PETER H. LENOIR, *et al*.....APPELLANTS; 1879

AND *Jan'y 30.

JOSEPH NORMAN RITCHIE.....RESPONDENT. *Nov. 4.

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

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.

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 questionwas 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,

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*,

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

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 crimnal 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.*