is clearly proved that she is not proprietor of them, and that she possesses for others.

I am of opinion this appeal should be dismissed with costs.

GWYNNE, J.:—

I agree that the opposant, having renounced all her estate and interest in the *communauté*, cannot support

her opposition upon the deed of January, 1856, in virtue of which alone she claims to have had possession of the land in question. I must say, however, that there appears to me abundant evidence to support the judgment of the Court of Queen's Bench in appeal, upon the grounds of fraud and simulation, upon which the majority of that Court rested their judgment.

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Appeal dismissed with costs.

Solicitors for appellant: *Robertson & Robertson.*

Solicitors for respondent: *Doutre, Doutre, Robidoux & Hutchinson.*

JOSEPH DANJOU.....APPELLANT;

AND

FIRMIN MARQUIS .....RESPONDENT.

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*Jan'y 21.

*April 16.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA (DISTRICT OF RIMOUSKI.)

Appeal—Mandamus—Supreme and Exchequer Court Act, secs. 11, 17 and 23.

Held: That the appeal in cases of *mandamus*, under section 23 of the Supreme and Exchequer Court Act, is restricted by the application of sec. 11 to decisions of "the highest court of final resort" in the Province; and that an appeal will not lie from any Court in the Province of *Quebec* but the Court of Queen's Bench. (*Fournier* and *Henry*, J. J., dissenting.)

Query:—Can the Dominion Parliament give an appeal in a case in which the legislature of a province has expressly denied it?

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*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, and Taschereau, J. J.

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Semble, per Strong, J., there is nothing in sec. 63 of the *Supreme and Exchequer Court Act*, confining appeals from the Exchequer Court to a recourse against final judgments only, the word used being "decision," which is applicable as well to rules and orders not final as to final decisions.

APPEAL from a judgment of the Superior Court of *Quebec*, district of *Rimouski*, dated the 6th May, 1877, on a writ of *mandamus*, adjudging the present Appellant to pay the costs.

On the 30th October, 1876, the Respondent presented a petition (*requête libellée*), alleging that at a meeting of the Municipal Council of the first division of the County of *Rimouski*, held on the 31st August, 1876, the following resolution was adopted:

"That the conclusions of the petition in appeal of *Firmin Marquis* and others be granted; that the by-law of the 17th July last (1876) enacted for the purpose of cancelling a by-law of the Municipal Council of the parish of *St. Fabien*, annulling a by-law of the same Council, bearing date February, 1876, which grants a by-road (*route*) on the line between *Samuel Bouchard* and *Luc Roussel* in the fourth range, be annulled, and that the said by-law of the month of February be declared valid, and be enforced according to its form and tenor, the whole with costs against the Respondents;"

That the minutes of the proceedings were not signed on that day by the appellant, and that respondent, who had a deep interest in the immediate opening of the by-road subsequently requested the appellant to sign the said minutes, which he refused to do.

The petition, therefore, prayed for the issuing of a writ of *mandamus*, commanding Mr. *Danjou*, in his quality of Warden to said Council, to sign immediately in the register of the proceedings of the said Council, the minutes of the 31st August, 1876, with costs.

The writ was issued by order of Mr. Justice *Maguire*

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and made returnable before him, at *Rimouski*, on the 8th November then next. After issue joined, in the month of December, the appellant signed the minutes, and on the 26th May, 1877, Mr. Justice *Maguire* gave judgment, adjudging the present appellant to pay the costs. From that judgment the appellant appealed to the Court of Queen's Bench for *Lower Canada* (appeal side) and that Court on the 8th September, 1877, on a motion to quash, rejected the appeal for want of jurisdiction, holding that under art. 1033, C. C. P., the judgment of the Superior Court in this case was final and in last resort. On the 22nd September, 1877, leave was granted by Mr. Justice *Maguire* to appeal direct to the Supreme Court of *Canada*.

Before the Supreme Court the respondent moved to quash the appeal, principally on the following grounds:

"Whereas the said appellant has not appealed from the judgment of the said Court of Queen's Bench, but from the judgment rendered by the honorable Judge *Maguire*, and that such appeal to this honorable Court is allowed only from the judgment of the Court of last resort in the Province where such judgment has been rendered, and in the present cause, from the judgment of the Court of Queen's Bench, which is the court of last resort in the Province of *Quebec*, according to section eleven (11), cap. 11, 38 *Vic.*, and that an appeal lies directly to the Supreme Court from the judgment of the court of original jurisdiction only by the consent of parties, according to section twenty-seven (27) of the said chapter, and that such consent has never been given by the respondent or his attorney;

"Whereas, by and in virtue of the laws of the Province of *Quebec*, no appeal lies in matters concerning municipal corporations and municipal offices, as provided by the articles 1033 and 1115 of the Code of Civil Procedure of *Lower Canada*, and that the *mandamus* in

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this cause has been issued against the appellant in his capacity of municipal officer, and to force him to fulfil the duties and obligations inherent to a municipal office, and that no appeal lies before this honorable Court from the judgment rendered by the honorable Judge *Maguire*, and that, even if such an appeal to this honorable Court did lie, this present appeal could not be maintained, having been brought after the delay mentioned in section 25th, cap. 11, 38 *Vic.*"

Mr. *Cockburn*, Q. C., supported the motion. Mr. *McIntyre*, *contra.*

STRONG, J.:—

This is a motion to quash an appeal pursuant to sec. 37 of the Supreme Court Act. The appeal is from a judgment rendered in the Superior Court of *Lower Canada* under the following circumstances. The Municipal Council of the municipality of which the appellant was the presiding officer, having passed a by-law in which the respondent had an interest, the latter obtained from the Superior Court for the District of *Rimouski* a writ of *mandamus*, in order to compel the appellant to sign the minutes of the meeting of the Council in which the by-law had been passed. After service of the writ the appellant signed the minutes. The Superior Court, or a Judge thereof in Chambers, on the 6th May, 1877, gave judgment adjudging the present appellant to pay the costs. From that judgment the appellant appealed to the Court of Queen's Bench for the Province of *Quebec*, and that Court, on the 8th of Sept., 1877, rejected the appeal for want of jurisdiction, holding that the judgment of the Superior Court was final and in last resort. The appellant has now appealed to this Court from the judgment of the Superior Court. A motion having been made by the

respondent to quash the appeal for want of jurisdiction, it was argued during the session of this Court in January, 1878, and re-argued during the last session.

By section 11 of the Supreme Court Act it is (*inter alia*) enacted:

And when an appeal to the Supreme Court is given from a judgment in any case, it shall always be understood to be given from the Court of last resort in the Province where the judgment was rendered in such case.

The 17th section is as follows:

Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction now or hereafter established in any Province of *Canada*, in cases in which the Court of original jurisdiction is a Superior Court; provided that no appeal shall be allowed from any judgment rendered in the Province of *Quebec* in any case wherein the sum or value of the matter in dispute does not amount to $2,000; and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases and cases of *mandamus*, *habeas corpus*, or municipal by-laws, as hereinafter provided.

Section 23 enacts that:

An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law of a municipal corporation has been quashed by rule of Court, or the rule for quashing it has been refused after argument.

The clear meaning of section 17 is, that the right to appeal is given from final judgments only, and, in *Quebec*, from final judgments, where the matter in dispute amounts at least to $2,000, except in Exchequer cases and matters of *mandamus*, *habeas corpus* and municipal by-laws, in which judgments not final may be appealed from. By this construction, which makes the exception apply to the provision regarding final judgments, and not to the Court appealed from, sections 11,

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17 and 23 stand well together, without any repugnancy, and it is the primary and natural meaning of the language in which the law is expressed. The exception cannot be read as applying to the proviso limiting the amount appealable in *Quebec* cases, for there would be no meaning in excepting Exchequer cases to which that proviso can have no application.

If it is said that its object is to except appeals in matters of *mandamus*, *habeas corpus* and municipal by-laws from the provision in the first part of the 17th section, limiting appeals to those from the highest Court of final resort, and to set such cases entirely at large as regards the Courts from which an appeal can be brought, the effect would be to cut down the general provision of the 11th section, by introducing an exception as regards the class of cases spoken of in the latter part of section 17, and in section 23. But we are not to give the general provision of the 11th section such an interpretation, unless it is absolutely requisite. Then, what are the cases in which the 17th section gives the right to appeal ? They are judgments of the highest Court of final resort in the Province in which the Court of original jurisdiction was a Superior Court. The exception of Exchequer cases would be without meaning here ; they would be senseless, idle words, as applying, by way of exception, to the judgments " of the highest Court of final resort " now or hereafter to be established in any province." There is no sensible way of reading this exception but by treating it as distinguishing between a class of cases —ordinary civil actions and suits *inter partes*, in which an appeal is to lie from a *final* judgment only, and those enumerated in it—cases in the Exchequer, and those of *mandamus*, *habeas corpus* and municipal by-laws, in which it is clearly intended that the appeal shall not be restricted to final judgments, but may be

taken from decisions on motions for rules and other applications not final in their nature, as well as from the ultimate determination. This is confirmed by sec. 23, which expressly gives appeals in cases of *mandamus*, *habeas corpus* and applications to quash municipal by-laws, "in any case of proceedings for or upon a writ "of *mandamus*," &c., as well as in any in which a by-law has been quashed, or the rule for quashing it has been refused after argument.

Again, section 68, which regulates appeals from the Exchequer, is quite consistent with this interpretation, since there is nothing in that clause confining appeals from that Court to a recourse against final judgments only, the word used being "decision," which is applicable as well to rules and orders not final as to final decisions.

This construction harmonises with all the provisions of the Act, and makes the several sections 11, 17 and 23 read consistently with each other, without suppressing any words as redundant, or reading any into the Statute by way of necessary implication. Appeals in ordinary civil suits between party and party are, therefore, governed by section 17, whilst appeals in matters of *mandamus*, *habeas corpus*, and municipal by-laws, are regulated by section 23 read, as regards the Court from which an appeal lies, subject to the interpretation clause, section 11 providing that an appeal shall always be understood to be given from the court of last resort in the Province. This disposes of the argument, that the effect of this exception of *mandamus* and cognate matters in section 17 was to emancipate those cases from the limitation as to the courts to be appealed from contained in the interpretation clause section 11.

I think it right to say here that by the allusion which I have made to the words "final judgment" in the 17th section, I by no means assume that those words indicate

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anything more than the meaning attached to them by the interpretation given in the 11th section, which I take to be final as regards the particular motion or application, and not necessarily final and conclusive of the whole litigation.

The next enquiry is, what is the meaning to be attributed to the words "Court of last resort" in section 11? I think it clearly means the highest Court of appeal in the Province in which the suit, action, or other proceeding has arisen. This conclusion is thus arrived at. The object of the 17th section is, as I have already attempted to establish, to limit appeals in civil suits and actions to final judgments, as these words are interpreted in section 11, and in *Quebec* cases to actions in which the matter in dispute is above the specified amonnt. As regards the Court from which the appeal is to lie, there is no reason to infer that the Legislature intended to make any difference between the class of cases particularly dealt with by section 17, and those to which the general provisions of the interpretation clause would apply. It is not to be arbitrarily assumed that the Legislature, by the words "highest Court of final resort," meant a different Court from that indicated by the words "Court of last resort in the Province," in section 11. Then, we may regard the definition of the Court from which an appeal is given in section 17 as intended to repeat with more fullness and particularity, and by way of explanation, the provision of section 11 on the same subject. We are, therefore, to consider the two expressions "Court of last resort" and "highest Court of final resort," as convertible and equivalent in meaning. "Acts of Parliament," it is said by a late writer (1) "are frequently framed in varying phraseology without any intention of conveying a different meaning. In their progress through

(1) Maxwell on Statutes, p. 285.

Parliament, alterations and additions from various hands are made, and thus present the style and language of different authors. In such cases, the more precise and determinate expression is regarded as fixing the meaning of that which may be conceived in language more general or ambiguous."

It follows that the appeal, in cases of *mandamus* under sec. 23, is restricted by the application of sec. 11 to decisions of "the highest Court of final resort." Then, the prefix "highest" entirely shuts out the possibility of the construction which would assign to the words "Court of final resort;" the flexible and varying meaning of Court of last resort in each particular case, as it might, or might not, happen to be subject to appeal to the ultimate Appellate jurisdiction in the Province, and fixes the true meaning as that of last Court of Appeal in the Province, without reference to the particular case; for, though there may be Courts of last resort in different degrees for different cases, it is clear there can only be one *highest* Court of final resort in a Province.

Therefore, it appears plain that an appeal will not lie from any Court in the Province of *Quebec* but the Court of Queen's Bench.

Article 1033 of the Code of Civil Procedure of *Lower Canada* is as follows: "An appeal from any final judg-"ment rendered under the provisions contained in this "chapter, lies to the Court of Queen's Bench, except in "matters relating to municipal corporations and "offices, provided the writ of appeal be issued within "forty days from the rendering of the judgment ap-"pealed from." The Court of Queen's Bench quashed the appeal to that Court, on the ground that this article applied, and that it had no jurisdiction; for the same reason this Court must, in my view, hold that the present appeal is also inadmissible in this Court.

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The interpretation which I have applied to the language of the *Supreme Court Act*, has appeared sufficient to warrant the conclusion arrived at without calling in aid any extrinsic arguments. There are, however, reasons of policy and convenience which show that every presumption should be made in favor of a construction which would refuse an appeal from the decision of a Superior Court of first instance, which the Provincial Statutes have declared to be final and in last resort, and not subject to revision by the Provincial Court of Appeals.

Without touching on what may hereafter come to be an important constitutional question, that regarding the powers of Parliament to confer appellate jurisdiction in particular cases or classes of cases on this Court, and the right of the Provincial Legislatures to withhold it, it would not, I think, be possible to attribute to the terms in which jurisdiction is conferred by the *Supreme Court Act* in the 11th section already referred to, even if it were read as an isolated enactment without any light from other parts of the Statute, a construction which would embrace appeals in cases in which the Provincial laws had precluded resort to the Provincial Court of Appeals. It must be presumed that the Provincial Legislature, in denying the right of appeal, designed to subserve the ends of justice and the requirements of good policy, and it must equally be presumed, in the absence of express words, that Parliament did not intend to subvert those laws, and thus to annihilate Provincial legislation regulating the finality of law suits concerning property and civil rights.

These observations have no reference to the constitutional question which would arise if Parliament was to give an appeal in a case in which the Legislature of a Province had expressly denied it, but they are

only intended to show how strong an influence such considerations ought to have in favor of a construction which would avoid such a conflict. Had the ambiguous words "Court of last resort" stood alone, this weighty presumption would, in my judgment, have been by itself sufficient to have impressed upon them the same meaning which I have derived from reading them in the light afforded by other provisions of the Statute.

It may well be remarked that no stronger instance of the impolicy of opening this Court to appeals shut out from the Appellate Court in the Province could be afforded than the present case. We have here an appeal respecting a *mandamus* granted against a municipal officer, who complied with the complainant's demand before the judgment was given, whose term of office has long since expired, and who appeals only for the sake of getting rid of the costs, which *primâ facie* his compliance with the demand after the writ was granted shows he was properly ordered to pay.

I think it also right to add that, although in strictness, we may not have it in our power to decline to entertain appeals for costs only, yet that such appeals ought, in my opinion, to be always regarded with the utmost disfavor, that the appellant should not, even though successful, be awarded costs, and that it may be found possible to make him pay costs.

In my judgment the motion must be granted and the appeal quashed with costs.

FOURNIER, J., :

Cette cause est maintenant devant la cour sur une motion demandant le renvoi de l'appel pour défaut de juridiction, et défaut de cautionnement.

Le présent appel origine des faits suivants :

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Joseph Danjou, l'appelant, préfet de la première division municipale du comté de *Rimouski*, ayant refusé de signer le procès-verbal des délibérations d'une assemblée du conseil de cette division, tenue le 31 août 1876, fut poursuivi devant la Cour Supérieure pour la province de *Québec*, district de *Rimouski*, à l'effet de le faire contraindre d'attester le dit procès-verbal par l'apposition de sa signature.

Après contestation liée, preuve et audition au mérite, la dite Cour Supérieure, siégeant à *Rimouski*, le 26 mai 1877 a rendu le jugement suivant:

Considérant qu'il est établi par la preuve, que le dit *Joseph Danjou*, en sa qualité de préfet et président de la dite session, a illégalement refusé de signer au préjudice du requérant le dit procès-verbal des délibérations et procédés du dit conseil, adoptés à la dite session tenue le trente-et-un août dernier;

Considérant cependant que le dit *Joseph Danjou* a, depuis le rapport du dit bref de *mandamus* et la contestation liée sur icelui, savoir, dans le mois de décembre dernier, signé le dit procès-verbal des délibérations du dit conseil, adoptées à la dite session tenue le trente-et-un août dernier, le soussigné condamne le dit *Joseph Danjou* simplement à payer les dépens distraits à *J. W. Pouliot*, écr., procureur du demandeur et requérant.

Il ne s'agit pas maintenant du mérite de ce jugement, mais seulement de la motion demandant le renvoi de l'appel pour les deux motifs mentionnés plus haut. Quant au second, savoir, le défaut de cautionnement, comme il a été réglé lors de l'argument, je m'abstiendrai d'en parler. Il ne reste actuellement pour la considération de la cour, que le premier motif, fondé sur le défaut de juridiction, savoir: que le jugement dont l'appellant veut appeler, ayant été rendu en matières municipales, n'est pas susceptible d'appel d'après les arts. 1033 et 1115 du C. P. C. de *Québec*.

La Cour du Banc de la Reine, devant laquelle cette cause a été portée en appel, a donné gain de cause à l'Intimé en se fondant sur les deux articles ci-dessus cités.

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Le présent appel n'est pas de ce dernier jugement, mais de celui de la Cour Supérieure siégeant à *Rimouski*, en date du 26 mai 1877, comme étant la cour jugeant en dernier ressort dans cette cause. Cette procédure a soulevé l'importante question de savoir, si l'appel à cette cour existe d'un jugement en dernier ressort rendu par une autre cour que la plus *haute* cour de dernier ressort, dans la province de *Québec*—c'est-à-dire la Cour du Banc de la Reine.

Les clauses de l'Acte 38 Vict. ch. 11, à consulter pour la solution de cette question, sont les 11e, 17e et 23e.

La 11e est une clause d'interprétation fixant la signification de certaines expressions employées dans l'acte. La 17e donne l'appel dans les causes civiles *seulement* qui y sont mentionnées, et en excepte les causes de la Cour d'Echiquier, celles de *mandamus*, d'*habeas corpus* ou concernant des règlements municipaux pour lesquelles des dispositions spéciales sont faites par la sec. 23. Cette dernière section est celle qui donne l'appel dans les causes soustraites à l'effet de la 17e. [L'honorable juge lit la 17e clause de l'Acte 38 Vic. c. 11.] L'appel dans ces causes a sans doute été excepté des effets de la sec. 17, parce que ces causes, n'étant pas appelables avant la passation de l'acte de la Cour Suprême, elles étaient alors jugées en dernier ressort par les Cours Supérieures de 1ère instance dans toutes les provinces de la Puissance, excepté celle de Québec où, dans certains cas, le Code de Procédure admet l'appel. Il eut été bien étrange de déclarer que l'appel dans ces causes n'aurait lieu que du jugement de la plus haute Cour de dernier ressort, quand il était certain que ces causes n'étaient pas susceptibles d'y être portées. Pour donner à cette clause une pareille signification, il faudrait donc supposer que le parlement qui a donné l'appel sans condition, en a cependant sous-entendu une, qui détruirait son œuvre : c'est-à-dire, que l'appel à la Cour

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Suprême n'aurait lieu que si une loi locale rendait ces causes appelables à la plus haute Cour provinciale afin qu'elles puissent parvenir jusqu'ici. Mais pourquoi supposer sans raison une condition si contraire au texte de la loi ? Le droit du parlement fédéral de rendre ces causes appelables, nonobstant toute législation au contraire existant alors dans les provinces, n'étant pas douteux, il me semble que cette disposition devrait recevoir son plein et entier effet.

Les procédures mentionnées dans la section 23, étant de la nature des appels, comme appartenant aux pouvoirs de surveillance et de révision exercés par les cours supérieures sur les juridictions inférieures, n'étaient pas, du moins pour la plupart d'entre elles, sujettes à l'appel, comme je l'ai dit plus haut. C'est aussi, sans doute, à raison de leur nature particulière qu'elles ont été soustraites à la nécessité d'un appel intermédiaire. Il était donc logique de dire simplement qu'il y aurait appel à la Cour Suprême, comme le dit si clairement la section 23.

Pour limiter l'effet de cette dernière section, l'Intimé s'appuie fortement sur la section 11e, fixant la signification de certaines expressions dans l'acte. Il prétend qu'elle a réglé cette question, en déclarant, que lorsque l'appel est donné, c'est toujours de la Cour de dernier ressort dans les provinces où le jugement a été rendu dans telle cause

On remarquera d'abord que dans cette clause, sans doute en vue de l'appel spécial donné par la section 23, l'on ne trouve pas comme dans la 17e le mot "highest," la plus haute Cour, il est seulement dit "la Cour de dernier ressort dans la province." Le mot "highest" a sans doute été retranché afin d'éviter la contradiction qu'il y aurait eu en déclarant d'un côté, qu'il y aurait appel des causes jugées en dernier ressort par les Cours Supérieures, et de l'autre que cet appel ne pourrait avoir

lieu que de la plus *haute* Cour de dernier ressort dans la province, à laquelle ces causes n'étaient pas alors susceptibles d'être portées. Le sens clair et évident de cette clause est que l'appel existe du jugement de la Cour qui prononce *en dernier ressort* par rapport à telle cause.

And when an appeal to the Supreme Court is given from a judgment in any case, it shall always be understood to be given from the Court of last resort in the province where the judgment was rendered in such case.

Il n'est pas ici question de la *plus haute* Cour, et ces termes doivent s'appliquer sans restriction à toute Cour siégeant en dernier ressort, pourvu qu'elle soit une Cour d'appel, ou une Cour de juridiction supérieure jugeant en dernier ressort.

Si toutefois les termes pouvaient avoir la signification que leur donne l'Intimé, on pourrait encore répondre que la section entière (la 11me) n'a pas d'application à la question sous considération.

En effet, il y est déclaré en termes formels que, à moins que "le *contraire* ne soit *prescrit*, ou que le *con-*"*texte n'exige* évidemment une autre interprétation," les expressions y mentionnées auront la signification qui leur est donnée. Les deux conditions qui rendent en certains cas cette clause d'interprétation inapplicable, ne se présentent-elles pas dans la question actuelle?

Le *contraire* de la prétention que l'appel n'a lieu que de la plus haute cour de dernier ressort, n'est-il pas *prescrit* par la section 23 donnant l'appel sans condition. Le *contexte* de la même section ainsi que celui de la section 17 n'exige-t-il pas une autre interprétation que celle qui aurait pour effet d'anéantir le droit d'appel si clairement donné? Si l'on admet que la section 11 doit contrôler l'appel donné par la section 23, n'en devrait-il pas être de même pour la section 49. Par cette section toute personne trouvée coupable de haute

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trahison, de félonie ou de délit devant une Cour Supérieure de juridiction criminelle, peut, lorsque la conviction a été confirmée par une cour de dernier ressort, en appeler à la Cour Suprême du jugement de confirmation.

La Cour d'Erreur et d'Appel d'*Ontario* qui est le plus haut tribunal de dernier ressort de cette province, n'a pas de juridiction d'appel en matières criminelles. Si l'on fait aux causes criminelles application de la dernière partie de la section 11, savoir : " et lorsque l'appel à la " Cour Suprême est permis à l'égard d'un jugement " dans aucune cause, il sera toujours sensé être permis " à l'égard du jugement de la cour en dernier instance " dans la province où le jugement a été rendu dans la " cause," il en résulterait qu'un appel ne pourrait pas avoir lieu à cette cour d'une conviction ou sentence prononcée par la Cour du Banc de la Reine de cette province, cette dernière n'étant pas la cour en dernière instance dans la province d'*Ontario*. Est-ce à dire que pour cette raison l'appel donné par la section 49 ne pourrait pas avoir lieu ? En faisant ainsi application de la clause d'interprétation, l'on détruirait une des dispositions les plus importantes de l'acte. Mais je ne pense pas qu'une telle interprétation serait admise. On répondrait à cette objection que la Cour du Banc de la Reine est une Cour Supérieure et en même temps une cour de dernier ressort dans la province pour les causes criminelles, et l'appel serait sans doute admis. Le même argument, s'il est valable dans ce cas, est également applicable à celui dont il s'agit. La Cour Supérieure de la province de Québec est, comme l'indique sa dénomination, une cour supérieure de première instance, en même temps qu'une cour de dernier ressort en certains cas, comme en matières municipales, d'après les arts. 1033 et 1115 du Code de P. C.

quelque manière que j'envisage la question, je

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ne puis trouver la confirmation des prétentions de l'Intimé dans la sec. 11e à laquelle, suivant moi, l'on donne une interprétation trop rigoureuse et une portée qu'elle ne devrait pas avoir. Ma manière de voir à ce sujet est appuyée sur les autorités suivantes :

Regina vs. *the Justices of Cambridgeshire ; Regina* vs. *the Justices of Shropshire. Regina* vs. *the Justices of Gloucestershire.* (1).

Dans ces causes lord *Denman*, à la page 491, s'exprime ainsi sur l'effet des clauses d'interprétation :

But we apprehend that an interpretation clause is not to receive so rigid a construction that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of the word must be under all circumstances. We rather think it merely declares what persons may be comprehended within that term, when the circumstances require that they should.

De plus, d'après les règles d'interprétation, la sec. 23 contenant une disposition particulière ne peut pas être contrôlée par la disposition générale de la sec. 11 :—

A particular enactment, says Maxwell, must prevail over a general enactment in the same statute. The general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

Cette section (23me) n'est aucunement en contradiction avec l'esprit de l'acte, et ne peut avoir l'effet d'en rendre aucunes dispositions incompatibles, ni d'en détruire les effets. Elle peut exister sans affecter aucune des dispositions de l'acte, pas même la section 11me qui contient la déclaration spéciale qu'elle ne s'applique pas dans le cas où le sens de l'acte ne s'y prête pas.

En résumé, la sect. 23 me paraît avoir un sens très clair : elle donne le droit d'appel dans des causes où la loi provinciale ne l'admettait point. Frappé des développements considérables des affaires municipales dans ces dernières années, surtout depuis que les corporations se sont engagées dans les entreprises de chemins de

(1) 7 Ad. & E. 480.

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fer pour bien des millions, le parlement fédéral a sans doute pensé qu'il était de l'intérêt public, de soumettre à la juridiction d'appel de cette cour les jugements des cours de 1ère instance décidant ces affaires en dernier ressort. Le pouvoir exercé de cette manière n'étant pas contestable suivant moi, je suis d'opinion que l'on doit donner effet à la sec. 23, en recevant l'appel en cette cause. La majorité de la cour en décide autrement.

HENRY, J.:—

In this case, a motion was heard to dismiss the appeal, on the ground that it was not a case within the meaning of the Act providing for appeals to this Court.

It is an appeal from the decision of a Judge of the Superior Court in the Province of *Quebec*, in a case of *mandamus* before him, to compel the appellant to sign his name as warden of the Municipal Council of the first division of *Rimouski* to certain acts and deliberations of the Council, in accordance with his duty as such warden, and which he refused to do. There was a decision for costs only against him. The judgment was against him on the merits, but, as the appellant had, in the interim between the application for the *mandamus* and the hearing, done what the *mandamus* would have required him to do, no order for it was made; but the appellant was condemed to pay the costs of the application. From that judgment an appeal was first had to the Court of *Queen's* Bench, in appeal, but that Court properly, I think, decided there was no appeal thereto. The appeal to this Court was consequently taken.

A question might be raised as to the power of the Dominion Parliament to provide for an appeal, under such circumstances, to this Court. I will first endeavor to dispose of that question.

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By the provision of the *British North America Act*, 1867, sec. 101, "The Parliament of *Canada* is given authority," from time to time, "to provide for the constitution, maintenance and organization of a general Court of Appeal for *Canada*." The right to "provide for the Constitution" of the Court without any terms of limitation, must, in my opinion, confer upon the Parliament of *Canada* the exclusive power of providing for appeals to this Court, from the highest to the lowest Courts in the Dominion; but, of course, in such a way as not to interfere with the procedure in the several Provinces, which is given for regulation to the Local Legislatures. No Act of the Parliament of *Canada* can affect the powers of the Local Legislatures in regard to appeals from one Court to another in any Province, but, when not so affecting such appeals, the Parliament of *Canada*, I hold, had, and has, the right to decide what cases shall come to this Court from the judgment or decision of any other Court.

Having disposed of that question, we must next enquire whether, by what Parliament has enacted, an appeal lies to the Court in the present, and similar cases.

Sections 11, 17 and 23 are those by which, it is said, we must be governed. Section 17 provides for the cases in which an appeal shall lie. It enacts thus: "Subject to the limitations and provisions *hereinafter* made, an appeal shall lie to the Supreme Court from all final judgments of the Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter to be established in any Province of *Canada*, in cases in which the Court of original jurisdiction is a Superior Court * * * And the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of *mandamus*, *habeas corpus*, or municipal by-laws, *as hereinafter provided*."

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Section 23 contains the only provisions to which the terms "*hereinafter*" and "*as hereinafter provided*" can be applied. Section 17 cannot embrace the provisions of section 11, for they are in reference to section 17 neither "*hereafter*" nor "as *hereinafter* provided." Section 17 in its last clause clearly exempts from its own operation "Exchequer cases, and cases of *mandamus*, *habeas corpus*, or municipal by-laws," and in so many words says that in all those cases, *as provided for in section* 23, there shall be an appeal. What then does section 23 provide? "An appeal shall lie to the Supreme Court *in any case of proceedings* for or upon a writ of *habeas corpus* not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law of a municipal corporation has been quashed by rule of Court, or the rule for quashing it has been refused after argument."

As I said before, from the stand point of section 17 we are told to look to section 23; and to invert our vision to section 11, would be looking backwards for the light we are ordered to look forwards for; we would, in fact, be looking toward the west for sunrise. If, however, we did look at section 11, we would find its provisions do not affect the construction we should put upon sections 17 and 23, for by its terms the enactments in sections 17 and 23 are clearly excluded. It commences thus: "Unless it is otherwise provided, or the context manifestly requires another construction," certain words therein mentioned shall have a prescribed meaning, and the section ends with these words: "and when an appeal to the Supreme Court is given from a judgment in any case it shall always be understood to be given from the court of last resort in the province where the judgment was rendered in such case." Were it not for the opening expressions used in the first part of that section, it would be in direct opposition to the

provisions of sections 17 and 23, but by them the provisions of those sections at variance with those of section 11 are to prevail, because by them it is without question "otherwise provided," and "the context manifestly requires another construction." Under section 23 there must of course be a judgment, order, or decision to appeal from, but, when there is, that section provides for an appeal to this Court. In regard to the proceeding for or upon a writ of *mandamus*, the section makes no limitation; but in the case "in which a by-law of a municipal corporation has been quashed *by rule of Court*, or the rule for quashing it has been refused after argument," the appeal is, as regards a municipal by-law, on conditions thus stated. It is allowed only in one case where the by-law has been quashed by rule of Court, or the rule for quashing it *has been refused after argument.* No such limitation as in the latter case is provided in regard to proceedings for or upon a writ of *habeas corpus* or writ of *mandamus.* I feel bound to conclude, from a careful study of the whole case, that an appeal lies in the case in question to this Court, and that our judgment on the motion to quash it should be for the appellant.

TASCHEREAU, J.:—

This case is before us on a motion to quash the appeal. *Marquis*, the respondent, sued out a writ of *mandamus* against the defendant, (appellant,) on the ground that the said appellant had, as warden of the County of *Rimouski*, illegally refused to sign certain proceedings of the County Council, in which he, the plaintiff, had an interest. The writ was allowed by a Judge in Chambers, and made returnable before him in Chambers, and the whole of the proceedings, including the judgment complained of, took place before a Judge in Chambers, sitting in vacation, under sections 10, 23 *et*

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seq. of the *Code of Procedure*. By this judgment, the defendant (appellant) was declared to have illegally acted, in refusing to sign immediately the proceedings in question, but as it appeared that, since the return of the said writ, he had signed them, he was condemned only in the costs of the proceedings. The defendant appealed from this judgment to the Court of Queen's Bench, but this appeal was dismissed on motion, as by article 1033 of the *Code of Procedure* no appeal is allowed on *mandamus* in municipal matters. This judgment is reported (1). It was undoubtedly correct, and it can hardly be seen how the defendant could have brought such a case before the Court of Queen's Bench in the face of the article of the Code, and the constant jurisprudence of the Courts in the matter (2).

He now admits this error, and appeals to this Court, not from the judgment of the Court of Queen's Bench, dismissing his appeal, but from the judgment given against him at *Rimouski* by a Judge in Chambers, as just mentioned. We have now to determine whether the appellant has an appeal to this Court from this last mentioned judgment.

Three clauses of the Supreme Court Act have to be examined on this question : the eleventh (11th), seventeenth (17th) and twenty-third (23rd). The eleventh, which is the interpretation clause of the Act, reads as follows :

> Unless it is otherwise provided, or the context manifestly requires another construction, the following words and expressions, when used in this Act with reference to proceedings under it in appeal, shall have the meaning assigned to them respectively.
>
> The expression "the Court," means the Supreme Court ;" and the expression "the Court appealed from," means the Court from which the appeal has been brought directly to the Supreme Court, whether such Court be a Court of original jurisdiction, or a Court of Error

(1) 3 Q. L. R. 335.

(2) See *Ouimet* v. *Corporation of Compton*, 15 L. C. Jur. 258; *Fiset* v. *Fournier*, 3 Q. L. R. 334, and cases there cited.

and Appeal; and when an appeal to the Supreme Court is given from a judgment in any case, it shall always be understood to be given from the Court of last resort in the Province where the judgment was rendered in such case.

The 17th clause is in the following words:

Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Courts of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of *Canada*, in cases in which the Court of original jurisdiction is a Superior Court; provided that no appeal shall be allowed from any judgment rendered in the Province of *Quebec* in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars; and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases and cases of *mandamus*, *habeas corpus* or municipal by-laws, as hereinafter provided.

And the 23rd clause enacts that:

An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law of a municipal corporation has been quashed by rule of Court, or the rule for quashing it has been refused after argument.

The contention of the appellant is that this last clause entitles him to his present appeal.

Certainly if it was to be applied as it reads alone, and independently of the other parts of the Statute, the appellant would be well founded in his contention. But if, on the one hand, a well settled rule on interpretation of Statutes is, that the interpretation clause is not to be strictly construed, on the other hand, it is a rule equally clear and well established that the intention of the law giver is to be deduced from a review of the whole and of every part of the Statute, taken and compared together (1). The interpretation clause must receive a liberal construction, it is true, but it is equally true, in my opinion, that it cannot be altogether

(1) Potter's Dwarris on Statutes p. 110.

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thrown aside in the interpretation of a particular subsequent enactment. Quite the contrary, it overrides the whole Statute, and, in the very terms of section 11 of the Supreme Court Act, unless *it is other wise provided, or the context manifestly requires another construction*, the meaning given to a particular word in the interpretation clause attaches to that word throughout the whole Statute.

Now, this section 11 positively enacts that, when an appeal to the Supreme Court is given from a judgment *in any case*, it shall *always* be understood to be given from the Court of last resort in the Province where the judgment was rendered in such case. On one part of his argument at the hearing before us, the appellant, far from denying the bearing of section 11, or section 23, invoked it, if I understood him well, but argued that, in his case, the judgment he appeals from is the judgment of the Court of last resort, *quoad* him, as he had no appeal to the Court of Queen's Bench. But it seems to me that the words of this section 11 clearly say that no appeal is given *in any case*, except from the Court of last resort in each Province. The words "whether such Court be a Court of original jurisdiction or a Court of appeal," in this section and in section 17, cannot be interpreted so as to give an appeal either from the Court of original jurisdiction or from the Court of Appeal in the Provinces where there are Courts of Appeal; but, it seems to me, only mean that, in the Provinces where there are no Courts of Appeal, the appeal to the Supreme Court shall lie from the court of original jurisdiction, (provided the court of original jurisdiction is a Superior Court,) and in the provinces where there exist Courts of Appeal, the appeal to this Court shall lie from that Court of Appeal; in all cases giving an appeal to this Court only from the Court of *last resort* in each Province. This distinction was most wisely made in the Act, as

it is well known that in *New Brunswick, Nova Scotia,* and some of the other Provinces, there are no Courts of Appeal. Cases come before us directly from the Courts of original jurisdiction, because for such Provinces they are the Courts of last resort. But is the appellant here, putting the question in the very words of section 11, appealing from a judgment given by the Court of last resort in the Province where the judgment was rendered in his case? Clearly not. The Court of last resort in the Province of *Quebec* is the Court of Queen's Bench; he appeals from the Superior Court.

The appellant, in another part of his argument, tried to get rid of this sec. 11 of the Act by relying entirely on sec. 23, and reading it by itself, and as not ruled by the said sec. 11. I have already laid down the clear, fair and well established principle that the intention of the law-giver is to be deduced from a view of the whole and of every part of a Statute, taken and compared together. "It is an elementary rule," says *Maxwell*, "that construction is to be made of all the parts together, and not of one part only by itself" (1). Now, taking the whole of this Act together, it appears to me that, even in criminal cases, the intention of the Dominion Parliament has been to give an appeal to this Court from the Courts of last resort in each Province only, and from no other Courts. As I have said already, if the Court of last resort in a Province is a Court of original jurisdiction, then the appeal is given from that Court of original jurisdiction; if, on the contrary, in another Province, the Court of last resort is a Court of Appeal, then the appeal to the Supreme Court is given from that provincial Court of Appeal.

And what would be the consequences for the Province of *Quebec*, if we were to give effect to this 23rd clause, as it reads by itself and without reference to

(1) Maxwell on Statutes, p. 25.

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sec. 11 of the Act? Virtually, to abolish the Court of Review and the Court of Appeal in all cases of *habeas corpus* (not arising out of a criminal charge), and in all cases of *mandamus*, in other than municipal matters. In such cases, under the Provincial laws, there is an appeal to both these Courts under certain restrictions (1).

Now, if section 23 of the Supreme Court Act is to be construed independently of sec. 11, in all these cases an appeal would be given to the Supreme Court directly from the Court of original jurisdiction, without obliging the parties to go to review or to appeal in the Province. It may be doubted, if the Dominion Parliament has such a power: whether it can in any case take away directly or indirectly the jurisdiction that each Local Legislature chooses to give to its own Provincial courts; whether under section 101 of the *B. N. A. Act* it has the power to give an appeal to the Supreme Court from any other but the Court of last resort in each Province. But I need not enquire into this; in my opinion, it has not done so in section 23 of the Supreme Court Act, because I hold that this section is ruled by section 11, and that, under both, no appeal to this Court lies in any case except from the Court of last resort in each Province.

Another anomalous consequence of the interpretation that the appellant gives to this clause would be that, in the Province of *Quebec*, an appeal to this Court would be in some cases from the Circuit Court. For, this section 23, gives also an appeal to this Court in all cases in which a by-law of a municipal corporation has been quashed by rule of Court, or the rule for quashing it has been refused after argument. Now, in the Province of *Quebec*, under the municipal codes, all such cases are brought before the Circuit Court, and, if the appel-

(1) *Barlow* v. *Kennedy*, 17 L. C. Jur. 253; *Reg.* v. *Hull*, 3 Q. L. R. 136; Art. 1033, C. C. P.

lant's contention was admitted, could be appealed from that Court here. By holding that there is no appeal except from the Court of last resort in each Province, we avoid making the Statute give an appeal to this Court direct from the *Quebec* Circuit Court, which I believe was not the intention of the Parliament to give. Then, with this interpretation, in cases concerning the quashing of municipal by-laws, as in *mandamus* and *habeas corpus* in civil matters, and all other cases, the parties have to go to the local Court of Appeal before coming here (1).

"Before adopting any proposed construction of a passage susceptible of more than one meaning," says *Maxwell*, on Statutes (2), "it is necessary to consider the effects or consequences which would result from it, for they do very often point out the genuine meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided."

Applying these remarks to this case, and believing that it was not the intention of Parliament to give in any case an appeal to this Court directly from the Circuit Court of the Province of *Quebec*, I cannot read this section 23 so as to have an effect which Parliament did not intend.

Another possible objection to this appeal is that it is from a Judge in Chambers, and not from the Superior Court. In certain cases, an appeal to the Court of Queen's Bench or to the Court of Review, is given from a Judge in Chambers, but only when a special enactment allows it. So it was held by the Court of Queen's Bench, in *Beliveau* v. *Chevrefils* (3); see, also,

(1) *Rolfe* v. *Corporation of Stoke*, Queen's Bench, *Montreal*, March, 1879, not reported; *McLaren* v. *Corporation of Buckingham*, 17 L. C. Jur. 53.

(2) P. 65.

(3) 1 Q. L. R. 209.

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Blanchard v. *Miller* (1). Now, *quoad* appeals to the Supreme Court, there is no such enactment.

I am of opinion that the respondent's motion must be granted, and the appeal quashed with costs.

THE CHIEF JUSTICE concurred with STRONG and TASCHEREAU, J. J.

Appeal quashed with costs.

Solicitor for appellant: *John Gleeson.*

Solicitor for respondent: *J. N. Pouliot.*

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*Jan. 20, 21.

*April 16.

DUNCAN MACDONALD..... APPELLANT;

AND

HARRY ABBOTT.....RESPONDENT.

ON APPEAL FROM THE COURT OF REVIEW FOR THE PROVINCE OF QUEBEC.

Security for costs of appeal—Supreme and Exchequer Court Act, sec. 31—Supreme Court Rule 6—Court of Review (P. Q.), no appeal direct from.

The following certificate was fyled with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of *Lower Canada*, now the Province of *Quebec*, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the *Supreme Court Act*, passed in the thirty-eighth year of Her Majesty, chapter second.—*Montreal*, 17th January, 1878.

Signed, "HUBERT, HONEY & GENDRON, P. S. C."

(1) 16 L. C. Jur. 80.

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*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

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Held,—On motion to quash appeal, that the deposit of the sum of $500, in the hands of the prothonotary of the Court below, made by appellant, without a certificate that it was made to the satisfaction of the Court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal.

Per *Taschereau*, J., the *case* should be sent back to the Court below in order that a proper certificate might be obtained.

Per *Strong* and *Taschereau*, J. J.,—That an appeal does not lie from the Court of Review (P.Q.) to the Supreme Court of *Canada*. [*Henry*, J., *contra*.]

MOTION to quash appeal.

The judgment appealed from was rendered by the Court of Review (P.Q.) sitting at *Montreal*, on the 29th September, 1877.

On the 22nd October, 1877, a motion for leave to appeal to the Supreme Court of *Canada* was made; on the 14th of the same month the motion was granted, the 20th November, 1877, being finally set down as the day upon which the amount and nature of the security should be adjudged. On the 20th November, 1877, appellant deposited in the hands of the prothonotary of the Superior Court for the district of *Montreal* $500. On the 5th December, 1877, execution was taken out by plaintiff, and defendant fyled an opposition *a fin d'annuller*, with an affidavit that the $500, deposited on the 20th November, 1877, were as security for the costs of the Superior Court, as appeared by the following certificate: "We, the undersigned, joint prothonotary of "the Superior Court for *Lower Canada*, district of *Mon-* "*treal*, do hereby certify that the said defendant de- "posited in our office on the 20th day of November "last, the sum of five hundred dollars as security for "costs in this cause.

"Given at *Montreal* this fifth day of December, 1877.

(Signed,) "HUBERT, HONEY & GENDRON,
"P. S. C."

On the 17th January, 1878, appellant procured from

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the prothonotary the certificate given above in the head note, and fyled it with the printed *case* as complying with the 6th Rule of the Supreme Court Rules.

Mr. *Bethune*, Q. C., for respondent:

The respondent moves to quash this appeal: 1st. On the ground that no appeal to the Supreme Court lies from a judgment of the Court of Review of the Province of *Quebec*, as it is not "the highest court of final resort" in the province; 2nd. On the ground that there is no certificate to show that a bond for costs was ever executed to the satisfaction of the Court below, or of a judge thereof, as required by the 31st section of the *Supreme and Exchequer Court Act*, and by the 6th Rule of the Supreme Court Rules.

The security that the appellant contends is sufficient in this case consists of the sum of $500, which was put into the hands of the prothonotary of the Court below on the 20th November, 1877. There is no evidence that the Court below, or any judge thereof, or the respondent, ever knew that this amount had been deposited for this appeal. There was an application made to put in security, and, after a long delay, on the 17th December, 1877, it was dismissed by Mr. Justice *Rainville*. An execution was then taken out by the respondent, and an opposition *a fin d'annuller* was put in by appellant, accompanied by an affidavit that $500 had been deposited in the hands of the prothonotary on the 20th November, 1877, as security for the costs in the Court below. It was only subsequently to the fyling of his opposition and the dismissal of this application, after execution issued, that respondent heard, for the first time that the $500 deposited were intended for security for costs of the Supreme Court appeal. I contend there is no provision in the Statute allowing the prothonotary to accept this security; no one but the Court or a

judge thereof can certify that proper security has been given.

Instead of a proper certificate, it seems that a private arrangement was arrived at between the prothonotary and the appellant, the amount which had originally been deposited for costs in the Court below being suddenly declared to be a security for costs of an appeal to the Supreme Court. It is clear there is no certificate of a judge given within thirty days from the date of the judgment.

THE CHIEF JUSTICE: We will hear the counsel for the appellant on this point before going any further.

Mr. *Loranger*, Q. C. (Mr. *McIntyre* with him) for appellant:—

Under the law of the Province of *Quebec*, the money once deposited in the hands of the prothonotary is under the control of the Court. If a party wishes to bring an appeal, and is not in a position to give security, a deposit of money in the hands of the prothonotary is deemed a proper security, for, under 31 *Vic.*, c. 5, sec. 4, P. Q., the prothonotary is obliged to deposit all monies received in a case to the credit of the parties in the hands of the Treasurer of the Province, and this must be considered the best kind of security. As to notice, there can be no necessity to give respondent notice, as no one can remove the money but on an order of the Court. It is contended that there is no proof that the security required by law has been given. The certificate fyled is in accordance with the 31st section of the *Supreme and Exchequer Court Act*, and there is, at least, a legal presumption that proper security has been given, for the Court below allowed the appeal only after taking cognizance of the security. In our province there is no mention of money, because money deposited in Court is considered better than any bond. The money is deposited for the costs of this appeal, and,

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so far, the law has been complied with; the judges of the Court below have allowed the appeal, and the case is fixed for hearing; and we are now told that the appeal must be quashed. I respectfully submit that if this certificate is not deemed sufficient, the appellant is entitled to have the certificate and security completed in accordance with the views of this Court.

Mr. *Bethune*, Q. C., in reply:—

The order of dates disposes as to the argument relied on in consequence of the granting of the appeal. The certificate referred to has nothing to do with the security; it only has reference to the settling of the case. There is nowhere to be found a certificate of the Court below, or of a judge thereof, that proper security has been given.

RITCHIE, C. J.:—

An application was made to quash the appeal in this case on two grounds. 1st. That no appeal would lie in the case. 2nd. That the security required by the Statute had not been given. As the last objection must prevail, it will be unnecessary to discuss the first.

The 31st section of the *Supreme and Exchequer Court Act* provides that:

> No appeal shall be allowed (except only the case of appeal in proceedings for or upon a writ of *habeas corpus*,) until the appellant has given proper security to the extent of $500 to the satisfaction of the Court from whose judgment he is about to appeal, or a Judge thereof that he will effectually prosecute his appeal and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed; provided that this section shall not apply to appeals in election cases, for which special provision is hereinafter made.

And Rule 6 of the Supreme Court Rules provides that:

> The case shall be accompanied by a certificate under the seal of the Court below, stating that the appellant has given proper security

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to the satisfaction of the Court whose judgment is appealed from, or of a judge thereof, and setting forth the nature of the security to the amount of five hundred dollars, as required by the thirty-first section of the said Act, and a copy of any bond or other instrument, by which security may have been given, shall be annexed to the certificate.

The only certificate accompanying the case is as follows:

We, the undersigned, joint prothonotary for the Superior Court of *Lower Canada*, now the Province of *Quebec*, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section thirty-first of the *Supreme Court Act*, passed in the thirty-eighth year of Her Majesty, chapter second.

Montreal, 17th January, 1878.

HUBERT, HONEY & GENDRON,
P. S. C.

And it does not appear that there has been "any proper security to the extent of $500 to the satisfaction of the Court from whose judgment the appellant is appealing, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed." The mere fact that the party appealing has deposited $500 as security in appeal before the Supreme Court, according to section 31 of the *Supreme and Exchequer Court Act*, and a certificate to that effect, is neither a compliance with the Statute nor the rule. The proper security must be to the satisfaction of the Court or judge, or it is not the security required by the Statute; and the certificate must show that such is the case. It does not follow, by any means, that the Court or judge would be satisfied that the proper security was given by the appellant of his own mere motion depositing "as security on appeal" $500 in the prothonotary's office. It is not for this Court to determine whether money simply deposited in the prothonotary's office is a satisfactory security or not. It is enough to say that

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whether the security, which, it is alleged, has been given, may be a sufficient security or not, it is not the proper security required by law, and which the law has made a condition precedent to the allowance of the appeal, and without compliance with which, the law declares no appeal shall be allowed.

This case has been a long time before the Court, and the appellant, in the course of his argument, has craved indulgence to enable him to produce a proper certificate; he has taken no steps whatever to bring any facts connected with this deposit under the notice of the Court, or in any way to explain why he did not obtain a proper certificate, or even to show that this money was really deposited as security for costs in this Court on this appeal, or that it is a security satisfactory to the Court or a judge; nor has he produced any affidavit in any way explanatory of the matter, or made any formal application; nor put forward any facts on affidavit to justify this Court in delaying the plaintiff from obtaining the benefit of the judgment pronounced in his favor: but, on the contrary, the documents in this cause would show that the amount deposited by appellant has been treated by him, not as security for the costs in this cause in this Court, but as security for costs in the Court below.

STRONG, J.:—

I think the motion to quash the appeal must be granted on two grounds.

First. An appeal does not, in my opinion, lie in any case from the Court of Review directly to this Court. The *Supreme Court Act* only authorizes an appeal from the highest Court of final resort in the Province, and in the judgment just pronounced in the case of *Danjou* v. *Marquis*, I have stated my reasons for the conclusion, that the highest Court of final resort in the province of *Quebec* means, under the present judicial constitution

of that Province, the Court of *Queen's* Bench, from which alone an appeal lies to this Court.

Secondly. The payment of the $500 to the prothonotary, not having been made under any order, or to the satisfaction of the Court appealed from, or of one of its judges, was entirely unauthorized by the Statute, and therefore nugatory, and just as ineffectual as security for the costs of the appeal as the payment of the same sum into any private hands would have been. The appeal must be quashed with costs.

FOURNIER, J:—

L'Intimé demande le renvoi de cet appel pour deux motifs,—le premier, est le défaut de juridiction de cette Cour pour entretenir l'appel; le deuxième est de n'avoir pas donné le cautionnement requis par la loi pour pouvoir se porter appelant.

Ce dernier moyen doit être considéré le premier, car s'il est fondé il devient inutile de s'occuper du premier. En effet, sans un cautionnement valable il n'existe pas d'appel, et dans ce cas, cette Cour ne se trouvant pas régulièrement saisie de la cause, elle doit s'abstenir d'examiner la question de juridiction.

La sec. 31 de la 38me Vict. ch. 11, impose comme condition préalable à l'exercice du droit d'appel, l'obligation de donner un cautionnement de $500 " à la satisfaction de la Cour de laquelle il y a appel, ou d'un juge " de cette Cour." Dans le cas actuel cette formalité essentielle n'a pas été accomplie.

Au lieu du cautionnement requis, l'appelant a fait entre les mains des protonotaires du district de Montréal un dépôt de $500 pour lequel ceux-ci lui ont donné le certificat suivant:

We, the undersigned, Joint Prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said Defendant has deposited in our office, on the twentieth

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day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31st) thirty-first of the Supreme Court Act, passed in the thirty-eighth-year of Her Majesty, chapter eleven. Montreal 17th January, 1878. HUBERT, HONEY & GENDRON, P. S. C.

Le dépôt ainsi fait, s'il avait reçu l'approbation de la Cour ou du juge, serait sans doute pour l'Intimé une garantie préférable à la simple promesse ou obligation de payer, constatée par un cautionnement. Aussi les tribunaux n'ont jamais fait difficulté d'admettre que le dépôt d'une somme de deniers, tenait valablement lieu du cautionnement exigé par la loi,—mais encore fallait-il toujours avoir recours à l'autorité de la Cour ou du juge pour faire déclarer que le dépôt tiendrait lieu de cautionnement. L'appelant pouvait donc remplacer le cautionnement par un dépôt ; mais il ne pouvait pas plus dans un cas que dans l'autre, se dispenser de l'approbation de la Cour ou du juge, tel que le requiert la section ci-dessus citée. Le juge devait être appelé à donner son approbation au dépôt des deniers aussi bien qu'au cautionnement.

En supposant que le dépôt en question aurait été fait conformément aux dispositions de "l'acte concernant les dépôts judiciaires," 35 Vict. ch. 5 (Statuts de Québec), l'appelant n'en était pas moins obligé de recourir à l'approbation du juge. Le certificat des protonotaires constate que les $500 ont été déposées dans leur bureau, mais il n'y a pas de preuve que cette somme ait été remise au trésorier de la province. La sect. 4 de cet acte oblige les protonotaires de déposer immédiatement la dite somme d'argent, par eux reçue à tître de dépôt judiciaire, au bureau du trésorier de la province et de produire dans le dossier de la Cour où cette somme a été déposée, le reçu de dépôt du trésorier,—lequel reçu fait preuve *primâ facie* du dépôt.

Il n'est pas prouvé que ce reçu a été produit dans la cause. Où sont actuellement les deniers ? Sont-ils

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encore entre les mains des protonotaires ou bien les ont-ils versés dans la caisse du trésorier de la province comme ils étaient obligés de le faire? Si les deniers sont entre les mains des protonotaires, ce n'est pas là qu'ils devraient se trouver;—s'ils sont dans la caisse du trésorier, ce fait n'est pas prouvé, et nous ne pouvons pas le présumer, car la loi a pris le soin de déclarer, que le fait du dépôt, serait établi par la production dans le dossier du reçu de dépôt du trésorier.

Les protonotaires certifient bien le fait de ce dépôt dans leur bureau, mais la loi ne les a pas chargés de cette mission vis-à-vis de cette Cour. C'est la fonction de la Cour ou du juge dont il y a appel, qu'en agissant ainsi, ils ont pris sur eux-mêmes de remplir sans en avoir l'autorité. Leur devoir était de produire le reçu du trésorier dans le dossier; et sur production de ce reçu, la Cour ou le juge aurait pu donner un certificat à cette Cour constatant le dépôt. Ce certificat eût, sans doute, été considéré comme un accomplissement suffisant de la formalité requise par la loi. L'approbation du juge est de rigueur; elle est indispensable pour mettre les deniers sous le contrôle de la justice et les affecter à la garantie des frais d'appel. Elle a été imposée, sans doute, pour mettre un terme aux contestations qui s'élevaient souvent sur la validité du cautionnement lorsqu'il s'agissait d'en réaliser le montant. Cette approbation du juge est un jugement final qui rend maintenant impossible une semblable contestation.

Rien ne démontre mieux l'importance de cette formalité, que la conduite subséquente tenue par l'appelant au sujet de ce dépôt. Après avoir obtenu des protonotaires le certificat ci-haut cité, constatant que le dépôt de $500, est fait comme garantie des frais d'appel, *as security in appeal in this case*, il a essayé d'en faire un autre emploi, en prétendant qu'il avait fait ce dépôt pour couvrir les frais encourus dans la Cour Supérieure comme on le verra ci-après.

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L'appelant n'ayant pas donné le cautionnement voulu par le paragraphe 5 de la sec. 32, pour suspendre l'exécution, l'Intimé fit émaner un bref d'exécution du jugement en cette cause, le 5 décembre 1877. Pour en suspendre l'effet, l'appelant produisit une opposition afin d'annuler, dans laquelle il prétend sous serment ne pas avoir donné de cautionnement d'appel. Il dit au contraire que son dépôt doit être affecté au paiement des frais de la Cour Supérieure.

" Qu'il est plus que suffisant pour couvrir les frais mentionnés au " dit bref, et ce dépôt ayant été fait comme susdit, ainsi qu'il appert " par le certificat produit avec les présentes (celui ci-dessous cité), " le demandeur (Intimé) est sans droit à demander l'exécution de " son jugement pour le montant des dits frais."

Ce nouveau certificat, aussi donné par les protonotaires, est comme suit :

We, the undersigned Joint Prothonotary of the Superior Court for Lower Canada, District of Montreal, do hereby certify that the said Defendant deposited in our office on the twentieth day of November last, the sum of five hundred dollars as security for costs in this cause.

Given at Montreal this fifth day of December, one thousand eight hundred aud seventy-seven. Hubert, Honey & Gendron, P. S. C.

Ainsi nous avons deux certificats, l'un appropriant les deniers déposés à la garantie des frais d'appel ; l'autre, les affectant au paiement des frais déjà faits en Cour Supérieure.

C'est un double emploi que l'appelant veut faire. Il est évident que si l'on avait eu recours en premier lieu à l'approbation du juge, l'appelant n'aurait pu faire un semblable usage de son dépôt, et encore moins tenir à l'égard des tribunaux une conduite aussi peu respectueuse.

Avant d'avoir vérifié les faits par la lecture des papiers, j'aurais été disposé, conformément à la jurisprudence bien établie dans la province de Québec, à permettre l'amendement du certificat, comme la Cour

du Banc de la Reine permet l'amendement du cautionnement, surtout dans les cas où l'erreur provient des officiers des tribunaux,—mais maintenant si une demande régulière était faite à cette fin, il faudrait, pour me décider à l'accorder, une preuve suffisante pour détruire le mauvais effet produit par l'opposition de l'appelant.

Pour ces raisons j'en suis venu à la conclusion que le dépôt est nul, et que l'appelant ne s'étant pas conformé à la 31e section, au sujet du cautionnement, son appel doit être renvoyé avec dépens.

Etant d'avis qu'il n'y a pas de cautionnement, et que par conséquent cette cause n'est pas régulièrement devant la Cour, je m'abstiens d'exprimer mon opinion sur la question de juridiction.

HENRY, J.:—

This is an appeal from the Superior Court in review in *Montreal*, who gave a judgment in favor of the respondent on an appeal to that Court from the Superior Court of first instance. An appeal was first had to the Court of Queen's Bench sitting in appeal, and after argument the latter Court decided that, inasmuch as the Court of Review confirmed the judgment of the Superior Court, there was no appeal to the Court of Queen's Bench. Under the law, I think, that decision was correct, and in consequence thereof the appeal to this Court was had. On a motion before us to dismiss the appeal, the respondent's counsel relied upon two grounds:—

1st. That under the circumstances the *Supreme Court Act* provided for no appeal.

2nd. That the proper security had not been given.

Sections 11 and 17 of the Supreme Court Act were relied upon, and it was contended that under those sections there was no appeal, except from the Court of final

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resort, and that as, in most cases, the Court of Review was not a Court of final resort, no appeal would lie from it to this Court in any case.

Section 11, after declaring how the terms "judgment," "appeal," the expression "the Court," and "the Court appealed from" shall be construed, provides that "when an appeal to the Supreme Court is given from a judgment in any case, it shall always be understood to be given from the Court of last resort in the province where the judgment was rendered in such case."

It is contended, on one side, that the true construction of the last provision is to limit the appeal to cases where a judgment is of the Court of last resort not in the particular case, but of the Court of last resort generally, and that no appeal will lie in any case from any other than the Court of last resort, whether the Court of last resort has jurisdiction as an Appellate Court in any particular case or not.

On the other side, it is argued that it means the Court of last resort in the particular case.

Owing to the peculiar position of jursprudence in *Quebec*, by which the Court of Review is made, in certain cases, the Court of last resort, as is the case here, a difficulty arises as to the last clause of section 11—the words "in such case," at the end of the clause. Were these words inserted immediately after the word "Province," the sentence would then read that the appeal should be "from the Court of last resort in the Province in such case," which would clearly favor the appeal herein, and I am of the opinion that we should so place them. The words of the clause are: "When an appeal is given from a judgment, *in any case*, it shall always be understood to be given from the Court of last resort in such case." The words "in the Province where the judgment was rendered," do not, in my judgment, affect the construction, adversely

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to my view, although they precede the words "in such case." It was, it appears to me, properly the intention of the legislature to create a general Court of Appeal, and when we find that by local legislation a party is debarred from an appeal to the highest Court in a Province, and when an appeal lies from Courts of original jurisdiction, where no higher Courts exist, provided they are superior Courts, I think, in a similar case, we are justified in the conclusion that the true construction of that section (13) would give an appeal in any case where the Superior Court in *Quebec* is the Court of final resort, and were we to be governed by that section alone, I would so hold.

Section 17, however, is differently constructed. It provides that "an appeal shall lie to the Supreme Court from all *final* judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction * * * in cases where the Court of original jurisdiction is a Superior Court * * * and the right to appeal in civil cases * * * shall be understood to be given in such cases as are mentioned in this section." The word "highest" adds nothing to the value of the provision, for the *court of final resort* must be "highest," and we are to read the sentence which contains it as simply the Court of final resort. That term is synonymous with the term used in the 11th section; for "last resort" and "highest resort," mean the same thing.

Section 11 is the interpretation clause of the Act, and must be construed to extend the meaning of "final judgment" in the 17th section. "Judgment" is a technical legal term, and without sec. 11 it would be construed in its technical sense, and would not cover "rules," "orders" or other matters specified in section 11. In section 17 we have the words "highest court of final resort," which, I have shown, means no more

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than "Court of final resort." As to the meaning and application of the latter term we are to look at section 11 and decide according to its provisions as in the other in regard to the prescribed application of the term "judgment." If, therefore, my construction of the concluding clause of section 13 be the correct one, section 17, as read in the light of the provisions of the section which interprets it, that is, as to the Court of final resort, I may safely say the appeal will lie to this Court.

The Parliament of *Canada*, when passing the *Supreme Court Act*, must be assumed to know the state of the law in *Quebec*, as to appeals from the Court of Review, (which is an Appeal Court,) and to have known that no appeal would lie therefrom in certain cases to the Court of Queen's Bench in appeal. The Act provides for appeals from all provinces where the Court of original jurisdiction is the Court of final resort in all cases. The policy of the Act is, therefore, to allow appeals in all cases where the Court of original jurisdiction is the Court of final resort, where the Court of original jurisdiction is a Superior Court. In certain cases, then, in *Quebec*, where the Court of original jurisdiction is a Superior Court, and, as to those cases, a Court of final resort, unless my construction be adopted, there would be no appeal, while in other provinces there would be. In *Quebec*, as to those cases, there would be no appeal, while in other provinces under similar circumstances an appeal lies. In the construction of Statutes, where any difficulty arises, we are not only authorized, but required to give effect, not only to the mere words employed as far as they are intelligible, but to give effect as well to the spirit as the letter of the enactment, and if by one construction an obvious inconsistency appears and by another it is consistent, we are bound to give a construction by which its consistency

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will be shown. I, therefore, consider myself justified in deciding that the appeal herein is provided for.

The other point, however, I feel bound to decide against the appellant. By the rules of this Court the appellant is required to put in security to the satisfaction of the Court appealed from or of a judge thereof, and the case must be accompanied by a certificate, under the seal of the Court, so stating. The certificate in this case is defective. In the first place it is not under the seal of the Court as required by rule 6 of this Court, and it does not allege the security to have been "to the satisfaction of the Court * * * or of a judge thereof." Section 31 of the *Supreme Court Act* requires the security to be so given, as well as the rule before mentioned. By the section and rule the security must be given to the satisfaction of the Court below or a Judge thereof, and the rule provides for the evidence of that fact to us. The right of deciding as to the sufficiency of the security is vested in the Court below or a Judge thereof, and I can see no way for substituting any other means of deciding it. Even were it shown the security was ample, we are not authorized to decide upon it, as the law has not authorized us to do so. Our jurisdiction to hear the appeal is conditional upon the Court below or a Judge thereof being satisfied with the security. Although not within our functions to decide upon the sufficiency of the security, we might possibly have reserved our decision and allowed the appellant reasonable time to obtain the necessary certificate, had we been so asked within a reasonable time after the appeal was first inscribed; but no such request having been made and so long a time having elapsed, I don't think we should now suggest such a course, or permit it to be taken. I think, therefore, the appeal must be dismissed.

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TASCHEREAU, J.:—

On the first ground of the respondent's motion to dismiss this appeal, that is to say, for want of sufficient security, I would be of opinion to remit the record to the Court below, under the fourth of the rules of practice of this Court, in order to allow the certificate to be completed. The prothonotary duly certifies to us that the appellant has deposited in his office the sum of $500 as security in appeal to this Court, according to section 31 of the *Supreme Court Act.* According to 35 *Vic.*, c. 5, Q., an Act concerning judicial deposits, that sum must now be in the hands of the Provincial Treasurer as such security. *Omnia presumuntur rite esse acta donec probetur in contrarium.* The first certificate given by the prothonotary, filed by the respondent with his motion, is not at variance with the certificate returned to this Court with the case, and I fail to see by the opposition made by the appellant in the Court below, and fyled here by the respondent with his motion, that these $500 were deposited for any other purpose than as security for the appeal to this Court. What other security was the appellant obliged to give, or could he even give? The prothonotary certifies to us that security has been given for the appeal to this Court, and for me this is conclusive. But there is an irregularity in this certificate, inasmuch as it does not state, as required by the 6th of our rules of practice, that such security was given to the satisfaction of the Court appealed from or of a judge thereof. As $500 deposited in cash are certainly the best security that could be given under section 31 of the *Supreme Court Act*, this irregularity seems to me only a matter of form, and, according to the 69th of our rules of practice, which says that no proceeding in this Court shall be defeated by any formal objection, I would be of opinion to remit

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the record to the Court below to have this irregularity remedied.

But on the second ground of his motion I am with the respondent, and think that this appeal should be dismissed, because it is an appeal from the Court of Review, and consequently not from the highest Court of last resort in the Province of *Quebec*.

I need not repeat here what I have just said in *Danjou* v. *Marquis*. For the reasons I gave then, which apply, for the greater part, to this case, I am of opinion that there is no appeal from the Court of Review in the Province of *Quebec*, because that Court is not the Court of last resort in the Province. The appellant contends that for him, in this case, the Court of Review is the Court of last resort. That is so. But it is not the Court of last resort in the Province where the judgment was rendered in this case, according to the very words of section 11. He is not allowed to go to that Court of last resort, but that is by his own act, and, then, it is not a reason to allow him an appeal from any other Court, in face of this section 11 of the *Supreme Court Act*. Then section 17, under which he brings his appeal, is still stronger against him. "An appeal shall lie to the Supreme Court," says this clause, "from all final judgments of the highest Court of final resort now or hereafter established in any Province, and the right to appeal in civil cases given by this Act shall be understood to be given only in such cases as are mentioned in this section" This seems to me perfectly clear. No appeal, except from the Court of last resort in each Province is given. If a different construction was given to the Statute, this case might have been pending at the same time before this Court and before the *Quebec* Court of Appeal. For immediately, when the judgment in Review was given, confirming the judgment of the Superior Court, the plaintiff, who, in

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the Superior Court, had obtained judgment for $16,000 less than he demanded, had a right to appeal to the Court of Queen's Bench from that judgment, under sections 499 and 1118 of the *Code of Procedure*. So that the case would have been pending at the same time before the Court of Queen's Bench on an appeal by the plaintiff from the judgment of the Superior Court, and before this Court on an appeal by the defendant from the judgment of the Court of Review.

I am of opinion that this appeal should be quashed with costs.

Appeal quashed with costs.

Solicitors for appellant: *Loranger, Loranger & Pelletier.*

Solicitors for respondent: *Bethune & Bethune.*

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*Feb'y. 11.

*April 16.

GEORGE GUNN.....APPELLANT;

AND

WILLIAM COX.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Evidence—Judgment, parol evidence of determination of suit by, inadmissible.

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in *Nova Scotia*, whose judgment, it was alleged, was reversed in appeal by the Supreme Court of *Nova Scotia*, oral evidence—"that the decision of the magistrate was reversed,"—was deemed sufficient evidence by the Judge at the trial of the determination of the suit below.

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*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J.

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Held (reversing the judgment of the Supreme Court of *Nova Scotia*), that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of *Nova Scotia*.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, rendered on the 2nd April, 1877.

This was an action brought by respondent (plaintiff) against appellant (defendant) to recover damages for alleged malicious prosecution.

The writ was issued on the 21st October, A. D. 1873, and the cause was tried before Mr. Justice *DesBarres* on the 28th March, A.D. 1876, when a verdict was found for the plaintiff for $150 damages.

A rule *nisi* was taken under sec. 212, c. 94 of Revised Statutes of *Nova Scotia*, 4th series, to set this verdict aside, the Judge having refused a rule, and was argued before the Supreme Court of *Nova Scotia* on the 12th day of April, A.D. 1876.

The rule *nisi* was discharged on the 2nd April, A.D. 1877.

The facts and pleadings sufficiently appear in the judgments on this appeal.

Mr. *Cockburn*, Q.C., for appellant:

There was no sufficient proof of the termination of the suit below. *R. L. Weatherbe's* evidence is the only evidence that the suit below was terminated. Mr. *Weatherbe* admits that the Judges on appeals of summary causes keep or use a docket and make minutes of their proceedings. This book should have been produced. There was, therefore, mis-direction on the part of the learned judge who tried the cause, who ought to have told the jury that there was not sufficient evidence to prove the termination of the proceedings under which the arrest was made. See *Panton* v. *Williams* (1); Rev. Stat. *Nova Scotia*, 4th series, c. 91, sec. 266.

(1) 2 Q. B. 169; L. R. 4 H. L. 521.

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Mr. *A. F. McIntyre*, for respondent:—

No objection was made to the charge by counsel on either side. The evidence of Mr. *Weatherbe*, which was offered and received to prove the termination of the proceedings had under the *capias*, was in all respects sufficient to establish the termination of those proceedings. The question whether judgment was given in favor of the respondent in the proceedings on the *capias* being a matter of fact was held to be properly provable as such by any competent witness present when the judgment was delivered and who knew the fact.

Dyson v. *Wood* (1); also *Sinclair* v. *Haynes* (2); *Pierce* v. *Street* (3); *Arundell* v. *White* (4).

There was no necessity under the practice of the Court to prove by record or memorandum the determination of the suit, for no record is filed in appeal cases, and execution issues in such causes upon the bill of costs filed without any record.

Rev. Stat. *Nova Scotia*, c. 91, secs. 1, 2, 3, 4, 19, 20, 31, 32, 33, 34; c. 94, sec. 77, 78 and 266.

The learned counsel also referred to *Broad* v. *Ham* (5).

THE CHIEF JUSTICE:—

This was an action for maliciously, and without reasonable or probable cause, procuring a party to be arrested and imprisoned on a writ issued against him at suit of defendant, and the declaration alleges, that "such proceedings were thereupon had in the said action that the now plaintiff obtained final judgment of *nil capiat* thereon against the now defendant, whereby the said action was determined;" and, in an added count, he

(1) 3 B. & C. 449.
(2) 16 U. C. Q. B. 247, 250, 251.
(3) 3 B. & Ad. 397.
(4) 14 East 216.
(5) 5 Bing., N. C., 722.

alleges that the magistrate who issued the writ gave judgment for plaintiff, the now defendant; that the now plaintiff, the then defendant, applied for, and perfected, an appeal from the said judgment to the Supreme Court according to the Statute, and the now plaintiff caused his appeal to be entered upon the docket of the Supreme Court, and did duly prosecute his said appeal in said Supreme Court, and such proceedings were thereupon had in said suit that the said judgment was reversed, and the now plaintiff obtained final judgment in said suit of *nil capiat* therein, against the now defendant, whereby said action was determined.

To this declaration defendant pleaded *inter alia*:

"6th. That the said action was not determined as alleged.

"9th. That the plaintiff did not appeal from the judgment of the said stipendiary magistrate as alleged.

"10th. That the said judgment was not reversed, as alleged, on appeal to the Supreme Court, whereby said action was determined as alleged."

On the trial, the judgment given by the magistrate appears to have been proved, and the only evidence given to support the allegation as to the appeal, reversal and final judgment that I can discover is as follows:—

Robert L. Weatherbe, sworn: I acted as Counsel for *Cox* on his appeal before the Supreme Court at *Truro*, at which Judge *McCully* presided. The decision of the magistrate was reversed.

Mr. *McDonald* objects.

Cross-examined: Don't know whether any judgment was entered in the Supreme Court on the appeal, or whether any execution was issued. I don't know whether Judges make entries on their dockets of the judgments which they deliver in summary and appeal causes, but I believe they make minutes.

Mr. *Thompson* objects.

And *Gunn*, defendant, says:

I was at the Supreme Court and heard the trial under the appeal.

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The only reference to this important allegation by the learned judge in his charge appears, after stating that in order to maintain suit it was incumbent on the plaintiff to give evidence of malice and want of probable cause for issuing writ and causing plaintiff to be arrested, to be comprised in these words "*and also to prove that the suit below was at an end.*"

A verdict having been found for the plaintiff, the defendant moved for a new trial on the ground, among others, of want of sufficient evidence of the termination of the suit in which the *capias* was issued. The Court discharged this rule and refused a new trial, and from this the defendant now appeals.

This is too plain a case to need any lengthened argument. There was no legal evidence of any determination of this suit, and the Judge should have directed a verdict for the defendant.

The case of *Pierce* v. *Street* (1), upon which the judgment of the Court is founded, has no application to this case whatever. In that case defendant had not declared within a year. Now we all know that formerly in *England* as well, I may say, as in *New Brunswick*, and I believe also in *Ontario*, by the general rule of law, a plaintiff must declare against a defendant within twelve months after the return of the writ; if he did not the cause was out of Court, and so most undoubtedly the cause was at an end, and there was no other way of showing it than, as was done in that case, by showing there was no declaration within the twelve months, and, therefore, Lord *Tenterden* says:

> There was quite sufficient proof that the suit was at an end at the time when this action was commenced.

And *Littledale*, J., says:

> The suit was determined by the plaintiffs not declaring within a year.

(1) 3 B. & Ad. 397.

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And *Parke*, J.:

When the cause is out of Court, it must be considered determined.

And it is somewhat curious that *Arundell* v. *White* (1), referred to by *Parke*, J., though noticed by the Court below, did not serve as a guide to show that such evidence as was given by *Weatherbe* in this case was wholly insufficient, and that though there may be no extended records, some evidence from the minutes or records of the Court is requisite. There it will be seen, as noticed by *Parke*, J., when in the Sheriff's Court in *London*, the practice was, upon the abandonment of a suit by the plaintiff, to make an entry in the minute book, it was held proof of such entry was sufficient to show that the suit was at an end. This case is much stronger here, the cause was never out of Court and never abandoned. If the suit was determined at all, it must have been by a solemn judgment of the Supreme Court, reversing the judgment of an inferior tribunal. If such took place, to say that in a Court such as the Supreme Court of *Nova Scotia*, there was no entry or record of such a judgment, or no docket, minute, or memorandum book, or no document of any description fyled of record in which the decision of the Court was entered or kept, either by Judge or Clerk, nothing in the shape of a record to show how the parties' rights had been dealt with, and how the cause was disposed of, is simply incomprehensible and inconsistent with the Revised Statutes of *Nova Scotia* (4th series). If no judgment was entered on the appeal, the party who desired to take proceedings in which it was necessary to show the cause finally disposed of, should have, by proper application, obtained a final disposition on the records of the Court before bringing an action, in which the

(1) 14 East 216.

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determination of the suit was essential to his right to recover. If it has been disposed of, then that fact should be shown by an exemplified or examined copy from the records of the Court, and not, as in this case, by a party who was present at the appeal simply swearing "the decision of the magistrate was reversed;" and this was objected to, which objection should have been sustained. Certainly, such a statement was not proper evidence of a final judgment of the Supreme Court of *Nova Scotia*.

FOURNIER, J., concurred.

HENRY, J.:—

This is an appeal from a judgment of the Supreme Court of *Nova Scotia*, in an action brought by the respondent to recover damages for malicious arrest under a writ of *capias*, issued by a justice of the peace at the suit of the appellant. To the respondent's declaration the appellant pleaded in substance, (and they are the only pleas necessary to be noticed):—

1st. A denial that he issued the writ in question without reasonable and probable cause.

2nd. That the suit commenced by the issue of the said writ of *capias* was not determined as alleged.

3rd. That he had probable cause for bringing the said action.

4th. That the respondent did not appeal from the judgment of the magistrate, as alleged.

5th. That the judgment given by the justice on the appeal whereby the said action was determined was not reversed as alleged.

On the trial of this cause an unsuccessful motion was made for a non-suit by the counsel of the appellant on the two following grounds:—

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1st. That there was no sufficient evidence to show the determination of the prior suit.

2nd. No sufficient proof of the want of reasonable and probable cause.

Under the charge of the learned Judge, before whom the suit was tried, a verdict was given for the respondent for $150 damages. A rule *nisi* to set aside the verdict and grant a new trial was subsequently granted, and the same was, after argument, ordered to be discharged with costs; and from that decision the appeal was had to this Court.

The grounds for setting aside the verdict embodied in the rule *nisi* were:—

1. Because the verdict is against law and evidence.
2. Mis-direction.
3. For the improper rejection and reception of evidence.
4. For excessive damages.
5. On the grounds taken at the trial.

Under the first and third objections the appellant can question the validity of the verdict.

The objection at the trial on the motion for non-suit was that no sufficient evidence had been given of the termination of the prior suit; and that is covered by the first ground taken in the rule *nisi*, and also in the third, which objects to the reception of the evidence received, after being objected to, of the termination of the suit given by the only witness on that point.

Entertaining the views I do as to the propriety of admitting that evidence, it will be unnecessary for me to refer to any other objection to the judgment. The only evidence adduced as to the determination of the prior suit was, as I copy it from the Judge's notes of the trial, as follows:

Robert L. Weatherbe sworn:—I acted as counsel for *Cox* on his

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appeal before the Supreme Court at *Truro*, at which Judge *McCully* presided. The decision of the magistrate was reversed.

Mr. *McDonald* objects.

The notes of trial show that Mr. *McDonald* was, on the trial, the counsel of the appellant. It is, therefore, open to the appellant still to object to that evidence, as the objection to it was over-ruled and that evidence submitted to the jury. On his cross-examination the same witness said:

Don't know whether any judgment was entered in the Supreme Court on the appeal, or whether any execution was issued. I don't know whether the Judges make entries in their dockets of the judgments which they deliver in summary and appeal causes, but I believe they make minutes.

To this evidence the counsel of the respondent objected.

We have, therefore, the evidence on cross-examination objected to also. I think that evidence was quite admissible, going, as it did, to show there was evidence in writing that should have been produced. Every lawyer knows that primary evidence is what is called for on every legal trial, and until that is shown to be incapable of production, from its having been destroyed or otherwise, secondary evidence cannot be received.

It is a distinction of law, and not of fact, referring only to the *quality* and not to the *strength* of the proof. Evidence that carries on its face no indication that better remains behind is not secondary but primary. The cases which most frequently call for the application of the rule now under consideration are those which relate to the *substitution of oral for written evidence*, and the general rule of law with respect to this subject is, that the *contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parol evidence.*

* * * * * *

And first, oral evidence cannot be substituted for any *instrument* which the law requires *to be in writing*, such as records, public and *judicial documents*, official examinations, deeds of conveyance of land, wills, &c. * * * In all these cases the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing

exists and is in the power of the party. Thus, for example, parol evidence is inadmissible to prove at what sittings or assizes a trial at *nisi prius* came on, or even that it took place at all; but the record, or, at least, the *postea* must be produced. So the date of a party's aprehension for a particular offence cannot be shown by parol, the warrant for apprehension or committal being superior evidence (1).

In his cross-examination, the witness before mentioned, when referring to Judges trying summary or appeal causes, says he believes "they make minutes," and certainly creates the impression that "there is better evidence beyond." He, the witness, only states that he acted for the respondent on his appeal, and that the judgment of the magistrate was reversed. He does not identify it as being the suit brought by the appellant under the *capias*, nor does he say how he came by the knowledge that the judgment was reversed. If oral evidence was at all permissible, he, if such were the case, should have stated that he was present and heard the judgment pronounced, or, in some other way, shown how he acquired the knowledge which might, for all he says, have been mere hearsay. It may be objected that he might have been cross-examined, and the source of his knowledge tested, but, I hold that the onus was on the respondent by the examination of his counsel to have got from the witness sufficient to show that he obtained his knowledge from a legitimate source. The evidence, therefore, in the bald way it is presented, does not, even if admissible, establish the fact that the particular suit referred to in the pleadings was determined.

Let us consider, however, the provisions for the trial of appeal cases in the Supreme Court of *Nova Scotia*. By section 77 of the *Practice Act*, Revised Statutes, 4th series, p. 456 :

In appeal causes, the appellant shall cause his appeal to be entered on the docket of summary cases, and in case he shall neglect to

(1) Taylor on Evidence (7th ed.,) pp. 358, 359 & 362.

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enter the same, the original judgment shall be affirmed at the instance of the opposite party, with costs.

Sec. 78. In all causes brought up by appeal and contested, the Court shall try the same anew.

Sec. 79 provides for a jury in summary and appeal cases at the discretion of the Court.

Sec. 80. In appeal cases, where the original judgment is affirmed, the final judgment shall include the debt and costs below, with the further costs, and execution shall issue for such debt and costs, or costs only as the case may require. Where the original judgment is reversed after the same has been enforced, the final judgment shall include the amount levied under the original judgment, together with the costs of reversal.

Sec. 81. In appeal cases the respondent may take out execution against the appellant or have recourse to the appeal bond.

Sec. 244 provides that:

The prothonotary shall examine and compare all bills of costs.

And that:

Before any such bill shall be charged against the plaintiff or defendant, it shall be allowed and signed by a Judge.

Sec. 235. Final judgment may be signed by any Judge, and the Judge shall set down the date on the docket. And the prothonotary shall mark on the record the day it was signed, but no marginal note shall be required thereon.

To carry out these enactments, it was necessary that judgment in summary and appeal causes should be signed. A docket of such causes was and is required, upon which, no doubt, minutes were made by the Judge or prothonotary. Bills of costs are to be taxed by the Judge after examination by the prothonotary; and other proceedings are to be in writing.

We must presume, without proof, that such proceedings in writing exist, and to which the rules of evidence apply. None were produced and nothing shown to dispense with their production. The evidence admitted being wholly irregular when objected to, and the termination of the previous suit being, therefore, not proved, the respondent has failed in an essential part of

his case. The appeal must be allowed and the rule *nisi* for a new trial be made absolute with costs.

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TASCHEREAU, J.:—

One of the material allegations of the Plaintiff's declaration was that the original action by the present defendant against him was determined. By the 6th and 10th of his pleas, the defendant specially denied this allegation, which necessarily had to be proved at the trial. The plaintiff did attempt to prove it, but how? By parol evidence. Now, can it be seriously pretended that the judgment of a Court of Justice can be proved by parol evidence? The defendant was examined, but he does not admit that judgment was given in the first case. As far as I can see by the minutes of the evidence, no question was put to him about it. Of course, as said by the learned Judge in the Court below, as soon as a judgment is pronounced in Court, the suit is terminated, and an action, like the present one, may be immediately taken. But when it comes to prove the judgment, it has to be done according to the rule that the best attainable evidence must be adduced to prove every disputed fact. The cases of *Arundell* v. *White* (1), and *Dyson* v. *Woods* (2), cited by the respondent, only go to decide that the proceedings in Courts of inferior jurisdiction and Courts not of record may be proved by the minute books in which they are entered, or by copies of such books, or, perhaps, by the officer of the Court, or other competent person, if it is proved that no entry of them has been made in any official book. This cannot be applied to the Supreme Court of *Nova Scotia*, and, then, no minute book, no writing whatsoever has been produced here, nor has it been proved that none exist. The parol evidence pro-

(1) 14 East 216. (2) 3 B. & C. 449.

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duced, under the circumstances, seems, to me, perfectly illegal.

The case of *Pierce* v. *Street* (1), also cited by the respondent, is not in point. The question there was the determination of a suit by discontinuance. Here, the respondent alleges, in his declaration, that the first suit was determined by a judgment of the Supreme Court of *Nova Scotia*.

I am of opinion that in the judgment of the Court below discharging the rule for a new trial obtained by the defendant, there is error; that the defendant's appeal from the said judgment must be allowed, and that the said rule must be made absolute, the whole with costs against the respondent.

GWYNNE, J., concurred.

Appeal allowed with costs.

Solicitor for appellant: *R. L. Weatherbe.*

Solicitor for respondent: *Samuel G. Rigby.*

(1) 3 B. & Ad. 397.

HUGH CLARKE.....APPELLANT; 1879

AND *Feb'y. 7.
*May 7.

TRUEMAN P. WHITE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Agreement, construction of—Sale of Timber—Consideration—Right to recover back money paid.

C., after having examined a lot, entered into an agreement with *W.*, the owner, whereby the latter sold all the pine timber standing on the lot to *C.*, "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per hundred cubic feet," and *C.* paid to *W.* $1,000, "the balance to be paid for before the timber is removed from the lot." *C.* cut $651.17 worth of first-class timber, suitable for the *Quebec* market, which was all of that class to be found on the lot, and sued *W.* to recover back the balance of the $1,000, namely $348.83.

Held,—That the true construction of the contract was that *W.* sold and granted to *C.* permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber;" that there was more than sufficient "good merchantable timber," still remaining on the lot to cover the balance of the $1,000, and that there was no evidence to show that the contract had been rescinded.

Per *Taschereau* and *Gwynne*, J. J., that the payment of the $1000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error he, and not the defendant, must suffer the consequences of this error.

APPEAL from a judgment of the Court of Appeal for *Ontario*, reversing the judgment of the Court of Com-

*PRESENT:—Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, J.J.

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mon Pleas of the said Province, rendered on the 29th December, 1877 (1).

This was an action brought by the plaintiff (appellant) to recover from the defendant a portion of certain purchase money for timber paid by the plaintiff to the defendant, the plaintiff alleging that there was a failure of consideration to the amount sought to be recovered back, also that there was a rescission of the contract under which the money was paid, whereby he became entitled to a return of that portion of the purchase money for which he received no value.

The action was in the Court of Common Pleas for *Ontario*, and was begun by writ of summons issued on the 30th day of May, A. D. 1877.

The respondent pleaded:—

1. Payment;
2. That he never was indebted as alleged;
3. Set off.

The contract reads as follows:—

"*Whitevale*, 8th September, 1876.

"I have this day sold to *Hugh Clarke*, of *Agincourt*, all the pine timber standing on south half of lot 32, concession 5, *Pickering*, such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per 100 cubic feet, and have received the sum of $1,000, the balance to be paid for before the timber is removed from the above lot, and I hereby grant the privilege of removing the timber across the land free of all incumbrance.

"T. P. WHITE."

There was evidence, which will more fully appear in the judgments, that "good, merchantable, waney-edged timber" is a definite description of timber, and that "first-class timber" is a different quality of timber.

(1) 28 U. C. C. P. 293.

Previous to entering upon the agreement the appellant represented to the respondent that there was on the lot some 15,000 to 16,000 feet of timber suitable for his purpose; and it was proved that all the "first-class timber" which was to be found on the lot was cut before appellant stopped cutting.

The cause was tried on the 24th day of October, 1877, at the Assizes for the County of *York*, at *Toronto*, before *Hagarty*, C. J., of the Court of Common Pleas, without a jury, and a verdict was then entered for the plaintiff for $348.

In Michaelmas Term, November 26th, 1877, the defendant obtained a rule *nisi* to set aside the said verdict, and to enter a non-suit, or for a new trial between the parties, and on the 29th December, 1877, a rule absolute was granted as of Michaelmas Term 41st *Victoria*, whereby the said rule *nisi*, obtained by the defendant, was discharged.

The defendant appealed from the said judgment to the Court of Appeal for *Ontario*, and on the 16th day of March, A. D. 1878, an order was made by the last mentioned Court whereby the rule *nisi* obtained by the defendant in the Court below was made absolute to enter a non-suit, and against the last mentioned order or judgment the plaintiff appealed to the Supreme Court of *Canada*.

Dr. *McMichael*, Q. C., for appellant:—

The case turns principally on the construction of the agreement under which the timber was bought. What is the meaning of the contract by itself? The words in dispute are "good merchantable waney-edged timber, *suitable for his purpose*." Parol evidence is permissible to show the meaning of the words "suitable for his purpose." The defendant contends that these words mean suitable for the *Quebec* market. Plaintiff contends

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that they mean the timber suitable for the contract he had to fulfil at the time. Plaintiff has proved that he took all the timber suitable for his purpose, and specified by his contract, and he has, therefore, a right to recover the balance of the money. The words "suitable, &c.," imply a power of selection, and they are controlled by the words "suitable for his purpose." These words mean "good, merchantable timber of *the first-class.*" Adding these words does not contradict the previous words. *Clarke* told *White* "that he was taking out the timber for the *Quebec* market for *McLean Stinson*, first-class waney-edged timber, and *White* must have so understood the contract. This evidence has been no doubt overlooked.

The agreement itself made the appellant the judge as to what would suit him and what would not, and he was not bound to take any but what suited him, and was entitled to all that would suit him. If, therefore, the agreement, unaided by parol evidence, is to control, the verdict was right and the judgment of the Court of Common Pleas should be affirmed, and the judgment of the Court of Appeal reversed. If parol evidence is admissible to explain the meaning of the words "suitable for his purpose," the parol evidence shows his purpose was to fill his contract with *McLean Stinson*, in other words, first-class timber such as that contract called for, and as there was upon the evidence, only a little over 5,000 feet of that kind of timber the appellant was entitled to recover back the difference between the $1,000 paid and the value of the quantity of that kind of timber obtained.

If we do not go out of the agreement, these words mean "what will suit me." See *Towers* v. *Barrett* (1). As to the question of the rescission of the contract, it

(1) 1 T. R. 133.

is not necessary to discuss it, as the Chief Justice says: "There was no contract left to rescind." All the timber that could be found was taken, and all that remained was to seek to recover back the amount mistakenly overpaid.

Hon. Mr. *McDougall* for Respondent:—

Plaintiff was lumbering for the *Quebec* market, and was an expert. He went into the defendant's lot and examined the trees. He (plaintiff) knew the soil. The plaintiff took another expert with him, and these two went through, settling in their own minds how many trees there were suitable for their purpose. They came to the conclusion that there were 150 trees suitable for their purpose—about 16,000 feet. They went to the plaintiff, who says: "I will not let you go into my bush and select my best trees and leave the rest." Then the agreement was signed. The form of the agreement was printed, and originally contained the words "square timber," which mean *first class timber*. These words were struck out, and the other words "good, merchantable, &c.," were *interlined*. The price was an average price. *Brady's* evidence proves this; and his evidence is uncontradicted, except by the plaintiff and *Stinson*, who go upon what they say the agreement calls for, viz.: first class timber. None of the illustrations used apply to this case. A better illustration would be that of a butcher engaged in sending cattle to a European market. He goes through the herd of a farmer and says: "I think there are 50 there suitable for my purpose. I will give you $10 a piece for them." He takes only 25 of the best. He must, in this case, be bound by what he considered his purpose.

At the trial, the Chief Justice thought there was a rescission of the contract, but there were only complaints on the part of the plaintiff. The defendant ad-

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mits there were some trees left suitable for his purpose, and there were sufficient trees of the first class to meet the contract. *Towers* v. *Barrett* is not applicable. There the subject matter was purchased on condition that it would meet with approval of a third person.

The plaintiff must show that the other party had the same understanding of the contract. See *Addison* on Contracts, p. 973.

Dr. *McMichael*, Q. C., in reply:

In the factum, the defendant does not contend there was sufficient quantity of first class timber left to complete the contract, but that there is a large quantity of merchantable timber left on the land. *Oxendale* v. *Weatherall* (1) is the converse of this case.

THE CHIEF JUSTICE:—

Action for money lent by plaintiff to defendant, for money paid by plaintiff for defendant, and at his request, and for money received by defendant for the use of plaintiff.

Plea—1st. Before action defendant satisfied and discharged plaintiff's claim.

2nd. Never indebted.

3rd. Plaintiff indebted to defendant in an amount equal to plantiff's claim for goods sold, work done, money lent, money paid, money received, and for interest.

Plaintiff's case is that he purchased certain timber from defendant under the following contract: [His Lordship read the contract (2)]. That there was not a sufficient quantity of timber in the land of the description named in the contract at the rate of $13 per 100 cubic feet to amount to $1000, and that he is now entitled to recover back the difference by reason of the failure of consideration.

(1) 9 B. & C. 386. (2) See p. 310.

If, as a matter of fact, there was not sufficient timber at the price named to cover the $1000, I think plaintiff would be entitled to recover the difference. I think the consideration in this contract being severable and the price apportionable accordingly, a failure of part of the consideration would give a right to recover a proportionate part of the price. I think under the terms of this contract the quantity plaintiff was to pay for was to be regulated and determined by measurement; that it was never intended that plaintiff should pay more than $13 per 100 cubic feet. If there was in fact only 5000 cubic feet on the land, to allow defendant to retain the $1000 would be to make plaintiff pay $20 per 100 cubic feet instead of $13, which would be, in my opinion, in direct opposition to the express terms of the contract. In the case of *Devaux* v. *Conolly* (1), which was an action brought for money had and received, to recover back a sum overpaid as upon a partial failure of consideration, in the course of argument counsel cited the observation of Lord *Ellenborough* in *Cox* v. *Prentice* (2) as follows:

> Let us put the case of parties agreeing to abide by the weighing of any article at any particular scales, and in the weighing an error, not perceived at the time, takes place from some accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, would not, in that case, money had and received be sustainable?

Maule, J., says:—

> No doubt about that; it would be like the purchase of a box of eggs at so much per hundred, and after the buyer has paid for them upon the supposition that the box contained 4000, he ascertains there are but 3,500.

It is very obvious that both parties were under the impression that there was more timber on the land than $1000 worth, at the price fixed, and no doubt

(1) 8 C. B. 640. (2) 3 M. & S. 344.

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there was considerable discussion between the parties in reference to this, before the contract was finally closed, and it is very possible both parties were, more or less, influenced by this consideration. But, I think, that what took place as to the probable quantity of timber on the lot was merely matter of discussion and expression of opinion, and that both parties honestly thought there was more than $1,000 worth of timber at the price named, of the description in the contract on the land. But, I think, there was no fraudulent representation in respect thereof, nor any representation constituting a warranty; that what took place was not understood or intended to, and did not, form any part of the contract, and though both may have been disappointed in their expectation, that would not alter the terms of the contract; that what the defendant sold and what the plaintiff purchased was all the timber standing on the lot of the description named at a certain rate per 100 cubic feet; nothing more, nothing less; that neither party knowing how much there was, plaintiff paid on account $1000. If there was more timber than $1000 would pay for, plaintiff was to pay the balance, if not enough to amount to $1000, plaintiff, in my opinion, would be entitled to recover back the difference. If there was $1000 worth of timber on the land, plaintiff was bound to take it out, and could not leave any part in the woods, and claim to be repaid any portion of the $1000 paid, because in such a case there was no failure of consideration.

I do not think there is any evidence of any abandonment or rescission of this contract. I think the evidence shows Mr. *White* did not stop plaintiff or his men, or put an end to the contract. Plaintiff says:

When Mr. *White* stopped the men working, I saw him and told him then, that I would see the men, and see that they were more careful. The men went on cutting after that. Mr. *White* did not interfere with either my men or me after that.

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The questions, then, which, I think, must determine the rights of the parties are: first, what is the construction of this agreement as to the description of timber? Having settled that, was there a sufficient quantity of the timber so specified in the agreement to amount to $1000?

As I read this contract the words "good merchantable waney-edged timber" designate the description or character of the timber, and the terms "suitable for his purpose," do not alter such description or character, but indicate that such timber will suit his purpose; that they do not justify any extension of or addition to such description, which appears to have a well understood meaning among those engaged in the lumbering business, still less to justify the insertion of qualifications by eliminating certain words and inserting others in their stead, which would remove the timber from the general class named, and limit and confine it to timber of a special class and of a superior quality; nor do I think there is anything in the parol testimony to vary this construction, but, on the contrary, if on the face of the contract there is any ambiguity which it would be proper to remove by parol evidence, the weight of evidence, I think, shows that this was the intention of the parties.

As to the first question, I have carefully examined plaintiff's evidence, and all he says as to the description or quality of the timber is as follows in his direct examination:

I made a claim against Mr. *White*, because I could not get enough of timber suitable for the purpose. * * There was not enough stuff on the lot to answer the agreement. * * * Mr. *White* found fault that we were cutting very small pieces out of large trees, and I did not want to press him. I think some of the 40 trees his man cut might have answered my purpose. I saw his men cutting a tree myself that I thought would make a piece. * * *

I am in the habit of buying timber and cutting it for the

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Quebec market. * * * We only cut fifty trees, that being all that was there suitable for my purpose, I mean that in the whole bush only 50 trees were fit for my purpose. * * * I suppose my men cut down all the trees that were suitable. They were there for that purpose. I saw one tree afterwards that *White's* men were cutting that I thought would make a piece.

To his Lordship—I have been at the place since, there is no timber there suitable for my purpose.

I will swear there is not a number of trees suitable for my purpose there still.

Now, it is most remarkable, if what has been pressed on us is the true construction of this agreement, that the plaintiff himself does not, in his direct examination or re-examination, pretend to say that "good, merchantable, waney-edged timber" was not the timber intended, nor that such timber was not suitable for his purpose, nor, more remarkable still, does he say one word in his direct examination as to what his purpose was in getting the timber, but on cross-examination he says:

I am in the habit of buying timber and cutting it for the *Quebec* men. I was paying $130 per 1,000, I was getting $175 for the timber delivered at *Frenchman's Bay*. I had to haul it from lot No. 5, in *Pickering* to *Frenchman's Bay*, I paid as high as $110 in the same neighbourhood. I paid $135 to *Armstrong;* that was that season. The average that season was more than $110 or $115. The reason for my being anxious to get as much timber in that neighbourhood as possible, was that if I managed to get a full crib at *Frenchman's Bay*, I was to get the same price as at *Toronto;* but, if I did not succeed in this, I was only to get the same price as delivered at the railway, which was considerably less.

In all this it may be inferred he was getting this timber for sale deliverable at *Frenchman's Bay*, but, notwithstanding this was drawn from him in his examination in his own case, he does not tell us the description of timber he was to deliver at the bay; still less does he say that "good, merchantable, waney-edged timber" was not suitable for that purpose; nor does he, throughout his whole evidence, in his own case venture to say one syllable as to having communicated to defen-

dant, previously to or at the time of making the contract, any purpose for which the timber was to be suitable.

Bethune, the employee of plaintiff, says:

I know what timber would be suitable for Mr. *Clarke's* purpose. As far as my knowledge went, we cut all the trees that were there suitable for our business. I was through lately with Mr. *Clarke*. I saw but one tree there that there might be a short piece taken out of.

And his direct examination likewise ends without a word as to the purpose for which the timber was required, or as to the description of timber that would answer that purpose. But on his cross-examination he says:

We were supposed to take out first quality. * * * We were making timber suitable for the *Quebec* market. * * * I do not think there are trees standing there now out of which timber could be taken suitable for the *Quebec* market.

Though he refrains from saying what description of timber is suitable for the *Quebec* market, he gives this important evidence: "Merchantable, waney-edged timber, and board timber are the same," and "our instructions from Mr *Clarke* were to cut good board timber fit for the market." *Conway*, the measurer of *McLean Stinson's* timber, says he measured what he *Stinson* had bought from *Clarke*, and states the quantity. On cross-examination he says:

Between merchantable timber and first-class timber there is a wide range. * * * I say the timber, with the exception of three pieces, was first-class timber. * * * I did not examine the lot to see if there were any trees there still suitable for merchantable timber. * * * There were some trees would have made timber, but it would not have been first-class.

Re-examined—The difference is in length and thickness, and the way it is cut out as well. In merchantable timber you can make it with a few knots, but first-class timber you are supposed to make it free from knots. *Clarke's* agreement with us was for first-class timber.

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The son of the plaintiff says:

There is timber there that would make boards. * * *
But not timber to my knowledge that would answer that contract.

By which, of course, witness means "first-class timber."

After the plaintiff's case was closed, a motion was made for a non-suit. The learned judge appears to have re-called plaintiff, and the following appears to have taken place:

His Lordship to the plaintiff—When you were bargaining with Mr. *White*, and he signed that agreement, did you explain to him the kind of timber you were to get out for *Maclean Stinson*?

A. I did.

Q. Did you, in explaining to Mr. *White*, make use of the words suitable for your purpose? Did you explain to him what these words meant?

A. I told him I was taking out the timber for the *Quebec* market for *Maclean Stinson*—first-class waney-edged timber.

Here for the first time we hear from plaintiff of *McLean Stinson*, or for the purpose for which he was taking out the timber, and we find in this evidence an attempt not only to extend this written contract by adding thereto, but to entirely alter it by eliminating therefrom certain words and substituting others in their stead, thereby changing the subject matter of the contract from "good, merchantable, waney-edged timber" to "first-class waney-edged timber."

Now we have seen that merchantable waney-edged timber and board timber are the same, and that there is a wide range between merchantable timber and first class timber; and *Bethune* also says: "Our instructions from *Clarke* were to cut good board timber fit for the market." If this were true, plaintiff could not have expected them to cut only first class timber, and defendant entirely denies that by the words "suitable for his purpose" was intended first class timber. He says:

The way he explained the words "suitable for his purpose" was,

that he would take out all the merchantable timber that was there suitable for the *Quebec* market. I told him I would not allow him to go in and take all the first class timber and leave the rest. It was thoroughly understood between us that it was to include all the timber,—not only first class, but merchantable as well.

To his Lordship—I had never sold any first class; but I heard the people complaining that when they went to cut first class they would cut only a small piece out of a tree and waste a great deal; and I explained this to Mr. *Clarke*.

So that on the fair construction of this agreement, and on the evidence, I have come to the conclusion that "good, merchantable, waney-edged timber" will fill the contract, and was the timber intended by both parties. If this is the fair interpretation of the agreement between these parties, then did plaintiff take off all the timber on the lot that would answer this description. I think the evidence shows he did not, but that there was, when he stopped cutting, trees on the lot that would have made good, merchantable, waney-edged timber. Plaintiff's own case shows this; his son says there is timber there that would make boards; and it is clear that plaintiff's men, whatever instructions he may have given, only sought to get out first-class timber, and did, with the exception of three pieces, get out all first class timber, and, if they took only first class, it follows, as an almost necessary consequence, there must have been good merchantable timber, that they might and ought to have got to meet the contract.

But, if this was left in any doubt in plaintiff's case, defendant's evidence clearly shows there was left by plaintiff, as *Brady* says, "merchantable waney-edged timber suitable for the *Quebec* market."

This being the case, I think plaintiff has failed to establish any case that would entitle him to repayment of any portion of the $1000, the preponderating weight of evidence being in favor of defendant that there was

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sufficient "good merchantable waney-edged timber" to cover the $1000, and so no failure of consideration.

FOURNIER, J., concurred.

HENRY, J.:—

This is an appeal from the judgment of the Appeal Court of *Ontario*.

The action was brought by the appellant to recover, under a count for money had and received, a sum of money, being, as is alleged, a balance due to him of the sum of $1,000 paid by him to the respondent for certain trees growing on the lands of the latter, under a special agreement. [His Lordship referred to respondent's pleas and read the contract (1).] The appellant contends that the words "suitable for his purpose," following "merchantable, waney-edged timber," should be construed to mean the class of timber known as "first-class waney-edged timber." From the evidence it appears there is a well-known recognized difference in quality between "merchantable" and "first-class" waney-edged timber, and that the latter class is better and brings a higher price. If, therefore, the appellant wanted "first-class" timber, why did he purchase by name, as in the contract, an inferior quality and expect that the words "suitable for his purpose" would raise the character of the timber to first-class. We cannot allow parol evidence to contradict or vary a written contract. These words cannot be so construed, any more than if he contracted to purchase a quantity of a certain quality of flour, say that which is known as "fine," naming it as it is known in the trade, and by adding "suitable for his purpose" expect the seller to give him a higher and more valuable grade, say superfine, merely because he told him he had a contract to

(1) See p. 310.

give a quantity of that higher grade to another person. What he purchased he should be obliged to take and pay for, even if it did not suit his other contract. If he wanted quality or grade number one, he should not have bargained for number two, and in this case, when selling "merchantable," it was not the business of the seller but of the purchaser to contract in the one case for what would suit in the other. The contract for "merchantable" cannot be turned into "first-class," for that would be contrary to the written contract. The words "suitable for his purpose" cannot raise the class, but would characterize the description of "merchantable" timber, if the respondent and appellant had, when the contract was entered into, agreed upon the application of those words so to characterize the particular "merchantable" timber, the former was to cut and remove. His "purpose" might have been understood between them to mean timber of certain lengths and sizes in the square, or of certain dimensions otherwise. This, however, was not so understood, nor was there any other understanding, and for that reason, and from what I have before remarked, we cannot give any value to the qualifying words of the contract, and we must read the contract as if they were not in it.

This, in my judgment, settles the whole case, for, without doubt, from the evidence, there was sufficient on the property, and more, to have enabled the appellant to have got quantity enough of "merchantable waney-edged timber" to have repaid him for the advance and payment of the $1,000.

I feel it unnecessary to refer at length to the legal aspect of the case. The action for money had and received must, in such cases, be regarded as founded on such equitable principles as, I think, should stand in the appellant's way.

The law raises no implied promise in respect of money had and

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received, when the rights of the receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount.

* * * * * * * *

The law raises, also, an implied promise to pay back money that has been received without consideration or upon a consideration that has failed; * * * or on the purchase of a good will or fixtures, shares or chattels when the things contracted for, or some of them, have not been transferred or delivered (1).

The action for money had and received is an equitable one, and one *stricti juris*. It is enough if it appears upon the evidence that the plaintiff ought not in conscience to recover (2).

The respondent, unwilling to sell if he had on his land a small quantity of suitable timber, and who, it appears, had not inspected his land and felt incompetent to judge, was, as the uncontradicted evidence shows, induced by the representations of the appellant, who had inspected the land, to enter into the contract which he otherwise would not have done, believing from those representations that there was timber enough at the rate bargained for to make up, at least, the $1,000. If, therefore, the appellant represented even innocently that there was at least the value of the sum mentioned by which he induced the contract, he cannot be permitted to deny the truth of that representation. His claim would, therefore, fail in showing that equitable right to recover the amount sued for which, it is necessary should characterize it.

There is no evidence of the rescission of the contract by agreement of the parties, and a Court could only order a rescission where the party applying can put the other in *statu quo*, which the appellant could not do in this case. There is, therefore, no rescission of the contract, or, in my opinion, a failure of any part

(1) Addison on Contracts, pp. 1062, 1065.

(2) See judgment of Lord Mansfield in *Bird* v. *Randall*, 4 Burr. 1354.

of the consideration. I think, therefore, the appeal should be dismissed, and the judgment below affirmed.

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TASCHEREAU, J.:—

I am also of opinion that the plaintiff is not entitled to recover in this action.

There certainly was no rescission of the contract between the parties. It is true, that after the plaintiff's men had commenced to cut the timber, the defendant stopped them, and, not pleased at the way in which they were proceeding, said that he would rather that they would stop than take so little out of the trees. But the plaintiff merely promised that his men would be more careful in the future, and they continued the cutting. The plaintiff himself, in his evidence, admits that his men worked as long as they found suitable timber. And one of his men, named *Bethune*, examined by him, says that they stopped, because there was no more timber suitable for plaintiff's purpose. No importance can be attached to the fact that the defendant had cut saw-logs off the land, as they were not included in the contract with the plaintiff; and, then, it is in evidence, that this was done only *five or six* weeks after the plaintiff had given up cutting, and his men had gone away. In my opinion, there is not a scrap of evidence of rescission of this contract.

Then, what was the nature of the contract between the parties? The defendant is a farmer. He had timber growing on his land. The plaintiff, a lumberer, and an expert in the business, goes to him and asks to purchase his timber. The defendant says that he does not know if the timber is such as will suit the plaintiff's purpose. The plaintiff says that he has examined the timber with another man of experience in the business, and that he could guarantee that there was certainly far over $1,000 worth of timber on the land, and

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offers to pay $1,000 cash before commencing to cut it. The defendant says: "Very well; if you can get that much out, I will sell it to you," or words to that effect. The bargain is concluded on this, as per agreement, in writing, dated the 8th September, 1876, fyled in the record, and the $1,000 are paid by the plaintiff. The plaintiff now alleges that there was not $1,000 worth of timber on this land; that he, in fact, found and cut only $500 worth of it, and claims from the defendant the other $500. To this, the defendant pleads that he only sold on condition that the sale would bring him at least $1,000; that the plaintiff represented to him that such would be the case, and that the plaintiff cannot now recover from him any part of these $1,000, even if it was the case that there was no timber to that amount on the land.

I think that the defendant has proved his plea, and that the judgment of the Court of Appeal, dismissing the plaintiff's action, must be confirmed. There is no failure of consideration on the defendant's part. He would not have sold, if the plaintiff had not told him that there was at least $1,000 worth of timber on the land. If the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error. Then is it the case that there is not on the land $1,000 worth of timber? That would appear to be so, if first-class timber only is meant. But the agreement between them speaks of "good, merchantable, waney-edged timber;" there is no mention of first-class timber. But the plaintiff says that the timber was to be suitable for his purpose, and that this meant first-class timber, as his contract with *Maclean Stinson*, for whom he bought this timber, was for first-class timber for the *Quebec* market. The defendant positively swears that he told the plaintiff that he would not allow him to go in and take all the first-class timber and leave the rest,

and that it was thoroughly understood between them that the contract was for all the timber, not only first-class, but merchantable as well. The plaintiff, it is true, swears the contrary. But as the agreement in writing speaks of merchantable, not of first-class timber, and, therefore, corroborates the defendant's testimony, I feel bound to accept the defendant's version. There is evidence that between *Clarke* and *Stinson*, first-class timber only was bargained for; but between *Clarke* and the defendant, it is proved to my satisfaction that the contract, as made, included merchantable timber as well as first-class timber; and I do not see it proved satisfactorily that the defendant was made aware of the nature of the contract between the plaintiff and *Stinson*. In fact, that enough merchantable timber remained on the property to make up the $1,000, I think is conclusively proved by the witness *Brady*. However, this is not important, according to the view I take of the case. The defendant never guaranteed, nor represented, that there was $1,000 of such timber.

I am of opinion the appeal should be dismissed with costs.

GWYNNE, J.:—

It is a canon of construction of all contracts that they are to be construed by ascertaining the intention of the parties, to be gathered, in the first instance, from the words of the instrument, but interpreted, if necessary, by the surrounding circumstances (1).

In *Wood* v. *Priestner* (2), *Kelly*, C. B, says:—

> The question in these cases [the construction of contracts] depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction.

Oral evidence, in fact, although inadmissible to add to, or to detract from, the plain, unambiguous terms of a

(1) *Carr* v. *Montefiore*, 5 B. & S. 428. (2) L. R. 2 Ex. 68.

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contract, is always admissible to show all the circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument (1).

The plaintiff here seeks to recover back a sum of money paid by him to the defendant as part payment upon a contract, upon the alleged ground of failure of consideration. [His Lordship read the contract] (2).

Now, "good, merchantable, waney-edged timber" is a definite description of a well known article, and it appears by the evidence, I think, sufficiently clear that there is a large quantity of such timber still upon the lot; but the plaintiff's contention is that, under the words "suitable for his purpose," there is to be added to the above description of the timber sold this further description, namely: That it should be of the first class quality, and such that, as first class timber, would meet the requirements of a particular contract, which the plaintiff says he had, to supply first class timber suitable for the *Quebec* market. Now, to give such a construction to the words "suitable for the purpose," would be certainly to add a very material term to the previous description of "good, merchantable, waney-edged timber," which is a definition perfect in itself, and would be, it seems to me, in plain violation of the canons of construction; and if, by reason of the ambiguity of the term "suitable to his purpose," we have recourse to the surrounding circumstances to aid the Court in construing the contract, it is apparent no such construction as that which the plaintiff contends for can be given to the contract, without imposing now upon the defendant terms totally at variance with *his* intention, and upon which he swears he never would have entered into the

(1) *Baird* v. *Fortune*, 4 Macq. 149; *Magee* v. *Lavell*, L. R. 9 C.P. 112.

(2) See p. 310.

contract at all, for it appears that the defendant peremptorily refused to permit the plaintiff to go into his woods and to cull the timber, taking only first-class quality, and that he refused to enter into any contract except upon the faith that (as the plaintiff represented) there was from 16,000 to 20,000 feet of timber in defendant's woods suitable for plaintiff's purpose. The plaintiff having taken out 5,000 feet of first-class quality, declines now to take any more timber, upon the allegation that there is no more of first-class quality, and he brings this action to recover back a portion of the money paid as part payment upon a contract, which he had procured the defendant to enter into upon the faith of the above representation. It does not appear to me that under these circumstances it is necessary to enquire whether such representation was made *bonâ fide* or not. It is sufficient to say that it was the foundation upon which the defendant entered into the contract.

Now, in an action to recover back money already paid, upon the ground of an implied promise to re-pay any part of it, as it appears to me, the circumstances surrounding the contract, and in view of which the money was paid, are to be regarded, in order that we may see whether it would be just to imply the promise from such circumstances. It was contended by the learned counsel for the appellant, that this action lies, unless the plaintiff's contract amounted to a guarantee to take from 16,000 to 20,000 feet of timber from the lot; but this is not so, for in the one action the question is, was there a warrantry, whereas in this action, although there was no warrantry, the money may have been paid under such circumstances as to raise no implied promise to refund any part. The money may have been accepted upon the faith of assurances which would make it inequitable in the person who paid to recall any part of the amount so paid. That is what is contended for here.

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The plaintiff desired to get some timber out of defendant's bush. The latter told him that he could not, for any consideration, let any man enter his bush to strip it of its best timber, taking only the first-class timber, but that plaintiff might inspect the bush, and if he should find there timber that would suit him to a considerable amount, without taking the first-class timber alone, defendant might come to terms with him. Accordingly, the plaintiff himself, a skilled person in such a matter, with another person, also a skilled person, inspected the defendant's bush, and after satisfying themselves, the plaintiff informs the defendant that he found timber enough there that would suit him to the extent of from 16,000 to 20,000 feet. The defendant replies in substance that this would do, but that he would not enter into a contract unless there was some such quantity; upon the faith of this assurance that there was, and upon the payment of $1,000 *on account*, the defendant makes the contract. Thereupon the plaintiff enters into the bush, strips it of the timber of the best quality, which the defendant had informed plaintiff he never would consent to, and upon the implied promise of plaintiff that it should not be done had entered into the contract, and the plaintiff now in effect says to the defendant: "I have taken all the timber of the best quality from your bush, there is no more first-class timber there, consequently I shall not take any more timber. True it is, I have stripped your bush of the best quality, taking that only which was first-class, and which you told me you never would consent to. True it is, I induced you to make the contract upon the assurance that there was timber in your bush which would suit me to the extent of from 16,000 to 20,000 feet, and that but for this assurance you would have made no contract with me, and the payment which I made to you of $1,000 was upon account, but I was mistaken when I made to you the assurance which alone induced you to enter into the

contract, and from that mistake of mine the law implies a promise upon your part to repay me the difference between the $1,000, which I paid to you, and the value of the first-class timber of which, contrary to your intention and your express desire, I have stripped your bush."

In my judgment the law implies no such promise, and I cannot see that there has been any failure upon the part of the defendant to give any part of the consideration which he undertook to give, and that, therefore, upon the facts appearing here the plaintiff is not entitled to recover back any part of the $1,000, and the appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for respondent: *Jackes & Galbraith.*

Solicitors for appellant: *Spencer, McDougalls & Gordon.*

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*Jan. 31.
*April 16.

FRANCIS KEARNEY AND MARIA KEARNEY, } .....APPELLANTS;

AND

ANN KEAN AND MARY McMINN.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Administratrix with Will annexed, purchase of fee simple estate by, when personal assets of testator sufficient to pay off incumbrance—Subsequent parol agreement to sell part of said Land null—Compensation Money for land, right to and how to be treated—Revised Statutes of Nova Scotia, (4th Series) c. 36, sec. 40.

About 1837 *Andrew McMinn* devised his lands to his wife, *Mary McMinn*, for life, with remainder to *Maria Kearney*. Letters of administration with the will annexed were granted to the widow. At the time of testator's death, the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by *Ann Kean*, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about $\frac{1}{4}$ of an acre of the land, until in 1873, under the authority of an expropriation Act, she was ejected from it, the Commissioner taking in all 3 acres $\frac{3}{10}$ths. of this property, the balance being in the occupation of *Maria Kearney* and her husband, *Francis Kearney* (the appellants). These 3 acres $\frac{3}{10}$ths. were appraised at $2,310, and that sum was paid into Court to abide a decision as to the legal or equitable rights af the parties respectively. *Ann Kean* claimed a title to the whole of the land taken, under an alleged parol agreement

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Taschereau and Gwynne, J. J.

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with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of the £725, and obtained a rule *nisi* for the payment to her of the sum of $2,310, the amount awarded as compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of $80 a year and liberty to occupy two rooms in a dwelling house then occupied by her. On a motion to make this rule absolute, several affidavits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to a master, to take evidence and report thereon, subject to such report being modified by the Court or a Judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the Court made an order apportioning the $2,310 between *Ann Kean* and the appellants, the former being declared entitled to be paid $1,015.61, and the latter, on filing the written consent of Mrs. *McMinn*, the residue of the $2,310.

Held,—On appeal, 1st. That the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void.

2. That when land is taken under authority of legislative provisions similar to Revised Statutes of *Nova Scotia*, (4th Series) c. 36, sec. 40, *et seq.* the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* on a rule *nisi* to confirm a masters' report. Under the authority of c. 36 of the Revised Statutes of *Nova Scotia*, some 3 acres $\frac{3}{10}$ths. land were expropriated for the *Nova Scotia* hospital for the insane, and the compensation money for the same being claimed by Mrs. *Kean* and by Mr. and Mrs. *Kearney*, was deposited in the Supreme Court to abide a decision as to the legal or equitable rights of the parties respectively.

On the 18th January, 1875, the matter was referred to *H. C. D. Twining*, Esq., a master to take evidence and report thereon, subject to such report being modified

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by the Court or a Judge. The master reported that Mr. and Mrs. *Kearney* had the sole, legal and equitable interest in the property. On motion to confirm that report the Court made the following order:—

"The order *nisi* to confirm the masters' report in this cause having been referred to the Supreme Court for argument and decision by a Judge of this Court, and the said order having been argued accordingly by counsel for all parties, and judgment having been given thereon on the 26th day of March, 1877, but no rule having been applied for till the day of this date: It is now ordered that each party bear his or their own costs of argument and attendance before the master, and the master's fees be paid out of the funds in Court to the credit of the cause. That the sum of $1,015.61, with the bank interest thereon, be paid to Mrs. *Kean* over her own receipt, and the balance of the $2,310 in Court, with the bank interest on such balance, be paid, on their joint receipt, to Mr. and Mrs. *Kearney* as soon as they, Mr. and Mrs. *Kearney*, shall have filed in Court the written consent of Mrs. *McMinn* to such payment. Dated the 2nd day of March, A. D. 1878."

From this order Mr. and Mrs. *Kearney* appealed to the Supreme Court. The material facts of the case sufficiently appear in the head note and judgments. The case was inscribed for hearing *ex parte*.

Mr. *Wallace* for appellants:

There was no specific agreement for the sale of any certain quantity of land between Mrs. *McMinn* and Mrs. *Kean*. The numerous versions, all materially differing, given by Mrs. *Kean* of a pretended parol agreement, destroys its certainty and specific character, and for that reason was not such an agreement as the law requires (1). The appellants contend, also, that they were

(1) Dart on Vendors and Purchasers, 1022, 1933; Fry on Specific Performance, 384, 423.

entitled to the property under the will of *Andrew McMinn*, and Mrs. *McMinn* would, under the relation of administratrix with the will annexed, there being sufficient personal effects left by *McMinn* to discharge all his debts including the mortgage, and under the other circumstances of the purchase, be a trustee for her daughter *Maria Kearney* (1). The occupation of house and small piece of land, with the consent of Mrs. *McMinn*, did not give her any other rights than those of a tenant at will or at sufferance, liable to be ejected at any moment. It is not because Mrs. *Kean* subsequently instituted proceedings in the Equity Court against Mrs. *McMinn* and the appellants for a specific performance of an alleged verbal agreement, that there was ever a resulting trust in her favor for these $3\frac{3}{10}$th. acres of land—such a position is utterly untenable (2).

Another reason why the appellants are entitled to the amount deposited as representing this property is that Mrs. *McMinn*, rather than be subjected to proceedings to have her declared a trustee for Mrs. *Kearney*, signed an agreement by which she conveyed the balance of the *McMinn* property to Mrs. *Kearney*, and afterwards made the lease of her life interest to the appellants. The property mentioned in that agreement and lease included the whole $3\frac{3}{10}$th. acres and the small house then occupied by Mrs. *Kean*, together with other property. Mrs. *McMinn* refused to perform this agreement, and a suit was instituted in the Equity Court to compel performance, to which no defence was put in, and a judgment was obtained in accordance with the bill. Under these circumstances appellants submit the master was fully justified in making the report he did, even if Mrs. *Kean* had proved a specific agreement for a specific

(1) Perry on Trusts, 17, 197, 205, 214, 217.

(2) Perry on Trusts, 83, 86, 116, 137 to 162.

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piece of property undisputed and undenied, which she did not do.

STRONG, J.:—

The facts of this case, so far as they are material to the present appeal, may be stated as follows: *Andrew McMinn*, being seized in fee of the lands in question, which formed part of a larger property at *Dartmouth* in *Nova Scotia*, made his will, whereby he devised these lands to his wife, *Mary McMinn*, for life, with remainder in fee to the child or children of his marriage with *Mary McMinn*. Of this marriage there was only one child, one of the present appellants, *Maria Kearney*. The respondent, *Ann Kean*, is a daughter of Mrs. *McMinn* by a former marriage. The testator appointed two persons as his executors, but they renounced, and letters of administration with the will annexed were granted to the widow. The testator, as nearly as I can ascertain, died about 1837. At the time of his death the property was mortgaged to a Miss *Tremain*, to secure £150. A suit to foreclose this mortgage was instituted after the testator's death, and it is alleged that a foreclosure was obtained, and that under it the property was sold and purchased by Mrs. *McMinn* for £905. There is great obscurity as to the true nature of this sale—the case, and the factum which the appellant has filed, alike leave us in the dark respecting it. The decree is not printed, and does not, indeed, appear to have been put in evidence in the Court below, although it was material to the case of the appellants in one aspect, and to that of the respondents in another. I gather, however, from the statements in the affidavits, that there was either a sale under a decree of the Court, at which Mrs. *McMinn* became a purchaser, or that the mortgage was paid off and an assignment taken; not that there was first a

final foreclosure, making the mortgaged land the absolute property of the mortgagee, and then a sale by the latter. The price which Mrs. *McMinn* says she paid was £905. The mortgage appears, from the certificate of the Registrar of Deeds, to have been, as stated, for the sum of £150, and to have been dated the 8th June, 1836.

It is, therefore, almost impossible to suppose that there could have been a redemption and transfer if the amount paid was, as alleged, £905, since the principal, interest and costs could not have amounted, at the time of the sale, to any thing like that sum; but a document has been put in by the respondent, Mrs. *Kean*, which, although not properly admissible in evidence originally, has been received without objection and treated as good evidence for her, and may, therefore, be used against her. This is a fragment of an account current, or bill of costs, furnished by Mr. *Uniacke*, Mrs. *McMinn's* former solicitor, to his client, which contains the two following entries under date 16th October, 1841 :—" Costs of defence *A. P. Tremain's* foreclosure £16 2s. 6d.; *cash* paid for assignment of *A. P. Tremain's* mortgage £379 17s. 8d." *A. P. Tremain* is a misprint for *H. P. Tremain*, who appears by the Registrar's certificate, already referred to, to have been the mortgagee. Against this we have, however, the oath of the respondent to the statement, not disputed by the appellants, that the property was sold under the decree for £905, and bought in by Mrs. *McMinn*. Had Mrs. *McMinn's* title deed even been produced, it might have thrown some light on this fact. But as it is, we must, I think, assume that the whole land subject to the mortgage was sold for a larger price than was required to pay off the mortgagee, and purchased by Mrs. *McMinn*. It is in proof that Mrs. *McMinn*, as the personal representative of the mortgagor, received personal assets

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of the testator amply sufficient to have paid off the mortgage had she chosen so to apply them.

The sum of £725 was, it is said, lent by the respondent, Mrs. *Kean*, to her mother, to make up the £905; and this, I think, is sufficiently proved to have been the fact.

The next circumstance to be mentioned is the sale by Mrs. *McMinn* to the public authorities, for the purposes of a hospital for the insane, of a considerable portion of the property, for the price of £1750, out of which Mrs. *McMinn* paid Mrs. *Kean* £400 in part payment of the loan of £725, and applied the balance to her own use. I may mention here, that the appellant, *Maria Kearney*, has not adopted this sale, but, on the contrary, she repudiates it, and declares her intention of calling its validity in question when her interest becomes an estate in possession on her mother's death.

Then, in 1858, Mrs. *Kean*, who had lived for a number of years with her mother, Mrs. *McMinn*, on this property, removed to a small house on the land, on which she laid out some money for repairs, and around which she enclosed about a quarter of an acre, and there she continued to live until the land was taken possession of, and she was ejected from it by the Commissioner of Public Works, under the authority of an expropriation act, for the purposes of the hospital for the insane. The land so expropriated consisted of 3 acres $\frac{3}{10}$ths, including that of which Mrs. *Kean* was, as stated, in occupation.

During the time Mrs. *Kean* was in possession, the fence she erected was pulled down by *Kearney*, and an action of ejectment was also brought by the *Kearneys* against her; this action, however, was never brought to trial. Mrs. *Kean* claims a title to the whole of the land taken, under an alleged parol agreement with her mother, Mrs. *McMinn*, that she should have the land

in satisfaction of £325, the residue unpaid of the loan of the £725 made by Mrs. *Kean* to her mother. It does not appear that Mrs. *Kean* was ever in possession of more than the quarter of an acre enclosed within her fence, *Kearney* being in possession of the remainder. The *Kearneys* having instituted a suit in the Probate Court to compel Mrs. *McMinn* to account for the personal estate of her husband, in order to obtain a settlement of the suit, Mrs. *McMinn*, on the 24th February, 1871, entered into an agreement to convey to Mrs. *Kearney* for life, and to her children in fee simple, all the *Dartmouth* property, subject to a prior life estate which she reserved to herself. This agreement was signed and sealed by Mrs. *McMinn* only, and was not executed by Mrs. *Kearney*. On the 1st May, 1872, Mrs. *McMinn* executed an informal instrument under seal, purporting to be a lease of her life estate in the whole property to Mr. and Mrs. *Kearney*, in consideration of a rental reserved of $80 a year. In June, 1872, Mrs. *Kean* brought a suit for specific performance of the alleged parol agreement with her mother, already mentioned, against the *Kearneys* and Mrs. *McMinn*, but, an answer having been filed, no further proceedings were taken. The appellants also instituted an action for the specific performance of the agreement of the 24th February, 1871, in which the plaintiffs obtained judgment by default, ordering a reference to a master, who is said to have made a report, though the purport of the reference, and the finding of the report, are neither of them stated. The Act of the Provincial Legislature under which the expropriation took place is not specifically referred to in the case or factum, but I assume that it was under the 40th and following sections of cap. 36 of the Revised Statutes of *Nova Scotia* (4th series). The Commissioner of Public Works requiring, as before stated, a further portion of the land in question, amounting to

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3 and $\frac{3}{10}$th acres, for the purposes of the hospital for the insane, proceeded, under the Statute, to procure the nomination of arbitrators, who, on the 10th September, 1873, made their award, allowing $4,000. This included the compensation for the land taken, together with an allowance for fencing, and making a new road. This amount was subsequently paid into Court according to the Statute. Subsequently the sum of $1,690, being the amount paid in beyond the value of the land, which was not claimed by Mrs. *Kean*, was paid out to *Kearney*, leaving the balance $2,310 in Court.

Mrs. *Kean*, on the 16th December, 1874, obtained a rule *nisi* for the payment to her of the sum of $2,310, the amount awarded as compensation for the land. On a motion to make this rule absolute, several affidavits were filed, including those of Mrs. *Kean*, Mr. *Johnston*, her solicitor, Mr. and Mrs. *Kearney*, and Mr. *Wallace*, their solicitor, and two affidavits of Mrs. *McMinn*, directly contradicting each other, were also filed, one by each party. The Court made a rule referring the matter to *Henry D. Twining*, Esq., one of the Masters of the Court, with power to call the several parties and their witnesses before him, and to examine them under oath on the subject matter of the cause, and in addition to such affidavits, and to enquire into the respective legal and equitable rights of the several parties to the lands recently vested in the Commissioner of Public Works and Mines under the Revised Statutes, cap. 36, and to the proceeds thereof remaining in Court, and to report thereon at an early day, and that such report should be moved on before a Judge, who might confirm or modify the same, and pass a final order for the appropriation and distribution of such proceeds and the interest thereon. Under this reference the Master heard evidence, and made his report, dated the 20th January, 1876, finding that Mrs. *Kearney* had the legal

and equitable right to the lands, and was, therefore, entitled to be paid out of Court the sum of $2,310. the compensation awarded for the lands A motion was made before a Judge to confirm this report, who directed that the case should be argued before the full Court, which was afterwards done, when the Court made an order apportioning the $2,310 between Mrs. *Kean* and the *Kearneys*, the former being declared entitled to be paid $1,015.61, and the latter, on filing the written consent of Mrs. *McMinn*, the residue of the $2,310.

From that order Mr. and Mrs. *Kearney* have appealed to this Court.

The first question which presents itself for decision is that relating to Mrs. *Kean's* rights against the *Kearneys* and Mrs. *McMinn.*

Mrs. *Kean* has no conveyance conferring on her any legal title to any portion of land, nor does she pretend to have any written evidence of an equitable title. If, therefore, she has an interest, it must necessarily be by virtue of an equitable title depending on a parol agreement, partly performed, for the sale to her of the land she claimed. The insufficiency of the proof of the parol agreement set up by the respondent is the first objection which the appellants make to the order of the Court below, and there can, in my opinion, be no doubt but that the proof is quite insufficient. It consists wholly of the evidence of *Ann Kean* herself, for Mrs. *McMinn's* short and unsatisfactory affidavit is neutralised by her subsequent affidavit of December, 1874, directly contradicting her former one. Her evidence, therefore, is entitled to no consideration. Mrs. *Kean's* evidence is confirmed in one single remote point by Mr. *Uniacke's* account, but it is only as to the fact of the loan having been made by her to her mother, and not in respect of the agreement relating to the land. Then the evidence of Mrs. *Kean* itself is full of discrep-

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ancies and self contradictions, and, moreover, is too uncertain as to the terms of the agreement to warrant any Court in acting upon it, even if it had been the testimony of a disinterested third person.

Further, Mrs. *Kean* is contradicted, as to the quantity of land she was to have, by her own solicitor, Mr. *Johnston*. Thus, in paragraph 9 of her affidavit of 9th December, 1874, Mrs. *Kean* says:

> The said *Mary McMinn* offered, in lieu of the said balance, to give a small house that was on the property, together with upwards of three acres of land adjoining, which she, at the time, pointed out to me.

But Mr. *Johnston*, in his *vivâ voce* examination before the Master, says:

> About three years ago Mrs. *McMinn* wished me to draw a deed or settlement for the property. Out of this property she wished to leave Mrs. *Kean* an acre for her life. The deed was not executed. I cannot now remember that Mrs. *McMinn* ever mentioned to me any specific quantity of land that she had promised to give to Mrs. *Kean* on any other occasion.

It also appears, that though a vague indefinite intention of giving some land either by deed or will to Mrs. *Kean* was announced by Mrs. *McMinn*, yet there was not any positive agreement to do so, nor was any exact quantity of land ever specified. This conclusion is warranted by passages in Mrs. *Kean's* own *vivâ voce* testimony. Thus she says:

> My mother promised to give me the land from the first time I sold my house and wharf and gave her the money. I was to have any part of the place that I wanted, instead of the £325 she owed me. I was to have it either by deed or will. *She told me her word was her bond*, and what more did I want.

This implies a sort of honorary engagement on the part of the mother, rather than a definite concluded contract, and is, moreover, inconsistent with Mrs. *Kean's* own statement, that the agreement was made when she demanded from her mother payment of the balance.

Mr. *Johnston* also further states in his evidence:

At the time of the settlement, Mrs. *Kean* wished some arrangement made with her mother, Mrs. *McMinn*, about this money, and wished to get a part of the Dartmouth property to re-imburse her. Mrs. *McMinn*, who appeared very jealous about parting with any of the property, put her off by saying that the property was all there and was for them, or words to that effect.

This evidence, besides being inconsistent with Mrs. *Kean's* statement that her mother had agreed to give her a specific piece of land at the time of the loan, also shows that there was no contract, but a sort of family arrangement to be carried out at Mrs. *McMinn's* election, by will or conveyance *inter vivos*, and which was to be dependent on the mother's good will. Then the possession was only of a piece of land of about a quarter of an acre, and was therefore inconsistent with the terms of the alleged agreement, which Mrs. *Kean* swears was for 3 acres.

Specific performance of a parol agreement for the conveyance or sale of land on the ground of part performance will never be decreed, unless a specific contract is clearly proved. In the present case such proof wholly fails. So far from a concluded agreement made at any fixed date, Mrs. *Kean's* evidence, in one of the passages cited, indicates that there was none, but that she was dependent on her mother's choosing to make a deed or will of the property. The conclusion must be, that this was one of those vague family arrangements in which possession of land is taken in reliance on a promise of bounty by a parent or relative, and not a contract entered into for valuable consideration (1) of which specific performance could be claimed. This result alone is fatal to the case of the respondent; but even if she had succeeded in proving a parol agreement partly performed for the whole $3\frac{3}{10}$ acres, it

(1) *Orr* v. *Orr*, 21 Grant 397.

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would not have sufficed to have entitled her to more than the value of Mrs. *McMinn's* life estate in that portion of the land. As I shall show hereafter, Mrs. *McMinn* was, subject to her own life estate, a trustee of the land for Mrs. *Kearney*, and Mrs. *Kean* would, of course, be bound by the same trust, unless she could show herself to be a purchaser for valuable consideration without notice; but to entitle herself to this protection, she must show a conveyance executed. This she never pretends to have acquired; she can, therefore, stand in no better position than her mother, but is bound by the same equities as regards Mrs. *Kearney*. The order of the Court below, so far as it directs the payment of any portion of the money to Mrs. *Kean*, must consequently, for the reasons given, be reversed. Mrs. *Kean's* claim being thus disposed of, the question next arises as to the rights of the appellants Mr. and Mrs. *Kearney* against Mrs. *McMinn*.

Mrs. *McMinn* was, without doubt, a trustee for her daughter, Mrs. *Kearney*, in respect of the fee simple. There are two characters in either of which she may have paid off the incumbrance or bought in the estate; she was tenant for life and also administratrix with the will annexed, who had received personal assets sufficient to discharge the mortgage, and, paying off the mortgage in either of these qualities she would become a trustee. If she had been tenant for life only, complicated equities as to contribution would arise which we are not called upon to consider or discuss, since the evidence is ample to show that Mrs. *McMinn* had received personal assets sufficient to satisfy the mortgage, and the payment must, therefore, be presumed to have been an act done in a due course of administration, the mortgage being primarily payable out of the testator's personal assets, and Mrs. *Kearney* having a clear equity to have the estate so exonerated. That the

transaction must substantially be regarded merely as the discharge of an encumbrance, whatever may have been its form, is clear when we consider that it must have either been a formal transfer of the mortgage, as is indicated by Mr. *Uniacke's* account already referred to, or, if in form a purchase of the estate under a decree of foreclosure for £905, still in substance a mere discharge of the incumbrance, since any surplus of the sale monies beyond the mortgage debt, interest and costs would belong to the estate of the testator. Apart, however, from this, an administratrix, allowing an equity of redemption to be foreclosed, while she had, or ought to have had, assets in her hands applicable to the payment of the mortgage, and afterwards becoming the purchaser of the estate herself from the mortgagee, upon the plainest principles of equity, would be regarded as a trustee for the persons entitled to the real estate, and the legal result of the transaction would be precisely the same as if she had paid off the mortgage and taken a transfer of it.

If, therefore, there had been no dealing with Mrs. *McMinn's* life estate, the proper disposition of the money would have been to have apportioned it between Mrs. *McMinn* and *Mrs. Kearney* according to the value of their respective estates. An instrument, purporting to be a lease, was, however, made on the 1st May, 1872, by Mrs. *McMinn*, by which she assumed to convey her life estate to Mr. and Mrs. *Kearney*, in consideration of a rental of $80 a year. This lease, not being in any way impeached, and being sufficient in equity, at least, to pass the estate, it follows that *Francis Kearney*, the husband, is entitled to receive the income of the money in Court during Mrs. *McMinn's* life, and that the *corpus* of the fund would, except in so far as it may be affected by the agreement of 24th February,

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1871, which I will presently further refer to, belong to Mrs. *Kearney*, as being, in the contemplation of equity, still real estate, though in the converted form of money. In one event, Mrs. *McMinn* might be entitled to some substantial indemnity out of the fund, although she has parted with all her interest in the land. Under the instrument of the 1st of May, she is entitled to a rent of $80 a year. Now, the $3\frac{3}{10}$th acres having been taken by title paramount, the *Kearneys* would be strictly entitled to an apportionment of the rent in respect of the eviction, and in that case Mrs. *McMinn* ought to receive an indemnity out of the fund for the deduction from the original rent. The *Kearneys* will, however, probably be prepared to waive any claim to an apportionment, which they must do by filing a written consent to that effect. If they are willing to do this, I think the Court need not send it back to the master to have so minute a calculation made, as would be involved in ascertaining what indemnity Mrs. *McMinn* would be entitled to, in respect of the deterioration of her security for her rent in consequence of the 3 th acres ceasing to be subject to it. If we give no costs against her, setting the costs against this indemity, we shall probably amply compensate her.

There remains still to be considered what rights (if any) Mrs. *Kearney's* children have under the informal instrument of the 24th February, 1871, made on the compromise of the suit in the Probate Court. Mrs. *Kearney* had, as already shown, a clear right to the remainder in fee, paramount altogether to any title derived under that agreement. She did not sign the agreement and has done nothing under it sufficient to bind her to make a settlement of her estate upon her children pursuant to its terms, unless her joinder with her husband as a co-plaintiff in the suit, brought for the specific performance of this article, should be suffi-

cient for that purpose. As the institution of a suit in the joint names of husband and wife is considered as the act of the husband alone, the suit and the judgment were insufficient to affect her rights as between herself and her children, and she is, therefore, free to insist that, as a married woman, her estate in this land can be bound by nothing short of a deed executed and acknowledged pursuant to the provisions of the Revised Statutes, (4th series) cap. 27, and no such deed is in existence. I am, therefore, of opinion that the finding of the Master was right, and the judgment of the Court below ought to be reversed.

I have before said that the fund is still to be considered land. The rule is clear, that when land is taken under the authority of legislative provisions similar to Revised Statutes, cap. 36, secs 40, *et seq.*, the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

This has in many cases been determined to be so with regard to lands taken under the English Land Clauses Consolidation Act. If the person entitled is *sui juris*, of course he can elect to take the fund as money, but a married woman can only deal with it as land. The consequence is that this money ought to remain in Court and be invested so as to produce an income which will be payable to *Francis Kearney* during the life of Mrs. *McMinn*, and at the termination of Mrs. *McMinn's* life estate, Mrs. *Kearney*, or her heirs, will be entitled to the *corpus*, unless Mrs. *Kearney*, her husband consenting, thinks fit, on being examined before a Judge apart from her husband, to authorize the payment out of Court of the money.

It will be sufficient for us to reverse the order complained of and remit the cause to the Court below with the foregoing declarations. The appellants should have their costs against Mrs. *Kean*.

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GWYNNE, J.:

I am unable to see any evidence in this case which would have justified the master, to whom the matter was referred, in reporting that the respondent *Kean* had any estate, legal or equitable, in the lands in question, which would entitle her to receive any portion of the purchase monies paid into Court, representing the fee simple estate therein; nor can I see that the evidence calls for any qualification in the terms of the report which he has made, whereby he finds that the appellant *Maria Kearney* had the legal and equitable right to these lands, and that she is entitled to receive the $2,310, proceeds thereof remaining in Court, together with any interest that may have accrued, unless it be that the evidence warranted his ordering: "Subject to the value of the life interest of Mrs. *McMinn* in the use of the two rooms reserved by her for her life under the lease of the 1st May, 1872."

The claim of the respondent *Kean* is based upon an assumption of a fact of which there is not a tittle of legal evidence, namely, that Mrs. *McMinn* became seized in fee simple, in virtue of a purchase made by her, and of a deed executed in her favor by the mortgagee of a mortgage executed by the late *Andrew McMinn* in his life time, securing £150, and which mortgage was, as is suggested, foreclosed by the mortgagee after the decease of the mortgagor, whereby the fee simple estate became vested absolutely in such mortgagee discharged of the mortgage. Now, in the evidence before us, there is neither the alleged mortgage, nor the decree of foreclosure, nor any deed, after the foreclosure, executed in favor of Mrs. *McMinn*, produced or shewn to have existed.

By the will of *Andrew McMinn*, a copy of which was produced, we find that he devised all his personal pro-

perty remaining after the payment of his just debts, and subject to such payment, to his widow, Mrs. *McMinn*, to whom he devised the lands in question and 550 acres of other land for her natural life, with remainder to the appellant *Maria Kearney* in fee. The appellant in her affidavit states that, as she is informed and believes, there was, at the time of her father the testator's death, a small mortgage to the amount of £150 upon the premises, but that there was personal estate left by him more than sufficient to pay that amount, and that there were no other debts due by him, and that letters of administration with the will annexed were granted to appellant's mother, the testator's widow, and that, instead of her paying the mortgage out of the personal effects, the said mortgage was foreclosed, and the whole property sold under a decree of the Court of Chancery, and bought in by appellant's mother, while appellant was an infant of about four years of age. This is the sole apparent foundation for the suggestion that Mrs. *McMinn* ever acquired a fee simple estate in the land in question. The appellant, who was an infant when these proceedings are alleged to have taken place, may have been informed that there was a decree of the Court of Chancery authorizing the alleged sale, but we cannot admit this statement in the appellant's affidavit (brought forward for the purpose of showing how defective would be any title set up by Mrs. *McMinn* obtained under such circumstances,) as evidence of the title. We should be slow to believe that a Court of Equity sanctioned such a destruction of an infant's estate. To support a title, resting upon a decree of the Court of Chancery for its validity, we must see the decree, if there be one, and, if none be produced, we must presume that there is none, for, assuming that there was a sum of £150 due upon a mortgage of the land in question at the

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time of the testator's death, we know that the amount so due should have been paid out of the testator's personal estate, of which his widow was legatee, subject to the payment of the debts, and also, as is sworn and not denied, administratrix with the will annexed, as well as devisee for life of the mortgaged premises, with remainder in her infant child in fee.

Now, there is evidence that there was considerable personal estate left by the testator, and if the legatee of personal estate subject to the payment of debts, who was also administratrix with the will annexed of the personal estate, and who was devisee for life of the mortgaged premises, the remainder in fee in which was devised to her own infant child, received and enjoyed the personalty without paying the mortgage debt, she could never be permitted to acquire by any deed the fee simple estate in the mortgaged premises to the prejudice of the devisee in remainder. I confess I think we should be slow to believe that a Court of Equity sanctioned any such proceeding. It is but reasonable that we should call for very precise evidence, and that we should scrutinize with a jealous eye all the proceedings by which such a result is claimed to have been attained.

In the absence, however, of any evidence of any such decree, and of all legal evidence shewing the estate devised to the appellant by her father to be defeated, we must hold the estate so devised to her to be still existing. Then, we find it established that on the 24th February, 1871, the respondent, Mrs. *McMinn*, in settlement of a suit instituted by the appellant against her as administratrix with the will annexed of the personal estate of the testator, calling her to account for her dealings with that estate, and to avoid, as is sworn and not denied, an examination respecting her conduct as such administratrix, executed a deed under her hand and seal in relation to this very land, in which it is

assumed that she had acquired the fee simple estate, in the words following :—

In consideration of the proceedings in the Probate Court against me, and of the devise of *Andrew McMinn*, to *Maria Kearney*, in his will, I agree to convey,on or before the 1st day of April next, all the real estate now owned by me, or in my possession at *Dartmouth* or near the asylum,to the said *Maria Kearney* for her life, then to go to her children in fee simple, subject to a life interest in myself in said real estate, which life interest in me I especially reserve to myself. A good deed of all my present estate therein subject to the said condition to be given, so as to carry out the above object and intention.

This instrument, so executed, seems to evince a desire to atone for an admitted wrong, which it is probable the suit instituted against the administratrix would have redressed, and the different disposition purported by the deed to be made of the estate which the testator had devised to the appellant cannot affect the appellant's right to rest in preference upon her title under the will, if, at least, the deed agreed to be executed, whereby the appellant would have only an estate for life with remainder to her children in fee, has not been executed. The object of the deed of February, 1871, seems to have been to remove all pretended claim of Mrs. *McMinn* to a fee simple estate in the land. Then, we find further that on the 1st May, 1872, Mrs. *McMinn*, in consideration of $80 per year, payable quarterly, doth demise and lease to the appellant and her husband all that farm known as the *McMinn* property, adjoining to the north the asylum property at or near *Dartmouth*, in the County of *Halifax*, for and during the life of the said *Mary McMinn*, to have and to hold the said farm to the said lessees for and during the life of the said *Mary McMinn*; and by that lease the appellant and her husband covenanted to pay to the said *Mary McMinn* yearly, during her life, $80 per year by quarterly payments; and also agreed to permit the said *Mary McMinn* to occupy two rooms in the dwelling house now occupied by her on the said farm.

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If this were a bill filed by the respondent Mrs. *Kean*, claiming specific performance of the verbal agreement now alleged by her to have been made by Mrs. *McMinn*, it is clear that no decree could be made in her favor upon the evidence here given, as against the appellant's estate in remainder, nor, if this was a bill merely claiming a right to charge Mrs. *McMinn's* life estate, would the evidence given warrant any decree to the prejudice of the lease of that life estate to the appellant by the deed of May, 1872, which, the appellant swears, was executed before ever the respondent Mrs. *Kean* asserted against Mrs. *McMinn* the claim which she does now assert. The contradictory statements at different times made by Mrs. *Kean*, who is Mrs. *McMinn's* daughter, as to the transaction which she alleges took place between them, and the affidavit of Mrs. *McMinn* made in February, 1873, denying altogether the loan which is now set up, and the apparent absence of any necessity for a loan for the purpose for which it is alleged to have been made, and the absence of all evidence in writing of the transaction as now set up, all concur in investing the alleged transaction with well founded doubt as to its reality, and as to the *bona fides* of the parties to it, whatever may have been its nature.

If the mortgagee of the small mortgage for £150 had actually obtained an absolute title in fee simple to the mortgaged premises by foreclosure, he might, no doubt, afterwards have sold the fee so obtained for £905 to whomsoever he pleased, but to obtain that title by foreclosure, there must have been a decree in Equity, and before that decree could have been obtained, the administratrix, who was also devisee of the mortgaged premises for life, would have been compelled to apply the personal estate of the mortgagor in payment of the mortgage as far as it would go. There seems to have been abundance of personal estate to

satisfy the mortgage, but assuming the administratrix, who was also legatee of the personal estate, to have squandered that estate, Equity would have compelled her to replace the amount, and in that case her *necessity* for borrowing would have been limited to the amount of the mortgage. But there is no reason to believe that the mortgagee ever did obtain title by foreclosure; indeed the account which was produced from the papers of Mr. *Uniacke*, if admissible in evidence, would seem to show that Mrs. *McMinn* obtained an assignment of the mortgage to herself, if, as seems likely, the item there charged under date of October 16, 1841, relates to this mortgage: "Cash paid for assignment of *A. P. Tremaine's* mortgage £379 17s. 8d."

Now, if this be the mortgage in question, then it is plain that the suggestion of her having borrowed £905 to purchase the fee from the mortgagee after foreclosure, or even by a sale under a decree of the Court, is altogether a myth; but whether it be the mortgage in question or not, there is no evidence that Mrs. *McMinn* ever by payment of £905, or of any other sum, or in any way, obtained, either through the intervention of a Court of Equity, or otherwise, any title to the mortgaged premises other than that derived from the mortgagor's will; and that a Court of Equity could have been a party to a transaction purporting to sell to her this property in fee simple for £905, or for any other sum, is what I must decline to believe in the absence of proof.

That something may have been done by Mrs. *McMinn* out of Court in a suit for the foreclosure of the mortgage, by which she may have tried to defeat the remainder, which was vested in her infant child, I can believe, for the deed of 1871 was apparently executed to atone for some such attempt, but that the attempt was ineffectual, I entertain no doubt, and that a Court

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of Equity took any part in such a proceeding, I must decline to believe. The evidence is wholly defective to establish such a position, and whatever may have been the dealings between Mrs. *McMinn* and her daughter, Mrs. *Kean*, who derived benefit under the same will as that which constitutes the appellant's title, and who, therefore, must have known in what her title consisted, the evidence is, to my mind, wholly insufficient to affect the life lease to the appellant of May, 1872, which, upon the evidence before us, cannot be said to have been obtained otherwise than *bonâ fide*, without any notice of any prior or preferable claim, lien or charge of the respondent Mrs. *Kean* upon that estate.

As against the appellant's claim, therefore, to the monies paid into Court, nothing is shown, unless it be, as I have said, the value, whatever that may be, of Mrs. *McMinn's* life interest in the benefit reserved to her by the lease of May, 1872, and all this litigation having taken place at the instance of, and in the interest of, Mrs. *Kean*, whose claim fails, she should pay all the costs, as well in the Court below as of this appeal, and it should be referred back to the Court below, with a direction that it be referred to the master to set a value upon such life interest of Mrs. *McMinn*, with directions to pay that amount, when ascertained, to Mrs. *McMinn*, and the balance to the appellant, *Maria Kearney*. I think Mrs. *Kean* may well be remitted to assert, as she may be advised, in the ordinary way any claim she may have, or may think she has, against Mrs. *McMinn*.

THE CHIEF JUSTICE and FOURNIER and TASCHEREAU, J. J., concurred.

The minutes of the order as finally approved were as follows:

ALLOW the appeal of *Francis Kearney* and *Maria*, his wife.

ORDER that the rule of the Court below of the 2nd March, 1878, be reversed and discharged.

DECLARE that the respondent *Ann Kean* is not entitled to any part of the sum of $2310 remaining in the Supreme Court of *Nova Scotia* in this matter.

DECLARE that the said appellants *Francis Kearney* and *Maria* his wife, in the right of the said *Maria*, are entitled to the whole of the said sum of $2310, less the capitalised value of the life interest of *Mary McMinn*, in the occupation of the two rooms in the dwelling house reserved by the lease executed by her to the said *Francis Kearney* and *Maria*, his wife, bearing date the 1st day of May, 1872, in the proceedings in this matter mentioned.

ORDER that it be referred to the master of the Supreme Court of *Nova Scotia*, in case the parties differ, to set a capitalised value upon such life interest of the said *Mary McMinn* in the said two rooms.

ORDER that such value, when so agreed upon, or ascertained, be paid out of the said sum of $2310 to the said *Mary McMinn*.

DECLARE that the residue of the said sum of $2310 is to be considered as land, and is to be dealt with and enjoyed by the said *Maria Kearney* and her said husband, as they would respectively have been entitled by the laws of *Nova Scotia*, to deal with and enjoy the land which it represents, regarding such land as the fee simple estate of the said *Maria Kearney*; subject, nevertheless, to the right of the said *Francis Kearney* and *Maria*, his wife, to elect to have the said money paid out to them, provided that the said *Maria Kearney*, on

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being examined before a judge of the Supreme Court of *Nova Scotia*, apart from her said husband, shall declare that she consents to the payment of the said money out of Court, freely and without the compulsion of her said husband.

ORDER that all interest accrued upon the said sum of $2310 be paid to the said *Francis Kearney*, as his own proper monies.

ORDER that the said *Ann Kean* do pay to the said appellants all their costs of the proceedings in the Court below and of this appeal.

Solicitor for appellants: *T. J. Wallace.*

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*Jan'y 23.
*May 9.

ROBERT WILLIAM STANDLY *et al*.....APPELLANTS;

AND

EBENEZER PERRY *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Accretion—Public Right of Way—Implied Extinction by Statute —Cobourg Harbour Works—22 Vic., c. 72.

By 10 *Geo.* iv., c. 11, the *Cobourg* Harbour Company were authorized to construct a harbour at *Cobourg*, and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient.

The Harbour Company commenced their work in 1820 by running a wharf, southerly from the road allowance between lots 16 and 17 of the township of *Hamilton*, which now forms Division Street in the town of *Cobourg*. By means of the mud and earth raised by dredging and gradual accretions, which were prevented from

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*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

being washed away by being confined by crib work, the original wharf was widened to the full width of Division Street, and in addition they constructed a store house and placed a fence dividing it from the land which appellant (whose lot fronted on Division Street and extended to the waters' edge,) had gained by accretion since the addition to the original wharf was made.

Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the store house and fence which the respondents caused to be placed on the addition to the wharf and praying that the respondents, other than the Attorney General, be decreed to remove them.

Held,—1. That land gained by alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land.

2. That the storehouse and fence complained of in this case were not constructed on any part of Division Street, but on an artificial structure constructed under the authority of a statute on the line of Division Street for harbour purposes, and, therefore, appellant was not entitled to be indemnified because he is denied access to his alluvial land through the premises of the respondents.

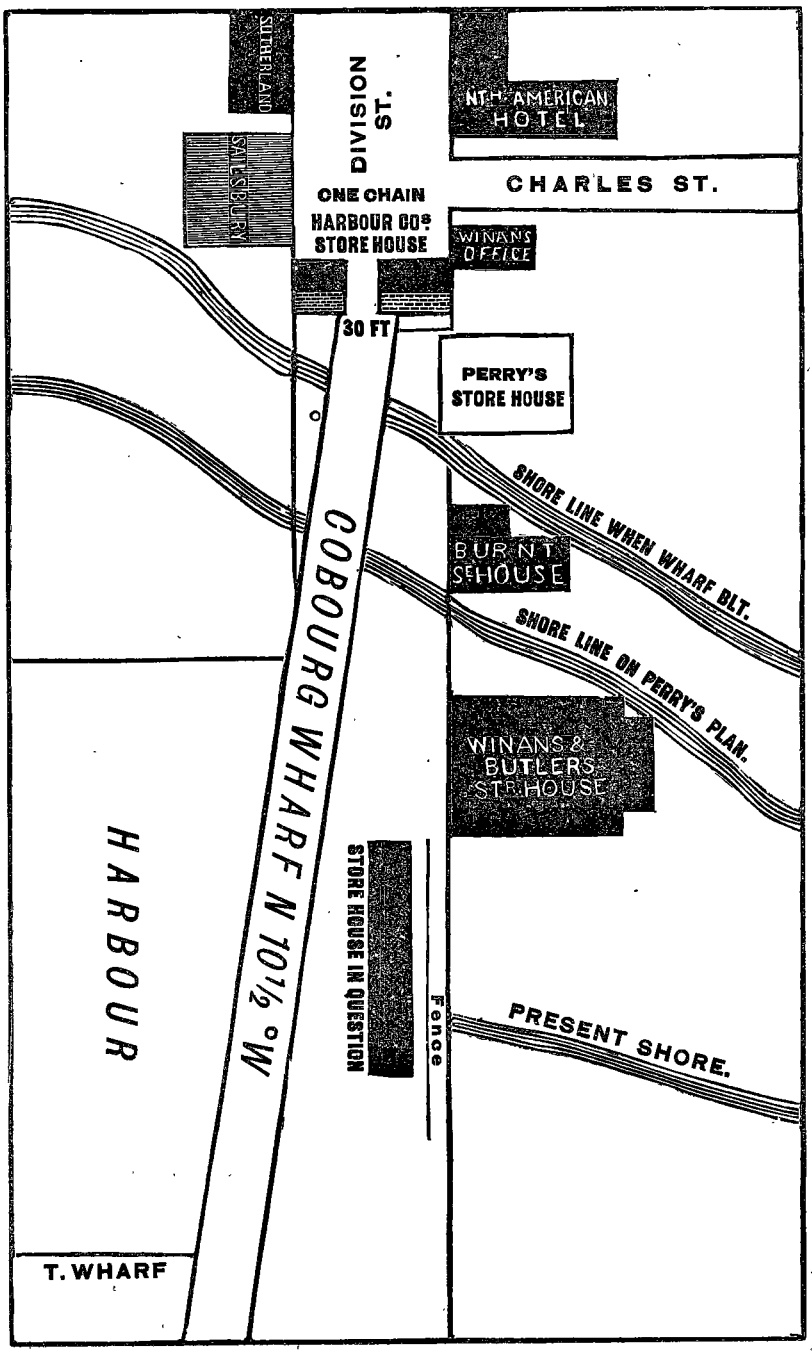
3. That the public right of way from the end of Division Street to the waters of Lake *Ontario*, was extinguished by statute by necessary implication.

Corporation of Yarmouth v. *Simmons* (1) followed.

APPEAL from a judgment of the Court of Appeal for *Ontario*, reversing a decree of the Court of Chancery of *Ontario*, and ordering that the Bill of Complaint filed by the Appellants, other than Her Majesty's Attorney General for the Province of *Ontario*, be dismissed with costs.

The Bill in this cause was filed on the 10th of day March, 1876, by the appellant *Standly*, against the respondents *Perry*, *Graveley*, *Dumble*, *McCallum*, *Boulton* and *Sutherland*, (who were Commissioners of the *Cobourg* Harbour Trust) and Her Majesty's Attorney General, complaining of the erection by the defendants, other than the

(1) L. R. 10 Ch. D. 518.


SUTHERLAND
SALISBURY
DIVISION ST.
NTH AMERICAN HOTEL
CHARLES ST.
ONE CHAIN
HARBOUR COs STORE HOUSE
WINANS OFFICE
30 FT
PERRY'S STORE HOUSE
SHORE LINE WHEN WHARF BLT.
BURNT SE HOUSE
SHORE LINE ON PERRY'S PLAN.
WINANS & BUTLERS ST. HOUSE
COBOURG WHARF N 10½ °W
STORE HOUSE IN QUESTION
Fence
PRESENT SHORE.
HARBOUR
T. WHARF

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Attorney General, of a store-house in the street called Division Street in the town of *Cobourg*, whereby the plaintiff's access to and from his property to the highway was hindered, and praying that the defendants, other than the Attorney General, might be decreed to remove the building. The bill was taken *pro confesso* against the Attorney General, who was only a formal party.

The other defendants answered the bill, setting forth in substance that they were commissioners of the *Cobourg* Harbour Trust; that under various statutes respecting the Harbour at *Cobourg*, they were authorized to erect and did erect the store-house referred to; that the land on which the store-house was erected was not a part of any public highway, but was part of the property vested, under the statutes in question, in them, for the purpose of the harbour.

The cause was heard at ths sittings of the Court of Chancery, at *Cobourg*, before the Hon. V. C. *Proudfoot*, on the 9th and 10th of May, 1876.

The facts of the case sufficienty appear in the judgment of His Lordship Mr. Justice *Strong*.

The Vice-Chancellor determined, 1st. that the land formed in front of Division Street, and the plaintiff's land was so formed by accretion; that the effect in law was to prolong Division Street and to add to the plaintiff's land the land formed between the former boundary of the plaintiff's lot and the water's edge. 2nd. That the defendants could not under any of the statutes referred to, justify the erection of the store-house in front of the plaintiff's lot, and he therefore pronounced a decree for the removal of the building (1).

From this decree the respondents appealed to the Court of Appeal of *Ontario*. That Court reversed the

(1) 23 Grant 507.

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decree of the Vice-Chancellor upon both the points referred to (1).

The present appeal was from the judgment of the Court of Appeal. The appellants *Covert* and *Hargraft* are trustees of the lands belonging to *Standly*, and were made parties in pursuance of a direction in the decree.

Mr. *Bethune*, Q. C., for appellant:—

The land claimed by appellant was formed partly by gradual accretion and partly by artificial accretion. The fact that the accretion to the lands in question was accelerated by the cribs and piers of the harbour, cannot deprive the appellants, the riparian proprietors, of their right to the new land so formed by accretion. This very point was expressly decided in *doe dem McDonald* v. *The Cobourg Harbour Company* (2); *Throop* v. *Cobourg and Peterboro' Railway Company* (3). The Judicial Committee of the Privy Council and the *U. S.* Supreme Court have also arrived at the same conclusion on this point. See *Doe dem. Seebkristo et al* v. *East India Co.* (4); and *Livingston* v. *The County of St. Clair* (5). This accretion had also the effect of prolonging Division Street, as may be seen by referring to the plan. The Commissioners had no right, by the erection of cribs or otherwise to exclude the public from pursuing the public highway to the waters' edge, the original boundary of Division Street.

[THE CHIEF JUSTICE: Is not the case of *Corporation of Yarmouth* v. *Simmons* (6) in point?]

There it was a right of way by custom that was taken away; in this particular case the only thing which has

(1) 2 Ont. App. R. 195.
(2) U. C. Q. B. Mic. Term. 7 Vic., Robinson & Har. Dig. p. 48.
(3) 5 U. C. C. P. 509 & 549.
(4) 10 Moore P. C. C. 158.
(5) 64 Ill. R. 64; S. C. in appeal 23 Wallace 46.
(6) L. R. 10 Ch. D. 518.

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been legalized is the wharf, and this was not physically inconsistent with the prolongation of Division Street. We contend the statute did not give the respondents the right of closing up streets, or take away from the public the right of going to the waters' edge over their highway. All the Judges in the Court below have agreed that according to the law of *Ontario*, the prolongation of Division Street by means of this accretion belonged to the public as part of Division Street. The Act incorporating the Harbour Company did not authorize them to take any land belonging to the Crown. When the Crown is not expressly named in an Act, the Crown property cannot be affected by it. The rights and powers of the respondents are defined in the Acts passed relating to the *Cobourg* harbour, and no authority was given to them to close up streets or to use or obstruct without purchase any original road allowance. The public continued to have the right of reaching the water over any embankment the Company or Commissioners may have constructed, and if this prolongation remained a highway, the appellants' right of access to it cannot be denied. The following authorities support this contention: *Marshall* v. *Ulleswater Co.* (1); *Eastern Counties Ry. Co.* v. *Dorling* (2). It is contended on the part of the respondents that subsequent legislation has legalized the acts of the Commissioners. Admitting that it has legalized the erection of the wharf, it cannot extend tothe store house complained of, as it was not built when the last Act was passed. The Acts belong to that class of Acts which are to be construed restrictively, and not so as to confer on them the right of closing up a public highway when such a right has not been given by express language. *Magee* v. *The*

(1) L. R. 7 Q. B. 166. (2) 5 C. B. N. S. 821.

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London and Port Stanley Ry. Co. (1); *Galloway* v. *The Mayor of London* (2).

Mr. *Boyd*, Q. C., and Mr. *Sidney Smith*, Q. C., for respondents:

The appellant contends that the statute authorizing the construction of a harbour at *Cobourg* could not affect Crown property. Now it is clear that all the works authorized necessarily interfered with the rights of the Crown, as the works were to be built on Crown property. See *Rex* v. *Smith* (3), *Atty. Gen.* v. *Richards* (4). The real question to be decided is, whether the extension was made as an extension of Division Street *qua* street, or as part of the Harbor Works, authorized by statute? The land in question never formed part of the town of *Cobourg*, and this has been recognized by the municipality of *Cobourg* itself: see 22 Vic. c. 72. The evidence also proves this land or "esplanade" to be artificially formed land, over which the Harbour Commission has always exercised its control, independent of the town jurisdiction.

As to the fence, there was a necessity of putting it up in consequence of the sudden fall of 3 feet to get to the adjoining land. It is built on the crib works which the respondents had the right to put there in order to protect their wharf. This raising took place in 1852, and there was then that difference between the two properties. Can it be contended that the appellant would have had then lateral access to this wharf? and if not, can the fact of this gradual accretion give him more right now than he had in 1852?

Then also, it cannot be denied that the rights of the Harbour Commission to the *locus in quo* have been recognized by subsequent legislation. And if it is admitted

(1) 6 Grant 172.
(2) L. R. 1 H. L. 34.
(3) 2 Dougl. 441.
(4) 2 Anstr. 603.

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that the wharf has been recognized by legislation, surely the word "appurtenances," which is to be found in sec. 2, of 13 and 14 Vic. c. 83, is quite sufficient to include "land" such as that in question in this suit. 36 Vic. c. 15, Ont., was passed after this esplanade was built and is an express recognition that it was one of the "appurtenances" of the Harbour.

Upon such a state of facts it is contrary to law to hold, as was done in the first instance, that the artificially formed land in front of Division Street was itself street. This could only be, at most, if the extension of the street was formed by process of accretion.

In any case the works complained of were authorized by statute, and if they interfered with the right of the public reaching the water, to that extent this right, by necessary implication, was limited by statute.

The case cited by the Chief Justice, *Corporation* of *Yarmouth* v. *Simmons* (1), is an authority on this point and coincides with the view taken by V. C. *Blake* in the Court below.

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

My contention is that they had no right to take this land to the prejudice of the public. The appellant must take his stand as one of the public, and submits respondents had no right to close the highway against the public.

The judgment of the Court was delivered by STRONG, J.:—

The plaintiff is the owner of land in the town of *Cobourg*. The defendants are the Commissioners of the *Cobourg* Town Trust, sued as individuals and not in a corporate capacity, and the Attorney-General for

(1) L. R. 10 Ch. D. 518.

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the Province of *Ontario*. The bill alleges that the defendants, other than the Attorney-General, have created a public nuisance by placing a fence and store-house on the highway, which causes peculiar damage to the plaintiff, by obstructing the access to his land.

The defendants set up that the fence and store-house are not placed upon the highway, but upon a pier, or wharf, forming part of the works of *Cobourg* Harbor.

At the time Division street, which is the highway in question, was originally laid out, the site of the store-house complained of was a long distance lakewards from the water's edge, the land on which it is built being made land, which has been brought into existence by means of works constructed for the purposes of the harbor. The plaintiff's land has been created by gradual accretions, which have been caused more or less by the harbor works.

The plaintiff's title to the land, in respect of which he sues, cannot be disputed; and it is equally clear, that if the site of the store-house forms part of the highway, or the defendants' works have been unauthorized by statute, the plaintiff is entitled to the relief which he asks; as, in either case, he would be entitled to sue for the special damage caused to him by a public nuisance interfering with the means of access to his land.

Four distinct points have been raised for our decision. *First*, it is said, that the place on which the store-house stands is a public highway, forming part of Division street. *Secondly*, that even though the *locus in quo* be part of the highway, yet the store-house is an illegal interference with the rights of the public, inasmuch as the statute authorizing the construction of the harbor, gave no authority to the Harbor Company to erect works in front of public highways or streets. *Thirdly*, it is urged, that even though the harbor and works may be perfectly legal, the public have a right of way

over the pier or wharf in question. *Lastly*, it is said that the defendants have no authority under their statutes to erect a store-house as part of their harbor works.

The discussion of these questions involves an examination of the several statutes relating to the harbor.

By the Act of 1829 (1), the *Cobourg* Harbor Company were incorporated, and were authorized to construct a harbor at *Cobourg*, which should be accessible to, and fit, safe and commodious for the reception of such description and burthen of vessels as commonly navigate the lake, and also to erect and hold all such needful moles, piers, wharves, buildings and erections whatsoever as shall be useful and proper for the protection of the said harbor, and for the accommodation and convenience of vessels entering, lying, loading and unloading within the same, and to alter and amend, repair and enlarge, the same as may be found expedient and necessary.

Section 3 provided for the determination by arbitration of the amount of damages to be paid to land owners whose lands might be taken for the purposes of the harbor, or of the roads, streets and approaches thereto.

Section 4 gave powers to take toll on goods and merchandise shipped or landed from or upon any part of the lake shore between the east boundary of lot No. 13 and the west boundary of lot No. 19 in the township of *Hamilton*, and upon all vessels and boats entering the harbor.

By the Act of 1832 (2), after reciting the progress made in the construction of the harbor, of which the wharf or pier in question formed part, a loan of £3,000 by the province to the Harbor Company was authorized to be expended in finishing the harbor.

(1) 10 Geo. 4, cap. 2. (2) 2 Wm. 4, cap 22.

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In 1835, another Act (1) was passed, authorizing a further loan of £1,000; and in 1839, the time for the completion of the harbor was further extended by 2nd *Vic.*, cap. 42.

In 1837, a Board of Police was established for the town of *Cobourg* (2), and power was given to the board to lay out streets, subject to a proviso that no new street which might interfere with the powers conferred on the Harbor Company, should be established.

The Act of 1850 (3) recited that the harbor had never been completed; that the harbor had been conveyed by the company to the Board of Works in security for such moneys as the Provincial Government had expended, and should expend on the harbor; that £10,500, or thereabouts, had been expended; that it was desirable that the harbour should be made as safe, commodious and convenient as possible, and that the town council was interested in improving and keeping improved the harbor for the purposes of the trade of the town, and attracting thither vessels navigating the lake. The Act then dissolved the corporation of the Harbor Company, and vested in the municipal corporation of *Cobourg* the harbor and all land attached thereto, and the moles, piers, wharves, buildings, erections and appurtenances, and all other things erected, or being, or belonging to, or used with, or in the harbor, and theretofore vested in the company, and all other moles, piers, wharves, buildings and erections. By the same Act the town council were authorized to make additions and improvements in and to the harbor, and to borrow money for the purpose of completing and improving it, and of erecting additional wharves, moles and piers, and of making such other additions

(1) 5 Wm. 4, cap. 43. (2) By 7 Wm. 4, cap. 42, sec. 26.
(3) 13 & 14 Vic., cap. 83.

and improvements as the town council should resolve on and approve.

In 1859 there was a further statutory transfer (1) of the harbor, wharves, piers and appurtenances (together with other properties belonging to the town of *Cobourg*) to the Commissioners of the *Cobourg* Town Trust.

Lastly: By an Act of the Legislature of *Ontario*, passed in 1873 (2), the Commissioners of the *Cobourg* Town Trust were authorized to issue debentures, not to exceed $100,000, charged upon the trust property, for the purpose of raising funds to deepen, enlarge, repair and improve the harbor.

The Harbor Company commenced their work in 1830 by running a wharf, which is shown on the plan, southerly from the line or road allowance between lots 16 and 17 of the township of *Hamilton*, which now forms Division street in the town of *Cobourg*. This wharf was constructed upon sunken cribs, the most northerly crib being laid partially on the land. The wharf did not run in the line of the street but inclined to the west. This wharf is known as *Cobourg* wharf. Further to the west another wharf, also running in a southerly direction, and of similar construction, was built, thus partially enclosing the waters of the lake so as to form the basin which constituted the harbor. In 1850, after the transfer to the town council, a contract was entered into by the town with *Cotton & Rowe* for dredging the harbor, and in carrying out this work the contractors deposited the mud and earth, taken from the basin formed by the two piers or wharves already mentioned, on the east side of the easterly pier. To retain these deposits, and to prevent their being washed away, to the injury of the harbor, they were subsequently confined by crib work. This crib work was laid down between 1853 and 1856. After the creation of the

(1) By 22 Vic., cap. 72. (2) 36 Vic., cap 120.

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Cobourg Town Trust in 1859 further dredging was done, the mud raised by which was also deposited to the east of the wharf and further crib work was laid down. By means of these deposits and additions, the original wharf was widened to the full width of Division street, not however to the full extent in length of the original wharf, but so as to project into the lake far beyond the shore line of the plaintiff's land adjoining, as shown on the plan. This plan also shows the line of the lake shore at the time the original harbor works were constructed, and at a later date, when, by accretion, that line had been advanced to what is called on the plan "Shore line on *Perry's* Plan," and it also shows the present shore line. The greater part of the fence and structure complained of are situate to the north of the present shore line. So much of the plaintiff's land as lies between *Perry's* shore line and the water's edge, in respect of which it is the plaintiff sues, has been gained by accretion since the addition to the original wharf was made. The addition is clearly delineated on the plan and distingushed from the original wharf.

The plaintiff complains that his access to this alluvial land is obstructed by the store-house and fence which the defendants have caused to be placed on the addition to the wharf. The deposits and crib work were, it is suggested, to some extent the cause of the accretion by which the plaintiff has acquired additional land, but whether this was so or not, it is beyond question that the accretion took place by imperceptible degrees. The addition to the wharf appears to have had several objects; the crib work was made in the first instance with a view to keep the deposits in their place, and to prevent their drifting away to the injury of the harbor; then a superstructure was added to widen the wharf and to enable a line of railway to be laid down upon it for shipping purposes, which was afterwards done.

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The law applicable to the facts thus stated appears to be extremely plain. The plaintiff makes out his title to the land in respect of which he says he is damnified, for it can make no difference whether this land was gained by alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible. The case of *Doe dem. Seebkristo et al* v. *East India Co.* (1) is authority for this. Then the fact cannot be disputed that the fence and store house do obstruct the access from the plaintiff's land to the wharf.

The plaintiff, therefore, makes out a case entitling him to relief, if he shows, either that the addition to the wharf upon which the store-house and fence complained of are placed form part of a public highway, or that the addition to the wharf was an illegal and unauthorized work. One or the other of these propositions he must establish to entitle himself to relief. I may here point out that the bill makes no case for relief on the ground of dedication to the public of a right of way on the original wharf and the addition, and that point does not appear to have been made in any of the courts below, nor was it raised in argument at this bar, and if it had been, in the present state of the pleadings, it would have been clearly inadmissible. Then, how did the land which forms the site of the store-house and fence become part of the public highway? We may grant that if this land had been formed by accretion instead of having been artificially made by the defendants' predecessors, it would have constituted part of Division Street. This may be more readily assumed here where the soil and freehold of the highway, like all public road allowances and streets under the municipal system

(1) 10 Moore P. C. C. 158.

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established by law in *Ontario*, are vested either in the Crown or in the municipality, for the use of the public, than would be the case if the public had only a right of way in the nature of an easement, the title to the soil being in private owners, as is generally the case in *England*.

Assuming this to be the legal effect of an addition to a street by accretion, it does not in the least degree assist the plaintiff, since the undisputed facts do not warrant the application of such a rule of law, for the addition to the wharf was artificially constructed on what was, at the time, part of the bed of Lake *Ontario*. It is consequently out of the question to contend that the storehouse complained of is placed in a public highway.

Next, it is pretended that the addition to the wharf was not authorized by the statutes giving powers to construct the harbor. Nothing can be more extensive than the terms of the original act. It empowers the company to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever as should be useful and proper for the protection of the harbor, and to alter and amend, repair and enlarge the same as might be found expedient.

The evidence shows that this addition was made originally for the protection of the harbor, and that afterwards a superstructure was placed upon it for the purpose of enlarging in width the original wharf, thus bringing the work within the exact terms of the statute. It is then argued that the act did not confer power to erect the harbor works, so as to intercept the passage from the end of a public highway to the waters of the lake. The answer to this is to be found in the original statute which authorises the selection of any site at *Cobourg*, without any exception of streets, for works which are to be the private property of the company.

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The statute of 1837 establishing the Board of Police, which contains a provision that streets to be laid out are not to interfere with the works of the Harbor Company, has also an important bearing on this part of the case.

Further, the legislature has, by a series of enactments already referred to, coming down to as late a period as 1873, recognized the legality of the harbor works in a manner which entirely excludes the possibility of holding them to be *ultra vires*. A case, decided in *England* since the judgment of the Court below was delivered, has, however, been brought to our notice by the Chief Justice, which constitutes a conclusive answer to this objection. I refer to the case of *The Corporation of Yarmouth* v. *Simmons* (1), where the precise point I am now referring to arose, and where it was held that statutory powers to erect a pier, authorized the projection of such a pier on the line of a public highway, and that the public acquired no right on the erection of the pier, to pass over it, to reach the water; in that case, the sea. It was also there contended that a public right of way could not be taken away without express words, but this contention was distinctly denied by the Court. It was also said, that the right to get from the end of the street to the water was a right appertaining to the Crown, and could not for that reason be taken away without express words. The same point is adverted to by the learned Vice-Chancellor in his judgment in the present case. Mr. Justice *Fry*, however, denies that the *primâ facie* right of the public to have access to the water was a right vested in any way in the Crown. This also is exactly applicable here, for, although the soil in the original road allowance was vested under the Provincial statutes in the Crown, yet, if the harbor works originally constructed were in the

(1) L. R. 10 Ch. D. 518; S. C. 38 Law Times (N. S.) 881.

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water, and south of the termination of the street, no right of the Crown can be said to have been interfered with, and a mere right of way in the public and the title of the Crown to land are, as is pointed out by Mr. Justice *Fry*, entirely different. The case just quoted is, therefore, an authority refuting nearly all the arguments by which the plaintiff attempts to support his case. It shows that there is nothing in the objection that the Harbor Company and their successors had no right to construct works in the lake opposite the line of a street. It also affords a conclusive answer to the claim that the public had a right of way from the street to the water over the harbor works, assuming them to be legal, and it shows that no rights of the Crown are interfered with.

The cases cited in the appellant's factum of *The Eastern Counties Railway Co.* v. *Dorling* (1), and *Marshall* v. *Ulleswater Co.* (2), are plainly distinguishable by the fact, that the barge and pier in those cases respectively were illegal, and unauthorized obstructions to the *primâ facie* right of way to which the public were entitled to enable them to obtain access to the water; here, on the contrary, we think that the obstructions interposed are authorized by statute.

The last ground on which the plaintiff rests his case is, that granting the addition to the wharf and all the other works to be *intra vires*, the store-house was unauthorized.

If the pier or additional wharf is a legal construction and there is no public right of way over it, conclusions which have already been arrived at, the plaintiff can have no *locus standi* to maintain any objection to a store-house being erected on the pier which he has no right to come upon, merely on the ground that it is *ultra vires* of the company. The Attorney General may always file

(1) 5 C. B. N. S. 821. (2) L. R. 7 Q. B. 166.

an information to restrain a corporation from doing or continuing an act which is beyond the powers conferred upon it by law, but a private individual has no right to complain, unless the act which is *ultra vires* occasions him some special legal injury.

Another conclusive answer to this last objection is that the act of 1829 gave the company authority to erect such buildings as should be useful and proper for the accommodation of vessels entering, lying, loading and unloading in the harbor. The evidence shows that this store-house is not only a useful and proper, but a necessary adjunct to the harbor works, and, indeed, the fact is so apparent that, even without evidence, we should be justified in so holding. The plaintiff, therefore, fails in this, as in the other arguments by which he has attempted to support his appeal.

Before concluding, I think I ought to notice an objection to the constitution of this record, which, though not raised in the answers of the defendants, nor made in argument, appears to me a serious one. By the act of 1859 the commissioners of the *Cobourg* Town Trust are legally incorporated. It is true that the words "corporation" or "incorporated" are not used, but the legal effect of the first section clearly is to constitute the individuals named a corporation. The corporation ought therefore to have been at least a party to the cause and in my judgment the sole party.

I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *W. I. Stanton.*

Solicitor for respondents: *Sidney Smith.*

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*Nov. 3.

*Nov. 10.

*Dec. 12.

*Dec. 20.

CONTROVERTED ELECTION OF NORTH ONTARIO.

GEORGE WHEELER .....APPELLANT;

AND

WILLIAM HENRY GIBBS.....RESPONDENT.

Election appeal, notice of setting down for hearing—Power of Judge who tried the petition to grant an extension of time for giving such notice—Supreme Court Act, sec. 48—*Rules* 56, 69.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the Court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the Judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Act,

Held,—That this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the Court could not grant relief under rules 56 or 69; and that, therefore, the appeal could not be then heard, but must be struck off the lists of appeals, with costs of the motion.

Subsequent to this judgment, the appellant applied to the Judge who tried the petition, to extend the time for giving the notice, whereupon the said Judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down by the Registrar for hearing by the Supreme Court at the February Session following, being the

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

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nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal or failed to bring the same on for hearing at the next session, and that the Judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this Court.

Held,—That the power of the Judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the Judge having made such an order in this case, the appeal came properly before the Court for hearing. (*Taschereau*, J., dissenting.)

THIS was a motion by the respondent to quash the election appeal in the matter of the Controverted Election of the appellant as member duly elected of the House of Commons for the Electoral District of the North Riding of the County of *Ontario*.

Judgment, allowing the petition of the respondent and personally disqualifying the appellant, was rendered by Mr. Justice *Armour*, on the 6th February, 1879, and the sum of $100 was, within eight days after the said judgment, paid into the Court, and also ten dollars, the prescribed fee for making up and transmitting the record.

The record was transmitted to the Registrar of the Supreme Court on the 11th June, 1879. On the 24th September, 1879, application was made on behalf of the appellant to the Chief Justice, under rule 55 (S. C. R.), to dispense with printing part of the record. It appearing, when this application was made, that the fee for entering the appeal had not been paid to the Registrar under rule 56 and schedule therein referred to, the Chief Justice refused to entertain the application until such fee should be paid, and the appeal duly entered. Thereupon the agent for the appellant's solici-

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tor paid the fee, and the Chief Justice made the order as asked. On the same day the case was set down for hearing by the Registrar of the Court for the October session.

On the 20th October, 1879, the agent of the appellant's solicitor made another application to further limit the printing, and to limit the appeal to the personal charges, which was granted by a Judge in Chambers on payment of $5 costs to the respondent.

On the 28th October, 1879, although no application had been made to the Judge who tried the petition for further time to give notice, the appellant gave notice to the respondent that the appeal had been set down for hearing.

The respondent thereupon moved to quash the appeal upon the following, among other grounds:—

"And for that the appellant did not cause his said appeal to be set down for hearing before this honorable Court, and a notice thereof to be given to the respondent pursuant to the statute and rules in that behalf, and did not obtain an enlargement of the time to give such notice.

"And for that, the said appellant caused the said appeal to be set down for hearing before the now ensuing session of this honorable Court without giving any notice thereof to the respondent."

Mr. *Cockburn*, Q. C., for respondent:—

The notice served on the 28th October is not in accordance with the 48th section of the Supreme and Exchequer Court Act and rule 51 of the Supreme Court Rules. The provision in the statute that a notice in writing shall be given to the parties affected by the appeal is imperative, and the omission to give such notice is an objection to the jurisdiction of this Court, and cannot be waived. Moreover, the orders taken out since the appeal has been set down, were steps taken by

the appellant, and respondent was bound to attend the applications made on the part of the appellant. An appeal in election matters is given by this 48th section of the Act, and as the notice that the appeal has been set down is a condition precedent, this Court has no jurisdiction, nor any power to relieve against failure to give it. See *Maxwell* on Statutes (1), and cases there cited.

Mr. *McTavish* for appellant:—

The objection regarding the failure to give notice of the time of hearing within three days is only a formal one under rule 69 of the Supreme Court Rules; no proceeding in this Court can be defeated by any formal objection. A great deal of delay occurred in the Court of Queen's Bench in having the record prepared and forwarded to *Ottawa*, and it was impossible to find out when the proper time had arrived to give notice, as appellant did not know on what day the Registrar would set down the appeal for hearing. Since the delay to give notice within the time required by the statute had expired, the respondent, through his attorney, waived this objection by appearing on two applications made in Chambers by appellant for limiting the appeal, and on one of which appellant was condemned to pay $5 costs, which appellant paid, and respondent accepted. The appellant has been allowed to proceed with the printing of the record and fyling of his factum, and it is too late now to object that a proper notice has not been given.

It was on account of the orders issuing that the notice was not given. The objection is a formal one and under the 69th rule, the Court has power to allow the appeal to go on. Both parties agreed that the case was to be argued this session. Everything has been done except the giving of the notice. Under rule 70 of

(1) P. 334.

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the Supreme Court Rules, this Court can extend the time. The constitutency, if the appeal is quashed, may be unrepresented for two Parliaments, and the appellant be personally disqualified in the meantime. The objection should have been taken the first day of this session.

The court will see by the affidavit that both parties, knowing the difficulty with which the appellant had nothing to do, understood and agreed that the appeal would be argued on the merits in the October sessions.

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Nov. 10.

THE CHIEF JUSTICE :—

This was an application to dismiss the appeal for want of the notice required to be given by the 48th section of the Supreme and Exchequer Court Act, which regulates appeals in controverted election cases, and which enacts that thereafter "any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition on any question of law or of fact, and desires to appeal against the same, may, within eight days from the day on which the Judge has given his decision, deposit with the clerk, or other proper officer of the court (of which the Judge is a member) for receiving moneys paid into such court at the place where the petition was tried, if in the Province of *Quebec*, and at the chief office of the court in any other province, the sum of $100 as security for costs, and a further sum of $10 as a fee for making up and transmitting the record; and thereupon the clerk, or other proper officer of the court, shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said court at the nearest convenient time, and according to any rules made in that behalf under this Act;

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and the party so appealing shall thereupon, within three days, or such further time as the Judge who tried the petition may allow, give to the other parties to the said petition affected by the said appeal, or the respective attorneys or agents by whom such parties were represented at the trial of the petition, notice in writing that the matter of the petition has been so set down for hearing in appeal as aforesaid,—in and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said court ought to have been given by the Judge whose decision is appealed from."

This cause was, at the instance of the appellant, duly set down for hearing on the 24th day of September, 1879, for this present sitting of the court. No notice in writing was given to the respondent, the other party to the said petition affected by the said appeal, or the attorney or agent by whom such party was represented at the trial of the petition, within the three days, as provided by the Act, nor was any further time allowed by the Judge who tried the petition, nor has any reason been given, or excuse offered, for not giving the notice, nor has any consent or agreement to waive or dispense with such notice been shown, so that the case rests on the bald question of a non-compliance with a provision requiring notice in writing to be given.

The jurisdiction this Court exercises over cases such as this is purely statutory, and no discretion is given by the statute to dispense with its requirements, nor is any authority given to the Court, or the Judges, to enlarge the time for giving this notice; the power or discretion to do this has been specially delegated to the

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Judge who tried the petition, and no general power has been conferred on this Court to deal with the matter. The obvious intention of the Legislature was that the party interested in the appeal should have speedy notice, and that the appeal should be promptly heard. The appellant cannot ignore the provisions of the statute, nor can this Court dispense with the requirements of the law, and deprive a party to the petition, affected by the appeal, of any privileges or advantages the statute has given him.

This notice is the first and only intimation the respondent has of the appeal—the previous steps by the appellant are *ex parte*; until this notice is given, as respects the respondent, as was said by *Erle*, C. J, in *Scott* v. *Durant* (1), "there has been no completed appeal," and it is only when so completed that "the appeal shall thereupon be heard and determined" by this Court. The words of *Wilde*, C. J., in *Norton* v. *The Town Clerk of Salisbury* (2), in reference to an appeal against the decision of a barrister appointed to review a list of voters under the 6 and 7 *Vic.*, c. 18, sec. 62, are very applicable to this case. He says: "In dealing with this Act of Parliament, which has for the first time delegated to a court of law a duty of much interest to the community, it behoves us to confine ourselves as strictly as may be within the path the Legislature has marked out for us;" and at the conclusion, he says; "It appears, therefore, to me that the the condition upon which alone the power of the Court to entertain the appeal rests not having been observed, we are bound to decline to hear it."

Rule 69 has been invoked on behalf of the appellant, which is that "no proceeding in the said Court shall be defeated by any formal objection;" but this cannot avail him. This is not a formal objection, nor can the

(1) 13 C. B. N. S. 218. (2) 4 C. B. 34.

rule apply if it was, because the Judges of this Court can only make rules extending "to any matter of procedure or otherwise not provided for by the Act, but for which it may be found necessary to provide, in order to insure the proper working of the Act and the better attainment of the objects thereof, and all such rules, not being inconsistent with the express provisions of the Act, shall have force and effect as if therein enacted."

It does seem hard, in a case such as this, that by any inadvertency, oversight, or neglect, the appellant should be shut out from his appeal; and were it in my power, I should gladly afford him an opportunity of having his case heard and determined in this Court. But the fault rests neither with the law, which is expressed in plain unambiguous language, nor with this Court, which must expound the law as it is written, regardless of consequences. *Jus dicere et non jus dare* is our province, or, as *Alderson*, B., says in *Miller* v. *Salomens* (1), "My duty is plain. It is to expound and not to make the law; to decide on it as I find it, not as I may wish it to be."

As, then, the express requirements of the statute have not been duly complied with, I am of opinion, that this appeal cannot be entertained, and it must be struck out of the list of appeals.

STRONG, J.:—

I am of the same opinion as the Chief Justice. The provision of the 48th section of the *Supreme Court Act*, requiring notice to be given within three days after the appeal has been set down for hearing, is imperative and not merely directory. The *Interpretation Act* requires us to place that construction on the words:

(1) 7 Ex. 543.

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"*shall* thereupon within three days thereafter * * * give notice."

The notice is, therefore, a condition precedent to the exercise of any jurisdiction by this Court, and the authorities quoted by his lordship shew decisively, that it is a well established rule of construction that the performance of a preliminary act, upon which jurisdiction depends, can neither be dispensed with nor waived. The case of *Peacock* v. *Reg.* (1) is a direct authority for this position.

Another rule applied to statutory requirements similar to that in question here is, that the Court cannot relieve a party against an omission to take a particular step in procedure within a limited time, when the public or any class of persons other than the parties to the proceedings are interested. In my judgment the condition of giving three days notice, in this section, is not imposed for the benefit of the respondent alone, but the public have also an interest in its strict performance.

Further, it appears to me that the respondent did nothing which could be considered an act of waiver. The appearance of the respondent's solicitor on the application to the Chief Justice with reference to printing the case, was on the same day the appeal was inscribed for hearing, and, therefore, too early to have any such effect. The attendance on the motion before Mr. Justice *Fournier* could not have any such consequence, inasmuch as the respondent assented to nothing, but merely appeared and asked for his costs.

Lastly, I am of opinion, that even if the Court were not excluded from enlarging the time for service by the two rules of statutory construction I have before stated, it could not interpose, for the reason that the statute, by giving power to enlarge the time to the Judge who tried the petition, must be construed as precluding this Court from making an order of the same kind.

(1) 27 L. J. Q. B. 224.

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The appeal should be struck out of the list of appeals with costs.

FOURNIER, J., concurred:—

HENRY, J.:—

After giving a great deal of consideration to this matter, with a view of keeping it under the jurisdiction of the Court, I regret that I have been unsuccessful in finding any reason by which this Court would be justified in retaining this appeal. The statute which has been referred to is of too imperative a character to be called in question in regard to the petition which is now before the Court. In the ordinary cases, a notice of appeal is required to be given within eight days. In this case, there is no notice of appeal provided for, and the notice—the want of which is complained of in this case—is the first notice the party gets that any such appeal has been taken. I think, therefore, it is material to the jurisdiction of this Court that this notice should be given as the statute provides. In the ordinary cases of appeal, the notice, I think, perfects the appeal, and it is then within the jurisdiction of this Court to be dealt with, and, if so, might, in that case, I think, be brought under the terms of rule 70 of this Court.

Now, had it been provided for in the statute that notice of appeal should be given, and that such notice had been given, I would consider the case was then legitimately in this Court; but, unless that notice were given in the ordinary appeals, I would consider the case was hardly here, and, therefore, not within our jurisdiction. I concur with my learned brethren in saying that this is a case which is specially provided for by the statute, and that the terms of it, by which the party is entitled to appeal, ought to be complied with; and, if not, under the authorities of all the cases which have been referred to and others I have turned

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my attention to, I regret to, say, this being, I think, a condition precedent, there is no appeal; and that the party is not regularly in this Court. I was in hopes that under the waiver that had been shown here, the case might still have been heard, but I think there is a fundamental objection, and that the waiver, such as it is, cannot be admitted. Under these circumstances I regret to say I feel myself bound to decide that this appeal is irregular, and, therefore, so far as it is now before us ought to be quashed.

TASCHEREAU, J.:—

For the same reasons, which it is needless to repeat, I concur with the decision and am of opinion that the appeal should be quashed. No doubt the appellant suffers great hardship, but, after all, he suffers from his own neglect.

GWYNNE, J.:—

I have endeavoured to support the position contended for upon the part of the appellant, that the notice, required to be given by the 48th section of the *Supreme Court Act*, is a matter of procedure only, and that the clause, requiring it to be given, is directory only and not imperative; but I regret to say that I am unable to arrive at that conclusion. True it is, that the same point may arise under the 68th section,on an appeal to this Court from the Exchequer Court, the notice there required being identical with that required by the 48th section, save only in so far as the words in the latter section, "or such further time as the Judge who tried the petition may allow," may make, if it does make, any difference. Every thing required to be done in the 48th section preceding the giving the notice of appeal is authorized to be done *ex parte*—behind the back of the respondent. The deposit of $100, as security for costs,

within 8 days from the day on which the Judge has given his decision, is the *ex parte* act of the person against whom the decision is given, and this is made a condition precedent to the clerk of the Court making up and transmitting the record to the Registrar of the Supreme Court. The transmission of that record is an *ex parte* act, of which the person in whose favor judgment was rendered is not, in the contemplation of the statute, deemed to have notice, except by the notice required to be given of its having been received by the Registrar of this Court, and by him set down for hearing at the nearest convenient time. So that the only notice which the statute provides to perfect the appeal is the notice required to be given to the opposite party within three days from the matter of the petition being set down by the Registrar of this Court, "or such further time as," not this Court, but "the Judge who tried the petition may allow." This, then, being the only notice of appeal provided by the Act, without which the respondent would know nothing of an appeal being contemplated, the words in the section, "and the appeal shall thereupon be heard and determined by the Supreme Court," seem certainly to make the giving the notice a condition precedent to the hearing of the appeal, and so the objection is not merely one of procedure only, but affects our jurisdiction to hear the appeal.

It was contended that the appearance of the respondent to two summonses, signed by a Judge of this Court, in respect of matters connected with the appeal, should be held to be a waiver of the want of notice, but our jurisdiction in this matter being wholly statutory, I fear we cannot adopt this view.

Regina v. *The Justices of Middlesex* (1) is a strong authority upon this point. The motion was for a mandamus, directed to the justices of the County

(1) 7 Jur. 396.

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of *Middlesex*, commanding them to enter continuances, and hear an appeal against a conviction under 4 Geo. 4, c. 98, s. 87, which required notice of appeal to be given within six days after the cause of complaint shall have arisen. The conviction took place on Monday the 2nd May, the notice of appeal was received on Monday the 9th May—the 8th being Sunday. The appeal came on to be heard at the sessions on the 6th July, when the appellant appeared in Court prepared to prosecute his appeal. On the appeal being called on, counsel for the respondent, without requiring service of the notice of appeal, or any other fact, to be proved, applied to have the hearing of the appeal adjourned to the next sessions, which was ordered accordingly. The next sessions commenced on the 7th August, when the case was again adjourned to the next sessions, which commenced on the 12th October. Upon that day both parties appeared by their counsel, and the appellant with his witnesses, when the respondent, by his counsel, admitted service of the notice of appeal on the 9th May as aforesaid, but objected to the appeal being heard on the ground that the notice of appeal was not served within the prescribed six days, and thereupon the Court of Quarter Sessions, acting upon the objection, refused to hear the appeal, and the conviction was confirmed. It was strongly contended, that the appearance of the respondent, and procuring the adjournment of the case without making the objection relied upon, operated as a waiver of the objection. It was also contended that, as the seventh day was a Sunday, the notice was good, but the Court, *Williams* J., said: "The question I had to determine arises upon the distinct language of the statute, and upon that language how can I say that this notice was given within six days. I think the plain words of the Act are not to be got rid of." And he adds, "I feel the less regret at coming to this conclusion because there were five

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days in which the notice might have been served, but the appellant chose to neglect and to raise this discussion." And the rule for the mandamus was discharged.

I cannot see that the appearance of the respondent's attorney upon the summonses relied upon can deprive him of the right to insist that he has never received that notice, the giving of which constitutes the means provided by the statute to subject him to the jurisdiction of this Court in relation to the matter in appeal.

The cases relied upon by Mr. *Cockburn* were cases of want of, or of defect in, the notice, which was made a step preliminary to the party appealing. I at first thought, and was in hope that I should find, this constituted such a difference as would make them inapplicable in this case, but, as the notice required by this statute is made a step preliminary to our hearing the appeal, and is the only means provided by the statute for subjecting the respondent to our jurisdiction, they seem equally to apply here; for although we may have jurisdiction to hear and determine the case, if the parties should choose to argue it without any notice, we have no jurisdiction to compel the respondent to submit to our jurisdiction, if he has not received the statutory notice, or under such circumstances to hear the case *ex parte*, in the absence of the respondent.

[*Case struck out of the lists of appeals with costs of the motion.*]

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Dec. 12.

Subsequently to this order, an application was made by the appellant to Mr. Justice *Armour*, who tried the election petition, to extend the time for giving the notice. On the 22nd November, 1879, the learned judge granted the application and made an order "extending the time for giving the prescribed notice till the 10th day of December, then next," and within the extended time the case was again set down by the Registrar for

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hearing by the Supreme Court at the sitting of February, 1880, being the nearest convenient time, and notice of such setting down given.

The respondent on the 12th December, 1879, moved the Court to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, and failed to bring the same on for hearing at the next session after the appeal had been instituted, and that the Judge had no jurisdiction to grant the order made on the 22nd November, 1879.

Mr. *Cockburn*, Q. C., appeared on behalf of the appellant, and Mr. *Hodgins*, Q.C., on behalf of the respondent. Their arguments, and cases cited, are referred to in the judgments hereinafter given.

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Dec. 20.

THE CHIEF JUSTICE :—

This is an application to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session after it was ripe for hearing. The motion is in the matter of an election petition tried before Mr. Justice *Armour*, a Judge of the Court of Queen's Bench of *Ontario*, under the Dominion Controverted Elections Act of 1874, in which the present appellant was respondent and the present respondent was petitioner. Judgment was delivered on the 26th of February, 1879, and the sum of $100 was, within eight days after the said judgment, paid into the Court of which the said Judge was a member, and also ten dollars, the prescribed fee for making up and transmitting the record. The record was transmitted to the Registrar of this Court, who, on the 24th day of September, set down the matter of the said petition for hearing by this Court at its then next sitting, being the nearest convenient time. The party so appealing did not thereupon, within three days, give the notice required by section 48 of the

Supreme and Exchequer Court Act, and did not obtain an allowance of further time for giving such notice from the Judge who tried the petition. On the third day of November, the respondent applied to this Court to have the said appeal struck out of the list of causes entered for hearing at the then sitting of this Court, for want of such notice, whereupon, and by reason of no such notice having been given, the Court did declare that the said cause could not, under the terms of the Supreme and Exchequer Court Act, be now heard and determined, and ordered the said case to be struck out of the list of appeals. Subsequently, an application was made to the Judge who tried the said petition to extend the time for giving the notice, whereupon the said Judge granted the application, and made an order "extending the time for giving the prescribed notice till the 10th day of December then next," and within the extended time notice has been given, and the case has been again set down by the Registrar for hearing by this Court at the sitting in February next, being the nearest convenient time.

The respondent's contention is that, no extension of time having been allowed by the Judge before the cause was set down in this Court, and no notice in writing having been given within the three days after the case was first set down, the jurisdiction of the Judge who tried the petition was at an end; that he was *functus officio*, and had no power or authority to make the said order of the 22nd of November, and that therefore the case cannot be heard in this Court, and the appeal is consequently at an end, and should be dismissed. The learned Judge appears to have been of this opinion, but having been told that the Supreme Court thinks that he had the power, he assumed to make the order.

After what took place on the argument, it is only necessary to repeat that the learned Judge was incor-

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rectly informed, and to re-affirm that this Court never expressed any such opinion, but, on the contrary, carefully and avowedly refrained from doing so. As regards the present enquiry, this is now wholly immaterial. The only question we have to determine is: had, or had not, the Judge who tried the petition power to extend the time as he has done? If he had, then, having granted the extension, and notice having been given within the extension granted, the matter is now ripe for hearing, and the appeal cannot be dismissed. It cannot be disputed, that if the Judge had the power, the exercise of that power cannot be now questioned, it being purely a matter of discretion, resting with the Judge who tried the petition, and not appealable, and with which we have nothing to do.

In considering this case it is very important, as was suggested by my brother *Strong* on the argument, to refer to the 35th section of the Dominion Controverted Elections Act of 1874, which was repealed by the Supreme and Exchequer Court Act, when the Supreme Court was organized and came into the exercise of its appellate jurisdiction. That 35th section provided that any party to the petition, being dissatisfied with the decision of the judge, and desiring to appeal, might, within eight days from the day on which the Judge gave his decision, deposit in the Court of which the Judge was a member the sum of $100 by way of security for costs, whereupon the Clerk of the said Court was required to set the matter of said petition down for hearing before the full Court of which the Judge was a member, as therein provided; and the statute goes on to say that the party so appealing shall thereupon, within three days, or such further time as the Judge may upon application allow, give to the other parties to the said petition affected by the said appeal, or their respective attorneys, or agents, &c., notice in writing that the matter of said petition

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has been so set down to be heard in appeal as aforesaid. After providing that the party appealing may limit the subject of appeal, it proceeds: "And the said appeal shall thereupon be heard and determined by said full Court." The section of the Supreme and Exchequer Court Act which repeals this 35th section provides for a like appeal by any dissatisfied parties, and makes similar provision as to time, place, and amount of deposit of $100 as security for costs, and provides for the further sum of $10 as a fee for making up and transmitting the record, and that thereupon the Clerk or other proper officer of the Court (that is the Court of which the Judge is a member) "shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said Court at the nearest convenient time and according to any rules made in that behalf under this Act; and the party so appealing shall thereupon, within three days, or such further time as the Judge who tried the petition may allow, give to the other parties to said petition affected by said appeal, or the respective attorneys or agents by whom such parties were represented at the trial of the petition, notice in writing that the matter of the petition has been so set down for hearing in appeal as aforesaid," and by which notice said party so appealing may limit the subject of appeal, &c., and the appeal shall thereupon be heard and determined by the Supreme Court.

The great difficulty which appears to have weighed on the mind of the learned Judge—who, while extending the time, expressed so strongly his opinion adverse to his right to do so—was his difficulty in conceiving that the Legislature could, in his own words, "have intended that a Judge in the Court below should be making orders respecting, and meddling with, the proceedings of the Supreme Court, after the cause had become a cause

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in that Court," and apparently this forced the learned Judge to the conclusion that "the application," that is, the application for an extension of time, "could only have been made and such allowance granted before the matter of the petition had been set down for hearing in appeal, and not afterwards; that after the matter of a petition had been set for hearing in appeal in the Supreme Court the cause thereupon became a cause in the Supreme Court, and the Judge who tried the petition thereupon ceased to have any authority to make any order in the cause."

It is self-evident that the Legislature contemplated cases in which an extension of the very short period of three days might be necessary, and it is equally clear that such extension was confided to the discretion of the Judge who tried the petition, and to him alone. It was so vested in him alone under the first Acts, and when the Legislature took the appeal from the full Court of which he was a member and vested it in the Supreme Court, it still specially reserved to the Judge who tried the cause, in precisely the same terms, the power to extend the period of time, which would necessarily commence, under the repealing Act, to run from and after the time when the cause was entered in this Court. I cannot think it possible that the Legislature could have intended, as the Judge suggests, that the allowance could only be granted before the matter of the petition had been set down to be heard in this Court. Until the petition was set down, how could it be known that an extension would be necessary? In this case the decision was given on the 26th day of February, 1878, but the record was not transmitted till the 11th day of June last, over three months afterwards. By the affidavits in the case it appears this delay arose from the inability of the officers in the Court below to prepare the record of the proceedings for transmission,

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as to which, it appears, the appellant did not know when the same would be transmitted, and therefore in such a case it would be utterly impossible, it appears to me, for an appellant to know whether, when transmitted, he would be able or unable to give the notice, and as until the case was entered there were no three days to extend, I am somewhat at a loss to understand how an extension of a period that did not exist, and of which the applicant could have no knowledge, could be reasonably asked or granted, except possibly under very exceptional circumstances. Can there be a doubt that, under the Act of 1874, the Judge during the three days would have had authority to extend the time? I am at a loss to conceive upon what grounds it can be contended he could not. Or could it be possible that under the original section, if from exceptional circumstances it became impossible to give the notice within the short period of three days, and equally impossible to reach the Judge by reason of sickness or absence on judicial duty, or on account of some other cause, so that an extension could not be obtained within the three days, that appellant should be shut out by no neglect or fault of his own from his appeal, and should have inflicted upon him the irreparable injury of a disqualification for seven years without an appellate hearing (1). And where, as the Judge says in this case, no party would be injured by the extension, I think this never could have been intended. It seems to me clear, that whatever power or discretion a Judge who tried the cause may have had under the 35th section of the Controverted Elections Act of 1874, he has under the 48th section of the Supreme and Exchequer Court Act, because the power and the authority are confided to him in precisely the same language, and the matter to be remedied or provided for is likewise precisely

(1) See *Banner* v. *Johnson*, L. R. 5 H. L. 157.

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the same. Therefore, I think the construction in both cases should be the same.

If, in acting under the Controverted Elections Act of 1874, the Judge, and he alone, might extend the time after the entry for hearing before the full Court of which he was a member, and during or after the three days, why should he be limited under the Supreme and Exchequer Court Act to an extension before the cause is entered in this Court, and thus be excluded from extending the time during and after the three days, and so make the enactment practically comparatively, if not wholly, useless? In dealing with the matter during or after the three days under the 35th section of the Controverted Elections Act of 1874, there is admittedly no incongruity, as the Judge who acts is a Judge of the Court in which the cause is; but is there any substantial incongruity under the Supreme and Exchequer Court Act? Is it not rather fanciful than real? The application for an extension of time is not to the Judge as to the Judge of a Court having seizure of the case, and so, as such Judge, having a control over the proceedings in the Court of which he is a member by virtue of its ordinary jurisdiction. The application is in a purely statutory proceeding, of a very peculiar character, to a Judge who heard the case, for the exercise of his discretion, under a statutory authority which entrusts to him alone the exercise of such discretion, and whose jurisdiction has not wholly ceased, but is continued to enable him to extend the time for giving the notice, if in his opinion it is right to do so, not thereby in any way interfering or meddling, obstructively or objectionably, with any matter with which this Court has full power to deal, but, on the contrary, in aid of the proceedings before this Court, in a matter over which this Court has not power, to enable the appellant to get the appeal in a position

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to be heard in this Court, and so to give this Court full seizin thereof by giving it authority to hear and determine the merits of the case.

But if the incongruity was so great as the learned Judge supposes, that should not prevent us from giving the words of the statute their legitimate construction, or from recognizing the power conferred on the Judge who tried the cause, though not a member of this Court. There can be no doubt that the Legislature deemed the Judge who tried the case—and who therefore would be necessarily conversant with all the proceedings therein and circumstances connected therewith—the most competent to deal with this question, rather than this Court or its Judges, who could know nothing of all that had taken place—a knowledge most necessary for the exercise of a sound judicial discretion.

I may add also that the construction which has thus been put on the words "shall thereupon within three days, or such further time as the Judge who tried the petition may allow" is only in accordance with the strict literal language used, which is consistent with a well-known canon of construction—that full effect should be given to the clear and definite words of the Legislature, there being nothing on the face of the statute to indicate a contrary intention. I think therefore that in this case, the statute not having limited the authority of the Judge, his power of extending the time is a general and an exclusive power, to be exercised according to sound discretion, and that so long as there has been no final disposition of the case, whenever that discretion is invoked the Judge, and he alone, has power to extend the time for giving the notice, and having done so in this case, it is now properly before this Court for hearing, and the appeal cannot be dismissed.

The question we decided when we refused to hear the appeal on a former occasion was entirely different

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from that now before us. We were then prevented from hearing the case by the express terms of the statute, which left us no discretion; we are now equally prevented from refusing to hear it, there having been a compliance with the provisions of the statute.

FOURNIER, J., concurred.

HENRY, J.:

When this case was under consideration at an earlier part of this Session, and when, owing to the notice of the setting it down for hearing not having been given within the three days from the time of such setting down, as required by section 48 of the Supreme and Exchequer Court Act, we decided to strike out the appeal, as then before us, the position of the case was essentially different from that it now occupies.

When our judgment was delivered the notice given was not within the prescribed three days; and the time for giving it had not been extended by the Judge who tried the merits of the petition. We felt therefore, that the requirements of the provision had not been fulfilled, and that, as the statute prescribed a limit and made necessary an order of the presiding Judge, to whose discretion alone it was left to extend the time, and as he had not exercised that discretion, we felt we could not extend the time, and had simply to say the proceeding was irregular and defective. The defect in the proceedings just mentioned has been since remedied by an order of the Judge; and that objection having been removed the appeal has been again set down for hearing, and the prescribed notice since duly given. The motion we have since heard was to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal or failed to bring the said appeal on to be heard at the first term of this Court after the appeal was ripe for hearing.

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The ground of the motion is, therefore, that the appellant unduly delayed to prosecute his appeal, or, in other words, failed to bring it on for hearing at the first term of this Court after the appeal was ripe for hearing.

Our previous judgment was given on the motion of the respondent himself, alleging that the case was not then ripe for hearing. By the order of the Judge extending the time, the inscription for hearing, and the notice subsequently given, it has since then, for the first time, become ripe for hearing; and no delay has since occurred. The papers on file, and referred to on the argument, show that, since the making of the order of the Judge, before alluded to, everything is regular. If the Judge had the power to make that order the proceedings are altogether regular, and if he had not, is the act of his having done so, legitimately questioned by the motion now under consideration, which is founded only on alleged *delay*. It is stated to be founded on section 41 of the Supreme and Exchequer Court Act, and the argument of the respondent was based on that section. Under it, the Legislature has limited our jurisdiction as to the dismissal of appeals, and, by it, we are to be governed. The words used in it are in substance the same as those we find in the notice of motion and in the motion itself. In the case, as at first before us, the notice of motion was for

> An order setting aside all proceedings taken in this appeal by the appellant and striking the appeal out of the list of causes set down for hearing at the (then) "next Session of this honorable Court, or for an order dismissing the appeal in this case out of this honorable Court," * * * or for such other order as might be deemed just.

The grounds were fully set out, and, amongst numerous others, the objection was taken that the notice of hearing, for the reasons before stated, was irregular and

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defective. Upon that objection we decided to strike out the appeal from the list of causes, as moved for.

In view of the present condition of the proceedings, can we consider them with the object of deciding upon their validity, under the present motion? If our power in such cases to dismiss an appeal was a general one for irregularity, we might, perhaps, go as far back as to consider the validity of the Judge's order (admitting that section 41 applies to election cases) and, on this motion, dismiss the appeal —if irregularity or nullity were found. I am, however, of the opinion, that as we have been asked to grant the motion solely on the ground of *delay*, and as the statute restricts our inquiry to the matter of delay, we cannot, in my opinion, on this motion, decide upon an alleged irregularity or nullity of an order made by a Judge before or after the inscription for the hearing in this Court. Under the provisions of the statutes applicable to such cases, and the circumstances of this case, I think the proper, and indeed the only time, to raise the question of the validity of the Judge's order for the enlargement of the time to give the notice, is at the argument on the appeal.

By section 37, this Court is given power to quash proceedings (which I take to mean a power to be summarily exercised) on motion, but that summary power is confined to two cases, one where an appeal does not lie, and the other where such proceedings are taken against good faith.

It is under section 38 we derive the general power to dismiss an appeal, but the provision only applies to cases heard and decided on the merits of the subject matter of the appeal. The result, therefore, of my best consideration is that, under section 38, we can only inquire as to alleged delays after the appeal was had. That under section 37 our power to quash proceed-

ings is confined to the two cases it provides for. That section 38 is limited, as I have just stated, and that our power being so limited, cannot be exercised on the motion made on the part of the respondent. This view of the position was not presented at either of the arguments, and as, at the time of the first one, we were occupied in session, and, therefore, unable to give the matter such full consideration as it has since had, and as the question was not raised at the first argument or considered by the Court, no decision was given on it. My present view, therefore, although apparently, is not really, opposed to the judgment we gave.

The validity of the Judge's order is now questioned; and as we have heard the parties fully on the point, it may be as well that we should give our views in regard to it. When the provision was originally made the Judge who tried the merits of the petition, was a member of the Court to which an appeal was given from his decision; and, it having been properly presumed he would be better qualified than the whole Court, or any other member of it, to judge of the proper extra time to be given, the legislature vested the power solely in him.

When the Act was passed for the creation of this Court, by section 48 the appeal from the Judge's decision was directed to be to this Court, but with a provision as to the extension of time for giving the notice, in the same words as those employed in the repealed section of the previous Act. The irresistible conclusion is, I think, that the Legislature intended the Judge to exercise the same discretionary power in the one case, that he could have done in the other. I have called it a *discretionary* power, and I have done so advisedly, for if exercised within the prescribed three days, or as I think afterwards, no Court can question his decision; unless, indeed, it was founded in fraud or the extension

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was so great as to be unreasonable, and evidently an abuse of his power.

It is, however, contended that his discretion is confined to the prescribed three days, and that when they had passed he had no power to make, as in this case, an order for further time. His power is not *expressly* limited to the three days, but it is contended the Legislature must be considered so to have intended it.

The power being unlimited by the section as to the time during which it may be exercised, can we, or ought we to limit it—or, in other words, are we bound to do so. No decision has been cited to sustain the latter proposition, and I can find none.

The decision of the appeal involves heavy penal consequences to the appellant, and we should be fully satisfied that we are bound by law to do so, before arriving at the conclusion contended for; and if after full consideration, a reasonable doubt remains, we are bound, I think, to resolve it against that contention. I feel justified in saying that by no rule of construction, nor for any other reason that I can discover, are we *bound* to say that the Legislature intended to limit the time to the three days. There is no principle or dictum that I can find which makes it obligatory on us to say so.

If right in that view we must say further that, although posessing, as contended for, the abstract power, we cannot claim to have the right to exercise it, when it would at least be doubtful that our doing so would be what the Legislature intended.

Admitting, however, we have the power, ought we to exercise it in this case which in many respects is peculiar? The difficulty has arisen from the failure to give the notice in the prescribed time; or to get the time extended. The giving of the notice was a condition precedent to the right, not to appeal, but to

subsequently validate the appeal when taken. Some delay was caused, by the difficulty shown in getting the necessary papers returned to this Court, through the pressure of other business on the time of the officer of the Court at *Toronto*. The case was inscribed for hearing in this Court in October last, being the first Session after the record was transmitted, and it might, and would, no doubt, have been disposed of on the merits in its order, but for the objection founded on the want of the prescribed notice made by the respondent. The fact that the case was inscribed for hearing was brought very shortly afterwards to the knowledge of the respondent's counsel and agents; and other proceedings were had before a Judge or Judges of the Court limiting and defining the issues to be argued, in which the respondents counsel took part. The respondent's counsel were justified, as we have held, in taking the course they did to prevent a hearing of the appeal; but still, under the circumstances disclosed, the objection was purely technical, although one we felt bound to sustain. Being wholly of that character, it operated nevertheless to prevent a hearing. By the Judge's order, since made, that technical difficulty has been removed, and I don't think the case is one in which we are called upon to weigh very nicely the power of the Judge to make it, or in which justice requires that any doubts that exist should be resolved in favor of the respondents.

I have fully considered the difficulties suggested by the learned Judge, when making the order, after the appeal had been taken to this Court and dismissed for the want of the notice. When, however, he made that order, the appeal having been dismissed, I think the case was remitted back to the same position it previously occupied, as fully as if no appeal had ever been had. His original jurisdiction, for a time suspended by the appeal, was, I think, restored by the order of this

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Court, which merely dismised it. When the Judge's order was made, this Court had parted with any jurisdiction as to its subject matter given it by the appeal. Where the Appellate Court has no jurisdiction, and so decides, the result is to remit back the case to the court appealed from. Such, I think, it must be considered was the result in this case.

A question might have been, and was raised by the learned Judge, as to the entitling of his order, whether it should be in this Court or in the Court appealed from; but it is unnecessary to decide that point, as two orders have been made, one of which is entitled in this Court. I may remark, however, that the discretion as to the extension of the time must, according to the statute, be always exercised by the Judge *after* the appeal has been had, the case inscribed for hearing, and the matter then regularly in this Court. Any subsequent affidavits or other papers would then be properly entitled in this Court. The Legislature had the right to say by whom subsequent acts in this Court should be performed; and having provided that the Judge who tried the merits of the petition should be alone authorized to make such an order, no objection could be successfully raised to its validity, or to its being entitled in this Court, on the ground that it was made after the appeal was taken, for the statute expressly so provides. This peculiar duty was left with the Judge when the main subject was removed by the appeal.

I think, therefore, we must conclude that the clear intention was, notwithstanding the appeal, to leave to the Judge the discretionary power of giving further time for the notice, and that his order was properly headed or entitled in this Court. The provision, to my mind, is too plain to admit of a doubt.

I think for the reasons given that this motion should be refused, and the appellant allowed to be heard on

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the merits of the appeal; but, taking all the circumstances into consideration, without costs.

TASCHEREAU, J.:—

I have the misfortune to dissent from the judgment about to be rendered on the motions now before us in this case.

It seems to me that this right of the Judge, who tried the petition, to give an order which shall apply to proceedings in the Supreme Court, and, as in this case, to relieve a party from his default and negligence in his proceedings in the Supreme Court, should not be extended by interpretation. This power given to a Judge of the inferior Court to give an order in the case, when the case has gone out of his hands, and is before the court appealed to, is of an unusual character. It cannot be denied that the legislative authority had the right to give him such a power. But I think that we ought not to extend it in any way whatsoever, and I would hold that the Judge has that power only during the three days following the setting down for hearing. After these three days, he is *functus officio*. If we hold that he has that power, even when these three days have elapsed, where shall be the limit? In this very case, the Judge has actually given such an order almost two months after the case had been set down for hearing. Can the law have purported to allow this? In my opinion, if the law allows of an interpretation which would prevent such consequences, that interpretation should prevail.

But here, not only has this order been given after the three days following the day on which the case was set down for hearing, but it has been given after the day on which it was to be heard. Now, it seems to me that, even admitting that the Judge could give this order after the three days mentioned in section 48 of the

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Supreme Court Act, the case, on the 24th of September, having been set down for hearing on the 27th of October last by the Registrar of this Court, as he was bound to do under this section, it was only between these two dates, and before the day it was so set down for hearing, that, at any rate, the application to the Judge who tried the petition to allow a further time than the three days for giving notice of such hearing should have been made, and such notice should have been given. In other words, the statute provides only for one setting down for hearing, and it is this hearing, the one fixed by the Registrar at the nearest convenient time, of which notice must be given within three days, or of which the Judge may allow an extension of time to give notice. The statute seems to me to say so positively. "Notice in writing that the matter of the petition has been *so* set down for hearing," are the words. Now *so* means the setting down by the Registrar, upon the transmission to him of the record, for hearing at the nearest convenient time. Of course, it is before the day fixed for hearing that the notice must be given of such hearing, and so it is before that day, and before that day only, that, in my opinion, the Judge who tried the petition can extend the time for giving such notice. It is the notice of the setting down by the Registrar on the reception of the record, that the Judge who tried the petition can allow to be given after the three days following the setting down. For this notice, and for no other, does the statute give him jurisdiction, and I fail to see how we can extend his jurisdiction in the matter to another setting down for hearing and another notice not provided for by the statute. That is always even supposing that he can give this order after the three days mentioned in the statute. Then, it seems to me, and the learned Chief Justice has just expressed this to be his opinion, if I understood him correctly, that it is

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after the case is set down for hearing, that the Judge can extend the time to give notice of the day fixed for such hearing. Indeed, it is obvious that the appellant cannot give notice of the day fixed, before that day is actually fixed, and so, that it is only after the day for hearing has been fixed, that the appellant will, under any circumstances, ask an extension of delay for giving notice of the day so fixed. But here, the contrary has taken place. The Judge has extended the delay *before* the case was set down for hearing, that is to say before the setting down *de novo* for hearing in February next. Now, I fail to see in the statute that the Registrar had any power of so setting down the case for February next, or that any one had the power to authorize him so to do.

As to the cases cited by the appellant on his argument against these motions: In *Lord* v. *Lee* (1) it was held that a Judge may extend the time given by statute for the arbitrators to make the award, after that time has expired. But I do not think this applies. This case here, it seems to me, must be governed by different principles. There nothing but private rights, and contestation between private individuals as such, were in question. But election cases affect public interests. That is why Parliament, instead of leaving to the parties the power of setting down their case for hearing as in ordinary cases, has *ordered* the Registrar to do so, in election cases, for the nearest convenient time, after the transmission to him of the record. Parliament evidently intended that election appeals should not be delayed.

Scott v. *Burnham* (2), cited by the appellant, does not seem to me to have any application to this case; nor does *Chowdry* v. *Mullick* (3). In *St. Louis* v. *St. Louis* (4), also cited by the appellant, the Privy Council held

(1) L. R. 3. Q. B. 404.
(2) 3. Ch. Cham. R. 399.
(3) 1 Moore P. C. C. 404.
(4) 1 Moore P. C. C. 143.

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that a motion to dismiss the appeal could not be granted, because the rule allowing a year and a day for prosecuting an appeal is not imperative on the King in Council, and the respondents had no right to complain of delay after laying by themselves eight months without making any application. The case is not in point. In *Leggo* v. *Young* (1), also cited, it was held that the Court will not entertain a second application upon grounds which might and ought to have been brought forward upon the former occasion. That was for ordinary acts of procedure, but here, I take it, we are dealing with a question affecting the jurisdiction of this Court to hear and determine this appeal.

It has been held, in recent cases, in *England*, that the Court of Appeal will not enlarge the time for appealing where, owing to the mistake made *bonâ fide* by the appellant's legal advisers, the time within which the appeal should have been brought has been allowed to run out. I refer to *International Financial Society* v. *City of Moscow Gas Co.* (2); *Craig* v. *Phillips* (3); *In re Mansel*, (4); and *Highton* v. *Treherne* (5).

In *International Financial Society* v. *City of Moscow Gas Co.* (6) *James*, L. J., said:—

> I am of opinion that we cannot give any time. The respondents here say they are within the rule, and they have a right (and I think it is as valuable a right as anything which a subject has in this country,) to know when they can rely upon the decree or order in their favour. The limitation of the time to appeal is a right given to the person in whose favour a Judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading, through any conduct of the other side, as was mentioned in the analogous case of vacating inrolment, which came before Lord *Cottenham*, and afterwards before Lord *Chelmsford*, in which it was laid down that the right of the suitor was *ex debito justitiae* to keep

(1) 17. C. B. 549.
(2) L. R. 7 Ch. D. 241.
(3) L. R. 7 Ch. D. 249.
(4) L. R. 7 Ch. D. 711.
(5) 39 L. T. N. S. 411.
(6) L. R. 7 Ch. D. 247.

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his inrolment of the decree, if it was made in due time, unless in very special cases. For instance, where there was anything like misleading on the part of the other side, or where some mistake has been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must abide by the consequences of that mistake. Beyond all question, in this case there was abundance of time to have brought the appeal, if it was intended really and *bonâ fide* to appeal from the order as pronounced.

Baggally, L. J., in the same case, said:—

I am of the same opinion. This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time.

In re Mansel, Jessel, M. R., said (1):

Has any sufficient case for extending the time been made? No reason has been given but that the solicitor's clerk made a mistake as to the meaning of the rule. If that is to be allowed as a sufficient reason for relaxing the rules they might as well be repealed. The opposite party is not answerable for the mistake, and is entitled to the advantage of it, unless he has done something to mislead the applicant.

These cases, I know, are not exactly in point, and as not one of the Judges doubted their right to grant this appeal after the time allowed therefor had elapsed, they may perhaps be invoked by the appellant as sustaining his contention, viz.: That even after the three days elapsed, Judge *Armour* could grant him an order extending the delay to give notice of the hearing.

But as to this contention of the appellant, it is not supported by these cases, because, the Supreme Court

(1) L. R. 7 Ch. D. 713.

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Act, sect. 26, virtually says that, in election cases, the time within which to appeal cannot be extended, and I think that, since the legislature specially made that provision as to election cases, for the right of appeal therein, we may apply the same principle as to the order of the Judge and the notice of hearing in such election cases.

Another feature of the case is this: Mr. Justice *Armour*, in fact, decided that he had no jurisdiction and no authority to grant this order. But, as it was stated before him, and even sworn to, I understand, that this Court had expressed the opinion that he had the power so to do, he, in deference to this view so stated to him, granted the order. Now, we have positively stated that this Court had never expressed the opinion that Mr. Justice *Armour* had such a power, and that this assertion made to him was erroneous and unfounded in fact, though we are satisfied that the gentleman who made it did not wilfully and knowingly assert a fact contrary to truth. Mr. Justice *Armour's* decision, in the exercise of his discretion, we could not review. He alone could give this order, and, if he refused it, the case was at an end. Now, he says that he, left to his own judgment, would have refused this order. He grants it, only in deference to an expresion of opinion which is stated to him to have been given from this Court. Now, this expression of opinion we never gave; the Respondent obtained, then, Mr. Justice *Armour's* order under false pretences. Without these false pretences, without this assertion before the Judge of a false statement, through error and misapprehension, no doubt, but yet false, the Judge tells us that he would not have granted this order. Are we to allow the appellant the benefit of having obtained this order under such circumstances? Must

we not treat Mr. Justice *Armour's* judgment as a refusal of the order ?

It has been said that it would be a hard case for the appellant, if he could not appeal from a decision by which he is deprived of his civil rights for seven years. But whose fault would it be, if that was so ? His, and his alone. He would have to bear the consequences of his own negligence. And, may I ask, is there no hardship in, for such a length of time, either depriving this *North Ontario* constituency of a representative in the House of Commons, or, still worse, in imposing upon it, as its representative, a man, whose election as such has been declared void, who, by a court of justice whose judgment in that respect is not impugned or appealed from, has been declared never to have been duly chosen as such by the electors thereof; and this, because this man himself has failed to conform himself to the law in his proceedings in this case, and because he has obtained an order upon the assertion of a fact which turns out to be untrue, though he may have believed it.

When I see that the statute allows only eight days to appeal in election cases, instead of thirty days, as in the other cases ; when I see that, though it gives the right to extend that delay in the other cases, it specially exempts the election cases from this extension of the delay to appeal ; when I see that it gives only three days to the appellant to give notice of the hearing ; when I see that, in accordance with the spirit of the Act, the rule of this Court orders the deposit of the factums only three days before the first day of the session fixed for the hearing of the appeal, instead of thirty days in the other cases, I think that we ought to pause before sanctioning proceedings by which the hearing of this appeal is so long delayed, and before relieving the appellant of an act of negligence and

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disobedience to the law for which he has not even attempted to give a shadow of excuse.

Of course, these were considerations for Mr. Justice *Armour*, in the exercise of his discretion in granting the order, if he had jurisdiction to grant it, but they also seem to me to be material and important when we have to decide whether Mr. Justice *Armour* had jurisdiction, and at what time and what period of the case he ceased to have jurisdiction in the matter according to the statute. And when I see that by rule 12 of this Court and the form of the schedule A thereof, combined with section 14 of the Act, it is provided for a special session of this Court for the hearing of election cases, I think that the least the appellant should have done, even admitting that Mr. Justice *Armour* had jurisdiction to give him this order, at the time it was given, should have been to apply to this Court or to the Chief Justice for a special and early session to hear his appeal, which would undoubtedly have been granted to him, instead of having fixed for hearing for February next only a case in which judgment has been given in February last. Here again I find that the appellant has unduly delayed, under the circumstances, to prosecute his appeal.

I would be of opinion to grant the respondent's motion to dismiss the appeal, under sect. 41 of the Supreme Court Act, because the appellant unduly delayed to prosecute his appeal, in not giving notice within the three days after the case was set down for hearing on the 24th September, or having failed to do so, for not obtaining from Judge *Armour* within these three days, or, at all events, at any time before the 27th of October, the day on which the case was to be heard, an order extending these three days, and for not having given notice at any time before the said 27th of October

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of the said hearing on the said day, as also for having had the case set down for February only.

I would, under the circumstances, think it better to grant the respondent's motion asking us to report to the Speaker of the House of Commons the proceedings in the case, such as they appear in the case and as they have taken place before us. It may be that this report could not be acted upon by the Speaker, because it would not be in strict conformity with the statute. But nevertheless, I should think it the best thing to do under the circumstances. We have not to decide what should be done on this report, and we may later, if we hear this case, find ourselves obliged to make to the Speaker a report not much more in accordance with the statute (1).

GWYNNE, J., concurred with *The Chief Justice* and *Strong*, *Fournier* and *Henry*, J. J.

Motion refused without costs.

Solicitors for appellant: *Hodgins & Spragge.*

Solicitors for respondent: *Cameron & Appelbe.*

THE MONTREAL LOAN AND MORTGAGE COMPANY. ..... APPELLANTS;

AND

P. A. FAUTEUX *et al*..... ..... RESPONDENTS.

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*June 9, 10.

Dec. 13.

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

Sheriff's Sale—Procès-Verbal, what it should contain—Art. 638 *C.C.P.*

Under a writ of *venditioni exponas*, issued in a suit wherein *M. C.* was plaintiff and *D. G.* was defendant, the latter's property was seized, advertized and sold to the appellants, under the follow-

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

(1) 37 Vict., ch. 10, sect. 30.

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ing description:—"4 lots of land or *emplacements* situate at *Coteau St. Louis*, in the Parish of *l'Enfant Jesus*, heretofore forming part of the Parish of *Montreal*, in the District of *Montreal*, being known and designated in the official plan and book of reference of the Village of *Coteau St. Louis*, in the said Parish of *Montreal*, under the Nos. 18, 19, 20 and 21, of the sub-division of No. 167, of the said official plan and book of reference, with 4 wooden houses and dependencies thereon erected." The sale was made in one lot only, at the Sheriff's office, in the City of *Montreal*. The respondents demanded the nullity of the sale by means of an opposition.

Held,—That it was not sufficient to give only the number of the official plan and book of reference in the *procès-verbal* of seizure and the advertisement of the Sheriff, as under Art. 638, C. C. P. it is necessary to give the range or the street where the property is situated, in addition to the official number, and therefore the sale was null and of no effect.

[As to sale having been made at the Sheriff's office instead of at the church door of the Parish of *l'Enfant Jesus*, see 42 and 43 *Vic.* ch. 25, *Q.*]

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), rendered at *Montreal* on the 21st December, 1878, which reversed the judgment of the Superior Court of 29th November, 1877, rendered in favor of the appellants, and annulled and set aside a purchase, made by the appellants, of certain real property from the Sheriff of *Montreal*.

The Sheriff of the District of *Montreal*, on the 5th December, 1876, under a writ of *venditioni exponas* issued in a suit wherein *Moïse Courtemanche* was plaintiff, and *David Gauthier* was defendant, seized, advertized and sold under the following description: "4 lots of land or *emplacements* situate at *Coteau St. Louis*, in the parish of *l'Enfant Jésus*, heretofore forming part of the parish of *Montreal*, in the district of *Montreal*, being known and designated in the official plan and book of reference of the village of *Coteau St. Louis*, in the said parish of *Montreal*, under the Nos. 18, 19, 20 and 21 of the sub-division of No. 167 of the said official plan and book of

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reference, with 4 wooden houses and dependencies thereon erected."

The sale was made in one lot only, at the Sheriff's office, in the City of *Montreal*, and the appellants were the purchasers, *adjudicataires*, for the sum of $450.

The respondents, hypothecary creditors of the defendant, *David Gauthier*, demanded, by opposition, that the sale in question be annulled on four grounds:—

1st. That there was no interpellation to the defendant to designate his real estate, and in consequence that there had been a seizure made *en bloc* of what ought to have been seized in separate lots; 2nd. The omission to mention the requirements of par. 3 of art. 638, C. C. P., the concession, the range or the street; 3rd. That these alleged irregularities were repeated in the official notices published by the Sheriff; 4th. That the sale took place at the Sheriff's office contrary to law, inasmuch as the property was not in the city or *banlieue* of *Montreal*, and ought to have been sold at the church door of the parish where they were situated.

The Court of Queen's Bench (appeal side) reversed the judgment of the Superior Court and declared the sale null and of no effect, on the ground that, as the property was situated in the parish of *l'Enfant Jésus*, a parish duly erected for all civil purposes, the property could only be sold at the church door of the said parish of *l'Enfant Jésus*, but the Supreme Court of *Canada* did not express any opinion on this point, as there was another reason sufficient to declare the sale null and void, and as this point had since been settled by legislation (1).

The evidence bearing upon the case sufficiently appears in the judgments hereinafter given.

Mr. *Laflamme* Q. C., and Mr. *Loranger* Q. C., for Appellants:—

(1) 42 and 43 Vic. ch. 25 *Q.*

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The appellants submit that the property was rightly sold at the Sheriff's office in *Montreal*. The judgment appealed from is based exclusively upon the Sheriff having sold the property in question at the wrong place. If this decision is a sound one, hundreds of other Sheriff's titles, besides appellant's, will be invalid, as sales of property situate in the city and *banlieue* of *Montreal* have always been advertized to take place, and been held, at the Sheriff's office in *Montreal*, both before and after the subdivision of that parish.

The learned counsel entered into a lengthy and elaborate argument to show that the *banlieue* of *Montreal* was recognized by legislative anthority, although no edict or law creating it can be found, and referred to a number of authorities, but as this point has since been settled by legislation and the judgment of the Supreme Court decided the case on other grounds, no further reference to this branch of the argument need be made.

The Court below was unwilling to reverse the judgment of the Superior Court on any of the other grounds taken. These grounds of nullity are three in number viz:

1st.—As to several lots being sold *en bloc*, there is no law requiring them to be sold separately, or forbidding the sale *en bloc*. On the contrary, the Code distinctly contemplates several lots being sold together by the Sheriff for one and the same price. *Vide* Art. 735, Code of Procedure. Common sense dictates that there should be no unbending rule.

2nd.—As to no demand of description of property being made by Bailiff on defendant, or refusal by him to give one. The *procès-verbal* of seizure shows that the seizing officer made the demand on defendant for description of his immovable property, at defendant's domicile, speaking to a grown person of his family; and that he

seized the real estate mentioned in said *procès-verbal* such as described by the defendant, speaking as aforesaid, and after having himself ascertained its correctness on the spot.

Art. 637, Code of Procedure, does not require any personal requisition on the defendant; and the seizing officer fully complied with it. It is evident also that if there had been any non-observance of its requirements, it is only the defendant who could complain of it, not the present appellants, and the defendant could do so by opposition *a fin d'annuler*; but only if the description in the *procès-verbal* was inexact. *Vide Dupuis vs. Bourdages and Bourdages* opposants (1).

3rd.—As to there being no indication of street range or concession. The description is in accordance with Act 2168 of the Civil Code. The *Coteau St. Louis* is given, the parish and the cadastral numbers of the lots, which Art 2168 declares to be the true description and sufficient *in any document whatever*. It is also specially stated that the Sheriff shall so describe immoveables in his notices of sale. If appellants had fyled an opposition on the ground that the property was on a street and that it ought to be so described, they would be required to allege and prove the fact. Now, they have not alleged the lots to be upon any street, nor have they produced any evidence proving it.

There is no allegation as to the lots being on Robin Street or any street; and the only witness who speaks as to their situation is the defendant, *David Gauthier*, who states that the lots are upon Robin Street, *Coteau St. Louis*, parish of *L'Enfant Jésus*, and that there is a sign board with the name of the street, and that it is known by that name, and in the village of *Coteau St. Louis*.

This is altogether insufficient evidence to prove the existence of a legal street, such as the Sheriff would be

(1). 4 L. C. R. 247.

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justified in stating the lots seized to be situated upon. Respondents prove the village to be incorporated, and should have produced the proper municipal officer to prove that Robin Street was a duly homologated legal street acquired by the corporation and paid for, otherwise the Sheriff would expose himself to a demand by the purchasers to set aside the *décret*, or for a reduction in price, if the "street" proved to be merely one of sufferance, or a projected one (of which there are many in *Montreal*) the ownership of which was in private hands, and which the corporation would have at some future time to acquire and assess the costs upon those interested; no one in the meanwhile being responsible for repairs, drainage, etc. There is documentary evidence in the record which goes to establish that this so-called street was in fact private property. In the deed of sale from respondents to defendant the lots in question are described as sub-division numbers of official No. 167 of *Cote St. Louis* and fronting on Robin Street, which is itself described, in parenthesis, thus "(No. 52 du No. 167)." Now, the fact that this "Robin Street" had a cadastral number proves that it was not a road or street in the eye of the law, but private property, cadastral numbers not being given to public streets. *Vide* 35 Vict., c. 16, sec. 2 *Q.*

The Code of Procedure does not set aside Sheriff's sales for informalities in the seizure which could be set up by opposition; on the contrary, it says that non-observance of the essential formalities prescribed for *the sale* shall have that effect; these formalities are set forth at length in Art. 665 to 689 C. C. P., and a violation of these, in some essential part, would be good ground for setting aside the sale, there being no other remedy open to the party aggrieved, as, of course, no opposition could then be fyled.

So far from these being grounds which could be set

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up after a Sheriff's sale in order to set it aside, it has been held that an opposition setting up such grounds should be fyled to the *first execution* under writ of *fieri facias*, and would be too late if opposed to the sale under the *venditioni exponas; vide Abbott vs. The Montreal and Bytown Railway Company* (1). *A fortiori*, it would be too late after the sale: *Berthelet vs. Guy* (2).

Mr. *Doutre*, Q. C., for respondents—after arguing that the sale was properly made at the Sheriff's office in the City of *Montreal*, continued as follows:

The other grounds of opposition on which the respondents rely also are:

(1). These four lots, bearing each a separate cadastral number, 18, 19, 20 and 21 of the subdivision of No. 167, were four different immovables and should have been sold separately. The law is not so precise on this point as it is on the other; but it ought to be interpreted, and, as a matter of fact, it has generally been interpreted, in a common sense way, in the interest of all parties, which consists in obtaining the most possible from judicial sales,—the plaintiff and other creditors in getting paid, the defendant in being released of his indebtedness. In the audience, at a sheriff's sale, there may be a number of persons capable of purchasing a house and lot and unable to buy four. The fact proved, that these houses were under one roof, in order to justify the sale of four houses in one lot, cannot go far to justify the very unusual proceeding of selling four houses in one lot. In every large city or town, there are terraces, containing fifteen or twenty houses, apparently under a continuous roof, but belonging to different owners.

The reason why they were sold in one lot, is given by the Sheriff's officer who made the sale, Mr. *Vilbon*, as follows: "Before putting up the property for sale, the defendant requested me to sell it by lots, and Mr.

(1) 1 L. C. Jur. 1. (2) 8 L. C. R. 299.

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Arthur Desjardins, who was the attorney *ad litem* for the plaintiff, objected to this; I then referred the matter to the Sheriff and to the Deputy Sheriff, and these gentlemen decided that the property should be sold *en bloc*; they consulted Mr. *Lacoste*, who was there, and they decided that the sale should be made in one lot only. Now we find that the property was adjudged to the same Mr. *Arthur Desjardins*, for the appellants, for the sum of $450!

Article 2167 of the Civil Code says:—Each lot of land shewn upon the plan is designated thereon by a number, which is one of a single series, and is entered in the book of reference to designate the same lot. Article 668 of the Code of Civil Procedure says that every bid must indicate, amongst other things, the immovable bid upon. The word "immovable" is in the singular number, implying thereby that one immovable only should be put up to sale at a time.

(2). Then also, contrary to article 638 of the Code of Procedure, section 3, the minutes of seizure did not indicate the street in which the immovables seized were situated. This is answered by art. 2168 of the Civil Code, where it is said that "the number given to a lot upon the plan and in the book of reference is the true description of such lot and is sufficient as such in any document whatever, and any part of such lot is sufficiently designated by stating that it is a part of such lot and mentioning who is the owner thereof and the properties conterminous thereto."

The Civil Code came into force on the 28th June, 1866; the Code of Procedure on the 28th June, 1867. By all the rules of interpretation the last statute prevails over the former one.

Carré & Chauveau (1) say that in these matters, the

(1) Vol. 5, Q. 2229, p. 448.

law must be observed strictly and no latitude of interpretation is admissible.

In the official cadastre of which this Court can take judicial notice, Robin street is well marked and described. The deed of sale which has been fyled in the case mentions the fact that this property is situated on Robin street. The provisions of the law have not been complied with, and it was for the appellants to show by authority that some of the formalities prescribed could be omitted.

Mr. *Laflamme*, Q. C., in reply :—

The evidence clearly establishes that it is usual for the Sheriff to sell *en bloc* an unfinished terrace built on four sub-divided lots. The law gives the Sheriff a discretionary power.

[FOURNIER, J.:—Must not that discretionary power be exercised at the time of the seizure and not at the time of the sale?]

Yes, but the seizure in this case does not specify that the seizure was of four separate lots, but it is specified here in one description as four lots of land.

As to the omission of the name of the street, this objection should have been taken before the sale and, moreover, it will be seen that there is no evidence of the legal existence of a street, and by referring to the amended cadastre, it will be seen that this property is not bounded by the street

FOURNIER, J. :—

Les intimés devant cette Cour, opposants en Cour inférieure, ont demandé la nullité du décret d'un immeuble saisi et vendu à la poursuite de *Moise Courtemanche* contre *Pierre Gauthier*, leur débiteur d'une créance hypothécaire.

Cet immeuble est décrit dans le procès-verbal de

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saisie et dans les annonces de vente faites par le shérif, comme suit :

" Quatre lots de terre ou emplacements situés au Coteau St. Louis en la Paroisse du St. Enfant Jésus, faisant ci-devant partie de la Paroisse de Montréal, dans le District de Montréal, étant connus et désignés aux Plan et Livre de Renvoi officiels du village du Coteau St. Louis de la dite Paroisse de Montréal, sous les numéros dix-huit, dix-neuf, vingt et vingt-et-un de la subdivision du numéro cent soixante-et-sept (167) des dits Plan et Livre de Renvoi officiels— Avec quatre maisons en bois et dépendances sus érigées."

Ces quatre lots ont été vendus comme n'en formant qu'un seul.

Dans leur opposition, les intimés allèguent qu'ils ont sur cette propriété une créance de bailleur de fonds au montant de $3,330.95, et que la vente qui en a été faite est nulle pour les raisons suivantes :

1o. Parce que la saisie des dits immeubles a été faite en violation des dispositions de la loi, lesquelles sont toutes à peine de nullité : § 1. Plusieurs lots de terre ayant été saisis en bloc ; § 2. Le Défendeur n'ayant pas refusé d'indiquer ce qu'il possédait d'immeubles et le Shérif les ayant ainsi saisis en bloc, sans indication ou désignation fournie par le Défendeur, et sans refus de sa part de les indiquer ou désigner (1); § 3. La description des immeubles saisis n'indiquant pas la rue, le rang ou la concession de la paroisse où les dits lots sont déclarés être situés (2).

Les mêmes causes de nullité sont aussi invoquées contre les annonces de la vente et contre la vente elle-même. Ils allèguent en outre que :

§ 1o. Chaque immeuble ou lot de terre devait être vendu séparément (3) ; § 2o. Le Défendeur a formellement requis le Shérif de mettre séparément en vente les dits lots de terre, et cela n'a pas été fait ; § 3o. La mise en vente en bloc constitue le dol et les artifices mentionnés en l'art. 714 du C. P. C. ; § 4o. L'adjudicataire qui a substitué la dite Compagnie " The Montreal Loan and Mortgage Company " à lui-même au bureau du Shérif et après la vente était l'avocat du saisissant, et tout ce qui précède était à sa connaissance.

Les intimés ajoutant de plus, que la conséquence des

(1) Art. 637 C. P. C. (2) Art. 638, § 3, C. P. C.
(3) Art. 668, C. P. C.

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procédés ainsi faits en violation de la loi a été de faire vendre la propriété en question à vil prix, et par là de leur faire perdre toute occasion d'être payés de leur prix de vente.

L'appelante a lié contestation par une réponse alléguant que la nullité du décret ne peut être demandée par opposition, mais qu'elle doit l'être par une requête libellée conformément à l'art. 715 du Code de Procédure Civile ; elle maintient la légalité de la saisie et des annonces et ajoute que la propriété en question, étant située dans la paroisse du *St. Enfant Jésus* formant autrefois partie de la banlieue de *Montréal*, dont elle a été démembrée, devait être vendue, non à la porte de l'église de cette paroisse, mais au bureau du shérif comme l'ont toujours été, avant et depuis le Code de Procédure, toutes les propriétés situées dans la banlieue de *Montréal*.

Les intimés, comme créanciers hypothécaires du saisi, *Gauthier*, ont indubitablement, en vertu de l'article 714 du Code de Procédure Civile, le droit de demander la nullité du décret. Mais on leur objecte que cette demande ne peut être formée par voie d'opposition, mais qu'elle doit l'être au moyen d'une requête libellée, signifiée à toutes les parties intéressées comme le veut l'article 715 du Code de Procédure Civile. La pièce de procédure que les intimés ont désignée sous le nom d'opposition contient en réalité toutes les allégations d'une requête libellée ; elle a aussi été signifiée à toutes les parties intéressées suivant les dispositions de l'article 715. Pour en faire une requête en tout conforme à cet article, il suffirait d'en changer le nom. Les procédures et les actions n'ont point de noms particuliers par lesquels elles doivent être désignées. Il suffit pour leur validité qu'elles contiennent des allégations suffisantes pour justifier l'octroi de leurs conclusions. L'objection faite à la procédure adoptée par l'intimé

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n'est conséquemment pas fondée. La Cour Supérieure et la Cour du Banc de la Reine ont été unanimes à la rejeter.

Une autre objection, basée sur le défaut d'interpellation faite au défendeur de donner une désignation de ses immeubles, ne me paraît pas fondée non plus. Le procès-verbal de saisie constate que l'huissier s'est adressé à une personne raisonnable de la famille du défendeur, et que parlant à cette personne, "il aurait "sommé le défendeur de lui donner une désignation de "ses immeubles." Le défendeur était sans doute absent de chez lui lors de la saisie ; mais son absence ne pouvait aucunement empêcher les huissiers de procéder. La loi n'exigeant pas que cette sommation soit faite personnellement au défendeur, elle peut l'être à son domicile, et il est constaté qu'elle a été faite de cette manière. La vérité de ce fait ne peut être mise en question, car le procès-verbal en fait une preuve authentique qui ne peut être contredite que par la voie de l'inscription de faux à laquelle on n'a pas jugé à propos de recourir. Le défendeur *Gauthier* n'a pas dû d'ailleurs tarder à être informé de cette saisie, et de la sommation qui lui avait été faite, puisqu'un double du procès-verbal contenant cette sommation a été laissé à son domicile. Le paragraphe 4 de l'article 638 du Code de Procédure Civile dit qu'un exemplaire du procès-verbal sera laissé au saisi, personnellement ou à son domicile réel ou légal. On doit donc considérer l'interpellation comme ayant eu lieu suivant la loi.

Quant à la prétention que les quatre lots saisis devaient être vendus séparément, la preuve à cet égard est contradictoire, bien qu'il en ressorte certainement le fait que ces maisons inachevées étaient destinées à faire des habitations séparées les unes des autres ; mais étant d'avis que les Opposants ont raison sur un autre point, et qu'ils doivent obtenir leur conclusion, je me dis-

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penserai d'analyser cette preuve. Je m'abstiendrai aussi de me prononcer sur une question qui a été l'objet de beaucoup de recherches de la part des savants avocats des parties :—c'est celle de savoir si la vente aurait dû être faite à la porte de l'église du *St. Enfant Jésus*, au lieu de l'être au bureau du shérif. La raison de mon abstention est que cette question a été, depuis que cette cause est sous considération, réglée par un statut de la dernière session de la législature de *Québec*. Il est vrai qu'il fait exception des causes alors pendantes.

Il reste maintenant à considérer la question de savoir si la description de l'immeuble donnée par le shérif dans ses annonces de vente est conforme à la loi, et si l'observation des formalités à ce sujet par le Code de Procédure sont à peine de nullité.

L'article 648 du Code de Procédure Civile oblige le shérif à donner dans ses annonces de vente la description de l'immeuble telle qu'insérée au procès-verbal de saisie. D'après l'article 638 la saisie est constatée par un procès-verbal *qui doit contenir* d'après le paragraphe 3 de cet article, " la description des immeubles saisis en indi-" quant la cité, ville, village, paroisse ou township, ainsi " que la rue, le rang ou la concession où il sont situés, et " le numéro de l'immeuble, s'il existe un plan officiel " de la localité, sinon les tenants et aboutissants." Le langage de cet article suffit pour faire voir que les formalités qu'il prescrit sont à peine de nullité. C'est dans la forme impérative que s'exprime le Code, " *la saisie* " *des immeubles est constatée par un procès-verbal qui doit* " *contenir.*" Les formalités prescrites ont-elles été observées dans le cas actuel ?

D'abord, quant à la situation, on voit par le procès-verbal que les emplacements en question sont situés au *Coteau St. Louis*, en la paroisse du *St. Enfant Jésus.*— Qu'est-ce que le *Coteau St. Louis* ? est-ce une cité, ville ou village ? Pour le savoir il faut recourir à la preuve,

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L'acte de vente des opposants qui conformement à l'article 1,210, paragraphe 2, fait preuve légale des énonciations qu'il contient, déclare que les lots en question sont

Situés sur la rue Robin (No. 52 du No. 167), en la municipalité de la Côte St. Louis, dans la paroisse de Montréal, connus et désignés comme lots numéros dix-huit, dix-neuf, vingt et vingt-et-un (Nos. 18, 19, 20 et 21) des plan de subdivision et livre de renvoi faits du numéro officiel cent soixante-sept (No. 167) des plan et livre de renvoi du village incorporé de la Côte St. Louis, paroisse de Montréal, et déposés, en conformité à l'article 2175 du code civil du Bas-Canada, contenant environ chaque lot de terre quarante pieds de largeur sur une profondeur de quatre-vingts pieds, plus ou moins, mesure anglaise.

Le député et le premier commis du shérif entendus comme témoins désignent cette localité, l'un sous le nom de "*Côte St. Louis*" et l'autre sous celui de "*Coteau St. Louis.*" Le défendeur entendu comme témoin dit que la propriété est dans les limites du village du *Coteau St. Louis.*

Le doute que peut causer cette preuve sur le véritable nom de la localité est facilement tranché en référant à la proclamation qui l'a érigée en municipalité de village. Cette proclamation, dont nous sommes tenus de prendre judiciairement connaissance, établit que la désignation donnée dans l'acte de vente des opposants est correcte. Dans ce cas il est clair que la localité n'a pas été désignée dans la saisie et les annonces de vente comme le veut l'article 638. On a omis une déclaration essentielle pour faire facilement reconnaître et identifier la propriété—celle que les lots en question étaient situés dans "*le village de la Côte St. Louis,*" nom sous lequel cette localité a été érigée en municipalité de village par proclamation en date du 14 octobre 1846.

Il est aussi en preuve par l'acte de vente que ces lots sont situés sur la rue Robin. Ce fait est aussi prouvé par le témoignage du défendeur et par l'acte de vente. Pas un seul des témoins entendus par l'appelante n'a

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prouvé le contraire. Cette dernière qui avait intérêt à justifier l'omission de la mention du nom de la rue n'a fait aucune tentative à cet effet devant la cour inférieure. Le défaut de transquestions au défendeur, seul témoin qui, à part de l'acte de vente, constate l'existence de cette rue, semble indiquer que l'appelante était satisfaite de la vérité du fait. Ce n'est que devant cette cour qu'elle a essayé de remédier à l'insuffisance de sa preuve à cet égard, en produisant devant cette cour une copie du plan officiel fait en vertu de l'art. 2175, au moyen duquel elle prétend faire la preuve du fait qu'il n'existe pas légalement une rue désignée sous le nom de rue Robin,

Ce n'est pas devant cette cour, en appel, mais devant la Cour Supérieure lorsque cette cause était à l'enquête que cette preuve devait être faite. Il n'est plus temps de la faire ici. Ce serait changer la position des parties devant la cour de première instance et décider la cause sur une preuve différente de celle qui a servi de base au jugement en cette cause.

Il est bien vrai que le plan officiel que l'on offre de produire doit faire une preuve authentique de la description des propriétés,—mais ce n'est pas une preuve de la non existence à l'époque de la saisie d'une rue qui pouvait ne pas exister lors de la confection du cadastre, mais qui peut bien avoir été légalement ouverte depuis. Dans tous les cas, c'est une preuve susceptible d'être contredite par une autre preuve d'égale force, et elle devait pour cette raison être produite comme toute autre preuve en temps et lieu convenable devant la Cour de première instance.

Cette Cour ne peut donc prendre connaissance de cette preuve,—elle doit décider ce point de la cause sur la preuve qui a été faite en cour de première instance et sur laquelle la cause a été décidée.

La preuve faite par l'acte de vente cité plus haut et

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par le témoignage du Défendeur, me paraît suffisante pour prouver l'existence de la rue Robin. Ainsi, il est établi que deux formalités essentielles pour la validité de la saisie et des annonces ont été omises, savoir: celle de la mention du nom du village, et celle du nom de la rue. Quoique la décision de l'Hon. Juge en chef, Sir *A A. Dorion*, ne repose que sur la question de la banlieue, il a cependant exprimé son opinion dans laquelle je concours pleinement, sur l'effet de l'omission de ces formalités. Je ne peux mieux faire que de la citer textuellement:

L'article 638 du Code de Procédure veut que la saisie des immeubles soit constatée par un procès-verbal qui doit contenir, entre autres choses: "La description des immeubles saisie, en indiquant "la cité, ville, village, paroisse ou township, *ainsi que la rue, le "rang ou la concession où ils sont situés, et le numéro de l'immeuble, "s'il existe un plan officiel de la localité, sinon les tenants et abou- "tissants.*" Les plans officiels auxquels réfère cet article sont ceux mentionnés dans l'article 2168 du Code Civil. Il n'y en a pas d'autres qui soient reconnus comme tels, et quoique ce dernier article porte que lorsque ces plans auront été déposés et qu'avis en aura été donné, le numéro de chaque lot indiqué à ces plans et au livre de renvoi correspondant, sera la vraie description de ce lot et *suffira dans tout document quelconque*, cela ne peut s'appliquer que lorsque la loi n'exige pas d'une manière expresse une plus ample désignation.

Le Code de Procédure, qui n'est devenu en force qu'après le Code Civil, a dérogé à l'article 2168, en exigeant que le procès-verbal de saisie et les annonces du shérif indiquent le nom des rues où sont situés les immeubles saisis et le numéro du plan officiel, ou les tenants et aboutissants, s'il n'y a pas de plan officiel. Il semble donc qu'il ne suffit pas de donner le numéro seul du plan officiel, il y a d'excellentes raisons pour cela. Ce que la loi veut, c'est que les intéressés soient informés que les immeubles sur lesquels ils ont des droits ou des réclamations ont été saisis et doivent être vendus par le shérif. La désignation par le numéro de l'immeuble, qui dans un contrat de vente ou d'échange serait suffisante, parce que les parties connaissent ce qui fait l'objet de leur transaction, ne l'est pas toujours pour porter à la connaissance des tiers la situation exacte d'immeubles saisis. C'est, sans doute, pour cela, que le Code de Procédure Civile exige que l'on donne le rang ou la rue où est situé l'immeuble saisi, outre son numéro, qui n'est là que pour remplacer

les tenants et aboutissants, qui sont encore requis lorsqu'il n'y a pas de plan officiel.

Pour ces motifs je suis d'opinion que le jugement de la Cour du Banc de la Reine de la province de *Québec* doit être confirmé avec dépens.

THE CHIEF JUSTICE concurred.

STRONG, J.:—

I concur in the judgment of my brother *Fournier*, and also in that of my brother *Taschereau*, so far as it holds the Sheriff's sale void for the insufficiency of the advertisement; but I cannot agree that the sale is null on the ground of fraud and artifice.

HENRY, J.:—

The sale of the lands in question in this case is contested, and sought to be set aside by the opposants on several grounds.

1st,—that the sale should have taken place at the door of the Chapel of the Parish of *L'enfant Jésus*, and not at the Sheriff's office in the city of *Montreal*. 2nd,—that the sale *en bloc* of four separate and distinct houses, although one tenement, was illegal under art. 637 C. C. P. 3nd,—that in the notice of sale the description of the property seized did not indicate the street, range, concession, or parish, where the lots were alleged to be situated, as required by art. 638, sec. 3, C. C. P.

After what has already been said by my learned brother *Fournier*, and the views I entertain as to the third objection, I do not consider it necessary to refer particularly to the two preceding ones.

In reference to the first I may say, however, that although the existence of the *banlieue* may have been sufficiently shewn, it may be, that when the parish before mentioned was established, any portion of the *banlieue* included within the boundaries of the parish

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would be effectually separated from the city of *Montreal* for all purposes. In that case the sale, I think, should have taken place at the chapel door of the parish. As I did not intend to found my judgment on either that point or on the second objection, I do not consider it necessary to decide it. The Legislature having, since the proceedings herein were commenced, validated all such sales except those then in litigation, our judgment on the point is not necessary.

I think, however, the sale was irregular and void because of what I consider a defective notice. The terms of the Code seem to me to the last degree imperative. It requires that the street which the lands adjoin shall be designated in the notice, which was not done, and I think the evidence is sufficient to show the legal existence of the street upon the side of which the lots in question are situated. It was named long before the sale, and the name of it was indicated on a sign board stuck up on it.

I therefore concur in the conclusion that the appeal herein should be dismissed and the judgment appealed from affirmed with costs.

TASCHEREAU J. :—

In a case of *Courtemanche vs. Gauthier*, the plaintiff, having obtained judgment against the defendant, seized the latter's immovable property, and caused it to be sold by the sheriff. The Montreal loan Company were the highest bidders at this sale, and the property was adjudged to them. A third party, *Fauteux*, who was a creditor of *Gauthier*, the defendant, and who had a mortgage on the immovable property so sold by the Sheriff, by an opposition demands that the said sale to the Montreal Loan Company by the Sheriff be set aside and annulled, upon, amongst others, the following grounds :—

1st. Because this seizure in the said case and sale was of several lots *en bloc*, the opposant

alleging that the selling *en bloc* constitutes fraud within the terms of Art 714 of the Code of Procedure, because the property was adjudged to a Mr. *Desjardins*, who was the plaintiff's attorney at the sale and bought the said property for and in the name of the said Montreal Loan Company, the said *Desjardins* having the said sale made *en bloc*, so as to get the property for the said company at a price far under its value, in consequence whereof the opposant, *Fauteux*, got nothing from the proceeds of the sale, and lost the amount of his mortgage. I will consider immediately this part of the case.

The Montreal Loan Company joined issue with the opposant and fyled pleas, equivalent to a general denegation, to this ground of the opposition. Of the fact, that *Desjardins* was the bidder at the sheriff's sale, and only substituted the Montreal Loan Company's name as *adjudicataires* after the sale, there seems to me to be ample proof in the record, though in the factum, the appellants, the said Montreal Loan Company not only deny it, but state that the sheriff's *procès-verbal* of sale establishes the contrary. Now, this is an error. It appears by the minutes of the biddings at the sale, returned by the Sheriff with his *procès-verbal*, that *Desjardins* bid twice in his own name, and that it was only at the the last bid that he gave the company's name, whereupon the adjudication was made to the company. As to the fact that *Desjardins* was also the attorney of the plaintiff in the case, it is established by the sheriff's officer who made the sale So much for these two facts.

I will now consider the points raised by the appellants on this ground of the opposition. They contend, first, that the respondent should have fyled an opposition to stop the sale, and that they cannot be allowed now to ask that the sale be set aside for the reasons by him given. Well, it must be remarked, that here the

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respondent attacks the sale, because the sale itself was irregularly made *en bloc*. Now, could he, before the sale, complain of the sale itself and of the manner in which it was made? How could he know before the sale, that each lot would not be put up separately? Though the seizure had been made *en bloc*, could not the Sheriff put up each lot separately? Then, though the judgment debtor himself is deemed to have acquiesced in the proceedings, if he did not complain by an opposition before the sale, within the delay fixed by law, this does not apply to third persons, who were not parties to the record; and not a single authority has been cited at the hearing applying to third parties the rule which binds the judgment debtor in such a case.

The appellants further contend, and this seems to be the ground upon which they insist the most, that this property could not be sold separately, because it was an undivided building. They have examined three witnesses as to this fact, *Rielle*, *Decary* and *Bélair*, whilst the respondent has also brought three, *Gauthier*, *Généreux* and *Trudelle*. A careful perusal of the evidence on this point has left no doubt whatever in my mind that the defendant's property consisted of four houses built on four separate official lots. *Gauthier* the defendant, who built them, says so positively, *Généreux*, a contractor and inspector of buildings, who specially inspected this property for another Loan Company, says, that these houses were built to be separate houses, that each house was forty feet and corresponded with each of the lots, which by the deed of sale are forty feet each. *Trudelle*, another inspector of buildings, and who also examined this property for a loan company, swears positively that these houses could be sold separately. So much for the respondents witnesses.

Now, when I come to the appellants witnesses, I see that *Rielle*, a provincial land surveyor, *thinks*

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that this block was to form only one building, but he is contradicted here by the man who built it, and being cross-examined, to the question, "Were these houses built to be sold separately, "so that each purchaser knew what he was buying?" he answers, "It is possible." This witness corroborates, in fact, the respondent's proof. *Decary* gives a description of the property when the houses were building, and were in an unfinished state, and does not think that they were to be sold separately, yet, he cannot swear that such a sale was impossible. And *Belair*, the appellant's third witness as to this fact, on cross-examination, positively says that it would have been easier to sell this property, house by house, contradicting all that he had said before on the subject. When I take into consideration, that one of the respondent's witnesses to establish that there were four separate houses on four different lots is the man himself who built them, and that the two others are inspectors of buildings, who, as such, examined this property for loan companies, and when I consider that these last three witnesses gave such positive, clear and logical testimony, and are uncontradicted to any extent, I am bound to place full reliance on it.

Now, as to the facts upon which the respondent relies to urge that this selling *en bloc* was a fraud or artifice employed, with the knowledge of the purchaser, to keep persons from bidding (1), they are briefly as follows. It is established, and to my mind conclusively proved: 1st. That *Desjardins* was the attorney of the plaintiff, who had the property sold and seized. 2nd. That he bought the property for the appellants, the Montreal Loan Company, at the Sheriff's sale, and that the said company were not creditors of the defendant, and had no mortgage or interest

(1) Art. 714 C. C. P.

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on the said property. 3rd. That a few minutes before this sale the defendant asked that his property should be put up and sold lot by lot, separately, and not *en bloc*. 4th. That *Desjardins*, who was there, as was then supposed, as the plaintiff's attorney, and to direct and watch the proceedings as such, positively refused this demand of the defendant, and ordered the Sheriff's officer to make the sale *en bloc*, which was so done. 5th. That this property was then sold to the Montreal Loan Company, the same *Desjardins* bidding for them, for the sum of four hundred and fifty dollars. 6th. That these lots, with the buildings thereon, were worth from four to six thousand dollars. 7th. That had each lot, with each house thereon, been put up separately, they would have been certainly sold at a higher figure.

Now, what it the reasonable inference from these facts? To me it seems clear that, if this property, worth at least four thousand dollars, was bought by the appellants for four hundred and fifty dollars, it is by the contrivance and device of *Desjardins*, their agent, and whose acts are their acts, in having this property sold in one lot, and so keeping from bidding other parties who, however desirous they may have been of buying one house and one lot, would not and could not think of buying four houses and four lots. I say, then, to use the terms of art. 714 of the Code of Civil Procedure, that, at this sale, with the knowledge of the purchasers, or of their agent, fraud and artifice were employed to keep persons from bidding, and that such being the case, the respondents, being creditors and interested persons, are entitled to have the said sale vacated. Such being the conclusion I have come to upon this ground of the opposition, I might perhaps refrain from going into the other parts of the case, since, whatever views I may take upon them, it cannot affect the result that the appeal must be dismissed, in my opinion.

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I will, however, say a few words about the ground taken by the respondent in his opposition, as to the insufficiency of the Sheriff's description of the property to be sold, in not indicating the street on which the property was situated. On this, Art. 638 of the Code of Procedure is positive. The seizure of immovables is recorded by minutes which must contain * * * a description of the immovables seized, indicating the city, town, village, parish or township, as well as the street, range, or concession in which they are situated. In the case submitted, the street, range, or concession is not given. That there is a street seems to be denied by the appellants, but I find ample evidence of it. 1st. In the deed of sale to the defendant of this property, where the property is sold as situated on *Robin* street. 2nd. In the deposition of *Gauthier*, who swears that it is situated on *Robin* street, that this street is known as *Robin* street, and is so marked as streets are usually marked. Now, in the absence of contrary evidence, this seems to me to establish clearly, that such property is situated on *Robin* street. And not a tittle of evidence to the contrary is to be found in the record. At the hearing before this court the appellants have fyled certain plans, in which they desire us to find the proof, either that no *Robin* street exists, or that this property is not situated on *Robin* street. Surely no additional proof can be made before this court. This evidence was not given before the lower court, and it therefore cannot be received here, in my opinion, and I cannot look at it. The appellants have also denied the respondents' right in law, to invoke now such a ground of nullity against the sale. I can only repeat here what I have said on the same objection, when taken to the ground of the seizure *en bloc*. It is the judgment debtor which the cases cited have held to be bound to invoke such nullities by opposition *afin d'annuler* before the sale, not third parties

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out of the record. These third parties are not bound to act till they are aggrieved; even if they are aware, before the sale, of such grounds of nullity, they are not obliged then to invoke them. It may be, that the sale will bring a sum sufficient to satisfy their claim, and they can wait till such sale takes place. It is quite time enough for them to move, when they find that they suffer. The law would be hard if it obliged them to do so, when they cannot tell whether their interests will be affected or not by the result of the sale. I even doubt if they could stop the sale by an opposition *afin d'annuler* upon such a ground. Art. 657 grants them that right if they have an actual interest in the seizure and sale. How can they be said to have an actual interest, before they are aggrieved? It is true that in *Berthelet* vs. *Guy* (1) third parties seem to have been allowed to fyle such an opposition, but I remark that they were *cessionnaires* of the defendant, also that this point of law was not raised, and moreover, by the judgment of the Superior Court, that they specially alleged that the property, in which they were interested, would bring a higher price, if the irregularities they complained of were remedied. I may also state, that in the Province *Quebec* oppositions *afin d'annuler*, for informalities in the seizure, by any other than the party whose property has been seized, are not often met with. However, it is unnecessary for me here to decide whether third parties interested have the right to fyle such oppositions upon such grounds. All that I say is, that they are not bound to do so to protect their rights, that they may wait till the sale, and then ask its nullity if they suffer from it.

Is this a fatal irregularity? is the next question. I hold that it is so. The minutes of the seizure of an immovable property must contain the description

(1) 8 L. C. R. 299.

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of such property, as indicated and ordered by art. 638 of the Code of Procedure, which is imperative in its terms. Sheriffs are bound to follow strictly the formalities required for the seizure and sale of property, and the court cannot sanction a relaxation of the stringent rules laid down by the law in such matters. If, in one case, the omission of the street was declared to be of no consequence, there is not one of the details required by art. 638 which could not be so declared, upon such a precedent. Sales by which the rights of third parties are swept away must be made in that way, and in that way alone, in which the law has ordered them to be made. Upon this principle, the tribunals of the Province of *Quebec* constantly maintain oppositions *afin d'annuler* by defendants, based upon the want of some of the formalities required by the said article 638. The nullities that a defendant can invoke by an opposition *afin d'annuler*, third parties interested can invoke by a demand *en nullité de décret*, and I think, in the present case, that this point is well taken by the respondent in his opposition.

The judgment appealed from has annulled the Sheriff's sale and I am of opinion that the said judgment is right, and that this appeal must be dismissed.

Another reason urged by the respondent against this sale, and the only reason upon which the Court of Queen's Bench has vacated it, is, that the sale took place at the Sheriff's office, instead of at the door of the parish church where the property lies. Since the judgment of the Court of Queen's Bench, and in fact since the case was heard before us, the *Quebec* Legislature has passed a statute by which all doubts upon this question are removed, and all Sheriff's sales so made are declared good and valid. So, though pending cases are not affected by this statute, by a special provision thereof, I deem it unnecessary to consider a question

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upon which the conclusion I might arrive at could not affect my judgment in this case, and which is now of no public importance whatsoever.

GWYNNE, J.:—

I had prepared a short judgment in this case, but having had the opportunity of considering the case in deliberation with my brother *Taschereau*, I adopt his judgment without reserve.

Appeal dismissed with costs.

Attorney for appellants: *G. B. Cramp.*

Attorney for respondents: *Doutre, Branchaud & McCord.*

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*Jan. 28, 29.
*May 9.

ALEXANDER McKAY.....APPELLANT;

AND

CHARLES SEYMOUR CRYSLER.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of land for taxes—32 Vic., c. 36, sec. 155 O.—Proof of taxes in arrear.

In a suit commenced by a bill in the Court of Chancery asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant) for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title, was valid. The evidence is fully set out below.

Held,—That there was no evidence to shew the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. [*Strong* and *Gwynne*, J. J., dissenting.]

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

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Per *Fournier*, *Henry* and *Gwynne*, J.J. :—Where it appears that *no* portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by section 155 of 32 Vic., ch. 36 O.

[*Strong*, J., *dissenting*, holding that sec. 155 applied to a case where *any* taxes were in arrear at the date of the sale.]

APPEAL from the judgment of the Court of Appeal for *Ontario* (1), dismissing an appeal from a decree of the Court of Chancery.

This suit was commenced by a Bill in the Court of Chancery, to restrain the defendants from trespassing upon the south half of Lot No. 15, in the 9th concession of *Winchester*, and to obtain possession of the lands, and asking for an account of the damages arising by the trespasses of defendants.

The defendants, other than *McKay*, the appellant, did not contest the respondent's claim. The appellant denied the respondent's title to the land, setting up that the tax sale of March, 1856, was invalid, owing to five years arrears of taxes not being due when the sale took place, and claimed title thereto in himself by length of possession.

The following extract of p. 132, of Book "B" belonging to the office of the Treasurer of the united counties of *Stormont*, *Dundas* and *Glengarry*, was fyled in the case:

WINCHESTER.

Lots.	Con.	Grantees.	Acres	1841	1842	1843	1844	1845	1846	1847	1848	1849	1850	1851	1852	1853
15	9	Chloe Froom. D.	200	Psh.	Psh.	Psh.	Psh.	Psh.					1-0-3 1-0-3 40-7		S½ 5-6	S 7-3

1854	1855	1856	1857	1858	1859	1860
Dec. 1853 and Addition.	May 1854 and Taxes of 54	Dec. 1854 and Addition.	May 1855 and Taxes of 55.	Dec. 55 and Addition Tax of 55.	May 56 and Tax of 56.	
N ½ 1-0-3 2- 63-5 S ½ 1-13- 3-3	N ½ 1-2-3 S ½ 1-16-3 6-5	N ½ 1-1-3 2-1 2-2-8 4-3	N ½ Sh 1-3-4 S ½ Sh 2-16-11 11-10	S ½ 11-10 1-4	S ½ 13-2 12-0	

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(1) 2 Ont. App. Rep. 569.

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The Treasurer in his evidence stated that these blanks indicated that no taxes were paid to him for these years, and that the south half of Lot 15, being charged for taxes for the years '46, '47, '48, '49 and '50, and for the years '52, '53, '54, the total sum amounting to £2 6s. 11d., he returned it to the Sheriff to be sold, and sent his warrant, on 1st August, 1855, to the Sheriff, to realize taxes for these years.

The evidence referring to the manner in which the Treasurer's books were kept, and in explanation of the entries made in the book, is reviewed at length in the judgments hereinafter given.

The case was heard before *Proudfoot*, V. C., at the Chancery Sittings at *Kingston*, in May, 1876, who pronounced a decree in favor of the defendant, and directed the plaintiff's bill to be dismissed.

This decree was re-heard at the instance of the plaintiff before the full Court, who reversed the decree of *Proudfoot*, V.C., *Blake*, V.C., delivering the judgment of the Court. The defendant thereupon appealed from the order and decree on re-hearing to the Court of Appeal in *Ontario*, when judgment was given affirming the decree of the Court of Chancery on re-hearing, and dismissing the appeal therefrom.

The principal question in dispute in the Courts below, as well as on this appeal, was the validity of the sale of the land in question for taxes, which took place on the 1st of March, 1856, through and under which the plaintiff claims title.

Mr. *Leggo* and Mr. *Gormully* for appellant:

The appellant contends that the sale of land for taxes which took place on the 1st March, 1856, through and under which respondent claims, is invalid. The first act of assessment was 59 Geo. 3. c. 7, and under that act wild unoccupied land, having no owner resident

in the township, could not be assessed or sold. The Quarter Sessions evidently took no action to tax non-resident lands, for the simple reason that under Ss. 2, 3 and 7 they were compelled to raise all the money required from the property and persons mentioned in those sections; and therefore resort to the non-resident lands would be, not only useless, but wrong. This view of the statute is well and fully explained by *Wilson*, J., in *Cotter* v. *Sutherland* (1).

There can be no doubt that the treasurer taxed this land, without the slightest authority, the maximum of the taxation under the statute, which was one penny in the £. This tax is called the "Land Tax."

The only statute under which this property could be taxed until 1850 was 59 Geo. III. c. 8 sec. 3, and that gave only a discretionary power to put a tax on wild lands, provided it did not exceed a certain sum. It is not pretended in this case that the Quarter Sessions ever moved in the matter. There is no evidence that they ever struck a rate in virtue of this statute, and if the rolls of the quarter sessions were never produced, it was no doubt because they did not move.

The only tax for which this property was liable was the "road tax," of one-eighth of a penny on every acre of wild land. This tax became a charge on the land by force of the statute and did not need the intervention of the Quarter Sessions or assessors.

There were, therefore, two taxes which the treasurer collected—the "land tax," which the appellant submits was an illegal one, and the "road tax," which he concedes was properly leviable.

The £1 0 3 appearing on the extract from the treasurer's book, as forming part of the sum of £2 6 11, for which the property was sold, is made up of this illegal

(1) 18 U. C. C. P. 401.

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"land tax" of one penny in the £, and of the legal and valid "road tax" of one-eighth of a penny per acre.

The entry in 1850 column is as follows: £1 1 0 0 3 3 £0 4 0 7. But there is no evidence what the taxes were for that year, nor explanation given. Then, what right had the assessor to divide the lot and put against one-half the taxes which should have been put against the whole lot? It might perhaps be explained by the fact that in that year the whole system of taxation was revolutionized by the passing of the statute 13 and 14 Vic., c. 67, known as the "Act of 1850." By this act the power of assessing was transferred to the municipal councils.

The first step under the new system was to ascertain the amount of arrearages due on each lot of land up to 1st January, 1851. Sec. 46 required the county treasurer to perform this duty,—to certify the list and arrears to the municipal council:—these were to be certified to the township clerk, who was directed to add the amount to the sums raised by By-Law under the new system and payable in 1851, *which aggregate was to be collected with the taxes for that year.* In column 1851 there is a blank.

It must be assumed that these officers performed their duties, and it follows that, if the taxes for the year 1851, imposed by the new authority of the county council, were actually collected, the sum of £1 0s. 3d. was also collected. Now, how were these taxes to be collected, and to whom were they to be paid? Sec. 40 provides for this;—it declares that "it shall be the duty of the *collector* (not the treasurer of the county) to receive taxes upon the lands of non-residents, if tendered to him within the time of his collection." Sec. 41 provides that, on or before the 14th December of each year, each collector shall return his collector's roll to the treasurer of the *township* (not the *county* treasurer) and pay over the amount collected to him. Sec. 42 provides that if the

collector cannot collect the taxes (in this case the taxes imposed by the county council for 1851, together with the £1 0s. 3d.) he shall make a return to the *township* treasurer, and also to the *county* treasurer, shewing the reason why he cannot collect, by inserting in each case the words "non-resident," or "no property," or "no property to distrain," or as the case may be, and having done this under oath, he shall be credited with the amount, and "*the account shall be sufficient authority to the county treasurer*" to sell the lands. Sec. 32 points out the mode of preparing the collector's rolls, and sec. 33 permits the county treasurer to receive, if so desired, the non-resident land tax; but it does not interfere with the *duty* of the collector to secure its payment under sec. 40. This clause is highly important.

Under this system the county treasurer must enter in his book the amounts reported to him by the collector as unpaid. If the collector had returned the taxes for the year as unpaid, we should have found an entry in that column, either of a sum composed of the £1 0s. 3d. and the taxes imposed by the county council, or of the amount of taxes imposed by the council, without the addition of £1 0s. 3d.; but in the absence of such an entry we are compelled to believe that the 1851 taxes were paid to the collector; and as we must assume that officer to have obeyed the positive injunctions of sec. 40, we must also assume that with this he collected the £1 0s. 3d., and this is the necessary legal inference unless displaced by positive evidence to the contrary.

The result is, that on the 31st December, 1854, up to which date the taxes are computed for which the warrant for sale was issued, there were not five years' taxes in arrear. In fact, there were not five years in arrear, even adding 1851, and the default necessary to warrant a sale can not be made out without using

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part, at least, of the £1 0s. 3d. for the purpose, and this, as has been seen, was doubtless paid along with the taxes of 1851.

The appellant further submits that the Assessment Act of 1859, 16 *Vic.*, c, 182, is the only curative one on which the respondent can depend, all prior ones having been passed subsequent to this sale, and not being retrospective; and he submits that no sale is valid unless there be full five years' arrearages of taxes due before the issue of the Treasurer's warrant.

Now, so far as the 155 sect. of the Assessment Act of 1869 affects this case, we must look upon that statute as an *ex post facto* legislation,and the Court should put the strictest possible construction on it, if we have proved that the land was not sold for the proper arrears of taxes. We contend this Act cannot make a sale valid which is invalid: see *Hamilton* v. *Eggleton* (1). It does not validate anything but defects in conveyance, and no matters subsequent to the sale.

The learned counsel referred also to *Proudfoot* v. *Austin* (2); *Austin* v. *Armstrong* (3); *Kempt* v. *Parkyn* (4); the cases collected in Mr. *Harrison's* Municipal Manual, Ed. of 1878, pages 682 *et seq.* and pages 716 and 717; and the remarks of *Draper*, C. J., in *Payne* v. *Goodyear* (5), on *Cotter* v. *Sutherland* (6).

Mr. *Maclennan*, Q. C., and Mr. G. M. *Macdonnell*, for respondent:

There is nothing in the statute of 59 Geo. III, c. 7 to warrant appellant's contention that wild lands could not be assessed. A value is put on wild land for the purpose of taxation (sec. 2,) and by sec. 7 the quarter sessions to whom the assessment roll was sent determined the rate to be fixed, and the fact of their striking the

(1) 22 U. C. C. P. 536.
(2) 21 Grant 566.
(3) 28 U. C. C. P. 47.
(4) 28 U. C. C. P. 123.
(5) 26 U. C. Q. B. 448.
(6) 18 U. C. C. P. 401.

rate affected the wild lands, as well as the lands of owners resident in the township; see also secs. 13, 14 and 15. Then, under the Act 59 Geo. III, c. 8 sec. 3, a positive definite tax was imposed upon all wild land for road purposes. We do not prove, it is true, any action of the quarter sessions, but the treasurer's evidence and book clearly shew that taxes had been imposed, and were in arrear for more than five years. The entries made in the book in 1850 and 1853, we contend, are evidence of the correctness of the arrears. It must be assumed the quarter sessions imposed the full rate and the treasurer, ascertaining the fact, made up the amount in accordance (1). Then also, we have the fact that, in 1850, the statute required the treasurer to obtain from the best information he could get what the arrears were. He tells us what he did, made his enquires carefully and the £1 0s. 3d. entered in the column of 1850 of his book is the result of his enquires.

The respondent contends further that, in order to support this decree, he is not compelled to prove that every part of this tax is due. If it is conceded the road tax was due, although the sum was small, the sale is valid, and it was for the appellant to show that it had been paid, which he has not done. But it is contended that this road tax also was paid, because the treasurer could not have left a blank in the column of 1851, if he had received the amount. Now, we have the evidence of *Macdonnell*, who says that the taxes due prior to 1850 should have been paid to him and that they were not paid.

The taxes of 1850 were no doubt paid for the whole lot by the resident on the north half of lot who was *Alex. McDonald*, and the arrears were not collected. But, as he was not a resident on the half lot in question, after that

(1) Best on Presumptions, p. 68; Best on Evidence, p. 426; Taylor on Evidence, p. 1015.

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it was assessed as a non-resident. Then the sale of this land took place under 16 *Vic.*, c. 182, sec. 55, which enacts that whenever a portion of tax is in arrear for five years a sale may be had; and sec. 62, whether the arrears are under this or prior Acts.

The respondent further relies on the fact, as stated by the Vice-Chancellor on the re-hearing, that sec 155 of 32 *Vic.*, c. 36 seems plainly to apply, and thus the sale is validated. It is a limitation Act and its object is to quiet titles.

We say if any tax is due at all, the owner having three years to attack the sale, the title of the stranger who has paid the tax should be quieted after three years. The case of *Jones* v. *Cowden* (1) seems to have determined this point.

The respondent relied also upon the following authorities:—*Proudfoot* v. *Bush* (2); *Bank of Toronto* v. *Fanning* (3); and *Hall* v. *Hill* (4).

Mr. *Leggo* in reply:

There is no section of 59 Geo. III, c. 7, which necessarily imposes a tax on non-resident wild lands. It was only in 1850 that these wild lands were taxed. There is no evidence that in 1850 the tax on the south half was paid. The collector must have found that there were arrears and he had no authority to receive the taxes for 1850 and leave the arrears unpaid. All he could do was to receive the amount charged on the assessment roll.

THE CHIEF JUSTICE:—

In this case there is, in my opinion, no sufficient evidence to shew the land sold was properly assessed, or, if assessed, that when sold there were any taxes in arrear;

(1) 34 U. C. Q. B. 345; 36 U. C. Q. B. 495.
(2) 12 U. C. C. P. 52.
(3) 18 Grant 391.
(4) 22 U. C. Q. B. 519.

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so that it is, in the view I take of the case, unnecessary to discuss what amount of arrearages should be shown, or what defects, substantial or formal, are covered by the 155th sec. of the 32 *Vic.*, ch. 36.

The question of assessment and arrearages rests on the testimony of *R. Macdonald*, treasurer of the united counties of *Stormont*, *Dundas* and *Glengarry*, since the month of October 1846. It is as follows on these points:—

Q.—How long have you been so [Treasurer]? A.—Since the month of October, '46.

Q.—You have there with you the treasurer's book in which the arrears of taxes are entered? A.—Yes, in which arrears of taxes for a certain period.

Q.—From what dates? Turn to this particular lot, the south half of 15, in the 9th concession of *Winchester*. A.—The lot in question is charged with taxes for the years' 46, '47, '48, '49 and '50, and for the years '52, '53 and 54. The total sum of the taxes then amounted to two pounds six shillings and eleven pence (£2 6s. 11d), for which I returned it to the Sheriff to be sold.

Q.—Have you your warrant? A.—Yes. It is for arrears of taxes up to the 31st December, 1854. It gives the south half of 15, in the 9th concession of *Winchester*.

Q.—Have you the Sheriff's return? A.—Yes. It says that the south half of 15, in the 9th concession of *Winchester*, was sold to Charles Rattery on the 1st March, 1856, (100 acres), for three pounds seven shillings and eight pence, including costs.

Q.—Was the land redeemed? A.—No.

[Mr. *Macdonnell* here placed treasurer's book before witness, referring to page where lot in question appears.]

Q.—What does that "O" and to "D" mean? A.—By this letter "O" it made the land subject to be sold for taxes; "P. S. H." shows that it was in the Sheriff's hands up to 1845, to be sold for taxes up to 1845.

Q.—So that the taxes for which it was sold were the taxes up to 1845? A.—No, up to 1855.

Q.—The taxes for which it was sold commenced in 1846? A.—Decidedly.

Q.—Then it was the taxes of 1854, going backwards. And what is this blank in 1851? A.—That signifies that it was not returned; at

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all events it was not taxable by a certain return received from the township.

Q.—In other words, the taxes were paid? A.—I do not know.

Q.—Would there be a blank there if the taxes were not paid? A.—I think so.

Q.—Then the presumption is that they were paid to the township in 1851? A.—Yes, for there is no charge for 1851.

Q.—There is none for 1845 or———? A.—That is the way we used to do the business; that is the system they followed, and I followed it up to 1850, when we got a new set of books.

Q.—You cannot swear that the taxes for '47, '48, and '49 were unpaid, at least from any information you get from these books? A.—The time is so far back that I cannot swear from perfect memory. I say that the system that would be followed when the assessment roll would be sent to us, and we had to examine it, and any lots that we would find upon the assessment roll they were supposed to be put upon the collector's roll, and collected in that roll. A lot that we would find upon the assessment roll we would charge the taxes against it by leaving it blank.

Q.—Can you say, from the mode that you adopted, that the taxes for '46, '47, '48, and '49 were not paid from the entries in the book? A.—Yes.

Q.—You say from looking at the book. Now the book shews blanks in these years. Will you be kind enough to tell me how it is from these blanks that the taxes were not paid? A.—Now, here is a lot (referring to another) that was found on the assessment roll when it came to our office, and the letter "A" was put after the year, signifying that it was assessed and put upon the collector's roll and assessed for the township, but when we found it was not on the assessment roll we left it a blank until the taxes were paid.

By Mr. MAGUIRE:—

Q.—So far as you know, in those years the lot was not assessed? A.—I think not—that is, so far as I know.

By HIS LORDSHIP:—

Q.—Do you say it was assessed or was not assessed? A.—I think it was not assessed. If it was assessed and could be found on the assessment roll the lot would be credited with the taxes in that way.

Q.—Then if it was never assessed for these years there could be no arrears? A.—Well, I think the statute provided—it was assessed according to a certain scale.

Q.—You told Mr. *Maguire* just now that it was not assessed for these years. Can you tell from your books whether the property was assessed? A.—I cannot tell, but I see here, from the system carried

out then, I think they did not assess it for these years, because it was one of those lots that were considered to be wild lots, unoccupied, and nothing upon them.

Q.—Wild lands were assessed in a certain way. A.—An act that was passed in '19 or '20 directed the way in which taxes could be raised on wild lands, and it was according to that scale that the system was carried out that I understood.

By Mr. MACDONNELL:—

Q.—Supposing it was assessed, you do not know of your own knowledge that it was not assessed? A.—That blank is to be taken as they were not paid. There was a new system adopted in '49 or thereabouts. When I was treasurer I got very little assistance from my predecessor by way of opinion, but to inform myself went to Brockville and saw Mr. Buell, who was then treasurer, and he gave me that schednle to point out the system they followed in their county.

Q.—Then it could not be sold for less than eight years? A.—No.

Q.—How did you return this to the sheriff as being for sale unless you were certain of these taxes being in arrears? You required all the years from '46 to be in arrears in order to justify the sale? A.—We were instructed to make out schedule of all lots in arrears up to, that would be up to the year '50, including '50, as far as I can remember, and to send the schedule to municipalities so that the officers there would examine it and compare it with their own documents; and any lot that they would say was wrongly charged or ought not to be charged on they erased the return, sending the lots they themselves considered should have been in arrears, and upon that schedule we acted, and this lot here I am convinced they returned as in arrears on that schedule.

Q.—It is very likely that schedule is in your office? A.—It is very likely it is.

Q.—Was the land in question assessed during the years '46 to '50? Can you say from your books that the land was assessed? A.—From the books I can say that the lands were in some arrears for these years. I say so from my books; I may be in error in that; I cannot say positively, but my impression is, whichever way I may be understood—my impression is that that lot has been in arrears for these years, and to strengthen me in that opinion this was examined by my auditors and marked as approved of.

By HIS LORDSHIP:—

Q.—You returned this lot to the sheriff as in arrears for these years? A.—Yes, returned it to the sheriff, and sent my warrant to the sheriff to realize taxes for these years.

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Q.—You must then have been under the impression that the taxes were in arrears? A.—Certainly I was.

Cross-examined by Mr. MAGUIRE:—

Q.—You said something about that Schedule that had been returned to you, and based your impression that the taxes had not been paid, and I think had been in arrears, upon that Schedule received from the township? A.—There was more reason than that. We were directed to return and make out a Schedule of all land in arrears in our office in each township, and I made out a scale of them, as appeared on the books of my office, and sent them to the township municipalities, so that officers there, who were supposed to have more local knowledge about matters in their own municipalities than we—so that they would examine the Schedule, and if they would find that any lot was wrongly charged or in arrears, to correct the error; and if they found any lot against which charges had been made, if they found that they ought not to be charged with the taxes, they left it out altogether, and they corrected my own lots.

Q.—And this Schedule came back to you and and remained a record in your office? A.—Yes.

Q.—I suppose that the Schedule that contained particulars in regard to these lands is there now? A.—It ought to be.

By Mr. MACDONNELL:—

Q.—In regard to those years in which the entries appear blank, supposing the taxes for these years had been paid, what would the entry in your book be for the years '46, '47, '48 and '49? Supposing they had been paid in any way, what entry would appear in your books? A.—Well, the book in which I enter items received for the lots is in my office; any taxes that have been paid to me as treasurer by any one, I have put down in the book in my office.

Q.—Would you have made any entries in this book of the payments? A.—No.

Q.—Now if payments had been made you, the entries would have been in another book in your office? A.—Yes.

Q.—Have you examined that book? A.—No.

Q.—You have not ascertained in that book whether any payments have been made? A.—No, but I feel pretty sure that no payments have been made to me, otherwise the land would not have been returned to the Sheriff. Before I would make out the warrant I would be satisfied.

I think this evidence quite too loose and unsatisfactory to justify the conclusion that five years taxes were duly assessed against this land, and that five years' or

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any number of years' taxes were in arrear at the time the sale took place. With respect to the particulars not helped by the act, they should, in my opinion, be made out beyond all reasonable doubt to the satisfaction of the court, before any man's property should be taken from him by a forced sale such as this; and with respect to all such particulars, the party seeking to dispossess an owner by proceedings to which he is no party should, in the absence of any statutory enactment relieving him from the burthen, be prepared to show very clearly and conclusively, that all the requirements of the statute under which the land has been sold have been strictly complied with, and nothing left to mere theory or conjecture; and as in a case of this kind the records of the county or assessed district, or the officers or books of the officers of the county, or district, ought to furnish conclusive testimony as to all these particulars, I do not think these means of information should be ignored, as it appears to me they have been in this case, and the court be called upon to take this defendant's property from him on evidence so vague and unsatisfactory and inconclusive as has been offered to establish the assessment and arrears in this case. We must, I think, have better evidence, than the mere suppositions, understandings or impressions of the treasurer, or his merely "feeling pretty sure" that no payments had been made to him, (for this is the exact character of his language and of his evidence on most material particulars), without the production of the schedule, which this witness says came back to him and remained a record in his office, and which contained the particulars in regard to these lands, and which the witness says ought now to be in his office, and in the absence of evidence to the contrary must be presumed to be there, but which he says he was not even subpœnaed to produce, and without production, or even examination, of the books in his

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office, in which entries, he says, would have been made if payments had been made.

And as to the entries in the book produced, which, with reference to this ½ lot are as follows:—

WINCHESTER.

LOTS.	CON.	GRANTEES.	ACRES	1841	1842	1843	1844	1845	1846	1847	1848	1849	1850	1851	1852	1853
15	9	Chloe Froom. D.	200	Psh.	Psh.	Psh.	Psh.	Psh.					1-0-3 1-0-3 40-7		S½ 5-6	S 7-3

1854	1855	1856	1857	1858	1859	1860
Dec. 1853 and Addition.	May 1854 and Taxes of 54	Dec. 1854 and Addition.	May 1855 and Taxes of 55.	Dec. 55 and Addition Tax of 55.	May 56 and Tax of 56.	
N ½ 1-0-3 2- 63-5 S ½ 1-13- 3-3	N ½ 1-2-3 S ½ 1-16-3 6-5	N ½ 1-1-3 2-1 2-2-8 4-3	N ½ Sh 1-3-4 S ½ Sh 2-16-11 11-10	S ½ 11-10 1-4	S ½ 13-2 12-0	

I have been, and am, wholly unable to understand them, or to draw from them any intelligent conclusion as to whether taxes were in arrear or not, nor have I been in the least aided by the evidence of the treasurer; for in answer to a most pertinent question, viz.:—"You cannot swear that the taxes for '47, '48, '49 were unpaid, at least from any information you get from these books?"—to this very plain and intelligent question we have this very unsatisfactory answer: "The time is so far back that I cannot swear from perfect memory"—with this, if not incoherent, certainly to me unintelligible addition: "I say that the system that would be followed when the assessment roll would be sent to us, and we had to examine it, and any lots that we would find upon the assessment roll they were supposed to be put upon the collector's roll, and collected in that roll. A lot that *we would* find upon the assessment roll we would charge the taxes against by leaving it blank."

As I must assume the assessment and arrearages

could have been made clear by reference to the official documents and records, I cannot feel myself justified in taking away this man's land on such unsatisfactory and inconclusive testimony.

I think the appeal should be allowed and the judgment of the Court below reversed, with costs in this Court and in the Court of Appeal, and on re-hearing, and the judgment of *Proudfoot*, V. C., dismissing plaintiff's bill, confirmed.

STRONG, J.:—

Was of opinion that sec. 155 of the Assessment Act of 32 *Vic.*, ch. 36, applied to a case where any taxes were in arrear at the date of the sale. In other respects he concurred in the judgment of *Gwynne*, J.

FOURNIER J. :—

Dans cette cause il s'agit de la légalité de la vente de la moitié sud du lot No. 15, 9me concession du township de Winchester, faite par le shérif des comtés-unis de *Stormont*, *Dundas* et *Glengarry* le 1er Mars 1856, pour arrérages de taxes dues sur ce lot, depuis au-delà de cinq ans, avant le 1er Décembre 1854.

Pour qu'une telle vente puisse être valablement faite, d'après les décisions des cours d'*Ontario*, qui ont fixé la jurisprudence à cet égard, il est nécessaire de prouver que, au moins une partie des arrérages réclamés est due depuis au-delà de cinq ans avant la vente. Le titre du shérif ne suffit pas pour prouver la vente ni l'existence de taxes dues, condition essentielle du droit de vendre (1).

La principale, ou pour mieux dire, la seule difficulté en cette cause, est de savoir si l'intimé (demandeur) a fait cette preuve, sans laquelle il est admis que le titre produit ne lui serait d'aucun service.

(1). Voir opinion de V. C. Blake: *Proudfoot* vs. *Austin*, 21 Grant 566.

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Le warrant adressé par le trésorier des susdits comtés-unis autorisant, entre autres, la vente du lot en question en cette cause, ainsi que le titre du shérif, déclare que cette vente devait se faire pour des arrérages de taxes dues depuis au-delà de cinq ans avant le 1er Décembre 1854.

La première chose à établir, est sans doute, l'existence d'une taxe légalement imposée, ou par la loi même, ou par une autre autorité à laquelle ce pouvoir a été délégué. Pour faire cette preuve il faut, ou citer le texte de loi imposant la taxe dont il s'agit, ou produire les procédés ou réglements de l'autorité municipale par laquelle cette taxe a été établie.

D'après la jurisprudence citée plus haut, c'est à l'intimé à faire cette preuve. Pour s'assurer s'il s'est conformé à cette condition, il faut d'abord référer à la loi en force à l'époque où la taxe en question est devenue due.

D'après l'état produit par le trésorier, M. McDonald, cette taxe paraît être due pour les années 1852-3 et 4. Pour l'année 1850, il y a l'entrée suivante: £1 0 8 } £0 40 7. Pour l'année 1851, il n'y a aucune entrée, ce qui signifie, d'après le témoignage du trésorier, qu'il n'est rien dû pour cette année-là. A moins de supposer qu'une moitié des 40/7 portés pour l'année 1850, ne doive être attribuée à la moitié sud du No. 15 pour les années 1846, 7, 8 et 9, il n'y aurait pas eu, lors de la vente, d'arrérages dus pendant le temps requis pour avoir droit de procéder à cette vente. Mais sur quoi s'est-on appuyé pour fixer le montant de 40/7; comment et pour quelle raison est-il ainsi chargé au compte du lot No. 15, c'est ce qu'il n'est pas facile de comprendre d'après la preuve. Il n'était cependant pas difficile de prouver ce fait par des documents écrits, soit par les listes de cotisations, les rapports des collecteurs, des trésoriers, ou par les livres que ces

derniers sont obligés de tenir d'après la loi, lesquels livres sont déclarés faire preuve *primâ facie*. Ayant négligé de faire cette preuve, et comprenant la faiblesse de sa cause, quant aux arrérages des années 1852, 3 et 4, l'intimé déclare qu'il n'insiste pas sur ce point et se retranche dans une autre position. Il n'est pas nécessaire, dit-il, qu'il y ait cinq années entières d'arrérages dus, il suffit qu'il y en ait une certaine partie due depuis au-delà de cinq ans pour que la vente soit légale. Laissant alors de côté les arrérages pour les années 1852, 3 et 4, l'intimé prétend que le lot en question était par la simple opération de la loi, sans procédé quelconque, sujet à une taxe de $\frac{1}{8}$ de *penny* par acre, imposée par sec. 3 de 59 Geo. 3 ch. 8. C'est en s'appuyant sur cette section que l'intimé essaie de prouver qu'une partie de la taxe était due depuis au-delà de cinq ans.

D'après le statut en question les taxes sont imposées comme suit : 1o. Toute personne dont le nom est inséré sur la liste de cotisation d'un township, sera, en proportion de la valeur de ses propriétés réelles ou personnelles, assujétie à travailler sur le chemin tous les ans. Le nombre de jours est ensuite déterminé dans une certaine proportion d'après la valeur de la propriété. La section 3 déclare que toute propriété cotisable qui, pour une raison ou pour une autre, ne se trouve pas comprise dans la liste de cotisation, sera néanmoins cotisée annuellement à raison de $\frac{1}{8}$ de *penny* par acre, pour être prélevé par le collecteur de la même manière que les autres taxes.

D'après cette disposition un lot inoccupé, mais cotisable, ne pouvait être sujet à cette taxe de $\frac{1}{8}$ de *penny*, (*road tax*), que dans le cas où il n'était pas compris dans la liste de cotisation, et que son propriétaire, s'il était un non-résidant, n'aurait pas demandé de l'y faire insérer. Dans le cas où il faisait une telle demande il devenait exempt de la taxe, et sujet alors à fournir un

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nombre de journées de travail ou leur équivalant d'après la valeur cotisée de sa propriété.

En référant à la sec. 2 du ch. 7, 59 Geo. 3, on voit que le lot dont il s'agit était cotisable; cette section déclare que les terres incultes, (*uncultivated lands*) seront cotisables, et pour les fins de l'imposition de la taxe, la valeur en est fixée uniformément à 4s. par acre. Toutes ces terres sont traitées de la même manière, soit qu'elles appartiennent à des résidants ou à des non-résidants.

La section 3 oblige les propriétaires à donner aux cotiseurs une liste de leurs propriétés cotisables; la 4ème déclare cotisables les propriétés tenues en *fee simple*, ou en vertu d'une promesse de *fee simple* obtenue en la manière y spécifiée. Le lot 15 dont il s'agit a été acquis de la Couronne par *Chloe Froom* et patenté le 6 Juillet 1807.

Lors de la confection du rôle de cotisation son propriétaire pouvait donc le porter dans la liste de ses propriétés qu'il devait donner aux cotiseurs pour être inséré dans le rôle de cotisation. Dans ce cas le propriétaire devenait sujet pour ce lot, comme pour ses autres propriétés, à fournir une certaine quantité de journées de travail pour les chemins, au lieu d'être soumis comme dans le cas où il était omis du rôle, à la taxe de $\frac{1}{8}$ de *penny* par acre. Ce n'est que dans ce dernier cas que cette taxe peut affecter le propriétaire. Elle ne peut exister de plein droit comme on l'a dit. La loi n'a d'effet et d'application, que si la propriété est omise du rôle, ce n'est qu'après la confection d'un rôle, constatant ce fait, que la taxe peut affecter la propriété omise. Puisque cette propriété pouvait y être légalement portée, on ne peut conclure à l'existence de la taxe de $\frac{1}{8}$ de *penny*, qu'en supposant qu'elle a été omise du rôle. Quelle raison nous oblige de recourir à une telle supposition. Serait-il juste d'adopter un semblable raisonnement lorsque la production du rôle, qu'il était si facile

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de faire, eût établi d'une manière positive la véritable position ? Obligé de faire preuve de l'existence de cette taxe, l'intimé devait la faire légalement par la production du rôle d'évaluation, ou celle des livres officiels du trésorier, qui eussent fait preuve *primâ facie* de l'existence des taxes dues. Il me semble que dans le cas actuel, cette preuve devait être faite de la même manière que le trésorier du township ou du comté aurait été obligé de la faire devant une cour, dans une action pour faire condamner un propriétaire à payer ses arrérages de taxe. Aurait-il pu obtenir un jugement sans produire le rôle de cotisation ? Certainement non. Dans le cas actuel il aurait fallu également, pour prouver que le lot en question était, par son omission du rôle, soumis à la taxe de $\frac{1}{8}$ de *penny*, produire le rôle même. En l'absence de cette preuve, un propriétaire qui en était exempté par l'entrée de son lot sur le rôle de cotisation, aurait pu être condamné à payer double taxe. Il n'y en a pas deux qui soient exigibles pour les chemins, l'une payable en journées de travail, et l'autre en argent, $\frac{1}{8}$ de *penny* par acre. L'une des deux seulement est due sur le même lot et il fallait faire voir laquelle des deux est légalment due. Cela ne pouvait être fait que par la production du rôle d'évaluation et des livres du trésorier qu'il était si facile de faire.

Le trésorier *R. McDonald* n'a parlé dans son témoignage que du paiement, et non pas du rôle d'évaluation. Quant au paiement son témoignage est loin d'être suffisant. Il dit que le montant des arrérages de taxe a été établi par une cédule contenant toutes les terres de chaque township en arrérages dans son bureau, laquelle cédule fut envoyée pour correction dans les municipalités du township, et renvoyée à son bureau pour y demeurer de record. Il ne produit pas ce document, dont par conséquent il n'est pas possible de connaître la valeur légale.

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Au sujet du rôle d'évaluation il n'est fait aucune question. Interrogé pour savoir quelle serait l'entrée dans son livre pour les années 46, 7, 8 et 9, en supposant que la taxe de ces années eut été payée, il répond que le livre dans lequel il fait ces entrées est dans son bureau.

Ce n'était pas son impression qu'il devait donner en témoignage mais les documents dont il fait mention. L'intimé doit s'imputer la négligence de ne pas en avoir exigé la production, et si sa preuve est trouvée insuffisante, c'est à lui-même qu'il doit s'en prendre.

Le défaut de production de la cédulé en question, des livres du trésorier, et plus que tout cela, le défaut de production du rôle d'évaluation, rend insuffiante la preuve faite de l'existence d'une quotité quelconque de taxes dues avant la vente.

Cette vente est encore nulle pour la raison que le statut oblige le secrétaire-trésorier à faire dans son warrant adressé au shérif, la distinction entre les les terres tenues en vertu d'une patente de la Couronne de celles qui ne sont qu'à titre de bail ou permis d'occupation, et dont la propriété (*fee*) demeure à la Couronne. Le shérif est également obligé de faire cette distinction dans les annonces de vente. Ni l'un ni l'autre de ces deux officiers ne s'est, dans le cas actuel, conformé à cette disposition de la loi, qui, pour l'omission de cette formalité, impose la peine de nullité. Ce point a été décidé dans la cause de *Hamilton* vs. *Egleton* (1).

Pour faire à cette vente l'application de la section 155, il était nécessaire de prouver qu'il était dû des arrérages de taxe au moment de la vente. C'est la condition indispensable du droit de vendre, sans cela pas de vente légale. Enfin je concours dans l'opinion de l'Hon Juge *Gwynne* sur l'interprétation à donner à la 155me section.

(1). 23 U. C. C. P. 536.

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Pour ces divers motifs, je suis d'avis que l'appel doit être reçu et le décret du Vice-Chancelier confirmé avec dépens dans toutes les cours.

HENRY, J.:

The respondent filed a bill in Equity in the Province of *Ontario* against the appellant and two others, alleging, amongst other things, that he was the owner in fee of a certain lot of land in the Township of *Winchester*, and County of *Dundas*, known as the Southern half part of Lot Fifteen, in the Ninth Concession of that Township; that the appellant, for several years previous and up to the time of the filing of the bill, continually trespassed on that lot, by cutting down and removing timber and trees from the same, which he alleges to have been of the value of $1,500, and praying for an injunction against the appellant to restrain him from committing further trespasses thereon—to be adjudged owner of the lot, and awarded damages for the alleged trespasses.

The appellant in his answer: 1st, denies that the respondent was seized in fee simple of the lands in question. 2nd, denies that the respondent had any title to the said lands. 3rd, alleges that he claims title by deed from one *Uriah Manhart*, in 1859, and that he and the said *Uriah Manhart*, and one *Alexander W. Connell*, through whom *Manhart* claimed, had been in the exclusive possession of said lot from the year 1841. That *Manhart* went into and held possession from 1843 till he conveyed to the appellant, and that the latter has held possession under his deed in 1859, from that time till the filing of the bill. 4th, He sets up the Statute of Limitations.

These are the main issues upon which the controversy rests.

The appellant under his deed from *Manhart* is enti-

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tled to set up a continued possession of twenty-three years, which I think is fully proved, and upon which he could successfully resist any claim made by the patentee, or those claiming through him—they having been so long out of possession.

The respondent, however, claims title by several transfers, commencing with a deed from *Charles Rattery*, who, he alleges, purchased the lot at public auction from the Sheriff of the County, who, on the 1st March, 1856, sold it under a warrant for taxes said to be in arrear for five years previous to December, 1854, and who subsequently, on the 3rd May, 1857, made a deed to him. The question for our decision, appears to me, to be only as to the effect of that sale and deed.

Leaving at present out of consideration the effect of section 155 of 32nd Victoria, in substance the same, as to this case, as sec. 156 of the Act of 1866, in relation to such sales and deeds, it becomes necessary to enquire what proof it would be incumbent on a party to adduce, to successfully maintain an action of ejectment. He should unequivocally in the first place show, by reasonably clear and legal evidence, that the taxes were imposed, either directly by force of some statute, or indirectly by the authorized acts of parties for that purpose duly appointed. In the next place the onus is upon him of showing some arrears for at least five years before the issuing of a warrant to sell land. The respondent contends that both municipal and statutory taxes for roads were in arrear for the required period. As to the first, I can see no satisfactory evidence that during the period in question any taxes upon the lot were assessed or imposed; and if not, could not be in arrear.

It is however claimed that, at all events, "under the Act 59 Geo. 3rd ch. 8 sec. 3, a positive definite tax was imposed upon all wild lands for road purposes."

That Act provided for the amending and keeping in order of Public Highways and Roads.

Section 2 enacted that * * * every person included or inserted upon the Assessment Roll of any Township, reputed Township, or place, should, in proportion to the estimate of his real and personal property stated on said Roll, be held liable to work on the highways and roads in each and every year. Then follows a scale apportioning the number of days work to be done, to the amount of each persons real and personal property.

Section 3 enacts that "every lot or parcel of land in this Province, subject to be rated and assessed, but which, by reason of its remaining unoccupied, or for other cause, *may not be included in the Assessment Roll* * * * shall nevertheless be rated and assessed at one eighth of a penny per acre annually * * * to be levied by distress and sale in case of non-payment, in the same manner *by collectors* in the different districts respectively, as the other rates and assessments shall and may be levied and collected by virtue of the laws then in force for that purpose."

Before this section is applicable, three conditions must, by proof, precede any claim for taxation: 1st. That the land must be subject to be rated and assessed; 2nd. That it has not been included in the assessment roll; and 3rd. That the owner, if non-resident, did not request that he should be rated.

Section 2 of the preceding chapter provides that uncultivated land shall be taxed, and that, for the purpose of taxation, it shall be rated at four shillings an acre as a valuation. It rates all lands alike, whether owned by residents or non-residents, excepting only from the operation of the Act crown property.

Section 3 provides that assessors shall obtain from every ratable *inhabitant* a list of all their ratable per-

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sonal property and lands, of which they were required to make a true return each and every year.

Section 4 provides "that all lands shall be considered as ratable property which are holden in fee simple, or promise of a fee simple, by Land Board certificate, Order of Council, or certificate of any Governor of *Canada*, or by lease."

Section 12 requires the Surveyor General annually to furnish the Treasurer of each District with lists of granted and other lands.

And section 13 provides, that *all* lands included in such lists of Schedules as granted or leased shall be subject to taxation.

Thus, then, the land in question was liable to be rated for municipal purposes, including the performance of statute labour, and if not included in the Assessment Roll of any year, but only in that event, became subject to the operation of sec. 3 of chapter 8, before recited.

It is argued that, because the land in question was what is called wild or uncultivated land, up to 1854, it could not be rated, but I have shewn that it was clearly ratable, if owned by a resident of the township. For all that appears from the evidence in this case it may have been rated in the assessment rolls for every one of the years in question, and if so, was unaffected by the provision in sec. 3 for the imposition of one eighth of a penny per acre. The respondent, I hold, was bound to show what would necessarily bring the land under the provisions of that section. The means, I presume, if it was not rated in the assessment rolls, were available by the production of the rolls, and no Court can be expected to presume it was not so rated when the law allowed it to be, if the owner were a resident one. Upon that point we have no evidence. *Chloe Froom* was the patentee, and the name is not mentioned or referred to in the evidence. Whether he,

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at the time of the trial, was alive or dead; or, if the latter, when he died, with or without issue; whether he, or his legal representatives, resided or not in the township when the alleged arrears occurred, or important parts of them—the evidence does not state. I take it that the regular, and I think the only regular, mode of establishing the fact that the land in question was not rated in the assessment rolls, was by their production, if in existence, which we must presume in the absence of proof to the contrary. If lost or destroyed, secondary evidence of their contents might have been given, if available. Who can say from the evidence that those rolls would not show the land in question to have been rated; and if so, totally exempt from the imposition of the tax levied by sec. 3? The *remainder* from a particular quantity cannot be ascertained till the quantity to be *deducted* is given or ascertained.

So, in this case, no one could tell what lands were subject to the operation of sec. 3, till the contents of the rolls were known. In the absence then of the rolls, I think no evidence of a hearsay character can be allowed. In fact, as to the rolls in question, we have, in the evidence, not the slightest reference, and we are asked to decide as to their contents by intuition or by violent, rash and unreliable presumption, and, through them, turn a party out of property he has purchased and held so long. I cannot think that equity or justice would sustain our conclusion to do so. The respondent purchased, knowing, as he must have done, the possession and title of the appellant; and, as he himself says, as a speculation; the success in which must be by the deprivation of the long acquired rights and interests of the appellant. This he no doubt fully understood, and to secure that success we should not, under the circumstances unnecessarily contribute.

To sustain a rate under sec. 3, it was necessary to

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prove what the rolls contained, and that the land was not included therein. The evidence of the treasurer shows nothing on the point. It wholly refers to the question of payment, not to facts to show what is the important point, whether or not the rolls included the land in question. I have read over repeatedly and carefully the whole of the evidence, and can find no part of it relating to the contents of the rolls, in the absence of which it is a matter of impossibility for any one to say, whether or not the land in question was, during any one year, subject to the rate imposed by section 3. A party was not liable to perform statute labor under sec. 2 and to be taxed under section 3. The evidence does not enable us to decide under which section the land was liable, and we cannot resolve the doubt by a hap-hazard conclusion upon a point the respondent should have made clear, and in regard to which the evidence was at hand. In deciding such a point under the evidence, we would be as little certain of being right as would be a person called upon to say in which of two hands another had concealed a coin. In all cases the onus of making out a clear *prima facie* case is on the plaintiff, and in none is it more necessary than in ejectment,—which this case substantially is,—by which a party is turned out of his real estate. Every necessary link in the chain must be proved by the plaintiff, and if any one is left, by the plaintiff's own evidence, in a state of doubt and difficulty, law and justice in every way call upon us to adjudge against him.

Under the statute all *uncultivated lands* of residents should, and no doubt in all cases would, be rated in the rolls of assessment; and, by another provision, the *uncultivated lands of non-residents would* appear there also in the name of the owner, if he requested the assessor to rate them. In either case, the rolls would show the

exact facts, and who can say that we have any evidence that in neither of the cases was the land in question rated or assessed in the assessment rolls. It may be objected, that such would be negative evidence, the onus of which was not on the respondent; but that objection is answered by sec. 3 being only operative in case the land is absent from the rolls, and that they, if produced, would show the true position. The tax of one-eighth of a penny was wholly conditional, and dependent on the absence of the land from the rolls, as otherwise a party might be taxed under both sections two and three, which was clearly not intended by the statute. From all that appears, the patentee, his heirs or devisees, may have, during the years in question, been residents of the township, and not only included in the rolls for assessment, but have actually performed statute labor under section 2.

There is another position which is important for consideration. Sections 3, 4 and 8, show that it was the duty of the collectors to collect the taxes under section 3, and if paid to them, there could be no arrears. The taxes in question, as far as the evidence goes, may have been paid to the collectors. If they were alive and procurable they could, if so it was, negative the fact of payment, and, if dead, their returns under oath to the treasurer of the township would be evidence. Sec. 45 of 16 V. ch. 182 provides, that "the production of a copy of so much of the collectors roll as shall relate to the taxes so payable by such party, purporting to be certified by the clerk of the such city, town, township, or village shall be *prima fac e* evidence of the debt."

The treasurer did not know except as to payments to himself; and although he says that the returns of the collectors and schedules are in his office, he does not even speak of any special knowledge he derived from

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them on that point, although, had he offered to do so, it would not be receivable evidence.

The Acts 59, Geo. 3rd, caps. 7 and 8 were repealed in 1850 by 13th and 14 Vic. chapter 66, which came into operation on the first day of January, 1851, and the provisions of section 3 of chap. 8, under which the tax of $\frac{1}{8}$ of a penny was imposed on all lands not included in the assessment rolls, have not since then been re-enacted. Sec. 3 cannot in any way affect the claim for arrears of taxes for 1851-52-53-54. We must see, therefore, even if there was shown to have been arrears for taxes for 5 years ending with and including 1850, under sec. 3 before mentioned, independently of the fatal objections I have already stated.

Sec. 46 of the Act 13th and 14th Vic. chap. 66 requires the county treasurers, before the 1st of January, 1851, to make out true lists of *all* arrears for taxes up to that date, including assessments for wild lands, with the names of the owners as far as known, and submit them to the county council, and the county clerk is required to certify to the clerk of the proper locality the said arrears, and provides they shall be added to the assessment roll for 1851, and collected in like manner. From the testimony of the county treasurer this was done, and the result would be the addition to the assessment in 1851 of all the arrears then certified to the township clerks, and the consequent power to collect all such arrears. When, then, the evidence shows no arrears for taxes in 1851, the reasonable presumption, in the absence of anything to the contrary, is that all arrears up to 1851 were collected by the collectors. Were it otherwise, the onus of shewing it was clearly on the respondent; and as the return of the collectors are pointed to in the act before mentioned as the satisfactory *prima facie* evidence on all such points, they should have been put in as the best, and indeed the only, reliable evidence.

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By section 14, ch. 7, of 59 Geo. 3rd., in force up to January 1851, the treasurer of each district was required to keep an account with every parish, town, township or place within his district, * * * in which account he shall particularly enumerate every lot or parcel of land in the said parish, &c. * * * and shall charge the same with or credit it for the amount of the taxes and rates payable or paid in respect thereof for each and every year. We may fairly assume the treasurer in this case kept such a book, for, in reply to a question put by the counsel of the respondent as to the fact of payments to him of taxes for '46.'47.'48 and '49, he said: "Well, the book in which I enter sums received for the lots in my office; any taxes that have been paid to me as treasurer by any one I have put down in the book in my office" and he says he would not have made any entries in the book then before him–that if payments had been made him the entries would have been in another book in his office; and that he had not examined the latter book.

The attention of the witness was called to a book, which the learned Vice-Chancellor in his notes calls the treasurer's book, a copy of a page of which forms part of the respondent's case. Who the treasurer was, whose book it was said to be, was not stated, or by whom it was kept, or by whom the entries were made. Entries in it appear five years before the witness became treasurer. No evidence shows who made them. It exhibits cabalistic marks, unintelligible to any one unaided by explanations, and I must say such have not been satisfactorily given, in several respects which might be stated. By reference to it, with the explanation given, we learn that the 200 acres, of which the lot in question forms the southern half part, appears from 1841 to 1845 both inclusive to have been rated as a whole; then for four years up to and including 1849 there is *no entry*.

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In 1850 appears the figures £1 0s. 8d. } £0 4 0s 7d. In 1851 there is another blank. Now what does the witness say in regard to them? He says that book is the one in which arrears of taxes were entered. He says further, that the lot in question (100 acres) is *charged* with taxes for the years '46.'47.'48.'49 and 50, and for '52.'53.'54. The book, however, for the first four years being a *blank*, shows no division of the lot and *charges* nothing. He is asked how the blanks show the taxes unpaid, but he evades the question and refers to a mark "A" in reference to another lot not touching the question put. He says further on, "that blank is to be taken as they were not paid" What "blank" he referred to is not shown, but we may, I think, reasonably assume the blank he referred to was for the four years in question. Then again, as to the blank as to 1851, he is asked what that blank means. He replies "that signifies that it was not returned, at all events it was not taxable by a certain return received from the township." How then could he construe the blanks for the four years to mean that there were arrears for those years and that the blank for 1851 meant the very opposite? He says "the presumption is that the taxes were paid to the township in '51, for there is no charge for '51." As far however as the book shews, there is no more charge for the four years than for 1851, and why the "blanks" should be differently understood he did not explain if he could, which, with the data before him, I very much doubt. How the *same mark* or the *same kind of blank* can mean one thing with respect to some years and the opposite for another year, I confess my inability to understand. He says in reply to a question as to the payments for '47.'48 and '49, and when asked to refer to the books he then had for information, "the time is so far back that I cannot swear from perfect memory." Again as to '46 to '50, he says: "From

my *books* I can say that the lands were in some arrears for these years. I say so from my books. I may be in error in that. I cannot say positively but my impression is—whichever way I may be understood—my impression is that the lot has been in arrears for these years" What "books" did he refer to? Certainly not to the one before him, for from that alone he could get no information. He did not examine the proper book to get it, and the contents of it could not be given without its production. He was not subpœnaed, or I presume asked, to produce it, and the only legitimate conclusion is that it would not have aided the respondent's case if produced. The non-descript book referred to in the evidence could not regularly be looked at, even to refresh the memory of the witness, until he first laid the grounds for the permission by shewing the entries were those of the witness himself and made very soon after the occurrences they referred to.

I might show further how incompetent the witness was to prove the essential facts the respondent was bound to establish, but I think I have shown quite enough. To turn a person out of property he bought, paid for, and occupied for so many years, upon such evidence, would be, to my mind, not only perpetrating great injustice, but destroying most salutary rules of evidence upon which the rights of property and even life and liberty depend. When "impressions" are the extent to which a witness can go, I cannot receive such as evidence of facts to make out even a *prima facie* case, where positive and reliable evidence is required, and I know of no rule under which they can be substituted for any purpose, much less for the evidence located in available public documents, which the statute makes evidence.

The statute applicable to this case, 59 Geo. 3, chap.

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7, sec. 7, requires the Courts of Quarter Sessions to apportion the amount to be assessed for the District upon each and every person named in the rolls, according to the provisions of sec. 2 of that act, but not in one year to exceed the rate of one penny in the pound. There is no evidence in the case of such rating and no sale for alleged arrears can therefore be upheld. It was hardly contended by the Respondent that the sale in question could be upheld for the ordinary municipal taxes, but his counsel contended that the sale for taxes under sec. 3 of chapter 8 was regular, and, therefore, the title passed by the Sheriff's deed. I felt great doubts on the argument of the correctness of that contention, and have since then satisfied myself that my doubts were well founded.

In *Blackwell* on Tax Titles (1), a work written apparently with great care and ability, he lays it down that "If land be sold for the non-payment of divers taxes, one of which is illegal and the residue legal, the sale is void; the land must be liable for all the taxes for which it was sold. In such cases all of the proceedings to collect are necessarily void, as it is impossible to separate and distinguish, so that the act should be in part a trespass, and in part innocent." In support of this doctrine he cites thirteen American cases. I will refer to some of them. In *Elwell* v. *Shaw* (2), it appeared that there were five distinct taxes assessed, for the non-payment of all which the land in controversy was sold. The only objection to the validity of the sale was, that in one of the assessments it exceeded by ten dollars and thirteen cents the amount authorized by the statute. The sale was held void. The Court said: "To suffer them" (the assessors) "to exceed this limit would be to subject the citizens to the payment of taxes, to the imposition of which they never as-

(1) P. 192. (2) 1 Greenleaf R. 335.

sented, and to create uncertainty in the amount in violation of the manifest provisions of the statute." The case now under consideration is much stronger where there is no evidence whatever of the imposition and apportionment by the Sessions as the acts require.

A still stronger case than the one just cited in support of the rule is *Huse* v. *Merriam* (1). There the assessment was, $226.62; the amount to be levied was $225 75; excess, $00.87. It was insisted that the proceeding was void, because the assessor had exceeded the levy *eighty-seven cents*. The answer was *de minimis &c.* Chief Justice *Mellen*, giving the judgment of the Court, says, that the maxim is not applicable to such a case, and that "the assessment was therefore unauthorized and void. If the line which the legislature has established be once passed we know of no boundary to the discretion of the assessors."

This doctrine would certainly apply to this case were it not for the legislation by the Validating Acts, 29 and 30 Vic. ch. 53 sec. 156, and 32 Vic. ch .36 sec. 155, *O.* The provisions of the two sections are indentical in language, except as to the time provided for questioning a deed made by a Sheriff or Treasurer.

Section 155 has been under consideration in many cases, and before, I think, all the Superior Courts of *Ontario*, and so far as I can ascertain has been always construed to have no affect unless where taxes were in arrear, some of the Judges holding it was necessary in the application of the section to show some taxes due for the period of five years before the issuing of the Treasurer's warrant; and so appears was the judgment of the Court of Appeal in this case delivered by Mr. Justice *Patterson*. He cited four cases, in which it was held that it was necessary to show some arrears, and two where those arrears should have been for five years,

(1) 2 Greenleaf R. 375.

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upon which he says he might, but for those decisions, have had some hesitation in arriving at that reading of the words "sold for taxes in arrears."

The case of *Jones* v. *Cowden* (1), was cited in the respondent's factum. I have read the case in both reports, and it differs from this case in one important feature. In that it distinctly appeared that there were arrears, and the judgment is founded on that assumption; the main questions in the case being as to the application of the Registry Acts, and the validity of the sale. Objection to the validity of the Sheriff's deed was taken because arrears were not shown in the absence of the proof that the taxes had been properly imposed by the quarter sessions, and therefore, that there were no arrears, but the Court held the particular objections cured by section 155. Vice-Chancellor *Blake*, in the first sentence of his judgment, says: "It is proved that at the time of the sale in question there were some taxes in arrear, and that a sale actually did take place;" and afterwards "the case is therefore brought within sec. 155 of 32 Vic. ch. 36, *O.*, and so the sale is validated, notwithstanding there may have been defects in the proceedings." Mr. Justice *Burton* said: "I think there is sufficient evidence of a sale, and a deed executed in pursuance of such sale, to bring the case within section 155 of the Assessment Act, and that it is consequently not open to the defendants to impeach the Sheriff's deed by reason of any alleged irregularities which were urged against it at the trial and renewed before us."

There is nothing therefore that I can see in the judgment in that case to weaken the decisions previously given with apparent unanimity, and all of which go to show the necessity of proving

(1) 34 U. C. Q. B. 345; and in 36 U. C. Q. B. 495, in the Court of Error and Appeal.

arrears at the time of the sale, and which necessity of proof I also feel bound to declare. To say that the section was intended to cover any thing more than mere irregularities would be giving to it too extensive an application; and to say that, as in one of the cases cited; where it was clearly shown there were no arrears, the rights of the owner, it might be, absent from the country at the time, should be transferred, through the mistakes or negligence of a public officer, to give credit for taxes paid, would, in my judgment, be going far beyond what I could conceive any civilized legislature could have intended.

I think before the aid of section 155 can be properly invoked, a sale should be proved independently of the recital or mention of that fact in the deed, and that arrears should be shown. In regard to the first, I may here say that, as the validity of the deed depends on the fact of a sale having taken place, a sale should be shown otherwise than by the deed, for the latter is only valid when a sale has been had. No proof having been given of any sale having taken place, and the sale being the point which is to give effect to the deed, I cannot hold it to come in this case within the purview of the section. It is no answer to this objection to urge that after many years the proof might be difficult. That may be one of the consequences of purchasing lands sold for taxes, but I don't think the amount of time elapsed in this case sufficient to call upon a court to presume that a sale did actually take place, unless indeed it was first shown that some diligence had unsuccessfully been used to get proof, either primary or secondary, of the fact. I am of opinion that the evidence does not shew any arrears at the time of the sale, that the want of proof of the sale invalidates the deed so as to take it out of the provisions of sec. 155, and that that section only applies to a sale and deed when taxes are in arrears when a

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warrant is issued. I therefore think the appeal should be allowed and the judgment below reversed.

GWYNNE, J.:—

One of the points pressed upon us by the learned counsel for the respondent was that, four years having elapsed without the Sheriff's deed, under which the plaintiff claims, and which was executed upon the 23 May, 1857, having been called in question, the 156th sec. of the assessment Act of 1866, made that deed now to be wholly unimpeachable, even though no portion of the taxes, for the alleged arrear of which the sale took place, had been due for 5 years, or even though there was no amount of tax whatever due, or in arrear, in respect of the land sold. It may be convenient, that I should address myself to this point, before adverting to the ground upon which the court below has based its judgment.

The fair and legitimate conclusion, resulting from the judgments of all the courts in *Ontario* upon the construction of the Assessment Acts, both before and since the first enactment of the section referred to, according to my understanding of the reported decisions, is, that the section can only be construed to remedy all irregularities and defects existing, when the event, the happening of which the statute has made an essential condition precedent to the creation of the power to sell, has occurred, namely, when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for the prescribed period, which was formerly five years, but now three; and that it cannot be construed as supplying the want of that condition precedent. Sitting as we do here as a Court of Appeal from the courts in *Ontario*, speaking for myself, I must say, that if I should find a judgment of any of those courts affirming the position contended for, I should feel it to be my bounden duty to

raise my voice for reversal of such a judgment, as one which would be, in my opinion, subversive of all security for property, at variance with the plainest principles of justice, contrary to the whole scope, object and tenor of the Act in which the clause is found, and one which could only be arrived at by disregarding the elementary rule for the construction of all statutes, namely: that the construction is to be made of all parts together and not of one part only by itself.

In *Hall* vs. *Hill* in the Court of Error and Appeal, in 1865 (1), *Richards*, C. J., delivering the judgment of the court, says:

The courts in this country have always held that the imposition of taxes on wild lands, and the selling those lands for the arrears of such taxes, with the additions and accumulations to the amount of taxes which these acts require, in effect works a forfeiture of the property of the owner of the lands. In relation to statutes of this class, *Turner*, L. J., in *Hughes* v. *Chester and Holyhead Railway* (2), says: "This is an act which interferes with private rights and private interests and ought therefore, according to all decisions on the subject, to receive a strict construction, so far as those rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases upon the subject. They might be cited almost without end."

In that case, in the Court of Queen's Bench (3), *Draper*, C. J., referring to the Assessment Act, in pronouncing the judgment of the court, says:

We must confess we more readily concur with what was said in *Doe* v. *Reaumore* (4): "The operation of this statute is to work a forfeiture, an accumulated penalty is imposed for an alleged default, and to satisfy the assessment charged together with this penalty the land of a proprietor may be sold, though he may be in a distant part of the world and unconscious of the proceeding. To support a sale made under such circumstances, *it must be shewn that those facts existed which are alleged to have created the forfeiture and which are necessary to warrant the sale.*"

In *Payne* v. *Goodyear* (5), *Draper*, C. J., says:

(1) 2 Er. and Ap. Rep. 574.
(2) 7 L. T. N. S. 203.
(3) 22 U. C. Q. B. 584.
(4) 3 U. C. Q. B. O. S. 247.
(5) 26 U. C. Q. B. 451.

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The primary, it may be said the *sole*, object of the Legislature in authorizing the sale of lands for arrears of taxes was *the collection of the tax*. The statutes were not passed to take away lands from their legal owners, but to compel those owners, who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay, by the sale of a sufficient portion of their lands.

And again, at p. 452:

The power to sell land was created in order to *collect the tax*.

In *Connor* v. *Douglas*, in the Court of Appeal (1), *Richards*, then C. J. of the Court of Common Pleas, (the Court of Appeal then consisting of all the Judges of the Superior Courts,) referring to the above language of the court in *Doe* v. *Reaumore*, draws a distinction between matters of procedure and other matters. Thus he says:

The Judges could not intend their language to apply to a mere defective or informal advertising of the lands for sale.

The language referred to,

(quoting *Doe* v. *Reaumore*, as above, he goes on to say,)

may well apply to all those matters creating a charge on the property, fixing as it were the burden on it, and rendering it liable to be sold. When the charge has once been fixed on the land, *and* the period has elapsed after which it may sold, then the subsequent matters, as to how it may be sold, the manner of selling, advertising, &c., to a certain extent cease to be mandatory, and are, in fact, but the mode pointed out by the statute *how* the property is to be sold, *which by all the requirements of law before the officer was directed to sell it, had been made liable to sale.*

And referring to the judgment of the Court of Common Pleas in the then recent case of *Cotter* v. *Sutherland* (2), he says (3):

I think the language used by my brother *Adam Wilson*, in *Cotter* v. *Sutherland*, in the Common Pleas, is correct, and may be properly applied and laid down as *the rule in those cases*, viz: "We should require strict proof that the tax has been lawfully made, but, in promoting its collection, we should not surround the procedure with too unnecessary or unreasonable rigour."

(1) 15 Grant, at p. 463. (2) 18 U. C. C. P. 357.
(3) At p. 464.

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And again, he says:

I would refer to the language used by the learned Judge from pages 405 to 408 inclusive. The conclusion arrived at is that: "Under these Acts there are certain things which must be strictly adopted, otherwise the whole proceedings following them must be void. There must have been an assessment in fact, and made by the properly authorized body. The writ must be directed to the Sheriff, and be returnable at the time named." * * * * *

"These are essential elements in the constitution of any valid tax sale. There must be a charge rightly created on the land, there must be a power rightly conferred on the Sheriff to sell it. The sale must not be without some reasonable and sufficient notice, nor sooner than he is authorized to sell, nor otherwise than by public auction."

The learned C. J., then, while concurring in the above language, guards himself from being supposed to hold that there may not be in some instances, some other ingredients required than those stated, to make the sale valid.

Draper, C.J., with whom *Mowat*, V.C., concurred, repeated his opinion, that the tax sale acts are to be treated as penal in their character, leading to forfeiture, and that therefore they should be construed strictly. We have in this judgment an affirmation by the Court of Appeal of the views expressed by the Court of Common Pleas in *Cotter* v. *Sutherland*, with the single exception that, whereas the Court of Common Pleas did not incline to regard these Tax Sale Acts as of a penal character, the Court of Appeal seemed to regard them in that light. However Mr. Justice *Wilson*, delivering the judgment of the Court of Common Pleas in *Cotter* v. *Sutherland* (1), affirms the law imperatively to be, that the owner must be a defaulter for the prescribed period of years before his land can be sold. He regards the lawful imposition of the tax as creating a judgment debt, to satisfy which alone the law authorizes a sale. In either view of the statute, namely, whether it be regarded as penal, or as creating a debt in the nature of a judgment, the Acts

(1) 18 U. C. C. P. 389.

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sanction no sale, except to realize arrears of taxes actually imposed, and some portion of which has been suffered to remain in arrear for the prescribed period. We have here, then, the clearest judicial enunciation of the scope, object and intent of these acts.

In *Hamilton* v. *Eggleton* (1), the Court of Common Pleas, in perfect conformity with the principles above enunciated, held that sec. 155 of 32 Vic., ch. 36, which is identical with sec. 156 of the Assessment Act of 1866, does not make valid a deed executed upon a sale as for taxes in arrear, when, in fact, no taxes were in arrear at the time of the sale. In a matter which appears to me of such great importance, I may be excused for referring to a portion of the reasons given for that judgment, altho' it was pronounced in my own language, with the full concurrence, however, of my brother Judges. After pointing out the several clauses of the Assessment Acts, and shewing their scope to be, as laid down by other Judges in the cases which I have here quoted above, the judgment proceeds :

> The whole object of the Acts, and the whole machinery provided, being for the purpose of enforcing the payment of arrears of taxes, and the only authority to sell conferred by the act being in case of there being such arrears due out of the land and unpaid, there can, I think, be no doubt that the 155th sec. of 32 Vic., corresponding with the 156th sec. of the Act of 1866, relates only to deeds given in such cases as were in pursuance of a sale contemplated by the act—namely, a sale for the purpose of realizing payment of taxes in arrear and unpaid. The only deed authorised to be given being a deed in pursuance of a sale, which was authorized only in the event of there being taxes in arrear and unpaid, the natural construction is, that the 155th section, like all other parts of the act, relates to the like object —namely, that which the Act authorized, not to an event not at all authorized or contemplated by the act—namely, a sale of lands in respect of which there were no arrears of taxes due and unpaid, and the owner of which had never been in any default which called for or justified the intervention of the act.
>
> The object of the clause relied upon, in my opinion, was, as its

(1) 22 U. C. C. P. 536.

language appears to me plainly to express, and as is consistent with the whole tenor of the act, to provide that, when lands became liable to be sold for arrears of taxes, and were sold to recover such arrears, and a deed should be given in pursuance of such sale, that such deed should not be questioned for any irregularity or defect whatever, unless within a prescribed period, but it would be contrary to the whole scope and intent of the act, [which it is to be borne in mind was merely an act to amend and consolidate the several acts respecting the assessment of property], to hold that the object of the clause was to make good, after a period of two years, a deed given under circumstances in which the act had not authorized or contemplated any sale at all should take place—in which, in fact, the very purpose for which alone a sale was contemplated was wanting.

In that judgment attention was also drawn to the provisions and effect of an Act, 33 Vic, ch. 23, to which, however, I propose now to draw more particular attention. That act was passed for the express purpose of making valid sales known to be absolutely invalid, and it enacted that, in cases where lands, which were liable to be assessed, had been sold and conveyed under colour of the statutes, for taxes in arrear, and the tax purchaser at such sale had, prior to the first day of Novr., 1869, gone into and continued in occupation of the land sold, or of any part thereof, for at least four years, and had made improvements thereon to the value of $200, or, in lieu of such occupation, shall have paid at least 8 years taxes charged on the land since the sale, such sale should be deemed valid, notwithstanding any omission, insufficiency, defect, or irregularity whatsoever, as regards the assessment, or sale, or the preliminary, or subsequent steps required to make such sale effectual in law. Provided always, that the statute should not apply, among other cases, to the following, namely, in case the taxes, for non-payment of which the lands were sold, had been fully paid before sale. And it was further enacted, that nothing in the act contained should effect the right or title of the owner of any lands sold as for

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arrears of taxes, or of any person claiming through or under him, where such owner at the time of such sale was in occupation of the lands, and the same have since been in occupation of such owner, or of those claiming through or under him.

Now, is it conceivable, that the Legislature would have passed this act, so passed for the express purpose of making invalid sales valid, but which excluded from its operation the case of there being no taxes in arrear at the time of the sale, which was the case of *Hamilton* v. *Eggleton*, and the case of the true owner continuing in occupation from the time of the sale, and which, in cases in which it did operate, only made valid sales which had been followed by actual occupation by the tax purchaser for the full period of four years, accompanied by an outlay of $200 in improvements, or, in lieu of such occupation, the payment of taxes accrued due for eight years subsequent to the sale, if there was then a statute in existence having the effect, as is now contended—for this is the whole contention—that, even in a case where the owner of property may have continued in possession regularly, paying all taxes, both before and since the sale, and where, consequently, no taxes whatever were in arrear, nevertheless, if in such case a sale should take place, and a deed be given, as occurred in *Hamilton* v. *Eggleton*, the mere lapse of four years from such wrongful and inexcusable sale should divest the true owner of his property, although he had never been in default, and may have had no knowledge whatever of the sale, until after the lapse of the four years, the purchaser at such invalid sale, should proceed to evict him?

To my mind I must confess that the statute appears to convey a legislative recognition that the Assessment Act of 1866 is not open to the construction contended for.

What a state of society would ours be, what a reproach would it be, not upon our system of jurisprudence only, but upon our state of civilization, if we should be obliged judicially to declare, that such is the frail tenure upon which property and civil rights are held in the Province of *Ontario*.

Let us consider for a moment longer the proposition contended for, that we may be thoroughly familiar with the aspect of a proposition which is asserted in the name of an Act of the legislature. Lands are liable to assessment, whether they are resided upon or not. Those not resided upon, when the owner is not resident within the municipality, (or is unknown, if residing in the municipality,) are assessed upon a separate roll called the "Non-Resident Land Roll." Those upon which the owners reside are assessed against the resident owners personally. Now, as to this latter class first. He may pay his taxes regularly to the proper officer every year; may carefully preserve all his receipts; he may never have been in default at all, and yet, as in *Hamilton* v. *Eggleton*, his land may be sold behind his back without his knowing anything about it. He may continue in possession after the sale, paying his taxes regularly as before, until, after a number of years, he finds he is no longer the owner of his own lands, the fee simple estate therein having, as is contended, passed to a stranger by the mere lapse of two years now, formerly it was four, from the committal by a municipal officer of an unwarrantable act which is called "A Sale under a Power." This may be done without any notice whatever to the owner; for, as advertisement of the sale is part of the procedure only, and as the clause, (according to the contention, and as is conceded,) cures all defects in procedure, the sale may have taken place without having ever been advertised, and without the owner, who was in no default, having ever had any notice whatever that his land was about to be, or had been, offered for sale.

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Then, the owner of lands assessed upon the non-resident land roll knows that the law permits him to suffer the taxes upon his land to fall in arrear,now for 3 years, formerly it was for 5 years, subject merely to the payment by him for that accommodation of compound interest, at the rate of 10 per cent per annum. Knowing this to be the law, and in perfect confidence in its integrity, he makes his arrangements accordingly. His business takes him abroad for three years. He returns before the expiration of the third year,in time to pay up all arrears, with the accumulated interest, within the period prescribed by the law, and he finds that, immediately after he left the Province, his whole property, consisting of a valuable estate, had been offered for sale without any authority of law by a municipal officer, as for one year's taxes due for the year before he left, when in fact none was due, and that a Deed has been executed by the municipal officer to a stranger, and that more than two years have elapsed since the sale, and he is told by the Courts of Law, where he seeks for redress, that his case is helpless—that, notwithstanding he was never in default, and that the act of the municipal officer was inexcusable and unwarranted, still the lapse of two years from the committal of that unwarranted act has had the effect of divesting him of his estate and and of vesting it in the person to whom the municipal officer so wrongfully, without any legal authority, had executed a Deed purporting to convey it. Surely, if ever there was a case in which, if necessary, judicial astuteness should be called into action to avoid such a construction it is this. But in my opinion no astuteness is necessary, for the proposition seems to my mind to be so shocking that I never could feel myself to be justified in imputing to the Legislature an intent so arbitrary, so subversive of civil liberty, and of the right of the subject to the full enjoyment of his property, as

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such a construction would imply, unless I should find the intent expressed in language which admits of no other possible construction, and from which there is no possibility of escape.

But it is said, that unless this construction be given to the act the maxim of law *omnia presumuntur rite esse acta* would be disregarded. The clause relied upon, and other similar clauses in other assessment acts, form the best commentary upon the inapplicability of such a maxim, for it was the repeated illegal acts committed by the public officers in the conduct of these sales which formed the sole excuse for the enactment of these clauses. However, the rights of property are too sacred to be left to the mercy of this maxim: moreover, it never claimed to apply to the giving jurisdiction to deprive a man of his estate. Even in the case of a sale under an execution issued out of the Superior Courts, it is necessary that there should be a judgment obtained against the owner of land, in order to support a transfer of his estate under the execution. Here the contention is that neither a judgment, nor anything analgous to it, is necessary. The maxim, too, only purports to operate *donec probetur in contrarium*, whereas the construction sought to be put upon the act in which the clause in question is found asserts the right to pass an estate by the mere lapse of two years from the committal of an act *proved, or admitted* to have been, at the time it was committed, illegal and wholly unwarranted. If this construction should be established, the first fruits of that decision would be to divest the true original owner of the land, which was the subject of litigation in *Hamilton* v. *Eggleton*, of his estate, which the judgment in that case, so long as the construction it put upon the act is maintained, secured to him; for the action there having been ejectment is not final, and the party who there claimed under the wrongful deed may bring

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a new action and recover the estate from the rightful owner, if a new construction should be put upon the act by this court.

Again, it it is said that in these cases the innocent purchaser should be protected, but I cannot see that he, however innocent, has any greater claims upon our sympathy than the innocent owner of the property, who would be cruely wronged if the purchaser in the given case should succeed. In a matter so affecting the rights of property, there is something more to be considered than: which party is most entitled to our sympathies? That is a question with which we, as expounders merely of the law, have nothing to do. What the owner of the property submits to our adjudication is, whether or not the language used by the legislature warrants the construction, that the mere lapse of two or four years from the committal by a municipal officer of an utterly illegal and unwarranted act, (whether such act was fraudulent, or only done in ignorance, or by mistake, is alike to the owner) can have the effect of divesting the true owner, who was in no default whatever to the muicipality, and who had been guilty of no breach of any law, of his estate in real property.

In *Proudfoot* v. *Austin* (1), the plaintiff, who was a purchaser at a tax sale, rested his case upon the sheriff's deed alone. *Blake*, V. C., held this insufficient, and that the 155th sec. of 32 Vic. ch. 36 only applies where there was an arrear of taxes due at the time of the sale, and where there has been an actual sale. He adds:

> I think, therefore, that here the plaintiff should have shewn that at the time of the sale there were some taxes due, *and* that an actual sale did take place.

And he remitted the case for further evidence.

This sentence, extracted from the learned Judge's judgment, by no means implies that he was of opinion

(1) 21 Grant 566.

that it was not necessary that some part of the arrears should be due for the period prescribed by the statute; he was simply adjudicating that a sheriff's deed alone was not sufficient, but that proof of arrears of taxes, and of an actual sale for such arrears *under the provisions of the statute, was necessary to be given.*

This judgment is no more authority for the contention that an arrear for any shorter period than the statute has prescribed would be sufficient, than is the expression in the judgment of the court in *Hamilton* v. *Eggleton* (1), that the sec. refers "only to cases of deeds given in pursuance of sales where *some* tax upon the land sold was in arrear."

When the evidence should be offered would arise the question whether what was offered was sufficient. Upon this point I have referred to the records of the court in *Proudfoot* v. *Austin*, and I find that upon the 11th and 25th June, 1875, the Vice-Chancellor took the further evidence which his judgment at the hearing had directed to be given, and that then the treasurer of the county produced the several collectors rolls for the years '52, '53, '54, '55, '56, and '57, shewing arrears of taxes charged upon the lands for each of those years, to the respective amounts following in the order of the years, and which still remained due when the sale took place in 1858, viz.:—£1 9s. 5½d., £3 6s. 7½d., £4 7s. 4½d., £19 5s. 7½d, £18 18s. 5½d., and £19 7s. 2d; and it was upon this evidence and evidence of the sale that a decree was made in favor of the plaintiff upon the 28th June, 1875.

In *Kempt* v. *Parkyn* (2), the Court of Common Pleas held that the section under consideration did not cure the defect that no part of the tax was in arrear for the period prescribed by law, viz.: 5 years in that case, be-

(1) At p. 541. (2) 28 U. C. C. P. 123.

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fore the Treasurer's warrant under which the sale took place issued.

In the case now in review before us Mr. Justice *Patterson*, delivering the judgment of the Court of Appeal for *Ontario*, says that he does not wish to throw any doubt upon the construction thus put upon the clause in the Court of Common Pleas, although he might have had some hesitation in arriving independently at that reading of the words "sold for arrears of taxes." He adds, however, language amply approbatory of the decision as just and sound. He says, and this is the language of the Court:

> I see nothing objectionable in principle, nor anything unreasonably restrictive of the beneficial operation of the clause, in holding that while it cures defects in procedure, either in the formal assessment of the land, or in the steps leading to and including the sale, its operation is excluded when it appears that the substantial basis of liability, viz.: the fact that a portion of the tax on the land had been over-due for the period prescribed by the law under which the sale took place, is wanting.

This language involves a complete affirmation by the Court of Appeal of the judgments in *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn*, for if the construction which in these cases is put upon the section is "unobjectionble in principle," and is not "unreasonably restrictive of the beneficial operation of the clause," then the canons of construction imperatively direct that this construction, which is reasonable, wholesome and "unobjectionable in principle," must be preferred to a construction, such as that now contended for, which is unreasonable, unjust and mischievous in the extreme, inasmuch as it would, without any shadow of reason, deprive a man in no default whatever, and guilty of no breach of any law, of his legal rights in real property, without any value or consideration whatever.

In *Nicholls* vs. *Cummings*, reported in the 1st Vol. of the Reports of the decisions of this Court (1), I find langu-

(1) P. 395.

age relating to this same assessment Act confirmatory of that quoted from several of the cases which I have above referred to and conclusive, as it appears to me, upon the clause now under discussion. The question there arose under the 61st sec. of the Act 32 Vic. ch. 36, which enacts that the assessment roll as finally passed by the Court of Revision and certified by the Clerk as so passed

> Shall be valid, and shall bind all parties concerned notwithstanding any defect or error committed in or with regard to such Roll.

Upon the Roll, so passed and certified, a party appeared to be assessed for $43,400.00 who had delivered to him an assessment slip stating his assessment to be only $20,900.00. It was contended that this 61st sec. made the Roll as passed binding and conclusive upon the party. I find however at p. 419 of the Report this language in the judgment of the Court:

> I think it more consistent with justice that the fundamental rule which ought to prevail is, that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition should be carried out and acted on.

And again at p. 422:

> When a statute derogates from a common law right, and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed; therefore it has been often held that acts which impose a charge or a duty upon the subject must be construed strictly, and it is equally clear that no provisions for the benefit or protection of the subject, can be ignored or rejected.

And again at p. 427:

> It needs no reference to specific authorities to authorise the proposition, that in all cases of interference with private rights of property, in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected.

And the Court held accordingly, that the 61st sec.

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applied only when pre-requisites ordained by previous clauses had been complied with. This case, as it appears to me, if it stood alone, ought to be conclusive authority in this Court, that the essential pre-requisite, which the statute ordains shall occur before the power to sell conferred by the statute comes into being, should occur to enable the clauses in question to apply; that the coming into existence of the power to sell under the conditions prescribed in the statute is an essential element in every deed authorised or confirmed by the statute.

But it is said, that the judgment of the Court of Appeal in *Jones* v. *Cowden* (1), is at variance with, and that therefore, being the judgment of a Court of Appeal, it in effect reversed, the judgment of the Court of Common Pleas in *Hamilton* v. *Eggleton*. If that were the effect of the judgment in *Jones* v. *Cowden*, it ought in my opinion to be reversed here, for the reasons which I have given. But in truth *Jones* v. *Cowden* has never been regarded as at variance with *Hamilton* v. *Eggleton*, or as an adjudication upon the point now under discussion. If it had been, *Kempt* v. *Parkyn* would not have been decided as it was, nor in the case now under review before us would the Court of Appeal itself have expressed itself in the terms it has of the judgments in *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn*. The court would, on the contrary, naturally have felt itself bound by *Jones* v. *Cowden*, and would have decided this case upon the short point as to the construction of the clause, and have so got rid of the difficulty, with which it seems to have been pressed, in arriving at the conclusion that there was direct evidence of there having been some portion of tax in arrear for five years sufficient to support the sale. A reference, however, to *Jones* v. *Cowden*, will shew that neither did the point which

(1) 36 U. C. Q. B. 495.

arose and was adjudicated in *Hamilton* v. *Eggleton*, nor that which arose and was adjudicated in *Kempt* v. *Parkyn*, arise in *Jones* v. *Cowden*. The tax sale took place in 1839, for eight years arrears of taxes to the 1st July, 1837, made up as follows:—

200 acres at ⅛*d.* per acre under 59 Geo. 3 ch. 8 sec. 3, road tax 2*s.* 1*d.* which for eight years amounted to..	£0	16*s.*	8*d.*
Add 50 per cent, under 9 Geo. 4 ch. 3 sec. 4.....		8*s.*	4*d.*
	£1	5*s.*	0*d.*
Then assessment of 1*d.* on the £ on 200 acres at 4*s.* per acre, under 59 Geo. 3, ch. 7, sec. 3, 3*s.* 4*d.* per acre for eight years.....	£1	6*s.*	8*d.*
Add 50 per cent.....		13*s.*	4*d.*
Total.....	£3	5*s.*	0*d.*

The evidence was that the clerk of the peace, on the 12th July, 1837, certified to the Quarter Sessions that there was this sum of £3 5*s.* due on the lot for eight years ending 1st July, 1837. The chairman made an order that a warrant for sale should issue, and the warrant was issued. *Wilson*, J., in his judgment in the Queen's Bench, says:—

> There is no reason to doubt that the land was actually though, perhaps not formally, taxed.

Now, as to the £1 5s. that was a tax clearly charged upon the land, being a tax directly imposed by statute, so that this amount was certainly due, and for the eight years, whether the 1d. in the £ was properly charged or not. There was no evidence, as in *Cotter* v. *Sutherland*, that it was not—the certificate of the Clerk of the Peace that it was charged upon the land, if not conclusive evidence upon that point would be sufficient *prima facie* evidence. When the learned Judge says that

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perhaps it was not formally taxed, he was alluding, no doubt, rather to his knowledge of the practice which used to prevail than to anything in the evidence showing it not to have been formally taxed. It was, he says, *actually* done. There was however no question that the £1 5s. for road tax was due and in arrear for the proper time, and a sale did take place to realise £3 5s. arrears of taxes; all of which was certified by the proper officers to have been imposed upon the land, £1 5s. of which was imperatively and completely imposed by statute directly. There was no suggestion that anything appearing in the evidence raised a presumption, as is contended the evidence in the case now before us does, that this charge had been paid before the sale. The case therefore had all those elements to support a sale which *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn* pronounce to be necessary; and forthis reason *Hamilton* v. *Eggleton* appears to have been referred to for the purpose of distinguishing it. There were, however, in *Jones* v. *Cowden* objections taken to the sufficiency of the advertisement of the sale. In the Court of Appeal we have not, unfortunately, the judgment of Chief Justice *Draper*, which, although written, appears to have been mislaid. He certainly was not in the habit of going out of his way to over-rule, or to cast a doubt upon, a judgment of a Court upon a point not at all necessary for the decision of the case before him, and which, in fact, the evidence in the case before him did not raise. If V. C. *Blake* had changed the opinion he had then recently expressed in his judgment in *Proudfoot* v. *Austin*, he surely would have pointedly intimated that change, and he would not have thought it necessary shortly afterwards to take, as he did, the further evidence in *Proudfoot* v. *Austin*, and base his decree upon such further evidence; but that he had not changed his mind appears from the fact that he based his judgment

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expressly upon the ground that it was shown sufficiently in his opinion that at the time of the sale there were taxes in arrear; and, as I have already stated, whatever taxes were due upon the land were so due and in arrear for the period then required. The judgment of *Burton*, J., wherein he says that by reason of the 155th sec. of the Assessment Act it was not open to the defendants to impeach the sale by reason of the alleged irregularities which were urged against it, must be confined to the objections as to the irregularities in the advertisement of the sale, and cannot be extended to refer to a matter which did not exist, and which therefore did not require adjudication, as the case was argued upon the assumption that there did sufficiently appear to be taxes in arrear for the period necessary to warrant a sale.

The result is, that in all the reported cases since the first enactment of the clause under discussion, which have been decided in favor of the purchaser, it was proved that the event, upon the happening of which alone the power to sell comes into existence, had occurred, and that in the only cases in which that event did not appear to have occurred, the title of the original and true owner has been upheld.

Both authority and principle concur, then, in laying down the law to be, as this Court should take this the earliest opportunity of affirming it to be, namely, that the section under discussion does not remove an infirmity arising from there not appearing to have been at the time of the sale some portion of tax due which had been in arrear for the period prescribed by law before the sale. That the section covers all mere defects of form which may have occurred in the procedure to impose an assessment actually charged against the land, and all irregularities and defects in the execution of the power, but cannot,

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upon any principle of justice, be construed to supply or cure the want of that condition precedent, the existence of which is essential to the coming into existence of the power to sell, namely, that some portion of the tax imposed was in arrear for the period prescribed by law, and was still unpaid at the time of the sale.

Until I heard my Brother *Strong's* judgment I had never heard that the case of *The Bank of Toronto* vs. *Fanning* (1) was relied upon as an authority governing the point before us. If I had, I could, I think, have shown that it has no more application than has *Jones* vs. *Cowden*; indeed if it had, being a judgment of the Court of Appeal of *Ontario*, that Court, no doubt, when this case was in judgment before them, would have proceeded upon that judgment, and have followed it, instead of quoting the language which they have used, and which is as inconsistent with the case of *The Bank of Toronto* vs. *Fanning*, being a judgment upon the point, as it is with *Jones* vs. *Cowden* being so.

The Court below has held that the necessary condition precedent has been fulfilled in the case before us. It is necessary therefore to dispose of that point also.

The plaintiff claimed title under a deed bearing date the 23rd of May, 1857, executed by the Sheriff of the United Counties of *Stormont, Dundas & Glengarry*, in pursuance of a sale made by the Sheriff on the first of March, 1856, for arrears of taxes alleged to have been due in respect of the said piece of land up to the 21st of Dec'r, 1854. The years for which these arrears were charged to have become due were the years '46, '47, '48, '49, '50, '52, '53 and '54. The contention of the defendant was, that there was no evidence of any rate having been imposed upon the land in question (which was wild unoccupied land), for the years

(1) 18 Grant 391.

'46 to '50, inclusive, under 59 Geo. III, ch. 7. It was also contended by the defendant, that certain matters appearing in a book produced by the Treasurer of the counties raised a presumption that in the year 1851 all taxes charged for the preceding years were paid, and that no sufficient evidence rebutting this presumption was offered. The effect of this contention, if well founded, would be that the sale in 1856 was illegal, for the reason that no part of the taxes in respect of which the sale took place was due for 5 years.

The learned counsel for the appellant contended, that the judgment in *Cotter* v. *Sutherland*, upon the construction of the 59 Geo. III, ch. 7, and the wild land rate thereby authorized, was erroneous, and desired to bring that judgment in review before us in this case; but it is not necessary to express any opinion upon that point, for the reason that, as was conceded in argument, and as appears by the statute 59 Geo. III, ch. 8, the road tax therein mentioned was, by the statute itself, without more, rated and charged upon the land, and the question presented for our determination is, whether or not there was sufficient evidence of that tax or any part thereof remaining unpaid for 5 years when the sale took place; for sec. 55 of 16 Vic. ch. 182, and subsequent sections, authorized the sale of land for arrears of taxes, whenever a portion of the tax has been due for 5 years. Now, that the tax imposed by 59 Geo. III, ch. 8, s. 3, for road tax, became and was a statutory charge upon the lot in question for the years from '46 to '50 inclusive, I think there can be no doubt. But in order to understand the point raised by the defendant, namely: that the evidence offered by the plaintiff raised a presumption of payment in 1851 of all previous charges, it is necessary to refer to 13 and 14 Vic. ch. 67, which came into operation upon 1st of January, 1851.

The 46 sec. of that Act directed the Treasurers of the

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several counties to make out, and submit to the municipal council of their county, on or before the 1st of January, 1851, a true list of the lands in their respective counties on which any taxes shall then remain unpaid, and the amount of taxes due on each lot, or part of lot, both for taxes chargeable under the wild land assessment law, and for assessments imposed under By-laws of the municipal councils, and that the said arrears should be certified to the clerk of the proper locality by the County Clerk, and should be added to the assessment roll for the year 1851, and collected in like manner; and by the 33rd sec. it was enacted that it should be the duty of the Clerk making out any Collector's Roll to forward immediately to the County Treasurer a copy of so much of the said Roll as should relate to the taxes on the lands of non-residents. This same 33rd sec. enacted that every Collector, upon receiving his Collection Roll, should proceed to collect the taxes therein mentioned, and for that purpose should call at least once on the party taxed, or at the place of his usual residence, if within the Township, and should demand payment of the taxes charged on the property of such person. Provided always, that the taxes upon lands of non-residents in any township might be paid to the County Treasurer, who, on being thereunto required, should receive the same and give a receipt therefor; and that such County Treasurer should keep an exact account of all sums so received by him, and should pay over the same to the Treasurer of the township to which they should respectively belong. Then, the 34th section enacted that, in case any party should refuse or neglect to pay the taxes imposed upon him for the space of 14 days after demand, the Collector might levy the same by distress and sale of the goods and chattels of the party who ought to pay the same. Then, the 38th sec. enacted that the Collector should receive the tax on

any lot of land separately assessed, or upon any undivided part of any such lot, provided the person paying such tax should furnish in writing a statement of such undivided part, showing who is the owner thereof. Then, by the 42nd sec. it was enacted that, if any of the taxes mentioned in the Collector's Roll should remain unpaid, and the Collector should not be able to collect the same, he should deliver to the Township Treasurer and to the County Treasurer an account of all the taxes remaining due on the said Roll, showing opposite to each separate assessment the reason why he could not collect the same, by inserting the words "non-resident" or "no property to distrain," as the case might be. Then the 45th sec. enacted that the County Treasurer should prepare a list of such lands in each township, &c., &c., upon which any taxes should remain due at the time of the Collector making his return, distinguishing in separate columns, and opposite the respective lots, the amounts due for county rates, and the amounts due for township rates.

The Treasurer of the United Counties was called as as a witness upon behalf of the plaintiff and he testified that taxes, at the rate of 1d. in the £ for the wild land tax, under 59 Geo. 3, ch. 7, and ⅛d. per acre under 59 Geo. 3, ch. 8, were charged upon the land, and in arrear and unpaid in the years '46 to '50 inclusive; and he produced a book, which I understood to have been his Non-Resident Land Roll Book, but which did not appear to have the yearly entries made in it in the manner directed by the statute. In this book, opposite to the lot, viz: 15 in the 9th concession in columns headed respectively with the years '46, '47, '48 49, were blanks, instead of the rate for each year. The Treasurer stated that these blanks indicated, as he swore also the fact was, that no taxes were paid to him for those years.

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In a column headed with the year 1850 were two entries thus: £1 0s. 3d. / £1 0s. 3d. } 4 0s. 7d.

These entries were said to represent the amounts as returned to the municipal council in the Schedule furnished by the Treasurer in pursuance of the above quoted directions contained in 13 and 14 Vic. ch 67, as due upon the north and south halves of the lot respectively. In the column under 1851 there was no entry.

Evidence was given to the effect that in 1851 the whole lot was assessed to one *Alex. McDonald*, although in 1850 he had been asssesed for the north half only. In the years from '52 to '60, both inclusive, the south half was returned as non-resident. In the columns headed 1852 and 1853 were entered the taxes rated and imposed for those years only. Now, upon this evidence it was contended that it must be presumed that in 1851 all arrears had been collected by the Township Collector, upon whose roll, under 13 and 14 Vic. ch. 67, the arrears had been placed for the purpose of being so collected. The Treasurer had in his office, as I understand the evidence, the roll as returned by the Collector, which should have shown whether he had or not been paid those arrears, and he also swore that he had a book in his office in which payment of the arrears, if made in 1851, would appear, which book he had not brought to Court with him. The objection, as it appears to me, is not so much one of presumption of payment, arising from entries in the book produced, as an objection to the sufficiency of the evidence to show that at the time of the sale there remained unpaid an arrear of tax for the period necessary to warrant a sale, in the absence of the collector's roll for the year 1851, and of the book which the Treasurer said he had at his office; for if payment was made to the Collector in 1851 of the arrears as charged to the year 1850, and entered upon his roll, there were not arrears due for the

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prescribed period to warrant the sale. It certainly seems to have been great negligence upon the part of the plaintiff, and of the Treasurer I think also, (whose duty it was to produce the best evidence the case admitted of, and which the Treasurer swears he had in his office,) that such evidence was not produced to establish the fact beyond all doubt. In a case where a plaintiff claims title under a Power of Sale, such as the power in these cases is, the courts should, I think, be very particular in requiring the clearest evidence that the right to exercise the power arose before they adjudge a man to be divested of his estate, unless the law provides any particular evidence as *prima facie* sufficient in the particular case; and if the case had stopped here I should be decidedly of opinion that the collectors returned roll should have been produced, and that the case should have been adjourned to another day, if that was necessary, as was done in *Proudfoot* v. *Austin*, to have enabled the treasurer to produce the roll, and I gather from Mr. Justice *Patterson's* judgment that this was his opinion also, for he rests his judgment in favor of the plaintiff, upon the effect of the statute 16 Vic. ch. 182, the 51st and 53rd sections of which imposed upon the treasurer the duty of keeping a book in which he should enter from the returns made to him by the clerk of the municipality, and from the collector's rolls returned to him any taxes unpaid, and the amounts so due, and he was required upon the 1st day of May in every year to complete and balance his books, by entering against each piece of land the arrears, if any, due at the last settlement, and the taxes of the preceding year which might remain unpaid, and to enter therein the total amount, if any, chargeable upon the land at that date, and to add 10 p. c. thereto each year.

The main object, no doubt, which the Legislature had

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in view in requiring this book to be kept by the treasurer, was as well to serve the convenience of the public, who had an interest in the matters so required to be entered, as for preserving in a convenient shape evidence of the charges against the lands; such entries, so made by a public officer, in discharge of a duty imposed upon him by statute, are always received as *prima facie* evidence of the matters so entered.

The treasurer testified to his having performed the duty thus imposed, and that in the book which he did produce he entered under the years 1853 and 1854, as directed, the result; and he moreover pledges his oath to his belief in the correctness of those entries, to make which he had necessarily occasion to refer to the rolls in his office including that of 1851. The entries so made shew the amounts entered on the collector's roll of that year as still unpaid in 1853 and 1854. This evidence, therefore, unless and until displaced, shews that there remained still, as a charge upon the land, so much of the amount at least as consisted of the road tax imposed by 59 Geo. 3 ch. 8, and the accumulations thereon for interest: so that a sale was warranted within the provisions of the statute, as some portion of tax charged upon the land was due, and in arrear for the required period. No attempt was made to displace this evidence, which no doubt would have been, if it could have been, done. For this reason I am of opinion that the appeal should be dismissed, with costs.

Appeal allowed with costs.

Solictors for appellant:—*Stewart, Chrysler* and *Gormully.*

Solicitors for respondent:—*Macdonnell* and *Mudie.*

THE CITY OF HALIFAX.....APPELLANTS ; 1879

AND *June 4.

THOMAS E. KENNY,.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assessment of Ships—37 Vic., c. 30, sec. 1, and 27 Vic., c. 81, Rev. St. N. S.— Vessels not registered in Halifax not liable.

K. resides and does business in the city of *Halifax*, and is owner of ships which are not registered at the City of *Halifax*, and which have never visited the Port of *Halifax*. Under the authority of 37 Vic. c. 30 sec. 1 and 27 Vic., c. 81 secs. 340, 347, 361, Rev. St. *N. S.*, the assessors of the City of *Halifax* valued the property of *K.* and included therein the value of said vessels.

Held: That vessels owned by a resident, but never registered at *Halifax*, and always sailing abroad, did not come within the meaning of the words "*whether such ships or vessels be at home or abroad at the time of assessment*," and therefore were not liable to be assessed for city taxes.

APPEAL from a judgment rendered by the Supreme Court of *Nova Scotia* in favor of the respondent on a special case submitted to that court for determination.

The following is the special case entered :

" Case entered into by consent of parties for argument before the Supreme Court at *Halifax*, between the City of *Halifax* and *Thomas E. Kenny*.

" *Thomas E. Kenny* resides and does business in the City of *Halifax*, and is the owner of ships which are not registered in *Halifax*.

" The assessors of the City of *Halifax* have valued the property of the said *Thomas E. Kenny* liable for city rates, and have included therein the value of said vessels,

*PRESENT :—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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as if they had been within the city at the time of assessment. Said vessels were never in the port of *Halifax*.

"The question for the opinion of the court is—whether or not the said *Thomas E. Kenny* is liable, under the laws in force in relation to the City of *Halifax*, to be assessed for city taxes in respect to said vessels, or on account of his being the owner of them.

"If the Court should be of opinion that the said *Thomas E. Kenny* is liable to pay such taxes, judgment to be entered against him for the City of *Halifax* for the costs of preparing this case and argument, otherwise judgment to be entered for the said *Thomas E. Kenny* against the City of *Halifax* for such costs.

"It is, however, expressly agreed, that this case shall not stay or interfere with the collection of the rates for this year, and no judgment shall involve the repayment by the city of any rates already assessed."

The statutes which bear upon the question are the following:

37 Vict., c. 30, s. 1, (1874):

"The city council shall have power to assess on the inhabitants and the property *within the city annually*, such sum of money not exceeding one hundred thousand dollars, as may be necessary to defray the expenses which are by law authorized to be incurred on behalf of the city."

(This is, so far as this question is concerned, a re-enactment of section 330 of 27 Victoria, c. 81, (the city charter). Section 330 was repealed and a new section substituted by 33 Vic., c. 47 ss. 1 and 2. The substituted section last aforesaid was itself repealed, and the section above set forth substituted therefor.)

27 Victoria, c. 81, (The Halifax City Charter of 1864.)

"s. 340. The assessment shall be rated on the occupants of real estate, being yearly tenants, and in all other cases on the owners of property, by an equal

pound rate upon the value of the real and personal estate within the city, whether such real and personal estate shall be possessed, occupied or owned by individuals, or by any joint stock company or corporation, and whether owned by parties resident or absent, according to the best knowledge and discretion of the city and ward assessors, subject to the exemptions hereinafter specified. The city council may direct the assessment to be made in the autumn of any year for the ensuing year, after the assessment has been made and the city rates imposed."

"Sec. 347. Under the term 'personal estate,' shall be included all household furniture, moneys, goods, chattles, wares and merchandise, kept in public or private premises, or in the Queen's or other public warehouses: all ships and vessels, or shares in ships or vessels, owned by persons residing or having offices, or doing business within the city, whether such ships or vessels *be at home or abroad at the time of assessment;* also all public stocks, except provincial and city debentures of the said city of *Halifax*: there shall also be included under the term personal estate, stocks in public or private banking companies, water, gas, fire, marine, or life insurance companies, or associations, or other joint stock companies or corporations, whether public or private, doing business within the city; and all moneys belonging to the inhabitants of the city, invested in public or private securities within the city, and all bullion and coin, of gold or silver, all province notes, and notes of solvent banks, in the province or elsewhere, which may be in the possession, and the property of any citizen, or in the custody of a bank, or other party, or moneys deposited on deposit receipt, shall be considered as his moneys, and be assessed accordingly."

"Sec. 361. As soon as the whole amount of real and personal property, on which any person, company, or

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corporation is to be assessed *within any ward* of the city, is determined, the city assessor shall serve or cause to be served a notice of such valuation upon the person assessed, or his agent, or on the company or corporation, their officer, clerk, or agent. This notice shall be in the following form, in print or ink:

Ward No.	NAMES.	Value of Real Estate as tenant or owner.	Value of personal property.	Total amount on which Assessment is to be levied.

"I hereby give you notice that the assessors, to the best of their judgment, have made the above valuation of your real and personal estate *within* ward No.—— of the city of *Halifax*, on which assessment for the current year is to be levied. If you wish to object thereto you are hereby notified to furnish me at my office in the city Court House, within fourteen days from this date, with a written statement under oath according to the form herewith served upon you."

"To Mr. City Assessor.

Dated at *Halifax*, day 18 "

These notices are to bear date on the days which they are respectively served.

"After the service of the notice, fourteen days shall be allowed to the parties to be rated, or their agents, to furnish the city assessor with a written statement under oath of the real and personal estate in the following form:

Statement of real and personnl property WITHIN *Ward No.—of the City of Halifax*, LIABLE TO ASSESSMENT.

	$	cts.
1. Real estate in possession of subscriber not rented to yearly tenants, estimated at ten times the yearly rent or value		

2. Household furniture and movable property in dwelling and premises occupied by subscriber..... ....
3. Goods, wares and merchandize, within the ward.....
4. Moneys in possession or in bank, &c.
5. Ships or vessels, or shares and interest therein, whether at home or abroad.....
6. Moneys invested in mortgage, or other security whatever, in the city.....

Total amount.....$"

"In making this statement, each item or class of property shall be separately valued; and the amount admitted under each of the six classes of assessable property shall be separately stated; and the assessor shall not be bound to adopt such statement where each is not expressly valued."

"*The return of ships or vessels or shares therein shall*, in every case, be made by the party rated in the affidavit or return by him or them made, in the ward in which such person shall reside. Such return or statement shall be verified in every instance by an affidavit in the form following:"

39 Vict., Chap. 32, s. 10.

"The failure to levy a Poll Tax has not affected nor shall it affect or diminish the validity or legality of any assessment made and levied within the City of *Halifax*."

Mr. *Cockburn*, Q. C., for appellants:

The point is whether a ship is *at home* at *Halifax* because her owner lives at *Halifax*. There are a number of authorities which establish beyond a doubt that a state can tax persons residing in the state for the per-

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sonal property outside of the state. I submit also, that on the principle "that personal property follows the person," and the property in question being movable and personal, and the Respondent's residence in *Halifax* being admitted (that being necessary to give jurisdiction to the city authorities), the case falls clearly within the scope of the Act above cited.

The case of *Nickle* v. *Douglas* (1), relied on by respondent, is not applicable, for under the Act of the *Ontario* Legislature personal property within the Province was alone assessable, and the property taxed was stock in a bank doing business outside the Province.

That the Legislature of *Nova Scotia* has power, for municipal purposes, to authorize the assessment of personal property elsewhere, but owned by persons within the Province, is undoubted, and the only question here is whether the Legislature have clearly exercised that power, which, it is submitted, must be established from a correct construction of the statute referred to.

The learned counsel relied on the following authorities: *Bulstrode, p.* 355; *Tupper* v. *Treasurer of the Hospital of St. Peter Port* (2); *The King* v. *Hull Dock Co.* (3); *Re Ewing* (4); *Thompson* v. *Advocate-General* (5); *Minturn* v. *Hays* (6); *Peabody* v. *County Comrs.* (7); *Reman* v. *Shepherd* (8); *Barratt* v. *Henderson* (9); *Re Hood's Estate* (10); *Lott* v. *Mobile* (11); *Hilliard's* Law of Taxation (12).

Mr. *Gormully* for respondent:—

In order to interpret secs. 340 and 347 conferring the power of assessment they should be read together, and

(1) 37 U. C. Q. B. 51.
(2) 3 Knapp 406.
(3) 3 B. & C. 516.
(4) 1 Cr. & Jer. 151, 158.
(5) 12 Cl. & F. 1.
(6) 2 Cal. 590.
(7) 10 Grey Mass. 97.
(8) 27 Ind. 288.
(9) 4 Bush 225.
(10) 21 Penn. 106.
(11) 43 Al. 578.
(12) Pp. 5, 7, 116, 117, 125, 128, 138.

it will then be seen that the probable legislative intent was to authorize first the assessment of all inhabitants in respect of their property within the city, and then the assessment of all non-residents in respect of their property within the city. Possibly more felicitous language could have been found which would have defined more clearly and precisely the extent and the limits of the power intended to be conferred. But if the language used is at all vague or uncertain, if it gives rise to a reasonable doubt in the mind of the Court whether the right to assess personal property is confined to personal property within the city or not, then the appellants, by virtue of a familiar canon of construction applicable to all tax laws, must certainly fail. The canon referred to is that "every charge upon the subject must be imposed by clear and unambiguous language." In *Wroughton* v. *Turtle* (1), *Parke*, B., says, that it is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous words. See also *Cooley* on taxation (2), where a number of the English authorities are collected; *Nickle* v. *Douglas* (3). The cases cited by the appellant are not applicable, they are founded on the maxim of jurisprudence that personal property follows the person, which is not applicable to the present case.

The maxim should be confined in its operation to cases of bankruptcy, marriage and succession.—(See *Wharton* conflict of Laws. s. 311). It has no application to such property as ships, which have an actual *situs* when considering their locality for taxing purposes. The actual *situs* of a British ship for taxing purposes is her home port and her port of registry. This was the decision in *The King* v. *White* (4), cited in Mr. Justice *Weatherbe's* judgment; it was also so decided by the

(1) 11 M. & W. 567.
(2) Pp. 200 and 201.
(3) 37 U. C. Q. B. 51.
(4) 4 Durn. & E. 771.

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Supreme Court of the *United States*, in *Hayes* v. The *Pacific Mail Co.* (1), and *Morgan* v. *Parham* (2).

All principle and all analogy to be derived from statutes in *pari materiâ* seem to favor a construction which would, if possible, cut down the jurisdiction of the appellants to property within their territorial limits.

THE CHIEF JUSTICE:

I think this property could not be taxed. Under the act, I think, the rate upon the value of the real and personal estate means the real and personal estate *within* the city, it does not mean by fiction of law property which is in *England*. As regards ships, at *home* or *abroad* at the time of assessment, it must mean ships which have been registered at *Halifax*, the Port of Registry of a ship being her home port. It is too late now to raise the question whether appellant's vessels should have been registered at *Halifax*, *Halifax* being the place of the owner's residence. We must assume the vessels were properly registered. There can be no doubt, as the case is put, that the appellant's vessels were not registered at *Halifax*, and have never been in *Halifax*, and so never were at home in the port of *Halifax*, nor actually or constructively *within* the city of *Halifax*, and therefore do not come within the terms of section 347, of 27 Vic. ch. 81. *Rev. St. N. S.*, which says:

> All ships and vessels, or *shares* in ships or vessels * * * whether such ships or vessels *be at home or abroad* at the time of assesssment.

Under these circumstances, I think the appeal should be dismissed with costs.

STRONG, FOURNIER, and TASCHEREAU, J. J., concurred.

(1) 17 How. U. S. R. 596. (2) 16 Wallace 472.

GWYNNE, J:—

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The reasons given by the court below are conclusive, and I concur with the Chief Justice that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *Wm. Sutherland.*

Solicitor for respondent: *J. N. Ritchie.*

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF FREDERICTON..... } APPELLANTS;

AND

THE QUEEN, ON THE PROSECUTION OF THOMAS BARKER..... } RESPONDENT.

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*Feb'y. 12.

*April 13.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Canada Temperance Act, 1878, *Constitutionality of—Powers of Dominion Parliament—Secs.* 91 *and* 92, *B. N. A. Act*, 1867—*Power to prohibit sale of Intoxicating Liquors—Distribution of Legislative Power.*

Held,—1. That the Act of the Parliament of *Canada*, (41 Vic., c. 16,) "An Act respecting the traffic in intoxicating liquors," cited as "*The Canada Temperance Act*, 1878," is within the legislative capacity of that body.

2. That by the *British North America Act*, 1867, plenary powers of legislation are given to the Parliament of *Canada* over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other.

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*PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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3. That under sub-sec. 2 of sec. 91, *B. N. A. Act*, 1867, "regulation of trade and commerce," the Parliament of *Canada* alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the Court has no right whatever to enquire what motive induced Parliament to exercise its powers.

[*Henry*, J., dissenting.]

APPEAL from a judgment of the Supreme Court of *New Brunswick*, quashing a return to a mandamus *nisi*, and ordering a peremptory mandamus to be issued in the cause.

On the 1st day of May, 1878, the second part of *The Canada Temperance Act*, 1878, which prevents the sale of spirituous or intoxicating liquors, with certain exceptions, was brought into force in the City of *Fredericton, N. B.*, pursuant to the provisions of the first part of that act.

On the 18th day of October, 1878, The Supreme Court of *New Brunswick*, upon the application of *Thomas Barker*, who kept an hotel in *Fredericton*, issued a *mandamus nisi* to the Mayor, Aldermen and Commonalty of the City of *Fredericton*, commanding them to issue a license to the said *Thomas Barker*, to sell spirituous liquors by retail within the said city in his hotel, or to shew cause to the contrary.

The Mayor, &c., duly made answer and return to the writ of *mandamus*, refusing to grant the license for the following reasons viz: "That *The Canada Temperance Act*, 1878, was declared in force in the City of *Fredericton*, on the first day of May last, and therefore the city council could not grant a license to *Thomas Barker* to sell spirituous liquors by retail contrary to the provisions of that act."

Upon motion to quash the return and for the issue of a peremptory *mandamus* all parties were heard by counsel. It was agreed that the only question which the Court should be called upon to decide was as to the

power of the Parliament of *Canada* to pass *The Canada Temperance Act*, 1878; all technical and other objections were waived.

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In Michaelmas Term, 1879, the Court, consisting of the Chief Justice *Allen* and Judges *Weldon*, *Fisher*, *Wetmore*, and *Palmer*, gave judgment, holding *The Canada Temperance Act*, 1878, void, as being *ultra vires* of the Parliament of *Canada*; *Palmer*, J., dissenting (1). The issue of a peremptory *mandamus* was then ordered.

From this judgment the Mayor etc. appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q. C., for appellants:

The question to be decided on this appeal is whether Mr. *Barker* was entitled to a mandamus compelling the City Council to give him a license to sell spirituous liquors in the city of *Fredericton*, where *The Canada Temperance Act*, 1878, was brought into force. None of the detail provisions of the Act are brought in question for decision, the broad question being the power of the Parliament of *Canada* to pass the second and third parts of the Act, which prohibit under certain penalties the sale of spirituous liquors except upon certain specified conditions.

I propose to submit to the Court three positions upon which I intend to base my argument:—

First.—That as to all matters relating to the internal affairs of *Canada* and the Provinces composing it, and to the good government of the same, full legislative authority is vested either in the Parliament of Canada, or in the Provincial Legislature, or in both; in other words, that there is no reserved power respecting those matters in the Imperial Parliament. Second.—That the Provincial Legislatures have only such legislative powers as have been specifically conferred upon them by the *B. N. A. Act*, and that the whole

(1) See 3 Pugs. & B. 139.

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balance of the legislative power over the internal affairs of *Canada* and the Provinces composing it rests with the Parliament of *Canada*. Third.—That when the powers specifically conferred upon the Dominion Parliament clash with the powers of the Provincial Legislatures, the latter must give way.

If these propositions be sound it follows, that in order to establish, as between the Dominion Parliament and the Provincial Legislatures, that a power does not exist in the Dominion Parliament, it must first be shewn that such power is vested in the Local Legislatures.

I will therefore first argue that the power to pass *The Canada Temperance Act*, 1878, is not within the legislative authority of the Provincial Legislatures. The act by sec. 99 prohibits the sale of liquor by *every body* in those places within which the act may be brought into force, except for certain purposes. Then, by the 100 section *et seq.* the act provides for penalties and prosecutions for offences against the second part of the act. Can it be said that the power to pass this legislation exists in Provincial Legislatures? It is contended on the part of the respondent that the act is within the powers of those Legislatures because they have power over the subject of "Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, Local or Municipal purposes" (1), and over the subject of Municipal Institutions and of property and civil rights in the Province (2), and over "matters of a merely local nature in the Province (3).

It will be observed that the 9th sub-section gives legislative authority over the *licenses* to be issued and not over the traffic to be carried on in the shop, saloon, &c. Legislative authority over that part of the business relating to the sale of liquor by a saloon-keeper,

(1). B. N. A. Act, sub-sec. 9, section 92. (2). Ibid. sub-sec. 13. (3). Ibid. sub-sec. 16.

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as well as to the sale of goods and merchandise by a shop-keeper, belongs exclusively to the Parliament of *Canada*, by reason of the commercial nature of the transactions. The case of *Severn* v. *The Queen* (1) seems to admit, that Provincial Legislatures cannot pass any law which would amount to prohibition. But, it is said, this act virtually takes away the right specifically given to Local Legislatures to issue tavern licenses. I submit it does not do so, for the power to issue the license remains, but I must admit that its usefulness is gone.

I contend that if there be legislative authority over any particular subject matter, that authority may be exercised notwithstanding that the exercise of it may affect the revenue derived from the precise condition of that matter before the exercise of such authority.

For instance, the Local Legislatures have authority to impose direct taxation for the purpose of raising a revenue. Suppose the Legislature imposes a poll tax upon aliens, that would not prevent the Dominion Parliament from naturalizing those aliens, thus depriving the Province of that source of revenue. So with the sale of liquor. If the Parliament of *Canada* can as a regulation of trade prevent its sale, the fact that the prevention will deprive the Provincial Authorities of a source of revenue cannot affect the power to prevent. Some other clause, then, must be looked to.

The next clause relied upon is sub-section 8, relating to "Municipal institutions in the Provinces." It is said that *Fredericton*, being a municipalty having control over this subject before confederation, the power cannot be taken away. I contend that the Dominion Parliament can pass laws which interfere with the powers exercised by municipalities previous to confederation, so far as relates to matters within the authority of Parlia-

(1) 2 Can. S. C. R. 70.

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ment. Will it be said, that Parliament has no control over the power possessed by municipalities before confederation over weights and measures. Such power existed previous to confederation, in certain municipalities. The same might be said of other matters.

It is also contended that this law, having for its object the suppression of drunkenness, is a police regulation and so within the powers of municipalities, and reference is made to the remarks of Your Lordship, the Chief Justice, in *Regina* v. *Justices of Kings* (1).

[THE CHIEF JUSTICE:—I think I said nothing that may be interpreted as to say the Local Legislatures had power to prohibit ?]

No, my Lord, and what was stated is quite consistent with the fact—that the Local Legislatures have certain powers, the exercise of which would tend to prevent drunkenness, but it does not follow that the sole right to legislate so as to prevent drunkenness rests with the Local Legislatures; the Legislatures may attain that end in one way, Parliament may attain it in another. The question here is not: is the object of this legislation within the powers of Parliament or of a Legislature ? But the question is, are the means used within those powers ? The means used in this case are certainly not in the local authority.

Great stress has been laid by the Court below upon the preamble of the Act, and it is said that it is not within the powers of Parliament, because the preamble shews that it is an Act for the promotion of temperance, and not a regulation of trade or commerce.

To this I answer, (*a*) that if Parliament possessed power to pass the Act without any preamble shewing its reasons for passing it, the insertion of the preamble declaring the reasons could not take away or affect the power so possessed, and that although the preamble

(1) 2 Pugs. 535.

may properly be looked to for the purpose of assisting in the construction of the Act as passed, and of ascertaining the meaning of the language used, yet it can have no effect upon the power of Parliament to pass the Act nor can it limit, except as a matter of construction, the effect of the language used, (*b*) that if the preamble be looked at at all, it must be looked at as a whole, and it expressly declares one of the reasons for passing the Act to be "that there should be uniform legislation in all the Provinces *respecting the traffic* in intoxicating liquors."

Mr. Justice *Fisher* in his judgment says that the Act is not a regulation of trade and commerce, because in his opinion its provisions are unnecessary to such regulation, but he admits that, if such provisions be necessary, the Act is within the powers of Parliament.

To this I answer that the necessity for an Act is a matter entirely for decision by Parliament, and that the Court, except as a matter of construction, cannot deal with it.

Judges *Fisher* and *Weldon* refer to the unequal partial effect of the Act, and seem to rely upon this as a reason why it is not a regulation of trade.

To this I answer, that the power of our Parliament to regulate trade does not depend upon the effect of the regulation being equal with respect to all, or upon the regulation effecting all parts of *Canada* at once.

The next sub-section relied on by the respondent is 13 of sec. 92., viz.: "Property and Civil Rights in the Province." I do not understand that the respondent contends that by virtue of those powers the legislature could have passed this Act, but they say it is an *interference* with such powers. The appellants contend that this fact does not affect the general powers of Parliament, as if there be such interference the powers of the Local Legislature must give way.

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The respondents are therefore confined to the contention that the necessary power exists in the legislature under sub-section 16 of sec. 92, relating to matters of a merely local or private nature in the Province.

To this it is answered, that by the latter part of sec. 91, it is expressly provided that any matter coming within sec. 91, shall not be deemed to come within the class included in sub-section 16 of sec. 92.

It is further said that, as by the sec. 121 of the *British North America Act* provision is made that articles, the growth &c. of one Province, shall be admitted free into the other Provinces, the power to import implies the power to sell, and that Parliament could not therefore interfere with that power. But the right to sell exists quite independently of the right to import. The *B. N. A. Act* does not declare that any article, which may be admitted to pass from one Province to another, may be sold in that other Province. It is not because an article is admitted to pass free from one Province to another that it can be legally sold. Immoral prints might be sent from one Province to another, but they could not be sold without an offence being committed, because the law says such things shall not be sold. There must be some legislative authority to destroy the power to sell. Certainly it can only be the authority of the Dominion Parliament.

It is contended that because the Act affects only particular districts, it is not general legislation, and therefore *ultra vires*. There is nothing in the *B. N. A. Act* which says that the powers of Parliament must be executed in any particular way or over the whole of *Canada* at once. Constantly there is partial legislation in a geographical sense. Take, for instance, the *Blake Act* against the carrying of fire arms. There is no authority to say it must be exercised generally in a geographical sense.

In addition to the regulation of trade and commerce, I will also contend that under the 27 sub-section of sec. 91, relating to the criminal law, the Dominion Parliament had power to pass this Act.

The power to legislate upon the Criminal law includes the right to declare Acts, in themselves lawful, to be no longer lawful, if Parliament thinks that the public good requires it. Drunkenness is a fruitful source of all kinds of crime. In legislating to promote temperance, Parliament is, in an eminent degree, dealing with the criminal law.

It is not obliged to wait till liquor has been sold and then drunk till intoxication has ensued and crime has been committed, before dealing with the subject. It has the right to legislate and attack the cause. Finding a cause lawful in itself productive of such criminal effects, it can, as part of the criminal law, declare that cause to be an offence, and so if possible obliterate the most fruitful source of crime known to exist. Drinking liquor was not *per se* a criminal offence, but this law was against the sale, not against the drinking of liquor. Carrying arms was not *per se* unlawful, but Parliament in its wisdom has deemed it advisable to make it an offence. Drunkenness, according to the reports of grand juries and other authorities, was one of the most fruitful sources of crime, and there was no reason why Parliament should not deal with it as had already been done with the practice of carrying arms.

The remaining point taken by the respondent is, that this act is a delegation of powers and that the Dominion Parliament has no power to delegate its powers. In this case there has been no delegation of authority, but merely conditional legislation. See *Queen* vs. *Burah* (1). Here the act has been passed and its effect is suspended, until certain conditions precedent

(1) L. R. 3 App. Cases 906.

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are performed, and then the act by virtue of its own self comes into force. I contend that the same *power*, with respect to the matters within its control, exists in the Parliament of *Canada* as exists in the Parliament of *Great Britain*, and if the power of delegating it exists here, the *British North America Act* itself is a delegation of authority from the Imperial Parliament. To sum up shortly I contend:

(1). That the Act is within the powers of Parliament because it could not have been passed by the legislature of the Province.

(2). That it is a regulation of trade and commerce.

(3). That even if not a regulation of trade it is within the Criminal law.

Mr. *Maclaren* followed on behalf of the appellant:—

As to the question of delegation, the cases cited in the respondent's factum are State decisions in the *United States*. It is scarcely necessary to point out the difference between the two systems. There the residuum of power is in the people and not in the legislature. It is however now recognized, that conditional legislation, or laws known as local option laws, are quite within the limits of their powers. See *Cooley* on Cons. Lim. (1).

In *Quebec* a large number of by-laws depend on their going into effect on the vote of the people. If the Local Legislatures had this power, surely the Parliament of *Canada* had the same power.

The *Dunkin* Act, which this act supersedes, came into force in the same way, for it left it optional to the municipalities to put it into operation. The constitutionality of that act was never questioned, before confederation. Then also there is the Act 32 Vic. c. 24, since confederation, "An Act for the better preservation of peace in the vicinity of Public Works," which provides that arms are not to be carried nor *liquors* to be sold within

(1) P p. 117, 120, 122 note.

certain limits of Public Works. This last act was only brought into force at the option of the Governor in Council. This last act also shows that the prohibition of the sale of liquors, has been considered as coming within the criminal jurisdiction given to the Dominion Parliament. I might also cite the Supreme and Exchequer Court Act which came into force by proclamation.

However, the appellant chiefly relies on sub-sections 2 and 27 of sec. 91, as giving power to the Dominion Parliament to pass *The Canada Temperance Act*, 1878.

A great deal of stress is laid on the preamble of the act, which seems to be the stumbling block to the working of the act in *New Brunswick*. The Judges of the Court below have assumed that this is not an act to regulate trade and commerce, but only to promote temperance.

[THE CHIEF JUSTICE: If the power to regulate trade and commerce exists and the exercise of that power has an effect on temperance, can it be a reason to interfere with the power?]

Our answer is that they have power to regulate trade and commerce in such a way as to promote the *good* government of the country. Then also it is said, that this act interferes with the exclusive control given to the Local Legislatures over municipal institutions in the Province, and matters affecting civil rights and property. My contention is that the Dominion Parliament has full power to legislate upon all matters strictly within its jurisdiction, no matter what effect it may have on classes of matters comprised in those assigned by sec. 92 to the legislatures of the Provinces; and I base my contention on the concluding lines of sec. 91. The Court below has not given full force to the words, "*shall not be deemed to come within the class of matters of a local &c.*"

[THE CHIEF JUSTICE: The Dominion Parliament can deal with shipping, and can it not do so irrespective of

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the power given to the Local Legislatures as to the *civil* rights over the subject ?]

Certainly, my Lord, my impression is that that sub-section 16 of sec. 92 includes many subjects previously mentioned.

[HENRY J. : Do you draw any line as to *trade and commerce*? This question is the most important one bearing upon the case. In dealing with trade and commerce, there is hardly any question of property or civil rights which could not be touched upon in some way. The main question is as to where the line should be drawn ?]

Altho' I do not feel confident in drawing a line, I would say this : Where there is an apparent conflict, in so far as it is a *bonâ fide* regulation of *trade* and *commerce*, the local interest must give way. I think this is a fair construction to put on the concluding words of section 91.

If the law were otherwise, the sub-section 13, *civil rights*, would take away the Dominion power altogether. In dealing with property and civil rights, there are many matters of commerce with which the Local Legislatures could deal, if Dominion authority was not considered paramount. The Dominion Parliament could not even legislate on criminal matters. All I am prepared to argue for the present is that the preamble of the act comes within sub-sec. 2 of sec. 91.

The word *traffic* is synonymous with *trade*. The traffic in intoxicating liquors has always been considered a branch of trade. The first decision is to be found in the legislative Journals of 1855 of the old Province of *Canada* (p. 957, 2 part). A Bill was introduced to prevent traffic in intoxicating liquors, and Speaker *Sicotte*, now one of the Judges of the Superior Court of *Quebec*, decided that the Bill related to trade, and as such should have originated in committee of the whole, and on that

ground it was thrown out. The courts in *Quebec* have unanimously held that the Local Legislatures had no legislative authority to pass a prohibitory liquor law. See *Sauvé* v. *The Corporation of the County of Argenteuil* (1); *Hart* v. *La Corporation du Comté de Missisquoi* (2); *Poitras* v. *Corporation of the City of Quebec* (3); *Cooey* v. *Corporation of the County of Brome* (4); *Spedon* v. *Parish of St. Malachie* (5); and *Regina* v. *The Justices of King's County* (6).

The power of the Parliament of *Canada* over this subject matter is much more extensive than that of Congress in the *United States*. Parliament has power to deal with foreign as well as domestic trade, while Congress only deals with the former. *Story* on Constitution of *United States* (7). It is also contended that this is not a regulation of trade and commerce, but a prohibition. To this it is answered that, whether the Act be a prohibition or a regulation of the sale, it is equally within the powers of Parliament which alone can deal with respect to the Criminal law and to trade and commerce. *Story* on the Constitution of the *United States* (8); *Gibbons* v. *Ogden* (9).

Chief Justice *Allen* in the Court below says: "had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of Parliament to pass such an Act."

The next inquiry is, whether an Act can be unconstitutional from the motives with which it is passed. I contend the motive cannot be inquired into. *Story*, ibid. (10).

Mr. *Kaye*, Q. C., for respondent:

In the distribution of Legislative powers, the *British North America Act*, 1867, part 6, section 92, assigns exclusively to the Provincial Legislatures the power of

(1) 21 L. C. Jur. 119.
(2) 3 Q. L. R. 170.
(3) 9 Rev. Leg. 531.
(4) 21 L. C. Jur. 182.
(5) C.C. Beauharnois, Bélanger, J., not reported.
(6) 2 Pugs. 535.
(7) Sec. 1056.
(8) Sec. 1064.
(9) 9 Wheaton 23; 1 Kent's Comm. p. 432.
(10) Sec. 1067, 1090, 1092.

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legislation in relation to all matters coming within *inter alia*—

Class 8—Municipal Institutions in the Provinces.

Class 9—Shop, Saloon, Tavern, and other Licenses, in order to the raising of a Revenue for Provincial, Local, or Municipal purposes.

Class 13—Property and Civil Rights in the Provinces.

Class 16—Generally all matters of a merely local or private nature in the Province.

The power thus assigned excludes any like power in the Parliament of *Canada*.

The exception in sub-section 29 of sec. 91 qualifies anything done of a *private* or *local* nature under the enumerated powers of sec. 91 and not any thing done under sec. 92. The object was, that if the Dominion Parliament, in legislating on some of the subjects enumerated in sec 92, necessarily comprised something of a *private* or *local* nature, such legislation would still be valid. Matters of a public nature are not qualified. If a power of a public nature is given by sec. 92 to the Local Legislatures, there is no power given to the Dominion Parliament to destroy that power. Thus the power given of raising a revenue, either by direct taxation, or by shop and saloon licenses, is a matter of a public nature, and I contend that there is no power vested in the Dominion Parliament by which it might destroy the sources of Provincial revenue. The introduction of these words *local* or *private* must have some meaning. Now, the only meaning you can give to the words *local or private* is, that if there are *public* matters assigned exclusively to the Local Legislatures by the 92 sec., then the Dominion Parliament cannot affect them. If the raising of money is not a *public* matter, my argument goes for nothing, but if it is, upon the plain language of the Act, there is no power in the Dominion Parliament to destroy it. The Provinces con-

sented to a union on the condition of being able to raise a revenue out of licenses.

[THE CHIEF JUSTICE:—Your reasoning would lead you to the belief that the Provincial Legislatures have power to prohibit the sale of liquors.]

I cannot see that it leads to that.

[THE CHIEF JUSTICE:—Then according to your argument you must hold that there is no power in *Canada* to deal with these matters, and that our Parliament had not, as Mr. *Lash* contended it had, a Constitution as perfect with reference to matters placed under its control as that of *Great Britain.*]

I do not think it possible to say this Dominion has such a Constitution as that of *Great Britain.* Their power is unlimited, because it is uncontrollable. Is it the same here? is not the power here controlled by the British Parliament? Whatever power exists, must be found in the *British North America Act.* If it had been the intention to give unlimited power to the Dominion, why not have had Legislative Union. What power exists to do away with the French language. So it is, I contend, with this subject-matter; it is not one which comes within the control of the Dominion Parliament.

It is contended that *The Canada Temperance Act* legislates on a matter which comes within class 2 of sec. 91: "The Regulation of Trade and Commerce."

Now, the same remark applies here, that the exercise of the power under class 2 cannot affect any matters in section 92 which are of a local or private nature; and that as class 9 of section 92 is of a local or private nature, it is not within the competency of the Dominion Parliament to legislate upon it.

Further, I submit that the term "Regulation" applies only to what concerns Trade as such—something having for its object to advance or benefit trade, and not to regulate the morals of traders. Thus it would not

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be competent to the Dominion Parliament to declare that no person should trade who was addicted to the habit of smoking, or that no one should be allowed to trade unless he attended some Christian place of worship.

It may be difficult to give the exact definition of "Regulation," but it is submitted that a law against drunkenness is in no sense a law for the regulation of trade.

It is to-day urged that this law was for the purpose of increasing sobriety, but to-morrow a law might be passed to make the people religious, or to make them follow a certain religion. The simple question is, can this law be said to be a regulation of trade, or is it merely a law for another purpose but affecting matters of trade?

See *Calder Navigation Co.* v. *Pilling* (1), where a distinction is made between the laws which a Canal Corporation were empowered to make for the good and orderly using the navigation, and rules which the Corporation made to regulate the moral and religious conduct of bargemen employed on the canal.

Then, it is said, that *The Canada Temperance Act* legislates on a matter which comes within the class of subjects No. 27, "The Criminal Law."

This power is limited, so far as concerns the class of matters in section 92, in its exercise to such of the matters enumerated in that section as are of a local or private nature. Thus, it would not be competent to the Dominion Parliament to declare that it shall be a crime to amend the constitution of the Province (sub-section 1), or to impose direct taxation within the Province, in order to raising of a revenue for Provincial purposes; neither can it make it a crime to do any of the matters in sub-sections 3, 4, 5, 6, 7, 8, or 9; none of which are matters of a local or private nature. So it would not

(1) 14 M. & W. 76.

be competent to the Dominion Parliament to declare it criminal to solemnize marriage in the Province.

Local Legislatures have the power to deal with police regulations, and to impose fines for a breach of the laws. Municipalities have power to prevent the sale of liquor on Sunday, and I do not think it would be for a moment contended that the Local Legislature had not power to authorize these restrictions. If it is held that this was a regulation of trade, and that the Dominion Parliament had power to override the Provincial laws and to legalize the sale of liquor on Sunday, it will considerably astonish the people who had advocated Confederation. Under the pretext of regulating trade they might prohibit the sale of tobacco. The simple statement of an object in passing a certain law cannot justify the Dominion Parliament in interfering with matters under control of the Local Legislatures. If this is not a regulation of trade it is a police matter, not a criminal law. It is not to prevent crime, for selling liquor is no crime; but to prevent the consequences of selling liquor.

Besides which,the *British North America Act* assumes the existence, after Confederation, of "Taverns," from which licenses can be issued, in order to the raising of a revenue for Provincial, local, or municipal purposes, and it could not be the intention of the act to include under the term "Criminal Law," those matters which are by the *British North America Act* held to be legal, and which are relied upon as a source of revenue for the Provinces. It is, therefore, submitted that *The Canada Temperance Act* is not an act of legislation on Criminal Law within the meaning of the *British North America Act*, class 27, sec. 91.

Now, if we take up the *B. N. A. Act* and read the 91st section, we find there that certain powers are given to the Dominion Parliament. It is the voice of the Provinces, speaking through the Imperial Parliament, giv-

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ing to the Senate and the House of Commons power to make laws for them. In this case Parliament has not exercised these powers, but allows the present law to come into force, when sanctioned by a portion of the people. This is a violation of the fundamental principle upon which this power was given to them, it virtually delegates *to a portion* of the people the power of controlling the legislation of the Province. The great struggle in consummating Confederation was to protect the minorities. The strongest guarantee of integrity in the Dominion Parliament is the responsibility of members to their constituents, but such a law as this is nothing less than an attempt to shift that responsibility to a section of the people. By referring to the Debates on Confederation, p. 547, it will be seen that the intention of the framers of the *Quebec* resolutions was to preserve the family life of the Provinces, and that it was for the purpose of having a uniform law throughout the Dominion, that the legislative control over the criminal law was given to the Parliament of *Canada*. This law, however, makes it a crime to sell spirituous liquors only in certain sections of the Dominion. The question here is whether they could delegate their power and ask the people to say whether a crime would be created. Local option laws involving the delegation of power might occur in the *States*, or in *England*, where there are legislative bodies with plenary powers, but not in *Canada*. Where the carrying out of a law is left to the people, it is not delegation, but is execution. To carry out a law already passed, is different from legislating one for one section of the Dominion.

The question here seems to me to be what Parliament did, had they power to do? We do not come to ask where the power exists.

There is another point to which I will refer before concluding :—

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The *British North America Act*, section 121, provides that all articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the union, be admitted free into each of the other Provinces. The power to import free, implies a power to sell.

The Canada Temperance Act takes this power from the importer of beer, ale, cider, and other liquors, as well where these liquors are the manufacture of another Province, as in other cases; it therefore violates the provisions of section 121.

Section 121 was intended to secure free trade between the Provinces in all articles of growth, produce, or manufacture of any one of the Provinces. *The Canada Temperance Act* gives a local manufacturer of certain articles, *e.g.* beer, etc., a power to sell, while it takes such power from the manufacturer in another Province. This is opposed to the spirit and meaning of the 121 section, and I submit that on this ground the act is *ultra vires*.

Mr. *Christopher Robinson*, Q.C., followed on the part of the Respondent:—

My learned friend who is with me has exhausted the points, and put them so forcibly that there can be no advantage in repeating them. I will however make a few observations as to the rules to be observed in construing this act. I think in construing our Constitution we may look at the debates, especially when the words of the act are to be found in the resolutions passed previously. Now, if we find that the construction given to these resolutions is that construction which we represent ought to be put on these important sections of the *B. N. A. Act*, it cannot be said not to be a valuable authority, just as the *Federalist* is looked upon as of the greatest authority in construing the *United States* constitution. In *Smiles*

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v. *Belford* (1) the Court read the debates. Now, we find that previous to Confederation the Provinces had plenary powers of legislation and the *B. N. A. Act* was to give certain powers belonging to them to the Federal Parliament. We know that it was desirable, as stated by Sir *John A. Macdonald*, to have federal laws uniform, and that the Provinces reserved to themselves all laws not uniform and general.

The language used by Lord *Selborne* in the case of *L. Union S. Jacques* v. *Belisle* (2) is very applicable. "Their Lordships observe that the scheme of enumeration in that section is to mention various categories of *general* subjects which may be dealt with by legislation. * * * Well, no such *general* law covering this particular association is alleged ever to have been passed." Now, I cannot help thinking that looking at the powers given to the Dominion Parliament by this act, we are wrong in saying our constitution is similar in principle to that of *Great Britain*. The British Parliament is supreme, whilst here any party can refuse to obey an act until he has tested in the courts the constitutionality of that act.

It is said we have no right to question the motive or intention of the Legislature. Now, in order to keep a Legislature within its limits, it is necessary often to ascertain what the motive was.

Take for example the *License* cases (3). If they impose licenses for other than legal purposes, then the act is void. The same principle was laid down in *Gibbons* v. *Ogden* (4). Here we contend that the act was not a regulation of *trade* and *commerce*, and it is therefore necessary to look to the motives. Altho' it must be admitted that the act does touch regulations of trade and commerce, yet it cannot be denied, as appears by

(1). 1 Ont. App. R. 444.
(2). L. R. 6 P. C. 36.
(3) 5 How. 583.
(4) 9 Wheaton 1.

the preamble of the act, that they had some other object in passing the act, and if that object is beyond their jurisdiction, the law must be declared unconstitutional. This act is sustained upon the ground (*inter alia*) that it is a criminal law. Of course so soon as an action is made a crime by law, the law referring to it must be held to belong to the criminal code. But if the Dominion Parliament can make anything a crime, they can practically get possession of all the *civil rights* exclusively assigned to the Local Legislatures.

It is also contended that it comes within the class of subjects enumerated in the 91st section, under "trade and commerce." No doubt the subject-matter of trade and commerce is within the jurisdiction of the Dominion Parliament, but only in so far as not affected by the police regulations made by the Provincial Parliament. Local Legislatures have certain powers over "trade and commerce," viz.: prohibition of trading on Sunday and of selling liquor within prescribed hours, and to that extent "trade and commerce" is within the supervision of the Local Legislatures.

The learned counsel then referred also to the following authorities:—*Abbott's* Law Dic. Vo. "Regulation"; *Cooley* on Constitutional Limitations (1); *Hardcastle* on Construction of Statutes (2); *Sedgwick*, Stat. and Cons. Law (3).

Mr. *Lash*, Q. C., in reply:—

Sec. 92 *B. N. A. Act* is qualified by sec. 91. The following words are very important: "And for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, *notwithstanding anything in this Act*, "the Parliament has under that section absolute and complete power

(1) 4th Ed. p. 128. (2) 2 Vol. p. 138.
(3) P. 148.

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over the subject-matters defined in the section notwithstanding anything in sec. 92. Under section 129 the power is given to change the existing law, and it is for the Court to say where the power exists. I claim that the power to change the law in force at the time of Confederation, so as to prohibit the sale of liquor or other things, does not belong to the Local Legislatures, and, therefore, it must be within the powers of the Dominion Parliament.

THE CHIEF JUSTICE:—

This is an appeal from the judgment of the Supreme Court of *New Brunswick*, quashing a return to a mandamus *nisi* and ordering a peremptory mandamus to be issued in this cause.

The Supreme Court of *New Brunswick*, by writ of mandamus *nisi*, commanded the appellants to grant a license to *Thomas Barker*, to sell spirituous liquors by retail within the city of *Fredericton*, in the hotel occupied by him in that city. The appellants returned to this writ that they refused and still did refuse to grant such license, "for the following reasons to the contrary, viz.:—*The Canada Temperance Act of* 1878 was declared in force in the said city of *Fredericton*, on the 1st day of May last, and therefore the City Council could not grant a license to the said *Thomas Barker* to sell spirituous liquors by retail, contrary to the provisions of that Act."

The Supreme Court, upon reading the mandamus *nisi*, the said return, and upon hearing counsel of the respective parties, made an order that the said return be quashed and that a peremptory mandamus be issued.

The present appeal is from the order so made.

The Respondent contends that the return is insufficient and that the order for the issue of a peremptory writ of mandamus should be affirmed, on the ground

that *The Canada Temperance Act of* 1878 is *ultra vires* the Parliament of *Canada*; and this is the only point submitted for our consideration.

The Act in question is entitled "An Act respecting the traffic in intoxicating liquors," and the preamble sets forth that

> Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors:
>
> Therefore Her Majesty, &c., enacts, &c.

After several preliminary sections, the first of which declares that "this Act may be cited as "*The Canada Temperance Act*, 1878," and the second defines the meaning of the expression "intoxicating liquors," and others, not pertinent to the question now to be discussed, the Act is divided into three parts. The first provides for "Proceedings for bringing the second part into force;" and the second provides for the "Prohibition of traffic in intoxicating liquors;" and the third for "Penalties and Prosecutions for offences against the second part."

The preliminary proceedings necessary to be taken, before the Act can come into operation, are to be commenced by a petition to the Governor in Council, praying that the second part of the Act shall be in force and take effect in the county or city named, and that the votes of the electors be taken for and against the adoption of the petition, and such petition is to be embodied in a notice to the Secretary of State, signed by electors qualified and competent to vote at the election of a member of the House of Commons, in the county or city, to the effect that the signers desire that the votes of all such electors be taken for and against the adoption of the petition; and that together with, or in addition to, every such notice, there shall be laid before the Secretary of State evidence that there are appended to it the genuine signa-

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tures of at least one-fourth in number of all the electors in the county or city named in it, and that such notice has been deposited in the office of the Sheriff, or Registrar of Deeds, of or in the county or city, for public examination by any parties, for ten days preceding its being laid before the Secretary of State; and that two weeks previous notice of such deposit had been given in two newspapers published in or nearest to the county or city, and by at least two insertions in each paper; and in case it appears to the satisfaction of the Governor General in Council, that such notice has appended to it the genuine signatures of one-fourth, &c., and has been duly deposited, &c., His Excellency may issue a proclamation under this part of this Act.

The Act then prescribes what is to be set forth in the proclamation, and makes provisions special and general for the holding of a poll for taking the votes of the electors for and against the petition, with numerous other provisions in connection therewith for securing a fair and honest vote, and for the prevention of corrupt practices, &c., &c.

The 96th section provides that

When any petition embodied as aforesaid in any notice and in any proclamation under this the first part of this Act has been adopted by the electors of the county or city named therein and to which the same relates, the Governor General in Council may, at any time after the expiration of sixty days from the day on which the same was adopted, by Order in Council published in the *Canada Gazette*, declare that the second part of this Act shall be in force and take effect in such county or city upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire; provided such day be not less than ninety days from the day of the date of such Order in Council; and if it be less, then on the like day in the then following year; and upon, from and after that day the second part of this Act shall become and be in force and take effect in such county or city accordingly.

Provision is then made that such Order in Council

shall not be revoked for three years, and then only on similar petition, notice and similar proceedings.

It is contended, that assuming the Parliament of Canada has the power to pass an Act for the prohibition of traffic in intoxicating liquors provided for by the second part of the Act, that the first part of the Act is a delegation of legislative powers to a portion of the people; that the Dominion Parliament have no right to delegate such powers, or to make its regulation subject to, or conditional on, its acts being adopted by any other body.

It cannot be doubted, and indeed it was admitted by Mr. *Kaye* in his very able argument on behalf of the respondent, that the Parliament of *Great Britain* has the general power of making such regulations and conditions as it deems expedient with regard to the taking effect or operation of laws, either absolute, or conditional and contingent; and in his factum he says :—

It may also be conceded that a body like that of the Provincial Parliament before Confederation could and did pass acts of a like kind, which it was not competent to a judicial tribunal to question.

Although the Dominion Parliament does derive its powers from the *British North America Act*, it cannot, I think, be successfully disputed that with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given "as large and of the same nature as those of the Imperial Parliament itself," and therefore they may be exercised either absolutely or conditionally, and, as was established by the Privy Council in the case of *The Queen* v. *Burah* (1), cited in *Valin* v. *Langlois* (2), leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. The Parliament of *Great Britain* having, as I think, conferred on the Dominion Parliament this general, absolute, uncon-

(1) L. R. 3 App. Cases 904. (2) 3 Can. S. C. R. 17.

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trolled authority to legislate in their discretion, on all matters over which they have power to deal, subject only to such restrictions, if any, as are contained in the *B. N. A. Act*, and subject, of course, to the sovereign authority of the British Parliament itself, with reference to the question under consideration, I can find in the *B. N. A. Act* no limitation, either in terms or by necessary implication, of the general power so conferred, and without which the legislative power should not, in my opinion, be limited by judicial interpretation. In the *United States*, where frequent discussions have arisen under the written constitutions, Federal and State, by which the legislative powers are limited and restricted, Mr. *Cooley*, in his work on statutory limitations thus states the doctrine as there understood (1):

> But it is not always essential that a legislative act should be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event.

It has likewise been urged that this Act affects only particular districts, that it is not general legislation, and therefore is *ultra vires*. I am entirely unable to appreciate this objection. If the subject matter dealt with comes within the classes of subjects assigned to the Parliament of *Canada*, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.

This brings us to the consideration of the really substantial question in this case, which arises under the

(1) 4 Ed. p. 142.

second part of the Act, viz.: Has the Dominion Parliament the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it?

Sec. 99 enacts that—

From the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for *bonâ fide* use in some art, trade or manufacture under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, *shall, within such county or city*, by *himself, his clerk, servant or agent, expose or keep for sale, or directly, or indirectly, on any pretence or upon any device sell or barter, or in consideration of the purchase of any other property give*, to any other person, any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating.

The second sub-section provides that—

Neither licenses to distillers or brewers,—nor for retailing on board any steamboat or vessel,—nor yet any other description of license whatever,—shall in any wise avail to render legal any act done in violation of this section.

Sub-section 3 provides for the sale of wine for exclusively sacramental purposes, and sub-section 4 for the sale of intoxicating liquor for exclusively medicinal, or for *bonâ fide* use in some trade or manufacture.

Sub-section 5 contains a proviso—

That any producer of cider in the county, or any licensed distiller or brewer, having his distillery or brewery within such county or city, may thereat expose and keep for sale such liquor as he shall have manufactured thereat, and no other; and may sell the same thereat, but only in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at any one time, and only to druggists and others licensed as aforesaid (that is to sell for sacramental, medicinal and trade purposes,) or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, and to be wholly removed and taken away in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at a time.

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Sub-section 6 contains a proviso of a similar character in favor of—

Any incorporated company authorized by law to carry on the business of cultivating and growing vines and of making and selling wine and other liquors produced from grapes, having their manufactory within such county or city.

With a further proviso by sub-section 7—

That manufacturers of pure native wines made from grapes grown and produced by them in the Dominion of *Canada*, may, when authorized to do so by license from the municipal council or other authority having jurisdiction where such manufacture is carried on, sell such wines at the place of manufacture in quantities of not less than ten gallons at one time, except when sold for sacramental or medicinal purposes, when any number of gallons from one to ten may be sold.

And by sub-section 8 it is provided also—

That any merchant or trader exclusively in wholesale trade, and duly licensed to sell liquor by wholesale, having his store or place for sale of goods within such county or city, may thereat keep for sale and sell intoxicating liquor, but only in quantities not less than ten gallons at any one time, and only to druggists and others licensed as aforesaid, or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, to be wholly removed and taken away in quantities not less than ten gallons at a time.

It is contended that this is strictly a temperance act, passed solely for the promotion of temperance, and not an act dealing with any of the matters within the power of the Dominion Parliament—that the power to deal with the sale of spirituous liquors and the granting of licenses therefor, and laws for the prevention of drunkenness, and of the like character of preventive means, are within the exclusive power of the Local Legislatures, and the recital of the Act is relied on as indicating conclusively its character.

If the Dominion Parliament legislates strictly within the powers conferred in relation to matters over which the *British North America Act* gives it exclusive legisla-

tive control, we have no right to enquire what motive induced Parliament to exercise its powers. The statute declares it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the class of subjects by this act assigned exclusively to the legislatures of the Provinces, and, notwithstanding anything in the act, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects enumerated, of which the regulation of trade and commerce is one; and any matters coming within any of the classes of subjects enumerated shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by the act assigned exclusively to the legislatures of the Provinces. If then, Parliament, in its wisdom, deems it expedient for the peace, order and good government of *Canada* so to regulate trade and commerce as to restrict or prohibit the importation into, or exportation out out of the Dominion, or the trade and traffic in, or dealing with, any articles in respect to which external or internal trade or commerce is carried on, it matters not, so far as we are judicially concerned, nor had we, in my opinion, the right to enquire whether such legislation is prompted by a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, or any other object which may, by regulating trade and commerce, or by any other enactments within the scope of the legislative powers confided to Parliament, tend to the peace, order and good government of *Canada*. The effect of a regula-

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tion of trade may be to aid the temperance cause, or it may tend to the prevention of crime, but surely this cannot make the legislation *ultra vires*, if the enactment is, in truth and fact, a regulation of trade and commerce, foreign or domestic.

The power to make the law is all we can judge of; and the recital in the act so much relied on ought not, in my opinion, to affect in any way the enacting clauses of the act, which are in themselves abundantly plain and explicit, requiring no elucidation from and admitting of no control by the recital, which can only be invoked in explanation of the enacting clauses if they be doubtful. Why it was deemed necessary to insert the self-evident abstract proposition that "it is very desirable to promote temperance in the Dominion," and to enact that this Act may be cited as "*The Canada Temperance Act*, 1878," does not seem very apparent, when the title of the Act itself was "An Act respecting the traffic in intoxicating liquors," and it contained a recital, that it was desirable there should be uniform legislation in all the Provinces respecting such traffic, which shows the legislation on its face immediately within the power of Parliament. It may be, that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone, and desired that idea should prominently appear. Still, if the enacting clauses of the Act itself deal with the traffic in such a manner as to bring the legislation within the powers of the Dominion Parliament, no such declaration in the preamble or permissive title can so control the enacting clauses as to make the Act *ultra vires*; though it cannot be doubted that the introduction of this temperance element on the face of the Act may have very much stimulated the idea, which has been so much relied on, that the legislation was not a regulation of trade and commerce, but was for

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the suppression of intemperance, a matter assumed to be within the exclusive power of the Local Legislatures, and so beyond the powers of the Dominion Parliament. If we eliminate from the recital in the Act the abstract proposition and the permissive clause to cite the Act as "*The Canada Temperance Act*, 1878," there does not appear to be a word in the title, preamble or enacting clauses from which the slightest inference could be drawn that Parliament was dealing with a subject-matter, other than simply as a regulation of trade and commerce in respect to the traffic in those particular articles of intoxicating liquors.

It has also been contended that no legislative powers to prohibit exist in the Dominion. I must respectfully, but most emphatically, dissent from this proposition. I cannot for one moment doubt, that by the *B. N. A. Act* plenary power of legislation was vested in the Dominion Parliament and Local Legislatures respectively to deal with all matters relating to the purely internal affairs of the Dominion, unless, indeed, anything could be found in the Act in express terms limiting such power, each, of course, acting within the scope of their respective powers; and, therefore, where one has not the power so to legislate, it necessarily belongs to the other. If this be so, then the question is: is this legislation within the powers conferred on the Dominion Parliament, or does it encroach on the powers exclusively confided to the Local Legislature? For, with its expediency, its justice or injustice, its policy or impolicy, we have nothing whatever to do.

Much has been said as to the analogy of the Dominion Parliament and Local Legislatures with the Congress of the Federal Government and the State Legislatures of the *United States*. But the constitution of the *United States* and the constitution of the States, as regards the powers which each may exercise,

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are so different from the relative powers of the Dominion Parliament and Provincial Legislatures, that the cases to be found in the American books, with regard to the powers of the State Legislatures in prohibiting the sale of intoxicating liquors, afford no guide whatever in the determination of the powers of the Local Legislatures and the Dominion of *Canada*. The Government of the *United States* is one of enumerated powers, and the Governments of the States possess all the general powers of legislation. Here we have the exact opposite. The powers of the Provincial Governments are enumerated and the Dominion Government possesses the general powers of legislation. Therefore we are told by Mr. *Cooley* that

> When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified powers is broad enough to embrace it, but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the *United States*, or of the State, we are able to discover that it is prohibited. We look in the Constitution of the *United States* for grants of legislative power, but in the Constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the Legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication, while the State Legislature has jurisdiction of all subjects in which its legislation is not prohibited (1).

With us the Government of the Provinces is one of enumerated powers, which are specified in the *B. N. A. Act*, and in this respect differs from the Constitution of the Dominion Parliament, which, as has been stated, is authorized "to make laws for the peace, order and good government of *Canada* in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces";—and that "any matter coming within any of the classes of subjects enumerated shall not be deemed to come within the class of matters of a local or private

(1) Cooley, Cons. Lim., 173.

nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces." Therefore "the regulation of trade and commerce," being one of the classes of subjects enumerated in sec. 91, is not to be deemed to come within any of the classes of a local or private nature assigned to the Legislatures of the Provinces.

To my mind, it seems very clear that the general jurisdiction or sovereignty which is thus conferred emphatically negatives the idea that there is not within the Dominion legislative power or authority to deal with the question of prohibition in respect to the sale or traffic in intoxicating liquors, or any other articles of trade or commerce.

It is said that a power to regulate does not include a power to prohibit. Apart from the general legislative power which, I think, belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange, indeed, that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the importation or exportation of any article of trade or commerce, or, having that power, could not prohibit the sale and traffic, if they deemed such prohibition conducive to the peace, order and good government of *Canada*.

There seems to be no doubt on this point in the *United States*. Mr. *Story* on the Constitution of the *United States*, with reference to the regulation of foreign commerce, which belongs to the National Government (as the regulation of both foreign and internal trade and commerce does to the Dominion Government) says :

The commercial system of the *United States* has also been employed for the purpose of revenue ; sometimes for the purpose of

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prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interests by bounties, by discriminating duties, and by special preferences and privileges; and sometimes to regulate intercourse with a view to mere political objects, such as to repel agressions, increase the pressure of war, or vindicate the rights of neutral sovereignty (1).

So in the case of the *United States* v. *Halliday* (2), in reference to the rights of Congress under its power to regulate commerce with the Indian tribes, the Supreme Court of the *United States* held that that power extended to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it was carried on were wholly within the territorial limit of the State. The Act made it penal to sell spirituous liquors to an Indian under charge of an Indian agent, although it was sold outside of an Indian reserve and within the limits of a State. The Court held the Act constitutional and based upon the power of Congress to regulate commerce with the Indians.

The contention in this case, as put by the learned Judge who delivered the judgment of the Court, was, "that so far as the Act was intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State—among its own inhabitants or citizens, and not within the powers conferred on Congress by the commercial clause." But the Court thus deals with this contention—Mr. Justice *Miller* says:

> The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the State, is, we think still more clearly

(1) Story, Con. U. S., s. 1076. (2) 3 Wall. 407.

entitled to be called a regulation of Commerce. "Commerce," says Chief Justice *Marshall*, in the opinion in *Gibbons* vs. *Ogden* to which we so often turn with profit when this clause of the Constitution is under consideration, "Commerce undoubtedly is traffic, but it is something more, it is intercourse" The law before us professes to regulate traffic and intercourse with the Indian Tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the *United States* and those Tribes, which is another branch of commerce and a very important one.

If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the *Unitea States* and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian Tribes, means commerce with the individuals composing those Tribes. The Act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says: "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines. If Congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from those propositions, which seem to be incontrovertible, that if commerce or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian Tribe, or any person who is a member of such Tribe, is absolute, without reference to the locality of the traffic, or locality of the Tribe, or of the member of the Tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian Tribes.

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It has been likewise very strongly urged that the Dominion Parliament cannot have the right to prohibit the sale of intoxicating liquors as a beverage, because to do so would interfere with the right of the Local Legislatures to grant licenses and to deal with property and civil rights and matters of a purely local character, and so with the right of the Local Legislatures to raise a revenue by means of shop and tavern licenses. I fail to appreciate the force of this objection. If substantial, it would prohibit to a great extent the Dominion Parliament from legislating in respect to that large branch of trade and commerce carried on in intoxicating beverages, and so take away the full right to regulate alike foreign and internal commerce. If they cannot prohibit the internal traffic because it prevents the Local Legislatures from raising a revenue by licensing shops and taverns, the same result would be produced if the Dominion Parliament prohibited its importation or manufacture. For by the same process of reason it must follow that they could not prohibit its importation or manufacture, or in any way regulate the traffic, whereby the sale or traffic should be injuriously affected and so the value of licenses be depreciated or destroyed. In my opinion, if the Dominion Parliament, in the exercise of and within its legitimate and undoubted right to regulate trade and commerce, adopt such regulations as in their practical operation conflict or interfere with the beneficial operation of local legislation, then the law of the Local Legislature must yield to the Dominion law, because matters coming within the subjects enumerated as confided to Parliament are not to be deemed to come within the matters of a local nature comprised in the enumeration of subjects assigned to the Local Legislatures; in other words, the right to regulate trade and commerce is not to be overridden by

any local legislation in reference to any subject over which power is given to the Local Legislature.

A case, precisely analogous in principle to this, is to be found in the Reports of the *United States'* Supreme Court (1), where the State Legislature had the control of the internal commerce, and the Federal government the right to raise a revenue by licenses, while here the Dominion Government have the control of the internal trade and commerce, and the Local Legislatures the right of raising a revenue by granting licenses. It was not doubted that where Congress possessed constitutional power to regulate trade and commerce, it might regulate it by means of licenses, and in case of such a regulation a license would give authority to the licensee to do whatever its terms authorized, but that very different considerations applied to the internal commerce or domestic trade of the States, over which Congress had no power to regulate, nor any direct control, but the power belonged exclusively to the States. There the power to authorize a business within the State was held plainly repugnant to the exclusive power of the State over the same subject. So here, over trade and commerce the Local Legislature have no power of regulation nor any direct control, and therefore the power of the Local Legislature to authorize a business is equally repugnant to the power of the Dominion Parliament over the same subject; and therefore, while Congress had the power to tax, it was held to reach only existing subjects and could not authorize a trade or business within a State, in order to tax it; that if the licenses were to be regarded as giving authority to carry on the branches of business which they license, it would be difficult, if not impossible, to reconcile the granting of them with the constitution. But it was held that it was not necessary to regard the laws as giving such authority, that, so far

(1) License Tax Cases, 5 Wall. 462.

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as they related to trade within State limits, they gave none and could give none.

If this same principle is applied here, the right of the Local Legislatures to tax by means of licenses gave the licensees no authority to exercise trade or carry on business prohibited by the Dominion Parliament having this control of trade and commerce. I think it equally clear, that the Local Legislatures have not the power to prohibit, the Dominion Parliament having, not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce, and of imposing duties of customs and excise; and having by law authorized the importation and manufacture of alcoholic liquors, and exacted such duties thereon, and so far legalized the trade and traffic therein, to allow the Local Legislatures, under pretence of police regulation, on general grounds of public policy and utility, by prohibitory laws to annihilate such trade and traffic, and practically deprive the Dominion Parliament of a branch of trade and commerce from which so large a part of the public revenue was at the time of confederation raised in all the Provinces, and has since been in the Dominion, never could have been contemplated by the framers of the *B. N. A. Act*, but is, in my opinion, in direct conflict with the powers of Parliament, as well over trade and commerce, as with their right to raise a revenue by duties of import and excise.

When I had the honor to be Chief Justice of *New Brunswick*, the question of the right of the Local Legislatures to pass laws prohibiting the sale or traffic in intoxicating liquors came squarely before the Supreme Court of that Province and that Court, in the case of *Regina* v. *The Justices of King's County* (1), unanimously held that under the *B. N. A. Act* the Local Legislature had no power or authority to prohibit

(1) 2 Pugs. 535.

the sale of intoxicating liquors, and declared the Act passed with that intent *ultra vires*, and therefore unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit. I think the same now. I then thought the power belonged to the Dominion Parliament, I think so still, and therefore am constrained to allow this appeal.

FOURNIER, J.:—

After having carefully considered the important questions which arise on this appeal, and having had the opportunity of taking communication of the able and elaborate judgment of the Chief Justice, I need only say that I entirely concur in the view taken by him as to the constitutionality of *The Canada Temperance Act*, 1878, and that the appeal should be allowed.

HENRY, J.:—

This case—argued before us a few weeks ago—being, in my judgment, one of the most important that has arisen, or is likely to arise and be presented for our decision, called for the most serious and deliberate consideration.

The issue raised is as to the constitutionality of an Act passed by the Parliament of *Canada*, in 1878, entitled, "An Act respecting the Traffic in Intoxicating Liquors," and which provides that it may be cited as, "*The Canada Temperance Act*, 1878." Prefixed to the Act is a preamble as follows:

> Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors.

The second section provides for the repeal of several

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sections of the Act of *Canada*, known as "*The Temperance Act*, 1864." The Act also indirectly repeals all the Acts in force, in all the Provinces, for the issue of licenses, for the sale of intoxicating liquors, and thereby necessarily affects and controls the Provincial legislative functions provided for by sub-section 9 of section 92 of the "*British North America Act*, 1867."

It provides, that on a petition of one-fourth of the electors of any county or city, to the Governor General in Council, a poll shall be taken; and a majority of the electors are authorized to decide, whether or not the Act shall go into operation within the county or city, as the case might be. If the answer should be in the affirmative, the prohibition contained in section 99, and the following sections, called the "Second Part" of the Act, become operative.

It has, I think, been legitimately contended, that in reference to all but one or two subjects, not in any way connected with the matter under consideration, the legislative powers of the Parliament of *Canada* and Local Legislatures are not concurrent, but fully distributed, and in part enumerated.

It is contended that Parliament had the necessary power to pass the Act—1st, under the general provision of section 91; 2nd, under the 2nd sub-section, "The regulation of Trade and Commerce"; and 3rd, under sub-section 27, "The Criminal Law," except the constitution of "Courts of Criminal Jurisdiction," but including the "Procedure in Criminal cases," and, in connection with, and supplementing them, the concluding clause of section 91 which provides that:

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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That position is contested on the other side.

The right to provide for the issuing of licenses for the sale of spirituous liquors is claimed for the Local Legislatures.

The leading clause of section 92 is as follows:

In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, &c.:

Sub-section 9:—

Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.

Sub-section 13:—

Property and civil rights in the Province.

Sub-section 15:—

The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter, coming within any of the classes of subjects enumerated in this section.

And 16:—

Generally all matters of a merely local or private nature in the Province.

It has been properly said, that it is a serious matter to consider and decide that an Act of a Legislature is *ultra vires;* but it is much more serious and unfortunate, by any judicial decision, to destroy the constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have on the Act in question, which, in itself, claims from us the most patient and deliberate consideration, but from the general result, in view of the constitutional relations established by the Imperial Act in question, as provided in the sections referred to in regard to other subjects.

A few days ago, I ascertained that my learned brethren were disposed to arrive at conclusions differ-

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ent from those which I considered the correct ones; and I have endeavoured, as far as other judicial duties permitted, to formulate the views I entertain, so as, at as early a moment as possible, to be able with my colleagues to give the result of our deliberations. Knowing the great interest taken in the subject, and it being desirable that Parliament—now sitting—should be informed of the result, I have felt bound to hasten the preparation of my judgment, but, in doing so, am obliged rather to give the conclusions at which I have arrived, than the argument at length in favor of them, or in detail the reasons by which I have been actuated.

It is contended that, inasmuch as the Local Legislatures could not provide as is done by this Act, Parliament necessarily must have the power it exercised. The proposition, as a general one, may be admitted, but there may be, and, I think, there are, exceptions, and that this may fairly be considered one of them. The position was assumed at the argument by the Counsel of the appellant, but not debated.

It was decided by the Court in *New Brunswick*, that municipal authorities under the Local Legislature had not the right to refuse to grant licenses, because it was an interference with trade and commerce; but the Court in *Nova Scotia* decided to the contrary. It has, therefore, not had that judicial sanction either way that would call upon us, without full independent consideration and inquiry, to adopt either view. I think that in this case we are to be guided by other considerations. If the Local Legislatures have not the power to refuse licenses, or to authorize municipal bodies to do so, because interfering with the prerogative of Parliament as to trade or commerce, it does not necessarily follow that Parliament can do so. If by the Imperial Act the Local Legislatures have the prerogative, of dealing with the subject

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of shop and tavern licenses, that prerogative is just as full and complete as that of Parliament in the other case, and as much entitled to be maintained independent of the consideration of the other proposition. We must decide upon the relative functions and prerogatives by the several specific and general provisions of the Imperial Act, and our ascription of powers to either must be in accordance with, and can go no further than, the Act prescribes.

If there be not concurrent legislative powers and the act is *intra vires*, then the necessary conclusion is, that all the local legislation on the subject of shop, saloon, tavern, and auctioneers' licenses since the first of July, 1867, has been *ultra vires*. Under such circumstances, it would be interesting to enquire, where there is any law in force restraining the sale of spirituous liquors in counties or cities who have not adopted *The Canada Temperance Act*, 1878.

By the construction put by the Supreme Court of the *United States* upon its constitution, concurrent jurisdiction has been found to exist in relation to several subjects; and legislation, by the States, has been decreed to be *intra vires* in many cases, until Congress legislated on the same subject. The Imperial Act, however, provides against such intermediate legislation, and gives to Parliament and the Local Legislatures exclusive jurisdiction, not contingent upon previous legislation by either. If this act is sustained as *intra vires*, the result is to leave the sale of spirituous liquors contingent upon the vote of each county or city. One county or city where the act is applied will have the prohibition, and the county or city which has not, or does not adopt it, will have no legislative restriction upon the sale. A decision of this case contrary to my views must produce that result. It is therefore most important, in the best inter-

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ests of the country, that the correct solution should be reached.

In order properly to construe the Imperial Act, it is necessary and proper to consider the position of the United Provinces before the union. Each had what may be properly called plenary powers of legislation, in respect of provincial subjects. In the agreement for the union, provision was made for the general powers of Parliament and the Local Legislatures, as well as for the "ways and means" by which each was to be sustained. It was by a surrender of the local legislative power, to the extent agreed upon, that the powers of the Parliament were agreed to be given. It was in the nature of a solemn compact, to be inviolably kept, that the rights and prerogatives of both were adopted, and the agreements entered into were intended to be carried out by the Act mentioned. That that compact cannot be changed by one, any more than another of the contracting parties, is a proposition embodied in despatches from the Imperial Government, and one of which, I think, cannot be gainsaid. It is, therefore, only permissible to construe the act in conformity with that consideration.

The first, and, as I think, the only important consideration, is the extent to which effect should be given to the provision "The regulation of Trade and Commerce;" and, admitting for the moment the power of Parliament to pass the act in reference to that subject, has it properly dealt with it? In deciding upon this question, our first inquiry is, whether Parliament intended the act as a regulation of trade or commerce? It does not necessarily follow, that if one in the pursuit of one purpose or object does an unjustifiable act, he can take shelter under a right he did not intend to assert or act on. There are circumstances in which, in such a case, the party would not be held justified.

The preamble of an act will not, of course, by itself,

give or take away jurisdiction to legislate. If, however, the legislature plainly shows by the preamble and provisions of the act that the legislation was directed, not in the pursuance of legitimate power, but in reference to a subject over which it had no jurisdiction, I am far from thinking it would be legitimate. We cannot assume any legislature would so act.

The preamble informs us that it was "*very desirable to promote temperance*," and the Act is provided to be cited as "*The Canada Temperance Act*, 1878." The object is therefore patent, but it is contended that the subsequent words in the preamble—

> And that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors—

makes a direct reference to *trade and commerce*. If the words last quoted stood alone, they would, to the extent they go, support the contention, but following the previous expression of the desire to *promote temperance*, we should construe them as only the expression of the idea, that *to promote temperance* uniform legislation respecting the traffic in spirituous liquors was deemed necessary as a means to the end, and not as at all intended as a regulation of trade and commerce.

By the 3rd section, certain sections of the Temperance Act of 1864, were repealed, but nothing is contained in the Act at all referring to *trade or commerce*. It is, therefore, plain and palpable, that the subject of trade or commerce was not at all present in the Parliamentary mind. The act, taken all together, shows it was not passed by Parliament as a regulation of trade or commerce. I have serious doubts, whether in such a case we would not be wrong in concluding that Parliament ever intended it as such, or that we should, in view of any power it had over the subjects of trade or commerce which it clearly did not intentionally exercise, give effect to the Act passed avowedly for a totally different purpose.

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It is not however, necessary for me to rest my decision wholly on that point, as there are others more serious and important. The great and important question arises as to the effect to be given to the term "The regulation of Trade and Commerce," taken as we are bound to take it, in connection with the provision for licensing shops, saloons, taverns, &c. We are to consider the matter of the regulation of trade and commerce, not only as to the scope and meaning of the term in its full force, but in relation to the licensing power expressly given to the Local Legsislatures.

Mr. *Story*, in his work of high authority on the constitution of the *United States* (1), quotes approvingly from a judgment of the Supreme Court principles of construction applicable to this case:—

> The Government, then, of the *United States* can claim no powers which are not granted to it by the constitution, and the powers granted to it must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And when a power is expressly given in general terms, it is not to be restrained to particular cases, *unless that construction grow out of the context expressly, or by necessary implication.* The words are to be taken in their natural and ordinary sense, and not in a sense unreasonably restricted or enlarged.

He says (2):

> On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. * * * Nor should it ever be lost sight of, that the Government of the *United States* is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution.

Vattel in his second book, chap. 17 sections, 285, 286 says:

> But the most important rule in cases of this nature is, that a con-

(1) Section 417. (2) Section 426.

stitution of Government does not, and cannot, from its nature, depend in any great degree upon verbal criticism or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our enquiries, we should never forget that it is an instrument of Government we are to construe; and, as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects and its general structure.

Taking, then, the provisions in regard to trade and commerce, according to the reliable authority I have first quoted, and all governing ones, in their natural and obvious sense in the relation in which they are placed, "and not in a sense unreasonably enlarged," how should we construe them?

The right to legislate in regard to the licenses in question is clearly with the Local Legislatures, if not controlled by the provision for the regulation of trade and commerce alone, or through the operation of the concluding clause of section 91. If the two sub-sections stood alone, I should have little difficulty in concluding that sub-section 9 of 92 was intended to and does control sub-section 2 of 91, for, I think, we would be bound to conclude that by the express and specific terms of sub-section 9 of 92, the subject matter was intended to be free from the operation of the general provision in regard to trade and commerce. We are not to decide upon the comprehensiveness, of the latter provision as if standing alone, but to ascertain if, in the employment of the general term, and the giving of power to another body to deal specifically with a subject that might be otherwise considered to be embraced by the general term, it was not intended that the specific power should not be considered as excepted from the general provision. We are bound, I think, to conclude that in using the general term it was not intended to

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reach the subject specifically provided for in sub-section 9 of 92. It was clearly intended to give the licensing power to the Local Legislature, because the section so plainly and unequivocally so provides; but then it is contended the concluding clause of 91 over-rules the specific provision in sub-section 9 of 92, and virtually ignores it, if the general term as employed in regard to trade and commerce includes the subject matter. That, however, drives us back to the original proposition, and makes the contention no better. So that, if the regulation of trade and commerce, as provided for in the general terms used, was not intended to embrace the subject so far as to nullify the specific provision for shop and other licenses, and therefore not to that extent included in the general provision for trade and commerce, the concluding clause would be inapplicable to it. There are, however, other important considerations not to be lost sight of.

When the union was negotiated and the Imperial Act passed, the leading idea was that in the large and extensive subjects affecting all the Provinces the General Parliament should legislate, and the smaller and less important subjects should be left to the Local Legislatures; and from the whole object of the union, and the Act by which it was formed, we may gather that the same principle would be properly applicable to the matter of trade and commerce.

We may therefore, I think, reasonably conclude that the regulation of trade and commerce referred to was, when taken in connection with the whole scope and object of the act, intended to apply to the general features, and not to the minute and trifling subjects, which might otherwise be considered as included. There are numberless subjects, more or less connected with trade and commerce, and which would be properly classed as coming within the classes of subjects given expressly

to the Local Legislatures, but which are of so unimportant a character, as affecting the general trade and commerce of the Dominion, that the Union Act may be fairly construed as not intended to give to the general Parliament the power to regulate them; but if everything connected with trade or commerce, however remotely, is decided to be exclusively with the general parliament, all the local acts in reference to such matters would be *ab initio* void. The general Parliament legitimately provides for manufactures, and for the importation of goods. It provides rules to govern parties importing such goods. Free interchange of all articles was provided for between the United Provinces, and when spirituous or other articles are imported, and the duties paid, they pass free from one Province to another. They are then clear of any claim over them of the general Parliament or government, and under the terms "property and civil rights" become amenable to local legislation. Taking, then, the provision for the legislation as to licenses for the sale of spirituous liquors in shops, &c., and the whole act, and its objects, can it be reasonably claimed that that provision was not intended to leave the subject matter clear of the operation of the general provision in regard to trade and commerce?

A question has been raised, whether the general Parliament could not wholly prohibit the manufacture, or importation of spirituous liquors. That question, however, is not involved in the issue before us. It is time enough to debate it when a necessity arises to do so. The one we have to consider is that Parliament, having authorized the importation and manufacture of spirituous liquors, and having received the revenue therefrom can it, by assuming the right to legislate for the promotion of temperance, although to some extent affecting trade and commerce, deprive the Local Legislatures, and

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the people of the several Provinces, of the right to raise the revenue from it specifically provided by sub-section 9?

As I before stated, the Imperial Act was founded on a compact for the federative union of the several Provinces; and from the explicit and unequivocal terms of section 9 we must conclude that the revenues to be derived from the issue of the licenses mentioned was intended to be permanently secured to the local authorities. Previously to the union, the revenues derived from licenses for the retail of spirituous liquors, I have reason to believe, in all the Provinces, were given to, and appropriated by municipal bodies, for municipal purposes, and I must conclude they were intended to continue so, or, at all events, to leave it to the Local Legislatures to decide whether they should so remain, or be appropriated for other local, or provincial purposes. Whether such revenues were great or insignificant, the principle applicable must be the same. If they amounted to several thousands of dollars, as I presume they did in some of the Provinces, it must be concluded that their retention by the local authorities was considered of importance, and accordingly was a part of the compact. The protection of the right to those revenues is a matter relatively of as much importance to the several Provinces as the protection of the right of the Dominion to the millions of dollars which the act enabled its government and Parliament to collect from the whole body of the people for Dominion purposes. I am free to admit the full scope and meaning of the grant of the power to regulate trade and commerce, and that but for the specific grant of the power to the Local Legislature by section 9 the ground might be covered, but, in the language and doctrine of *Vattel*,

> While we may well resort to the meaning of single words, to assist our inquiries, we should never forget that it is an instrument of

> Goverment we are to construe and * * * that must be the truest exposition which best harmonizes with its design, its objects, and its general structure.

I am of the opinion that is the way we should construe the act of union, and, if we do, we can have but little difficulty in reaching the conclusion that the Act in question is an usurpation of power, and an inroad upon the constitution and prerogatives of the Local Legislatures, and results in depriving them of one of the reservations for local objects intended and provided for by the compact and act of union.

If the General Parliament had the power to legislate as the Act provides, it is only under the provisions I have referred to, and, that power once admitted, what is there to restrain its further legislation—what is there to prevent it from changing and altering the whole principle and framework of the Act, so as, by "the regulation of trade and commerce," to provide for licenses for the sale of spirituous liquors for any purpose, and to collect a revenue therefrom? The present Act, if *intra vires*, virtually repeals all local acts on the subject of licenses. It prohibits, if the majority in a county or city so wills, the sale of spirituous liquors except for certain purposes mentioned; but, if it has full and complete power over the subject matter, it may remove at any time the prohibitions, and provide for licenses for the sale for other purposes, prescribe duties to be paid for them, and take the revenues that were clearly to my mind, intended for Provincial, Local, or Municipal purposes. This may be called an extreme proposition, on the ground that Parliament would be restrained by motives of expediency; but, in the first place, the working out of the local constitution should not depend upon Parliament, and, in the next, if the Local Legislatures have no power over the subject matter, Parliament must take cognizance of it, or the sale will be wholly unrestricted.

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These considerations are of importance to exhibit the difficulties and wrongs involved in the validation of the Act; but they are insignificant compared with the consequences, which, in my opinion, must necessarily result in regard to other subjects, and in other respects. If it be finally decided, that the provision for "the regulation of trade and commerce" overrides the power of the Local Legislatures in the matter of licenses, I see no impediment in the way of legislation, in regard to matters affecting in the remotest way trade and commerce, that would not merely restrain and control, but completely nullify, the Local Legislative power in respect of "civil rights and property" and other important interests. It may be said, there is no danger to be apprehended in this respect, and that Parliament could not be expected to legislate with such a result, but my answer is, that we cannot allow any such considerations to affect our judgment. We are required to estimate the powers given severally to Parliament and the Local Legislatures, and it is our duty so to define them that neither will have to depend on the forbearance of the other.

I am fully sensible of the difficulty of laying down any general rule of construction applicable to all cases, or of drawing any line. Each case must largely depend upon its own merits as it arises, and when principles are applied to one case all similar ones will be determined by them. I consider the subject of licenses for the retail of spirituous liquors in shops, saloons, and taverns, is wholly one of the nature of a police regulation, and that it was not intended, either by the compact for union, or the act passed therefor, that the local power should be affected, restrained, or controlled, by any Dominion legislation.

There were other objections to the act, raised by counsel, to which I have not thought it necessary to refer, as I think those I have given sufficient.

I have, however, considered the ground taken on the other side, that Parliament had the right to pass the act under the provision of sub-section 27 of sec. 91, "The Criminal Law," but have been unable to accede to the proposition. I cannot think it was the intention, under that general term, to give to Parliament power to the extent contended for, and I cannot find by the act itself anything that would bring the subject within the category of criminal jurisprudence.

For the reasons I have rather hastily, (when the importance of the issue is considered,) put together, and so imperfectly but I trust intelligibly expressed, I think the appeal should be dismissed, and the judgment below affirmed with costs.

TASCHEREAU, J. :

I am of opinion to allow this appeal. It is clear that *The Canada Temperance Act*, 1878, could not be enacted by the Provincial Legislatures, for the simple reason, that they have only the powers that are expressly given to them by the *B. N. A. Act*, and that the said *B. N. A. Act* does not give them the power to effect such legislation. This has been held in *Reg* v. *The Justices of King's* (1), in *Hart* v. *The Corporation of Missisquoi* (2), in *Cooey* v. *The Municipality of Brome* (3), (reversed in Queen's Bench, *Montreal*, but judgment of Queen's Bench, reversed in Supreme Court, by consent), and in *Poitras* v. *The Corporation of Quebec* (4) ; and, in fact, seems to be admitted by all the learned Judges of the Court below who have held this Act to be *ultra vires* of the Dominion Parliament. Well, it seems to me, the admission that the Local Legislatures could not pass such an Act implies an admission that the Dominion Parliament can do so. Once the

(1) 2 Pugs: N. B. 535.
(2) 3 Q. L. R. 170.
(3) 21 L. C. Jur. 182.
(4) 9 Rev. Leg. 531.

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power of legislation over a certain matter is found not to vest in the Provincial Legislatures, the question is solved, and that power necessarily falls under the control of the Dominion Parliament, subject, of course, to the exigencies of our Colonial status.

Section 91 of the Imperial Act is clear on this. It expressly authorizes the Federal Parliament to make laws in relation to *all* matters *not* exclusively assigned to the Provincial Legislatures, and enacts in express terms, that the enumeration given of the classes of subjects falling under the control of the Federal Parliament is given for greater certainty, but not so as to restrict the rights of the Federal Parliament generally over *all* matters *not* expressly delegated to the Provincial Legislatures.

If this Temperance Act would be *ultra vires* of the Provincial Legislatures, because the *B. N. A. Act* does not give them the power to enact it, I fail to see why it is not *intra vires* of the Dominion Parliament. Then, it seems to me, that under the words "regulation of trade and commerce" the *B. N. A. Act* expressly gives the Dominion Parliament the right to this legislation. It may, it is true, interfere with some of the powers of the Provincial Legislatures, but sect. 91 of the Imperial Act clearly enacts that, *notwithstanding anything* in this Act, *notwithstanding* that the control over local matters, over property and civil rights, over tavern licenses for the purpose of raising a revenue, is given to the Provincial Legislatures, the *exclusive* legislative authority of the Dominion extends to the regulation of trade and commerce, and this Court has repeatedly held, that the Dominion Parliament has the right to legislate on all the matters left under its control by the Constitution, though, in doing so, it may interfere with some of the powers left to the Local Legislatures. That the Act in question is a regulation of the *trade and commerce* in

spirituous liquors seems to me very clear. It enacts when, where, to whom, by whom, under what conditions, this traffic and commerce will be allowed, and carried on. Are these not regulations? Some of the learned Judges in the Court below say that the Act is *ultra vires* because it prohibits and does not regulate, whilst another learned Judge of that Court says that it is *ultra vires* because it regulates and does not prohibit. To my mind, it is a regulation, whether it is taken as prohibiting or as regulating the trade in liquors. A prohibition is a regulation.

But it has been said *The Temperance Act* is not an Act concerning the regulation of trade and commerce, because it is not an Act *for* the regulation of trade and commerce, but only a Temperance Act. To this, I may well answer by the following words of *Taney*, C.J., in re the *License cases* (1):

> When the validity of a State law, making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives, that may be supposed to have influenced the legislation, nor can the Court inquire, whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. * * * * * * The object and motive of the State are of no importance and cannot influence the decision. It is a question of power.

These words may well be applied here. Is *The Temperance Act of* 1878 a regulation of *trade* and *commerce*, or of an important branch of trade and commerce? I have already said that it seems to me plain that it is so. Then, is it the less so because it has been enacted in the view of promoting temperance, or of protecting the country against the evils of intemperance? If for this object the Parliament has thought fit to make a regulation of the trade and commerce in spirituous liquors, does it lose its character of being a

(1) 5 How. 583,

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regulation of this trade by reason of the motive which prompted the legislator to enact this regulation? I cannot see it.

I hold, then, that *The Canada Temperance Act*, 1878, is constitutional, and that this appeal should be allowed with costs.

GWYNNE, J.:—

All the arguments upon which has been based the contention, that the Act in question, "*The Canada Temperance Act*, 1878," is *ultra vires* of the Dominion Parliament, are attributable wholly, as it seems to me, to a want of due appreciation of the scheme of constitutional government embodied in the *B. N. A. Act*, and to a misconception of the terms and provisions of that Act. Historically we know, that the terms of a feasible scheme of union of all the *B. N. A.* Provinces, constitutes a subject, which, for many years, engaged the attention of public men in those Provinces—that the matter became the subject of debate in the legislatures of the several Provinces—that eventually the views of public men of all political parties were moulded into the shape of resolutions, which, having been subjected to the most careful consideration and criticism in the Provincial Legislatures, and to the consideration also of the Imperial Authorities, in consultation with delegates sent for the purpose to *England*, by the respective Provinces, were, after having been revised and amended, reduced into the form of a Bill, which the Imperial Parliament, at the special request of the Provinces, passed into an Act.

The object of this Act was, by the exercise of the Sovereign Imperial Power, called into action by the request of the then existing Provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, to revoke the constitutions under which those Provinces then existed, and, as the

preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of *Great Britain* and *Ireland*, with a constitution similar in principle to that of the United Kingdom—to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British Crown until it should attain perfect maturity, would in the progress of time become a nation, identical in its features and characteristics with that from which it had sprung, and to which, in the meantime, should be given the new name of "Dominion," significant of the design conceived, and of the anticipated fortunes of this new creation.

The Act then proceeds to show, that the mode devised for founding this new "Dominion," and for giving to it a constitution, similar in principle to that of the United Kingdom, was to constitute it as a *quasi* Imperial Sovereign Power, invested with all the attributes of independence, as an appanage of the British Crown, whose executive and legislative authority should be similar to that of the United Kingdom, that is to say, as absolute, sovereign and plenary as consistently with its being a dependency of the British Crown it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local, or private character—matters relating (to use the language of a statesman of the time,) "*to the family life*," (so to speak,) of certain subordinate divisions, termed Provinces carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given.

The inhabitants of those several Provinces, being, as such, members of this *quasi* imperial power termed the Dominion of *Canada*, might, in some matters, have interests, *qua* inhabitants of the particular Province in which they should live, distinct from, or conflicting

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with the general interests which they would have as constituent members of the Dominion. In order to prevent the jarring of those distinct, or conflicting interests, and to maintain the peace, order, and good government of the whole, it would be necessary, in any perfect measure, that provision should be made for such a contingency, that the subordinate should yield to the superior—the lesser to the greater; and that, in respect of any matter over which the several Provinces might be given any legislative authority concurrently with the Dominion Parliament, the authority of the latter, when exercised, should prevail, to the exclusion, and, if need be, to the extinction of the provincial authority.

The scheme therefore comprised a fourfold classification of powers. 1st. Over those subjects which are assigned to the exclusive plenary power of the Dominion Parliament. 2nd. Those assigned exclusively to the Provincial Legislatures. 3rd. Subjects assigned concurrently to the Dominion Parliament, and to the Provincial Legislatures. And 4th. A particular subject, namely, education, which, for special reasons, is dealt with exceptionally, and made the subject of special legislation.

To give effect to this scheme the *B. N. A. Act*, in its 3rd clause, enacts that, upon proclamation being made by Her Majesty, by and with the advice of Her Majesty's most Honourable Privy Council, within six months after the passing of the Act, the Provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, should form and be one Dominion under the name of *Canada*.

Immediately upon the proclamation being issued, the above named Provinces, by force of the above clause, became and were to all intents and purposes divested of their former existence, and became merged in the Dominion so created; and then the 5th clause, *out of the Dominion so created*, carves four subordinate creations called Provinces and named *Ontario*, *Quebec*, *Nova*

Scotia, and *New Brunswick*, the two latter of which, although being coterminous with those of the extinguished Provinces of like names merged into the Dominion, are notwithstanding wholly new creations, brought into existence solely by the *B. N. A. Act*. The executive and legislative authority of all the Provinces, as at present constituted, as well as of the Dominion, are due to the *B. N. A. Act*, which now constitutes the sole constitutional charter of each and every of them, and which, with sufficient accuracy and precision, as it seems to me, defines the jurisdiction of each.

The 9th section declares, that the executive government and authority of and over *Canada* continues to be and is vested in the Queen; and as to the legislative power the 17th section enacts, that

> There shall be one Parliament for *Canada*, consisting of the Queen, an upper house, styled the Senate, and the House of Commons.

And the 91st section, that

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons, to make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the class of subjects by this act assigned *exclusively* to the Legislatures of the Provinces.

By this clause, the absolute sovereign power of legislation is vested in a Parliament, consisting of the Queen, a Senate, and a House of Commons, in respect of all matters of every nature and description whatsoever, save and excepting only matters coming within the class of subjects *by the Act itself assigned exclusively* to the Legislatures of the Provinces: over all matters whatsoever, excepting only the excepted matters, the legislative power of the Dominion Parliament is made absolute.

Herein consists the great distinction between the constitution of the Dominion of *Canada*, and that of the *United States* of *America*,—a distinction necessary in a constitution founded upon, and designed to be similar

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in principle to, that of the United Kingdom of *Great Britain* and *Ireland*, but deliberately designed specially, as I have no doubt, with the view of avoiding what was believed to be a weakness and defect in the constitution of the *United States*, and to have been the cause of the civil war out of which that country had then but recently emerged. Instead of a confederation of several distinct, independent states, which, while retaining to themselves sovereign power, have agreed to surrender jurisdiction over certain matters to a central government, we have constituted one supreme power, having executive and legislative jurisdiction over all matters, excepting only certain specified matters, being of a local, municipal, domestic, or private character, jurisdiction over which is vested in certain subordinate bodies, termed Provinces, carved out of the territory constituting the Dominion, and which jurisdiction is subject to the control of the Dominion Executive, as the legislative power of the Dominion Parliament is itself subject to the control of Her Majesty in Her Privy Council.

All that is necessary, therefore, in order to determine whether any particular enactment is *intra* or *ultra vires* of the Dominion Parliament, is to enquire: does or does not the enactment in question deal with, or legislate upon, any of the subjects assigned *exclusively* to the Provincial Legislatures? If it does, it is *ultra*, and if it does not, it is *intra vires* of the Dominion Parliament; but lest, by possibility, doubts might arise in some cases in determining whether a particular enactment did or not deal with any of the subjects assigned *exclusively* to the Provincial Legislatures, the 91st section *ex majori cautelâ* proceeds to enact

> For greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared, that (*notwithstanding anything in this Act*) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within any

of the classes of subjects next hereinafter enumerated, that is to say: (here follow 29 items) and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Here, then, to dispel all doubts, if any should perchance arise in certain cases, and to remove all excuse for any encroachment by the Dominion Parliament upon the jurisdiction of the Local Legislatures, or for any assumption by the latter of the sovereign power and authority of the former, two tests are given by our charter for the ready determination in every case of the question, whether a particular enactment is or not *ultra vires* of the Dominion Parliament, or of the Local Legislatures; namely:

First,—if to the question "Does the particular enactment deal with any of the particular subjects enumerated in the 92nd section, assigned exclusively to the Local Legislatures? a plain answer in the affirmative or negative can be given free from any doubt,—that settles the point. If the answer be in the affirmative, the enactment in question is *beyond* the jurisdiction; if in the negative, it is *within* the jurisdiction of the Dominion Parliament.

The power to legislate upon every subject rests either in the Dominion Parliament, or in the Local Legislatures, and the Act is precise, that *all matters not exclusively assigned to the Local Legislatures* fall under the jurisdiction of the Dominion Parliament.

But to remove all doubts, in case the enactment under consideration should be of a nature to raise a doubt, whether it does or not deal with one or other of the matters particularly enumerated in the 92nd section, the second test may be applied, namely: "Does the enactment deal or interfere with any of the subjects particularly, and for greater

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certainty, enumerated in the 91st section? If it does, then, (notwithstanding that it otherwise might come within the class of subjects enumerated in the 92 section), it is within the jurisdiction of the Dominion Parliament, for the plain meaning of the closing paragraph of the 91st section is that, notwithstanding any thing in the Act, any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so.

It was argued, that what was intended by this clause was to exclude the subjects enumerated in the 91st section from a portion only of the subjects enumerated in the 92nd section, namely: those only "of a local or private nature," the contention being that the 92nd section comprehends other subjects than those which come under the description of "*local or private*," and so that, in effect, the intention was merely to declare, that none of the items enumerated in section 91 shall be deemed to come within item 16 of sec. 92. If this were the true construction of the clause, it would make no difference in the result, nor would it effect any thing in aid of the contention in support of which the argument was used, for the previous part of the 91st section in the most precise and imperative terms declares, that, "*notwithstanding any thing in the Act*," notwithstanding, therefore, any thing whether of a local or private nature, or of any other character, if there be anything of any other character enumerated in the 92nd section, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the class of subjects enumerated in the 91st section; but, in truth, all the items enumerated in the 92nd section are of a provincial and domestic, that is to say, of a "local or private" nature. The frame of the 92nd section differs from that of the 91st in its

form. That of the 91st is general, of the 92nd particular; but this is precisely in character with the nature of the jurisdiction intended to be given to each. By the 91 section, the Imperial Parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion Parliament *all matters*, excepting only certain particular matters assigned by the Act to the Local Legislatures. This mode of expression seemed to require a particular enumeration of those subjects so to be assigned to the Local Legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the Local Legislatures in the same general terms as had been used in the 91st section, by placing under the jurisdiction of those legislatures all matters of a purely local or private nature within the Province, (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid,) enumerates, under items numbering from 1 to 15 inclusive, certain particular subjects, all of a purely provincial, municipal and domestic, that is to say, "of a local or private" character, and then winds up with item No. 16—a wise precaution, designed, as it seems to me, to prevent the particular enumeration of the "local and private" matters included in the items 1 to 15 being construed to operate as an exclusion of any other matter, if any there might be, of a merely local or private nature. The wisdom of this mode of framing the 91st and 92nd sections appears when we read the items enumerated in the 91st section, some of which might be well considered to be matters which would come within some of the subjects enumerated in the 92nd section, but the scheme of the Act being to vest in the local legislatures all matters of a purely provincial, municipal and domestic, or "of a local or private" nature, and in the Dominion Parliament all mat-

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ters which, although they might appear to come within the description of provincial, or municipal, or "local or private," were deemed to possess an interest in which the inhabitants of the whole Dominion might be considered to be alike concerned, and that, therefore, these matters should be under the control of the Dominion Parliament, in order to prevent doubt as to those matters it was, as it seems to me, a necessary and wise provision to make, that *notwithstanding any thing in the Act*, and however much any of the items enumerated in the 91st section might appear to come within the subjects which, as being of a purely "local or private" nature, were enumerated in the 92nd section, yet they should not be deemed to come within such classification or description. We may, then, as it appears to me, adopt, as a canon of construction of these two sections, the rule following:

All subjects of whatever nature, *not exclusively* assigned to the Local Legislatures, are placed under the supreme control of the Dominion Parliament, and no matter is exclusively assigned to the Local Legislatures, unless it be within one of the subjects expressly enumerated in sec. 92, *and is at the same time outside of* all of the items enumerated in sec. 91, by which term *"outside of"* I mean does not involve any interference with any of the subjects comprehended in any of such items.

It was argued, that this rule could not be adopted as one of universal application—that it would not apply to the terms "marriage and divorce," in item 26 of the 91st sec., contrasted with "*solemnization* of marriage," in item 12 of the 92nd section, but these matters respectively are placed in those sections in perfect accord with the scheme of the Act as above defined and with the above rule.

"Solemnization of marriage," that is to say, the power of regulating the form of the ceremony—the mode of its

celebration—is a particular subject expressly placed under the jurisdiction of the Local Legislatures, as a matter which has always been considered to be purely of a local character. It was a matter purely of provincial importance whether the ceremony should take place before the civil magistrate, or whether it should be a religious ceremony; this was a matter in which the inhabitants of the different Provinces might take a different view. It was, therefore, a matter essentially to be regarded as "local," and as such to be placed under the jurisdiction of the Local Legislatures. It is, therefore, specifically mentioned as exclusively assigned to these Legislatures but, as it is the *solemnization* of the marriage which is the only matter in connection with marriage which is so exclusively assigned, then *all* other matters connected with marriage are, by the express terms of the act, independently of the particular enumeration in the 91st sec., vested in the Dominion Parliament. That there are other matters connected with and involved in the term "marriage" besides the form of the ceremony of its solemnization, there can be no doubt, as, for example, the competency of the parties to the contract to enter into it—the effect upon the status of the children, if presumed to be *de facto* entered into by persons not competent by law to enter into it—its obligatory force when entered into—the power of dissolving the tie when entered into—these are all matters which (inasmuch as the *solemnization* of the ceremony is all that is mentioned in the 92nd sec. in relation to marriage), would come under the control of the Dominion Parliament by the mere force of the clause which enacts that the Dominion Parliament shall have jurisdiction over all matters not exclusively assigned by the Act to the Local Legislatures, without any enumeration whatever of items in the 91st sec.: but, *for greater certainty*, the Act expressly mentions in the 91st sec.

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"marriage and divorce," and the *rule* taken from the Act says in effect, that these terms, so used in item 26 in the 91st sec., shall not be deemed to come within the term "solemnization of marriage" in item 12 of the 92nd sec. The matters mentioned in these respective items are then declared to be diverse and distinct. "*Solemnization* of marriage," is, then, a matter "*outside* of" the term "marriage and divorce," in the 91st sec., and the result is that the application of the rule (in perfect conformity with the theory of the scheme of the Act as above defined,) leaves the power of legislating as to the form of the ceremony as a purely local matter, under the control of the Local Legislatures, and places all other matters connected with marriage, including divorce, under the control of the Dominion Parliament.

The only question, then, which we have to consider is, does the matter which is the subject of legislation in the *The Canada Temperance Act*, 1878, come within any of the subjects by the *B. N. A. Act* exclusively assigned to the Local Legislatures?

In the court below, it seems to have been considered sufficient to make the Act to be *ultra vires* of the Dominion Parliament, if its provisions are of a nature to affect injuriously the power given to the Local Legislatures, under item 9 of sec. 92, to legislate in respect of

> Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, Local, or Municipal purposes.

But this is clearly an erroneous view, for nothing can be more explicit than the provision of the statute which declares that, if power to legislate upon the matter in question *is not given, and exclusively given*, to the Local Legislatures, it is vested in the Dominion Parliament. One of the learned Judges in the Court below seems to have inverted the rule expressly laid down in the *B. N. A. Act* for our guidance when he says that,

> Unless the power to pass *The Canada Temperance Act* is given

under the *enumerated* classes of subjects exclusively assigned to Parliament, the act is *ultra vires, as interfering with property and civil rights* in the Province, the right to legislate on which is exclusively assigned to the Local Legislatures.

The converse of this is what in fact the Act says, and although it may be admitted, that if the power to legislate upon any subject is not in the Dominion Parliament it is in the Provincial Legislatures, for all matters must come within the jurisdiction either of Parliament or of the Local Legislatures, yet the unerring test to determine whether the power to pass the act is, or is not, vested in the Dominion Parliament is to enquire, under the application of the rule as I have above stated it, does it, or does it not, deal with a subject jurisdiction over which is given exclusively to the Local Legislatures? for, if not, it is vested in the Parliament.

Now, that the intemperate use of spirituous liquors is the fruitful cause of the greater part of the crime which is committed throughout the Dominion—that it is an evil of a national, rather than of a local or provincial character, will not, I apprehend, be denied. The adoption of any measures calculated to remove or diminish this evil is, therefore, a subject of national rather than of provincial import, and the devising and enacting such measures into law, as calculated to promote the peace, order, and good government of *Canada*, is a matter in which the Dominion at large and all its inhabitants are concerned.

When we find, then, the design of the *B. N. A. Act* to be to impart to the Dominion Parliament a *quasi* national character, and to assign to the legislatures of the Provinces carved out of and subordinated to the Dominion matters only of a purely provincial importance, if the question, whether the power to pass such an Act as the one under consideration, arose upon the construction of the Act, as if it contained the clause, that:

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It shall be lawful for the *Queen*, by and with the advice, and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of *Canada* in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the legislatures of the Provinces—

followed by the enumeration of the items in the 92nd section assigned to the Local Legislatures, and without any enumeration of the items which for greater certainty have been inserted in section 91, I should have great difficulty in coming to the conclusion that, under the terms of the 13th item of section 92, namely: "property and civil rights *in the Province*," any power was given to pass such an Act as *The Canada Temperance Act*, 1878, which undoubtedly professes to deal with a subject of a national, rather than of provincial import, but with the enumeration of the particular items inserted in section 91, and regarding the whole scope, object and frame of the Act, it is clear beyond all question, that the Act under consideration is *ultra vires* of the Provincial Legislatures.

Turning to the Act, we find it to be entitled, "An Act respecting the Traffic in Intoxicating Liquors," its object, as stated in its preamble, is to promote temperance as a thing most desirable to be promoted in the Dominion; the means adopted in the Act for attaining this end consist in regulating and restraining the exercise of the trade or traffic in intoxicating liquors. Reading, therefore, the object of the Act to be as it was read in the Court below, namely: to endeavour to remove from the Dominion the national curse of intemperance, and observing that the means adopted to attain this end consist in the imposition of restraints upon the mode of carrying on a particular trade, namely: the trade in intoxicating liquors, it cannot admit of a doubt, that power to pass such an Act, or any Act, assuming to impose any restraint upon the traffic in intoxicating liquors, or to impose any rules or regulations, not

merely for municipal or police purposes, to govern the persons engaged in that trade, and assuming to prohibit the sale of liquors, except under and subject to the conditions imposed by the Act, is not only not given *exclusively*, but is not *at all* given to the Provincial Legislatures. The principle of *Regina* v. *Justices of King* (1), decided, and properly so decided, in the Court from which this appeal comes, is equally applicable to exclude from the jurisdiction of the Local Legislatures all power to pass such an Act.

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The Act, then, being *ultra vires* of the Provincial Legislatures, as dealing with a subject *not exclusively* assigned to the Provincial Legislatures, *cadit questio*, for that point being so determined, it follows, by the express provision of the *B. N. A. Act*, that it is within the jurisdiction of the Dominion Parliament.

This Court has no jurisdiction other than is given to it by the Act of the Dominion Parliament which constitutes it, and that Act does not authorize it to assume to impose restrictions upon Parliament as to the terms, conditions and provisions to be contained in any Act passed by it upon any subject which is within its jurisdiction to legislate upon. That point being determined, the jurisdiction of Parliament as to the terms of such legislation is as absolute as was that of the Parliament of Old *Canada*, or as is that of the Imperial Parliament in the United Kingdom, over a like subject.

What, therefore, may be the opinion of text writers, or what may be the decision of the *United States* Courts, as to the powers of the Central Government and Congress, or of the legislatures of the several States, upon the like subject, is unimportant, for, as the Dominion Government and Parliament are founded upon the model of, and made similar in principle to, those of the United Kingdom of *Great Britain* and *Ireland*, it fol-

(1) 2 Pugs. 535.

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lows that, once it is established that the subject matter of *The Temperance Act of* 1878 is a matter within the jurisdiction of the Dominion Parliament to legislate upon, the provisions of that Act are as valid and binding, and beyond the jurisdiction of this Court to deal with, otherwise than by construing it, as *The Temperance Act of* 1864, from which the Act of 1878 is taken, was valid and binding, and beyond the jurisdiction of the Courts of Old *Canada* to deal with, otherwise than by construing, and as a similar Act in *Great Britain*, if passed by the British Parliament, would be valid and binding upon the Courts there.

It is unnecessary, therefore, to discuss any of the other matters, relied upon in the Court below, and referred to in the argument before us, and the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Beckwith & Seeley*

Solicitor for respondent: *H. B. Rainsford.*

PETER H. LENOIR, *et al*.....APPELLANTS ; 1879

AND *Jan'y 30.

*Nov. 4.

JOSEPH NORMAN RITCHIE.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Powers of Local Legislatures—37 Vic., c. 20 and 21, N. S., ultra vires—Queen's Counsel, Power of Appointment of—Letters Patent of Precedence, not retrospective in their effect—Great Seal of the Province of Nova Scotia,—40 Vic., c. 3, D.

By 37 Vic., c. 20, *N.S.* (1874), the Lieutenant Governor of the Province of *Nova Scotia* was authorized to appoint provincial officers under the name of Her Majesty's Counsel learned in the law for the Province. By 37 Vic., c. 21, *N.S.*, (1874), the Lieutenant Governor was authorized to grant to any member of the bar a patent of precedence in the Courts of the Province of *Nova Scotia*. *R.*, the respondent, was appointed by the Governor General on the 27th December, 1872, under the great seal of *Canada*, a Queen's Counsel, and by the uniform practice of the Court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the Province, and signed by the Lieutenant Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for *Nova Scotia*, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor General after the 1st of July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant Governor, was published in the *Royal Gazette* of the 27th May, 1876, and the name of *R.*, the respondent, was included in the list, but it gave precedence and preaudience before him to several persons, including appellants, who did not enjoy it before.

Upon affidavits disclosing the above and other facts, and on

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*PRESENT :—Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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producing the original commission and letters patent, *R.*, on the 3rd January, 1877, obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Province of *Nova Scotia* since the 26th December, 1872, and to set aside, so far as they affected *R.'s* precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of *Nova Scotia*, on the 26th March, 1877, and the decision of that Court was in substance as follows:—1. That the letters patent of precedence, issued by the Lieutenant Governor of *Nova Scotia*, were not issued under the great seal of the Province of *Nova Scotia;* 2. That 37 Vic., c. 20, 21, of the Acts of *Nova Scotia*, were not *ultra vires;* 3. That sec. 2, c. 21, 37 Vic., was not retrospective in its effect, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence of the respondent. On the argument in appeal before the Supreme Court of *Canada* the question of the validity of the Great Seal of the Province of *Nova Scotia* was declared to have been settled by legislation, 40 Vic., c. 3, *D.*, and 40 Vic., c. 2, *N.S.* A preliminary objection was raised to the jurisdiction of the Court to hear the appeal.

Held,—1. That the judgment of the Court below was one from which an appeal would lie to the Supreme Court of *Canada;* (*Fournier*, J., dissenting.)

2. Per *Strong*, *Fournier* and *Taschereau*, J.J.,—That c. 21, 37 Vic., *N.S.*, has not a retrospective effect, and that the letters patent issued under the authority of that Act could not affect the precedence of the Queen's Counsel appointed by the Crown.

3. Per *Henry*, *Taschereau* and *Gwynne*, J.J.:—That the *British North America Act* has not invested the Legislatures of the Provinces with any control over the appointment of Queen's Counsel, and as Her Majesty forms no part of the Provincial Legislatures as she does of the Dominion Parliament, no Act of any such Local Legislature can in any manner impair or affect her prerogative right to appoint Queen's Counsel in *Canada* directly or through Her representative the Governor General, or vest such prerogative right in the Lieutenant Governors of the Provinces ; and that 37 Vic. c. 20 and 21, *N. S.*, are *ultra vires* and void.

4. Per *Strong* and *Fournier*, J.J. . —That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.

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APPEAL from a Rule of the Supreme Court of *Nova Scotia* made on the 26th March, 1877, ordering that the rank and precedence granted to *Joseph Norman Ritchie*, Esquire, the respondent, be confirmed, and that he have rank and precedence in the said Supreme Court over all Queen's Counsel appointed in and for the Province of *Nova Scotia* since the 26th day of December, 1872.

The following are the material facts of the case:

The respondent, a barrister of the Province of *Nova Scotia*, was appointed to be one of Her Majesty's Counsel learned in the law in and for the Province of *Nova Scotia* on the 26th December, 1872, by Letters Patent under the Great Seal of *Canada*.

On the 7th May, 1874, the Legislature of *Nova Scotia* passed an Act whereby it was declared and enacted that it was, and is, lawful for the Lieutenant Governor, by Letters Patent under the Great Seal of the Province of *Nova Scotia*, to appoint from among the members of the Bar of *Nova Scotia* such persons as he may deem right to be, during pleasure, Provincial officers under the name of Her Majesty's Counsel learned in the law for the Province of *Nova Scotia* (1).

On the same day the same Legislature passed another Act entitled, "An Act to regulate the precedence of the Bar of *Nova Scotia*" (2).

By the first section of this Act it was enacted that the following members of the Bar should have precedence in the following order: The Attorney General of the Dominion of *Canada*, the Attorney General of the Province, members of the Bar who were before the 1st July, 1867, appointed Her Majesty's Counsel for *Nova Scotia*, so long as they are such Counsel, according to such seniority of appointment as such Counsel.

The second section is as follows: "Members of the Bar

(1) 37 Vic., c. 20.

(2) 37 Vic., c. 21.

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from time to time appointed after the 1st July, 1867, to be Her Majesty's Counsel for the Province, and Members of the Bar, to whom from time to time Patents of Precedence are granted, shall severally have such precedence in such Courts as may be assigned to them by Letters Patent, which may be issued by the Lieutenant Governor under the Great Seal of the Province."

The third section enacts "that the remaining members of the Bar shall, as between themselves, have precedence in the Courts in the order of their call to the Bar."

The fourth section preserves the right and precedence of Counsel acting for Her Majesty or for the Attorney-General in any matter depending in the Courts in the name of Her Majesty or of the Attorney-General. On the 27th May, 1872, Letters Patent, under the seal used as the Great Seal of the Province, were issued by the Lieutenant-Governor of *Nova Scotia*, appointing appellants, together with other barristers, "to be, during pleasure, Provincial officers under the name of Her Majesty's Counsel learned in the law for the Province of *Nova Scotia*." The patent was as follows:—

"DOMINION OF CANADA, } "VICTORIA, by the
"PROVINCE OF NOVA SCOTIA. } Grace of GOD, of the United Kingdom of *Great Britain* and *Ireland*, Queen Defender of the Faith.

[L.S.]

(Sgd.) ADAM G. ARCHIBALD.

To all to whom these presents shall come. Greeting:

"WHEREAS, under and by virtue of the provisions of chapter 20 of the Acts of 1874, entitled "An Act respecting the appointment of Queen's Counsel," we have thought fit to nominate and appoint certain persons, being members of the Bar of *Nova Scotia*, to be our Counsel learned in the law.

"NOW KNOW, that we have appointed and do

hereby appoint *Henry A. Grantham*, Hon. *Philip Carteret Hill*, *Peter H. LeNoir*, Hon. *Mather Byles Des Brisay*, Hon. *Daniel McDonald*, *J. R. Shannon Marshall*, *Robert G. Haliburton*, Hon. *Otto S. Weeks*, *Jared C. Troop*, Hon. *A. J. White*, *William A. D Morse*, *John W. Anseley*, *Robert L. Weatherbe*, *William F. McCoy*, *John D. McLeod*, *Murray Dodd*, and *Sandford H. Pelton*, to be during pleasure Provincial Officers under the names of Our Counsel learned in the Law, for the Province of *Nova Scotia*, hereby conferring on the said several persons and each of them full power and authority to execute and discharge the duties of the said office, and to have hold, take and enjoy all rights, fees, privileges and advantages unto the said office belonging or in anywise appertaining.

"AND WHEREAS we have also thought fit to regulate the precedence of the said several Counsel learned in the Law, under the provisions of section second of chapter 21 of the Acts of 1874, entitled "An Act to regulate the precedence of the Bar of *Nova Scotia*," We do therefore hereby assign to the several persons above appointed precedence in the order following, that is to say:

"*Charles B. Owen*, *S. H. Morse*, *Henry Pryor*, *Henry A. Grantham*, *William Howe*, Hon. *P. Carteret Hill*, *Alexander James*, *Peter H. LeNoir*, *James Thompson*, *James W. Johnston*, *William A. Johnston*, *M. H. Richey*, Hon. *Mather Byles Des Brisay*, Hon. *Daniel McDonald*, *J. N. Shannon Marshall*, *Robert G. Haliburton*, Hon. *Otto S. Weeks*, *J. C. Troop*, Hon. *H. A. N. Kaulbach*, *J. N. Ritchie*, *A. J. White*, *N. W. White*, *W. A. D. Morse*, *N. L. McKay*, Hon. *W. Miller*, *A. W. Savary*, *John W. Anseley*, *Robert L. Weatherbe*, *William F. McCoy*, *Samuel G. Rigby*, *John D. McLeod*, *Murray Dodd*, and *Sandford H. Pelton*.

"And we do hereby declare, that as between each

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other, and as to all the members of the Bar, where precedence is not fixed by the said Act, the said several persons appointed Our Counsel learned in the Law, shall be entitled to precedence in our said Courts in the order in which their names are herein above recited. And we do hereby strictly enjoin all our said Courts to grant precedence to our said Counsel learned in the Law in the order above recited.

"IN TESTIMONY WHEREOF we have caused these our Letters to be made Patent, and the Great Seal of our said Province of *Nova Scotia* to be hereunto affixed.

"WITNESS our trusty and well-beloved the Honorable ADAMS GEORGE ARCHIBALD, Member of the Privy Council of Canada, Companion of the Most Distinguished Order of St. Michael and St. George, Lieutenant Governor of *Nova Scotia*, at our Government House, in our City of *Halifax*, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-six, in the thirty-ninth year of our reign."

"By command,

(Signed) P. CARTERET HILL,

"*Provincial Secretary.*"

On the 30th May, 1876, the respondent wrote the following letter to the Provincial Secretary :—

"HALIFAX, 30th May, 1876.

"SIR,—I observe by this morning's paper, that my name is included in a list of Queen's Counsel, published in the *Royal Gazette* of the 27th inst., to whom Precedence has been given by His Honor, the Lieutenant-Governor.

"As I have not asked for this privilege, I beg most respectfully to decline the honor intended to be con-

ferred, and request that my name may be omitted from the Letters Patent.

"I have the honor to be, Sir,

"Your obedt. servt.,

(Signed), "J. N. RITCHIE."

"To the Honorable The Provincial Secretary."

He received the following answer:—

"PROVINCIAL SECRETARY'S OFFICE,

"HALIFAX, N. S., May 30th, 1876.

"SIR,—I have the honor to acknowledge the receipt of your letter of this day's date, requesting that your name may be omitted from the Patent of Precedence of Queen's Counsel, recently appointed.

"I have it in command to inform you, that as the Government did not appoint you a Queen's Counsel, they have no power to deprive you of the position.

"I have the honor to be, Sir,

"Your obdt. servt.,

(Signed), "P. CARTERET HILL."

"J. N. RITCHIE, Esq."

Subsequently, the prothonotary of the Supreme Court of *Nova Scotia* at *Halifax*, in making up the dockets, &c., gave the appellants, with others, precedence over the respondent, which had not been accorded to them since the date of the respondent's appointment in 1872. Thereupon, on the third of January, 1877, the respondent obtained from the Supreme Court of *Nova Scotia* the following rule *nisi*.

"Supreme Court *Halifax*, S. S.

"In the matter of the application of *Joseph Norman Ritchie*, for the recognition of his rank and precedence as Queen's Counsel.

"On hearing read the Letters Patent under the Great Seal of *Canada*, dated the 26th day of December, A. D., 1872, appointing the said *Joseph Norman Ritchie* one of Her Majesty's Counsel learned in the law, the affidavits

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of the said *Joseph Norman Ritchie*, sworn to on the twelfth and twenty-seventh days of December, 1876, and the exhibits annexed thereto, and the documents or Letters patent, dated on the twenty-seventh day of May, A. D., 1876, with reference to Queen's Counsel and filed in this Court on the seventh day of November last. It is ordered that the rank and precedence granted to the said *Joseph Norman Ritchie* by said Letters Patent of 26th December, A. D., 1872, be confirmed, and that he have rank and precedence in this Court over all Queen's Counsel appointed in and for the Province of *Nova Scotia*, since the said 26th day of December, A. D., 1872, on the following grounds:

"1. Because the Letters Patent of 26th December, 1872, give rank and precedence to Mr. *Ritchie*, as a Queen's Counsel from the date thereof, which have never been legally taken away.

"2. Because the document or Letters Patent of the 27th May, 1876, does not in any way affect said rank and precedence.

"3. Because said last mentioned document is not Letters Patent issued by the Lieutenant Governor of *Nova Scotia* under the Great Seal of that Province.

"4. Because no Patents of Precedence have been granted to any Queen's Counsel appointed after the 26th December, A. D., 1872, giving them rank and precedence over Mr. *Ritchie*.

"5. Because no Letters Patent, or Patents of Precedence, have been granted giving the Queen's Counsel appointed since 26th December, A. D., 1872, by Letters Patent under the Great Seal of *Canada*, precedence over Mr. *Ritchie*.

"6. Because chapter 24 of the Acts of the Legislature of *Nova Scotia*, for 1874, and all Letters Patent, or other documents granted thereunder, are illegal and *ultra vires*, in so far as they may affect the rank and prece-

dence of Mr. *Ritchie*, as granted to him by the Letters Patent of 26th December, 1872.

"7. Because last mentioned chapter has not a retrospective effect.

"8. Because the Act of the Local Legislature of *Nova Scotia*, namely: Chapter 20 of the Acts of 1874, under which certain barristers were appointed Queen's Counsel by the Lieutenant Governor of *Nova Scotia*, by the document or Letters Patent of the 27th May, A. D., 1876, is *ultra vires*, and such appointments are therefore invalid and of no effect.

"9. Because the Acts authorizing the Lieutenant Governor of *Nova Scotia* to appoint Queen's Counsel, and to give precedence to certain members of the Bar of *Nova Scotia*, were not passed until long after the grant of the Letters Patent conferring the rank and precedence on Mr. *Ritchie* and cannot affect the rights thereby conferred.

"10. And for other grounds appearing from the said papers, affidavits and exhibits, unless cause to the contrary be shewn before the Court on the third Saturday of February next ensuing.

"And it is further ordered that a copy of this rule be served upon each of the following Queen's Counsel and Barristers, viz.:—*C. B. Owen*, Esquire; *S. H. Morse*, Esquire; *Henry Pryor*, Esquire; *William Howe*, Esquire; *Henry A. Grantham*, Esquire; The Honorable *P. C. Hill*; *Peter H. Le Noir*, Esquire; *M.H. Richey*, Esquire; The Honorable *D. McDonald*; *J.N.S. Marshall*, Esquire; *Robert G. Haliburton*, Esquire; *Otto S. Weeks*, Esquire; and The Honorable *H. A. N. Kaulbach*.

"HALIFAX, 3rd January, A. D., 1877.

"By the Court.

(Signed) "M. I. WILKINS,

"Prothonotary."

The Supreme Court of *Nova Scotia*, by a majority of

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Judges, made the rule absolute on the second of the above grounds, maintaining the validity of the acts mentioned, and also held that the seal affixed to the patent was not the true Great Seal of *Nova Scotia*.

The case was twice argued before the Supreme Court of *Canada*, in consequence of the resignation of two of the Judges who heard the first argument.

As to the validity of the Great Seal, before the second argument before the Supreme Court, two acts had been passed to settle this question (1), and therefore, no further reference need to be made to it.

A preliminary objection was raised on behalf of the respondent to the jurisdiction of the Court to entertain the appeal, on the ground that the *rule* absolute in this case was not a "judgment," from which an appeal will lie under the 17 sec. of the Supreme and Exchequer Court Act, but the Court decided to hear the appeal on the merits.

Mr. *Haliburton* for appellants:

The Supreme Court of *Nova Scotia* has held that the Great Seal in use by the Government is invalid, and that, therefore, all grants, patents, &c., issued under it are void, and this ground is relied on in respondents factum. If that Court was right, the patent of precedence is merely waste paper, and the question at issue is disposed of at the outset. We contend that that Court should not have entered into the question, because the Court must receive the Great seal without proof of authenticity.

"Absolute faith is universally given to every document purporting to be under the Great Seal, as having been duly sealed with the authority of the Sovereign" (2). "Royal grants are matters of public record" (3), and as

(1) 40 Vic., c. 3, D., and 40 Vic., c. 2, N. S.

(2) Lord Campbell's Lives of the Lord Chancellor's *intr*.

(3) Stevens' Comm., B. II, pt. 1, c. 21.

such import truth upon their face (1). Lord *Melville's* case (2), is always referred to as the leading case, but on referring to it we find that it merely appears that the Great Seal was received without further proof, but the point was not discussed in it. The only treatise on the Great Seal, excepting a work of no value by *Boyden*, is one of *Prynne's* Parliamentary Tracts, entitled: "The opening of the Great Seal of *England*;" written at a time when Parliament was hesitating about making a new Great Seal in place of that that had been carried off by *Charles* I. Baron *Maseres* in the "Canadian Freeholder," II, 238, 243, goes fully into this subject.

[STRONG, J.: But I thought the Great Seal question was settled by a Dominion Statute?]

I contend that, so far as this case is concerned, that question has been disposed of by 40 Vic. c. 3., *D.*—

No question arises here as to whether the Crown had issued Letters Patent granting what did not belong to the Crown, or what was not within the exercise of its prerogative, precedence at the Bar being beyond question a matter of prerogative.

The only question here is whether the Crown through its Keeper of the Great Seal has not issued Letters Patent of Precedence which affect rights granted under previous Letters Patent. Mr. *Ritchie* claims that he has vested rights under his Patent which cannot be superseded, or affected.

The eighth ground relied on by him in his factum is the same as in his Rule *nisi*, and is the only one that touches upon the validity of chapter 21 of Acts of 1874, or of the Patent of Precedence issued under it: "Because Cap. 21 of the Acts of the Legislature of *Nova Scotia* for 1874, and all Letters Patent or other

(1) Per all the Justices in *Judford* v. *Green*, cited in 17 Viner, 155, also, *ib.*, 71-8; 2 Inst. 555, 6, c. b. Bro. Ab. Tit. *patents*; 2 Comm., c. 21.

(2) 29 St. Tr. 707.

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documents granted thereunder, are illegal and *ultra vires, in so far as they may affect the rank and precedence of Mr. Ritchie* as granted to him by Letters Patent of the 26th December, 1872."

The Crown, unless controlled by statute, can issue second Letters Patent which operate by way of extinguishment of previous Letters Patent. 17 *Vin.* (93 M. B. 5.) 100, 109, (Q. B. 2.) *Sec.* 8. See argument of Atty. General, also judgment of Court *In re Bedard* (1).

To prevent error or surprise on part of the Crown, 6 H. VIII. c. 15 makes second Letters Patent void where they do not refer to previous Letters Patent. But where there are no fees or emoluments attached to subject of grant, such recital is not considered necessary. *Vin.* 109. Q. B.; *The King* v. *Foster*, 2 *Freeman* 70.

Though a subject may be injured by the issue of such subsequent Letters Patent, yet they must be recognized and respected by the Court until duly cancelled by issue of *scire facias* by leave of the Crown, such Letters Patent being not void, but only voidable.

"When a patent is granted to the prejudice of a subject, the King of right is to permit him, upon his petition, to use his name for the repeal of it in *scire facias* at the King's suit, to hinder multiplicity of actions on the case." 2 *Vent.* 344. 17 *Vin.* 98, 100, 109, 115, 122 (u. b) 155, sb. "*Scire facias* may issue to revoke grants injurious to the rights and interests of third parties; though if the patent be void in itself, *non concessit* may, it seems be pleaded without a *scire facias*." *Chitty* on Prerog. ch. 12. s. 3. (cites 3 Comm. 260. 2 Rol. Ab. 191. S. pl. 2.) *Sir Geo. Mackenzie* says that by the law of *Scotland*, which on this point we find the same as that of *England*, the validity of second Letters Patent must be raised, not by pleading, but by an application to have them cancelled. "No right once passed under the Great Seal

(1) 7 Moore P. C. C. 23.

can be annulled by way of exception, but only by way of reduction. When double rights are passed, the first is put to the necessity of a reduction" (1).

We contend that 37 Vict. c. 21 and Letters Patent issued thereunder are not, as contended for by respondent, "illegal and *ultra vires* in so far as they may affect the rank and precedence of Mr. *Ritchie*, granted to him by the Letters Patent of the 26th December, 1872."

As respects the precedence of Queen's Counsel appointed since 1867, sec. 2 of 37 Vic., c. 21 is merely declaratory, and did not alter or abridge the previous right of the Lieut.-Governor to issue the Letters Patent of precedence in question. See *James N. S. R.* 182.

As that Act refers to matters exclusively reserved for the Local Legislatures, it is not *ultra vires* so far as the rights of the Dominion Parliament are concerned.

It cannot be contended that the Act is *ultra vires* because it may lead to the passing of Letters Patent which may affect the priority of persons claiming precedence under Letters Patent issued since 1867 under a *Greater Seal* by the Governor-General. The Patent of 1854, issued by the Lieutenant Governor to Mr. *Uniacke*, gave him precedence over Queen's Counsel holding Patents directly from the Queen. The commission and instructions of the Governor General are unchanged, so far as any right to issue Letters Patent of Queen's Counsel is concerned.

A Provincial Act within the limits of local legislation may, if assented to, limit the Royal prerogative as fully as if it were an Act of Parliament, or a Dominion Act within the scope of Dominion Legislation. The effect

(1) See Obs., on the VI. Parliament of James V. Sir George Mackenzie's Works, 1, 278. Also, 4 Inst. 87, 88, Bro. Ab. Tit. *Sire Facias.* 69, 185. Dyer. 197*b*, 198*b*. Cases cited in 2 T. R. 564. Bro. Ab. Tit. *Patents*, pl. 2. *R.* v. *Chester et al.* 5 Mod. 301. *Rex* v. *Kemp*, 4 Mod. 277. *The King* v. *Foster*, 2 Freeman 70.

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of the assent given to the *Prince Edward Island Land Act* is in point—it being held by the Crown that it was bound by the assent given to that Act, and that the prerogative was thereby limited.

The Crown does not regard this Act as infringing upon its prerogative, as it was passed at the suggestion of the Imperial Government.

"When an Act of Parliament doth authorize the Lord Chancellor or Lord Keeper to make or grant any commission under the Great Seal, he may make or grant the same without any further warrant, because the King is a party to the Act of Parliament, and there cannot be a greater warrant to the said Chancellor than an Act of Parliament." 4 Inst., ch. 29, p. 169.

From 1863 the use of the Royal Warrant was dispensed with by a dispatch from the Secretary of State for the Colonies in the case of all appointments except in the Admiralty Court.

The intent of the Act and of the Letters Patent of precedence is clear and explicit.

No reasonable doubt can exist that the Legislature by this Act proposed to regulate the precedence of all Queen's Counsel not appointed prior to July, 1867, as it was entitled "An Act to regulate the precedence of the Bar of *Nova Scotia*," and was passed with the sole object of enabling the Lieutenant Governor to assign to the Queen's Counsel whom he might appoint such relative rank as he might think fit, as respects the Queen's Counsel that had then been appointed since July 1st 1867.

Section 2 of the Act provides that Members of the Bar appointed Queen's Counsel since July 1st, 1867, and members of the Bar to whom, from time to time, Patents of Precedence maybe granted, "shall severally have such precedence as may be assigned to them by Letters

Patent, which may be issued by the Lieut.-Governor under the Great Seal."

The Act being therefore clear, the intent of the Letters Patent of Precedence, which profess to carry out the provisions of the Act, is equally clear. After appointing seventeen Members of the Bar Queen's Counsel, the Letters Patent, reciting sec. 2 of the Act, proceed: "we do hereby assign to the several persons above appointed, precedence in the following order, that is to say"—. It then gives, according to the dates of their being called to the Bar, the names of thirty-four Queen's Counsel, including the seventeen first appointed and all not appointed prior to July 1867. By this list the appellants, who were then appointed Queen's Counsel, have rank given to them before Mr. *Ritchie* who had been appointed in 1872.

The Court is asked by Respondent to adopt one of two interpretations.

1st. (In direct contradiction to the very words of the Letters Patent), that they only regulated the precedence of the Queen's Counsel then appointed "as between each other," and not "as to all members of the Bar whose precedence is not fixed by the said Act," (*i. e.* all not appointed prior to July, 1867).

2nd. A nugatory and absurd intent—that though the Patent of Precedence proposed to give some of the Queen's Counsel then appointed precedence before Mr. *Ritchie*, it did not affect his precedence as respects them.

It is impossible to see how the Court, unless it is able to cancel or ignore the Letters Patent, can assume that a list of precedence which includes Mr. *Ritchie* by name was not intended to affect his precedence.

Even if he had not been mentioned, his precedence would have been affected by implication. The commission of a Justice of the Peace may be superseded

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"by a new commission, which virtually but silently discharges all the former justices not named therein, for two commissions cannot exist at once." 1 Comm. 353.

As the Act in question provides that members of the Bar from time to time appointed after the first day of July, A.D. 1867, to be Her Majesty's Counsel for the Province, &c, shall severally have such precedence in such Courts as may be assigned to them by Letters Patent which may be issued by the Lieutenant-Governor under the Great Seal, he can claim no precedence not assigned to him by such Letters Patent.

There are no vested rights in Patents of Queen's Counsel, or Patents of Precedence, but the Crown as "the Fountain of Justice and of honors" can at all times, at its will, regulate precedence at the Bar. The Attorney-General *In re Bedard* (1) contended that "the Crown by Letters Patent can give precedence at pleasure, *except so far as this prerogative is limited by Statute.*" "All degrees of nobility and honor are derived from the King as their fountain, and he may institute what new title he pleases. It is a part of the prerogative at common law. No one can doubt that the Queen can give precedence among Queen's Counsel. The Court decided in that case that Letters Patent of precedence to a Judge affecting precedence under previous Letters Patent were valid. "A custom has for some time prevailed of granting Letters Patent of Precedence to such barristers as the Crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents, sometimes next after the Attorney General, but usually next after Her Majesty's Counsel then being." 3 Comm. 28. See also *James N. S. R.* 182. 4 Inst. 167, 362. 1 Comm. 272. *Chitty*

(1) 7 Moore P. C. C. 23.

Prerog. 77, 82, 107, 112, 132, 330 note *g.*, also 331. *Manning's* Case of the Sergeants, 127. Droit Public de *Domat*, Liv. i. tit. ii. sec. 2 p. 10, (Fol. Ed 1745).

In *ex parte Robinson* (1), the Court refused to enquire into the issue of Letters Patent by a Governor and Council superseding previous Letters Patent, the office in question being held at will.

Respondent's application is irregular and unprecedented.

Even assuming that no Act had been passed, authorizing the Lieutenant-Governor to issue Letters Patent of Precedence, or, if passed, that it was *ultra vires*, and that the Keeper of the Great Seal improperly and without any warrant affixed the signature of Royalty to Letters Patent of Precedence, yet these are matters between the Crown and its Keeper of the Great Seal, into which the Court cannot enquire, but it must recognize the Letters as valid and binding upon the Court until an Act of Parliament has been passed to annul the Patent, or the Crown itself issues a *scire facias* to cancel it. "The Great Seal shall always be credited, and where the certificates under it are not strictly true, there is no remedy but an Act of Parliament, or by authority of the Chancellor of *England* to cause parties to bring them into Chancery" (2).

That the Crown to this day jealously preserves its prerogative of enquiring into the validity of its grants, is clear from the fact that in the recent Supreme Court of Judicature Act, whereby it was proposed to transfer to the new Court of Appeal the Jurisdiction of the Court of Chancery, as well as of the House of Lords, and of the Judicial Committee of the Privy Council, one of the few things reserved was "any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent,

(1) 11 Moore P. C. C. 288.

(2) 17 Vin. 71-78. Nel. Ab. III., 207, 210.

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or the issue of Commissions or other writings to be passed under the Great Seal of the United Kingdom." 36 and 37 Vict. c. 66, s. 17. "By this section it will be seen that the most important branch of the existing Common law jurisdiction of the Lord Chancellor, viz: holding plea by *scire facias* to repeal a patent, is not given to the High Court. It is supposed that this will be retained as a personal jurisdiction of the Lord Chancellor, as it is not given to the High Court, and of course, not to the Court of Appeal." See *Griffith*, Sup. Court of Judic. Act, p. 17.

The prerogative of the Crown of directing *scire facias* to issue to repeal its grants is not vested in the Supreme Court of *Nova Scotia*. See Rev. Stat. (4th series), c. 106, s. 1; c. 95, s. 1 and 7; c. 11, s. 18. *Roy n'est lie par auscun Statute, si il ne soit expressement nosme.* See *Chit.* Prerog. 366, 383, 374. *Broom* Leg. Max. 74, 75.

The Supreme Court of *Nova Scotia* was asked to pronounce these Letters Patent to be void, in proceedings to which the Crown was not made a party, though there is not a single authority or precedent to be found for such a course, nor has any been cited in support of Mr. *Ritchie's* application.

Mr. *Ritchie's* application is highly irregular and unprecedented, inasmuch as, instead of praying the Crown to sue out a *Scire Facias* to cancel its Patent, he takes proceedings to which the Crown is not made a party, and without citing a single precedent or authority in support of his application, he asks the Supreme Court of *Nova Scotia* in a summary way to cancel or ignore Letters Patent that have been granted under the Great Seal.

It is therefore contended that, as the Great Seal is the official signature of Royalty, these Letters Patent are a Royal grant as fully as if issued by the Lord Chancellor, or by the Queen herself; that they do not come

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within the class of Royal grants which a series of Statutes have rendered void, and which the Courts of Law can therefore treat as *void*; that, if *voidable*, it can only be by *Scire facias* issued in the name and by leave of the Crown; that this remedy was open to Mr. *Ritchie* when he took these proceedings, and is still open to him should he consider himself injured by these Letters Patent.

In all matters that are under the exclusive jurisdiction of the Local Legislature, the Lieutenant Governor represents the Queen, and all powers enjoyed by him prior to Confederation in relation to the organization of the courts and the administration of Justice were confirmed by the *B. N. A. Act.*

The act regulating precedence having been passed at the suggestion of the Crown, thereby received the previous assent of the Crown, and also subsequently received the assent of its representative the Lieutenant Governor.

In *The Queen* v. *Burah* (1) it was held, where the prerogative of pardon had been exercised by the official governing a newly created district in *India*, that "where plenary powers of Legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may in their Lordships' opinion be well exercised either absolutely or conditionally."

Tne *B. N. A. Act* gives the Provincial Legislature, as respects a large number of important subjects, "*exclusive powers* of legislation." If in these matters plenary powers are not possessed by it, where do they exist?

Mr. *Ritchie* has not questioned the validity of the act, except so far as it affects his precedence. Any decision of the Court which goes beyond this, and decides that the Lieutenant-Governor is not the Queen's Representative, and that the Queen is no part of Provincial Legis-

(1) L. R. 3 App. Cases 906.

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latures, is a serious one, that vitally concerns the whole Dominion. This is a constitutional question which was not argued before.

Supposing the Patent void, or rather voidable, we are dealing with the Lieutenant-Governor here as Keeper of the Great Seal, an office which does not necessarily require the person holding it to be the Queen's Representative. The Keeper of the Great Seal in *England* is not the Queen's Representative. If he has improperly used the Great Seal, there are recognized modes of cancelling the patent.

It cannot be said that the Queen has not authorized the issue of this patent, for it is *signed by the Sovereign.* The *B. N. A.* assented to by the Crown continued to the Provinces the use of their Great Seals, and the Great Seal is recognized everywhere as "*the most solemn signature of the Sovereign.*" Whether the Crown was wise in allowing its signature to be used by the Lieutenant-Governor is not a question for this Court. It has authorized the use, and the signature must be recognized and respected, until the patent is properly cancelled by *scire facias*, or an Act of Parliament.

Whether the title of Queen's Counsel is a legal rank or a title of honour does not arise here, as the patent of Queen's Counsel issued in 1876, under c. 20 of Acts of 1874, did not affect Mr. *Ritchie's* rank under his patent of 1872. The patent of precedence, however, issued under c. 21 did affect him, and the only question for our consideration is as respects its validity. It confers no rank or status outside the Courts, and is merely a mode of regulating the business of the Courts by specifying the order in which Counsel will be heard.

I find the responsibility unexpectedly thrown upon me of defending the status hitherto claimed and enjoyed by Lieutenant-Governors, and Provincial Legislatures, and I therefore do not profess to do so, as the

subject was not discussed in the argument before the Supreme Court of *Nova Scotia*. It was quite unexpected by me, and apparently also by respondent, who, in his factum, has given no authority or reference on this point, except the Governor-General's Commission, which as respects these questions is the same as before the Union. The subject is of such grave public importance that it is to be hoped it will not be necessary under the circumstances for the Court to consider it.

Mr. *Cockburn*, Q.C., for respondent:

I will not follow the learned Cousel in his argument as to the great seal, that question has, so far as this case is concerned, been disposed of by the Statute of *Canada*, 40 Vic., c. 3. I contend, however, that the Statute of the Province of *Nova Scotia*, 37 Vic., c. 20, respecting the appointment of Queen's Counsel, and so much of the Statute 37 Vic. c. 21, as affects the right of precedence and of preaudience of Queen's Counsel,are *ultra vires*,and that the letters patent of 27th May, 1876, issued under the authority of the latter statute, are wholly inoperative.

The appointment of Queen's Counsel is a prerogative of the Crown, and no such power is conferred on the Lieutenant Governors of Provinces, nor could the Provincial Legislatures under the constitution (see *B. N. A. Act*, sec. 92) legislate on any subject of prerogative law. By the royal commission granted to the Governor General under the great seal of the United Kingdom certain limited powers to represent the Crown in its prerogative rights are conferred (paragraph 3 clearly embraces the appointment of Queen's Counsel). But the royal instructions which accompany the commission guardedly require that all bills passed by the Parliament of *Canada* which touch the prerogative shall be reserved for Her Majesty's pleasure. And while the Provincial Legislatures may enact laws for the amendment of their

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own constitutions, they are prohibited from altering the office of the Lieutenant Governor (*B. N. A. Act*, sec. 92, sub-sec. 1), so that unless this officer has power conferred upon him by the Constitutional Act to represent Her Majesty in the exercise of her prerogative powers, he can neither do so now, nor can he at any future time be empowered to do so by the Legislature of the Provinces. The office of the Lieutenant Governor is defined in sec. 58 and 59. He is the representative of the Governor General, not of the Queen; he assents to bills in the name of the Governor General, not of the Queen, and in the exercise of his powers withholds bills for the Governor General's, and not for the Queen's assent. All the laws of the Parliament of *Canada* are made by the Queen, the Senate, and the House of Commons. The Queen is present, and is a constituent part of Parliament. She does not merely assent to bills, she is also an enacting party; not so with the Provincial Legislatures. Those bodies exclusively make the laws within the limit of their authority. While the most jealous care is taken in the *B. N. A. Act* to provide for the speedy transmission of authentic copies of all bills passed by the Parliament of *Canada* for Her Majesty's pleasure, no similar provision exists as to the Provincial Legislatures. The Queen may be wholly unadvised and uninformed as to the laws they are enacting, and there exists no necessity for supervision, inasmuch as Imperial and Prerogative questions do not fall within the scope of their powers.

There have been three important occasions in which the powers of the Lieutenant-Governors, in respect of their being representatives of the Crown, have been brought up for consideration since the Confederation.

The first was the claim of the Lieutenant-Governor of *New Brunswick* to exercise the pardoning power (see the report of the Minister of Justice, 21st of December,

1868, and the despatch of Lord *Grenville* to the Governor-General of 24th of February, 1869.)

The second was the question as to the amnesty claimed to have been promised by the Lieutenant-Governor of *Manitoba* in the *Lepine* case. (See the despatch of Lord *Carnarvon* of 7th of January, 1875.)

On both of these occasions the pretension was clearly refuted and refused.

The third occasion arose (indirectly) on the question of the Ministerial responsibility of the Governor General's advisers for his disallowances of Bills passed by the Local Legislatures within the scope of their powers. See the report of the Minister of Justice, 22nd December, 1875, in which he says: "The powers of Provincial Legislatures are, by their constitution, limited to certain subjects of a domestic character, so that their legislation can affect only Provincial, and at most, Canadian interests. Provincial Acts to the extent to which they may transcend the competence of the Legislature are inoperative *ab initio*, there is no power to allow them nor can any attempt at allowance give them vitality, so that void Acts left to their operation are void altogether." * * * * The contention of this state paper was that the Dominion Government alone should supervise and control the provincial legislation.

The theory that the Queen is bound by certain statutes because she is an assenting party, has no application to the Provincial statutes. These must stand or fall on a strict interpretation of the powers of the Local Legislatures. The two Acts in question are clearly *ultra vires* for the reasons given, and the Letters Patent appointing Mr. *LeNoir* and others to be Queen's Counsel must therefore fall to the ground.

In any case those statutes could not have had a retrospective effect so as as to annul the right of preaudience already granted to Mr. *Ritchie* under the Great Seal of the Dominion.

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On the constitutional question, the learned Counsel referred to Sessional papers, 1867 and 1868, Vol. 1 No. 22; Sessional papers, 1869, Vol. 2, No. 16; Sessional papers, 1875, Vol. 8, No. 11; Sessional papers, 1876, Vol. 9, No. 116; return to an address for correspondence relating to the appointment of Queen's Counsel, Session of 1873, No. 50; *British North America Act*, sections 9, 17, 91, 92 (sub-sec. 1), 56, 58, 59; Mr. *Todd's* Pamphlet on a Constitutional Governor, p. 29; *Chitty's* Prerogative, pp. 107, 331; Bac: abr: Title Prerogative.

I further submit that the writ of *scire facias* is not as contended for the only proceeding to avoid Letters Patent, their validity may be questioned in actions at law, *Perry* v. *Skinner* (1); *William's Saunders* rep. (2); *Foster* on *Scire Facias* (3). As to the Crown being bound generally by Acts of Parliament, see *Weymouth* v. *Nugent* (4); also that statutes should be construed so as not to operate retrospectively against vested rights, *Perry* v. *Skinner* (5), (cited above); *Thisleton* v. *Frewer* (6); *Maxwell* on Statutes (7); *Dwarris* on Statutes (8). Finally that powers conferred by the Legislature, such as to the power to regulate the Bar, should be exercised not arbitrarily as was done here, but with sound and judicial discretion. *Lee* v. *Buda & Torrington Ry. Co.* (9); *Marshall* v. *Pittman* (10); *Maxwell* on Statutes (11).

STRONG, J.:—

Was of opinion that the *Nova Scotia* statute did not affect the precedence of Queen's Counsel appointed by the Crown, and that consequently the Court was not called upon to pronounce upon the Constitutional power of the Legislature to pass that statute. He was

(1) 2. M. & W. 475.
(2) Vol. 2, p. 252.
(3) P. 256, notes.
(4) 11 Jur. N. S. 465; 6 B. & S. 22.
(5) (Cited above).
(6) 31 L. J. Ex. 231.
(7) P. 21 *et seq.*
(8) Passim.
(9) L. R. 6. C. P. 581.
(10) 9 Bing. 601.
(11) P. 21.

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therefore of opinion that the appeal should be dismissed with costs.

FOURNIER J.:—

L'Intimé, *J. N. Ritchie*, avocat du barreau de la *Nouvelle-Ecosse*, a été nommé Conseil de la Reine, par lettres patentes sous le grand sceau du *Canada*, le 26 Décembre 1872.

Le 7 Mai 1874, la législature de la *Nouvelle-Ecosse* a passé deux actes, les ch. 20 et 21,—le premier, autorisant le Lieutenant-Gouverneur à nommer des Conseils de la Reine pour cette province—le deuxième, lui donnant le pouvoir de régler l'ordre de préséance entre eux.

Le 27 Mai 1876, l'Appelant et plusieurs autres membres du barreau de la *Nouvelle-Ecosse* furent nommés Conseils de la Reine en vertu de lettres patentes leur donnant rang et préséance sur l'Intimé. Le protonotaire de la Cour Suprême de la *Nouvelle-Ecosse*, ayant cru devoir se conformer à ces lettres patentes dans la préparation du rôle des avocats, assigna à l'Appelant et à d'autres une préséance qu'aucun d'eux n'avait eu sur l'Intimé auparavant. Ce dernier obtint de la Cour, le 3 Janvier, 1877, une règle pour se faire réintégrer et maintenir dans l'ordre de préséance dont il était en possession depuis le 26 Décembre 1872, date de ses lettres patentes.

C'est du jugement déclarant cette règle absolue que le présent appel est interjeté.

Les principales questions soulevées en cette cause sont: 1o. Si le jugement rendu sur cette règle le 26 Mars 1877 est susceptible d'appel à cette Cour: 2o. Si les ch. 20 et 21, 37 Vic., des Statuts de la *Nouvelle-Ecosse* ne sont pas au-delà de la juridiction de la législature; 3o. Si ces actes peuvent avoir un effet rétroactif affectant la position des Conseils de la Reine nommés en vertu de lettres patentes émises sous le

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grand sceau du *Canada* avant la passation des deux Statuts en question.

Une autre question à laquelle il a été attaché une importance considérable—celle de la légalité du grand sceau avec lequel les lettres patentes du 7 Mai 1876 ont été scellées, ayant été, *pendente lite*, réglée par deux lois, l'une du Parlement fédéral et l'autre de la législature de la *Nouvelle-Ecosse*—il devient en conséquence inutile de s'en occuper. Je me contenterai de dire que je partage l'opinion exprimée à ce sujet par le juge en chef Sir *William Young*.

Après avoir eu beaucoup de doute sur la question, de savoir s'il y avait lieu à l'appel d'un jugement rendu dans une instance, introduite comme l'a été celle dont il s'agit, par une motion pour obtenir une règle *nisi*, j'en suis venu à la conclusion que cette Cour a juridiction dans le cas où le jugement qu'elle rendrait, soit pour affirmer ou infirmer le jugement dont il y a appel, serait de nature à être mis à exécution.

En effet la clause 17, définissant la juridiction d'appel de cette Cour, n'a pas déclaré que l'exercice de ce droit dépendrait du mode de procédure adopté en Cour de première instance pour faire valoir ses droits. Le mot "*case*" employé dans cette section n'est pas synonime de "cause," il a une signification plus étendue et s'applique à toutes les procédures au moyen desquelles on peut arriver à un jugement sur ses droits dans une Cour de juridiction supérieure.

Pour donner le même droit d'appel dans toutes les provinces il était nécessaire d'employer une expression d'une signification aussi étendue que celle-là. Si ce droit eût été accordé d'après la nature du mode de procédure, ou action, il en serait résulté que dans certains cas, à cause de la différence des systèmes de procédure existant dans les diverses provinces de la Puissance, un jugement sur une même question aurait pu être appe-

lable dans une province et ne pas l'être dans l'autre. C'est, sans doute, pour éviter un semblable inconvénient et donner, sauf certaines restrictions, l'appel d'une manière générale que la sec. 17 de l'acte de la Cour Suprême déclare, en se servant de cette expression très vague, qu'il y a *appel dans les cas* où se rencontrent les conditions suivantes, savoir: 1o. Que le jugement dont on veut appeler soit un jugement final de la plus haute Cour de dernier ressort; 2o. dans le cas où le jugement est d'une Cour Supérieure exerçant une juridiction en première instance ou d'appel, mais décidant en dernier ressort. Pour qu'il y ait appel il suffit que l'une ou l'autre de ces conditions se rencontrent, quelle que soit d'ailleurs la manière de procéder qui ait pu être employée pour arriver à jugement. La signification du mot *case* employé dans notre acte est au moins aussi étendue que celle du mot *suit* qui se trouve dans la 25e section de l'acte de la Cour Suprême des *Etats-Unis*, et dont le juge en chef *Marshall* a donné la définition suivante:

The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of justice, by which an individual pursues that remedy in a Court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a Court of justice, the proceeding by which the decision of the Court is sought, is a suit (1).

Et *Story* on Const. U. S. (2).

What is a suit? We understand it to be the prosecution, or pursuit of some claim, demand or request. In law language, it is the prosecution of some demand in a Court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be the "lawful demand of one's right; or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio, quod alicui debetur*...

Or, le jugement en question en cette cause étant final,

(1) *Weston v. City Council of Charleston*, 2 Peters, 464.

(2) 2 Vol. No. 1125, p. 485.

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du moins sur la présente procédure, et rendu par une Cour Supérieure (la Cour Suprême de la *N.-Ecosse*) décidant en dernier ressort,—ce jugement se trouve sous ce rapport dans les conditions voulues par le statut pour qu'il y ait appel. Dans deux causes où les instances ont été commencées comme dans le cas actuel, par motion, cette cour a déjà decidé qu'il y avait appel,—ce sont les causes de *Wallace* vs *Bossom*, (1) et *Wilkins* vs *Geddes*. (2)

Aussi, je serais disposé pour ces raisons à considérer le jugement comme susceptible d'appel si, d'ailleurs, il s'y rencontrait deux autres conditions que je considère essentielles pour donner juridiction : c'est 1o. que le jugement n'eût pas été rendu dans l'exercice du pouvoir discrétionnaire qu'exercent les Cours pour la conduite des affaires et le maintien de la discipline pendant leurs séances ; et 2o. que le jugement rendu fût susceptible d'être mis à exécution.

Pour s'assurer si ces deux conditions existent dans la présente cause, il est utile de se rappeler les termes de la motion qui a été la base du jugement. Quel est d'après cette motion l'objet de la contestation, *the matter of record* ? c'est la demande de préséance que l'Intimé fait en ces termes :

That it be ordered that the rank and precedence granted to the said *Joseph Norman Ritchie* by said letterspatent of 26th December, A.D. 1872, be confirmed, and that he have rank and precedence *in this Court* over all Queen's Counsel appointed in and for the province of *Nova Scotia* since the said 26th day of December A.D. 1872.

C'est là toute la demande ; suivent les raisons au nombre de dix, données à son appui. Elle se réduit donc exclusivement à la question de préséance sur les C. R. nommés depuis le 26 Décembre 1872, *in and for the Province of Nova Scotia*, quoique les raisons invoquées pour la faire triompher, attaquent la validité des deux statuts en vertu desquels ces nominations ont été

(1) 2 Can. S. C. R. 488. (2) 3 Can. S. C. R. 203.

faites. Mais ce ne sont pas ces propositions de droit qui constituent la demande

Bien que le jugement sur cette motion soit une reconnaissance du droit de l'Intimé à la préséance sur l'Appelant, il n'en laisse pas moins subsister les lettres patentes conférant à celui-ci la distinction de C. R. En effet, on ne pouvait les faire déclarer nulles que par le moyen d'un *scire facias*, ou d'un *quo warranto*, peut-être ; dans tous les cas, on ne pouvait atteindre ce but que par une procédure demandant spécialement l'annulation de ces lettres patentes. Toute procédure de ce genre eût été longue et aurait nécessité la mise en cause de la Couronne. Le meilleur moyen de mettre un terme, au moins temporairement, à un conflit qui se manifestait devant la Cour et d'en éviter les désagréables conséquences, était sans doute de s'adresser à la juridiction sommaire de la Cour concernant la conduite des affaires le maintien du bon ordre et de la discipline à faire observer pendant les séances des tribunaux. C'est ce qui a été fait en adoptant le procédé suivi en cette cause. Mais dans l'exercice de ce pouvoir, les décisions des Cours Supérieures sont sans appel ; elles échappent à toute révision, si ce n'est à celle du comité judiciaire du Conseil Privé de Sa Majesté, lorsqu'il y a eu condamnation à l'amende ou à l'emprisonnement. Je crois pour cette raison que l'appel ne devrait pas être admis.

Un autre motif qui me porte à croire que, dans le cas actuel, il ne devrait pas y avoir d'appel, c'est que le jugement de cette cour qui infirmerait celui de la Cour Suprême de la *Nouvelle-Ecosse* serait inexécutable.

C'est un principe général auquel cette cour est soumise, comme tous les autres tribunaux, qu'une cour n'a pas juridiction dans les cas où le jugement qu'elle prononcerait ne serait pas susceptible d'exécution. Pour qu'un jugement soit exécutable, il faut que la cour puisse faire mettre la partie réclamante en possession

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de ce qui fait l'objet de sa demande, ou à défaut qu'elle lui accorde une indemnité pécuniaire, ou enfin qu'elle puisse prononcer une condamnation par corps contre la partie récalcitrante.

Pour faire voir la difficulté, pour ne pas dire l'impossibilité de faire exécuter le jugement de cette cour, supposons qu'elle infirme le jugement de la cour de première instance et qu'elle reconnaisse aux Appelants le droit de préséance qu'ils réclament sur l'Intimé. Qu'arriverait-il dans ce cas? Comment et contre qui s'exécuterait le jugement? Pourrait-on faire émaner un bref quelconque adressé à Sir *Wm. Young*, le juge en chef de la Cour inférieure, pour lui enjoindre de reconnaître la préséance des Appelants? Et s'il s'y refusait, serait-il lancé contre lui un ordre pour mépris de cour? Les jugements s'exécutent contre les parties et non pas contre les juges. Les Appelants auraient-ils au moins quelques moyens de forcer l'Intimé à se désister de sa préséance ou de le contraindre à refuser de répondre à l'interpellation que lui adresserait le juge en chef nonobstant notre jugement? Aucun, certainement, le jugement ne serait donc dans ce cas qu'une expression d'opinion qui resterait lettre morte.

Si je ne puis présumer qu'une Cour inférieure se refusera à l'exécution des jugements de cette Cour dans les cas ordinaires, parce qu'ils seraient contraires aux siens,—je n'ai peut-être pas tort de croire que dans un cas comme celui-ci, où il s'agit de l'exercice d'un pouvoir discrétionnaire qui n'est pas soumis à notre contrôle, elle se croirait justifiable de ne pas s'y conformer, afin de conserver intacts ses prérogatives et son pouvoir discrétionnaire. Dans le cas supposé, nous serions exposés à voir la Cour Suprême de la *Nouvelle-Ecosse*, malgré notre opinion contraire, maintenir sa première décision. Rien de semblable ne pourrait arriver, si au lieu de s'adresser à la juridiction disciplinaire de la Cour, on eût

attaqué par *scire facias* la validité des lettres patentes. Dans ce cas, le jugement s'exécuterait comme tous les autres et il n'y aurait pas de conflit possible entre les deux Cours. Je serais porté pour ces motifs à déclarer que cette Cour n'a pas juridiction, et qu'elle devrait s'abstenir de juger. Mais comme je suis sous l'impression que je suis seul à entretenir cette opinion, je donnerai brièvement les motifs de ma décision sur le mérite de la question soumise.

Après la Confédération, des difficultés s'élevèrent dans les provinces d'*Ontario* et de la *Nouvelle-Ecosse*, au sujet du pouvoir des Lieutenants-Gouverneurs de nommer des Conseils de la Reine. Cette question affectant la prérogative royale, fut, pour cette raison, référée par le Conseil Privé du Canada au Secrétaire d'Etat pour les Colonies, afin d'obtenir l'opinion des officiers en loi de la Couronne. Le mémoire du Conseil Privé, signé par Sir *John Macdonald*, après avoir cité le paragraphe 14 de la section 92, relativement à l'organisation des tribunaux, contient la déclaration suivante :—

Under this power, the undersigned is of opinion, that the legislature of a province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts ; and may make such provision with respect to the bar, the management of criminal prosecutions by counsel, the selection of those Counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

A cette partie du mémoire le ministre des Colonies, Lord *Kimberley*, a fait la réponse suivante que l'on trouve dans sa dépêche du 1er février 1872 :—

I am further advised that the legislature of a province can confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel ; and with respect to precedence or pre-audience in the Courts of the province, the legislature of the province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor, as above explained.

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Le juge en chef, Sir *Wm. Young*, dans les motifs de son jugement sur cette cause, parlant de l'effet de cette correspondance sur les deux actes en question, s'exprime ainsi :—

Among the grounds taken in the rule it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments under them invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments and the Acts having gone into operation, this contention is quite untenable.

La décision de cette cause ne l'exigeant pas, je n'examinerai pas la question de savoir si la réponse de Lord *Kimberly*, faisant connaître l'opinion des officiers en loi, doit être considérée comme comportant en même temps un consentement suffisant de la part de Sa Majesté pour autoriser la législation qui s'en est suivie. Il me suffit de dire que je reconnais la sagesse de la règle qui fait présumer en faveur de la légalité des actes législatifs, et qui porte les tribunaux à n'examiner la question de leur validité que dans le cas seulement où la solution de la question soumise au tribunal l'exige impérieusement. La présente cause n'offre pas un de ces cas-là, et la règle à laquelle je viens de faire allusion doit ici recevoir son application. La question à décider ici est bien moins de savoir si les actes en question sont *ultra vires*, que de savoir si l'un d'eux, le ch. 21, peut avoir un effet rétroactif affectant les lettres patentes du 26 décembre 1872, accordées à l'Intimé. Il est en conséquence tout-à-fait inutile de s'occuper de la constitutionalité de ces deux actes, et on ne pourrait le faire dans la présente cause sans violer la règle mentionnée plus haut. Pour ce motif je m'abstiendrai de me prononcer sur la validité des actes attaqués, limitant mes observations à la question de rétroactivité soulevée par rapport au ch. 21.

La 2me section de ce chapitre est en ces termes :

Members of the bar from time to time appointed after the 1st

day of July 1867, to be Her Majesty's Counsel for the provinces, and members of the bar to whom from time to time patents of precedence are granted, shall severally have such precedence in such Courts as may be assigned to them by letters patent, which may be issued by the Lieutenant Governor under the Great Seal of the Province.

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Les Appelants prétendent que les termes de cette section donnent un pouvoir absolu au gouvernement provincial d'assigner aux C. R. qu'il nommera en vertu de cet acte, rang et préséance sur ceux nommés antérieurement par Sa Majesté ou son représentant. Cette interprétation est certainement erronée. Cette section est rédigée dans les termes dont on se sert pour donner effet aux lois pour l'avenir seulement. Elle ne contient pas une seule des expressions employées ordinairement pour leur donner un effet rétroactif. Admettre la rétroactivité de cette loi serait une violation de la règle générale d'interprétation suivante :

It is a general rule that all statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended.

Il serait inutile de citer ici d'autres autorités sur ce principe. Il me suffit de dire que je m'appuie aussi sur les nombreuses autorités citées dans la cause de *The Queen vs. Taylor*, (1) décidée par cette Cour, au sujet de l'effet rétroactif que l'on voulait donner à une section de l'acte qui constitue cette Cour.

Me fondant sur ces autorités je suis d'opinion que la section du chapitre 21, ci-dessus citée, n'a point d'effet rétroactif; que les lettres patentes donnant rang et préséance aux Appelants ne doivent pas avoir plus d'effet que l'acte lui-même, ni affecter en aucune manière la position de l'Intimé.

Je suis en conséquence d'avis que l'appel doit être renvoyé avec dépens.

(1) 1 Can. S. C. R. 65.

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HENRY, J. :—

This is an appeal from a decision of the Supreme Court of *Nova Scotia*, on an application sustained by affidavits of the Respondent, asserting a right of precedence as Queen's Counsel over the Appellant, he, the respondent, having been appointed by the Governor-General in Council, previous to the appointment as Queen's Counsel of the appellant by the Lieutenant Governor of *Nova Scotia* in Council, under an Act of the Legislature of Nova Scotia, passed subsequent to the appointment of the respondent, and by which precedence over the respondent was given to the appellant. The Court of *Nova Scotia*, while upholding the constitutionality of the Act, held that, while the right to regulate the matter of precedence generally appertained to the Local Legislature, it had not by the act exercised the power to the extent of giving precedence to Counsel appointed under it over those previously appointed by the Governor-General in Council, and that it consequently had no retrospective operation. I feel bound to dissent from that proposition.

The second section of chapter 21 provides that:

> Members of the Bar from time to time appointed after the first day of July, in the year of our Lord 1867, to be Her Majesty's Counsel for the Province, and members of the Bar, to whom from time to time patents of precedence are granted, shall severally have such precedence in such Courts as may be assigned to them by Letters Patent, which may be issued by the Lieutenant Governor under the Great Seal of the Province.

The retrospective operation is not only seen, but the limit of it is to be back to a certain date. How then can I conclude the Legislature did not mean what it so plainly says? This section in plain words *is* retrospective. It provides that all Queen's Counsel appointed *after the first day of July*, 1867, with those subsequently appointed shall have the precedence awarded them

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by the letters patent to be subsequently issued. Both classes are by the provision put upon the same footing, and an individual is to have precedence irrespective of any position he formerly held. If, indeed, the words were merely that Queen's Counsel thereafter should have the precedence awarded by the patents, for the issuing of which it provided, a question might then be fairly raised that it was not intended to be applied to previous appointments; but here the provision by unmistakable language includes all appointed since the date specially limited, and applies as forcibly to the respondent as to the appellant. The words "from time to time" in the section do not only authorize the interference with the patents issued since the date mentioned, but would, in my judgment, authorize the change "from time to time" of the precedence given by any patent previously issued under the same section. Having arrived at these conclusions, it becomes necessary to ascertain whether the Local Legislature had the power to pass an Act with such a provision.

In the argument before us it was contended, as it had been previously, that the Act of the Local Legislature was *ultra vires*; and that the patent of the appellant was not verified by the affixing thereto of the seal contemplated by the Act and was therefore void. In the view I take of the first objection it is unnecessary to refer to the second; and as, through the means of subsequent legislation, any doubts upon that question have been removed, I shall, passing it by, devote my consideration to the one first mentioned.

The Act in question was passed in 1874, and to decide the point raised it is necessary to ascertain the extent of the functions of the Provincial Legislatures and their right, if any, to deal with the matter of the appointment of Queen's Counsel, and to confer on the Lieutenant-Governor in Council the power of awarding

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precedence to Counsel in the Provincial Courts. No special reference is made to the subject in the *British North America Act*, or in the powers given by it to the Local Legislatures; and, unless included in and covered by the general provisions of sub-section 14 of section 92 for "the administration of justice in the Province," and "the constitution, maintenance and organization of Provincial Courts," it is difficult to discover whence the Local Legislatures derive any power over it.

The Local Legislatures are now simply the creatures of a statute, and under it alone have they any legislative powers. The Imperial Parliament by the Union Act prescribed and limited their jurisdiction; and, in doing so, has impliedly but virtually and effectually prohibited them from legislating on any other than the subjects comprised in the powers given by that Act. The right of the Imperial Parliament, when conferring legislative powers on the Local Legislatures, to limit the exercise of them cannot be questioned; and any local Act passed beyond the prescribed limit, being contrary to the terms of the Imperial Act, must necessarily be *ultra vires*.

That the right of granting Letters Patent of Precedence to barristers is personal to the Sovereign, is a proposition that has never been questioned, and there is no record of any parliamentary attempt to interfere with its exercise. *Chitty*, in his work on "Prerogative" (at page 116), says:—

> If a Peer be disturbed in his dignity, the regular course, says Lord *Holt*, is to petition the King, and the King endorses it and sends it into the Chancery or the House of Peers, for the Lords have no power to judge of Peerage unless it be given to them by the King.

At page 118:

> To the Crown belongs also the prerogative of raising practitioners in the Courts of Justice to a superior eminence by constituting them

Sergeants, &c., or *by granting* Letters Patent of Precedence to such barristers as His Majesty thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents.

At p. 107:

The Crown alone therefore can create and confer dignities and honors. The King is not only the fountain but the parent of them; nor can even an ordinance of the House of Lords confer Peerage.

The sovereign in *England* manifests his will by the issue of patents, but I can see no objection to the delegation, without any legislation, of the power to any immediate representative of the Crown to issue such patents within his territorial jurisdiction. The Imperial Parliament, by an Act assented to by the Sovereign, could, no doubt, otherwise provide for conferring dignities and for giving precedence to barristers in the Courts, and could specially authorize Colonial Legislation for that purpose; but, without that authority, I cannot discover, in the present constitution of the Local Legislatures, any power to deal with the subject.

A despatch of Lord *Kimberly*, Colonial Secretary, in 1872, addressed to the Governor General of *Canada*, has been referred to as giving sufficient authority to Local Legislatures; but I feel bound to except to the affirmative ruling on that point in one, at least, of the judgments of the Court in *Nova Scotia*. His lordship in that despatch, after negativing the power of a Lieutenant Governor since the union to appoint Queen's Counsel, says:—

I am further advised that the Legislature of a Province can confer by Statute on its Lieutenant Governor the power of such appointment, and, with respect to precedence and pre-audience in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor, as above explained.

This despatch makes no reference to the source of the power thus attributed to the Local Legislatures, or of

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the advice upon which such is alleged; and I am, therefore, unable to consider the grounds upon which the position is taken; and for which otherwise I have been unable to find any authority. Unless within the scope of the Imperial Act we find evidence of the power in question, from what other source could it be derived? It is contended that, without any legislative power to deal with this subject, the Act of the Local Legislature is not *ultra vires* because, first, it is in the terms of that despatch; and, secondly, it has been assented to by the Governor General representing the Sovereign. The Sovereign could, no doubt, under her royal sign manual, give the necessary power to a Governor, but the mere despatch of a Colonial Secretary cannot be held sufficient to transfer to any body the exercise of a purely prerogative right of the Sovereign, when merely suggesting the usurpation of that right by a subordinate, or, indeed, any Colonial legislature. If, as I have already shewn, the Local Legislative power is limited by the Imperial Parliamentary authority which created it, a statutory prohibition is thereby interposed to legislate beyond the prescribed subjects, and that prohibition is operative to make void any Act embraced within any subject matter of such prohibition. This doctrine is applicable independently of any question of conflict in legislation between the Dominion Parliament and the Local Legislatures. The power of the Imperial Parliament in the matter of the creation and distribution of the Colonial Legislative powers is supreme, and no Colonial Secretary has *ex officio* the right by a despatch, or otherwise, either to add to, alter, or restrain any of the legislative powers conferred by the Imperial Act in question, or, indeed, by any Act, or to authorize a subordinate legislature to do so.

The special assent of the Queen to the Local Act, providing for the issuing of patents of legal precedence

could not, in my opinion, validate it. The Local Legislatures have, as I have already stated, a prescribed and limited jurisdiction, and, if the subject in question is beyond their legislative limit, the mere sanction of the Queen could not validate the Act passed in reference to it.

But, as the Sovereign is the source of all honors and dignities, it is argued that the royal assent to the Act, however otherwise *ultra vires*, must be taken as a legislative declaration of the waiver and transference of the Sovereign's functions. Several difficulties, however, present themselves. The first is that by such a conclusion the Act of the Imperial Parliament would be extended, if not in part repealed. Second, if the Local Act be *ab initio* void, it cannot become law merely by the assent of the Sovereign. It might as well be claimed that an ordinance of a City or County Council of the same tenor, giving power to a Mayor or Reeve to appoint Queen's Counsel, if assented to by the Queen, would be valid? If the Imperial Statute has not given the necessary legislative power to the Local Legislatures, an Act of theirs would be of no higher value than a city ordinance such as I have stated. The argument of this question, however, is unavailable, for the Queen has not signified her assent to the Local Act in question. By the provisions of section 90 of the Imperial Act the Governor General, and not the Queen, assents to Local Acts made in his name as provided. The Lieutenant Governors are appointed not by the Queen, but by the Governor General in Council. It cannot, therefore, be successfully contended that the Queen has assented to the Local Act in question; nor can it be with greater success contended, that by assenting to it the Governor General had any power in doing so to interfere with the royal prerogative in question. It is not necessary to say what means directly used by the Sovereign would be

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operative to authorize the issuing of patents for the appointments in question. Some may be found, but it is only necessary at present to deal with the course which has been already taken.

Looking then at sub-section 14 of section 92 let us ascertain the ground it covers :—

> The administration of justice in the Province including the constitution, maintenance and organization of Provincial Courts, and including procedure in civil matters in those Courts.

The matter of the administration of justice, the constitution, maintenance and organization of Courts and procedure therein, has for centuries challenged and obtained parliamentary consideration in *England*, and statutes have been frequently passed to regulate them; but in none of them is found provision for the appointment of Queen's Counsel. The prerogative of the Sovereign has been universally and at all times admitted and exercised. Such being the case, how can we say that it was intended by the section in question, that the Imperial Statute should give to the Local Legislatures a power to regulate the appointment of Queen's Counsel, when Parliament itself, recognizing at all times the Royal Prerogative, exercised no such power. The legislative powers given by sub-section 14 are full and complete as far as they extend; and may be fully executed without including the right to provide for the appointment of Queen's Counsel.

Provisions for such appointments are not necessarily included in those for the administration of justice, or for the constitution, maintenance, or organization of Courts; and, as at the time of the passing of the Imperial Act, the Royal Prerogative in regard to them had never been questioned in *England*, we are bound to conclude, in the absence of express legislation, that its Parliament did not intend to interfere with its exercise, and did not intend to give to subordinate Legislatures a

power to deal with a subject which it had never itself exercised or contended for.

Independently of that construction, we have to be governed by the well settled doctrine that the Crown is not affected by legislation, unless specially referred to, and consequently that its fully admitted prerogative of regulating precedence at the Bar can only be affected, or taken away, by constitutional legislation in clear and express terms.

I entirely agree with a remark contained in one of the judgments of the Court in *Nova Scotia*, that it would be ridiculous, and an absurdity,

> That a scale of precedence should be adopted by the Lieutenant-Governor to-day to be over ruled by another framed in *Ottawa* to-morrow, and that reversed the next day by a fresh Gubernatorial Act in *Nova Scotia*.

But I cannot concur in the conclusion drawn that

> *Therefore* the Act confers on the Lieutenant-Governor the exclusive right of regulating the precedence of Counsel in this Province,—

for the best of all reasons, that, in my opinion, the local statute is *ultra vires*—gives no power to the Lieutenant-Governor to issue patents for such appointments —and therefore no such ridiculous or absurd condition of matters can arise or exist. The anomally and absurdity would appear only by the improper assumption of the right by which they would be created, and the suggestion of them is rather an argument against the right claimed for the Local Legislature.

The preamble to the Local Act in question is as peculiar as illogical. It recites that

> Whereas the regulation of the bar in *Nova Scotia* is vested in the Provincial Legislature, it is expedient for the orderly conduct of business before the Provincial Courts that provision be made for the order of precedence of the members of such bar in such Courts.

It rests the right to legislate in respect to precedence upon the properly alleged right to legislate in respect

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to the bar generally, but the latter right, being limited short of the matter of precedence, cannot in its exercise affect that subject. It might have been considered *expedient* to deal with the matter of the appointment of Queen's Counsel, but that consideration has little value in determining the matter of legislative jurisdiction.

In *England*, the sovereign, as a general rule, uses the prerogative to confer honors and dignities upon eminent and deserving barristers, noted for the exhibition of superior legal talents and abilities and public services. The object of the Local Act in question, as the preamble exhibits, is not only very different, but novel.

On behalf of the appellant an objection was taken which demands notice. It is that the only mode of attacking the patent issued to him was by *scire facias*. Had the proceeding been to vacate or repeal a patent of the Crown, valid until set aside, the objection would have been good, but it does not require any such proceeding in a case where the fact of a valid patent having been issued is negatived, as it is in this case by an adjudication that the patent was *ab initio void*. It does not require a procedure by *scire facias* to avoid the consequences of an unauthorized patent. A *scire facias* admits the validity of a patent. A Court is asked, for reasons shown, to vacate or repeal it, in the same way as an action for divorce must be shown to be based upon a legal marriage. And, in an action for infringing a patent, a plea denying that it was issued would put in issue the validity of it.

The position of the respondent, as given by the patent under the Great Seal of *Canada*, when issued, was not only unassailed, but admitted at the arguments, and, as to it, I am not, therefore, called upon to express an opinion; and, as in my opinion, the subsequent local Act is *ultra vires*, I can come to no other conclusion than one in favour of the precedence

acquired by the respondent under his patent. His application to the Court below was for the judgment of that Court in favoring and ordaining it, and the Court having so decreed, although on other and different grounds, I think, for the reasons I have stated, their judgment should be affirmed, and the appeal therefrom dismissed.

TASCHEREAU, J. :—

I am also of opinion that the judgment appealed from should be confirmed.

I have come to this conclusion upon the ground taken by four of the learned Judges of the Court appealed from, that the second section of c. 21st, 37 Vic., of *Nova Scotia*, has not a retrospective effect. It can be construed as to have a prospective operation only, and must be so construed, upon the universally admitted rule that Courts of Justice will give all statutes a prospective operation only, unless their language is so clear as not to be susceptible of any other construction.

But I go further than the learned Judges, and I say that, if by this statute 37 Vic., c. 21, entitled "An Act to regulate the Precedence of the Bar in *Nova Scotia*," it was intended to invest the Lieutenant-Governor with the power of superseding the nominations of Queen's Counsel made by Her Majesty at *Ottawa* or in *England*, and consequently with the power of setting at naught Her Majesty's prerogatives in the Province of *Nova Scotia*, as regards Queen's Counsel and patents of precedence at the Bar, then the Act is *ultra vires* and unconstitutional.

Though, with the view I take of the non-retroactivity of this c. 21, 37th Vic., it is not absolutely necessary for the solution of this case that I should consider the constitutional questions raised therein, yet, as they appear on the face of the record to form an important part

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of the issue between the parties, and have not only been considered by the learned Judges of the Court appealed from, but also have been fully and ably argued before us at the hearing, I feel that I cannot, by deciding the case on minor issues, rid myself of the responsibility of considering these grave and important questions, the determination of which this Court has been more specially created for.

It is perhaps better that I should first consider the statute authorizing the appointment by the Lieutenant-Governor of Queen's Counsel in *Nova Scotia*, 37 *Vic.* c. 20, as one of the respondent's contentions is that the appellants are not Queen's Counsel at all, and that the said chapter 20, under which they claim to have been named as such by the Lieutenant Governor, as well as chapter 21, under which the Lieutenant-Governor has assumed to give them precedence over the respondent, is *ultra vires* and inoperative.

This chapter 20 is in the following terms:—

Whereas the Lieutenant-Governor of right ought to have the power to appoint, from among the members of the Bar of *Nova Scotia*, Provincial Officers who may assist in the conduct of all matters on behalf of the Crown, under the name of Her Majesty's Counsel learned in the Law for such Province; and, whereas doubts have been cast on the power of the Lieutenant-Governor to make such appointments; Be it therefore declared and enacted, by the Governor, Council and Assembly as follows:—It was and is lawful for the Lieutenant-Governor, by Letters Patent under the Great Seal of *Nova Scotia*, to appoint, from among the members of the Bar of *Nova Scotia*, such persons as he may deem right to be, during pleasure, Provincial Officers, under the name of Her Majesty's Counsel learned in the law for the Province of *Nova Scotia*.

Now, does this statute authorize the Lieutenant-Governor of *Nova Scotia* to confer the honour and dignity known as Queen's Counsel, the dignity which Her Majesty has, by one of Her prerogatives, the right to confer? I do not think so, and I will state why hereafter, but, if such was the intention of the Legislature,

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if this statute is taken as vesting the Lieutenant-Governor with Her Majesty's prerogative rights of appointing such Queen's Counsel, I hold, then, that it is *ultra vires* and an absolute nullity.

It is trite to say that the Sovereign is the fountain of honors and dignities. "The Crown alone," says *Chitty*, "can create and confer dignities and honours. The King is not only the fountain but the parent of them." (1). It must also be admitted that, in the exercise of that prerogative, the Crown has the right to appoint King's or Queen's Counsel, and to grant Letters of Precedence to members of the Bar. "To the Crown belongs also the prerogative of raising practitioners in the Courts of justice to a superior eminence, by constituting them sergeants &c., &c., or by granting Letters Patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective Patents" (2). And I may here add that these prerogative rights are rights inherent in the person of the Sovereign himself, which he alone, and without advice or consent, may exercise how and when he pleases. I need hardly add that the Sovereign has this prerogative of conferring honours and dignities over the whole of the British Empire, and that, by the *British North America Act*, the Crown has not renounced or abdicated this prerogative over the Dominion of *Canada*, or any part thereof.

I will now proceed to state the grounds upon which I have come to the conclusion that this statute is *ultra vires*, if the Legislature intended thereby to give to the Lieutenant-Governor the power of appointing Queen's Counsel; I mean here, of course, the rank and honour known under this name throughout the British Empire. I will consider afterwards the appointment of

(1) Chitty on prerogatives, 107. (2) Chitty on prerogatives, 118.

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the *Provincial officers* created by this statute in *Nova Scotia* under the same name.

It is now conceded, I believe, though the *Nova Scotia* Legislature seems to have been of a contrary opinion, that the Lieutenant-Governor of *Nova Scotia* had not, before the statute now under consideration, any such power. Indeed, there is not a single clause, a single word of the *British North America Act* upon which it can be seriously contended that the Lieutenant-Governors are vested with Her Majesty's prerogative rights of conferring such honours and dignities. It cannot be under section 65 of the Act, which defines the powers of the Lieutenant-Governors. The purport of this sec- (which applies only to *Quebec* and *Ontario*) is to give them the powers previously vested in the Governors, or Lieutenant-Governors, under any *Act of the Imperial Parliament*, or any *Act of Upper Canada, Lower Canada, or Canada*, and the dignity of Queen's Counsel does not exist in virtue of any such Act or Acts. It cannot be under section 58. This section merely enacts that

> For each Province, there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

In fact nowhere in the Act, can a single expression be found to sustain the contention that the Lieutenant-Governor has such a power. Well, if he has not this power in virtue of the *British North America Act*, how can the Provincial Legislature give it to him? In which clause of the Act can it be found that these Legislatures have such a right? Which part of section 92, where the subjects left under their control and authority are enumerated, gives them the power to legislate upon Her Majesty's prerogatives? There is a clause, it is true, giving them exclusive authority over the administration of justice, but, surely, the creation and appointment of Queen's Counsel has never been consid-

ered as a part of the administration of justice. They have the power to legislate on the Bar and its regulations, but the rank of Queen's Counsel, either here or in *England*, does not derive and never derived its origin from the Bar, or from the statutes incorporating the Bar, or defining its power and privileges and concerning it. The Legislatures of the different Provinces, before the Union, had also full power and authority over the administration of justice and the regulation of the Bar, in their respective Provinces, yet, I am not aware that they ever claimed the right to appoint Queen's Counsel. Then, under the rule that Her Majesty is bound by no statute, unless specially named therein, and that any statute which would divest or abridge the Sovereign of his prerogatives, in the slightest degree, does not extend to or bind the King, unless there be express words to that effect (1), even if the power of creating Queen's Counsel could ever have been interpreted to be included in the power over the administration of justice, it remains in Her Majesty, and in Her Majesty alone, as the Imperial statute does not specially give it to the Legislatures. The Legislatures have no more the right to authorize the Lieutenant-Governors to appoint Queen's Counsel in Her Majesty's name, than to appoint them themselves, or authorize any one else in the Provinces to do so. Yet, to contend that they have the right to so authorize their Lieutenant-Governors is to contend, not only that they can themselves make such appointments, but also that they can authorize any one else in the Province to do so. One is the consequence of the other. If they have it for the Lieutenant-Governor, they have it for any one else. To grant to these Legislatures the exercise of Her Majesty's prerogatives, or the power to give to any one the exercise of these prerogatives, it would require, in my opinion, a very clear enactment,

(1) Chitty on prerogatives, 383.

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and I cannot find it in the *British North America Act.* The appellant's contention, forsooth, is that the Provincial Legislatures have, under Confederation, more extensive powers, in the matter, than the Legislatures in the different parts of what is now *Canada* had before the Union. This proposition seems to me quite untenable.

But, said the appellants, Her Majesty has assented to this Act of the *Nova Scotia* Legislature. This, in my opinion, is a grevious error. Her Majesty does not form a constituent part of the Provincial Legislatures, and the Lieutenant-Governors do not sanction their bills in Her Majesty's name. The sections of the *British North America Act* on the respective constitutions of the Federal Parliament and of the Provincial Legislatures are now so well known that I need not here cite them. But I may perhaps refer to the sections concerning the sanction of the bills. As to the Federal Parliament, section 55 enacts that:

> Where a bill passed by the Houses of Parliament is presented to the *Governor General* for the *Queen's* assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to *Her Majesty's* instructions, either that he assents thereto in the *Queen's* name, or that he withholds the *Queen's* assent, or that he reserves the bill for the signification of the *Queen's* pleasure.

Now, by section 90 of the Act, this section 55, as regards the Provincial Legislatures, is to be read as follows:

> Where a bill passed by the Provincial Legislatures is presented to the *Lieutenant-Governor* for the *Governor-General's* assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to the *Governor-General's* instructions, either that he assents thereto in the *Governor-General's* name, or that he withholds the *Governor-General's* assent, or that he reserves the bill for the signification of the *Governor-General's* pleasure.

And section 56, for the Provinces, must be read as follows:

Where the *Lieutenant-Governor* assents to a bill in the *Governor-General's* name, he shall by the first convenient opportunity send an authentic copy of the Act to the *Governor-General*, and if the *Governor General in Council* within *one* year after receipt thereof by the *Governor-General* thinks fit to disallow the Act, such disallowance (with a certificate of the *Governor-General* of the day on which the Act was received by him) being signified by the *Lieutenant Governor* by speech or message to each of the Houses of the Legislature or by proclamation, shall annul the Act from and after the day of such signification.

I really do not see on what the appellants can rely to support the contention that Her Majesty has sanctioned the Act now under consideration. It seems to me that the theory that the Queen is bound by certain statutes because she is a party thereto can have no application whatever to the Provincial statutes. In the Federal Parliament, the laws are enacted by the Queen, by and with the advice and consent of the Senate and the House of Commons. Not so in the Provinces. Their laws are enacted by the Lieutenant Governors and the Legislatures. The Governor General is apppointed under the Royal Sign-Manual and Signet; the Lieutenant Governors are not even named by the Governor General, but by the Governor General in Council. They are officers of the Dominion Government. Their office, as the heads of the Provinces, is a very high and a very honourable one indeed, but they are not Her Majesty's representatives, at least *quo ad* the matter now under consideration, and so as to bind Her Majesty in any matter not left exclusively under the Provincial control by the *British North America Act.* I mean that, admitting the theory that the Provincial laws must be held to be enacted in Her Majesty's name, and I need not consider how far this may be admissible, *this can be so only when such laws are strictly within the powers conceded to the Provincial Legislatures by the Imperial Act.* When they go beyond the limits assigned to them, they act without jurisdiction. Her Majesty's authorization

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to make laws in Her name, which, according to this theory, she has given to them by the Imperial Act, can apply only to the laws passed within the limits assigned to them by the Act. They cannot avail themselves of that authorization to make laws outside of these limits.

The appellants further contend that, though it may be that the Lieutenant-Governor's sanction is not Her Majesty's sanction, the Act in question, not having been vetoed by the Governor-General, under the clause I have just cited, this is equivalent to a sanction of the Act by Her Majesty.

Well, in the first place, the power of veto is given to the *Governor-General in Council*, not to the Governor General himself. And it cannot be contended that the *Governor-General in Council* is the Queen or the representative of the Queen, or that the *Governor-General in Council* exercises the prerogatives of the Queen, or can give, directly or indirectly, to any person or public body the right to exercise such prerogatives. (Of course, I speak here only of the power to grant dignities and honours.) The Governor-General, alone, exercises the prerogatives of the Queen in Her name in all the cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself. So that it is impossible to say that Her Majesty is bound by a Provincial statute, because it has not been vetoed at *Ottawa* by the *Governor-General in Council*. It is well known that Provincial statutes cannot be disallowed in *England*, and that they are not transmitted to the Imperial authority, under the *British North America Act*, as the Federal statutes are.

In the second place, a Provincial statute, passed on a matter over which the Legislature has no authority or control, under the *British North America Act*, is a complete nullity, a nullity of *non esse*. *Defectus potestatis*,

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nullitas nullitatum. No power can give it vitality. Still less can it get vitality from the mere non-vetoing of the superior authority. In fact, the veto, in such a case, does not add to its nullity. It records it; it gives notice of it, but it cannot avoid what does not exist. *Quod nullum est ipso jure, rescindi non potest.* The Legislatures have the power conceded to them by the *British North America Act*, and no others. And no one, no authority (except the Imperial Parliament, of course) either impliedly or expressly can add to these powers, and give to these Legislatures a right or rights which they do not have by the *Imperial Act*. If they pass an Act *ultra vires*, this Act is null, whether it is vetoed at *Ottawa* or not. Still less can it be pretended, as it seems to have been in this case, indirectly at least, that the Imperial Secretary of State for the Colonies could add to the power of the Provincial Legislatures, or, which is equivalent to it, that the statute now under consideration is valid and legal because it has been approved of or authorized in *England* by a Secretary of State, or the Colonial Office, or because a high officer of state has given his opinion that the Provincial Legislatures had the power to pass such a statute. An interpretation of the law in a despatch from *Downing Street* is not binding on this, or any Court of Justice, and is not given as such. And the despatch referred to by the appellants does not purport to authorize the Provincial Legislatures to pass a statute appointing Queen's Counsel. It merely gives an opinion that they may do so in virtue of the *British North America Act*. How could any officer, either here or in *England*, give to the Provincial Legislatures other powers than those they have by the *Imperial Act*, or authorize the Lieutenant-Governors or any one else to appoint Queen's Counsel in Her Majesty's name, or give

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to the Provincial Legislatures the right to so authorize their Lieutenant-Governors.

So far, I have considered this *Nova Scotia* statute, 37 Vic., c. 20, as if the Provincial Legislature had purported thereby to vest the Lieutenant-Governor with one of Her Majesty's prerogatives, and to authorize the appointment by him of Queen's Counsel as such are usually named by Her Majesty, or by the Governor-General in her name; and I hold, that if such is the power which the legislature intended to assume, this Act is *ultra vires* and null.

But, as I have already mentioned, the Legislature of *Nova Scotia*, it seems to me, did not, by that Act, assume that power, and they have not thereby legislated on this dignity and honour of Queen's Counsel. They have merely appointed *provincial officers* connected with the administration of justice. They have guardedly stated in the preamble that it is *Provincial officers* that, in their opinion, the Lieutenant-Governor ought to have the right to appoint. And in the enacting clause, they simply authorize the Lieutenant-Governor to appoint *Provincial officers*. Now, no one can deny them their right to this legislation. These *Provincial officers*, it is true, are to be known under the name of Her Majesty's Counsel learned in the law for the Province of *Nova Scotia*. But that does not make them of the rank and dignity of that name grantable by Her Majesty, and the statute does not pretend to make them so. It is a new Provincial office under the name that has been created in *Nova Scotia*, and nothing more. The Legislature had, in my opinion, full power and authority to do so. They can create Provincial offices for the administration of justice and call their officers by any name they choose. They can be Provincial officers known as *Nova Scotia* Queen's Counsel just as well as there can be Pro-

vincial officers known as *Quebec* Knights, *Ontario* Baronets, or *Manitoba* Lords. No one, probably, would have the least objection (at all events, it is not the objection raised in this case) to such Provincial titles being taken in the Province by such Provincial officers as would be authorized to do so by the respective Provincial Legislatures, no more than there is any legal objection, in this case at least, to the Provincial officers named in *Nova Scotia* under the statute in question taking the name of Queen's Counsel, so long as it is not in Dominion Courts, nor anywhere else out of *Nova Scotia*, and only as members of a Provincial officer or order that they lay claim to it, and without assuming to be of the rank of Queen's Counsel, known under that name in the Empire. And this may explain satisfactorily why this Act was not vetoed at *Ottawa*. It may have been considered as creating a Provincial office only, and so not affecting Her Majesty's prerogatives. The Act so taken being constitutional, the Federal authority had no reason for interfering and allowed the law to stand.

But the appellants read the Letters Patent naming them, issued under that law, as creating them of the same rank and dignity as the respondent, who has been appointed a Queen's Counsel by Her Majesty through the Governor-General in 1872. That is an error. If they read the statutes, they will see that, though they are called by the same name, it is only a new order or office which was created thereby; and a reference to their Letters Patent will convince them that it is merely of this order or new office that they have been appointed officers: "Now know that we have appointed and do hereby appoint" Messrs. *Lenoir* and *Haliburton* "to be during pleasure—*Provincial Officers*," say their Letters Patent. Evidently, these words "Provincial Officers" in the statute and in these Letters Patent have been inserted purposely, because the legis-

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lator was not prepared to openly and frankly assert his rights to legislate on one of the Queen's prerogatives, and he felt himself that his powers to do so were very doubtful.

I say, then, that the appellants are not Queen's Counsel at all in the sense attached to this name in, for instance, the respondent's commission, and that, for this reason, independently of the reason I gave in the first instance, their appeal, in my opinion, should be dismissed.

Now, as to the other statute, the 31st Vic. c. 21, regulating the precedence of the Bar in *Nova Scotia*, little remains for me to say. Applying to it the principles which I have enunciated, and which must also govern it, I hold that though it may be legal in the enactment regulating the precedence of the Provincial officers named under the preceding statute between themselves, it is *ultra vires* and unconstitutional in so much as it purports to regulate the precedence between Queen's Counsel named by Her Majesty herself, or by the Governor-General in Her name, and in so much as it purports to give to other members of the Bar precedence over such Queen's Counsel. The Provincial Legislatures cannot, directly or indirectly, interfere with Her Majesty's prerogatives, or with Her acts done in the exercise of these prerogatives. As remarked by one of the learned judges in the Court below, it would be absurd if a scale of precedence could be adopted by the Lieutenant-Governor to-day, to be overruled by another framed at *Ottawa* to-morrow, and that reversed the next day by a fresh gubernatorial action in *Nova Scotia*. The learned judge is of opinion that to prevent such absurd consequences, it must be held that the Lieutenant-Governor has the exclusive right of regulating the precedence of counsel in the Province. This, I hold, *cannot be done*. Her Majesty's prerogative rights over the Dominion of *Canada*, as the fountain of honours,

have not, in the least degree, been impaired or lessened by the *British North America Act*, and Her Majesty, as heretofore, either directly from *England*, or through the Governor-General from *Ottawa*, has the right to appoint Queen's Counsel and regulate the precedence at the bar (1). This the appellants do not deny, but they claim that the Lieutenant-Governor has a concurrent power to exercise the same right in Her Majesty's name. Well, I repeat it, I cannot see that he has that power by the *Imperial Act*, and still less that the Provincial Legislature could invest him with it, and authorize him to so use Her Majesty's name. The confusion of powers and conflict of authority which would inevitably ensue if this right could be exercised in the Province as at *Ottawa* or in *England* cannot have been intended by the Imperial Act.

The Provincial Legislatures have the right to regulate the Bar, but they cannot, by any legislation, either directly or indirectly, limit or lessen Her Majesty's rights or render them inoperative. They cannot, in any degree, lessen or take from the ranks and dignities which it pleases Her Majesty to establish and confer. It would be a singular state of things, indeed, if a Queen's Counsel appointed by Letters Patent in *England* or *Ottawa* by Her Majesty could be the next day superseded in his rank by the Lieutenant-Governor, and put at the foot of the Bar by the issue of new letters of precedence. Yet, such is the appellants' contention, or, at least, where their contention leads to.

Mr. *Ritchie*, the respondent, was duly appointed a Queen's Counsel on the twenty-sixth day of December, 1872, by Letters Patent from *Ottawa*, under the Great Seal of *Canada*. On the twenty-seventh day of May, 1876, Letters Patent were issued, under the two Statutes, chs. 20 and 21, to which I have referred, by the Lieutenant-Gov-

(1) Chitty on Prerogatives, 32, 33.

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ernor of *Nova Scotia*, purporting to name the appellants Queen's Counsel, and to give them precedence over Mr. *Ritchie*. The prothonotary of the Supreme Court of *Nova Scotia*, subsequently, in making up the dockets, &c., gave the appellants precedence over Mr. *Ritchie*. Of this Mr. Ritchie complained to the said Court, and obtained a rule *nisi* to confirm the precedence given to him by his Letters Patent of 1872, and to direct that he should have precedence in Court over the appellants. The Court granted his demand, and made the said rule absolute in the following terms:—

> It is ordered that the rank and precedence granted to the said *Joseph Norman Ritchie* by his Letters Patent of 26th December, 1872, be confirmed, and that he have rank and precedence in this Court over all Queen's Counsel appointed in and for the Province of *Nova Scotia* since the said 26th day of December, A. D., 1872.

From this judgment and rule the appellants have brought the present appeal to this Court. I am of opinion their appeal should be dismissed with costs.

GWYNNE, J.:—

The respondent has raised three points of objection to the present appeal:

1st. He contends, that the order of the Supreme Court of *Nova Scotia* against which this appeal is brought is not one from which an appeal lies within the meaning of the statute constituting this Court; but that order is undoubtedly a final disposition of the matter relating to which it is made, and, if the contention of the appellants be well founded, materially impairs the legal rights of the appellants, and does, therefore, clearly, as it appears to me, constitute appealable matter.

2nd. He contends, that the Letters Patent by which the appellants were purported to be made Queen's Counsel were not under the Great Seal of the Province as they professed to be. It was admittted on the argument, that we have been relieved by an Act of the Do-

minion Parliament, 40 Vic., c. 4, from the necessity of determining this point, and of entering into the interesting heraldic research which it seemed to open: from this necessity, however, in the view which I take, we should have been relieved independently of that Act.

And 3rd, which is the sole objection on the merits, he contends that the appointment of Queen's Counsel is *ultra vires* of the Provincial Executive, and that the Act of the Legislature of *Nova Scotia*, 37 Vic., c. 20, (in virtue of which the appointment of the appellants is, by the Letters Patent under which they claim, professed to be made,) is *ultra vires* of the Provincial Legislature. This latter point the Supreme Court of *Nova Scotia*, while deciding in favor of the respondent upon other grounds, pronounced to be quite untenable, but, with great deference to the learned Judges of that Court, it seems to raise a very grave constitutional question.

It was not disputed, as indeed it could not be, that the right to appoint Queen's Counsel is a branch of the Royal Prerogative, that it, (equally with the power to grant Letter Patent of Precedence, to make Sergeants-at-law, Judges, Knights, Baronets, and other superior titles of dignity and honour) flows from the fountain of honour which has its seat and source in the person of royalty. In *England*, in point of form, a Queen's Counsel is the standing Counsel of the Queen, retained by her to be of her Counsel in all matters in which she may require his services. Substantially, the title is one of honour and professional rank, conferring precedence upon the person invested with the honour. Though, in point of fact, the recipients of this honour are nominated and selected by the Chancellor for the time being, yet, in point of form, the Queen's pleasure is taken upon their appointment.

In the Colonies the appointments were made sometimes, I believe, under the Royal Sign Manual, but

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more usually by Letters Patent under the Great Seal of the particular Province of whose Bar the recipient is a member, signed by Her Majesty's representative within the Province in virtue of the authority vested in him by his commission appointing him Her Majesty's representative, and in pursuance of royal instructions from time to time given to him, governing him in the execution of the powers vested in him in respect of matters in which the Royal Prerogative is concerned.

An Act of Parliament passed by the old Legislatures of the respective Provinces which now constitute the confederated Provinces of the Dominion of *Canada*, under the constitutions which they had before confederation, of which Legislatures Her Majesty was an integral part, as she is of the Imperial Parliament, upon being assented to by the Crown, was competent to divest Her Majesty of the right to exercise within the Province any portion of Her Royal Prerogative; but, at the time of the dissolution of those old Provincial constitutions, upon the passing of the *B. N. A. Act*, and of the creation of the new constitutions under which those Provinces were made members of the confederation now existing, there had been no Act passed detaching the right to appoint Queen's Counsel from the Royal Prerogative, or in any manner impairing or affecting Her Majesty's exclusive right to appoint them. The questions, therefore, which now arise are: Has the *B. N. A. Act* invested the Lieut-Governors of the respective Provinces constituting the confederation with the right and power to exercise this branch of the Royal Prerogative? or has it invested the Legislatures of those Provinces with any control over it? For, if Her Majesty is not, by that Act of Parliament, divested of this her prerogative right, it must follow from the nature of the new constitutions which that Act confers upon the several Provinces, that no Act of any of the Provincial Legisla-

tures thereby constituted can in any manner divest Her Majesty of this or any other branch of her prerogative, or impair or affect her exclusive right to the exercise of it.

It is a well established rule that the Crown cannot be divested of its prerogative even by an Act of Parliament passed by Queen, Lords and Commons, unless by express words or necessary implication. The presumption is that Parliament does not intend to deprive the Crown of any prerogative right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.

Now, when we consider the object of the *B. N. A. Act*, the first thing which occurs to us is, that from anything appearing in it, there does not seem to be any reason or necessity for stripping the Crown of its prerogative in respect of the particular matter in question, for the purpose of placing it under the control of the subordinate Executive or Legislative authorities of the respective Provinces which the Act brings into existence. The particular right in question cannot consistently be vested in the Crown, and also at the same time in either the Executive or the Legislative authorities of the respective Provinces. To be invested in either of the latter, it must be absolutely separated from the prerogative, for if Her Majesty should still retain the power to appoint Queen's Counsel, or to grant Letters Patent of Precedence, she must retain it in virtue of that prerogative in virtue of which she orginally held it. It would be quite anomalous, and unwarranted by anything in the British constitution of an analogous character, and it would be quite derogatory to the royal dignity, that this power to confer rank and precedence, which, by the constitution, Her Majesty possessed in right of her prerogative, should be shared by her with any subordinate person or authority.

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If either authority should have power at pleasure to make appointments superseding those made by the other, the right to confer rank and precedence would in fact rest with neither. In order, therefore, to vest the power in the subordinate, Her Majest must, *quoad* the power, be divested of Her prerogative. Now, does the *B. N. A. Act*, in express terms or by irresistible inference, divest Her Majesty of this branch of Her prerogative?

By this Act, which is the sole Constitutional Charter of the Dominion of *Canada* and of the respective Provinces constituting the confederation, Her Majesty expressly retains all Her Imperial rights, as the sole and supreme executive authority of the Dominion, and her position as an integral part of the Dominion Parliament. The Dominion of *Canada* is constituted a *quasi* imperial power, in which Her Majesty retains all her executive and legislative authority in all matters not placed under the executive control of the provincial authorities, in the same manner as she does in the *British Isles*; while the Provincial Governments are, as it were, carved out of, and subordinated to, the Dominion. The head of their executive Government is not an officer appointed by Her Majesty, or holding any commission from her, or in any manner personally representing her, but an officer of the Dominion Government, appointed by the Governor-General, acting under the advice of a council, which the act constitutes the Privy Council of the Dominion. The Queen forms no part of the Provincial Legislatures, as she does of the Dominion Parliament. The Provincial Legislatures consist in some Provinces of such subordinate executive officer and of a Legislative Assembly, and in others of such executive officer and of a Legislative Council and Assembly.

The use of Her Majesty's name by these Provincial authorities is by the act confined to the summoning and

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calling together the Legislatures; and, singular as it seems, this is, by the 82nd section, rather by accident, I apprehend, than design, confined to the Lieutenant-Governors of *Ontario* and *Quebec*.

By the 91st section it is declared that the acts of the Dominion Parliament shall be made by the Queen, by and with the advice and consent of the Senate and House of Commons, treating the Queen herself as an integral part of the Parliament, while the 92 section enacts that the "Legislatures" of the respective Provinces, that is to say, the Lieutenant-Governor and the Legislative Assembly in Provinces, having but one House, and the Lieutenant-Governor and the Legislative Council and Assembly in Provinces having two houses, shall make laws in relation to matters coming within certain enumerated classes of subjects, to which their jurisdiction is limited. Nothing can be plainer, as it seems to me, than that the several Provinces are subordinated to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures, and that no act of any of such Legislatures can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers, which she continues to enjoy untramelled, except in so far as we are obliged to hold that, by the express terms of the *B. N. A. Act*, or by irresistible inference from what is there expressed, she has, by that act, consented to being divested of any part of such prerogative.

It is contended, that the 92nd sec., sub-sec. 14, involves such consent. That sub-section places under the exclusive control of the Provincial Legislatures

> The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.

But, applying the well established rule as to the con-

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struction of statutes, namely: that the Crown cannot be divested of its prerogative by statute, unless by express words or necessary implication, it appears to me to be very clear that nothing in this section can have the effect contended for; for Queen's Counsel have never been, nor can they be, regarded as a necessary element in the constitution and organization of Courts either of civil or criminal jurisdiction. Those Courts, in fact, were constituted and in perfect organization before ever the title or rank of Queen's Counsel was created, and they could still be conducted in full and perfect efficiency though that rank should never have been conferred. They are not in any sense officers of the Courts, nor Provincial officers. In the whole course of Imperial and Provincial Legislation, although Courts of Justice have been constituted by Act of Parliament, never has provision been made for the appointment of Queen's Counsel as part of the constitution and organization of such Courts, nor has it ever been suggested, I venture to say, until now that they form a part of such organization. The power to create this rank or order having, by the constitution, existed always in virtue of the Royal Prerogative right to create titles of dignity and honor, the transfer of such branch of the prerogative from the Crown to the Provincial Legislatures could only be effected by language expressed in the most explicit terms. By the 96th sec. of the Act, the power of appointing Judges, who do form a most essential element in the constitution of Courts for the administration of justice, is transferred—not however to the Provincial, but to the Dominion Government. As to the appointment of Queen's Counsel, nothing is said, nor is there any subject placed under the exclusive control of the Provincial Executive or Legislative authorities which, by the most forced construction, can, in my opinion, be said *necessarily* to involve the right to ap-

point Queen's Counsel. The result must therefore be, that the right still continues to form, as it ever has formed, part of the Royal Prerogative vested in Her Majesty (who still retains her Supreme Executive authority over the Dominion of *Canada* equally as over the British Isles), to be exercised by her at her pleasure, either under her sign manual, or through the high officer, the Governor General of the Dominion, who alone within these confederate Provinces fills the position of Her Majesty's representative.

The Provincial statute, in virtue of which the Letters Patent appointing the appellants are professed to be issued, recites, that the Lieutenant-Governor *of right ought to* have the power of appointment. I fail to see, however, by *what right* that officer, who is not by the constitution Her Majesty's representative, *ought* to have the power to confer this title of honour in preference to Her Majesty herself, and to her representative the Governor-General of the Dominion. I presume it will not be contended, that greater discretion in conferring the rank upon the most worthy would be thus secured. The Imperial Parliament, however, is the only power which can vest the right in the Provincial Executive, and, if it has not done so, no other power, not even the Provincial Legislature, is competent to say that *of right* the power *ought to* be vested in it.

There are other considerations also which appear to shew the inconvenience of vesting such a right in the Provincial authorities. If vested in them, it might with much force be asked, what right could their Letters Patent confer to entitle the recipient to recognition in this Court, or in any other Dominion Court, as for example, the Maritime Courts, or an Insolvent Court, if such should be established? while Her Majesty's appointment can confer the like rank in all those Courts,

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as well as in her Provincial Courts, and as well out of those Courts as within their precincts.

Then, again, by an old law of the Province of *Upper Canada* it was enacted, that it should no longer be necessary that commissions should be issued for holding Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, but that if they,should issue, they should contain the names of the Chief Justices and Judges of the Superior Courts of Common Law, and that they might also contain the names of any of the Judges of the County Courts and of any of Her Majesty's Counsel learned in the law of the *Upper Canada* Bar, one of whom shall preside in the absence of the Chief Justices and of all the other Judges of the said Superior Courts, and that,if no such commissions should be issued, the said Courts should be presided over by one of the Chief Justices or of the Judges of the said Superior Courts, or ,in their absence, then by some one Judge of a County Court, *or by some one of Her Majesty's Counsel learned in the law of the Upper Canada Bar*, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of such Superior Courts to attend for that purpose. Now if, by any chance, a gentleman, claiming to hold the rank of a Queen's Counsel in virtue of Letters Patent signed by the Lieutenant-Governor, should preside at a Court of Oyer and Terminer upon the trial of an important criminal case, and the validity of the trial should be called in question, upon the ground that the gentleman presiding was not qualified to sit as a Judge, not having any commission from the Dominion Government, conferring upon him the rank of "Judge," and not having any appointment from Her Majesty conferring upon him the rank of "Queen's Counsel," a very embarrassing question might arise, and the ends of justice might be frustrated. Convenience, therefore, as well as the observance of uniformity in the exercise of the power, would seem to concur

with other considerations in pointing to the propriety of this branch of the Royal Prerogative being maintained, as of old, inseparably annexed to that prerogative, and to be exercised at the sole discretion of Her Majesty, through her sole representative in the Dominion, His Excellency the Governor-General.

The Provincial Act which contains the above recital proceeds to *declare and enact* that it was and is lawful for the Lieutenant-Governor, by Letters Patent, under the Great Seal of the Province of *Nova Scotia*, to appoint from among the members of the Bar of *Nova Scotia* such persons as he may deem right to be during pleasure Provincial officers, under the name of Her Majesty's Counsel learned in the law for the Province of *Nova Scotia*.

Now, if "it has been and is lawful" for the Lieutenant-Governor to make Queen's Counsel, it can only be so by the provisions of the *B. N. A. Act*. If that act does confer the power upon the Provincial Executive, no doubt the Lieutenant-Governor has it, and a Provincial Act can add no force to the Imperial Act; but if the Imperial Act does not confer the power then the Lieutenant-Governor has it not, nor can any act of the Provincial Legislature effectually declare that he has, or by enactment pointing to the future confer it upon him.

The futility of a declaratory Act, passed by a subordinate Legislature, for the purpose of authoritatively defining the intention entertained by the supreme Parliament in the act which gives to the subordinate its existence, and professing to put a construction upon a doubtful point in the act as to the powers conferred upon the subordinate, is too apparent to need comment. The office of a declaratory act is of a nature which requires that it should be passed only by the power which passed the act, the intention of which is professed to be declared. And as to an act, providing for the

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future for the extension of the limits of the authority of the Lieutenant-Governor, it is equally plain that no power but the Imperial Parliament, which has set limits to the jurisdiction of the Provincial Executive, can extend those limits and enlarge that jurisdiction.

It has been said, that the Crown officers in *England* at some time have given it as their opinion that the power claimed to be exercised by the Lieutenant-Governor might be conferred upon him by an Act of the Provincial Legislature, of which he himself is a component part. I have not seen their opinion, nor have I been able to suggest to myself the arguments by which such an opinion could be supported; all I can say, therefore, in the absence of the light of the opinion given, is that, in the best exercise of my own judgment, which I am bound to exercise here to the utmost of my ability with such light as I have, I have been unable to bring my mind to any other conclusion than that the Letters Patent under which the appellants claim rank as Queen's Counsel, and the Provincial Statute in virtue of which those Letters Patent issued, as well as the Act regulating precedence, are, for the reasons above given, null and void, and for this reason I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *Robert G. Haliburton.*

Solicitor for respondent: *John S. D. Thompson.*

CONTROVERTED ELECTION OF THE ELECTORAL DISTRICT OF THE SOUTH RIDING OF THE COUNTY OF ONTARIO.

1879
*Nov. 10, 11.
1880
*Feb'y. 9.

DANIEL McKAY.....APPELLANT;

AND

FRANCIS WAYLAND GLEN.....RESPONDENT.

Controverted Elections Act, 1874—*Gifts and subscriptions for charitable purposes—Payment of a just debt without reference to Election, not bribery.*

Held—1. That if gifts and subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on any condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promise or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Election and Controverted Elections Acts, 1874.

2. That the settlement by payment of a just debt by a candidate to an elector without any reference to the election is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised it and never gave it.

[*Gwynne* and *Taschereau*, J. J., doubting whether the transactions proved were not within the prohibitory provisions of the Act.]

THIS was an appeal from a judgment delivered by Mr. Justice *Galt* on the 14th January, 1870, dismissing the election petition filed against the return of the re-

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

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spondent as member of the House of Commons for the electoral district of the south riding of the county of *Ontario*.

The petition was in the ordinary form, and charged that the respondent, by himself and his agents, was guilty of corrupt practices within the meaning of that expression, as defined by the Election and Controverted Elections Acts, and by the common law of Parliament. There were in all 53 charges mentioned in the particulars, to which several others were allowed to be added during the trial.

The judgment appealed from declared none of these charges were sustained, either against the respondent or his agents.

The appellant, by notice, limited his appeal to the amended particulars delivered before the trial as Nos. 7. 31, 37, 47, 50, 51 and 53, and to those added at the trial numbered 6 and 7.

They were given as follows in the amended particulars:

Number.	Name of Person Bribing.	Name and Address of Person Bribed	Time.	Place.	Nature.
7	John Spink..	Louis O'Leary, Pickering...	Between 15th August and Sept. 10, '78.	Frenchmen's Bay..	Promise to procure office.
31	F. W. Glen...	G. H. Pedlar, Oshawa....	During Contest.	Oshawa.....	Settlement of claim of money.
37	F. W. Glen...	Thos. Dingle, Oshawa....	During Contest.	Oshawa.....	Promise of office for son.

47. The said respondent, in the month of May, 1878, at *Oshawa*, corruptly made a gift of trees to a cemetery of the Roman Catholic Church, to induce Roman Catholic voters and others generally, to vote or refrain from voting at said election.

50. The said respondent, on the first July, 1878, at

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Oshawa, gave money and other valuable considerations to members of the Roman Catholic Church, at a pic-nic then being held, to induce the members of such Church, and others generally, to vote or refrain from voting.

51. Also, the respondent, at *Duffin's Creek*, during the canvass at said election, corruptly made gifts of money, and other valuable considerations, to the members of the Roman Catholic Church, to induce the members of the said Church, and others generally, to vote or refrain from voting at said election.

53. The respondent, during the canvass for the said election, at divers other times and places, corruptly made gifts of money, and other valuable considerations, to other religious and charitable associations, and to other laudable and popular undertakings, to induce electors in general to vote or refrain from voting at said election.

And in the particulars added at trial, by leave of the Judge:

6. *Dingle.—Glen* promised *Thomas Dingle* a contract if he would support *Glen.* This was promised in June last.

7. *James Wallace*, bribed by *Higgins* at *Whitby*, by promise of office.

These charges and the material parts of the evidence bearing upon them are reviewed at length in the judgment of the Chief Justice hereinafter given.

Mr. *H. Cameron*, Q C., for appellant:—

The appellant, by his notice, has limited his appeal to the charges numbered in the particulars delivered before the trial as Nos. 7, 31, 37, 47, 50, 51 and 53, and to those added at the trial, numbered 6 and 7.

The first case I will take up is No. 7, the *Spink-O'Leary* case. This is a charge of bribery. The bribe was the procurement for *O'Leary* of the office of Land-

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ing Waiter at *Frenchman's Bay*, through the exertions of one *Spink*, whose agency cannot be seriously disputed. [The learned Counsel then reviewed the evidence on this case.]

It sufficiently appears that *O'Leary*, whatever his secret determination may have been—and it is one of the suggestive features of the case that, although *Spink* deposes that *O'Leary*, having informed him that he had made up his mind never to vote with the Conservatives again after the Orange riots at *Montreal*, *O'Leary* never alludes to this change of sentiment on his part—could not induce Mr. *Spink* to move on his behalf, or to make him any promise until he distinctly announced his determination to vote, if he voted at all, for the Respondent; that thereupon Mr. *Spink* did promise to procure the office, and the pretence set up is a palpable absurdity. It would not be easy to make out from the mouths of unwilling witnesses more damning evidence of a corrupt bargain.

The next case is what I call the *Glen-Pedlar* case, No. 31 of the particulars. This is a personal charge against the Respondent. It is that, in consideration of obtaining the vote of one *George H. Pedlar*, or to prevail on him to keep quiet and not to vote, he (the respondent) paid a claim of *Pedlar's* against him.

[The CHIEF JUSTICE:—Have any cases gone so far as to hold the payment of a legal debt to be a corrupt act?]

If done with the corrupt purpose of influencing the voter. The evidence clearly shows that the settlement took place for th e purpose of obtaining *Pedlar's* neutrality. This, I contend, is a corrupt act within the meaning of the section. There is a case *Re North Ontario* (not reported) in which the Court of Appeal for *Ontario* declared that the payment of even a just debt, never disputed by the debtor, if for the purpose

of inducing an elector to vote, or to refrain from voting, is bribery, and, as the exercise of a perfectly lawful right, if done for the purpose of influencing an elector, is undue influence and unlawful. *Norfolk* case (1); *Blackburn* case (2); *NorthAllerton* case (3); so may the doing of a perfectly lawful act be bribery—See *Cooper* v. *Slade* (4).

The charges No. 37 and No. 6 of added particulars, *Dingle's* cases, may be treated together. [The learned counsel argued that the result of the evidence in these charges was that they had been fully sustained.]

As to the charges of colorable charity, the respondent is charged with giving with more than his usual liberality to churches and charities, with a corrupt motive. The respondent himself admitted that he had never before been so liberal in his charitable expenditure, and he further admitted when asked his object in thus spending money liberally on behalf of the Roman Catholic body, that he "did not know that he could say any particular object; to have their goodwill in the first place;" and he admits that it was to make himself popular with the Catholic people of the riding. Again, the respondent admits that the Catholic electors of the riding, of whom he estimates there are about one in every eighteen or twenty usually supported his opponent, Mr. *Gibbs*, were of great importance in the contest. To break the force of these admissions, the respondent, in his examination by his own counsel, stated very broadly, that "for the past ten years my average to all charitable purposes would be one thousand dollars a year." But this was qualified, and in effect done away with, by the admissions already extracted, and by what he was compelled on re-examination to concede.

(1) 1 O'M. & H. 240.
(2) 1 O'M. & H. 204.
(3) 1 O'M. & H. 168.
(4) 27 L. J. Q. B. 451.

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The question on these facts is, as put by Mr. Justice *Grove* in the *Boston* Case (1), whether these distributions were made with the intention of, in legal language, "corrupting" the electors. It is urged that these donations were in view of the impending dissolution of Parliament—so much is in terms almost admitted by the respondent; that no reasonable motive or object is pretended for them; that they were excessive, judged by the respondent's former practices; that they were mainly to one denomination, whose influence it was desirable to secure, and the vote of the electors belonging to which decided the contest in the respondent's favour. Can it be said, in view of the warnings that have been given (see *Boston* Case, already cited, and *South Huron* Case (2),) that these donations were not corrupt in the sense in which the word is used? See the *Launceston* Case (3); *Drinkwater & Deakin* (4).

[As to the *Wallace* case, the learned counsel argued that the evidence of Mr. *Wallace* was very clear and that there were many of the surrounding circumstances which go far to support his veracity, and concluded by stating:]

It is a remark that is applicable to this as well as other charges in appeal, that the evidence of no witness, on whose testimony reliance is placed by the appellant, has been discredited by the learned Judge who tried the petition. The Supreme Court is, therefore, in as good a position to determine on which side the truth lies as was the learned Judge. And the Controverted Election Act, expressly allowing an appeal on questions of fact, the appellant is entitled to the judgment of the Court on them, irrespective of the views entertained by the learned Judge who heard the evidence.

Mr. *Robinson*, Q. C., and Mr. *J. D. Edgar* for respondent:

(1) 2 O'M. & H. 161, at 163.
(2) 24 U. C. C. P. 488, at 497.
(3) 2 O'M. & H. 129, at 132.
(4) L. R. 9 C. P. 626.

There are some general considerations entitled to weight in deciding upon the various charges.

The Court below remarked that the enquiry into the circumstances of the election had not been rendered incomplete by the action of any of the parties to the petition, and that there was no evidence of illegal expenditure. The respondent is therefore entitled to contend that the character of the evidence shows that the election was conducted in accordance with the Dominion Elections Act, and that the sense of the constituency having been obtained, it would not be judicious to set aside the election on suspicious evidence, especially when the learned Judge who has seen and heard the witnesses declared in favour of the respondent. Moreover, the respondent showed by his words and conduct that up to the 19 May, 1878, he sought to bring others forward as candidates, and did not seek or desire the position himself. This must materially weaken inferences of corrupt intent sought to be drawn from his conduct prior to that date.

[The learned counsel then reviewed in detail the following charges: Charge 1. *Louis O'Leary* bribed by *John Spink*, by promise to procure office; Charge 31. The bribery by respondent of *Geo. H. Pedlar*, by the settlement of claim and money; Charge 37 and Charge 6, amended particulars, as to bribery of *Thomas Dingle*, by promise of office for his son and a contract for himself; Charge 7, of added particulars, *James Wallace* bribed by *Higgins* by promise of office; and contended that the alleged attempts of bribery had not been proved, that the testimony of the appellant's witnesses, was contradicted by respondent's witnesses, that the payment of a just debt, without any reference to the election before the respondent was nominated, cannot be said to be a corrupt act, and referred to: The

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Windsor case (1); The *Mallow* case (2); The *Boston* case (3).]

The next cases are those of colorable charity.

The respondent was, during 16 or 17 years before the election, very liberal to Roman Catholic objects; the Roman Catholics often spoke of his generosity, and he had a general reputation for that quality for years. Indeed, respondent is uncontradicted in his statement that he had given as much away, on an average, during the previous ten years as he did the year of the election. His was no suddenly developed zeal for charitable, or public, or religious objects. If he had any corrupt intentions he would not have allowed his political opponents to be aware of his gifts and charities; while the fact is, that at the Dominion Day picnics he went to Mr. *Dingle*, an active opponent, to have his cheques cashed for the money he is accused of spending corruptly.

It is contended by the Appellant that these corrupt charities influenced the Roman Catholic vote, and thereby decided the contest in Respondent's favor. To prove this, the Respondent's opponent, Mr. *Gibbs*, was called, and he attributed his defeat partly to the defection of the Catholic vote. This is pure speculation, under the ballot, and it seems to have been founded upon curious reasoning, because Mr. *Gibbs* was defeated once before by 150 when he thinks he received the Catholic vote. From Mr. *Gibbs*' own evidence, another inference may be fairly drawn. In the year 1872 his expenditure was four or five thousand dollars and his majority but 93; whereas in 1873 he spent ten or eleven thousand dollars and raised his majority to 242. It is therefore more fair to assume that election expenditure affected the results than that the Catholic electors swayed the elections in that riding.

(1) 2 O'M. & H. 89. (2) 2 O'M. & H. 18.
(3) 2 O'M. & H. 161.

The authorities applicable to this case are: *Drinkwater* v. *Deakin* (1); The *Stafford* case (2); The *Youghal* case (3); The *Windsor* case (4); *Somerville* v. *Laflamme* (5).

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

THE CHIEF JUSTICE:—

This is an appeal from the judgment of Mr. Justice *Galt*, dismissing the Election Petition filed against the respondent, charging him and his agents with corrupt practices, as defined by section 49 of the Dominion Controverted Elections Act of 1874, and by the Dominion Elections Act, 1874, and by the common law of Parliament, whereby the election and return of the respondent are void.

In the original particulars 39 cases of bribery were charged; 3 cases of undue influence, threatening and intimidation; 1 of treating; and 10 of corrupt practices. Amended particulars were filed in which there were 39 cases of bribery; 3 cases of undue influence, intimidation and threatening; 1 case of treating; and on the trial 7 more were added by leave of the Judge, making in all 103 cases. Of these, 43 were charges against the respondent personally. In the opinion of the learned Judge, none of these charges were sustained, either against the respondent or the other persons charged.

The appellant has taken no exception to the disposal of 96 of the cases, but has limited, by notice, his appeal to 9, viz:—Nos. 7, 31, 37, 47, 50, 51 and 53 in the particulars delivered before the trial, and Nos. 6 and 7 of those added at the trial.

It is a notable fact, that there is no allegation or indication in the evidence of any general bribery, or corrupt practices, or improper conduct in connection

(1) L. R. 9 C. P. 626.
(2) 1 O'M. & H. 230.
(3) 1 O'M. & H. 294.
(4) 2 O'M. & H. 89.
(5) 2 Can. S. C. R. pp. 248, 260, 277, 273, 317, 318, 306.

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with the election itself, which would seem to have been conducted, so far as appears before us, apart from the cases now to be considered, in the most correct and unimpeachable manner; and the respondent testifies that, with regard to the election, he took special means to prevent bribery; that he asked his friends to offer a reward; and he says 60 of the leading Reformers signed a paper offering a reward of $50; it was offering a reward for the conviction of bribery on either side. Five hundred of these bills were printed and distributed. "I warned my friends in every meeting I had, but especially at my committee meetings, to be careful and to crush out anything like bribery."

Of the nine cases we have to deal with, No. 7 is a charge of bribing one *O'Leary* with a promise of office by *J. Spink*. No. 31 is a charge of bribing one *Pedlar* by settlement of claim and money by respondent. 37 and 6 of added particulars, bribing one *Dingle* by promise of office for son and of contracts for himself by respondent. 47, corrupt practices towards a number of R. Catholic voters by gift of trees to R. C. Cemetery by respondent. 50 and 51, similar charge towards same by gifts of large sums of money at pic-nic by respondent. 53, similar charge as to whole constituency by subscriptions to charitable and other objects by respondent.

In considering Nos. 47, 50, 51, 53, which are cases of alleged profuse liberality by which the whole community or certain denominations were bribed by subscriptions to charitable and other objects, it must be borne in mind that the respondent was not a non-resident, or comparative stranger coming to the locality, seeking election as its representative. He was and had been for years, not only a resident, but largely and personally interested in its welfare and progress, and in its industrial, social and religious institutions, and had been for years a uniform,

consistent and liberal contributor, especially to charitable and religious objects

The first, No. 47, is the gift of trees to the Roman Catholic Cemetery.

I can discover nothing whatever in this transaction of a corrupt or illegal character. The Catholics, about two years before, had established a cemetery a short distance from *Oshawa*; it is described as being a bare looking place. We all, I suppose, know that of late years a very great change has taken place with reference to the character and adornment of the places where the dead are interred, and which is strikingly evidenced in the picturesque rural cemeteries now substituted in many places for the old-fashioned grave yards, as they were not inappropriately designated. As to the cemetery in question, the respondent thus details his connection with it:

Q—You are not a Roman Catholic, I believe; that is not your religious persuasion? A—No, sir.

Q—Did you at any time last year make any contribution towards laying out the grounds of the cemetery in connection with the Roman Catholic denomination? A—I gave some trees.

Q—When was that? A—In January or February I promised to give them. I offered them.

Q—Who did you offer them to? A—To Father *McIntee*.

Q—Where is the cemetery? A—Two miles and a-half about from *Oshawa*.

Q—Does it belong to *Oshawa* parish? A—I so understand.

Q—And you reside in *Oshawa*? A—Yes.

Q—In January or February, what was the offer made? A—To give him some trees if he would plant them in the cemetery.

Q—Were you in the tree business? A—My brother was.

Q—Where does your brother reside? A—*Rochester, U. S.*

Q—Was that a purely voluntary offer on your part? A—It was.

Q—What was the size of the cemetery? A—From five to eight acres.

Q—How long has there been a cemetery there. How long has this place been a cemetery? A—About two years I should say, perhaps three years.

Q—Was this your first donation towards beautifying the cemetery? A—Yes.

Q—Had you taken any interest in it before this? A—I don't know that I had.

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Q—Can you tell how it was, in January or February, you happened to think of the cemetery—the Roman Catholic cemetery? A—Father *McIntee* and I were very good friends; and I had a very good old friend—Mr. *Welch*—buried there. On driving past it, it looked to me very bare. I took an interest in tree growing and planting. I remember the offer I made very well.

Q—You say Father *McIntee*, a very old friend; friendship of long standing? A—Not very long.

* * * * *

Q—Then as to this tree planting; what was the first thing induced you to think of planting trees? A—I spent ten years of my life in the horticultural business in *Rochester*; I had a great deal of taste for tree planting; I would like to see every cemetery in the land beautified by trees; I have often urged that between *Oshawa* and the township they ought to buy a lot of land and make a beautiful cemetery; I think it very desirable for any community to have a handsome cemetery; ever since I came to *Oshawa* I have urged that.

The respondent could procure these trees from his brother at wholesale prices. It is not, to my mind, difficult to understand, if Mr. *Glen* had any taste for the business he had been engaged in, how much a cemetery bare of trees would suggest so appropriate a contribution, and induce a man, ordinarily free in his gifts, to be at the expense of the trees, if the proprietors of the cemetery would be at the expense of setting them out, as they undertook to do in this case.

This gift, in itself, exhibits, to my mind, only good taste and good feeling, and not by any means, I am happy to think, of an extraordinary or unusual character. What then makes this a corrupt act of bribery? The offer was made in January or February. Mr. *Glen* was not spoken of as a probable candidate till March; he appears not to have desired to be a candidate, and endeavored, though unsuccessfully, to induce others to accept a nomination, and was not himself nominated till 31st May, 1878. Parliament was not dissolved till two or three weeks before the 17th September, and the elections did not take place till that date. Who was to

be bribed? It is not pretended that this gift was offered, or made as an inducement to, or on any condition that, any body of men or any individual, should vote or act in any way at any election, nor is there the slighest evidence that there was, on the part of any body of men, or any individual, any promise or undertaking express or implied, that they or he would, in consequence of such gift, vote or act in respect to any future elections, otherwise than they should or would do if no such gift had been made. The utmost that can be said of this transaction in reference to election matters is, that it might possibly, and probably would, commend the donor generally to the good or favourable opinion of the denomination to whose church the cemetery belonged. In my opinion, it ought to commend him favorably to every person of good taste who might have occasion to pass the cemetery, as a general benefactor. We may as well here see what the cases say with reference to matters of this kind.

In the *Westbury* case (1), it was proved (as part of the recriminatory case) that the petitioner had sent a check for £10 as a subscription to a dissenting congregation almost at the same time as he issued his address as candidate. Mr. Justice *Willes*:—

I wish I could be spared the theological part of the case unless it is a very clear case.

Mr. *Cole*:—

If your Lordship thinks nothing of it I will not press it?

Mr. Justice *Willes*:—

No, I do not say I think nothing of it. I have myself often observed that people who mean to become candidates often subscribe to things they would otherwise not have subscribed to, but I think that is a step off corrupt practices, it is charity stimulated by gratitude or hope of favors to come.

In the *Hastings* case (2), it was proved that previous

(1) 1 O'M. & H. 47. (2) 1 O'M. & H. 217.

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to the election a lavish household expenditure had gone on in the establishment of the Respondent, and this was said to have been done for the purpose of influencing the election generally, but not of influencing any vote in particular.

Mr. Justice *Blackburn* says :—

There is no law which says that any lavish expenditure in a neighborhood with a view of gaining influence in the neighborhood and influencing an elector is illegal at all. In order to constitute anything which would be a corrupt practice in respect of expenditure of that sort, it must be made with a view of influencing a particular vote. If such an expenditure is made at a place with a tacit understanding of this kind: "I will incur bills and spend my money with you, if you will vote for me," that being not the side on which you intended to vote; if it is intended to produce that effect upon the voter it amounts to bribery.

In the *Belfast* case (1), it was proved that the respondent gave a subscription towards an Orange Lodge although he was not an Orangeman properly so called, nor were his opinions identical with those of the Lodge. It was contended on the part of the petitioners, that this was a corrupt payment within the meaning of the Corrupt Practices Act 1834.

Baron *Fitzgerald*, in his judgment, said as to this:

The profession of a candidate of holding certain opinions is a legitimate mode of influencing voters, and if the respondent thought that it would be for his benefit with reference to his election to inform orangemen and others that he did entertain opinions in favor of institutions of this kind, I can see nothing illegitimate in that. The case appears to me identically the same as if he had written a pamphlet in support of such institutions as Orange halls and had paid the printer for publishing it.

In the *Boston* case (2), in which the respondent was unseated by reason of the manner in which the agent distributed the gifts, Mr. Justice *Grove* thus treated of charitable gifts. He says:

We know, for instance, that persons, looking forward to be candidates for Parliament, are generally pretty liberal to the charities in

(1) 1 O'M. & H. 282. (2) 2 O'M. & H. 161.

the district, and such liberality, so far as I am aware, has never been held to vitiate the election; I suppose on the ground that such persons do not select voters as contradistinguished from non-voters as the objects of their charity, that the object itself is good and that, although the donors may, in so bestowing their charity, look to their personal interests and personal ambition, still a man is not to be injured in an object of personal ambition merely because he does good, which, perhaps, without that stimulus, he might not have been induced to do.

In the *Stroud* case (1), *Bramwell*, J., says:

The Act does not say that liberal conduct towards your men, or such a thing as I suggested—for instance, the putting up of a drinking fountain, or what not—although it may be done very much to influence voters, is an act of bribery. I do not think that it was the intention of the Legislature to prevent the doing of any act, liberal and good in itself. * * * The Legislature intended to prohibit acts done with the specific object of influencing the mind of the individual voter to whom they had relation by the particular temptation held out to him, but it did not intend to prevent an act being done to a person, kind and good in itself, merely because it had a tendency to make the person favorable to the persons doing it.

The grievance appears to be that this was a Catholic cemetery, and the object was to secure Catholic influence at the election, and so the contributions to the Sisters of Charity are likewise brought forward.

Respondent is asked:

Q—Is this the first time you had done any in this way to the Roman Catholic denomination? A—By trees, you mean?

Q—Or in any other way? A—No, sir. I had always subscribed every time I was asked for charitable purposes. I do not think I ever refused.

Q—What would be the extent of subscription? A—I think in the fall of 1877 I gave about sixty dollars, about Christmas time; previous to Christmas.

Q—That would be the Christmas of 1876, you mean? A—The Christmas of 1877.

Q—What was that for? A—I sent it to the Sisters. Some turkeys and some flour and other things to distribute among the poor.

Q—Did you do that voluntarily, without being requested? A—I did, sir. I do not think I was invited to assist.

(1) 2 O'M. & H. 184.

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Q—Were you seized at that time with a universal fit of benevolence? A—I gave a great many turkeys away.

Q—To any other religious denomination? A—That is the only denomination, the Roman Catholics; not to any other religious denomination.

Q—Then the only denomination were the Roman Catholics? A—I sent these to the Sisters. I sent none to any other denomination then.

Q—Then this you did without being solicited at all, to the value of sixty dollars? A—Yes; about that.

Q—Had you ever done anything of that nature before? A—Not of that nature; but I did in money whenever I was asked to.

Q—But it was at Christmas, 1877, you first voluntarily contributed in that form? A—I gave some money before that when I was not solicited.

Q—When was that? A—I think probably in October, 1877.

Q—For what purpose? A—To pay their taxes.

Q—You were not solicited in 1877, and you gave the money. Whom did you send it to? A—I sent it to the Sisters.

Q—We hear a good deal about exemption in these days. Were they not exempt? A—They were taxed. It was brought up before the council. The half of the tax was remitted; the other half was not. I brought the matter up in the council, and the half the council did not remit I voluntarily paid myself.

Q.—How much was that? A—Ten or fifteen dollars—whatever the deficiency was.

The contribution to the Sisters of Charity, to enable them to furnish the poor with a Christmas dinner, and the contribution towards their taxes, is, I think, not very generously brought up against the respondent. The respondent was a large manufacturer in the town in which he lived, and must have been the employer of much labor, and would naturally feel a peculiar interest in looking after those in whom he must necessarily be more or less interested, and who, on their part, would be more or less dependent on him as a large employer. The giving of turkeys and providing otherwise for securing a good dinner on Christmas day to those unable to procure it for themselves is, I am happy to think, by no means a rare occurrence; and, in view of the respondent's character and position in *Oshawa*, it would

have been remarkable, if at Christmas time he had forgotten the poor. The circumstance of selecting the Sisters of Charity to dipense his liberality and the nature of the gift, a Christmas dinner, which we may fairly assume would be distributed only among those not able to procure one for themselves and family, and therefore a class of the community least likely to be voters or to have political influence, ought to disarm the act of a corrupt intent.

With respect to the expenditure of money at pic-nics and bazaars.

It would be absurd for us to affect not to know that all sorts of devices are resorted to at these gatherings to induce the parties who attend to spend their money, and that many who so attend are induced to expend more than they contemplated, and that not a few are debarred on that very account from attending at all. And among the novelties modern ingenuity has invented for extracting money is the procuring a comparatively trifling present, and the putting up the names of rival politicians, or others, to be voted for by their respective friends, the present so provided to be presented to the successful candidate. The more tickets sold the more successful the scheme. No doubt on such occasions a very considerable amount of excitement or enthusiasm (though very absurd in the eyes of some) is got up, as appears to have been the case in the instance complained of, where the present was a biscuit basket, and the candidates were the wives of the respective candidates before the community for election to Parliament. Respondent appears to have bought tickets largely and distributed them among his friends to vote for his wife, and a strong supporter of the rival candidate bought and distributed largely among his friends to vote for the opposite side. Mrs. *Glen* appears to have had the most votes and got the biscuit basket, but who

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was bribed by this operation? To the minds of many this would be considered perhaps a very foolish affair, but to the demonstration it answered the purpose for which it was intended; but where was the bribery? The friends of both these ladies, or possibly the friends of their husbands, respectively, bought the tickets, but I fail to see in this any connection with the Dominion Election; in fact *Dingle*, the supporter of Mr. *Gibbs*, the treasurer of the day for the Sons of *England*, I think, conclusively shows this transaction to have been without any corrupt intent in connection with the election. He says:

I was treaasurer of the day for the Sons of *England*. I was endeavoring to promote the interests of the society and get as much money as I could.

To Mr. Robinson—I am sure that he told me he had been to the Roman Catholic meeting, and had returned. I think between one and two o'clock I cashed the cheque for fifty dollars; then between three and four o'clock he wanted me to cash the other cheque to patronize the Sons of *England*. I did cast a thousand votes at that pic-nic. I was doing it to patronize the Sons of *England;* we wanted to get all the money we could for them. I knew if I cast the votes for Mr. *Gibbs*, that Mr. *Glen* had borrowed money for the purpose, and he would use that money in return; he was bound to win the pitcher, and I did not care how much money he spent so long as we got a good day. My object was to make him spend as much money as I could; it was no part of my duty particularly to make Mr. *Gibbs* popular; I do not think I had done anything for Mr. *Gibbs* in the canvass; I did not know as I was doing anything improper for Mr. *Gibbs* at the time.

And the respondent gives this account of the affair:

A—I was at the Sons of *England* pic-nic most of the time.

Q—What was going on there? A—A baby show, horse races, a game of cricket or lacrosse with the Indians, and a competition among the bands, an exhibition of carriage horses, and all that sort of thing, to draw.

Q—A kind of English entertainment, including a baby show? A—Yes. Then there was an election between *John A.* and *Mackenzie*, for a cake basket, to be presented to the wife of the candidate who got the largest number of votes. Then there was a competition in the same way for a pitcher and two goblets between my opponent

and myself, to be presented to the wife of the candidate who got the most votes. These were got up to draw a crowd there.

Q—Did that cost you a trifle? A—Yes.

Q—How much did you spend? A—About one hundred and seventy-five dollars.

Q—At the baby show? A—Principally over the pitcher and the cake basket.

Q—I hope Mrs. *Glen* got the pitcher? A—She did.

Q—And Mrs. *Mckenzie* the cake basket? A—She did.

Q—What was the total vote polled? A—I think 5,600, to the best of my recollection, at ten cents a vote.

Q—On the two, or on the one? A—Between my opponent and myself.

Q—How much of the five hundred and sixty dollars did you contribute? A—From one hundred and seventy-five to two hundred dollars.

Q—How much did the cake basket draw? A—I do not remember. A good deal smaller than that.

Q—Did you contribute towards winning the cake basket? A—Some.

Q—Altogether there must have been about two hundred and fifty dollars contributed by you? A—I mean my own altogether from one hundred and seventy-five to two hundred dollars.

Q—Where are the Sons of *England* head-quarters? A—I do not know.

Q—Is there any branch about the riding? A—A branch in *Oshawa*.

Q—Has the branch been in existence long? A—I think two or three years. I am not certain.

Q—Was this the first demonstration they had? A—As far as I know.

Q—The first time that you spent two hundred dollars at all events? A—The first thing of any extent they had.

Q—What was the object—surely you were not desirous of winning the pitcher? A—Well, the affair was done in the excitement of the election between *Gibbs* and I who should get the pitcher.

Q—Was it done to secure the good will of the Sons of *England*? A—I had not the least idea of that. If I had thought of it in the morning that I would have spent so much that day, I would have deemed myself crazy.

Q—It was not a profitable investment? A—No.

Q—It did not make much difference how you spent it. You were desirous of winning the election? A—It was done in a state of excitement to win the pitcher.

Q—Are you an excitable individual? A—Sometimes. The pitcher

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contest got very warm. It was all done in about an hour, I suppose. Nine-tenths of the money was spent in the course of an hour.

The respondent appears to have attended another pic-nic.

Q—Was there any other Catholic pic-nic attended during the canvass? A—Yes; at *Duffin's* Creek.

Q.—That is in the constituency? A—Yes.

Q—When was that held? A—I think in June.

Q—Before the First of July, or after? A—Before the First of July, I think.

Q—How much did you contribute there? A—I took tickets on a pipe between Mr. *Spink* and Mr. *Moodie*; I think to the amount of ten or twelve dollars on the outside.

Q—Speak positive on that? A—I gave two ladies four or five dollars each to vote for me; and I think I gave one or two dollars more; and I think part I had to borrow.

Q—Who were the ladies? A—Mrs. *Higgins* and Mrs. *Donovan*; she lives in *Whitby*; Mrs. *Higgins*, she is the wife of *W. H. Higgins*.

Q—*Duffin's* Creek; what parish is that in? A—It is in the Township of *Pickering*.

Q—Who is the Priest? A—Father *Beausang*.

Q—I suppose the result of all the liberality on your part was that you grew in favour with the Catholic body? A—I cannot say whether that was the result or not.

Q—You cannot say that was the result? A—I cannot say.

Q—Then, you would not swear to it as a fact? A—No: I would not.

Q.—Will you tell what was your motive or object in thus spending money liberally on behalf of the Roman Catholic body at that time?

A—I do not know that I can say any particular object: to have their good-will in the first place.

As with the trees, so with these pic-nics, I can discover neither bribery or corruption.

So with reference to the subscription to a small church at *Frenchman's* Bay, (at the Bible Christians' meeting,) not a Catholic body, when they wanted to raise a sum of money to pay off a debt on the church. The respondent had been asked to preside at the supper; the subscriptions, he says, went a little slow, two or three appeals were made not very successfully, when, the respondent says, "I

finally started with $25 and Mr. *Bunting* from *Duffin's* Creek with $15." He is then asked this question:

Q—He, *Bunting*, was contributing to his own denomination and you were contributing to make thing go a little quicker? A—The crowd began to disperse, I doubled my subscription on condition that Mr. *Bunting* would double his, then finally we gave a little more—I gave $54 altogether—the amount required was $150.

He is asked:

Q—I am told only eighty-six dollars were wanted at the time? A—I think one hundred and fifty is the amount stated to me at the time.

Q—That was the first time you ever contributed to the Bible Christians? A—I think when they built their church in *Oshawa* I gave something.

Q—How much? A—May be twenty-five or fifty dollars; I cannot say the sum; I am not positive; it is a good many years ago; perhaps ten years ago.

Q—Within the last ten years did you contribute anything? A—If I had been asked I would have, no doubt.

Q—Have you been asked? A—Not that I recollect of.

With respect to these charges of bribing the whole constituency or any portion of it by subscriptions, &c., to charitable objects, Mr. *Glen* swears that for the last 10 years his charitable gifts, including his own church, would average $1000 a year, and being asked, "Have your charities been confined to your own church at all?" He answers, "I never thought of my own church, except that I had more frequent applications from my own church. I never thought of confining my gifts to any one church." And being asked, "You had given to the Roman Catholics before that?" answered, "I had. I do not think I ever refused applications from the Sisters. I think I have assisted at pic-nics or anything that has happened in the Catholic body for the past 8 or 10 years. I first began when Father *Shea* came to *Oshawa*. He and I were warm friends." And this is confirmed by *Higgins*, a Roman Catholic, who says he has known *Glen* since he came to *Oshawa* 16 or 17 years ago intimately.

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During all that time he has been very liberal to Roman Catholic objects, that was his habit; to my knowledge he has year after year given to them liberally. I know at the Catholic bazaar four years ago he contributed very liberally.

All the acts charged were entirely consistent with the respondent's established character for charity, generosity and liberality, and with his previous acts; these were not gifts to individual voters, they were gifts to the poor, a gift to ornament the place where repose the dead; they were expenditures in aid of churches and expenditures at bazaars or pic-nics, by no means inconsistent with what usually takes place under similar circumstances wholly unconnected with bribery and corruption. Mr. *Glen* distinctly affirms that the amount expended by him in all did not exceed his usual annual expenditure, and was not in any way connected with the elections.

Glen says:

Q—In addition to everything you have been asked here to-day, do you know of any circumstance, any attempt at corruption, or any corrupt act committed on your behalf by any person? A—I do not.

Q—Do you believe or know of any bribery, or attempt at bribery, during the election? A—I asked my friends to warn all parties against anything of the kind; and I have not heard of a single case of bribery or attempt at bribery; and I myself carefully avoided it as as far I knew the law.

Q—Was the subject of the election ever mentioned in connection with any of your gifts? [This question asked by Mr. *Robinson.*] A—Never in the slighest degree whatever; in connection with the Rifle Association, or any of the others.

Q—Was it mentioned in connection with any of your charities? A—Never mentioned or alluded to in the slightest degree whatever.

I think, therefore, the conduct of the respondent, for years before this election, in respect to contributions to charitable and religious objects, justifies the conclusion that he was actuated by legitimate motives; rather than, that what he did was done in an illegitimate sense to influence his election. No doubt liberality of that kind would not operate unfavorably to him, but natur-

ally the reverse, still, the fact that what he did would gain him popularity would not make that corrupt which otherwise would not be corrupt.

In the *Windsor* case (1), it was proved that respondent some long time before the election gave away £100 among his tenants, some of whom were voters and some not, and who paid him altogether about £3,000 a year in rent. This money was spent in coals, beef and tea, and the respondent, on being asked, whether when he made those gifts he had in view the election for the Borough, admitted that to a certain extent he had. It was argued that the gift of this money was a corrupt act, on account of which the respondent should be unseated.

Baron *Bramwell*, in his judgment, said:

It is certain the coming elections must have been present to his mind when he gave away those things. But there is no harm in it, if a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone, would be an illegitimate one. He is not to refrain from doing that which he might legitimately have done, on account of the existence of this motive, which by itself would have been an illegitmate motive. If the respondent had not been an intending candidate for the *Borough*, and yet had done as he has done in respect to these gifts, there would have been nothing illegal in what he did, and the fact that he did intend to represent *Windsor*, and thought good would be done to him, and that he would gain popularity by this, does not make that corrupt which otherwise would not be corrupt at all.

The principle here enumerated is also applicable to the *Pedlar* case.

It is very clear there were unsettled accounts between *Glen* and *Pedlar*, in which I think it very clearly appears *Glen* was indebted to *Pedlar*, and which accounts ought to have been arranged long before. I cannot think *Glen's* doing what *Pedlar* wished, and claimed to have done wholly apart from political or election considerations, and which it was *Glen's* duty

(1) 2 O'M. & H. 88.

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to do, to settle his accounts and pay his just debts, can be construed into a corrupt act of bribery, and especially so as *Glen* distinctly swears he never asked *Pedlar's* support, *Pedlar* never promised it, and *Glen* never got it. He may have been anxious to secure *Pedlar's* neutrality, but both he and *Hawthorn*, who was instrumental in the bringing about of a settlement of the account, but who was not shewn to have been an agent of respondent as respects the election, say, that nothing was ever said to the respondent about the settlement of this account in relation to the election, and that the settlement was never hinted to him as referring to the election.

As regards the *O'Leary* case.

If *O'Leary* is to be believed, though he had been a conservative, he had made up his mind how he was going to vote before he thought of the office, and that *Spinks*, who it is alleged bribed him, appears to have distinctly stated to him he did not care how he voted, what he was doing for him, he was not doing it on that head at all; and being asked "what he was doing it for?" answered, "Because for services rendered to him previous to that personally."

Spinks says:

He told him he was not going to do anything that would in any way tend to affect the election. Mr. *O'Leary* told me then that he had never told me before that Mr. *Long* and him "had made up their minds long before, after the *Montreal* affair, never to vote for the conservative party again, and that he was going to vote for the reform party if he voted at all." I told him that I wished to be very careful and to avoid everything that would in any way tend to influence a voter to change his views by offer or otherwise, as on consulting my lawyer he had told me to be careful not to do anything that would in any way affect the election. I told *O'Leary* that I had taken the advice of a lawyer on the matter, and he told me not to have anything to do with it, if it was going to have the effect of changing a voter's mind. I told him he might vote for *Gibbs*, or work for *Gibbs*, or anything he had a mind to, I would sign the petition all the same. I said to him I would do all I could for him in any case.

He said the fact of the matter was this, that *Long* and he had both pledged their words to change after the Orange procession in *Montreal;* they would not support the conservative party hereafter. That being the case, I had no objection to sign the petition. I told him I would only do anything in the matter because I distinctly understood my doing so would have no effect on his action.

I can find nothing in his evidence to lead me to the conclusion that *Spinks* was not acting *bonâ fide* in thus separating the transaction from the election.

As to the *Wallace* case.

The office, with the promise of obtaining which respondent is alleged to have been bribed, was not in existence. *Wallace* was not bribed, but voted for and was an active supporter of Mr. *Gibbs* at the election. Respondent appears to have looked on his (*Wallace's*) attempt to get an office created, and to which he looked forward to being appointed, rather as a joke. I can discover no evidence whatever of bribery in this case. *Wallace* appears to have been an active and consistent supporter of the defeated candidate throughout, and to have voted for him.

With respect to this, in the *Windsor* case (1), *Bramwell*, J., says:

To my mind a threat must be an operative threat at the time of the election, and if it were a bribe it must be an operative bribe at the time of the election. An offence might be committed, although the bribe was not operative at that time. * * * Unless you can shew that the bribery or threat is one the force of which is in existence continuing till the time of the election, although the bribe or threat which has been given or made may have subjected the parties to penalties, it is not a bribe or threat which will avoid the election.

We had occasion not very long ago to point out the authorities in the Privy Council and in the House of Lords, which very clearly established the position that an appellate Court ought not to be called upon, on a mere balance of evidence, to decide which side preponderates, but to procure a reversal it should be shewn that the

(3) 2 O'M. & H. 91.

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judgment complained of in a matter of fact is entirely erroneous. It may be safely affirmed that where a Judge has had the advantage, which we have not had in this case, of hearing the evidence given, and of seeing the demeanor of the witnesses, his decision on any question of fact, as was said in *Ungley* v. *Ungley* (1), ought not to be over-ruled on slight grounds, but very strong grounds should be shown. At the same time in a proper case we must not shrink from acting upon our own view of the evidence, giving, of course, always great weight to the consideration that the demeanor and manner of the witnesses are very material elements in judging of their credibility, bearing also in mind that when the question of fact is as to the effect of the facts proved in raising inferences of fact the rule does not apply; and bearing in mind the principles laid down in the *Mallow* case (2), which commend themselves to my mind as just and reasonable, and which are thus stated by the learned Judge:

> I have desired to apply two rules to work out my judgment. They are shortly these:—First, that I should be sure, very sure, before I come to a decision adverse to any party where his character or credit is involved. Secondly, that offers or conversations unaccompanied by any acts should be much more strongly proved in evidence than where some definite act has followed the alleged offer or conversation.

Now, in reference to the *Dingle* case.

The learned Judge who tried the petition says as to No. 37, and the promise of procuring an office for his son, and No. 6, the promise of a contract for himself if he would support the respondent:

> These two charges may be considered together, and if the evidence given by *Dingle* himself be accepted as true, they might be considered as proved, but he is contradicted in every particular.

I have read with a great deal of care the evidence, and I find this party contradicted by no less than six

(1) L. R. 5 Ch. Div. 887. (2) 2 O'M. & H. 22.

witnesses, and on so many different and material statements, that I should think it presumptuous were I to overrule the finding of the learned Judge on the questions of fact to which these contradictions refer, he having had the opportunity of seeing and hearing the witnesses, and therefore so much better qualified to form a correct opinion as to their credibility.

As to the office for the son.

Though opposed in politics, the respondent appears to have been on very friendly terms with *Dingle*, and to have befriended him on previous occasions. Mr. *Garvin*, a brother-in-law of *Dingle*, who applied to respondent, as he says, at the request of *Dingle*, says:

Q—Mr. *Dingle* had requested you to interest yourself with Mr. *Glen;* to get him to use his influence to get a position for his son? A—I urged the appointment of Mr. *Dingle's* son to a position very strongly.

Q—What did Mr. *Glen* say? A—He said he had done everything in his power for *Dingle* in contracts and otherwise, and would continue to do so irrespective of politics; he said, I cannot make promises to *Dingle* in view of the election, because it would be used against me. In regard to the election, I said to Mr. *Glen*, that nothing I said to him must be taken with respect to the elections. He promised to interest himself on behalf of the young man; he declined to make a promise of getting him a situation; he said he would do what he could for him on personal grounds.

Glen says:

I never asked or authorized Mr. *Garvin* to speak or write to Mr. *Dingle* about getting an office for his son. I told *Garvin* I had always been friendly towards Mr. *Dingle*; I had been friendly in a number of ways. I was instrumental in securing him the contract for building the *Oshawa* Stove Works; the wood-work for the Mason's Company's Works; I also gave him the contract for our own extension some time ago; I was his security in building the town hall; and I also offered to be his security for the building of the additions to the Agricultural College near *Guelph*. That is what I referred to when speaking to Mr. *Garvin*.

As to the contract.

Mr. *Glen* spoke no doubt to *Dingle* about estimating and contracting for the work of a factory *Glen*

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was about erecting, but I fail to discover a trace in the evidence, apart from the evidence of *Dingle*, of a bribe to *Dingle* by promise of a contract to vote or abstain from voting at the election. So far from *Dingle* being bribed, *Glen* gave the contract to another party, and *Dingle* not only voted, but used every exertion against *Glen* at the election, and when we have the statement of *Glen*: "I never spoke to *Dingle* about his support in connection with this contract at all. I may have asked him to support me. I never spoke of his support in reference to this contract," and the statement of a witness, apparently disinterested, that *Dingle* stated to one *Hurst* that "*Glen* never offered him or his son any office, either in a bank or any other place"; and when by another witness, it was remarked to him, "*Glen* wants you to vote for him, *Dingle* replied no; he never asked me to vote for him, he knows which way I go, only he does not want me to do anything against him"; and again to another, "if *Glen* had acted the gentleman with me, and done the work as he agreed to do, he could not have expected me but to vote against him, but I would not have done any more than that; he could not expect me but that I would vote against him, give my silent vote against him"; and the many other contradictions as to the contract ever having been promised him at all; all these circumstances, taken in connection with the proved and not contradicted statements as to the openly declared desire of respondent, that nothing should be done to jeopardize the election, and which I can discover nothing in the evidence to lead me to suppose was merely simulated, and not with the intention they should be acted on, I cannot conceive it possible that any Court would with propriety say the Judge who saw all the witnesses and heard the evidence from their own mouths did wrong in refusing to give credence to a witness so discredited,

or that we can say all these parties should be disbelieved, and the statements of this witness credited. Independent of this, taking the whole evidence together and considering all the surrounding circumstances, I think, so far from saying the Judge was wrong, we ought to arrive at a similar conclusion.

I note the following cases as bearing on the points raised:

In the *Lichfield* case (1), the alleged bribery was of one *Barlow*, whom petitioners alleged to have been bribed by a promise of a place in a hospital. *Willes*, J., says:

To prove a corrupt promise, as good evidence is required of the promise illegally made as would be required if the promise were a legal one to sustain an action by *Barlow* against the respondent upon *Barlow* voting for him for not procuring or trying to procure him a place in the hospital.

And in the same case, as to one *Baxter*, who had been in the employment of an agent of respondent and had left in consequence of a dispute and was anxious to get back, the Judge says:

An insensible influence existed in consequence of this upon the mind of *Baxter* at the time when *Baxter* voted for respondent. *Baxter* was taken into *Symonds'* employment very soon after the election, and it was proved that *Symonds* would not, or probably might not, have taken *Baxter* back unless he so voted. That does not prejudice the decision of the case. But it was not proved that *Symonds* made any express promise to *Baxter* to do so, it was left to inference amounting to suspicion only, and upon such inference and suspicion I must decline to act for the purpose of defeating the election.

In the *Wigan* case (2), Baron *Martin* says:

If I am satisfied that the candidates intended honestly to comply with the law and meant to obey it, and that they themselves did no act contrary to the law, their desire and object being that the proceedings in reference to the election should be pure and honest, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction.

(1) 1 O'M. & H. 22. (2) 1 O. M. & H. 192.

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And in the *Westminster* case (1), he says:

I think I am justified, when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent, I should say very strong and very cogent, it ought not to affect the seat of an honest and well intentioned man by the act of a third person * * * I should require to be satisfied and certain that there could be no mistake with reference to the alleged act.

In the *Penryn* case (2) it was submitted, that what was said to the voter, as to the respondent getting him employment, did amount to a promise to him conditional upon his voting for the respondent. As to this *Willes*, J., says he must not make the vote a condition of giving employment:

But the employment of persons to do work must go on in election times as well as others, the affairs of life cannot be brought to a standstill. If you have a sum of money or a benefit, for which nothing is returned, conferred upon a voter, you have a tangible case which cannot be explained away by saying "I did it, and I had no particular reason for it." You have then a case in which a member or his agent must be called upon to give an account of what they meant and to show satisfactorily that that which *prima facie* was giving a benefit to a person which might have the effect of inducing him to vote for the member was really done with some other and innocent motive. *I am clear that where an unfavorable inference is to be drawn from the fact that some person has been employed, one ought* to become *quite sure* that there is something more than merely getting the man's work for that which is the real equivalent for the man's work.

[The Chief Justice then referred orally to the case of the loan of a steam thresher to one *Farewell*, and stated that the loan of this machine had taken place in the ordinary course of Mr. *Glen's* business, as president of the Hall Manu'f Co., as an advertisement. The reasons which he had given for his decision in the other cases applied with equal force to the present case. He did not think the evidence on this charge of such a nature as to warrant a reversal of the judgment of the Court below.]

STRONG and FOURNIER, J. J., concurred.

(1) 1 O'M. & H. 96. (2) 1 O'M. & H. 128.

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HENRY J.:—

The respondent in this case was a successful candidate at the election to the House of Commons for the electoral district of the South Riding of the County of *Ontario*, holden on the 17th of September 1878, and the appellant was a petitioner against his election and return. The petition contained charges of bribery to the number of 53, as given in the particulars, and other corrupt practices, against the respondent and his agents, and several others were subsequently added. The petition was tried before Mr. Justice *Galt*, who gave judgment for the respondent, and from that judgment it has come by appeal to this Court. In all cases of doubt or uncertainty it is the province of the presiding judge, exercising at the time also the functions of a jury, to decide; and where there are doubts arising from conflict of testimony, or otherwise, we would be almost bound to uphold his decision. It is only in cases where the law is not administered, or the evidence misinterpreted, or insufficient effect manifestly given to the weight of it, that we should in any case interfere Bearing such in mind, we must reverse his finding only where misapprehension of the law or evidence has clearly existed. There is no charge of effective or consummated bribery alleged to have been proved either by the respondent or his agents. What, however, amounts to the same thing in law, attempts to influence voters by promises and payments of money, and otherwise, are charged. The rule with respect to such charges by Baron *Martin* in the *Cheltenham* case (1) having been adopted and acted upon by other judges in *England* and *Ireland*, is, I think, a safe one for our guidance. He said:

> Where the evidence as to bribery consists merely of offers or proposals to bribe, the evidence required should be stronger than that

(1). 1 O'M. & H. 64.

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with respect to bribery itself or where the alleged bribing is an offer of employment * * * it ought to be made out *beyond all doubt*, because where two people are talking of a thing which is not carried out, it may be that they honestly give their evidence; but one person understands what is said by another differently from what he intends it.

Mr. Justice *Willes* in the *Coventry* case (1) says substantially the same thing. Speaking of such an offer or proposal to bribe, he says:

It is a legal offence, although these cases have been spoken of as being an inferior class by reason of the difficulty of proof by the possibility of people being mistaken in their accounts of conversation in which offers were made, whereas there can be made no mistake as to the actual payment of money.

Mr. Justice *Morris* in the *Mallow* case (2) said:

I have desired to apply two rules to work out my judgment by. They are shortly these: First.—That I should be sure, very sure, before I come to a decision adverse to any party where his character or credit is involved. Secondly.—That offers or conversations unaccompanied by any acts should be much more strongly proved in evidence than where some clear definite act has followed the alleged offer or conversation.

These citations, copied from the judgment of Mr. Justice *Galt*, show, as I think, most properly, his adoption of the principles announced in them. They were applicable to the case, and I entirely approve of his decision which gave effect to them.

There is another important consideration which, in the case of a charge of individual bribery by offers or proposals, should not be lost sight of. Where there is no reasonable ground from the evidence to conclude there was anything like general bribery by the expenditure of large sums of money or otherwise at the election, the proof of individual bribery by promises should be stronger than where the opposite is the case. As regards the respondent, there is no evidence of such a character, and therefore not the same reason to suppose that in

(1) 1 O'M. & H. 107. (2). 2 O'M. & H. 22.

reference to some of the cases he was simulating innocence, when in reality he intended a violation of the law. If therefore the evidence rebuts the idea of general illegal or improper conduct of the election, and shows general propriety of conduct, the evidence of bribery by an offer or proposal should be proportionately clear and undoubted. The presiding judge finds specifically "that corrupt practices have not, nor is there reason to believe that corrupt practices have, extensively prevailed at the election."

Before considering the only cases to which I think it is necessary specially to refer, I may say, that I can find nothing objectionable in the judgment, either as to the law or in respect of the evidence given on the trial. The onus of proof was on the appellant, and he was required to give such positive or circumstantial proof as would leave no reasonable doubt of the guilt of the respondent or his agents of one or other of the offences known to the law and charged against him or them. If reasonable doubts remain as the result of the whole evidence, the respondent is entitled to our judgment sustaining, as it will do, that of the learned judge at the trial. And we must arrive at our decision, after making proper allowance for the weight that should always be given to conclusions arrived at from the evidence by the presiding judge. The credibility of the witnesses is a matter solely, in the first place at all events, with him. If apparently he had reason to disbelieve a witness, it is not for us to correct an alleged error on his part, unless indeed it be a very gross one.

Keeping these views before me, I will briefly refer to the several cases urged upon our attention.

In the particulars, from number 44 to 52, the respondent is charged with corruptly giving personally, or by his agents, various sums to charitable or other institutions and societies, public and private, and to

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religious bodies and associations sums of money or other valuable considerations, to induce members of such institutions, societies, religious bodies and associations "and others, generally, to vote or to refrain from voting at the said election." Some of the sums are alleged and shown to have been given some months before the respondent was declared a candidate, the others afterwards, but the most of the latter over two months before the election, and two during the canvass. The offence, as charged in the alternative, constitutes in substance two distinct ones, and should not have been so charged. It is an offence to give money to induce a party to vote for a party, but it is a totally different one if the object was to induce the party to abstain from voting.

It is in the nature of a criminal charge; for the accused party is subject to be indicted and disqualified. It is contrary to every principle of pleading to include in that way the two offences. A count in an indictment or criminal information so framed would be bad in law, and no judgment could be rendered on it. The verdict in such cases is either to find the accused "guilty or not guilty" of the charge in one or more counts. With a verdict of guilty on a count charging two different offences the court could not deal, for it could not say he was guilty of the two offences by the one act of giving one sum of money which are inconsistent the one with the other. It could not be given to induce a man to vote and at the same time to abstain from voting. Taking then the petition with the particulars subsequently given, no one could say which offence was charged. The appellant had, however, on the trial the benefit of this improper way of stating the charges, which he would not have had if proper means had been taken to require the petitioner to have made his election, or at all events to have stated positively each

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offence as a separate and distinct charge. The petition is general and merely alleges that the respondent "before, during, and after the election, was by himself and his agents guilty of corrupt practices within the meaning of that expression as defined by section of the Dominion Controverted Elections Act, 1874, and by the Dominion Elections Act, 1874, and the common law of parliament."

It therefore contains no specific charge. A man might as correctly be tried under an indictment charging him with "a malicious injury" under the statutes, naming them, without particularising any one of the numerous offences called malicious injuries created by the several sections of them. Looking then at the particulars we will see they are equally defective. There is in the heading of them. "Name of person bribing." "Name of person bribed," "Time," "Place" and "Nature." All the necessary information is given under each heading but the last; and when we look under the heading "Nature" we find only a statement of what was alleged to have been given or promised, but nothing to shew whether in any one case the money or promise was given or promised, so as to bring the case within any one of the numerous cases of accomplished bribery or offer, or proposal to bribe, or what the corrupt object was in giving the money or making the offer or proposal, The respondent is not informed, because no particular offence is charged, and he does not therefore know, whether he has to meet a case of bribery at common law or under the statutes, or whether he has to meet a charge of accomplished bribery, and if so, what the nature of it is, or in case of promises merely, to whom they were made or the object of them, whether to induce the party to whom or on whose behalf they were made to vote, or to abstain from voting, or whether he is charged with corruptly

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doing any of the alleged acts, on account of the voter having voted, or refrained from voting. To constitute an offence, the statute prescribes and requires that in the one case the object must be "in order to induce any voter to vote or refrain from voting," and in the other "on account of such voter having voted or refrained from voting." By the prohibition

> Every person who directly or indirectly gives, lends, or agrees to give, or lend, or offers, or promises any money or valuable consideration, or promises or endeavours to procure any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any person, in order to induce him, &c.

We have under the heading as to many of the cases simply and solely the word "money," to others the words "promise to procure office," to others the word "work," and besides others, not necessary to be stated, to one, the word "unknown." How then, having only the petition and particulars to direct him, could any one know which of the numerous offences he was charged with, and be prepared to meet, or how could any judge say what issue he was to try? The term "bribery" has a technical meaning, but that term is not used in the petition, and the term used "guilty of corrupt practice" is no more definite, sufficient, or intelligible, than the "guilty of a criminal act" would be in an indictment. As I have already shown, the "particulars" are no more explicit than the petition; which then of the numerous statutable or common law offences is the respondent notified to meet? To ascertain what an issue is we are to be informed and guided by the record. If that furnishes no evidence of one, there is nothing to try. The practice is not so technical in the election cases as in ordinary ones, but still, before a petitioner can expect a court to unseat a member *prima facie* legally returned, he should allege some one or more specific offences which under the statutes or common law would be

sufficient to unseat or disqualify him, or both, otherwise his complaint amounts to nothing tangible, and there would be no jurisdiction for inquiry. A judge is authorized by the statute to investigate a complaint of any one or more specific offences, either by statute or common law, but if none such is alleged, he has no power or jurisdiction. Here neither the petition, nor the particulars, separately or unitedly, have formulated a charge of the commission of any one of such specific offences. It may however be urged, that if the particulars were defective the respondent might have caused them to be amended. Admitting that he might, was he bound to do so? I think not. If a plaintiff serves a declaration so defective that no material issue can be taken thereon, with or without sufficient particulars, the defendent is not bound to demur, but may take advantage thereof at the trial; as it is only on material and proper issues that a judgment can be regularly founded.

A judge in an election case has a prescribed and special jurisdiction and can only try the specific offences created. I am therefore strongly inclined to the opinion, that for the reasons I have given there was strictly no jurisdiction in this case, and therefore that our judgment should be based on that conclusion. If the judgment appealed from had been against the respondent I think it would for that reason be liable to be reversed; but as it is in his favor, if I am correct as to the position taken, all that would be necessary would be to confirm it.

I will, however, refer to the cases relied upon by the appellant.

The charges as in the particulars, from number 44 to 52 inclusive, are for monies given to societies, associations and religious bodies. The record does not shew how the gifts were intended to operate, whether to

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induce the parties interested in the gifts to vote or to abstain from voting, and the evidence gives us no information on the point. I cannot therefore by my judgment convict the respondent in the alternative and disqualify him under the statute.

But, apart from that consideration, is the evidence such as to sustain either case? It is not contended that the gifts produced any improper results and there is no evidence to sustain such a position, if taken. It must therefore (if anything) be not for accomplished bribery, but for the attempt to commit it by gifts of money or otherwise. It is well settled, that an election may be illegal by general distributions of money at or shortly before an election, or indeed at any previous time, if made for any of the objects forbidden by law. Several elections have been set aside in *England* for such a corrupt practice. Improper influences which prevent unrestrained expression of the voters' wishes, if operating so largely that a free election cannot be said to have taken place, have been in many cases in *England* the grounds for avoiding an election. It has not, however, been decided, that a man, who entertains an idea that he may possibly be a candidate at an election subsequently to take place, shall immediately cease and desist from giving aid to public or charitable bodies or associations, as he had been in the habit previously of doing. Some of the charges refer to cases several months before the respondent had been decided upon as a candidate, and the donations made in those cases are not necessarily presumed to have been from corrupt motives. He was himself the only witness examined in proof of those charges. He gives the details as to them and positively negatives the charge of corrupt motive. He proves he had previously for some years expended annually in much the same way as large an amount.

He is a pretty extensive manufacturer, and such persons not unfrequently are found, from benevolent feelings or policy in regard to their business, to do as the respondent alleges he was in the habit of doing, irrespective of political results, and the law is not so unreasonable as to oblige a man, who intends to be a candidate at an election to stay his hand in such cases. He is not certainly to use money to secure or aid in his election, but he is not required to injure his prospects by withdrawing the usual support or aid to such benevolent or public objects he would be expected under ordinary circumstances to afford. I think the evidence shows little, if at all, beyond his accustomed gifts to the same and similar objects. The learned Judge who tried the case was of the opinion that the circumstances did not show general bribery or corruption, and I am of the opinion, that according to the current controlling authorities, it would be wrong for this Court to interfere with his decision.

No. 53 I think is of the same character.

Charge No. 9 of particulars is for bribery of *Louis O'Leary* by *John Spink* as agent of respondent.

The result of the evidence is, that shortly before the respondent became a candidate, and about five months before the election, a situation in the Custom House near the residence of *O'Leary*, became vacant. *O'Leary*, who had been a warm supporter of *Spink* when recently a candidate as a municipal officer, applied to the latter to aid him in getting the office, which he did. It is shown they were warm personal friends, and they both swear that the matter of the election had nothing to do with *Spink's* aid towards getting him the office, and that the election was not spoken of. *O'Leary*, however, volunteered to tell *Spink* he had made up his mind for other reasons to vote for the respondent. He swears such was the case, and I don't think we are

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required to say his statement was untrue. There is no evidence, in my opinion, of any corrupt practice in this case.

The gravamen of the charge is not in mere giving, but giving with the alleged corrupt intent. The corrupt intent is necessary to be sustained by proof either of a positive or of a necessarily inferential character. If nothing is said to base the act upon a promise in regard to the election (and none is shown in this case), it is only from all the surrounding circumstances a judgment is to be formed. The principle upheld in English cases and in this Court is, that if an act be done by a party, either a candidate or an agent, which from the evidence is capable of two constructions, one, that it was stimulated by a friendly feeling alone, and the other that it was corruptly done, the conclusion should be in favor of the former, and that the charge of corrupt motive is not necessarily inferred. There is nothing in the evidence before us to prove that what was done would not have been done were no election in prospect or taking place. The petitioner was bound to *prove* the corrupt motive, but he cannot do so by proving an act not necessarily improper.

These observations apply to all the remaining cases.

In respect to *Pedlar's* case, there is no evidence to prove an illegal or corrupt act. It is quite true that in the payment of a legal debt, bribery may be committed. If at one time disputed, but subsequently at an election, or in view of one, a party who is a candidate or agent makes an agreement which is carried out on condition that the party shall vote for the candidate or abstain from voting, I have no doubt it would be a corrupt practice, whether the party voted or refrained from voting as agreed upon. The party here was paid, but there is no proof of an illegal compact. He employed *Hawthorne* as his agent to collect the debt, and not then

feeling personally friendly to Mr. *Gibbs*, he told *Hawthorne*, that if the respondent settled the claim he might promise what he pleased about the election. *Hawthorne* and the respondent both positively swear this remark of *Pedlar* was not communicated to the respondent, and that the account was settled without any reference to the election. There is no law that I can find to justify us in saying a corrupt practice of any kind was proved. *Pedlar* never ceased to oppose the respondent and use his influence against him. If indeed he had changed, had left his political party and voted for the respondent, there might have been some reason to contend that, altho' not shown, there was some secret and implied agreement between the parties. Nothing of the kind could be contended here, for *Pedlar* would, I presume, have been quite willing to say so if he could have truthfully done so. Whatever motive actuated the respondent, we have only to deal with the charge of a corrupt one. It is sufficient to say that the proof of such is entirely insufficient. Every one is presumed to be innocent until he is proved guilty. Here, without proof, we are asked to assume guilt.

In the alleged charge of corrupt practices in respect of *Dingle*: 1st. By promise of office for his son, and 2nd. By promise of a contract.

These two charges were attempted to be sustained by the testimony principally of *Dingle* himself. In his important statements he is contradicted by several witnesses to such an extent that the learned Judge who heard the several witnesses places little reliance on his statements. He was evidently much incensed against the respondent, who gave the contract alleged to have been promised to him to another party before the election, and exhibited vindictive feelings against him. It was shown, that the respondent on several previous occasions had largely befriended him, although

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they were politically opposed to each other. The respondent, however denies the statements, made by *Dingle*, and the surrounding circumstances, and the testimony of others, go largely to sustain the statements of the respondent. Under the whole of the circumstances, I feel bound to sustain the finding of the learned Judge, that as to the alleged corrupt offer of the contract the case was not proved.

Then, as to the promise of office for his son, the particulars state the charge: "Promise of office for son."

The statutory provision for the "prevention of corrupt practices" at elections, under which this charge is made, is contained in sub-section two of section 92, of the Dominion Elections Act of 1874.

The 92 section, which relates to this charge, provides that "the following persons shall be guilty of bribery and shall be punished accordingly," and sub-section 2 is as follows:

> Every person who directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, or promises any office, place or employment, or promises to procure, or to endeavor to procure any office, place or employment, to or for any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, &c.

Of the several offences created by that section, the one charged against the respondent is, as before stated, "promise of office for son." It is not a charge that he gave or procured the office, but that he agreed, or promised, or offered to give the office. It is not that the respondent promised to procure or to endeavor to procure the office. Each is created a separate and distinct offence, and the charge must be proved as alleged. The interpretation of the provision I take to be, that the terms "gives," "agrees to give," "offers," or "promises" any office, refer to an office in the gift or at the disposal or under the control of the party himself, but the terms "agrees to procure," promises to procure," "or to endeavor to procure,"

refer to an office in the gift or at the disposal or under the control of some other person or persons. The statute, then, having made a plain and palpable distinction, the charge of a corrupt practice by the promise of an office for his son must be held to be some office in the gift or at the disposal of the party charged, and is not sustained by proof of a promise to procure or endeavor to procure an office in the gift or at the disposal of another. Taking, then, the evidence given by *Dingle* to the fullest extent, it makes out, not the case charged, but one essentially different, if an offence at all. The statute, in my view, points to some specific office, place, or employment to be stated and understood by the parties, or in the alternative to certain ones stated. I am therefore inclined to think, that some one or more specific office or offices, &c., should be stated and referred to, and that it should be so stated in the particulars if called for.

The evidence, however, does not reach the point in another aspect. The alternative in the provision is "in order to induce any voter to vote or to abstain from voting." Taking the whole evidence together, the conclusion I would draw from it amounts to this: *Dingle* was an active and energetic supporter of the party opposed to the respondent, and Mr. *Gibbs* ranks him amongst his leading supporters. There was a misunderstanding between him and *Dingle*, *Pedlar* and others of his leading supporters, at a recent municipal election, and it would appear that knowing this the respondent may be assumed to have hoped, not to get their support, or that they would not vote for Mr. *Gibbs*, but that *Dingle* might be induced to moderate his opposition to him and his exertions for Mr. *Gibbs*. That is, I think, the reasonable deduction from the evidence, and, if so, any thing said or done by the respondent was neither to induce *Dingle* to vote for him

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or to refrain from voting for his opponent. He has not therefore, in my opinion, been shown to be amenable to any provisions of the statute, and after diligent search I can find no other law under which his seat could be vacated or a charge for bribery or corruption successfully made against him.

I have applied the principles I have enunciated to the remaining cases, and I see no reason to differ from the learned Judge who tried the petition, in the conclusions at which he arrived in respect to them and the whole of the others to which I have particularly referred

Mr. *Gibbs* in his evidence, so far from suggesting bribery or corrupt practices on the part of the respondent, uses this language:

> I attribute my defeat at the last election to two causes. First, a misunderstanding between myself and my leading supporters in my own town. This has been alluded to several times during the progress of this trial. *Pedlar*, *Dingle*, *Thomas* and others of my leading supporters, owing to some misunderstanding at the previous municipal election. This caused a considerable coolness towards me. This influenced the election to a considerable extent. The other cause to which I attributed my defeat is the defection of the Roman Catholic vote.

From that and other reliable evidence we may fairly assume, that there was nothing like general bribery or corruption. That the election was generally fairly conducted, and that position of affairs calls for stronger and more unequivocal proof of a corrupt motive in reference to the matters with which the respondent is specifically charged.

I think the conclusions of the learned Judge were right, and therefore that the appeal should be dismissed with costs.

GWYNNE, J.:—

When so many learned Judges have concurred in

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acquitting the respondent of all conduct impeachable as corrupt within the meaning of the Act, I cannot but feel great distrust in my own judgment, which compels me to say that the matter has not struck my mind in the same light. In my mind, I confess it has appeared, that the Statute is less potent than I had taken it to be to prevent corrupt practices at elections, if some of the transactions complained of, and which the respondent himself admits, are to be regarded as unobjectionable and not within the prohibitory provisions of the Act. In a matter, however, attended with such penal consequences, I do not propose to support my view against the opinion of my learned brothers.

TASCHEREAU, J., concurred in Mr. Justice *Gwynne's* remarks.

Appeal dismissed with costs.

Solicitors for appellant: *Hodgins & Spragge.*

Solicitors for respondent: *Cameron & Appelbe*

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*Feb'y. 10.

*May 9.

FRANK LAKIN.....APPELLANT;

AND

THOMAS NUTTALL *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Special Agreement, non fulfilment of—Indebitatus counts.

L. sued *N. et al* to recover from them, under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "*L* was to run accord-

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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ing to his best art and skill a tunnel of 200 feet for the sum of four dollars per running foot; that $150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." *L.* made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labor.

Held: That there was not a sufficient fulfilment of the agreement, and inasmuch as *L.* had given no particulars nor any evidence under the indebitatus counts, the rule absolute of the court below ordering judgment to be entered for the defendants should be affirmed and the appeal dismissed with costs.

THIS was an action commenced in the Supreme Court of *British Columbia*, for breach of a contract to pay for work and labor in running a tunnel to test a supposed formation of anthracite coal on defendants' land.

The declaration contained two counts *ut seq*:

1. For that in consideration that the plaintiff would run, according to his best art and skill, a tunnel for the purpose of thoroughly testing the presence of a formation of anthracite coal on the ground of the defendants, situated on the *Kokesalia* river, the said tunnel to be of the following extent and dimensions: The length to be two hundred feet, the floor to be five feet wide, the width of the roof to be four feet, and the height to be six feet; the mud sills, caps, and all the necessary timbers to be substantial and serviceable, the defendants promised to the plaintiff to pay to the plaintiff four dollars per running foot for the said tunnel. And the plaintiff did, according to his best art and skill, run a tunnel for the purpose aforesaid, in conformity with the terms of the said agreement. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to payment for the said tunnel at the rate of four pollars per running foot aforesaid. Yet the defendants did not pay the plaintiff for the said

tunnel at the rate of four dollars per running foot as agreed.

2. The second count consisted of the indebitatus counts.

The writ was specially endorsed as follows:—

"To balance of account due plaintiff by defendants for work and services of the plaintiff done and rendered for the defendants, under and in pursuance of an agreement under seal dated 12th July, 1876, and made between the plaintiff and one *Thomas C. Nuttall* on behalf of the defendants, $400."

The respondent pleaded:

1. The defendants say to the first count of the declaration that they did not contract as alleged.

2. And for a second plea the defendants, other than the said *Thomas C. Nuttall*, say that the said alleged agreement in the said count mentioned was by deed and in the words and figures following and no other, that is to say:—

Memorandum of Agreement entered into the twelfth day of July, 1876, between *Thomas C. Nuttall*, acting for and on behalf of the *Kokesalia* Mining and Agricultural Company, of the first part, and *Frank Lakin*, miner, *Victoria*, of the second part. That is to say, the said party of the second part agrees to run according to his best art and skill a tunnel for the purpose of thoroughly testing the presence of a formation of anthracite coal on the ground of the above company, situated on the *Kokesalia* river, the said tunnel to be of the following extent and dimensions: The length to be two hundred (200) feet, the floor to be five (5) feet wide, the width of the roof to be four (4) feet, and the height to be six (6) feet, the mud sills, caps and all the necessary timbers to be substantial and serviceable; and the said party of the second part agrees to do all the work as specified, for the sum of four (4) dollars per running foot, he finding himself

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with all the tools, provisions, labor, freight, and passages necessary for the performance of the said work; in other words he is to receive four (4) dollars per running foot in full of all demands whatsoever. And the parties of the first part agree to allow the party of the second part the use of whatever tools may be on the ground free of charge, and the parties of the first part agree to advance to the party of the second part the sum of one hundred and fifty ($150) dollars on account of this contract, the balance to be paid on the satisfactory completion of the work; and it is further agreed between the said parties that the work is to be commenced with all possible dispatch.

IN WITNESS WHEREOF we hereunto set our hands and seals the day and year first above written.

For the *Kokesalia* Mining and Agricultural Company

THOS. C. NUTTALL,
HIS
FRANK X LAKIN,
MARK.

Signed, sealed and delivered by both parties in the presence of

H. C. COURTNEY.

And the defendants, other than the said *Thomas C. Nuttall*, further say that the parties in the said indenture named of the first part, is the defendant, *Thomas C. Nuttall*, and that the party therein named of the second part, is the plaintiff, and the said defendants, other than the said *Thomas C. Nuttall*, further say the causes of action in the second count mentioned are the same as those in the first count.

3rd, 4th and 5th pleas in substance denied the completion of the contract, and alleged that certain parts of the work done were not serviceable.

Plea to the second count, "never indebted as alleged."

The appellant took issue on all the pleas.

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The facts of the case are as follows:

The respondents, an unincorporated company owning land on the *Kokesalia* river, *British Columbia*, supposed to contain anthracite coal, sanctioned and accepted the above contract, under seal, signed by *Nuttall*, one of the respondents, for and on behalf of the company. The appellant immediately after his arrival at the scene of the work, wrote to Mr. *Nuttall* the following letter:

"SUNDAY, July 23, 1876.

"*Mr. Thomas Nuttall:*

"SIR,—I embrace the opportunity to write a few lines to the Coal Company of the *Cocosila* river. I am starting on the north side, the south side is not worth anything at all. I am commencing now as low down as I can for water but the face of the coal does not look so well as I would like to see it I have a hard job to get my provisions and tools into the mines I will be able in a little time to give you further information.

"I remain your humble servant

"F. LAKIN."

And on the 13th August, 1876, he wrote to respondents the following letter:

"AUGUST the 13, 1876.

"*To the Gentlemen of the Cocosila Company.* As far as I have run tunnel No 1, it is as far as it is necessary to run it; it is in forty eight feet but no indications of coal. No 2 tunnel is across the seam, no indications of coal, and the two tunnels run one hundred and ten feet. I am going to turn this tunnel in another direction. I am thinking to run another tunnel in Robertson's top seam. I am now gentlemen doing the best that lies in my power to find the seam, may be it will bother you, the reason that I started two tunnels, by starting two tunnels I have cut off about a hundred feet which will give a much better test. I will be through in about

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three weeks. I hope that some of the Company will be up soon.

"I remain gentlemen your humble servant

"F. LAKIN."

Respondents did not reply, but sent one *James Johns*, a coal miner, to report, and he reported that the tunnels run by appellant were of no use.

Appellant made five tunnels, none of which were two hundred feet, but claimed he had done in all 204 feet.

The learned Judge at the trial ruled as follows:

1st point.—As to construction of agreement, plaintiff has failed. His course was pointed out. It was not discretionary with him.

2nd point.—As to 2nd point, agreement binding on defendants and adopted. *Nuttall* had authority, etc., to execute, etc.

3rd point.—Under particulars plaintiff at liberty to go to Jury as to whether benefit conferred exceeded amount paid.

Case to go to Jury, subject to Mr. *Drake's* right to move Court that non-suit or verdict be entered for defendants, in case of verdict for plaintiff, if I am right in my construction of the agreement, or wrong as to the question under the particulars. As to the construction of the agreement, if wrong, and there should be a verdict for the defendants, Mr. *Robertson* to be at liberty to apply for new trial, as in case of misdirection.

In answer to several questions submitted to them in writing, the Jury found a verdict for appellant for $350.00

A rule was afterwards obtained to set aside the verdict, and enter a non-suit, or a verdict for defendants, or a new trial.

The Rule was argued before *Begbie*, C. J., and *Gray*, J., on the 17th December, 1877. and the following order was made:

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IN THE SUPREME COURT OF BRITISH COLUMBIA.
The 17th day of December, A.D. 1877.

Upon reading the Rule *Nisi* in the cause on the 15th day of November, 1877, and hearing Mr. *Robertson*, of Counsel for the plaintiff, and Mr. *M. W. Tyrwhitt Drake*, of Counsel for the defendants, it is ordered that the verdict found for the plaintiff, on the issues joined, be set aside, and that judgment be entered for the defendants an those issues.

(Signed) M. B. BEGBIE, C. J.

After the appeal was allowed this rule was twice altered—first, by directing that judgment of non-suit be entered for the defendants on the ground reserved at the trial; secondly, by striking out all the words after the word "plaintiff" and inserting in lieu thereof, "be set aside and a non-suit entered on the following grounds reserved at the trial," setting them out at length.

It was, however, decided by the Supreme Court of *Canada* when the case came up for argument that the only rule which could be taken into consideration was the one made before the allowance of this appeal.

Dr. *McMichael*, Q. C., for appellant:

The written contract is very open, and if the appellant has done what is reasonable and fair, it should be read in that way.

Appellant was to use his best art and skill. He understood this left him a large discretion, and he exercised it, advising the respondents from time to time as to what he was doing, and they did not dissent. The true meaning of the contract, it is submitted, is therefore that appellant should, by his best art and skill, test the presence of the supposed seam of coal, and that he was not to run a single tunnel of 200 feet, if such a tunnel obviously would not tend to the accomplishment of the

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object proposed in the contract. If respondents intended to select and determine mode of testing the presence of a seam, they would have indicated their views by annexing a plan and specifications of the work to the contract, shewing initial point of tunnel, direction, dip and curvature (if any).

It is contended that respondents were not parties to this sealed instrument and therefore are not liable under the contract. The evidence, however, clearly shows that the contract was adopted by the defendants, and it cannot be said that appellant cannot recover because one of the parties only has verified the document. See *Thomas* v. *Wilson* (1).

Moreover, in this case there is evidence of a verbal agreement with defendants to do this very work in accordance with the sealed instrument. See *Whitehaven* v. *Buffalo and Lake Huron Rly. Co.* (2); *Ottawa Gas Company* v. *Currier* (3).

Now, assuming that the special contract was unperformed, a new contract is to be implied from the conduct of the parties, and the plaintiff is entitled to recover on an implied assumpsit arising from work done under the deed. When work is done by one party under a special contract, but not according to its terms, and the other party accepts and takes the benefit, he may be sued for the value. Acceptance is a question of fact, and the Jury have found there was an acceptance.

The action here is for work done and accepted by the company.

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

The agreement was signed after the interview between appellant and the respondents, and the parol agreement was merged in and destroyed by the sealed instrument.

(1) 20 U. C. Q. B. 331. (2) 7 Grant 361.
(3) 18 U. C. C. P. 202.

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To enable appellant to recover against *Nuttall*, he must prove the performance of his contract.

The evidence of the plaintiff shows that, instead of one tunnel, two hundred feet long, he ran five tunnels, none of which were two hundred feet long, and none of which, in other respects, accorded with the specifications in the contract: *Appelby* v. *Myers* (1).

The appellant limited his demand by the particulars endorsed on the writ, and no other particulars of demand were furnished under the common counts of the declaration; the result is that he was bound to prove that he had performed his contract, and that there was a balance due under it.

If the appellant had proved a substituted contract in lieu of the one sued upon, he would be in a dilemma, because the action having been brought on the original contract, he could not recover on the first count of the declaration, and neither could he recover on the second count, because he is restricted by his particulars of demand to the original contract.

THE CHIEF JUSTICE was of opinion the judgment of the Court below should be affirmed.

FOURNIER, J., concurred.

HENRY, J.:—

The appellant in this case seeks to recover from the respondents money claimed to be due to him for work done under a contract under seal for the respondents.

By sec. 2 of ch. 104 of the Acts of *British Columbia*, 1869, "The English Common Law procedure Acts, and the rules and practice of pleading made in pursuance thereof," were adopted, as far as practicable, to regulate the practice and procedure of the Superior Courts of the Colony in all actions and proceedings at law.

(1) L. R. 2 C. P. 657.

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The evidence on the trial on both sides shows clearly that the contract was not completed, and consequently that the appellant could not recover under the first Count of his declaration. The issue under the pleadings was simply and singly as to the question of performance of the contract, and any side issues found by the Jury cannot affect the case as to the first Count.

At the conclusion of the plaintiff's case the Counsel for the respondents moved for a non-suit on the grounds, substantially: 1st. That the contract was shown by the plaintiff's evidence not to have been fulfilled; 2nd. That the defendants other than *Nuttall* could not be sued on the covenants; 3rd. That the plaintiff could not give evidence under the Common Counts, being limited by his particulars.

The learned Judge decided the first point in favor of the respondents, but the other two in favor of the appellant—the "case to go to the Jury subject to Mr. *Drake's* right to move the Court that a non-suit or verdict be entered for defendants in case of verdict for plaintiff. If I am right in my construction of the agreement or wrong as to the question under the particulars. As to the construction of the agreement, if wrong, and there should be a verdict for the defendants, Mr. *Robertson* to be at liberty to apply for a new trial, as in case of misdirection." The verdict being for the appellant for $350, a rule *nisi* was subsequently granted to shew cause why the verdict should not be set aside and a verdict entered for the respondents, or a non-suit, on the first two grounds taken for the motion for non-suit—for the erroneous admission of evidence under the Common Counts, or for a new trial, 1st, on the ground that the verdict was against the weight of evidence, and 2nd, that the verdict was contrary to the evidence and perverse.

I have already disposed of the first objection, and

have only to repeat my opinion that the appellant is not entitled to recover on the first count. Such being the case, I need not consider the second objection, which is but subsidiary to and covered by the decision on the first.

At the conclusion of the respondent's evidence the learned Judge, at the instance and request of the appellant's counsel, submitted certain propositions to the jury in connection with the issue raised by the plea of "never indebted," to the second count. It is contended by the respondents, that under the particulars of the plaintiff applicable only to the first count, any evidence to sustain the common counts could not be legitimately received, and should therefore have been rejected. I am of the opinion that the evidence in question was improperly received and should have been rejected, and consequently that the Judge should have directed and the jury should, under the pleadings and particulars, have found a verdict for the defendants.

By C. L. P. Act 1852, sec. 25, it is enacted that the particulars endorsed on the writ of summons under that section shall be considered as particulars of demand.

Roscoe in his work on evidence at *nisi prius* p. 96, 13th ed., says:

> When the plaintiff has delivered a particular of his demand he will be precluded from giving any evidence of demand not contained in it (1).

If the appellant's counsel at the trial wished to have had the benefit of the second count, his only course, I take it, under the practice, was to have asked leave to amend his particulars, and his application would no doubt have been granted, subject to such terms, as to

(1) See *Moss* v. *Smith*, 1 M. & G. 228; *Breckon* v. *Smith*, 1 Ad. & E. 488; *Wade* v. *Beasley*, 4 Esp. 7; *Headley* v. *Bainbridge*, 3 Q. B. 316; *Mearing* v. *Hellings*, 14 M. and W. 711; *Law* v. *Thompson*, 15 M. and W. 541.

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the postponement of the trial, costs and otherwise, as the presiding judge might have considered proper, and which amendments the opposite party must always be prepared for; but without any such amendment, the statutes and rules very wisely provide that the particulars limit the plaintiff's right to what they contain.

The respondents here got notice by his particulars that the appellant intended only to try the question as to the performance of the contract, and it would be as irregular as unjust to allow the appellant to apply the evidence given under the first count to the second without any previous notice or intimation to the respondents of any such intention. For this issue, being totally different and requiring evidence of a different and more extensive character than that required for the issue on the first count, the respondents could not reasonably be assumed to be prepared.

I have, however, fully considered the value of the whole evidence, and can find nothing in it to sustain the second count. It cannot be doubted that if, in the event of the failure to perform the whole of a contract, the party accepts and gets the benefit of a partial performance, the law renders him liable to pay *pro rata* or a *quantum meruit* therefor. Here, however, the work was done on the property of the respondents, and in that case an express acceptance was necessary to be shown; and it is to be distinguished from a case wherein a change of possession might be evidence of acceptance. In this case I can see no evidence of any acceptance of the work, and there is evidence I think to show that what was done was of no value to the respondents; but even if it were, unless they adopted it either expressly, or by acts which amounted to the same thing, they would not be bound to pay for work they had never requested to be done for them. They bargained for a tunnel 200 feet long and of prescribed dimensions, and secured and

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supported in a prescribed manner. What their object was, it was not for the contractor to consider. He was to be paid whether their object failed or not, and if he even found the coal sought for he could only claim payment for such work as was prescribed by his contract and he had fulfilled it.

For the reasons given I think the appeal should be dismissed and the judgment of the Court below affirmed with costs.

TASCHEREAU, J.:

I am of opinion, that taking all the circumstances of the case into consideration, the contract made by *Nuttall* with the plaintiff was binding on all the defendants. But I am also of opinion that the plaintiff failed to perform his contract. The evidence on this point seems to me conclusive. There can be no two interpretations of the memorandum of agreement of the 12th July, 1876. One tunnel, two hundred feet long, was what the plaintiff contracted for. He never ran such a tunnel. That is clear. But he contends that he ran four or five tunnels, and that these tunnels together are more than two hundred feet long. That was certainly not what he undertook to perform. The defendants contracted for one tunnel of two hundred feet in length; the plaintiff, for a certain consideration, bound himself to run that tunnel; he cannot now, not having performed his contract, claim the contract price. His right to sue on the contract depended on his performance of it.

On the *quantum meruit*, the plaintiff's action must also fail. What he did was under a contract, and that contract he did not perform. But even admitting the evidence adduced upon that count, I am of opinion that the plaintiff cannot succeed. There is not in the record a single proof of the value of the work done by the plaintiff. It cannot be contended that four dollars a

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foot was agreed upon by the contract, and that this is to be taken as the value of the work done and declared upon under the indebitatus counts. If the plaintiff, on these counts, leaves the contract aside, and says that he did for the defendants something else than that contracted for, he cannot have it taken for granted that what he did was of the same value as what was contracted for. He was bound to prove the value of what he did: he did not do so. He would probably have failed to prove that what he did was worth four dollars a foot, as it must generally be cheaper to run five tunnels of forty feet each than one of two hundred feet; at the mouth of a tunnel the work does not amount to much; it is as the sinking goes on that the difficulties and the cost increase.

The plaintiff argued that the defendants had accepted his work as performance of his contract. I can see nothing of the kind in the evidence.

Altogether, I am of opinion that the judgment of the Supreme Court of *British Columbia* in favor of the defendants must be confirmed and the appeal dismissed with costs.

GWYNNE, J.:—

It is unnecessary to enquire whether the instrument upon which this action has been brought is the deed of the defendant *Nuttall* alone, or whether, under the circumstances attending its execution, it might, upon the authority of *Ball* v. *Dunsterville* (1), be held to be the deed of all the defendants, who appear to have been present at its execution and to have authorized the defendant *Nuttall* to sign for them all; for, assuming the instrument to be the contract of all the defendants —whether their deed or their simple contract only, (as which latter it seems to have been declared upon,) matters not—it is quite clear that the plaintiff never did

(1) 4 T. R. 313.

fulfil what he had undertaken by the contract, and until completion of his part of the contract nothing was payable further than what was paid when the contract was made. The plaintiff therefore never could sustain an action upon the special contract. It is equally clear, that he could sustain no action as for work and labour upon a *quantum meruit*; for there was no evidence whatever to go to a jury of the defendants having accepted what work the plaintiff did do as a fulfilment of the special contract upon his part. Nor was there any evidence of any mutual abandonment of the special contract, and the substitution of a new implied contract to pay for the work done according to its value (1). Nor was there any evidence that the plaintiff was prevented from fulfilling the special contract upon his part by any default of the defendants (2).

The plaintiff at the trial rested his case upon the construction of the special contract, which he contended he had fulfilled by the work he did. The learned Judge thought the plaintiff should be non-suited, and I think he was right. He consented, however, to submit the case to the jury, reserving leave to the defendants to move the court in term for leave to enter a non-suit, or a verdict for the defendants, in case the jury should render a verdict for the plaintiff.

We must regard this reservation as having been made upon the consent of the plaintiff in the usual way—indeed, that is not disputed, and that, but for such consent, the learned Judge would have charged the jury, that upon the evidence they could render no verdict other than one in favor of the defendants.

Upon this reservation the Court rightly set aside the verdict which the jury, without any evidence whatever to warrant it, found for the plaintiff, and the Court made

(1) *Munro* v. *Butt*, 8 El. & Bl. 739.

(2) *Appleby* v. *Meyers*, L. R. 2 C. P. 651.

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absolute a rule to enter a verdict for the defendants, in accordance with the reservation at *nisi prius*. Afterwards, and after the plaintiff had appealed from that rule to this Court, the Court below changed the rule into a rule absolute for a non-suit. Whatever difference, if any, was made by this rule, was a difference in favor of the plaintiff, who, however, now objects here that the Court had no right to alter the former rule, which, as is contended, is the rule now before this Court on Appeal.

If the plaintiff is unwilling, as he says he is, to accept the non-suit, I see no objection to our holding him to the consent involved in the reservation of the case at *nisi prius*, and to our dismissing his appeal, and upholding the rule directing the verdict and judgment to be entered for the defendants, that being the only verdict which the facts warrant; or, if the plaintiff now consents, we may direct the rule to issue in the Court below for judgment of non-suit. It matters little which form the rule is in ,for in any case the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *A. Rocke Robertson.*

Solicitors for respondent: *Drake and Jackson.*

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*June 6.

*June 7.

THE SOUTH WEST BOOM CO., ...APPELLANTS;

AND

DANIEL McMILLAN, ...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Additional Plea, Supreme Court no power to allow.

D. McM., the respondent, sued *S. W. B. Co.*, the Appellants, to recover damages alleged to have been sustained by reason of the obstruction of the River *Miramichi*, by ap-

PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau, and Gwynne, J. J.

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pellants' booms. The pleas were not guilty, and leave and license. On the trial the counsel proposed to add a plea, that the wrong complained of was occasioned by an extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty.

On appeal, the counsel for the appellant contended that the obstruction complained of was justified under the Statute 17 *Vic.*, c. 10, *N. B.*, incorporating the *South West Boom Company*.

Held:—That the appellants, not having put in a plea of justification under the Statute, or applied to the Supreme Court of *New Brunswick* in *Banco* for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below.

APPEAL from a judgment of the Supreme Court of *New Brunswick*, discharging a *rule nisi* for a new trial.

This was an action brought by the Testator *Miles McMillan*, against the appellants and one *Daniel McLaughlin*, to recover damages alleged to have been sustained by reason of the obstruction of the River *Miramichi* by the appellants' booms, and also for short delivery of quantities of *McMillan's* lumber, which floated down the river into the appellants' boom.

The three first counts of the declaration were for obstructing the river, whereby the plaintiff was unable to float down a quantity of deals, and sustained damages by the loss in the price, from his inability to fulfil a contract he had made, and by the deterioration of the deals in value in consequence of lying in the water for four months. The fourth, fifth and sixth counts were for the loss of a quantity of logs through the defendants' negligence. The seventh count was in trover.

The *South West Miramichi*,—the river in question,—is a tidal river and navigable for some distance above the boom for boats and small steamers.

The appellants were incorporated by the Act of the *New Brunswick* Legislature, 17 Vic., cap. 10, (*N. Brun.*

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L. & P. Acts, p. 856.) Their act of incorporation, being about to expire in 1872, was extended by 35 Vic., cap. 44, (Acts of 1872, p. 86,) until the year 1882. By a subsequent Act, 37 Vic, cap. 107, (Acts of 1874, p. 334,) the capital stock of the Company was increased, and they were authorized to extend their works.

The pleas were not guilty and leave and license.

The following extract, taken from the Judge's *Fisher's* notes at the trial, and agreed upon as part of the case between the parties to be submitted to the Supreme Court of *Canada*, shows what took place in reference to the addition of pleas.

"Mr. *Davidson* moves for trial.

"Mr. *Wilkinson*—The pleas are, not guilty, and leave and license. I propose to add a third plea, that the defendant, *McLaughlin, was a lessee of the company.* 4th plea. That the wrong complained of was occasioned by the extraordinary freshet. (See proposed plea). It was through the extraordinary circumstances of the river that caused the difficulty.

"*Davidson* objects that they have no power to lease the boom.

"1. Dr. *Barker* objects that the pleas are demurrable, bad in form and substance, and under no circumstances can a plea be added which requires separate and distinct replication, because of the practice we are entitled to the time which we could not get.

"*Wilkinson*—As to separate replication, a general replication puts in issue the whole plea.

"2. Judge can impose such terms as are just.

"I refuse the application, as I intend to admit the evidence under the plea of not guilty."

The Jury found a verdict for the plaintiff on the count for obstructing the navigation of the river and also on the count in trover.

An application was made to the Supreme Court of

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New Brunswick, and a rule *nisi* granted, calling upon the defendants to shew cause why the verdict should not be set aside and a new trial granted, which rule, after argument, and the court taking time to consider, was discharged.

Mr. *Weldon*, Q, C., for appellants :

The first question is whether the *New Brunswick* Act of Incorporation which authorized them to construct these booms so "as to admit the passage of rafts and boats, and to preserve the navigation" is *ultra vires.*

[STRONG, J.:—How can that question be raised on the pleas to the first three counts ? You plead *not guilty*, which only puts in issue whether the obstruction was put there by defendants.]

We contend that the *main boom* did not do damage, and we are not responsible for swing boom.

[STRONG, J.:—You should have pleaded justification under the statute.]

If the Court below had decided on the pleadings, I would have applied to amend, but Mr. Justice *Fisher* tried the case as if the plea of justification was put in and no preliminary objection has been taken here.

[HENRY, J.:—In this case it seems very hard, but we cannot send back the case because the pleas are insufficient.]

Dr. *Barker*, Q. C., for respondent was not called upon.

The judgment of the Court was delivered by THE CHIEF JUSTICE :—

A plea of justification under the statute was not pleaded, and we have no power to add one now. And there are many good reasons for that, one of them is that the defendant might raise, as in this case another issue altogether, which would have to be tried in the Court below ; and the plaintiff might choose to demur to this additional plea, and that would have to

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be argued in the Court below. Under these circumstances the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *L. J. Tweedie.*

Solicitor for respondent: *A. A. Davidson.*

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*June 4.

CHARLES BEAMISH *et al*.....APPELLANTS;

AND

H. A. N. KAULBACH.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Original Court not a Superior Court—Judgment not appealable—B. N. A. Act sec. 99—*Supreme and Exchequer Court Act sec.* 17.

Held,—On a motion to quash, that an appeal will not lie to the Supreme Court of *Canada* in cases in which the Court of original jurisdiction is not a Superior Court, and that the Court of Wills and Probate for the County of *Lunenburg, Nova Scotia*, is not a *Superior Court* within the meaning of the 17 section of *The Supreme and Exchequer Court Act.*

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, maintaining the decree or judgment of the Court of Wills and Probate for the county of *Lunenburg, N. S.*, upholding the validity of the last will and testament of *Beamish Murdock*, deceased.

Mr. *W. F. MacCoy*, for respondent, moved to quash the appeal, on the ground that the Supreme Court of *Canada* had no jurisdiction to hear the cause, because

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the Court of Probate, where the cause originated in *Nova Scotia*, is an Inferior Court, (*R. S. N. S.*, c. 90); and contended that under the 17 section of the Supreme and Exchequer Court Act, an appeal does not lie in cases in which the Court of original jurisdiction is not a Superior Court, and cited *Hilliard* on new trials (1); *King* v. *Hanson* (2); *Queen* v. *Stock* (3).

Mr. *Cockburn*, Q. C., *contra*.

THE CHIEF JUSTICE:—

I do not think there can be any doubt in this case. The statute puts it beyond all doubt that the cause must originate in a Superior Court in the Province, then go to the highest Court of final resort, and then here. In no other case will an appeal lie; except, of course, when brought under sec. 27 of *The Supreme and Exchequer Court Act*, allowing an appeal by consent of parties direct from a Superior Court of original jurisdiction, or when brought in a criminal case under sec. 49 of the Act. The Court of Probate from whose decision the appellant now appeals is in every sense of the word an Inferior Court. The proceedings before that Court are entirely different from those of a common law court, and are subject to a writ of prohibition from the Supreme Court of *Nova Scotia*.

The appeal should be quashed.

STRONG, FOURNIER, HENRY and GWYNNE, J. J., concurred.

TASCHEREAU, J.:—

I agree with the judgment of the Court that the appeal should be quashed, but I do not wish it to be understood that I concur with the remarks of the Chief Justice, that an appeal will lie from a Superior Court

(1) Pp. 559, 585. (2) 4 B. & Ald. 521.
(3) 8 A. & E. 405.

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of original jurisdiction direct to this Court by consent of parties. I reserve my opinion as to the right of the Federal Parliament to allow an appeal otherwise than from the highest Court of Appeal in theProvince.

Appeal quashed with costs.

Solicitor for appellant: *Samuel G. Rigby.*

Solicitor for respondent: *W. F. McCoy.*

1879

*June 4.

RODERICK McLEAN.....APPELLANT;

AND

MICHAEL HANNON.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trover, action of, against Sheriff—Transfer of property by execution debtor—Misdirection of Jury.

In an action of trover or conversion against appellant, High Sheriff of the County of *Cumberland, N.S.*, to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of excution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

Held: That the sheriff was entitled under his pleas to have it left to the Jury to say whether the plaintiff had shewn title or right of

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

possession to the goods in question, and therefore there was misdirection.

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APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* to set aside the verdict for the plaintiff.

This was an action of trover or conversion brought in the Supreme Court of *Nova Scotia*, by the respondent against the appellant, High Sheriff of the County of *Cumberland*, to recover damages for alleged conversion by the appellant of certain personal property claimed by the respondent.

The pleas were a denial of the conversion, no property in the plaintiff, no possession, or right of possession in the plaintiff, and a justification under the writ of execution. The cause was tried before *Smith*, J., and a jury at *Amherst*.

There was no evidence tendered on behalf of the defendant, and the evidence of the plaintiff's witnesses showed that part of the personal property, viz: one mare and one two year old colt, belonged to the execution debtor and was in his possession when the seizure took place. That the balance, viz: a waggon, was left with the execution debtor in exchange for another waggon. That the plaintiff was the son of the execution debtor and claimed the mare and foal, as having purchased it from his brother; and the waggon from one *Wilmot*.

The learned Judge delivered the following charge to the Jury:

"I told the Jury I thought it was incumbent on the Defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

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The Jury found a verdict for the plaintiff.

A rule *nisi* to set aside said verdict was taken out by the appellant, and argued before the Supreme Court of *Nova Scotia* in *banco*, which gave judgment discharging said rule *nisi* with costs, from which judgment this appeal was taken.

Mr. *Gormully* for appellant was not called upon.

Mr. *Haliburton* for respondent:

The appellant was bound to prove the judgment on which the execution issued. See *White* v. *Morris* (1), and he should have pleaded that the sale was fraudulent or void against creditors.

In *Adams et al* v. *Kingsmill* (2), "where a Sheriff justified under an execution, and alleged that the goods had been fraudulently sold and delivered to the plaintiffs by the debtor to defeat the execution, the plea was held bad, because it did not show the judgment upon which the execution issued."

[THE CHIEF JUSTICE:—The Sheriff was not a wrongdoer as against this third party, and the Judge should have left the Jury to decide whether there was any title in this third party, but instead of this the learned Judge says it was incumbent on the defendant to make out his case.]

There was proof of a sale, and even if the transaction was colorable, it was good between themselves, and the Sheriff must show he represented a creditor. *White* v. *Morris* is relied on in *Atkinson's* Law of Sheriffs (3); and it has also been accepted as the leading case on this point by the *Ontario* Courts.

[THE CHIEF JUSTICE:—Your authorities are all good law, but not applicable to this case.]

THE CHIEF JUSTICE:

The sheriff seized under an execution goods which

(1) 11 C. B. 1015. (2) 1 U. C. Q. B. 355.
(3) Ed. 1878 p p. 297, 301.

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he found in the execution debtor's possession. A third party sues the sheriff, claiming the property as his under an alleged transfer from the execution debtor. The sheriff pleads several pleas, *inter alia* no property, or right of possession in plaintiff, also a justification under a judgment and execution. The plaintiff gives evidence of a transfer from the judgment debtor, and the sheriff gives evidence which, he contends, shows that such transfer was a mere sham, and that the property and possession never passed, nor was ever intended to pass out of the judgment debtor to the plaintiff. Unless the plaintiff could make out that he had the right of possession, by showing that he had a valid title, how could he recover the property which was not taken from his possession? And if he had no title, even against the execution debtor, what right of action could he possibly have against the sheriff or anybody else, who might have taken the goods from the judgment debtor. But the Judge, instead of submitting the question of the plaintiff's title to the jury, ruled that the defendant could not succeed, because he did not prove the judgment, as well as the execution under which he seized the goods. If this action had been brought by the judgment debtor for improperly seizing his property, this would be all well enough, but what right has a third party to sue the sheriff and recover against him for taking goods under an execution out of the execution debtor's possession, unless he is able to establish that the goods are his, or that the transfer under which he claims is, as against the judgment debtor, valid; in which case it might be necessary for the sheriff to shew the judgment, if he contested the validity of the transfer as against creditors.

STRONG, FOURNIER, and TASCHEREAU, J. J., concurred.

HENRY, J.:

The property having remained in the possession of

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the father, there was no transfer of it; and that being the case any body could take it and it would not be for the plaintiff to complain. The first question which should have been put to the jury was, in whose possession was the property; and secondly, who was the owner of it.

GWYNNE, J.:

As the Court below proceeded on *White* v. *Morris* (1), it is only necessary to refer to that case. Now, *White* v. *Morris* has no application to this case. It proceeded upon its being shewn by the plaintiff that he claimed under a *deed* executed by the judgment debtor, conveying to the plaintiff the property and right to immediate possession, and which deed was good, valid and indisputable against the grantor and all the world except his creditors. The *onus* being thus shifted from the plaintiffs to the defendants, it was necessary for them to justify under a judgment. In the case as reported in 11 C. B. *Jervis*, C. J., as the basis upon which the judgment rests, says the first point urged was on the plea of not possessed; it was contended that no possession passed to the plaintiff by the deed of assignment of the 11th October, 1850, sufficient to entitle him to maintain the action, and in support of this view, *Bradley* v. *Copley* (2) and *Wheeler* v. *Montefiore* (3) were cited.

But a comparison of the deeds in those cases with the language of the *deed* here, will shew that they have no application. Here, a right to the possession did pass to the plaintiffs by the *deed*, though it was incumbered with a trust, but which trust is quite consistent with the right to the possession remaining in the plaintiff. In the cases cited, however, instead of a trust, there was a proviso to the effect that until default made the assignors should have possession, and no right to the present possession passed to the assignees.

Then he proceeds:

It must be assumed that the instrument of the 11th October, 1850, *was intended by the parties to operate as a deed;* and, though

(1) 11 C. B. 1015. (2) 1 C. B. 685.

(3) 2 Q. B. 133.

fraudulent and void as against creditors (as the Jury have found), it is a perfectly good deed against all persons except creditors. It is an established rule of law,—never doubted until the case of *Bessey* v. *Windham* (1),—that the mere production of the writ and nothing more, will not enable the Sheriff to show that a *deed*, good as against all except creditors, is fraudulent and void. He must show that he represents a creditor. For this purpose the mere production of the writ is not enough.

And again:

I think, that, to entitle the defendants in this case to dispute the title of the plaintiff, they ought to have produced and proved the judgment.

And *Maule*, J., says (2):

The deed was one under which plaintiff was bound to take possession of the goods assigned for the purpose of enabling him to perform the trusts.

And upon this he bases his judgment, that to avoid the plaintiff's title so shewn, it was necessary to shew a judgment as well as a writ.

Cresswell, J., (3), puts it in like manner:

The assignment was clearly an operative assignment as between the parties; it was intended to convey the legal property in the goods to the plaintiff, subject to the trusts. I can understand that parties may go through the ceremony of executing a thing which it is not intended to operate as a deed, *but it is not suggested that that is the case here.* This assignment can only be disputed by creditors.

The question here is one which a Jury alone can determine, namely: whether there was or not any validity whatever in the transaction set up by the plaintiff as the evidence of his title?

As to the pleading, which Mr. *Haliburton* objects to as insufficient to raise the point, it is well settled that in trover, both writ and judgment can be proved under the plea of not guilty and not possessed, but in reality the case never went so far as to call upon the defendant to show anything.

Appeal allowed with costs.

Solicitors for appellant: *Townshend* and *Dickie.*

Solicitor for respondent: *William M. Fullerton.*

(1) 6 Q. B. 40. (2) Ibid p. 1030.

(3) Ibid p. 1034.

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TAXES—*Sale of land for taxes—32 Vic., c. 76, sec. 155, O.—Proof of taxes in arrear.*] In a suit commenced by a bill in the Court of Chancery asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant) for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title, was valid. The evidence is fully set out below. *Held:* That there was no evidence to show the land sold had been properly assessed, and, therefore, the sale of the land in question was invalid. [*Strong* and *Gwynne*, J. J., dissenting.] Per *Fournier*, *Henry* and *Gwynne*, J. J.: Where it appears that *no* portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by section 155 of 32 *Vic.*, c. 36, *O.* [*Strong*, J., *dissenting*, holding that sec. 155 applied to a case where *any* taxes ware in arrear at the date of the sale.] MCKAY *v.* CRYSLER — — 436

2——*Foreign corporation—Branch Bank—"Income," as distinguished from "Net Profits"* —31 *Vic., c. 3, sec. 4, N.B.*] *L.*, manager of the Bank of *B. N. A.*, a foreign banking corporation, having a branch in the City of *Saint John*, derived from such business during the fiscal year of 1875 an income of $46,000, but, during the same period, sustained losses in its business beyond that amount. The Bank, having made no gain from said business, disputed the corporation's authority to assess them under 22 *Vic.*, c. 37, 31 *Vic.*, c. 36, and 34 *Vic.*, c. 18, on an income of $46,000. *Held:* That

TAXES—*continued.*

under the Acts of Assembly relating to the assessing of rates and taxes in the City of *Saint John*, foreign banking corporations doing business in *Saint John* are liable to be taxed on the gross income received by them during the fiscal year; and that *L.* had been properly assessed. (*Henry*, J., dissenting.) LAWLESS *v.* SULLIVAN. — — — — — 117

3——*Halifax city taxes* — — — — 497
See ASSESSMENT.

TROVER, *Action of, against Sheriff—Transfer of property by execution debtor—Misdirection of Jury.*] In an action of trover or conversion against appellant, High Sheriff of the County of *Cumberland, N.S.*, to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of execution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence." *Held:* That the sheriff was entitled under his pleas to have it left to the Jury to say whether the plaintiff had shown title or right of possession to the goods in question, and therefore there was misdirection. MCLEAN *v.* HANNON — — 706

WILL—*Administratrix with Will annexed, purchase of fee simple estate by, when personal assets of testator sufficient to pay off incumbrance—Subsequent parol agreement to sell part of said Land null—Compensation Money for land, right to and how to be treated—Revised Statutes of Nova Scotia (4th Series), c. 36, sec. 40.*] About 1837 *Andrew McMinn* devised his lands to his wife, *Mary McMinn*, for life, with remainder to *Maria Kearney*. Letters of administration with the will annexed were granted to the widow. At the time of testator's death the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by *Ann Kean*, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter,