1881

ANDREW MERCER..... APPELLANT;

*Mar. 5,7,8.

*Nov. 14.

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Escheat—Hereditary revenue—The Escheat Act R. S. O., c. 94 ultra vires—B. N. A. Act, secs. 91, 92, 102 and 109.

On an information filed by the Attorney General of *Ontario*, for the purpose of obtaining possession of land in the city of *Toronto*, which was the property of one *Andrew Mercer*, who died intestate and without leaving any heirs or next of kin, on the ground that it had escheated to the crown for the benefit of the Province, and to which information *A. M.* the appellant, demurred for want of equity, the Court of Chancery held, overruling the demurrer, that the Escheat Act, c. 94 R. S. O., was not *ultra vires*, and that the escheated property in question accrued to the benefit of the Province of *Ontario*. From this decision *A. F.* appealed to the Court of Appeal for *Ontario*, and that court affirmed the order overruling the said demurrer and dismissed the appeal with costs. On an appeal to the Supreme Court the parties agreed that the appeal should be limited to the broad question, as to whether the government of *Canada* or the Province is entitled to estates escheated to the crown for want of heirs.

Held,—[Sir *W. J. Ritchie*, C. J., and *Strong*, J., dissenting,] that the Province of *Ontario* does not represent her Majesty in matters of escheat in said Province, and therefore the Attorney General for *Ontario* could not appropriate the property escheated to the crown in this case for the purposes of the Province, and that the Escheat Act, c. 94 R. S. O., was *ultra vires*.

Per *Fournier*, *Taschereau* and *Gwynne*, J.J.—That any revenue derived from escheats is by sec. 102 of the B. N. A. Act placed under the control of the Parliament of *Canada* as part of the Consolidated Revenue Fund of *Canada*, and no other part of the act exempts it from that disposition.

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* PRESENT: Sir W. J. Ritchie, Knight, C. J.; and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

APPEAL from a decision of the Court of Appeal for the Province of *Ontario* affirming the judgment of *Proudfoot*, V. C., on an appeal of the appellant to the said Court of Appeal, from the decision of the said Vice-Chancellor, over-ruling the demurrer of the appellant to the information of the Attorney-General for *Ontario*.

An information was filed in the Court of Chancery on the 28th September, 1878, by the Attorney-General of *Ontario* against *Bridget O'Reilly*, *Andrew F. Mercer* and *Catharine Smith*, stating that *Andrew Mercer*, late of the city of *Toronto*, died on the 13th day or June, 1871, intestate, and without leaving any heir or next of kin, whereby the estate of the said *Andrew Mercer* in *Ontario* became escheated to the Crown for the benefit of the province; that he died seized of certain specified real estate; that immediately upon his death the defendants entered into possession of it without permission or assent of her Majesty, and have continued in possession, and refused to give up possession to her Majesty; that possession was demanded on 21st Sept., 1878, but the defendants refuse to deliver up possession; and praying that the defendants be ordered to deliver, up possession of the said land, &c. The defendant *Andrew F. Mercer*, demurred to the said information for want of equity, and the demurrer was argued before *Proudfoot*, V. C. On the 7th January, 1879, the learned judge made an order overruling the said demurrer.

From this decision, the defendant, *Andrew F. Mercer*, appealed to the Court of Appeal for *Ontario*, and that court held that the Provincial Governments are entitled, under the *British North America* Act, to recover and appropriate escheats, and affirmed the order overruling the said demurrer and dismissed the appeal with costs.

Against this judgment and order of the Court of

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Appeal, the defendant appealed to the Supreme Court, and the parties agreed that the appeal should be limited to the broad question as to whether the Government of *Canada* or of the Province is entitled to estates escheated to the crown for want of heirs.

The Minister of Justice for the Dominion of *Canada*, concurring in the view of appellant's counsel, that the hereditary revenues of the crown belong to the Dominion, intervened, and the case was argued before the full court in March, 1881—Mr. *Lash*, Q C., for the Dominion Government, opened the case.

Mr. *Lash*, Q. C.:—

The Dominion Government have intervened in this case in order to have the question determined whether the government of the Dominion of *Canada* or the government of the Province of *Ontario* have the right to deal with the escheated property It is admitted that the land in question here did escheat, and the only question is to which government the land now belongs.

Andrew Mercer died 13th June, 1871; the crown patent for the land in question issued before confederation. It is, I think, necessary to decide what is the reason why land escheats. There are but two reasons given—1st. that the crown is the last heir (*ultimus hæres*) and takes by royal prerogative; 2nd. that in socage tenure of lands an estate remains in the crown, which, when the heirs of the tenant in fee simple fail, draws to it the fee simple, thus making the crown the owner.

Opinions differ as to which is the true reason. The case must therefore be argued in both views. That the crown is the last heir is the opinion of Lord *Mansfield* in *Burgess* v. *Wheate* (1). This view is also supported by the provisions of the act of *Edward* II, concerning

(1) 1 W. Bl. 162.

the prerogatives of the king (1), and also by *Proudfoot*, V. C., in his judgment in this case. That escheat is a consequence of the free and common socage tenure, see *Blackstone* Comm. (2); *Burgess* v. *Wheate* and *Middleton* v. *Spicer* (3), and the judgment of *Patterson* J., in this case. By 31 *Geo.* 3, c. 31, Imp. stat., the lands in the province of *Ontario* are held in free and common socage. Now the effect of this Imperial statute, which is still in force, is that the allodial estate remains in the crown and, in the old province of *Upper Canada*, from 1791 to confederation, neither the provincial executive nor legislature had control over that tenure. Assuming then that escheat took place in either of the ways mentioned it was a royal revenue, and prior to the union act, 3 and 4 *Vic.*, c. 35, sec. 54, belonged to the Crown and did not go to the consolidated revenue of the province. By that statute the territorial and other revenues of the Crown were surrendered to the provinces, not absolutely or unconditionally, but to the account of the consolidated revenue fund of *Canada* during the life of Her Majesty and for five years after the demise of Her Majesty. This section 54 is repealed by Imperial act 10 and 11 *Vic.*, c. 71, and new provision of a similar kind is substituted by the Canadian act, 9 *Vic.*, c. 114. Now if the word "revenue" as used in the Imperial statutes, included revenues from escheats, I contend the word revenue in sec. 102, *B. N. A.* Act, 1867, includes revenues from escheats and that such revenue passed to the control of the Dominion parliament. This section excepts only "such portions thereof as are by *this act* "reserved to the respective legislatures of the province." The question therefore arises whether the power of appropriation over revenues derived from escheats was by the *B. N. A.* Act

(1) 1 vol. Imp. Stats., p. 182.
(2) Leith 2 edtn., p. 279.
(3) Reporter's notes, 1 Brown's Rep. 205.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

"reserved to the respective legislatures of the provinces." Assuming first that *escheat* is a royal prerogative, I contend that the *B. N. A.* Act gives no power over it to the provincial legislatures. In the recital of the act, we do not find a word said about the provinces to be created out of the Dominion and there is not a word about provincial constitutions till sec. 58. Section 5 merely relates to the territorial division of *Canada.* Section 9 continues the executive government of *Canada* in the Queen. I cannot find anywhere in the act provision for the appointment of a Governor General. This power exists in the Queen by common law. The first 57 sections and a few others respecting legislative authority would have been a sufficient constitution for *Canada* and would have entitled the Governor General, as representing the Queen, to do every thing which before the union the other governors could have done.

We now come to the provisions respecting the provincial constitutions. They are specific; the others are general. The effect, therefore, was to create each province a body politic—a *quasi corporation,* as distinct from her Majesty—so that whatever rights she held individually if now vested in the provinces must have been taken away from her Majesty and given to the provinces.

What rights possessed by the Queen have been taken away from her and handed over to the provinces? The Queen can come to *Canada* and rule in person, under the advice of her Canadian Privy Councillors. She can appoint a governor-general, but she cannot rule in the provinces with the advice of the provincial executive council. The lieutenant-governor must do that, and therefore she does not form part of the provincial legislature, as she does of the Dominion Parliament. The Queen, not being allowed to act either in the government or in the legislature of the province, the pro-

vinces must be regarded as having a separate existence from and any rights possessed by them which the Queen previously possessed must have been taken out of the Queen and vested in them by the *B. N. A* Act. If the right of escheat, therefore, be a prerogative right where is it taken out of the Queen and vested in the province? Not by sec. 92, not by secs. 109 or 117, as this prerogative right is not lands or property.

The estate which, is granted, is the freehold and not the allodial estate, which must remain in her Majesty, represented by the Governor-General. There is nothing in sec. 92 of the *B. N. A.* Act taking away this prerogative right. Section 109 did not change the tenure of the lands, for it expressly says: "subject to any interest other than that of the province in the same." This allodial estate certainly did not belong to the province at the union, for the land had been granted and, under the imperial statute, it was in the Queen.

The only other section is sec. 129, which gives the right to alter and change existing laws, but laws existing in virtue of the Imperial statute, 1791, could not be altered by the legislatures in so far as the allodial estate of her Majesty is concerned. What was surrendered was the revenues, when they might arise, but not the prerogative right, which remains in her Majesty.

If this view is correct, then lands in the province of *Ontario* which escheat to the crown in right of the royal prerogative, whether as last heir or by reason of the socage tenure, are within the meaning of section 102 of the *B. N. A.* Act and belong to the Dominion, and the Attorney General of the Dominion, and not the Attorney General of the province, is the proper officer to represent her Majesty and to take proceedings in her name for the collection of these revenues.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

The following statutes and authorities were also cited by counsel in the course of his argument.

Imperial Statutes: 1 *Will. IV.*, c. 25; 1 and 2 *Vic.*, c. 2, sec. 12; 31 *Geo. III*, c. 31; 3 and 4 *Vic.*, c. 35 (union act), sec. 42, 53, 54, 57, 59; 10 and 11 *Vic.*, c. 71; 30 and 31 *Vic.*, c. 3 (*B. N. A.* Act); 15 and 16 *Vic.*, c. 39.

Dominion Statutes: 31 *Vic.*, c. 5, sec. 12, 50; 31 *Vic.*, c. 39, sec. 3.

New Brunswick Civil List Act: Revised statutes, *N. B.*, vol. 1, c. 5, sec. 7. But see copy unrevised appendix journal *U. C.* assembly, 1857-8, p. 391.

Cases as to grants affecting Royal Prerogative: The case of *Mines, Plowden*, 3306; the *King & Capper* (1); *Cruise*, vol. 5, p. 422-423; 17 *Viner's* abg't tit. prerogative, p. 126, 130; *Touchstone*, p. 76, 77, 245; *Lenoir* v. *Ritchie* (2).

Mr. *Macdougall*, Q. C., for appellant:

I appear as counsel for the appellant *Mercer*, the private party in this case. The judgment of the *Ontario* Court of Appeal, from which we have appealed to this court, after expressing doubts as to some of the technical questions relating to procedure which were raised in that appeal, maintained the jurisdiction of the provincial authorities in all cases where lands escheat in this country for want of heirs.

I will first ask your lordships to consider the position of the crown in respect to "waste lands" in *Canada*—and indeed in all the *North American* provinces —prior to the Union Act of 1840. But, before I enter upon that enquiry, I desire to explain my client's position as between the two governments. His interest in this contest, is not, in my view, entirely a question of jurisdiction. It is a direct pecuniary interest, for if the

(1) 4 Price, 217. (2) 3 Can. S. C. R. 57.

local government administers this property he will get very little; if the Dominion government is entitled to represent her Majesty in the matter of escheats, he and his children will fare much better, because it has been the uniform practice in *England*, for a long period, for the crown to quit claim, or transfer escheated property, to the natural relatives of the deceased owner, where such relatives exist (1). This has also been the practice in *Canada* and the other provinces; therefore, I say my client's interest is not only a moral, but a legal interest, for in such matters custom makes the law. Even the *Ontario* Government admits that he is the natural son of the deceased *Mercer*, and if we succeed in proving that the jurisdiction is in the Dominion, I shall expect to receive from her Majesty's representative in this country the same liberal treatment for my client that he would have received before Confederation.

Prior to 1837, the control of the waste lands of the crown, or, as they were called, "the casual and territorial revenues," was a subject of discussion and dispute between the crown officials and the local assemblies in all the provinces. These revenues were not administered or appropriated by the local legislatures, but by the governor and his appointees. As settlement went on these revenues increased, and it was found that the executive government could be maintained at the expense of the crown without assistance from the legislatures, and that the people through their representatives could not obtain those reforms which they desired, nor exercise that influence which is now deemed essential to good government over officials who were practically independent of them.

(1) "Escheat is seldom called into action in modern times, as the crown usually waives its prerogative by making a grant to restore the estate to the family," etc.—WHARTON, 350.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

This was one of the subjects of dispute which culminated in the outbreak of 1837. The result was favorable to the popular demand, for Lord *Sydenham* was authorized to consent on behalf of her Majesty to a transfer or surrender of the casual and territorial revenues of the crown for a time, and on certain specific terms and conditions. In his speech to the *Upper Canada* Legislature, which will be found in the journals of the legislative council for 1839, he said: "I am commanded again to submit to you the surrender of the casual and territorial revenues of the crown in exchange for a civil list, and I shall take an early opportunity of explaining the grounds on which her Majesty's government felt precluded from assenting to the settlement which you lately proposed."

It appears that the *Upper Canada* assembly had proposed a transfer, without conditions which would have secured the salaries of the governor, the judges, and other high officials against the hostile action of a possibly disloyal or domineering majority in the popular branch of the legislature. I find that in the session of 1837-38 the assembly addressed the governor for a copy of an act which had been agreed to between the home authorities and the legislature of *New Brunswick*, regulating the collection and disbursement of the casual and territorial revenues in that province. Your lordships will find this act, or a copy of it, in the appendix to the Assembly journals of *Upper Canada* for 1837-38, p. 391. It is to be found also in the revised statutes of *New Brunswick*, but much abbreviated, though in substance the same. I call your lordships' attention to the preamble, and especially to the 6th section of this act. It is a rule in the construction of statutes that they are to be interpreted by reference to former acts *in pari materiâ*, "for it is presumed," says *Maxwell* (1), "that the

(1) P. 31.

legislature uses the same language in the same sense when dealing at different times with the same subject."

[The learned counsel then read several passages to show: 1. That the waste lands of the crown in *New Brunswick*, and the hereditary revenues, including escheats, were not previously subject to the control of the provincial legislature. 2. That the transfer was conditional and for a limited time. 3. That the prerogative right of the sovereign to deal with escheats, to compromise, grant to relatives, or otherwise dispose of them, was expressly reserved. 4. That by the use of the words "lands, mines, minerals and *royalties*," as distinct from hereditary revenues such as escheats, it is seen that the construction put upon the word "royalties" by the *Quebec* Court of Queen's Bench, in the case of *Fraser* v. *Atty. Gen.* (1), is a mistake, for this *New Brunswick* act was, no doubt, prepared by the law officers of the crown in *England*.

A bill, founded on the *New Brunswick* precedent, was passed, but containing, as I believe it did, stipulations that would have infringed on the prerogative rights of the crown, it was not assented to. I have not been able to find a copy of the bill, but I think I have suggested the true explanation of the language used by Lord *Sydenham*. As regards *Upper Canada*, therefore, it is evident that prior to the Union Act of 1840, both the casual and the territorial revenues of the crown in that province were under the absolute control of the direct representative of her Majesty in *Canada*, and that her title to the waste lands *jure coronæ* and to the hereditary revenues from whatever source had not been, and constitutionally could not be, affected by any act of the provincial legislature without her Majesty's consent, under the authority of an act of the Imperial parliament. We start then with the Union Act of 1840, to

(1) 2 Q. L. R. 236.

1881
MERCER
v.
ATTORNEY GENERAL FOR ONTARIO.

ascertain the nature and extent of local legislative authority over crown lands and crown revenues in *Canada*, before Confederation. The first point to be observed is the extreme care taken by the Imperial parliament to secure a permanent civil list, especially in respect to the salaries of the governor and judges, as fixed by schedule A of the act. The governor (sec. 53) might abolish any of the political offices, and vary the sums payable for their services, mentioned in schedule B, but the permanent offices could only be touched by an act of the legislature, which of course required the assent of the crown. But as regards the waste lands of the crown, we find this significant restraint on the power of legislation in the 42nd section :—

"Whenever any bill or bills shall be passed containing any provisions which shall in any manner relate to or affect her Majesty's prerogative touching the granting of waste lands of the crown within the said Province, every such bill or bills shall, previously to any declaration or signification of her Majesty's assent thereto, be laid before both houses of parliament," for thirty days, and, if either house should think proper to address her Majesty asking her to withhold her assent, it would not thereafter be lawful for her to give it. Other formalities were required to prevent any covert legislation which, if neglected, rendered such legislation *ipso facto* void. It will be seen that under these restrictions, in connection with those of the 57th section, preventing the legislature from passing any vote to appropriate any part of the surplus of the consolidated revenue fund, without "a message" from the governor, and in the 59th section, which requires the governor to exercise *all* his powers and authorities in conformity with instructions from her Majesty, any law *divesting* the crown of any of its prerogative rights, and *vesting* them in the provincial legislature, must emanate from, or be express-

ly confirmed by, the Imperial parliament. Now, it will be for my learned friends to produce such a law prior to July 1867, if they can. I have failed to discover it. By the Imperial Act of 1791 the tenure of free and common socage was declared to be the tenure of lands in *Upper Canada*, when granted by the crown, but the fee, estate, or title of the sovereign in the ungranted lands, has never been divested or transferred to any other power, Imperial or local. I contend that the power of the Canadian Parliament before 1867, and the power of the local legislatures since, in respect to the public lands was and is simply a power of administration. I admit that an act of the old Canadian Parliament, sanctioned and approved by her Majesty, as required by the Union Act of 1840, might have transferred to the Canadian Government the absolute proprietorship, the prerogative right, of her Majesty in the public lands, as well as the power to manage and sell, and collect and account for, the proceeds, but no such act is to be found, and therefore the prerogative right remains as before. Such then is the general conclusion at which we arrive as to the legal and constitutional position and power of the Canadian Government prior to 1867, in respect to the prerogative rights of her Majesty in the casual and territorial revenues and waste lands of the crown. In addition to the sections I have cited from the Union Act of 1840, I refer your lordships to *Forsyth's* cases and opinions (1), for the opinion of the law officers of the crown, that escheats, in the colonies, cannot be granted before they accrue; and the English Civil List Act 1 and 2 *Vic*, c. 2, and the Imperial Act, 15 and 16 *Vic.*, c. 39, were passed to remove doubts as to whether hereditary revenues in the colonies had not been surrendered to the *Imperial* Consolidated Fund. From all these acts and authorities I

(1) Pp. 156 and 157.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

contend it is clear that the jurisdiction of the Canadian Government, even when these lands and revenues were under the control of a governor who was a direct representative of the crown, was limited, conditional, fiduciary, and temporary; and that the power reserved by the 6th section of the *New Brunswick* Civil List Act, and by the 12th section of the Imperial Civil List Act (which are almost identical in terms) was reserved in the case of *Canada*, and that her Majesty has never parted with her right to dispose of escheats by and through her representative, the Governor General. The 1st and 2nd *Vic.*, c. 2, in terms extends to the colonies and foreign possessions of the crown, and the 15th and 16th *Vic.*, c. 39, to remove doubts, confirms my contention, because it leaves the 1st and 2nd *Vic.* to its operation in the colonies, except as "to moneys arising from the sale of crown lands which might have been lawfully disposed of" if the Civil List Acts of *William IV.*, c. 25 and 1st and 2nd *Vic.* c. 2, had not been passed, and expressly provides that the surplus not applied to public purposes in the colonies "shall be carried to, and form part of, the said consolidated fund" (1). The doubt-removing act is limited to the revenue from the sale of crown lands; it leaves the hereditary revenues from other sources, and the prerogative powers of the crown, in the same position as before, in all the colonies. When in 1847 the Canadian Parliament desired to make some changes in the restrictive provisions of the Union Act, and passed an act for the purpose, what happened? It was reserved, and as it was expedient to pass it—the object not being contrary to the spirit of the compact between the Imperial and Colonial Governments—the law officers of the crown found that it would be necessary to repeal certain clauses of the Union Act before the Canadian Act could

(1) Sec. 2.

become law. This was done, and the Canadian Act was appended as a schedule, and became, therefore, an Imperial enactment, unalterable by colonial legislation.

In the case of *William IV*, and in the case of her Majesty (and those acts are still in force in Great Britain, and as far as they apply are in force in the colonies of Great Britain) we find that parliament expressly reserved to the sovereign, or in other words to the crown, the right as against parliament and the government of the day, in respect of these revenues, to grant escheats of this description to relatives of the deceased—to those who were not, under strict construction of law, entitled to enforce their rights as legitimate heirs. That right to evince the benevolent disposition of the crown towards the natural relatives of a deceased person who may have left his property subject to escheat, is reserved in express terms, and, in order to prevent any possibility of misconstruction, it is reiterated *ex majori cautelâ* that the reservation is made to the intent and for the purpose of enabling the crown independently of those acts, and of the disposition that was apparently made of all the hereditary revenues, to deal with this particular class of revenues as it should please the Royal will. The same discretion and power must be held to remain in her Majesty in respect to these revenues in the colonies, for that act, 1st and 2nd *Vic.*, c. 2, relates to the colonies and foreign possessions of the crown, as well as to *Great Britain* and *Ireland.*

I now come to the *British North America* Act of 1867 The relative rights and powers of the Federal and Provincial Governments and Legislatures, and the qualified, conditional and temporary assignment or loan of the hereditary *revenues*—not prerogative rights, or even "lands"—but "revenues," the "net produce" of which was to be "paid over" after all proper deductions (3 and 4 *Vic.* c. 35, sec. 54) to the consolidated

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

fund of old *Canada*, have to be ascertained and considered in construing the Union Act of 1867. We must determine the effect and meaning of the provisions of the act of July, 1867, by ascertaining the legal and constitutional position of the subject-matter immediately before the passing of that act.

It is to be observed, in the first place, that the new legislative authority for the dominion is declared to be a "Parliament"—it was only a "Legislative Council and Assembly" before—and the "Queen" is *eo nomine* declared to be a part of that Parliament. It "consists" of the Queen, the Senate and the House of Commons. But she is not a part of any other corporation or legislative body under that act. The great powers of government are given to the Parliament of *Canada*, and only limited, enumerated, and definite powers of legislation, on local and municipal subjects, are given to the local assemblies.

The Lieutenant Governor is not the representative of the prerogatives of the crown in this country, except in a very limited sense. The Lieutenant Governor is appointed by the Governor General as other officers are appointed by him. He is a high official; he has important functions unquestionably, but among them is not included the power of representing the prerogative rights of her Majesty in respect to her hereditary revenues. As *Lord Carnarvon* stated in his despatch of January 7th, 1875, written under the advice of the law officers of the crown in England, he is a "part of the colonial administrative staff." He is, therefore, subject to the direction of the Governor General, who is advised, in respect of questions of dominion import, by the responsible ministers of the crown in this country. He is appointed by the Governor General, not by the Queen; he is commissioned by the Governor General, not by the Queen; he is instructed by the Governor

General, not by the Queen; he is subject to dismissal, under certain circumstances, by the Governor General; he is not subject to dismissal by the Queen. And, if I am permitted to refer for the purpose of my argument and in illustration of my case to a recent political event, he is subject to dismissal in consequence of a vote of censure by the Parliament of *Canada*, even against the opinion, so far as it could be ascertained, of the Governor General himself. The correspondence in that case and the action that followed clearly prove that my construction of the act in regard to the office of the Lieutenant Governor, is the true one. We have not had a judicial decision upon the point, but, so far as executive action and official opinion are concerned, that case proves that the Lieutenant Governor is regarded as a local officer appointed by the Governor General, and in no manner subject to direction, approval, or disapproval by the Imperial authorities. He is to all intents and purposes a local colonial officer and nothing more. If that be so, it is absurd to suppose that he can, by virtue of his office, in any manner undertake to represent or exercise Imperial functions, or dispose of the revenues resulting from the exercise of the prerogative rights of the crown. If you could find in this act language which showed a clear intention on the part of the Imperial Parliament for convenience, or for any reason of state, to clothe this officer, appointed by the Governor General, with authority to deal with this particular property or revenue, I would in that case admit, as the power of the Imperial Parliament is supreme, that he was properly exercising the functions of his office in collecting and disposing of the revenues resulting from the enforcement of the hereditary right of the crown in the case of escheats. From the evidence of intention which we find in the act itself, from the judicial commentaries and expositions it has received, from

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the action of the Imperial Government through the Secretary of State, from the action of the Governor General in this country, from the action of our own Parliament—from all these, I contend, it is established that the Lieutenant Governor is a local and not an Imperial officer, and can in no way intervene in proceedings for the recovery of escheats.

By sec. 102, "all duties and *revenues*" over which the previous provincial legislatures had power of appropriation (except what is otherwise disposed of by the act) are to constitute a consolidated fund for the public service of *Canada*.

But for the exception in this clause there would be no doubt, I apprehend, as to the present position of the hereditary revenues of the crown in *Canada*. It would be clear—beyond question—that these "revenues" as well as the "duties" arising under existing laws from various sources, were transferred to, and intended to form part of the consolidated fund of the dominion, for the purposes of the dominion, and that conclusion would be all the more evident from a consideration of the special object for which this transferrence was made. It was made in order that the new government should have the means from the same sources as before, and in pursuance of an existing contract, of providing for certain services, for certain salaries, and for certain public establishments. That duty is transferred to the dominion. The Imperial act having cast upon the dominion the *burden* of these services, it would be only reasonable and natural to suppose that the framers of this act would provide the dominion with the *means*, from the same sources as had previously furnished them with funds to meet those charges. But the excepting clause, according to some authorities, raises the question involved in this case: "Except such portions thereof as are by this Act *reserved* to the respective

legislatures of the provinces." I call your lordships' attention to the peculiar language of that clause. The act does not say that any revenues are reserved for appropriation by, or subject to, the control of the provinces or their local governments, but a portion is reserved to the "legislatures" of the provinces. The legislatures are the only power, newly constituted, to which this reservation is made; therefore, it is a legislative power. Their power of disposition or control is derived exclusively from their functions as a legislature. They must pass a law; they must dispose of whatever is under their control by an act of legislation. It is to them in their corporate, legislative capacity, that this power of control is given by the Imperial Act. When we look at the section of the act which assigns to them their legislative powers, we do not find, I contend, any sufficient words to convey to them the power to intermeddle with, or dispose of the hereditary revenues of the crown.

Now, I cannot understand the reasoning of the learned judges who say that by the word "land," in the 109th section, the absolute estate and prerogative right of the crown—always theretofore reserved—in the waste lands of the crown have been granted to and vested in the provincial legislatures. It is clear, from the qualifying expression "belonging" to the provinces "at the Union," that nothing more was intended to be given to the new, than had already been given to the old, provinces. Therefore, we come back to the proposition I have endeavored to establish, viz, that under the Union Act of 1840 the Queen's prerogative right remained intact, and that neither the 109th nor any other section of the act of 1867 has infringed upon or divested it. If we look at the 92nd section, which enumerates and limits the legislative powers of the province, we find these significant words: "The

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

management and *sale* of the public lands *belonging to the province*, and of the *timber* and *wood* thereon." If it had been intended to extinguish the estate or title of the crown, and to vest in the legislature the absolute dominion over, and fee simple in, the public lands, why specify "the timber and wood thereon?" In this grant of legislative power every word suggests agency, trusteeship, and limitation; not absolute ownership or undivided authority.

As this is a question of interpretation and intention, and as we sometimes derive great advantage from the light which is thrown upon doubtful words and phrases in acts of parliament—though I see nothing obscure or doubtful here—by ascertaining the views, opinions, and intentions of the framers of those acts, and as the estate or title which "belonged" to the Province of *Canada* "at the Union" of 1867 is the estate or title which belongs to *Ontario* now with certain qualifications, I direct your lordships' attention on this point to the explanations of Lord *John Russell*, who introduced and carried through parliament the Union Act of 1840. You will find the report in the *Mirror of Parliament* for 1840 (1). Lord *Stanley*, who had previously held the office of Colonial Secretary, though at the time in opposition, approved generally of Lord *John Russell's* Union Bill.

We find there a commentary upon the land and revenue clauses of the act of 1840, by those who framed them, and explained their meaning to parliament. It supports my contention that, as Lord *Stanley* puts it, "it is not the crown lands themselves, but the revenue arising from them" that was transferred to the Canadian Legislature. It results from this view of the reservation of the prerogative right of the crown in the waste lands of the crown, under the Act of 1840, that

(1) Vol. 4, pp. 3722 and 3725.

the same right subsists, and was not intended to be granted to the local legislatures by the act of 1867. The judgment of the Court of Queen's Bench for the province of *Quebec*, in the *Fraser* escheat case (1), to which I have before referred, and on which the respondents also rely as a decision in their favor, is based on the assumption that the word "royalties" in the 109th section of the *British North America* Act transfers to the provinces the hereditary revenues accruing from escheats. I admit that these revenues did belong to the old province of *Canada*, subject to the right of her Majesty to quit claim to or release them in favour of relatives, as I have already pointed out. But the "net produce" of these revenues was all that was granted by the act of 1849, and the 102nd section of the act of 1867, gives these revenues to the consolidated fund of the dominion, in express terms. The word "royalties" has no reference to these casual revenues, but to the rents or dues reserved for mining rights in the Maritime Provinces. "It is usual for the crown to reserve a *royalty* on minerals raised from waste lands in the colonies" (2). Not only is this clear from the associate words, but the next sentence shows that such a construction was never contemplated by the framers of the act, "and all sums then due or payable *for* such lands, mines, minerals or royalties shall belong to" the provinces. What "sums" could possibly be then due or payable "for" the prerogative right to inherit, as *ultimus hæres*, the property of persons dying intestate and without heirs? Are the *jura regalia* of the crown things, commodities, that can be sold in the market place, and for which "sums" of money may be "due or payable" by private persons? Surely not; yet, my lords, the respondents quote the case of *Dyke* vs. *Walford* (3) to support that proposition,

(1) 2 Q. L. R. 236.
(2) Forsyth, p. 178.
(3) 5 Moore P. C. 434.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

for they say royalties here means the same thing as *jura regalia* there.

The *Ontario* Court of Appeal, though arriving at the same conclusion as to the jurisdiction, would not base their judgment on the word "royalties," as the *Quebec* Court had done, but discovered an intention to transfer —I will not say, to *sell*—the prerogative to the local legislature, in the words "all lands." But they overlook, or do not attempt to construe, the proviso at the end of section 109. The grant of "all lands," etc., is subject expressly to "any trusts existing in respect thereof, and to any *interest*"—that of the sovereign, by virtue of her prerogative, as well as any—"other than that of the province in the same." This proviso qualifies the whole section. Private as well as public rights had to be considered in handing over the administration of the public lands to local legislatures. Sales had been made and rights acquired, which it became necessary to protect against unjust treatment by an arbitrary majority in legislatures which did not then exist. That proviso was intended to give a legal remedy against these new powers if they attempted to take away, or affect injuriously, the existing rights of any of her Majesty's subjects in the old provinces. I trust this court will not ignore the proviso.

The next point urged by the respondent, and recognized by the *Ontario* Court as a correct inference in law, from the word "lands," is, 1st, that the estate, or interest of the crown in escheats in *Canada*, is a "reversion," and, 2nd, that a grant of lands without more, in an act of parliament, conveys this reversion. I have tried in vain to find any authority for this doctrine as applied to lands in a colony. The respondent, in his reasons against appeal, mentions no cases. Remembering the commendation of my legal preceptor in favor of an old book, which he said was the great storehouse of cases

on the law of real property in England, especially concerning tenures, I resorted to *Touchstone*, and this is what I find there :—

"Grant of an estate in being by the king must recite the previous estate or else the grant of the new estate will be void (1)."

"Misrecital of previous estate in a deed may pass the reversion in the case of a private person, but will be void in case of grant by the king (2)."

"By grant of land in possession reversion may pass, but by grant of reversion land in possession will not pass." But this applies to private persons (3).

In *Cruise's* digest (4) I find it laid down that "where a reversion is vested in the crown it could not be barred by common recovery, which barred reversions and estates tail," and again, "the crown could not be deprived of any part of its property by ordinary conveyances which would divest subjects. An act of parliament expressly declaring that the reversion shall be divested out of the crown is necessary." It is clear from all the authorities that nothing will be inferred or implied against the rights of the crown. The reigning sovereign cannot even abandon a prerogative unless authorized by statute to do so (5). In the case of *Mines* (6) it was laid down, and has been followed as good law ever since, that if the king granted "lands and mines therein contained" it passes only certain mines, and not mines of gold and silver. The grantee will not take anything not expressly mentioned (7). And as it is an equally well established rule that no act of parliament can affect or take away the crown's prerogatives, unless by clear and express words, I do not

(1) Shep. Touchstone, p. 76.
(2) *Ib.* 77 and 245.
(3) *Ib.* 91 and *supra.*
(4) Vol. 5, p. 422, 423.
(5) *Queen* vs. *Alloo Paroo*, 5 Moore P. C. 303.
(6) Plowden 330 b.
(7) See the *King* vs. *Capper*, 5 Price 217.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

see any justification in law or logic for the claim of the respondent in this case that the words "all lands" in the 109th section of the *B. N A.* Act, even if they were not explained and limited by the succeeding words, include and were intended to grant away forever the prerogative right of the crown, whether you call it a royalty, a reversion, or a caducary succession.

The construction that is suggested respecting the Union Act of 1867, would utterly destroy the object and purpose of that reservation of authority in her Majesty with respect to escheats in *Canada.* It would place that kind of property which is expressly reserved by the crown in *England*, under the control absolutely of whom? Of the local assembly, the provincial representatives of the people. And how are they likely to exercise that control? What does this very example show of the disposition of such a body? In this case about $150,000 worth of private property belonging to the deceased, Mr. *Mercer*, accumulated by himself, not resulting from free grants or anything of that kind--which might, perhaps, have justified a feeling in the public mind that his property ought to revert to the public for public purposes—but the private earnings and accumulations of this person, are taken from the possession of his own son by the local government, by the vote of a bare majority of the local legislature, and appropriated to public uses. The local officials, with a voracity that is revolting, seize it for the purpose of gaining credit to themselves with their partizans, and, ignoring the moral, and, as I contend, the rightful claims of the admitted son and four grand-children of this deceased person, appropriate their patrimony to the use of abandoned women, to the erection of an asylum, a reformatory for prostitutes—and, adding insult to injury, with cruel sarcasm, they give this reformatory the name of ANDREW MERCER! Now, my lords, I say

that, looking through these Imperial statutes and the reports of transactions of this kind in *Great Britain*, we find that her Majesty has never acted in that spirit or in that manner in dealing with escheated property. I remember a case, and no doubt some of your lordships have met with it, which happened two or three years ago in *England*, where a person was killed by a railway accident. He happened to be without heirs. His estate consisted of personal property. I think he lived in the city of *Bristol*, and the property was taken possession of as an escheat of the crown. The money was, by order of her Majesty, appropriated for some public purpose in the town in which the man had lived. It was appropriated for the benefit of his neighbors and friends. Under the provisions of the Civil List Act, and under the influence of those moral considerations which have induced the crown to act leniently and unselfishly in matters of this kind, the money was given in that case, not to relatives, because the man had none, but it was devoted to public purposes in the town in which he had accumulated his property. It was not permitted to reach the public treasury. I refer to that case as showing the spirit which prevails, and the policy which directs in the disposition of such properties in *England*, and that the representatives of her Majesty in this country will, presumably, exercise this mild and generous prerogative power in dealing with properties of this kind which legally come to the crown in *Canada*. The argument of convenience and inconvenience is, I perceive, made use of by the respondents in this case, as if some weight ought to be given to it in a court of law. I think, therefore, I am justified in directing your attention to the public policy which is involved in this question, in view of the uniform practice of the Imperial authorities. At all events, it will operate to this extent—that it will cause your lordships to look into

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the matter with great care to discover the meaning and purpose intended, and the conditions imposed, in the transfer of these revenues to old *Canada* in 1840, and will sustain my contention that they were transferred to the jurisdiction and control of the Dominion Parliament by the act of 1867, under the same conditions. Now, I will call your lordships' attention, at this stage, to a case decided in this court, which involved the question of authority to exercise the prerogative right of the crown under our present constitution: I refer to the case of *Lenoir* vs. *Ritchie* (1), and, although it bears upon another branch of the prerogative, yet the doctrines propounded, and cases cited by some of the learned judges who delivered judgments in that case are, I think, doctrines and authorities which are applicable to the question which is now under your consideration.

See also *Chitty* on prerogatives (2). In looking over the cases bearing upon this question, I have met with a judgment pronounced by the Judicial Committee of the Privy Council in the case of *Theberge* vs. *Landry* (3), in which that doctrine is reaffirmed, although the court in that case distinguished as to the subject-matter, and refused to advise the exercise of her Majesty's prerogative right to hear appeals. As it is the latest decision on the point, by the highest court in the empire, I ask your lordships to make a note of it.

This is a judgment upon the *British North America* Act, and supports my contention that when I have shown that the prerogative as to escheats existed in this country prior to 1867, precise words must be found in the Union Act of 1840 and in the Confederation Act of 1867 to take away that prerogative. Now, my lords, there are no such words in either of these acts. There is another point with reference to the Act of 1867: The 91st section of the *B. N. A.* Act declares that:—

(1) 3 Can. S. C. R. 575. (2) P. 383.
(3) 2 App. Cases 106.

"It shall be lawful for the Queen, by and with the advice of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada* in relation to *all* matters,"—no more comprehensive language could be used than this,but there is one exception—"to all matters not coming within the classes of subjects *by this act* assigned exclusively to the legislatures of the provinces."

Now, my lords, it is the plain meaning of the language used by the Imperial Parliament in this section, that the Dominion Parliament should have, full, complete, and, so far as a subordinate legislature can have, absolute authority to deal with every matter of legislation in *Canada*, except those special matters that are assigned to these local bodies. The whole field of legislation, the whole scope of legislative power, is placed in the hands of the Dominion Parliament, and may be exercised over the lives, liberties and property of the people of this dominion, except in those special cases in which this subordinate sectional legislative power is conceded to the local legislatures. And to impress still more strongly and clearly on those who are to read this act, and the courts which are to interpret it, that they are not to question this general exclusive authority of the Dominion Parliament to legislate upon every matter concerning the people under its jurisdiction, except in those special cases in which certain questions are expressly assigned to provincial authorities, it is provided:—

"And for greater certainty, but *not* so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in this act, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated."

And certain subjects are then enumerated for the pur-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

pose of explanation and suggestion to people about to be placed under a new constitutional system. It might have been inferred from the enumeration of excepted matters, if this first enumeration had been omitted from the act, that the powers of the general parliament would after all be largely limited; but with this enumeration they would see at a glance the great multiplicity of matters upon which the Dominion Parliament have unquestionably a right to legislate. And for fear that the specification of particular powers might, according to a well known rule, operate as a restriction of the Dominion Parliament, the following is added:—

"And any matter coming within any of the classes of subjects"—not the particular subjects, but the "classes" of subjects—"enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces." Although in the enumeration of local powers it might seem that some of those assigned to parliament were included, you are not to include them. The very first subject over which the Dominion Parliament is given exclusive authority is "the public debt, and," as I interpolate, *the public* "property." "The public debt and property" must be read as if the word "public" had been inserted before "property," because no other property can be intended. That is the power with which the Dominion Parliament is endowed. It includes the "public property" of every kind which is not expressly assigned to the provinces. The 102nd section, as I have pointed out, covers everything so far as duties and "revenues" are concerned. The power to manage and sell the waste lands which were under provincial jurisdiction at the union, and collect the moneys or "sums" in respect of previous sales which were then uncollected, were under

the 109th section, given to the provinces. So there is no difficulty about that. Now, that power of legislation conferred upon the Dominion Parliament by the 1st sub-section, taken in connection with the general authorization in the 91st section, and taken in connection with the 102nd section relating to "all duties and revenues" seems to me, my lords, to give to the Dominion Parliament, beyond any question whatever, the right to deal with the subject-matter involved in this case, unless it is found to have been conveyed or transferred to the local legislatures by some other section. With reference to that contention, I shall have to examine with some detail the judgments, in the first place, of the Queen's Bench of *Lower Canada*, where this point was first decided. In the *Fraser* case to which I refer, it appears that in the first instance the question came before the learned judge who now so worthily fills his place upon this Supreme Court Bench Hon Justice *Taschereau*. The judgment given by him in that case affirmed the jurisdiction of the Dominion Parliament and the Dominion Government in matters of escheat. That was appealed against, and the case came before the Court of Appeal of *Lower Canada*. As I pointed out, the learned chief justice of that court admitted that he found nowhere in the *B. N. A.* Act of 1867, any direct and express transfer of lands or revenues escheating to the crown in *Canada* to the local legislatures.

[The learned counsel then reviewed the arguments and positions taken by Chief Justice *Dorion* in the *Fraser* case, and of the judges of the Court of Appeal of *Ontario* in the present case.]

Jurisdiction over every possible subject of legislation is, in general words, assigned to the Dominion Parliament, and the exception, so far as it extends, is something taken or carved out of that power, and is all that

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

is given to the local legislatures. The entire legislative authority, as it existed in the various provinces before confederation, was dealt with by the Imperial Parliament. No one can doubt the power of the Imperial Parliament to have deprived Canada (so far as an Act of Parliament could do it) of representative government altogether. It might have converted, or reconverted, our provinces into crown colonies, with some new experimental system of colonial government. Probably it would not have been well received. They might have found Boers in *Canada*, as well as in *South Africa*; but, as a matter of law—as a matter of argument before a court of law—I contend that the whole subject was completely within the control of the Imperial Parliament. They could assign such powers of legislation for the future as they thought fit without respect to the "rights" of the past. There were no rights in the question which a court of law can recognize. The people of the four provinces, united together in the new form, were endowed with even greater rights and larger powers than before, but the legislative control and direction of affairs were placed under two distinct legislative bodies. The greater power was that of the Dominion. The full and complete exercise of that power was vested in the Parliament of the Dominion, but certain geographical distinctions were retained, and the provinces were allowed, under the machinery provided in the act, to legislate upon certain specified local subjects as a matter of convenience. Now, I cannot understand what the learned judge (*Burton*) means when he speaks of political rights which remained in, or belonged to the Province of *Ontario*. What rights could *Ontario* have had? There was no such political entity or corporation; there was no such province in a legal sense. It was a geographical expression. It is true you will find that our statutes from 1840 down, were applicable,

some to *Lower*, and some to *Upper Canada*. The old distinction was kept up to limit the operation of certain statutes in consequence of local laws that had previously existed in the provinces. So far as the people of *Lower Canada* are concerned, I admit that from the peculiar circumstances under which the French inhabitants of *Quebec* were dealt with after what the English call the "conquest," and they call the "cession," certain privileges and rights were reserved or secured to them by a so-called treaty. But those rights were not secured to *Quebec* according to her present limitary lines. They were conceded to the French population who were scattered at that time over the whole northern part of this continent. The cession was not restricted to the Province of *Quebec* as bounded at present. These boundaries were established under English jurisdiction; the French never bounded their province on the north; therefore, when rights were reserved to the French inhabitants of this colony, they extended to the *people*, and not to any geographical or territorial circumscription or boundary. So, the pretence that there ever was any grant or reservation of particular rights to British immigrants who came to *Canada* since the cession, and are now living within territory formerly part of the Province of *Quebec*, is altogether unwarranted in the history or reason of the case.

Is escheat a reversion? The doctrine that it is a reversion in the ordinary sense, seems to be relied on both by Mr. Justice *Burton* and Mr. Justice *Patterson*, and it is also stated in the reasons against appeal, by the learned gentlemen who prepared the case, that they rely upon that doctrine of reversion. I am not going to occupy the attention of your lordships with a discussion upon tenures, because it seems to me the feudal relation is not involved in

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the argument here. I did go into that question at some length before the Court of Appeal. I had carefully examined the authorities, because it was a matter of some historical as well as legal interest. The origin of feudal tenure, the mode in which property was transferred under that tenure, the relation of lord and tenant, the rights of tenants, and the successive changes made by parliament as to these rights; first, their right to sell; secondly, their right to devise by will, destroying thereby the right to escheat in the lord to a great extent; and, lastly, the right of the crown in the absence of a mesne lord: all these questions were and are very interesting as a historical study, but it seems to me they have very little weight in this discussion, because in *Canada* we have a tenure, the character, incidents and bearings of which are well understood even by laymen, from the frequent discussions and expositions in the courts—I mean free and common socage. This was established in *Upper Canada* in 1791 —and we have to deal with this question in the light of doctrines applicable to the tenure of free and common socage. I contend, as a matter of plain, elementary law, that it is neither in accordance with modern decisions nor the reason of the thing, to say that when the crown grants waste lands in a colony to private persons, or authorizes a colonial legislature to grant them, the rights of the crown as *ultimus hæres*, or, if you please, the reversionary right of the crown arising from escheats, is granted at the same time. That sovereign right is not granted; that is the "seigniory" which is always reserved. Let us suppose it to have been granted once in a particular case, and that a subsequent owner happen to die intestate and without heirs, what becomes of that seigniory? The crown having granted the reversion cannot resume it. It has ceased to exist. Therefore, the reversion here is not that kind of reversion

which lies in grant. Lord *Mansfield* said, in the case of *Burgess* vs. *Wheate* (1), that it was a caducary succession, a "sort of reversion," that is to say, it reverted, it came back to the lord or king, but in contemplation of law it was not the reversion which is granted, or may be granted by the owner of a prior estate, if he uses language to show that he intends to grant the reversion. It is not a part of the inheritance, it is something which springs into existence by accident, and is no part of the original estate or fee, which is always vested in some person, and may descend successively through unending generations. Therefore, I contend that the judges of the lower courts treating it as a part of the inheritance known as a reversion, have entirely mistaken the fundamental principle on which the doctrine of reversion is based. In the colonies that now form part of the *United States*, as well as these provinces, and also in *India*, the crown has always been treated as the ultimate heir, to whom property descends or passes that is vested in no one else, and it is by virtue of that doctrine that this property fell to, and is now vested in her Majesty. It is not vested under any doctrine of reversion found in the old books with reference to feudal tenure. Perhaps it will be as well at this point to give your lordships the authority on which I rely, and which, in my judgment, is conclusive. See *Cruise's* Digest (2).

That expresses very clearly the doctrine with respect to title by escheat since the abolition of military tenures. In *New Brunswick* it was held, on the authority of the law officers of the crown, that the wild lands of that province belonged to the King, *jure coronæ*, and were disposable by the representative of the crown, and not by the provincial legislature (3). I hold that the waste

(1) 1 W. Bl. 163.

(2) Edition of 1835, vol. 3, in page 397.

(3) Forsyth, 156.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

lands in *Canada* are still crown lands in the same sense, and that only the *revenue* has been granted to the provinces, and only "the management and sale" entrusted to their legislatures. The pretence that this land, which has come to the crown by the accident of escheat, was included or contemplated in the word "lands," as used in the 109th section, cannot be sustained as a matter of law, in my humble opinion, for a single moment. That it was not conveyed or transferred under the word "royalties" I hope I have succeeded in convincing your lordships. The learned judges of the Court of Queen's Bench were misled by *Brown's* Law Dictionary. Their attention was not directed to the use of this word in the provincial statutes. Upon this point I would direct your lordships to an opinion expressed in another place by a distinguished lawyer and politician. I refer to the Premier of this Dominion, who was one of the framers of the *B. N. A.* Act. It will be found in the House of Commons debates for 1880, page 1185.

The opinion of a distinguished statesman, and one who has been conversant with legislation and political affairs in this country for a great many years; who was chairman of the convention which planned, elaborated, and finally succeeded, with the co-operation of the Imperial Government, in carrying through the Imperial Parliament the Confederation Act—that is an opinion which I venture to say is entitled to great weight even in a court of law. My learned friend who, as Minister of Justice, acquiesced in the decision of the Quebec Court, will contend, I presume, that their interpretation of the word "royalty" is according to the intention of this act, or that because the word happens to be found there, your lordships may by a large construction make it cover the royal prerogative of escheats. I submit that even if the word is capable of that meaning it cannot be held to include the hereditary revenue from escheats.

It refers to the rents or charges for mines in *Nova Scotia* and *New Brunswick*. There were none reserved in *Ontario* and *Quebec*. Those who are familiar with the preliminary stages of the bill, are aware that the word "royalties" was inserted after the first draft, at the suggestion of gentlemen from *Nova Scotia* and *New Brunswick*, lest these rents or sums payable to the crown under the name of "royalties" should be held not to be included; and thus the word was added. By the well known maxim *noscitur a sociis*, you are to interpret words of this kind by reference to those with which they are associated; and according to the doctrine also that the prerogative rights of the Crown, cannot be conveyed or granted unless by express words, you must be satisfied that it was undoubtedly the intention of the Imperial Parliament to grant them in this case. Unless that is clear, you must give a limited signification to the word "royalty." The court in *Quebec* based their judgment principally on that word. The court in *Ontario* founded their judgment upon the doctrine of reversion, being of opinion, as we must assume, that it was the intention of the Imperial Parliament to convey to the provinces by the use of the word "land" this so-called reversion. That construction, I submit, is in direct conflict with the old, and heretofore, unquestioned doctrine with respect to the prerogative rights of the crown in *England* and in the colonies. In *Theberge* vs. *Landry*, the doctrine that her Majesty's prerogative in her colonies must not be infringed, must not, in any manner be affected by any Act of Parliament, except by precise words, is reaffirmed by the highest court in the empire. I contend that even her Majesty, without the express sanction of parliament, cannot grant away the hereditary revenues of the crown from her successor. In all the acts relating to that subject since parliament was

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

established, there is evidence of extreme care when dealing with hereditary revenues of the crown, and prerogative rights of the crown, to preserve them intact for the successor; otherwise the crown would not be worth fighting for.

No subordinate power can touch the prerogative. If the Parliament of *Great Britain* should choose to turn the sovereign out and convert the country into a republic, as once happened, I suppose parliament could do it, but not without the consent of the sovereign. With that assent parliament is supreme. But, I apprehend, even my learned friends will agree that such an act must contain words which clearly evidence the intention of transferring her Majesty's prerogative to the legislatures of the provinces. My lords, there is nothing to evidence that intention here. It is only an inference at best, and that inference is contradicted by all the expressed objects of the act.

Surely it is a trifling thing to allow the Queen's representative in this country, as a matter of authority, as a proof of the existence of that authority, to dispose of any properties which may, by the death of the existing owners, be escheated. It is a light burden, and my learned friends wish to deprive us, not only of the fact, but even of the sentiment, which is inspired by the existence of the fact, and to cut the last—almost the last—link which binds *Canada* to the Mother Country. I say it would be a most fatal result if it should turn out that the Imperial Parliament meant to extinguish the sentiment of loyalty, where it has hitherto inspired to noble deeds, by removing forever from the eyes of our youth this sign, this badge of the royal authority. Certainly it is not the expressed meaning of Parliament. I am satisfied it was not the intention. My lords, if such an intention had been avowed, that act would never have passed the Parliament of *Canada*,

much less the Parliament of the Empire. My learned friends must go that far. They must admit that the surrender is for all time; that this act is perpetual; that it has no limitation; that it is a complete and final transfer to the subject, of the power of asserting the prerogative rights of the crown in *Canada*. They must say that the crown of *England* is no longer entitled to claim any rights whatever in the casual or territorial revenues which previously did accrue and belong to that crown, in *Canada*. I deny that there is a word in the act to support that construction. I leave the case there. It is an important one. Its importance is not by any means to be measured by the amount of money involved, or the private interests directly concerned. It is a question whose decision will settle the relative powers and rights of these two legislative systems in this country. It is the first case, so far as I have observed in looking through the judgments of this high court, in which the question of prerogative jurisdiction has been squarely presented. Though I am here representing private parties only, I have felt it my duty to draw your lordship's attention—perhaps to a greater extent than would be warranted in an ordinary case—to the public interests involved in this case.

Mr. *Blake*, Q. C., for respondent:

While entirely agreeing with the learned counsel on the other side that the importance of the case far outweighs the amount involved, I am unable to agree with them when they claim that upon the decision of this case rests the ultimate fate of the scheme of Confederation. I fail to perceive how the connection of this country with the empire could depend upon the question, whether the property of an inhabitant of *Ontario* or *Canada* who died without heirs was to be disposed of by the Dominion Government or by the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Provincial Government. If the connection depended upon that, it is hardly worth retaining.

I will first refer to the position of the provinces before the union. This right of escheat, which is improperly called a prerogative right, is an incident of tenure in socage—a species of reversion. This right of escheat fell to the lord; and not to the crown, unless the crown happened to be also the lord of whom the land was held.

This view is confirmed by 2 *Cruise's* Digest (1).

See also in *Attorney-General* vs. *Sands* (2).

If a lord to whom the land reverted might be himself a subject, an escheat could not be called a prerogative right.

This was the old law.

In 1791, by the Imperial Act, 31 *Geo. III.*, c. 31, the legislature of the province of *Upper Canada* was empowered to make laws for the "peace, welfare and good government" of *Upper Canada;* but there was a limitation as to the general power of making laws in any manner relating to or affecting "his Majesty's prerogative touching the granting of *waste lands*" of the province, with regard to which no laws were to be made except with the sanction of the Imperial parliament. This limitation is to be found in section 42, and it is clear that if this proviso had not been inserted, the legislative body could have made a law affecting the prerogative of the king touching the granting of the waste lands of the province. By the 43rd section, the most pertinent to this question, all lands in *Upper Canada* were to be held in free and common socage, and legislative power was given to make "alterations with respect to the nature and consequences of such tenure of free and common socage." Now, though this tenure

(1) Title escheat, p. 397.

(2) Tudor's leading cases on real property (3rd. ed.), p. 774.

involved the right of the crown as ultimate heir, it is as clear as day that the legislature could have altered that tenure, and such legislation would necessarily have interfered with the crown's right in respect of escheat. Such legislation would, no doubt, have been subject to disallowance by the crown, but in this respect only were provincial rights curtailed. The provincial legislature could not, without the sanction of the Imperial parliament, have interfered with the prerogative with regard to "waste lands," but they could deal with the subject of escheat in regard to all other lands. The act of union, 1840, 3 & 4 *Vic.*, c. 35, gave the same powers and had the same reservations, and re-enacted section 42 of *Geo III.*, c. 31.

By the act of 1854, 17 & 18 *Vic*, c. 118, "An act to empower the legislature of *Canada* to alter the constitution of the legislative council for that province, and for other purposes," section 42 of the act of 1840, 3 & 4 *Vic.*, c 35, was repealed; so that so far back as 1854 the only remaining prerogative of "granting waste lands" was abolished, and full power was given to the provincial legislature to deal with this prerogative of granting waste lands, and with it power over escheat as respects such lands.

If it is found that by the acts of 1791 and 1854 absolute legislative power was given to the local legislature to deal with this subject matter, we approach without difficulty the distribution of legislative powers under the *B. N. A.* Act. But before considering the *B. N. A.* Act it is necessary to refer to the act of 1852, 15 & 16 *Vic.*, c. 39, relied on by the other side. That act was passed "to remove doubts as to the lands and casual revenues of the crown in the colonies and foreign possessions of her Majesty," and allowed those revenues and lands to be lawfully appropriated for the benefit of the colonies in which they existed. By the first section of

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the act it was declared, that "the provisions of the said recited acts in relation to the hereditary casual revenues of the crown shall not extend or be deemed to have extended to the *moneys arising* from the sale or *other* disposition of the lands of the crown in any of her Majesty's colonies." The phrase "hereditary casual revenues of the crown" is a general expression, used in connection with the words "sale or other disposition of the *lands* of the crown," and would include *all* lands, whether waste lands or lands falling to the crown by escheat.

Then in a distinct phrase the act speaks of *the moneys arising from the sale of the land.* Here again is a clear legislative declaration that the subject-matter of the lands should hereafter be left under the exclusive control of the local power. And surely it was never intended, in the ever widening and deepening current of liberty of the colonies, that the management of these lands should continue to be under the control of the Imperial parliament.

Then again escheat is not a revenue, but a casual profit. What is revenue is the fruits of the escheat. Nor were escheats ever looked upon as revenues in the sense argued, for a custom had grown up to hand over the property to the connections of the person who had died; and the complaint here is that the Local Government have dealt differently with the fund, and that the whole was not given to the natural son of the deceased. If that be so, how much force is there in the argument that this fund was considered as a fund for paying salaries of the judges, or that *Canada* must depend on these revenues to pay the civil list?

It is also contended that these sums fell into the consolidated revenue fund; but on the 1st July, 1867, that fund terminated, for, as the learned counsel for the appellant had to admit, the legislative power over all lands was by the *B. N. A.* Act vested in the local legis-

lature, not conditionally but absolutely, just as legislative powers were given to *Canada* over other subject-matters, not for the life of the sovereign and five years after, but for ever.

The principal point, the proper construction of the *B. N. A.* Act, remains for consideration. There can be no doubt that the act should be construed with due consideration to the condition of the different parties who entered into the compact of confederation.

Here when it is intended to grapple with the conjunction of four provinces and the establishment of separate legislative powers, and when it has been attempted to deal with all these subject-matters in a few printed pages, it would be a fatal error to stick to the letter of the act. It is the duty of this court to look around in order to get at the proper construction to be put on the different paragraphs of the act. The rule of general intent and the rule of public convenience are of vital consequence in dealing with this act.

There are some points which seem tolerably well admitted.

1. We need to know what were the rights of the different provinces before the union, because it is necessary to apprehend where these rights have gone If it is found that a subject-matter was before confederation a proprietary right of the provinces, it must be found existing in one of the identities which were created. There was no intention to surrender what had been granted by *England* to the provinces before confederation, and all proprietary rights existing before confederation must after confederation exist in the government either of *Canada* or the provinces.

2. It was the intention that each of the provinces should stand upon the same footing as to constitutional as well as proprietary rights, and what was done for *Nova Scotia* and *New Brunswick* was to be done for

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Quebec and *Ontario*. It is only because *Ontario* and *Quebec* had to be born, so to speak, that there are these different sets of powers. If that leading principle of construction is applied, all these sections can be made to harmonize in such a way as to give no more to *Ontario* and *Quebec* than to *Nova Scotia* and *New Brunswick*. Of course, it is not meant that provincial tenures were to be assimilated, but what is meant is that the power to deal with them was intended to be the same in each of the provinces.

If confederation is so regarded, the construction of the *B. N. A.* Act involves the question: What is the real nature of the union? One section cannot be taken by itself, but all must be read together in order that, by a broad, liberal and quasi-political interpretation, the true meaning may be gathered. The preamble recites the desire for federal union, etc. Then there are some curious provisions. By the third section the provinces of *Canada, Nova Scotia* and *New Brunswick* are to be one dominion under the name of *Canada*; and then they are divided into four provinces. Then the twelfth section provides that "all powers, authorities and functions which, under any act of the parliament of *Great Britain*, or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada, Lower Canada, Canada, Nova Scotia* or *New Brunswick*, are at the union vested in or exercisable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those governors or lieutenant-governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the government of *Canada*, be vested in and exercisable by the Governor-General, with the advice,

or with the advice and consent of, or in conjunction with, the Queen's Privy Council for *Canada*, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the parliament of *Canada*." The sixty-fifth section vests the same powers in the Lieutenant-Governors of *Ontario* and *Quebec*, as far as the same are capable of being exercised after the union.

It is clear, then, that whatever might have been done by any governor fell to the Governor-General of *Canada* if the subject-matter related to the Dominion of *Canada*, and fell to the lieutenant-governor if the subject-matter related to the province. There is nothing said of *Nova Scotia* and *New Brunswick*, because the 64th section deals with them. The constitution of *Nova Scotia* and the constitution of *New Brunswick* were already created, and were simply continued. Sections 64 and 65 should be read together, for if *Ontario* and *Quebec* had been existing, section 65 would not have been inserted, and we would have found the lieutenant-governors having the right to exercise all the statutory powers they might have had. If the powers of the lieutenant-governors are interpreted by section 65 alone, see how narrow the words are. The constitution of the executive authority of each province is implied from the fact of its existence before the union. All the provinces are placed upon the same footing, and in *Ontario* and *Quebec*, as well as in *Nova Scotia* and *New Brunswick*, the power of dealing with all subjects which *Nova Scotia* and *New Brunswick* had prior to the union was continued, subject to the alterations made by the act. The consequence is that all the powers existing in the old

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

provinces, except such as are taken away, are grafted upon the new-born provinces of *Ontario* and *Quebec*.

Then there is the distribution of the legislative bodies. It is quite true one is called a parliament and the other a legislature, but to both are given legislative powers. There is a general legislative power in the parliament of *Canada*, but the old province of *Canada* had larger powers than the parliament of *Canada* have now, because the power of the Dominion parliament is limited. In section 91 a general phrase is used excluding certain subject-matters: 1st, The public debt and property. The "public debt" is defined shortly afterwards. "Property," also, is sufficiently defined in the act, for all that is given to *Canada* must be found in the act. Thus Indian lands, *Sable Island* and particular properties are the properties over which legislative authority is given to the parliament of *Canada*. True, it is provided that the particulars of 91 shall over-ride the particulars of section 92, but it is nowhere provided that if the two conflict the latter shall be superseded. This section has been wrongly interpreted, for it is not said matters enumerated in section 91 shall exclude matters enumerated in 92.

There is another mode of construing these sections; it is to interpret them as you would an ordinary grant. It is admitted that there is a general provision in favour of *Canada* and in all matters not granted to the province, and relating to the peace, order and good government of *Canada*, the power is there, yet it is not a power more paramount than the local power is over subject-matters granted to it. Within its range each has an exclusive power. Local authority is legislative in its character and exclusive within its bounds. Among the branches of subject-matters granted to the provincial legislatures is the sale and management of public lands. It is said that this is a limited power, but it is to be remembered

that we are dealing with a legislative power, and it does not seem that anything has been left out or excepted. The intention of the legislature clearly was to give the local authority most ample power.

Then there is also the jurisdiction over "property and civil rights," (which give their chief dignity to the functions of the local legislatures), and "all matters of a local or private nature."

In section 95 there is a concurrent power over emigration. This is the only subject-matter over which there is a concurrent power, and therefore it is the only case in which a law within the jurisdiction of the local legislature can be over-ridden by the parliament of *Canada*.

Now, it is clear, looking at the whole act, that there are words large enough to shew what are the legislative powers of the provinces and of *Canada* respectively over lands. To *Canada* belongs property consisting of Indian lands, *Sable Island*, etc., and to the provinces all public lands and the timber and the wood thereon.

Taking up the act in its order we come next to section 102, which declares that "all revenues over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had and have power of appropriation, except such portions thereof as are by this act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund, to be appropriated for the public service of *Canada* in the manner and subject to the charges in this act provided."

Reliance is placed by the other side on this section 102, and it is said here is a revenue over which the local legislature had a right of appropriation, and not being reserved to them in the act, they have now no control over it. If this argument is correct, it would equally embrace the proceeds of sale of all the lands, for they

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

are not reserved—and can it be said they are to go to the consolidated revenue fund of *Canada?* Then, how can it be argued that the subject-matters shall belong to the local legislatures and the proceeds of the same belong to *Canada?* Surely it was not necessary when the subject-matter was appropriated to the province to add "and the proceedst hereof, if disposed of by the local legislatures." Therefore, if it should be held that the land itself is under the control of the local legislature, the revenue derived therefrom cannot be said to come within section 102. If the argument is good, then the court will hold that all revenues of all lands belong to the consolidated revenue fund.

Section 107 assigns particular assets. Section 108 gives *Canada* a proprietary interest in certain properties as well as in the public works. So that time and again, when dealing with lands under control of *Canada.* they are dealt with specifically. Now, section 108 is in itself enough. There the particular properties which go to *Canada* are found, and the court is asked to hold that property not then given to *Canada* remained with the province, for that is the irresistible inference, But the act does not leave the matter to rest on inference, for all lands, mines, minerals, royalties and other public property belonging to each province are, by the 109th and 117th sections of the *B. N. A.* Act, declared to continue to belong to such province, to be used and administered by the provincial authorities for the use and advantages of the provinces.

Therefore, reading these different sections together, it is manifest that *Canada* got such property as was expressly given to her and the provinces kept what was not given to *Canada.* How will the provinces get a revenue from these lands, if not by sale, licenses, etc.? The power to deal with them is full, ample and com-

plete, and the scope, sense and spirit of the confederation act is plain and obvious, viz.: That all lands situate within a province in respect of which her Majesty had any sort of right or interest continued to belong to the province, with the exception of certain lands given to *Canada*.

It would be absurd to suppose that authority over the whole question of granting and transferring property was given to the local legislatures, and yet one of the smallest and least significant matters incident to it, that of escheats, should be withheld. Can it be said such a little, thwarting, vexatious question, serving no high political interest, was not given to the provinces, and that they were not to decide whether there should be an escheat or not? If fit to deal with the land, then they are fit to deal with this matter.

It has already been said that this is not a prerogative right, for it belonged to the lord and had to be dealt with by the lord. If it is a prerogative, there are prerogatives of a higher class which have been handed over to the provincial legislatures and to which this right is but an incident.

Suppose the land had been granted after 1867 and there is an escheat, to whom does it belong? Is it to *Canada*? The right to alter tenure, the power to legislate over the subject-matter, belongs to the provinces, and yet it is contended escheat would belong to *Canada*. This is said to be a *petitio principii*; but if we find in the provinces before confederation power to deal with the subject and this power is continued, there is an end of the matter.

The question is not one of any personal prerogative, but it is simply whether the attorney-general for *Canada*, who is responsible to parliament, shall advise as to the mode in which the escheat shall be applied, or whether the attorney-general for *Ontario*, who is

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

responsible to the people of *Ontario*, shall advise as to what shall be done with the escheat. To hold the former view involves a clashing of functions and of jurisdiction, which is abhorrent to those who desire the welfare and peace of the confederation.

The question to be decided is: What executive authority shall control this subject-matter? Public convenience is in favour of escheated property being dealt with by the province and becoming the property of the province, and the proper way is to leave it to that authority which is responsible to the people who are interested in the proper administration of the lands of the province.

Mr. *Bethune*, Q.C., followed on behalf of respondent:

The first question is, What is escheat? In addition to the authorities cited by the other side I refer to *Cruise's* Digest (1), where it is thus defined by Lord *Mansfield*, in his judgment in *Burgess* v. *Wheate*, there cited: "It has been truly said that on the first introduction of the feudal law, this right was a strict reversion—when the grant determined by failure of heirs, the land returned as it did on the expiration of any smaller interest. It was not a trust, but an extinction of a tenure; as Mr. Justice *Wright* said, it was the fee returned." The same learned judge further on, referring to the liberty of alienation, which was given to tenants, says: "As soon as the liberty of alienation was allowed without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres*."

In *Ontario* and in the former province of *Upper Canada*, all lands were holden directly of the crown in free and common socage. It is quite clear that escheat applied to lands held in socage. At page 401 of the same volume of *Cruise*, it is said "All lands and tene-

(1) 4th edition, page 404, title 30, section 25.

ments held in socage, whether of king or subject, are liable to escheat."

There seems no doubt upon all the old authorities that the right of the crown to escheat was strictly a species of reversion. My learned friends upon the other side have spoken of an estate in fee simple in land as if that were the land itself. An estate in fee simple is the largest estate which can be granted, but the lord, who in *Canada* is the crown, notwithstanding a grant in fee simple, still retains a reversion which is called an escheat. Once an escheat took place, it operated to extinguish the title of the grantee, the tenure of the grantee came to an end.

Assuming that so far I am correct as to the nature and effect of an escheat, let me apply it to the matter in question; and first let me apply it to a case of escheat upon lands granted by Letters Patent of the province of *Ontario* since confederation. We assume that on the 1st day of July, 1867, the crown was possessed, for the province of *Ontario* and its use, of a lot of land which had passed to that province under section 109, of the *B. N. A.* Act, which is in the words following: "All lands, mines, minerals and royalties belonging to the several provinces of *Canada*, *Nova Scotia* and *New Brunswick* at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." Before confederation that land was vested in her Majesty; she held it for the use of the former province of *Canada*; after confederation she held it, but for the use of the province of *Ontario*. Nothing in the act had divested her Majesty of the title to these lands. The

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

same *B. N. A* Act continued certain laws in force, under which her Majesty, through the instrumentality of the commissioner of crown lands, was enabled to make a grant of this land. The grant is made under the Great Seal of the Province of *Ontario*. We assume a grant in fee simple. After this grant there would remain in her Majesty her reversionary right in this estate. This reversionary right her Majesty would hold for the benefit of the province of *Ontario*. It could not be that, while the land before being granted was held by her Majesty for the use of the province of *Ontario*, yet upon or after the grant in fee simple the reversionary estate would be held by her Majesty for the use of the Dominion of *Canada*; nothing in the act would warrant an inference that that reversionary interest should thus be disposed of. That being so, it would appear that, in the event of the failure of the title of the grantee, in such a case as I have put, and in the event of his dying intestate, her Majesty in behalf of *Ontario*, would become entitled to the land, for the use of *Ontario*.

The next question that arises is, whether there is any difference between a case in which a grant has been made by the crown in the former province of *Canada* before confederation, and a grant made by *Ontario* since confederation, in reference to the right of *Ontario* to the escheat? I submit that there is nothing in the *B. N. A.* Act which indicates the slightest difference between these two cases. Under section 109, all lands, mines, minerals and royalties which belonged to *Canada* passed to the provinces of *Ontario* and *Quebec*. The term land would include, I apprehend, any interest in land which the crown might have had. The reversionary right, called escheat, is certainly an interest in land. It is only a question of degree between that kind of reversionary interest, and the reversionary interest

which the crown possesses expectant upon the determination of a term for years. Where the crown had, as in many instances it had, made grants for terms of years, it might as well be argued that the reversion of the crown would not pass to the province of *Ontario* because it could not be said that that province had the land; it had only the reversionary interest in the land, expectant upon the determination of the term.

Another reason why I submit this escheat passes to the crown is, that it is a matter appertaining to the title. It is quite clear that under the terms "property and civil rights," in section 92 of the *B. N. A.* Act, section 13, a provincial legislature might by an act abolish escheat as an incident of tenure; it might provide that the whole land should be granted, and that the crown should never under any circumstances assert title to the property which it had once granted; and such a law, if not disallowed, would be valid. It is argued on the other side, that under section 102 of the *B. N. A.* Act, this escheat passes as one of the "revenues" over which the legislature of *Canada* had power of appropriation before confederation. I submit, however, that the nature of the revenue must be taken into account in determining what is meant by the term "revenue," in section 102. Before confederation the crown lands were sources of revenue; and it is quite clear that under that term, in section 102, the crown lands did not pass.

To remove any doubt upon this point, section 117, says:—"The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of *Canada* to assume any lands or public property required for fortifications or for the defence of the country."

From the two sections 109 and 117, it seems reasonably clear that it ought to be presumed that this prop-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

erty belongs to the province, unless it comes clearly within that assigned to the Dominion.

The true solution of this question is, that there was a division of the assets between the Dominion and the provinces, and (having reference to the general terms employed) your lordships ought to hold that escheated property falls on the provincial side of the division. If you look at the power which was given to deal with "property and civil rights," and to deal with lands, it is more in accordance with the spirit of the act to hold that escheats were intended to pass to the provinces than that they should remain with the Dominion. All the lands and interests in land which are reserved to the Dominion are described in section 108. When you look at the term "revenues," as employed in that act, as descriptive of what should belong to the Dominion, none of the revenues intended seem to include revenues from lands (except those derived from public works.)

The other side argue that this is a prerogative right, and that none of the prerogatives of her Majesty belong to the provinces. I submit that the prerogatives of the crown, so far as necessary to carry out matters to be executed by the provincial authorities, have passed under the *B. N. A.* Act to the province, and are to be executed by the lieutenant-governor as the proper representative of her Majesty.

It has been assumed by the other side that the executive authority of the Queen does not extend to provincial matters, but that a new kind of executive has been created, which is not part of the executive power of her Majesty, but is a statutory right which has been created and vested in the lieutenant-governor. This view, I submit, is erroneous. Turning to the 9th section of the *B. N. A.* Act you will find it declared that "the executive government of and over *Canada* is hereby declared to *continue* and be vested in the Queen." The argu-

ment of the other side must narrow that section to mean over *Canada* as a body politic or as a subject of federal government; so that while the executive authority of the Queen *quâ* Dominion matters extends over the whole of the Canadian territories, as to provincial matters it is not anywhere to be found in any of the provinces. It would certainly require very strong words to abolish the prerogative right of her Majesty as to any matter in respect of which it existed before confederation. I submit that the true construction is that the executive authority of the Queen continues, and was to be carried out, in every part of *Canada* after confederation, by the Governor-General in respect of Dominion matters and by the lieutenant-governors as her representatives in provincial matters, precisely as such executive authority existed before confederation. I call attention to the words "of and over *Canada*." The words "of and over" would be quite unnecessary if the section meant merely that the executive power of *Canada*, as the subject of Dominion government, should continue in the Queen; the words "over *Canada*" would have no meaning if they did not apply to *Canada* territorially, and thus include within *Canada* the provinces and their executive. I think that under the preceding sections this is reasonably plain. Looking at section 3, it is quite clear that one dominion was to be formed under the name of *Canada*; and by section 4, *Canada* shall be taken to mean *Canada* as constituted under this act, unless it is otherwise expressed or implied. By section 5, *Canada* is divided into four provinces; but that division into provinces is quite consistent with the continued existence of the prerogative over these provinces, to be executed in matters as to which the new provincial governments were to be agents.

I suppose we may look to the headings which precede the various sections; and looking at these, it is

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

quite clear that the words "executive power," which precede section 9, are describing the same kind of thing which the words "executive power" that precede section 58 (as to lieutenant-governors) describe. When you come to provincial constitutions, beginning at section 58, you find these words: "Provincial constitutions," "Executive power." Then you find by section 58, that there is to be an officer called a lieutenant-governor appointed by the Governor-General of *Canada*, by instrument under the great seal of *Canada*, and that lieutenant-governor is to hold office during the pleasure of the Governor-General, subject to removal for cause. It is not said whose "officer" he is. The appointment is made by the Governor-General under the great seal of *Canada* and, I assume, in her Majesty's name. This officer is to exercise the executive power necessary to carry out that part of the government committed to the province. It is, I submit, a part of the same executive power which, under section 9, is declared to continue and be vested in the Queen. None of the sections which deal with the executive of the provinces contains a line that shews it was intended to transfer, in provincial matters, that power which had formerly existed in her Majesty as a matter of prerogative, to the Governor-General. It cannot be argued that it was intended to transfer it to the Governor-General, for he has no duties in connection with the provinces, except the consideration of the question of allowance or disallowance of laws. The other side are driven to argue that this part of the prerogative has been extinguished. Why should that be assumed? All these prerogative rights existed for the benefit of government, and because they were thought necessary to such government. If necessary to the proper carrying on of government in the old provinces, why should it now be thought unnecessary?

Under section 65, all the statutory powers and func-

tions which were formerly possessed by the lieutenant-governors of *Upper* and *Lower Canada* under Canadian or Imperial statutes, are declared to be exercisable by the lieutenant-governors of *Ontario* and *Quebec*. I submit that there can be no doubt that under the *Upper Canada* and *Lower Canada* constitutions, which preceded the union of 1840, the lieutenant-governors were the proper depositories of the "prerogative," so far as it appertained to the Government of the two provinces of *Upper* and *Lower Canada;* and these are still to be exercised after confederation by the lieutenant-governors of these two provinces, in the same way as they had been exercised by former lieutenant-governors.

Then under section 64, the constitution of the executive authority in *Nova Scotia* and *New Brunswick* was to continue as it existed at the union, until altered by the authority of the *B. N. A.* Act. It cannot be doubted that before confederation the lieutenant-governors of *Nova Scotia* and *New Brunswick* respectively possessed the right as representatives of her Majesty to execute the prerogatives necessary to colonial government. If this be so, then it would follow, under section 64, that these prerogative rights continued in these two lieutenant-governors; and the whole scope of the *B. N. A.* Act shews that there was not intended to be any difference in the powers of the lieutenant-governors of the various provinces.

The reason why the *B. N. A.* Act is silent about the exercise of these prerogatives by the lieutenant-governors is very obvious. It is quite clear that the Governor-General is under the act made the deputy of the Queen, and that the Governor-General is enabled to appoint a further deputy of the Queen for certain provincial purposes. That deputy is called a lieutenant-governor. He is appointed by an instrument in the name of her Majesty, and, consistently with the law as

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

to the execution of powers, it seems quite plain that if the Governor-General is an officer of her Majesty, his deputy is also an officer of her Majesty as to the prerogative of her Majesty in convoking the House of Assembly and in other matters. By section 82 it is said that the lieutenant-governors of *Ontario* and *Quebec* shall from time to time, in the Queen's name, by instrument under the great seal of the province, summon and call together the legislative assembly of the province. By section 72 the legislative council of *Quebec* is to be constituted of persons to be appointed by the lieutenant-governor, in the Queen's name, by instrument under the great seal of *Quebec*. By section 75, so often as a vacancy shall occur the lieutenant-governor, in the Queen's name, is to fill it.

It is said on the other side that section 82 found its way into the act by inadvertence. This assumption, I apprehend, cannot for a moment be entertained. Those who make it must also account for sections 72 and 75 having found their way into the act in the same way. But it is quite plain why these sections are there. By section 88, the constitution of the legislature of each of the provinces of *Nova Scotia* and *New Brunswick* was declared to be continued as it existed at the time of the union until altered; and the House of Assembly of *New Brunswick* was to continue undissolved. The reason why the House of Assembly and legislative councils of old *Canada* could not be continued was because of the division of *Canada* into the two provinces, *Ontario* and *Quebec*; and it became therefore necessary to provide for the creation of Houses of Assembly for these two provinces; but it is impossible for a moment to contend that the constitutions of the four provinces were intended to be in any respect different. If they were the same, it follows that the prerogatives proper for the execution of provincial

government are to be exercised by the lieutenant-governors.

Take another prerogative, namely, the prerogative of justice. It is quite clear that the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of criminal and civil justice, is committed to the provinces. Courts of criminal as well as civil jurisdiction have been created in *Ontario* by the provincial legislature. Are not these courts her Majesty's courts? Does not the process of these courts run in the name of her Majesty? If the prerogative of justice is not to be invoked in aid of the provincial courts, what authority is there for the administration of justice in her Majesty's name? Was it not intended by the framers of this act that her Majesty's prerogative of justice should continue in the courts established by the provincial legislatures, just as if these courts had been established by the Imperial parliament?

For these reasons I submit that the judgment appealed against should be affirmed.

Hon. Mr. *Loranger*, Q.C., followed on the same side, on behalf of the province of *Quebec*:

The right in question is a common law right which ought to be governed by local laws. This right is called by different names; sometimes it is called an escheat, sometimes a reversion, and sometimes a *droit de déshérence*. It is nothing else than a fiscal right engrafted upon the law of succession. Society being originally proprietor of all lands, they revert to society if the owner dies without heirs. The sovereign chosen by society holds the land in trust for the people, as a *fidei commissum*. The civil law theory of vacant property is this: If a man gave up property with the intention that some one should take, that person was entitled to it, while if he abandoned it for the sake and

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

with the intention of abandoning it, then the first one who took possession would be entitled to retain it; but if the abandonment is without his will, then it goes to his heirs; and if he leaves no heirs, or they are unwilling to accept, then it goes to the people at large, and under the Roman law it went to the Roman Republic. That right was exercised by a public sale of the property.

In *France* as well as in *England*, and in fact throughout all feudal and monarchical *Europe*, the right of escheat or *droit de déshérence* never ceased to be looked upon as a right of descent, whether exercised by a king or a seigneur, and always formed part of the law of succession. Did the king exercise that right in his capacity of sovereign; in other words, as a royal prerogative? No; but as representing the people, and he had to demand it, and certain forms had to be followed. He took as successor: see *Ferrière*, Coutume, Tit. VIII., sur Art. 187.

It was so well considered as an incident of the law of descent that it was legislated upon by the French Parliament. It is a maxim that they could curtail only the civil law, still we find them legislating upon this right. In *Quebec* it will go to the wife in default of heirs, or to the donor, if the property came from an ascendant.

At the time of the French revolution the feudal system was abolished, and with it the *droit de déshérence*. How was it dealt with since? The civil code was prepared, and *Napoleon* did not say it should go to the sovereign or chief magistrate, but by Arts. 768 and 767, he says it shall belong to the state, not as a prerogative right belonging to the head of the nation, but as coming from the law of descent.

How was this right to be exercised after *Canada* was

ceded to *England*? *Chitty* on Prerogatives (1) distinctly says it must be settled by local laws. Then it was, and is, perfectly competent in this country for our local legislatures to deal with this subject-matter. There was the *droit d'aubaine*, which formerly went to the king, but this has been done away with by legislation.

I contend that if the Dominion Parliament have no legislative authority over the subject-matter, it must go to the provinces. It also falls under their control under the words "property and civil rights." And I say, that as a maxim of international law the right of legislation over a subject belongs to the government under whose control the subject-matter happens to be.

Lex rei sitæ must prevail, even if the Confederation Act did not say so in so many words. And this principle, viz., that escheat should be regulated by the laws relating to property, is not peculiar to the law of *Canada*, for both *Blackstone* and *Chitty* treat this subject-matter under the heading of "the laws relating to the transmission of property."

If the local legislature has legislative powers over property, escheated property must belong to the local and not to the federal government. A great part of the argument on the other side was for the purpose of shewing that the crown had not parted with its prerogative, yet it must be admitted that the sovereign is no longer in the personal enjoyment of this right, and that it belongs now either to the federal government or the local government.

I contend that it belongs to the local government, because it is a subject-matter over which the province has legislative powers, otherwise you would have to conclude that the federal government could own property within the provinces which the local legislatures by legislation could take away.

(1) Ch. 3, p. 25.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

It having been established that the right of escheat being governed by the law of property, namely, by the law of succession, must, of necessity, fall under the control of the provinces, vested, by the 13th paragraph of the 92nd section of the *B. N. A.* Act, with the power of legislation over "property and civil rights," it follows that as a consequence all public property, which at the time of confederation belonged to these provinces and which became subject to provincial legislation, must equally belong to them.

If the Confederation Act had been silent upon this power, escheated property would have gone to the local government on the ground, as I contend, that a true interpretation of the federal compact is, that all powers not specially conferred by it have devolved upon the provinces.

In entering into the federal compact, the provinces did not resign any of their respective constitutions, powers, property and revenues to the federal authority in such a way as to vest it with them to their entire exclusion; in a word, they never intended to renounce, and in fact never did renounce, their distinct and separate existence as provinces, when becoming part of the confederation; this separate existence, their autonomy, constitution, revenues, property, rights, powers and prerogatives, they expressly preserved for all that concerns their internal government; and by forming themselves into a federal association under political and legislative aspects, they formed a central government for inter-provincial objects only. Far from the federal authority having created the provincial powers, it is from these provincial powers that has arisen the federal government, to which the provinces ceded a portion of their rights, property and revenues.

At the time of confederation, all legislative and executive power, legal attributes, public property and

revenues that are now the appanage of the central government and of the provinces, belonged incontestably to the latter. The federal compact did not create a single new power. The part now belonging to the federal government was taken from the provinces to be conferred upon this former power.

The powers, in particular, that are granted by section 91 to the Dominion parliament, had theretofore formed part of the powers of the provinces, in common with those mentioned in section 92, which remain within the jurisdiction of the provinces. These powers have been divided. Those conferred upon the federal parliament were given to it, and those left to the provincial legislatures they merely retained. Then, all that has not been vested in the federal government, remains with the provinces; and again, in the distribution of powers made by these two sections, whatever be their wording, the general rule is the provincial jurisdiction, and the exception the federal.

The same rule applies to the distribution of the property; all belonged to the provinces at the time of confederation, and the federal government has no share, except what has been given to it. There again, the general rule is in favour of the provinces, and the exception is in favour of the federal government.

The authority of the lieutenant-governors, within the limits of their jurisdiction, is on an equality with the authority of the Governor-General. Both are, within their respective spheres, representatives of the Queen, the former in the provincial, the latter in the federal sphere. It is true that the lieutenant-governor is appointed by the Governor-General, but it is in the name of the Queen that he is so appointed, and as her agent or representative. In his official acts, it is the Queen whom he represents and in her name that he acts.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

The relations between the provinces and the Imperial Government remain, after the union, what they were before. The Queen forms part of the legislature of each province, by the intermediary of the lieutenant-governor; it is in her name that the houses are called and prorogued and that the laws are assented to. The sole change, in this respect, consists in the disallowance and disapproval of provincial acts, which is made by the Governor-General, but this is not a legislative act.

The executive government resides in the person of the lieutenant-governor, as the first magistrate of the province, and here again he acts as the representative of the Sovereign.

It is the same with the concession of the revenue to the federal government as with legislative jurisdiction and public property; here again, the public treasury belonging to the provinces was divided to make a budget for the federal government, the remainder was left with the provinces.

The consequences to result from the solution of this conflict between the provincial and federal claims are of great importance to the provinces, and particularly to the province of *Quebec*. In fact, if the federal pretensions prevail, and the principle of the inferiority of the provinces and the subordination of their legislatures to the federal power is well founded, less than fifty years will see their absorption in the central government; and, the annihilation of local governments having done away with the necessity of their existence, the federal government will give place to that legislative union which is so justly dreaded by the province of *Quebec*, whom I represent. Although having no material and direct interest in the suit, the consequences of an unfavourable result might so prejudicially affect its political condition th it thought

it proper to join with the province of *Ontario* in asserting their common claim to the present right of escheat or *droit de déshérence*.

To thoroughly understand the nature and extent of the powers and limits of the jurisdiction of the federal parliament and of the local legislatures, a precise knowledge of their political situation at the time of confederation and of the powers of their legislatures, is necessary. Integral portions of the British Empire for upwards of a century, *United Canada*, *Nova Scotia* and *New Brunswick*, to which at first was limited the federal compact, each possessed, under the guarantee of *England*, whose power was felt rather in protecting than in coercing them, an independent and almost sovereign constitution.

This constitution, modelled on the British constitution, left them the absolute government of the internal affairs of the province, the control of their public funds, the enjoyment of their property, and the disposal of their revenues of all kinds; even the territorial revenues which had been exchanged for a civil list. Within the sphere of their powers, their legislatures or provincial parliaments, under the ægis of the principles of responsible government, worked freely; and their internal action was not under the control of any foreign power.

These provinces, each of which was clothed with the totality of the powers now possessed separately by the federal and local government, were therefore in the enjoyment of their complete political and legislative autonomy.

These constitutions, rights, and powers, and this autonomy, were guaranteed to them by treaties, and Imperial laws which, in the relations between the British Government and the colonies, have the force of treaties. The constitution of the united provinces of

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Upper and *Lower Canada* (to speak only of these two provinces) had been granted to them by the Union Act of 1840; and the constitutions which each had enjoyed for three-quarters of a century (with the suspension of a few years in the case of *Lower Canada*) had come to them by the Constitutional Act of 1791, not repealed by the Union Act of 1840, but simply modified to make it harmonize with the union of the provinces and the new system.

It is therefore to the Constitutional Act of 1791 that we must look for the origin of the powers of the legislatures of the provinces of *Canada*, which were in force at the time of confederation, modified as has just been stated. These powers, with the reserve of Imperial interests, were unlimited, and extended to every species of legislation, whether public or private, necessary for the good government and welfare of the country. Thus, as already stated, it extended to all the objects of legislation now divided between the federal parliament and the local legislatures.

A right or a power is not taken away from a nation or an individual, except by a law which revokes it, or by a voluntary abandonment. Is there, in the resolutions of the conference of the colonial delegates, held in *Quebec*, in October, 1864, or in the federal act itself, one word which repeals their powers or explicitly derogates therefrom? Certainly not. Does any one of these resolutions, or any section of this law, or the whole of either, imply an implicit repeal of such rights? Article 29 of the resolutions says, with respect to the federal parliament: "The general parliament shall have power to make laws for the peace, welfare and good government of the federal provinces (saving the sovereignty of *England*) and specially laws respecting the following subjects." The *B. N. A.* Act, section 91, enacts: "It shall be lawful for the Queen, by and with

the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

Sec. 92.—"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects, next hereinafter enumerated."

Were these powers of the provinces revoked by the federal compact which became the *B. N. A.* Act? On the contrary the old provinces preserved their corporate identity under confederation. A distinction must here be made between the former province of *Canada* and the other provinces, as those of *Nova Scotia* and *New Brunswick*, which entered into the federal compact under their old corporate names. Under the old constitutional act of 1791, *Upper* and *Lower Canada* each formed a province separately constituted, under the names of the provinces of *Upper* and *Lower Canada*. Reunited by the union act of 1840, they formed only one province, under the name of the province of *Canada*. Under the *B. N. A.* Act of Union, they were again disunited and made into two separate provinces, called the provinces of *Ontario* and of *Quebec*; but did they again become in reality as each was under the act of 1791, although having different names? Has this difference in name and in territorial boundaries effected a difference in their identity, and can it be said that they have become new corporations? Have they not rather remained as they were, as well as *Nova Scotia* and *New Brunswick*? The maxim of law *Nil facit error nominis, cum de corpore constat*, a maxim of universal application in all legal matters, and which declares that the name does not affect the thing, so long as its identity is apparent, seems to settle the question. The

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

only difference in the result is, that, in place of entering the confederation under only one name and as a single member of the union, the two provinces entered it under two different names and as two members of the union. They are, moreover, each clothed with the same powers as before, and as the other confederated provinces, each having one and the same constitution. I do not see, either in the resolutions of the conference. or in the federal act, any provision which would give a pretext to the pretension that, in entering confederation, the provinces lost their former identity to acquire a new one.

Any such inference is rejected by the preamble of the act, which states: "Whereas the provinces of *Canada*, *Nova Scotia* and *New Brunswick* have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of *Great Britain* and *Ireland*, with a constitution similar in principle to that of the United Kingdom;" and by section 3, which declares: "It shall be lawful for the Queen, by and with the advice of her Majesty's most honourable Privy Council, to declare by proclamation that, on and after a day therein appointed, not being more than six months after the passing of this act, the provinces of *Canada*, *Nova Scotia* and *New Brunswick* shall form and be one dominion under the name of *Canada*; and on and after that day those three provinces shall form and be one dominion under that name accordingly;" and section 5, which enacts: "*Canada* shall be divided into four provinces, named *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*," makes the contrary decision absolute.

It was the identical old provinces which united to form a new government and to constitute a federal dominion, without losing their identity; and without ceasing to be what they had been, distinct governments. It is not then from the Dominion that the

provinces arose, but it was the provinces that created the Dominion and were transformed into a new political body, without ceasing to exist in their former condition.

Were they endowed under the new system with their former constitution? Is the constitution given to them by the federal compact their old constitution, modified to suit the new order of things, or is it a new constitution?

It is necessary, first, to know what were the organic characteristics of the old constitution. Let us confine ourselves to the constitution of the provinces of *Upper* and *Lower Canada*, and to that of the province of *Canada*. These constitutions were formed upon the model of the British constitution. The executive power resided in the person of the sovereign, represented by the Governor-General or a lieutenant-governor. The legislative power resided in a legislature sometimes known as the provincial parliament, composed of three branches; the governor or lieutenant-governor representing the sovereign, the legislative council, appointed by the governor, and a legislative assembly or house of assembly, elected by the people. The parliament was convened by the governor in the name of the sovereign, it was prorogued in the same manner, and the laws were assented to in the same name by the same officer. Let us see what are, on the same subjects, the provisions of the federal compact in the constitution of the provinces.

The learned counsel referred to secs. 58, 71, 82, 90, 55 of the *B. N. A.* Act.

It is objected to the analogy, which we find between the executive and legislative powers conferred upon lieutenant-governors and the provinces of the confederation, and the same powers conferred upon the former governors and lieutenant-governors and the old

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

provinces, that under the new system the sovereign does not exercise the executive power as under the old, through the governor who represents him, and by whom he was directly appointed; that under the new system the lieutenant-governor is appointed by the Governor-General, of whom, and not of the sovereign, he is the representative. Secondly, that the sovereign is not a branch of the legislature of the provinces, because the lieutenant-governor, clothed with secondary powers as just stated, does not represent the sovereign as the first branch of the legislative authority.

The answer to these objections is based upon the fundamental principles of the British Constitution, upon which depends the Imperial Sovereignty itself, and the constitutional existence of the colonies, which are: That the executive power of the nation resides in the person of the sovereign, as the chief magistrate of the realm, and the legislative power in the parliament, composed of the sovereign himself, and the other two branches of the nation, the House of Lords and the Commons. That it is from the sovereign and the parliament thus composed that is derived the source, principle and end of all power, "*fons principium et finis omnis potestatis.*"

According to the constitutional doctrine, all legislative and executive power granted by *England* to her colonies is a delegated power, the legislative power being delegated by the parliament, of which the sovereign is the first branch, and the executive power by the sovereign alone, of whom the colonial governors are the representatives in the executive government as well as in the legislatures. The authority of the governors appointed by the sovereign is in no sense personal; it is in the name of the sovereign that they exercise it, in virtue of a commission, which might be assimilated to what is, in the civil law, an ordinary mandate.

In political as in civil law, in the absence of any provision specially applicable to the subject, recourse must be had to the common law, to ascertain the relations between the government and the governed. This rule is admitted in *England*, where, for instance, the publicists hold that the hereditary right to the crown is governed by the law of ordinary successions. It was thus that on the death of *Edward VI.* without children, the crown, like the large baronies, devolved, in default of other heirs male of the late king *Henry VIII.*, to his two daughters, *Mary* and *Elizabeth*, but the former excluded the latter, to avoid a plurality of sovereigns.

Applied to the powers of lieutenant-governors, the rules of mandate, which, being drawn from the civil law, and founded upon natural reason, are common to all civilized nations and are the same in *England* as in *Canada*, clearly show how the federalists are in error, when they hold that the lieutenant-governors do not represent the sovereign. One of the fundamental principles in matters of mandate is that the persons commissioned by the mandatary, with the consent or by order of the mandator, to execute the mandate, are responsible to the mandator, and represent him for all the purposes of the mandate. Here, the Governor-General, appointed by the sovereign under the Federal Act, appoints the lieutenant-governors to fulfil certain functions created by the same act. Can it be doubted that the Governor-General having made the appointment in the name of the Queen, and made it for her, the lieutenant-governor is not his servant, but became, as the Governor-General himself, one of her Majesty's officer's, and that, in the performance of the duties conferred upon him, he represents the sovereign?

What are his functions? The executive power resides in his person, by section 58, as we have seen. He is assisted by an executive council (sec. 63), and he can exer-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

cise all powers and functions declared to be exercisable by the lieutenant-governors formerly.

Now, by the Union Act of 1840, which in these respects was in force at the time of confederation and which confirmed the provisions of the Constitutional Act of 1791, the governor of the province of *Canada* convened the parliament in the name of her Majesty (sec. 4) as he still does under art. 81 of the Federal Union Act; prorogued it in the same name (sec. 30); in the name of her Majesty, gave assent to or refused to sanction bills (sec. 37); and, a very remarkable fact, by section 59, it was enacted that the exercise of the functions of governor should be subject to her Majesty's orders; a provision which is not repealed by the Confederation Act, but is still in force under section 65 of that act hereinbefore recited. If that law intended to subordinate the exercise of the functions of lieutenant-governor to the control of the Governor-General, as his officer, would it not have modified the provisions of section 59 of the Union Act of 1840 in order to apply it to the Governor-General, instead of simply keeping it in force and leaving the exercise of the functions of lieutenant-governor to be subject to the orders of her Majesty. It is equally to be noticed that the powers of the governor, created by the Constitutional Act of 1791, are not only not repealed, but, on the contrary, are re-enacted in the Union Act of 1840; and for further security, the latter law has a special provision that the powers conferred upon the governors by the old constitution are continued by the new.

Let me, however, continue the enumeration of the powers of a lieutenant-governor under the federal constitution. He forms, as we have already seen, the first branch of the legislature (sec. 71). In *Quebec* he appoints by instrument under the great seal the legislative councillors, *in the name of the Queen*, and not in

that of the Governor-General (a provision re-enacted from the preceding constitutions of 1791 and 1840. If a vacancy in the legislative council of *Quebec* should occur, by resignation or otherwise, the lieutenant-governor, in the name of her Majesty, fills the vacancy, by appointing a new legislative councillor (sec. 75). He appoints the speaker of the legislative council of *Quebec* (sec. 77). It is not here stated that it is in the name of her Majesty, but was not that omitted to avoid a pleonasm? He fixes the time for the elections and causes the writs to be issued (secs. 84 and 89). No appropriation of the public revenues or taxes can be made by the legislature, unless previously recommended by the lieutenant-governor (secs. 54 and 90.)

Are not these functions of the lieutenant-governors royal functions, which the sovereign, as chief executive magistrate of the nation, as the first branch of parliament, exercises in *England*, and which none other than her representative can exercise in a colony? These functions are numerous, as we have just seen, but were they only to include two of the powers explicitly granted by the Federal Union Act, the appointment of legislative councillors in the name of the Queen (sec. 72), and the convening of the legislature in the same name (sec. 82), this double prerogative affords, beyond doubt, the proof that he is the mandatary of the sovereign. In fact, he acts directly in the name of the Queen in the exercise of these two powers, and not in that of the Governor-General: the choice of councillors no more rests with the Governor-General than that of any other provincial appointment, and to the Queen alone belongs the power of convening any legislature in her empire, from the Imperial Parliament to the legislative body of the humblest colony, since this convening is a prerogative of the executive, residing solely in the sovereign and in the colonies exercised through the governors.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

It is evident that, both from the legislative and executive point of view, the royal prerogatives—which in *England* are not the personal appanage of the sovereign, but are the property of the people, and which the sovereign holds in trust to exercise them in the interests of the British nation—are equally exercised in the provinces by the Queen, not more however to her personal profit than in the mother country, but for the people of the provinces, with respect to whom these prerogatives have not lost their character of a trust; and that not being able to exercise them herself she has delegated their exercise to the lieutenant-governors who are her mandataries.

I now come to the objection that the legislatures are not called parliaments.

What is a parliament? A parliament is "a meeting or assembly of persons for conference or deliberation." In its judicial sense the word has only the value given it by the custom of different countries, and it has no accepted determined meaning, to signify the powers belonging to one or more legislative assemblies.

In the old provinces which now form the Canadian confederation, the provincial legislatures were indifferently called parliaments or legislatures. It was held that they were *mutatis mutandis* clothed with the same power as the British parliament, and (until the Union Act of 1840, which conferred upon the legislative assembly the absolute right of electing the speaker) when the latter claimed from the governor or lieutenant-governor the confirmation of his election, he claimed the parliamentary privileges which are recognized in the English parliament.

The name of "parliament" was given to the legislatures of the old provinces in a host of official, parliamentary and legislative documents; even in acts of the British parliament itself. The word "parliament,"

as a synonym of "legislature," was so familiar under the old system, that the resolutions of the *Quebec* conference make use of both terms jointly to signify the legislative body of the confederation. "There shall be a general legislature or parliament for the federated provinces, composed of a legislative council and a house of commons," says the 6th of these resolutions. The 41st says: "The local government and legislature of each province shall be constructed in such manner as the existing legislature of each shall think fit."

The control which *England*, in theory, possesses over the colonies, exercised in legislating for them or in repealing their legislation, is an act of legislative power, that is to say, of parliament, whilst the *veto* or disallowance of the laws is an act of executive power, that is to say, of the soverign acting with the advice of his council; and it is the same with the disallowance by the Governor-General of provincial laws. This disallowance, which is only a prohibition from carrying into execution a colonial law, that might trench upon Imperial prerogatives or give rise to serious conflict between the rights of the empire and those of the colonies, has always been and still is considered in *England*, not as an act of legislation, but of executive authority.

For the same reason, of avoiding encroachment by local legislation upon imperial interests and federal legislation, and conflicts between both legislations, and to facilitate this double supervision, which is better exercised upon the spot than in *England*, the federal Union Act placed this right of *veto* in the hands of the Governor-General; but it is not as a branch of the parliament and as administering legislative authority that he exercises such right, but as representing the executive authority of the confederation; and in the exercise of this authority he acts upon the advice of his council, who are responsible for such, as for all other advice.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Nothing in the federal union act rebuts the assertion that the confederated provinces are identically the old provinces, with the exception, however, of the provinces of *Quebec* and *Ontario*, divided into two as they were before the union act of 1840, under the constitutional act of 1791.

I will now shew that this Union Act itself, in express terms, establishes this proposition. The preamble states: "Whereas the provinces of *Canada*, *Nova Scotia* and *New Brunswick* have expressed their desire to be federally united into one dominion, (section 3) it shall be lawful for the Queen.....to declare.....that.....the provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, shall form and be one dominion under the name of *Canada*. (Section 5.) *Canada* shall be divided into four provinces, named *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*."

And the act continues thus to speak of the provinces, whose existence, as old provinces, it recognizes, without saying a word of the creation of new provinces. We have just seen that the legislatures are composed of the Queen, represented by the lieutenant-governor, and, for *Quebec*, of the legislative council and legislative assembly; that the executive power resides in the person of the lieutenant-governor, as representing the sovereign, and that the organization of powers is the old provincial organization, notwithstanding the disallowance of the bills of the legislature by the Governor-General and the appointment and removal of lieutenant-governors by that officer. This organization of powers would alone be sufficient to shew that the constitution of the provinces remained identically the same, but the constitutional act goes further and completes this proof, by declaring (section 88) that "the constitution of the legislature of each of the provinces of *Nova Scotia* and *New Brunswick* shall continue as it exists at the union."

The Union Act further contains provisions respecting the constitution of *Quebec* and *Ontario*, only because of the dis-union and the inequality of the provincial representation of these provinces.

The third paragraph of the preamble of the union act, which states: "It is expedient, not only that the constitution of the legislative authority in the dominion be provided for, but also that the nature of the executive government therein be declared," and which does not extend this provision to the provinces, corroborates this assertion. It was decided at the *Quebec* conference (Art 41) that: "The local government and legislature of each province shall be constructed in such manner as the existing legislature of each such province shall provide."

I have stated that the powers of the provinces could not be taken from them, except by the constitution or by the abandonment made by them. It is one of the points of the doctrine hostile to local powers, that in entering into confederation, the provinces returned to the Imperial government all the rights theretofore possessed by them, as well as all their property, so that a new distribution thereof might be made between them and the federal government.

This doctrine is contrary to all the political events, which preceded, accompanied and followed confederation; it is altogether improbable and we must say is regugnant to common sense. Why should the province of *Quebec*, for example, have, abandoned its rights, the most sacred, guaranteed by treaties and preserved by secular contests, and sacrificed its language, its institutions and its laws, to enter into an insane union, which, contracted under these conditions, would have been the cause of its national and political annihilation? And why should the other provinces, any more than *Quebec*,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

have consented to lose their national existence and consummate this political suicide?

This principle, that the provinces retained their old powers when they entered confederation, and have, under confederation, continued to be governed by their former constitution, was judicially consecrated by the court of appeal in the Tanneries case. At least the majority of the court decided in that sense, and especially the opinions of Chief Justice *Dorion* and of Judge *Sanborn*.

The general government can have only those powers which are conferred upon it by the confederated provinces. This government is essentially the creation of those provinces, as an ordinary partnership is the work of the partners. In the absence of contrary provisions, the particular governments are managed by the organic rules which constituted them before forming the confederation, and preserve all the powers which belonged to them, if they do not delegate a part to the central government. In the case of the Canadian confederation, the provinces did not attribute to the federal government powers of a different nature from those that each before possessed. They delegated to it a portion only of their local powers to form a central power, that is to say, they allowed it the management of their affairs of a general character, but retained their own government for their local affairs. It was a concession of existing powers that was made to it and not a distribution of new powers. The powers of the central government came from the provinces, as those of an ordinary partnership come from the partners; to invert the order and state that the powers of the provinces come from the central government, would be to reverse the natural order of things, place the effect where the cause should be, and have the cause governed by the effect.

I have said that if there is relative inferiority and

superiority between the federal government and the provincial governments, such inferiority is to be found with the federal government, and the superiority with the governments of the provinces. But it is not necessary to make this comparison in order to establish their respective competence; let us rather say that there is equality between them, or rather a similarity of powers, and that each of the two powers is sovereign within its respective sphere. *Blackstone* says: "by sovereign power is meant the making of laws, for wheresoever that power resides all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on." According to this principle, whatever may be the respective importance of the powers conferred upon each of the governments in the exercise of their powers, each having an independent authority is equal in authority.

In the *United States* the central power is subordinate to the government of the states; it is from the states that congress draws its authority, and all powers not conferred by the constitution upon congress, belong to the states. Canadian federalists wish to lay down this principle of the constitution of the *United States* as special and exceptional, contrary to the principles of all other confederations and notably to that of the Canadian confederation. We maintain, on the contrary, that this superiority of the states over congress is a general principle, and is derived from the nature of confederations themselves; that the same principle prevails in the Helvetian and Germanic confederation, and in all other possible confederations; that it is of the essence of the federal system; that the central government has only those powers which are conferred on it by the states, and the latter retain the remainder, for the very simple reason that the central government is the creation of the several governments that have given it the form and

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

the totality of powers which they deemed suitable, and no more.

But, once more, this does not give rise to relative authority, since each of the governments remains absolute master and independent of the other within its sphere of authority. It is legislative equality for the Canadian confederation.

Starting from the preconceived idea that the provinces are subordinate to the federal parliament, an application of this principle has been sought in the distribution of powers, made by sections 91 and 92 of the Confederation Act, in the text of these articles.

The dominant idea of these two sections is to attribute the power of legislating upon matters of general interest to the parliament of *Canada*, and the power over matters of local interest to the provinces. It is only when two countries join together and submit to a general government, while preserving their local government, that the powers attributed to the central government become general, and those reserved to the individual governments remain local.

Outside of this granting or concession, altogether arbitrary or conventional, there cannot be a general rule to establish the line of demarcation between these general and local powers. Thus in stating that all matters of a general character, not reserved for the provinces, belong to parliament, and those of a local nature, not assigned to parliament, should belong to the legislatures, the draft of the Confederation Act stated nothing, or only repeated that which had been declared in the distribution of the special subjects assigned to each of the legislatures by the remainder of article 29 and by article 43. As these articles, dealing with particular powers, might have omitted a large number, and as the working of the governments might be impeded by these omissions, the authors of the federal Union Act, who

gave the finishing touch to the draft in *England*, felt that, to remedy this serious inconvenience, it was necessary to establish another line of demarcation and another rule of competence, by means of which they remedied this omission by having those omitted cases entered in one or the other category of powers; and, to attain this end, they amended the draft in the manner shown by sections 91 and 92.

Let us consider the effect of these amendments. Section 91 of the federal Union Act states: that it shall be lawful for parliament to make laws in relation to all matters not coming within the classes of subjects assigned to the legislatures. These subjects being those specially enumerated in section 92, and followed by a distribution of all matters of a merely local or private nature in the province, it follows that this limitation of their local or private matters, was taken for the general line of demarcation between the powers, that their local or private matters, including those specially enumerated in section 92, remained within the competence of the local powers; and the rest of the powers necessary for the peace, order and good government of *Canada*, with those specially set forth in section 91, were attributed to the powers of parliament, and must have been considered as general powers.

But, as these latter powers specially assigned to parliament by section 91, were powers withdrawn from the provinces, and before confederation were local powers, to remove doubts upon the conventional nature of these powers declared to be general, section 91 adds: "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" [that is to say, to prevent those omitted powers from being considered otherwise than as powers of the federal parliament] "it is hereby declared that (notwithstanding anything in this act) the exclusive authority of the parlia-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

ment of *Canada* extends to all matters coming within the classes of subjects," etc.

The rule of distribution of federal powers then is, that all which is not local and, as such, does not belong to the government of the provinces, belongs (including the powers enumerated in section 91, which will always be considered as general powers) to parliament.

Sections 91 and 92 might, perhaps, as well have been couched in the following terms: "The competence with respect to matters of a local or private nature, including the powers specially enumerated in section 92, which shall always be considered as local powers, shall belong to the legislatures, and the remainder of the legislative powers necessary for the peace, order and good government of *Canada*, including the special powers enumerated in section 91, shall be considered as general powers and shall belong to parliament."

It was also to avoid confusion and doubt as to the concession to parliament of competence in these matters, that section 91 added: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

I cannot overlook the difficulties in interpretation occasioned by a phraseology so intricate and so confused, and in order to understand it better, we might again further alter the wording of these articles, which might be summed up as follows: "With the exception of the matters enumerated in section 92 and of all which are of a local or private nature, which shall be within the competence of the provinces, parliament shall have power to make laws necessary for the good

government of *Canada*, upon all other matters, including those enumerated in section 91."

In taking this rule for a guide, let us see what would be the natural and logical process to practically establish the line of demarcation between the two powers.

If the 16th paragraph of section 92, granting to the provinces legislative power over matters of a local and private nature, had not been joined to the fifteen other paragraphs, a rule of easy application would have presented itself. The competence of the provinces would be limited to particular matters or to a particular class of laws, the remainder would belong to the federal parliament, and it might, in that case, have been truly said, that all powers not delegated to the legislatures belong to parliament. The competence of the provinces would have been special, and that of parliament general. But it was not so, and the law has granted to the provinces power over all local matters, in addition to those specially enumerated in the paragraphs preceding paragraph 16. It follows that the concession to the provinces was general, for the aggregate of local and private laws constitutes a generality.

I have stated that each of the provinces was clothed with all the powers conferred upon the two legislatures, the powers conferred upon parliament were withdrawn from the provinces. All the powers of the provinces, I also stated, were powers of a local order, that which remained retained its nature and that which was withdrawn to be attributed to parliament was only by a fiction called general, being in reality a particular competence. As a general rule, then, all powers belong to the provinces and the powers of parliament belong to it only as an exception; the powers of parliament come from the provinces, which are the source of all legislative authority in the confederation, and the legislative power of parliament is only a residue of the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

provincial legislative power. In this order of ideas, it should be said that all power which is not federal has remained provincial. To ascertain the nature of any power whatever, it is necessary, then, to examine all classes of local subjects, and it is only when this power does not enter into one of these classes and when it interests all the provinces, that this power is a federal power. If it interests only one or more of the provinces, without interesting all, it remains within the provincial sphere.

Again, the provincial competence constitutes the rule, the federal the exception.

This conclusion is in accordance with the spirit of legislation, and with the practical end which the authors of confederation had in view.

At the outset of confederation no person had any idea of forming a political association; it was rather a commercial league of the nature of the Hanseatic league or the German Zollverein, than a confederation of the nature of the Germanic or Helvetian confederation, which the provinces wished to form between themselves. This view results from historical documents and the debates in the provincial legislatures upon the subject of the resolutions of the conference. It was only gradually and later on that the basis of their association was enlarged and the circle of their common interests extended to form a general government.

Whatever may have originally been the importance more or less great of their general relations, the idea that prevailed was to have the interests common to all the provinces managed by the general government and to leave the provinces in possession of their particular government for the internal management of their private interests.

Starting from this idea, upon any given point, the object of any inquiry as to the competence of either

power must be to ascertain whether the subject upon which legislation is sought affects only one or more of the provinces or all of them. If this object comes directly and specifically within the sphere of one of the two powers, as marked out by sections 91 and 92, there is no doubt that it must be attributed to the power which was specifically clothed with such competence. Thus, for example, if the object has anything to do with the postal service or the defence of the country, it would be federal; if with the civil law or the administration of justice, it would be provincial; but if it does not fall within the special attributes of any of these powers, that is to say, within any of the 29 paragraphs of section 91 and the 15 paragraphs of section 92 or what may be inferred from them, then under the general provisions of paragraph 16, it must first be ascertained whether it is local, and for this the subject matter of the two sections and the general spirit of legislation must be inquired into. If this subject affects only one or more provinces, as has been stated, it must be left to be disposed of by the legislatures; if it affects all the provinces, it is within the competence of parliament, and in doubtful cases, as that only which is federal belongs to parliament, and the rest should belong to the provinces which must have originally controlled and now control all which is not federal, such subject would be treated as local. In a word, in cases of doubt the doubt is decided in favour of the provinces, which are the source of all the powers.

It does not always happen, however, that legislation takes such a decisive character; there are hosts of subjects which affect both general interests and the particular interests of the provinces, and it is upon this frequent division of interests, that the federalists have based their argument in favour of the federal parliament. They say, in cases of doubt, only those matters

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

that are *purely* local, and within the terms of paragraph 16 of section 92 are of provincial competence and the rest is federal. But this reasoning is evidently based upon false conceptions of legislative principles; for, in legislation all the powers are divisible in the same way as the subject upon which they are exercised. If a law, clearly federal, affects a local interest, this interest is withdrawn from the jurisdiction of parliament, however unimportant such interest may be, as compared to the general object of the law, and *vice versa* for the province. For instance, let us suppose a commercial law; if this law affects solely the interprovincial interests of commerce, it belongs to parliament, in the same manner as if it affected only the civil interests arising from commercial relations, it would belong to the provinces, but if it affected both the interprovincial interests and private relations, giving rise to civil interests between traders, it would belong, for its interprovincial portion, to parliament, and for its local portion to the provinces. To ignore this distinction and say, that in cases omitted, or in the cases provided for, only matters of a *purely* local nature are within the competence of the provinces, and that all mixed legislation belongs to parliament, is to set up a principle contrary to daily legislative experience, for there is not in legislation any subject purely general or purely local and private. This would be to invade the rights of the provinces. Paragraph 16, in qualifying as *merely* local the matters reserved to the provinces, made use of a word that was void of meaning and altogether inapplicable. The end of section 91 had first simply called these same subjects local and private; this corroborates the argument that the adverb *merely* which precedes them in paragraph 16 of section 92 has no value.

I have spoken of subjects that might be within the competence of both powers, on account of their double

nature, general and local, in connection with the omitted cases in sections 91 and 92. In addition, there exists, for some of the subjects enumerated in those sections, a concurrent jurisdiction growing out of the very attribution of power which gave rise to them.

Thus, paragraph 3 of section 91 gives as within federal jurisdiction "any mode of taxation," and paragraph 2 of section 92, leaves to the provinces "direct taxation within the province in order to the raising of a revenue for provincial purposes." Respecting direct taxation allowed to both powers, and in all cases in which their competence is manifest by the law, there is no necessity for interpretation and consequently no doubt, the benefit whereof should be accorded to the provinces against the federal power.

Section 95 again gives to the provinces and to the parliament concurrent power to make laws in relation to agriculture and immigration, to the former in each province, and to the latter for all the provinces; but it is enacted that the law of the province shall, in case of repugnance to the federal law, yield to that law and have no effect. Here again it is evident that interpretation is not required, the superiority of the federal law being declared.

Let us pass now to the powers of the provinces respecting public property.

According to the organic principles of confederation, there is a connection between the legislative powers and the right of property. The provinces entered into the federal compact with the entirety of their public property, as they entered into it with the entirety of their political rights and legislative powers. All public property, which was not granted to the federal government, remained with the provinces. In addition to the property, which is disposed of between the federal government and the local government by the act itself,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

section 117 states, "the several provinces shall retain all their respective public property, not otherwise disposed of in this act," a provision that shews, that the provinces, in entering the union, had not abandoned their rights of property any more than they had abandoned their legislative powers; but that they had retained all that they had not resigned to the federal government. They also each have their separate budget, and section 126 enacts that the duties and revenues over which the respective legislatures of Canada "had before the union, power of appropriation, as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province," and section 109 in addition to these provisions adds, "all lands, mines, minerals and royalties, belonging to the several provnces of *Canada*, *Nova Scotia* and *New Brunswick* at the union, and all sums then due or payable for such lands, mines, minerals, or royalties shall belong to the several provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate or arise."

It is objected, that the provinces have not, as the federal power, a civil list, but this is an error. Out of the consolidated fund, established by section 126, a certain sum is set apart to defray the civil expenditure of the province, and if it is objected that the province has no civil list, as was done by a judge in the question of an escheat mooted between the federal attorney-general and the attorney-general of *Quebec*, that the civil list is granted to the sovereign in *England* for her personal expenses and that ours does not contain a similar grant, inasmuch as the province does not defray the salary of the representative of royalty, we would answer

that if we do not give a grant to the sovereign, we pay the officers of the civil government, and that it is from this application of the public funds that the civil list gets its name. Some French writers even think anomalous the English practice, which calls the civil list the grant to a sovereign who does not pay the civil expenses of his government, expenses that are paid by the state. As with finances so with respect to legislation and government, the provinces then are, with the exception of the cases provided for, and which we have enumerated above, independent of the federal government and in the sphere of their property, rights and powers, they are on an equality with it. If it were not that the Imperial sovereignty over-rides all our public organization we would say that they are sovereign in this sphere, as it is in its sphere.

RITCHIE, C. J. :—

This is an action brought by the Attorney General for the province of *Ontario* to recover from the defendants the possession of a certain parcel or tract of land in the city of *Toronto* and county of *York*, in the province of *Ontario*, being part of the real estate of one *Andrew Mercer*, late of the said city of *Toronto*, issuer of marriage licenses, who died intestate, and without leaving any heirs or next of kin, on the thirteenth June, 1871, and whose real estate, it is alleged, escheated to the Crown for the benefit of the province of *Ontario*. The said *Andrew Mercer*, at the time of his death, was seized in fee simple in possession of the parcel of land in question.

The action was commenced in the Court of Chancery for *Ontario* by the filing of an information on the 28th day of September, A. D. 1878.

The defendant, *Andrew F. Mercer*, demurred to the said information for want of equity.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

On the 7th day of January, 1879, the Vice-Chancellor made an order overruling the said demurrer.

From this decision the said defendant, *Andrew F. Mercer*, appealed to the Court of Appeal and the appeal was argued on the 23rd day of May, A. D. 1879; and on the 27th day of March, 1880, the said Court of Appeal affirmed the order overruling the demurrer and dismissed the appeal with costs.

Against this last mentioned judgment and order of the Court of Appeal the defendant, *Andrew F. Mercer*, now appeals to the Supreme Court of *Canada*. The parties agree that the appeal shall be limited to the broad question as to whether the government of *Canada* or of the province is entitled to estates escheated to the Crown for want of heirs.

We have therefore nothing whatever to do with any other question than simply to determine to which government escheated estates belong.

The determination of this question depends upon the construction of the *B. N. A. Act.*

Before, however, referring to that Act, to enable us the better to understand its provisions and to arrive at a correct conclusion as to the intention of the Parliament of *Great Britain* in reference to this matter, it may be well to see what the state of the law was in regard to escheated estates, and how such estates were dealt with in the provinces at the time this Act passed.

With respect, then, to the law of escheat, the doctrine is unquestionably founded on the principles of the feudal system, and is not to be confounded with forfeitures of land to the Crown, from which it essentially differs. Mr. *Chitty*, in his prerogatives of the Crown (1), observing on this difference, says:

> For forfeitures were used and inflicted as punishments by the old Saxon law without the least relation to the feudal system, and they differ in other material respects.

(1) P. 230.

And therefore, he says:

Escheats revert * * * to the lord of the fee who is almost universally the king. In the cases of attainder of high treason, the superior law of forfeiture intervenes and renders the doctrine of escheat irrelevant, for by such attainder lands of inheritance, though holden of another lord, are forfeited to the Crown.

And Chancellor *Kent* says of Title by forfeiture:

The English writers carefully distinguish between escheat to the Chief Lord of the fee and forfeiture to the Crown. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy.

It is clear that the law of escheat is an incident of tenure by which for failure of heirs the feud falls back into the lord's hand by a termination of the tenure, and therefore it is said that all lands and tenements held in socage, whether of the king or of a subject, are liable to the law of escheat, and no species of property which does not lie in tenure is subject to escheat, and so Mr. *Chitty* (1) says:

His Majesty's right of escheat stands on the same ground as every other legal right, it arises out of the seizen, and is, in general, governed by the same rules as govern escheats to the subject.

And Chancellor *Kent* thus speaks of title by escheat (2):

This title, in the English law, was one of the fruits and conse. quences of feudal tenure. When the blood of the last person seized became extinct and the title of the tenant in fee failed for want of heirs or by some other means, the land resulted back or reverted to the original grantor or lord of the fee, from whom it proceeded, or to his descendants or successors. All escheats under the English law are declared to be strictly feudal and to import the extinction of tenure.

And so it is said:

The lord on the escheat takes the estate by a title paramount to the tenant since he is in of an estate out of which the tenant's interest was originally derived or carved, and it is said to be "a mixed title being neither a pure purchase nor a pure descent, but in some measure compounded of both," and that it differs from a forfeiture in that the latter is for a crime personal to the offender of

(1) On Prerogatives, p. 233. (2) Kent's Commentaries, 423.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

which the crown is entitled to take advantage by virtue of its prerogative, while an escheat results from the tenure only, "and arises from an obstruction in the course of descent." It originated in feudalism and respects the intestate's succession.

And Mr. *Adams*, says:

Escheat is merely an incident of tenure arising out of the feudal system whereby the escheated estate on the death without heirs of the person last seized escheats to the lord as reverting to the original grantor, there being no longer a tenant to perform the services incidental to the tenure. It is therefore inapplicable to estates which do not lie in tenure.

And this right of escheat is treated of as a reversion. In *Cruise's* Digest it is said:

Escheat is a casual profit which happens to the lord by chance, and unlooked for; an escheat is therefore in fact a species of reversion, and is so called and treated by *Bracton*; and when a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres*.

And in *Burgess* v. *Wheat* (1), it is said:

An escheat was in its nature feudal, and in default of heirs the land, strictly speaking, revested, and the legal right of escheat with us arises from the law of enfeofment to the tenant and his heirs, and then it returned to the lord if the tenant died without heirs. * * *

And again:

It reverts by operation of law on extinguishment of an estate that was a fee simple incapable of any further limitations. * * * The right comes as a reversion failing heirs.

And in a note to *Middleton* v. *Spencer* (2), by Mr. *Eden*, he says:

In *Burgess* v. *Wheat* it was a question of tenure, the claim of the Crown having been admitted on all sides to be seignorial and not prerogatival.

If, then, this is a reversionary interest, we all know that reversion is defined by Lord *Coke* to be the returning of the land to the grantor or his heirs after the grant is determined.

(1) 1 Wm. Bl. 175. (2) Br. Ch. C. 205.

In another place Lord *Coke* describes a reversion to be :—

> Where the residue of the estate always continues in him who made the particular estate.

The idea of a reversion is founded on the principle that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him, and the possession of it reverts or returns to him upon the determination of the preceding estate.

Hence Lord *Coke* says :—

> The law termeth a reversion to be expectant on the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate doth expect or look for to enjoy the lands or tenements again.

And Chancellor *Kent* thus defines a reversion :—

> A reversion is the return of land to the grantor and his heirs after the grant is over, or according to the formal definition in the *New York* Revised Statutes, it is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. It necessarily assumes that the original owner has not parted with his whole estate or interest in the land. * * * The usual incidents to the reversion under the English law are fealty and rent.

In *Bunter* v. *Coke* (1) before the passing of the statute making wills speak from the death of the party, it was held that "a devise of lands is not good if the testator had nothing in them at the time of the making his will, for a man cannot give that which he has not, and the statute only empowers men *having* lands to devise them, so that if the devisor has not the lands, he is out of the statute"; citing *Co. Lit.* 392. It was admitted "that, if one has a manor and devises it and after a tenancy escheat, that shall pass by the devise as being part of the manor."

(1) 1 Salkeld 237.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

This being the doctrine and law of escheat, the Crown before confederation surrendered to the respective provinces the management, control, and disposal of the Crown estate, and the casual and territorial revenues of the Crown deriveable therefrom; in other words, the Crown surrendered its rights in the public domain and practically placed the provinces in the same position in reference thereto that the Crown itself held.

Our attention has been called, by the learned counsel in his contention for the claims of the Dominion, to the law passed in the province of *New Brunswick*, as illustrative of what the Crown intended to part with in reference to all the provinces. This Act, as I stated on the argument, was prepared in *England*. It was transmitted by Lord *Glenelg*, the then Colonial Secretary, in a despatch dated 31st October, 1836, to the Lieut. Governor Sir *A. Campbell*, in which he says:—

SIR,—In my despatch of the 10th September, I apprised you that I was engaged in correspondence with Messrs. *Crane* and *Wilmot*, [then delegates from the H. of As., of *N.B.*,] on the provisions of the Act for securing the Civil List which it is proposed to grant to His Majesty in *New Brunswick*.

I now enclose for your information, a copy of that bill, which has been prepared in concurrence with the Lords Commissioners of His Majesty's treasury. It is compiled from the corresponding Acts of Parliament which apply to the grant of the Civil List in this country, with no other changes than such as unavoidably grow out of the different circumstances of the two cases.

This Act was subsequently made perpetual, and is to be found in the Consolidated Statutes of *New Brunswick*, 1877, Title 3, ch. 5, and by which it is enacted that—

Section 1. The proceeds of all Her Majesty's hereditary, territorial and casual revenues, and of all sales and leases of Crown lands, woods, mines and royalties, now and hereafter to be collected, having been surrendered by the Crown, shall, with the exceptions hereinafter provided, be payable and paid to the provincial treasurer for the use of the province.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

Section 2. Provides for the payment to Her Majesty of the clear yearly sum of £14,500 out of the above and other revenues of the province, with preference to all other charges or payments.

Section 3. All monies paid to the treasurer under this chapter, except the said fourteen thousand five hundred pounds, shall form part of the general revenues, and be appropriated as such.

Section 4. The Governor in Council may expend out of such revenues such sums of money necessary for the collection, &c., thereof.

Section 5. The Governor shall within 14 days from the opening of every session of the legislature lay before the assembly a detailed account for the previous year of the income and expenditure relating to the said revenue, &c.

Section 6. All grants, leases, &c., by this chapter declared to be under the control of the legislature, unless made upon sale or lease to the highest bidder at public auction after due notice in the *Royal Gazette*, and the consideration thereof made payable to Her Majesty.

Section 7. Nothing in this chapter shall impair or affect any powers of control, management or direction, which have been or may be exercised by the crown, or by other lawful warrant, relative to any proceedings for the recovery of any such revenues, or to compensation made or to be made on account of any of the same, or to any remission, mitigation or pardon of any penalties, fines or forfeitures, incurred or to be incurred, or to any other lawful act, matter or thing which has been or may be done touching the said revenues, or to disable Her Majesty from making any grant or restitution of any estate, or of the produce thereof, to which Her Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or of the same having been purchased by or for the use of an alien, or to make any grant or distribution of any personal property devolved on the Crown for the want of next of kin or personal representatives of any deceased person; but such rights and powers shall continue to be exercised and enjoyed in as ample a manner as if this chapter had not been made, and as the same have or might have been heretofore enjoyed by the Crown; but the moneys arising from the full exercise and enjoyment of the rights and powers aforesaid, shall be a part of the joint revenues at the disposal of the General Assembly, subject to the restrictions hereinafter provided.

Section 8. Nothing in this Act shall annul or prejudice any sale, or purchase, so made before the 17th July, 1837, but the same shall remain good and valid.

This Act, cited with so much confidence by Mr. *Me-*

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

Dougall as supporting the claims of the Dominion, very clearly establishes that the lands and casual and territorial revenues surrendered to the province were to be sold by auction, and that escheated lands might be granted or the proceeds distributed by the Crown, that is by the executive government of the province representing the crown without the interference of the local legislature; and in the province of *New Brunswick* anterior to confederation (and I have been at a loss to discover that it was different in the other provinces) the exercise of that right, prerogative, or seignorial, as you may choose to call it, was exercised there up to and at the time of confederation by the provincial executive. I may cite the case of the estate of *John E. Woolford*, who died in 1866 and on whose estate for want of heirs administration was granted to a nominee of the crown, and which estate, real and personal, has been dealt with by the Governor in Council; and prior to 1866 I may mention the case of the estate of one *Nichols*, which was dealt with by order of the Governor in Council in *New Brunswick*; for as Mr. *May*, in his constitutional history of *England* (1), says, in reference to the concession of responsible government to the colonies:—

> At last she (*England*) gave freedom and found national sympathy and contentment. * * * Patronage has been surrendered, *the disposal of public lands waived by the Crown*, and political dominion virtually renounced. In short their dependence has become little more than nominal except for purposes of military defence.

This transfer and surrender, as is well known, was much opposed in *New Brunswick* by the then Lieut. Governor and his Council; and though the House of Assembly and Legislative Council passed the bill when first presented to it, the Lieut. Governor refused his assent, whereupon he was recalled, or resigned, and another Governor was sent with instructions to imme-

(1) 2 Vol. p. 539.

diately call the Assembly together that the bill might be again submitted to the local legislature, which was done and the bill passed. Extracts from Lord *Glenelg's* despatch dated 6th April, 1837, will show how this Act was viewed by the Imperial authorities at the time.

Extract from despatch dated 6th April, 1837, from Lord *Glenelg* to Major Gen. Sir *John Harvey*:—

Fourthly. A further question of great importance having been noticed in Mr. *Street's* (1) letter of the 23rd March must not be passed over in silence. That gentleman suggests that it is not competent to the King, with the advice and consent of the Legislative Council and Assembly of *New Brunswick*, to alienate the hereditary revenues of the Crown in such a manner as to bind His Majesty's royal successors. On this topic I limit myself to a general statement, declining as unnecessary, and therefore as unadvisable, the discussion of the wide constitutional principles involved in this inquiry. On careful reflection I am convinced that Mr. *Street's* opinion is not well founded. I do not think that the cession which during the last century it has been customary to make to Parliament of the hereditary revenue of the Crown for the life of the reigning sovereign only is to be understood as an affirmation of the maxim that the king, lords and commons of *Great Britain* and *Ireland* are incompetent to conclude a permanent settlement of the question. That the existing practice is founded on the highest grounds of expediency is indeed indisputable, but I do not perceive that the motives which so urgently forbid a permanent alienation of the hereditary revenues of the Crown in this kingdom apply to the case of a British province on the *North American* continent. That such a cession may be rendered valid by an Act of the General Assembly, assented to by His Majesty, and that the enactment of such a colonial law may under some circumstances be judicious and expedient might readily be shown from a reference to our colonial history. I allude especially to the case of the Island of *Jamaica*. The objection, if well founded, would of course apply to a settlement for ten years, as distinctly as if it should be made in perpetuity. Understanding that Messrs. *Crane* and *Wilmot* [delegates from the House of Assembly] and Mr. *Street* concur in thinking that it would be expedient that the civil list should be permanently settled, I have His Majesty's commands to acquaint you

(1) Mr. Street was then Solicitor General and was sent home to press the views of the Governor and his Council on the Colonial Secretary, in opposition to the House of Assembly.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

that, if such should be the opinion of the House of Assembly, you are at liberty to assent to the Civil List Bill with that alteration.

The whole history of this bill and the controversies in connection therewith will be found in the despatches, addresses and the proceedings in the journals of the local legislature of *New Brunswick*.

Before this surrender, though the title to the public domain was in the sovereign, and though the revenues derivable therefrom unquestionably formed a part of the territorial revenues of the Crown, there can, I think, be no doubt the practical constitutional principle acted on was, that these lands and the proceeds and revenues thereof, though beyond the control of the local legislature, were held and disposed of by the Crown for the benefit of the provinces in which they were situate; and all grants in connection therewith were issued by the Colonial executive in the name of the Crown, under the great seal of the provinces, and thus in *New Brunswick* at the time of the surrender there was, as will appear from the documents I have referred to, a surplus of £171,224 unexpended which was also surrendered, and in this connection in the same despatch Lord *Glenelg* says:—

> Sixthly. Mr. *Street* has objected that any surplus funds which at the expiration of the term of ten years may remain in the public treasury, may at that period be claimed by the Assembly, although they would have placed at their disposal all the surplus which has been at present accumulated. I do not perceive the force of this objection. The existing accumulations are surrendered to the House cheerfully; not merely with contentment but with satisfaction. His Majesty can have no other interest in the matter, than that the funds should be expended in whatever manner may best advance the welfare of the province; and on that question His Majesty conceives that reliance may, with far greater safety, be placed on the judgment of the representatives of the people than on any other advice. The cession of the existing fund is, therefore, not regarded by the king in the light of a sacrifice, but rather in that of a direct advantage. If during the next ten years (supposing the civil list limited

to that time) any new accumulation should take place, it will constitute a saving effected by the frugality of the House of Assembly, to the benefit of which they will have the clearest title.

And to show how absolutely Crown rights were intended to be subjected to provincial control, we need only refer to Lord *Glenelg's* despatch of 29th April, 1837, in which he says "the cession is co-extensive with the powers of the Crown."

As this was the spirit and intention with respect to *New Brunswick*, it is not disputed that the Crown substantially dealt in a like liberal manner with the other provinces.

Thus we see, that at the time of the union the entire control, management, and disposition of the crown lands, and the proceeds of the provincial public domain and casual revenues, were confided to the executive administration of the provincial government as representing the Crown, and to the legislative action of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate, and therefore when property escheated it became re-invested in the Crown for the use and benefit of the province, and was treated and dealt with by the executive government and legislatures of the provinces as part of the public property of the province, and grantable by the Lieutenant Governor under the great seal of the province when the same should be disposed of by the provincial authorities in the interest of the province. Has then the *B. N. A. Act* altered this and deprived the provinces of the right to public property, which since confederation may escheat *propter defectum sanguinis*, and vested the same in the Dominion to form part of the consolidated fund of *Canada?*

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

In considering the bearing of the *B. N. A. Act* on this question, it is, in my opinion, necessary to examine and compare several of the provisions of the Act with a considerable degree of critical minuteness.

By section 9: The executive government and authority of and over *Canada* is declared to continue and be vested in the Queen.

By section 12:

All powers, authorities and functions which under any act of the parliament of *Great Britain*, or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada, Lower Canada, Canada, Nova Scotia* or *New Brunswick*, are at the union vested in or exercisable by the respective Governors or Lieutenant Governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall as far as the same continue in existence and capable of being exercised after the union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the advice, or with the advice and consent of, or in conjunction with, the Queen's Privy Council for *Canada*, or any members thereof, or by the Governor General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the parliament of *Canada*.

Section 63—Provides for the appointment of executive officers for *Ontario* and *Quebec*, necessitated no doubt by reason of the union of *Ontario* and *Quebec*, severed by the *British North America Act*, rendering a section similar to that relating to the executive government of *Nova Scotia* and *New Brunswick* inapplicable, viz.: section 64, which provides that "The constitution of the executive authority in each of the provinces of *Nova Scotia* and *New Brunswick* shall, subject to the provisions of this Act, continue as it exists at the union until altered under the authority of this Act," and this is again repeated in section 88.

And for the same reason it was necessary to declare the powers to be exercised by Lieutenant Governors of *Ontario* and *Quebec*, which is done by section 65, which is as follows:

All powers, authorities and functions which under any Act of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the legislature of *Upper Canada*, *Lower Canada*, or *Canada*, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those provinces, with the advice or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the union in relation to the Government of *Ontario* and *Quebec* respectively, be vested in, and shall, or may be, exercised by the Lieutenant Governor of *Ontario* and *Quebec* respectively, with the advice, or with the advice and consent of or in conjunction with the respective executive councils or any members thereof, or by the Lieutenant Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the parliament of *Great Britain* or of the parliament of the United Kingdom of *Great Britain* and *Ireland*), to be abolished or altered by the respective legislatures of *Ontario* and *Quebec*.

And as to the provisions for the appointment of executive officers for *Ontario* and *Quebec* and declaring the powers and duties of such officers, and as to issuing proclamations before and after the union, we find by sec. 134 until the legislatures of *Ontario* and *Quebec* shall otherwise provide the Lieut. Governor of *Ontario* and *Quebec* may each appoint under the great seal of the province the following officers to hold office during pleasure, *inter alia*: the Attorney General, and in the case of *Quebec* the Attorney and Solicitor General; and by section 135 it is provided that—

Until the legislature of *Ontario* or *Quebec* otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General [and other officers named] by any law, statute, or ordinance of *Upper Canada*, *Lower Canada* or *Canada*, and not

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the discharge of the same, or any of them.

By sec. 136:

Until altered by the Lieutenant Governor in Council, the great seals of *Ontario* and *Quebec* respectively shall be the same, or of the same design, as those used in the provinces of *Upper Canada* and *Lower Canada* respectively, before their union as the province of *Canada*.

By sec. 139:

Any proclamation under the great seal of the province of *Canada* issued before the union to take effect at a time which is subsequent to the union, whether relating to that province or to *Upper Canada* or to *Lower Canada*, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the union had not been made.

And by sec. 140:

Any proclamation which is authorized by any act of the Legislature of the province of *Canada* to be issued under the great seal of the province of *Canada*, whether relating to that province or to *Upper Canada* or to *Lower Canada*, and which is not issued before the union, may be issued by the Lieutenant Governor of *Ontario* or of *Quebec*, as its subject-matter requires, under the great seal thereof; and from and after the issue of such proclamation, the same and the several matters and things therein proclaimed, shall be and continue of the like force and effect in *Ontario* or *Quebec* as if the union had not been made.

As the executive governments of *Nova Scotia* and *New Brunswick* were continued these provisions were not necessary as to those provinces, but these various enactments and the continuance of the executive governments of *Nova Scotia* and *New Brunswick* very clearly show that the provincial executive power and authority was to be precisely the same after as before confederation. That whatever executive powers could be exercised or administrative act done in relation to the Government of the provinces respectively by the Lieutenant Governor of a province before confederation can be

exercised or done by Lieutenant Governors since confederation, subject, of course, to the provisions of the Act, as is said, in reference to *Nova Scotia* and *New Brunswick*, and is expressed in reference to *Ontario* and *Quebec* "as far as the same are capable of being exercised after the Union." That is to say, that the executive government of the provinces, as exercised by the Lieutenant Governors and Executive Councils, until altered by the respective legislatures, continue as before confederation, except so far as the executive powers of the Governor General over the Dominion of *Canada* may interfere.

Therefore, when it is claimed that a Lieutenant Governor and Council are not competent to deal with a matter or do an executive administrative act that was within their competency before confederation, the burthen is cast on those putting forward such a claim to show clearly from the *B. N. A. Act* that by express language or by necessary implication the Local Governments have been denuded of that authority and the power has been placed in the executive authority of the Dominion. Special pains appear to me to have been taken to preserve the autonomy of the provinces, so far as it could be consistently with a federal union.

To say then that the Lieutenant Governors, because appointed by the Governor General, do not in any sense represent the Queen in the government of their provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant Governors did before confederation, in the performance of all executive or administrative acts now left to be performed by Lieutenant Governors in the provinces in the name of the Queen; and this is notably made apparent in section 82, which enacts that "the Lieutenant Governor of *Ontario* and *Quebec* shall from time to time, in the Queen's name, by instrument under the Great Seal of the province,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

summon and call together the Legislative Assembly of the province,"—and with reference to which matter, nothing is said in respect to *Nova Scotia* and *New Brunswick*, the reason for which is obvious, the executive authority at confederation continuing to exist, the Lieutenant Governors of those provinces were clothed with authority to represent the Queen, and in Her name call together the legislatures—and also in the section retaining the use of the Great Seals, for the Great Seal is never attached to a document except to authenticate an act done in the Queen's name, such as proclamations summoning the legislatures, commissions appointing the high executive officers of the province, grants of the public lands, which grants are always issued in the name of the Queen, under the provincial Great Seals.

These being the direct enactments in the matter of the executive powers of the Dominion and the provinces respectively, it is well to look at the distribution of legislative powers; and as to all matters coming within the classes of subjects enumerated over which the exclusive legislative authority of the parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with provincial executive authority or property or its incidents, whereas, in the enumeration of the matters coming within the classes of subjects in relation to which the provincial legislatures may exclusively make laws, we find No. 1. "The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of Lieutenant Governor,"—and from this, I think a fair inference may be drawn, that as the Lieutenant Governor under certain circumstances and in certain matters having reference to provincial administration represents the Crown, the provincial legislatures are not permitted to interfere with this office,—No. 5. "The

management and sale of public lands belonging to the province, and of the timber and wood thereon,—No. 13. "Property and civil rights in the province," and No. 16. "Generally all matters of a merely local or private nature in the province." When we come to the clauses relating to "Revenue, debts, assets, taxation," we find, sec. 102, creation of a Consolidated Revenue fund :—

All duties and revenues over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had and have power of appropriation except such portions thereof as are by this act *reserved to the respective legislatures of the provinces* or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund to be appropriated to the public service of *Canada* in the manner and subject to the charges in this act provided.

And as I understand the argument, the words "all duties and revenues" in this section are mainly, if not entirely, relied on as vesting in the Dominion the right to escheated estates.

In reading section 102 one cannot, in view of the argument which has been so strongly pressed upon us, but be struck with the clear indication that the words "all duties and revenues" are to be read in a limited sense and are not to apply to all revenues of every nature and description, because in the first place the words are confined to those "over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the time of the union had and have power of appropriation" and are expressly restricted by the exception of "such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act." This establishes, to my mind, in the most unequivocal manner, not only that the duties and revenues referred to were to be confined to those over which the legislatures had power of appro-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

priation, but that with equal clearness the parliament thereby recognized the existence of revenues other than those over which the legislature had the power of appropriation to which the words were not to apply, and also that of those revenues over which the provincial legislatures had power of appropriation there were reserved portions thereof to the respective legislatures of the provinces, and which by the express terms of the section are expressly excepted in like manner, as are those to be raised by the local legislature in accordance with the special powers conferred on them by the Act, and all doubt on this point is set at rest by the provision for the Provincial Consolidated Revenue Funds. In that section this excepted portion is thus dealt with:

Section 126. Such portions of the duties and revenues over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick* had before the union power of appropriation, as are by this Act reserved *to the respective governments* or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one Consolidated Revenue Fund to be appropriated for the public service of the province.

Here we see that while by sec. 102 the duties and revenues are confined to those over which the respective local legislatures had power of appropriation subject to the exception therein contained, this section 126 recognizes as having been reserved, not only duties and revenues *to the legislatures of the provinces*, but expressly speaks of duties and revenues *reserved to the respective governments* as well as *legislatures of the provinces*; and especially in view of the very strongly urged argument by Mr. *McDougall* that the revenues should be at the disposal of the Dominion Executive to be granted by the representative of the Crown to those having moral claims on the intestate, (in this case his illegitimate son) the last words of section 102 would seem to show that the revenues therein referred to are not revenues

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

that had been or were to be disposed of, because the language is "shall form one Consolidated Revenue Fund, *to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided;*" and as to the appropriation of this Dominion Consolidated Fund, after, by sections 103, 104 and 105, charging the same with the costs, &c., of collection, &c., the interests of the provincial public debts, &c., the salary of the Governor General, the appropriation from time to time is, by section 106, thus provided for, "Subject to the several payments by this Act charged on the Consolidated Revenue Fund of *Canada*, the same *shall be appropriated by the Parliament of Canada for the Public Service*," thereby ignoring any right in the Executive to deal with this fund in the manner the Crown dealt with the hereditary revenues of the Crown, or in any manner other than through the instrumentality of parliament, and therefore the provision would work in a manner the exact opposite of that for which Mr. *McDougall* contends; for if escheated estates are held to continue to form part of the provincial Public Property and to be dealt with after confederation as it was before, as the provincial Executives before confederation granted such estates like all other Public Lands without the intervention of the legislatures, they would still be in a position to do so and so to deal with equitable and moral claims as section 3 of the *New Brunswick* Act contemplates the Crown as represented by the provincial executive should do; but if these estates pass under the words duties and revenues, and are to form part of the Consolidated Revenue Fund of *Canada*, they are withdrawn from executive control and must be appropriated, as it is enacted the Consolidated Fund of *Canada* shall be by the parliament of *Canada*, for the public service of *Canada*. In looking through the Act we look in vain for any provincial revenues granted to the Domi-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

nion but those from which the revenues intended to be reserved to the provinces are expressly exempted, and tho' there are no duties or revenues in express specific terms reserved to the legislatures of the provinces of *Ontario* and *Quebec*, *Nova Scotia* and *New Brunswick*, nor to the provinces individually, if we exempt the lumber dues in *New Brunswick*, as by this Act it is clearly expressed that there were revenues intended to be and that are reserved to the provinces, the irresistible inference is that there must be revenues which arise from or are incident to or growing out of the property reserved to the provinces. If we refer to the provisions with reference to the distribution of provincial property, we find that as to the Dominion, by section 107, "all stocks, cash, banker's balances and securities for money belonging to each province at the time of the Union, except as in this Act mentioned, shall be the property of *Canada*, and shall be taken in reduction of the amount of the respective debts of the provinces at the Union," and by section 108 "The Public works and property of each province enumerated in the third schedule to this Act shall be the property of *Canada*."

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbors.
3. Lighthouses and Piers and *Sable Island*.
4. Steamboats, Dredges and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages and other debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of *Canada* appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing and Munitions of War, and lands set apart for general public purposes.

These are all the provisions to be found in reference to the vesting of provincial property in the Dominion. With respect to the provinces, section 117 provides that "The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of *Canada* to assume any lands or public property required for fortifications or for the defence of the country." Section 109 provides that:

> All lands, mines, minerals and royalties belonging to the several Provinces of *Canada*, *Nova Scotia* and *New Brunswick* at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

The executive and legislative powers of the Dominion are large, and so of necessity should be, and while it behoves all courts in the Dominion to recognize and give full force and effect to all executive and legislative acts within the scope of such powers, it is at the same time equally the duty of all courts, especially this appellate tribunal, to recognize and preserve to the executive governments and local legislatures of the provinces their just rights, whether political or proprietary, and not to permit the provinces to be deprived of their local and territorial rights on the plea that Lieutenant-Governors in no sense represent the crown, and therefore all seignorial or prerogative rights, or rights enforceable as seignorial or prerogative rights, of necessity belong to the Dominion.

While I do not think it can be for a moment contended that the Lieutenant-Governors under confederation represent the crown as the Lieutenant-Governors before confederation did, I think it must be conceded, that Lieutenant-Governors, since confederation, do

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

represent the crown, though doubtless in a modified manner.

In my opinion it was not intended by the *British North America Act* to deprive the provinces of the executive and legislative control over the public property of the province, or the incidents of such property, or other matters of a purely local nature, except such as are specifically taken from them, and that within the scope of the executive and legislative powers confided to the Dominion and provinces respectively they are separate and independent, neither having any right to interfere with or intrude on those of the other; and while I find a clear expressed intention of parliament to continue to the provinces all proprietary and territorial rights in all "their respective public properties" not specifically disposed of by the act which belonged to them at confederation, and which the term "public property," as used in the 117th section in connection with the other sections of the act to which I have referred, I think may be read as covering all proprietary rights and incidents of property of every nature and description, I can find no such clear indication of the intention of parliament to denude the provinces of those incidents in the nature of reversions pertaining to their proprietary rights in the public property, such as are escheats, and to transfer them to the Dominion government to be disposed of as part of the consolidated revenue of the Dominion by the parliament of the Dominion.

I cannot bring my mind to the conclusion that it was intended that the lands and their accessories or incidents should be separated and the lands should belong to the provinces and the reversionary or accessory interest to the Dominion; that though the Crown has surrendered all its rights in the property and the revenues derivable therefrom to the provinces, when the land es-

cheats for want of heirs, and the property reverts to the original grantor, it is not to revert to be held as it was at the time of the grant made for the benefit of the province, but for the benefit of the Dominion which never had any interest in the lands whatever; that while the provinces are to retain their public property and have the management and sale of the lands and of the timber and wood thereon, the public property and lands, reinvesting by reason of the want of heirs, should become the property of the Dominion, and so there should be, growing out of and resulting from the tenure of the public lands belonging to the provinces, public lands belonging to the Dominion and subject to its legislation.

I do not think, from a most careful consideration of the *British North America Act*, that it could have been the intention of parliament that while the public properties, and the revenues and proceeds from the disposition thereof, should be retained by the province, and they so continue to retain the position occupied by the surrender to them of the Crown rights, that on escheat, the escheated lands should not revert to the province, but instead thereof should belong to the Dominion, and so the management, control and disposition of what are commonly called the Crown Lands or Public Domain in the provinces consequently be divided, by the withdrawal of the escheated lands from the control of the government and legislation of the provinces and vested in the parliament of the Dominion. I find no expressions in the *British North America Act* that the Dominion were to be proprietors by virtue of the Act of any Crown lands in the provinces or any legislative power granted them to deal with any such lands, excepting always the properties specially named, such as beacons, lighthouses and *Sable Island*, lands reserved for the Indians and public works and property specifically enumerated in the third schedule, together

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

with such other provincial lands and public property as the Dominion may require and assume for fortifications or for the defence of the country.

The Crown having surrendered to the provinces the Crown lands and all casual and territorial revenues incident thereto, or growing thereout, the provinces, so far as the original ownership and beneficial interest in the lands and the incidents thereof is concerned, have by such surrender been placed in the position of the Crown, and therefore when lands granted cease to have any owner *propter defectum sanguinis*, or *propter delictum tenentis*, they revert to the Crown, the original grantor, but to be held as the property and for the benefit of the provinces.

This was so at confederation, the *B. N. A. Act* in no way changed the tenure by which these lands were held ; on the contrary, it was enacted the several provinces should retain their public property, and as a necessary consequence their incidents and reversionary interest therein. If the Crown has then surrendered the land and its reversionary interest therein to the provinces, as no interest in the land has been vested in the Dominion, it is difficult to understand how they could have a reversion in such lands ; in fact, it is a contradiction in terms to say that the lands never owned by the Dominion could revert to it by reason of a failure of heirs, or *propter delictum tenentis*, and surely nothing but the most unequivocal words could prevent the land from reverting to the original grantor to be held for the benefit of the province to whom the rights of the Crown, the original grantor, had been surrendered, in other words, to be placed in the same position and held by the Crown for the benefit of the province as if they never had been granted. When then the property reverts to the crown, I can discover nothing in this to change the purposes for which,

under the surrender by the Crown to the provinces, it was to be held by the Crown as represented by the Lieutenant Governor and the executive of the provinces respectively.

I think the terms "all duties and revenues" in the 102 section, under which it is claimed these escheated estates pass to the Dominion, refer to the ordinary duties and revenues such as customs, impost and excise, and the like, which were at the sole disposal of and subject to direct appropriation by the legislature, and not lands, which, by accident, fall to the lord, or those representing the lord, as is said by *Coke* (1), "the word 'escheat' *id est cadere, excidere* or *accidere* properly signifieth," in other words, not casual, accidental or extraordinary revenues which come in the shape of land, and which lands are managed and granted and disposed of by the executive without the intervention of the legislature, and under certain circumstances without even the proceeds being subject to legislative action, as in the case of lands donated to those who may by reason of connection with the deceased or other reasons have a special claim on the clemency and favor of the Crown represented by the provincial executive.

Very strong observations were made as to the manner in which the government of *Ontario* had dealt with a portion of this estate and would probably deal with that in controversy, if it was now decided that the disposition of the estate belonged to the provincial government. With considerations of this kind, we have clearly nothing to do. Though very pointedly and earnestly put forward by Mr. *Mc Dougall* in his very able and ingenious address that those connected with the estate and who had therefore a moral or equitable claim to consideration would be seriously aggrieved and injured by holding that the disposition of an escheated

(1) L. 1, c. 1, sec. 4.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Ritchie, C.J.

estate belonged to the provincial and not to the Dominion authorities, this proposition has not commended itself to my mind in the way it appears to have so forcibly impressed Mr. *McDougall*, because I can see no reason whatever why in a case such as this, the provincial executive should be guided or should act on any different principle whatever in regard to the disposal of escheated estates from those that would govern the Dominion executive; on the contrary, it seems to me that precisely the same principles and considerations that should influence and govern the one should guide and determine the action of the other; and it must be borne in mind that there may be many escheats where no circumstances exist calling for any special action, and therefore in the older books we find it stated "that it is the ordinary course for the Crown *upon petition* to give a lease or grant to the party discovering an escheat with a view to encourage discovery" (1).

For these reasons I think the conclusion arrived at by the Court of Appeal of *Ontario* is correct, and this appeal should be dismissed with costs.

FOURNIER, J. :—

La question soulevée en cette cause est de savoir lequel du gouvernement d'*Ontario* ou du gouvernement fédéral a droit sous la constitution actuelle de profiter des biens tombant en déshérence.

Tout le monde est d'accord pour reconnaître que la déshérence est une prérogative royale qui ne peut être exercée que par la Reine elle-même, ou par ceux auxquels elle a spécialement délégué ses pouvoirs à cet effet.

Quelle que soit l'origine et la nature de la déshérence, il faut admettre que dans la province d'*Ontario* où le système féodal n'a jamais existé, elle est moins un inci-

(1) 1 Chitty's Gen. Pr. 280. citing 7 Ves. 71, and 6 Ves. 809.

dent de la tenure des terres qu'une prérogative fiscale accordée au souverain, par la constitution anglaise, comme source de revenus. C'est ainsi que *Blackstone* (1) la qualifie en la classant parmi les diverses sources de revenus du souverain :

The King's *fiscal* prerogatives, or such as regard his revenue; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power.

A la page 302, au No. XVII, il définit comme suit la prérogative de déshérence :

Another branch of the King's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the King, who is esteemed in the eye of the law the original proprietor of all the lands in the kingdom.

Cette autorité établit trois propositions importantes pour la solution de la question soumise—1o la déshérence est une prérogative royale; 2o une source de revenus du souverain; 3o qu'aux yeux de la loi le souverain est considéré comme le propriétaire originaire de toutes les terres du royaume.

Dans la législation antérieure au statut impérial 1 Guil. 4, ch. 25, les dispositions concernant la déshérence ou l'appropriation des biens et revenus en provenant n'ont pas affecté la prérogative de la Couronne. Les statuts 39 et 40 Geo. 3, 59 Geo. 3 et 6 Guil. 4 n'ont pas été passés pour investir la Couronne d'aucun droit nouveau, ni pour diminuer ceux qu'elle avait déjà sur cette espèce de biens, mais bien plutôt pour en faciliter l'exercice. Il n'y est question de ces biens que comme propriétés de la Couronne. La 59me Geo. 3, ch 94, sec. 3 déclare que le surplus de la vente de ces biens, après l'exécution des ordres de Sa Majesté, sera payé aux commissaires du revenu territorial de Sa Majesté, " *shall be paid to the Commissioners of His Majesty's Land*

(1) Ch. 8, p. 281.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fournier, J.

Revenue." La prérogative est laissée intacte et les biens qui en proviennent conservent leur caractère de revenu.

Ce n'est que par la 1re Guil. 4, ch. 25 que la destination de cette source de revenu, de même que les autres droits héréditaires, casuels, territoriaux et autres particulièrement attachés à la Couronne, a été aliénée en échange de la liste civile. Elle doit pendant la durée de ce règne, former partie du fonds consolidé du Royaume-Uni, aux conditions et réserves spécifiées dans cet acte. Une de ces conditions est ainsi exprimée: "It being the true intent and meaning of this act that the said rights and powers shall not in any degree be abridged, restrained, affected or prejudiced in any manner whatsoever, but only that the money accruing to the Crown, after the full and free exercise of the enjoyments of the said rights and powers, subject as aforesaid, shall, during His Majesty's life time, be carried to and made part of the consolidated fund of the United Kingdom." Telle est encore, en vertu des dispositions de l'acte impérial 1 et 2 Vict., ch. 2, la destination des droits et revenus particulièrement attachés à la Couronne, et entre autres, ceux provenant de la déshérence.

Le premier changement qui ait été fait dans l'appropriation des revenus héréditaires de la Couronne, dans les provinces formant actuellement la Puissance du *Conada*, a été introduit par l'acte du *Nouveau Brunswick* Cons. Stats. N. B. Tit. 3, ch. 5, dont les dispositions sont à peu près celles de la 1re *Guil.* 4, ch. 25. Des dispositions du même genre furent ensuite introduites dans l'acte d'union du *Haut* et du *Bas Canada* en 1840. Elles furent plus tard modifiées par des statuts subséquents cités en détail dans l'argument du savant conseil de l'appelant. Il résulte de l'état de la législation à l'époque de la Confédération que les revenus provenant de la déshérence appartenaient, lors de la passation de l'acte de l'*A B. N.*, au *Canada* Uni. Cette proposition

admise de toute part, même par le savant conseil de l'appelant, il ne reste donc plus qu'à s'assurer si l'acte de l'*A. B. N.* n'en a pas disposé, comme des autres revenus des provinces, en faveur du gouvernement fédéral.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fournier, J.

Pour moi la solution de la question qui nous occupe se trouve entièrement dans la sec. 102, ainsi conçue :

Tous les droits et revenus que les législatures respectives du *Canada*, de la *Nouvelle-Ecosse* et du *Nouveau-Brunswick*, avant et à l'époque de l'union, avaient le pouvoir d'approprier, sauf ceux données par le présent acte aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par le présent acte, formeront un fonds consolidé de revenu pour être appropriée au service public du *Canada*, de la manière et soumis aux charges prévues par le présent acte.

D'après cette section, tous les droits et revenus des législatures doivent former le fonds consolidé de revenu du *Canada*, sauf les deux exceptions y mentionnées.

Les biens provenant de la déshérence forment à n'en pas douter une source de revenus publics depuis que la Couronne en a fait l'aliénation en vertu des lois concernant la liste civile ; ce revenu doit être compris dans la cession qui est faite en termes généraux de tous les *droits et revenus* des provinces, à la Puissance. Il n'y a à cette disposition générale que l'exception en faveur des provinces, des revenus qui leur *sont réservés* par l'acte constitutionnel et qu'elles peuvent percevoir en vertu des pouvoirs spéciaux qui leur sont conférés. La section 126 qui crée le fond consolidé des provinces déclare qu'il sera composé des droits et revenus qu'elles avaient, avant l'Union, le pouvoir d'approprier, et qui sont réservés aux gouvernements ou législatures. Ces deux sections s'accordent à déclarer que tous les *revenus* des provinces, excepté ceux qui leur sont spécialement réservés par l'acte constitutionnel, appartiendront au fond consolidé fédéral. Pour main-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fournier, J.

tenir que le revenu provenant de la déshérence appartient aux provinces, il faudrait donc trouver dans l'acte constitutionnel une réserve à cet effet. Il n'y en a certainement pas. Les sources de revenus des provinces sont indiquées dans les sous-sections 2, 3 et 9 de la section 92, et dans la section 118, accordant une subvention à chaque province,—mais aucune de ces sections ne contient de réserve spéciale qui soit susceptible de comprendre le revenu provenant de la déshérence. La seule réserve spéciale que l'on trouve est celle contenue dans la section 124, conservant au *Nouveau-Brunswick* son privilége de prélever sur les bois de construction les droits établis par une de ses lois passées avant l'Union. Cette exception n'a pas d'autre effet que celui de confirmer le principe genéral de la section 102.

Pour appuyer sa réclamation au bénéfice de la déshérence, l'intimé invoque encore un autre moyen tiré de certaines dispositions de l'Acte de l'*Amérique Britannique du Nord.* Il prétend que les sec. 109 et 116 ont opéré en faveur des provinces un transport législatif de cette prérogative.

Par la sec. 109 "toutes les terres, mines, minéraux et réserves royales (*royalties*) appartenant aux différentes provinces du Canada, etc., lors de l'Union, et toutes les sommes d'argent alors dues ou payables pour ces terres, mines, minéraux, et réserves royales (*royalties*), appartiendront aux différentes provinces d'*Ontario*, *Québec*, la *Nouvelle-Ecosse* et le *Nouveau-Brunswick*, dans lesquels ils sont sis et situés, ou exigibles, restant toujours soumis aux charges dont ils sont grevés, ainsi qu'à tous intérêts autres que ceux que peut y avoir la province."

Par la déclaration, contenue dans cette section, que toutes les terres et réserves royales appartenant aux différentes provinces lors de l'Union continueront de leur appartenir, l'Intimé en conclut que le domaine direct de la Couronne sur toutes les terres publiques a été

transporté aux provinces, et qu'une des conséquences résultant de ce transport c'est que les propriétés tombant en déshérence doivent faire retour aux provinces. Mais le transport n'est pas aussi général et aussi absolu que le prétend l'Intimé. Il est restreint et qualifié par les expressions " terres, etc., appartenant, etc., lors de l'Union." Ces termes ne comportent évidemment qu'une confirmation de la propriété limitée des terres publiques, telle qu'elle était alors—le pouvoir des provinces sur ces terres n'est nullement augmenté—aucun pouvoir nouveau n'est ajouté à ceux qu'elles avaient déjà—aucune prérogative nouvelle ne leur est concédée. Il est resté ce qu'il était auparavant, ainsi que le comporte la sous-sec. 5 de la sec. 92, restreint à l'administration et à la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent.

Leur pouvoir sur les terres est donc actuellement ce qu'il était avant la Confédération et rien de plus. Pour savoir quel est à présent ce pouvoir, il faut nécessairement se reporter à la législation antérieure, tant impériale que provinciale, sur ce sujet. D'après l'examen que j'ai fait de cette législation, dont l'honorable juge *Gwynne* a fait un exposé si complet qu'il serait inutile de revenir sur ce sujet, je suis forcé d'en arriver à la conclusion que le pouvoir des provinces sur les terres publiques n'a pas été augmenté par la sec. 109. Il est comme avant la Confédération un pouvoir d'administration, la Couronne ne s'étant jamais départi par aucun acte impérial ou provincial en faveur de qui que ce soit, du domaine direct lui appartenant dans les terres publiques. Dans ce cas, c'est à la Reine comme ayant encore le domaine directe des terres que les biens tombant en déshérence devraient faire retour, si l'on considère cette faculté plus comme un incident de la tenure des terres que comme une prérogative du souverain.

Mais la province d'*Ontario* n'ayant jamais été sou-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fournier, J.

mise au régime féodal, ce n'est pas au souverain, comme seigneur (Lord of the Manor), mais à titre de souveraineté que le droit de retour doit lui appartenir, en vertu du principe qui le fait présumer comme le dit *Blackstone*, propriétaire de toutes les terres du royaume. C'est sans doute pour cette raison que sous la constitution actuelle, les concessions de terres publiques se font encore au nom de la Reine. Dans tous les cas l'argument de *reversion* fondé sur le système féodal, s'il était susceptible d'être appliqué à la province d'*Ontario*, ne pourrait affecter que les propriétés immobilières. Que deviennent dans ce cas les biens mobiliers de la succession; à qui feront-ils retour ? La prérogative va-t-elle se diviser suivant la nature des biens,—les immeubles appartiendront-ils aux provinces et les biens mobiliers à la Puissance ? Cette question suffit pour faire voir le vice de l'argument uniquement fondé sur le droit de retour comme incident de la tenure féodale. Il est plus logique de reconnaître que c'est en vertu de la prérogative royale que le souverain a droit de bénéficier de toute espèce de biens tombant en déshérence.

Au surplus, lors même que le transport des terres serait absolu, je ne comprends guère comment il pourrait par lui-même comporter une aliénation d'une prérogative attachée à la personne du souverain. Il est de principe que toute législation affectant les prérogatives royales doit être formelle et expresse, ou résulter du moins des dispositions qui impliquent nécessairement que le législateur a voulu les modifier. Ce principe, si souvent proclamé par les décisions des tribunaux en *Angleterre* a été encore assez récemment réaffirmé par le Conseil Privé dans la cause de *Landry* v. *Théberge*.

Il n'y a certainement dans la clause 109 aucune expression concernant la prérogative, et ses dispositions ne sont pas non plus de nature à faire nécessairement présumer qu'elle a été aliénée.

L'argument fondé sur les expressions "réserves royales" dans la même sec. 109 (*royalties*) que l'on a fait valoir dans la cause de *Church* vs. *Blake* (1) semble avoir été abandonné par le savant conseil de l'Intimé. En effet, le terme *royalties* n'est pas employé là pour signifier les pouvoirs ou les attributions de la royauté. L'explication qui en a été donnée par le savant conseil des appelants est la seule correcte. Il est évident que cette expression se rapporte seulement aux droits de percentage ou de commission que la Couronne percevait avant la Confédération dans les provinces de la *Nouvelle-Ecosse* et du *Nouveau-Brunswick* sur les concessions de mines. Pour ces raisons la sec. 109 ne me paraît aucunement affecter la prérogative en question.

Un autre argument que l'on a aussi fait valoir dans cette cause, et qui ne me semble pas plus concluant que celui fondé sur la section 109, est celui tiré du pouvoir des législatures sur la propriété et les droits civils.

La déshérence étant une interruption de la succession, et le souverain ne prenant les biens que comme *ultimus hæres*, les législatures peuvent, dit-on, changer cet ordre de succession. Mais la déshérence est une matière de prérogative et non pas une question de propriété ou de droit civil. D'ailleurs l'ordre actuel des successions admettant cette prérogative en faveur de la souveraine, il faudrait démontrer que le pouvoir de législater sur les prérogatives royales appartient aux législatures Ce serait retomber dans la question de savoir à qui appartient l'autorité souveraine sous la constitution actuelle, sur les sujets de législation non spécialement délégués, question sur laquelle j'ai déjà eu occasion de me prononcer. Je ne crois pas devoir y revenir, car je crois que la sec. 102 suffit pour résoudre la question soumise.

Ayant pris communication de l'opinion si savam-

(1) 2 Q. L. R. 236.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

ment élaborée de l'honorable juge *Gwynne*, je me suis contenté d'indiquer brièvement les motifs de mon concours dans les conclusions qu'il a adoptées. En conséquence je suis d'avis que l'appel devrait être alloué.

Fournier, J.

HENRY, J. :—

Having fully considered the interesting and highly important interests involved in the discussion and decision of this case, I shall now briefly state the conclusions at which I have arrived.

On the part of the respondent it is claimed that on the failure of heirs of *Andrew Mercer*, who died intestate, the province of *Ontario* became entitled to his estate—both real and personal—as legislative assignee of the Crown.

On the part of the appellants it is contended that no such assignment was made, but that by the *British North America Act* the assignment, if any, was to the Dominion.

If therefore the claim of the respondent be not sustained our judgment must be for the appellants, whether or not the Dominion, by the act in question, became entitled to the position claimed for *Ontario*.

If the majority of the court should be of the opinion that the respondent's claim cannot be allowed, it will be unnecessary, in my opinion, to consider the proposition advanced by the appellants, that the assignment was to the Dominion. It has been contended in other cases that plenary legislative powers were given by the act mentioned over all subjects and for all objects, either to the parliament of *Canada* or to the several legislatures. I have, in at least one of my judgments, refused to admit the correctness of that proposition ; and have held that we must look to the act and trace to it the right to legislate in regard to every matter arising

for decision. If we always keep in view the consideration that the whole legislative power is given by it, and by it alone—a position requiring no argument to sustain—and determine from that the existence of any legislative power claimed, the solution will, to that extent, be easier; and the decision more likely to be correct. There are, no doubt, many subjects given fully, either to the Dominion or to the local legislatures, or in part to each, wherein it is manifest the one or the two, each of the part allotted to it, should have legislative power to deal with the whole of such subjects; but although that may be properly said to be the general rule, I maintain the existence of cases that should be declared exceptions.

It is not necessary, as I have before said and for the reasons given, to be shown, that the right claimed by the respondent should appertain to the Dominion. It may be that the latter has no such right; but that conclusion, in my opinion, should have little weight in the present case. To recover in this action, the exclusive right must be shown in *Ontario*. The appellants are entitled to our judgment unless the respondent shows a valid legislative transfer of the prerogative right in question to the province; and such a transfer as would deprive the sovereign of the right to its future exercise. I am induced to make these suggestions as many of the reasons for arriving at the conclusion that there was no such transfer to the several provinces composing the Dominion apply with equal force to show there was none to the Dominion.

I have said that we must seek from the *British North America Act*, and from that alone, for the sustainment of the respondent's claim.

Our attention was directed at the argument to the position of *Canada* immediately preceding the passage of the act as regards Crown or waste lands, and also to

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

that of *Upper Canada* before the union with *Lower Canada*. Holding, however, the views I do as to the result of the union of the four provinces in 1867, I am unable to feel that much, if any, weight should be given to an argument founded on the position, as touching the question under consideration, which the provinces or any of them occupied at any time before confederation, except so far as the act specially refers to such position. The Imperial Act was not one forced upon the provinces by an arbitrary proceeding of an overruling legislative body, depriving them, or any of them, of legislative power. In such a case it might be contended that the extent of the deprivation must be ascertained from the act; and as regards any subject or matter not embraced in it, the power would still remain. Here, however, the case is far different. The act was passed, as it recites, on the application of the provinces to give legislative sanction and authority to an agreement entered into on the part of the provinces for their federal union. The implied, if not expressed, principle acted on was that all rights and privileges, including legislative as well as others, of each of the provinces, should be surrendered; and that each should, if the union were consummated, depend subsequently for the exercise of their rights and privileges upon the Imperial Act to be passed, to give effect to the agreement for union entered into. This is patent in the act itself and in the resolutions of the delegates upon which it was founded and passed. I could give many reasons, and show many facts, to prove the correctness of this proposition; but it appears to me only necessary to suggest that if it were intended to be otherwise, we would reasonably expect to find provision made for intended exceptions. The absence of any such is strong presumptive evidence that none were desired.

Section 102 of the act gives to the Dominion the appropriation of

All duties and revenues over which the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act,

to form one consolidated revenue fund to be appropriated for the public service of *Canada*.

By the terms and provisions of that section all the duties and revenues controlled before the union by the legislatures of the provinces, with the exception of the portions reserved by the act to the provinces, were clearly given to the Dominion. If, then, before the union, the right claimed by the respondent was vested in the provinces, it was transferred to the Dominion by this section, unless we find it reserved in the act to the provinces. I think therefore that the decision of this case should not be affected by the position of the provinces, or by their legislation, before the union, with the exception I have before mentioned. If the portions of the revenues reserved to the provinces cannot be construed to include the right in question, it matters not that it can be satisfactorily and undoubtedly shown that *Ontario* possessed it before the union.

The reservation to which I have just referred we find, on reference to the act, to be "lands, mines, minerals and royalties, belonging to the several provinces at the union." "Lands" and "royalties" need only to be referred to in this connection. As to the first it is contended, that by the mere transfer from the Crown to the provinces, the prerogative right to an escheat, on the failure of heirs, is transferred. The first inquiry naturally is had the province of *Canada*, before the union, that right? If it had not, then it could not be a part of the reservation. It was the duty of the respondent to have pointed out some legislation of the Imperial Parliament abolishing or transferring the prerogative right of the Crown by escheat over lands in

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

the provinces held in free and common socage, previous to the accession of his Majesty *William IV.*; or to some such statute repealing the statute passed in the first year of his reign, ch. 25, by which his Majesty surrendered to parliament, to form part of the consolidated fund of the kingdom, his Majesty's interest in the hereditary revenues of the Crown, and in the funds "which might be derived from any *droits* of the Crown or admiralty," from any casual revenues either in his Majesty's foreign possessions or in the United Kingdom; and providing that, after his decease, all the said hereditary revenues should be payable and paid to his heirs and successors; to which was added a proviso, that nothing in the act should extend, or be construed to extend, in any wise to impair, affect or prejudice any rights or powers of control, management or direction which had been or might be exercised by authority of the Crown relative (amongst other things) "to the granting or disposing of any freehold "or copyhold property, or the produce of or any part of "the produce or amount or value of any freehold or copy-"hold to which his Majesty, or any of his royal prede-"cessors, had or hath, or shall be entitled to, either by "escheat for want of heirs, or by reason of any forfeiture, "or to the granting or distributing of any personal pro-"perty to which the Crown would become entitled by "reason of the want of next of kin or personal represen-"tatives, of any deceased person," but that the same should be enjoyed in as full and effectual manner as if that act had not been passed; the act declaring that the said rights and powers should not be abridged, restrained, affected or prejudiced in any manner whatever; but only, that the monies accruing to the Crown, after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, should, during his Majesty's life, be carried to and made part of the consolidated fund of the United Kingdom.

The act of the province of *New Brunswick* for the transfer of the hereditary, casual and territorial revenues, and of the lands, woods, mines and royalties, contains similar provisions as to the reservation of the rights of the Crown, *to make any grant or restitution of any estate, or of the produce thereof, to which it might become entitled by escheat for want of heirs, &c.*, or to make any grant or distribution of any personal property devolved to the Crown for want of next of kin, &c., and declaring *that it was only the monies arising, after the full and free exercise and enjoyment of the rights* reserved, should be carried to and form part of the consolidated revenue of *New Brunswick*. That act has been re-enacted, and is still in force.

It could not therefore be successfully contended that in *New Brunswick* the local legislature could legislate upon the subject, as that province could not claim the right under the provisions of the *British North America Act*; not having enjoyed or exercised any such right previously, but, on the contrary, expressly legislated against it. Having been specially exempted from the operation of the *New Brunswick Act*, it may be contended that, inasmuch as the Confederation Act contains no such reservation, it was intended to pass the right claimed; but it will be seen that the terms of the latter are not general, and do not apply at all to the hereditary Crown revenues as such, but specifically refer to lands, mines, minerals and royalties. The argument might be applicable to the grant to the Dominion in its comprehensive terms, if the provinces had previously such right, but is not applicable to the specific reservation to the provinces.

Up to the time of the union of *Upper* and *Lower Canada* in 1840, it cannot be claimed that either had any claim to control the appropriations of the casual or territorial revenues of the Crown. By the Imperial Act

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

passed to consummate that union, it was provided that before any act of the united provinces relating to, or affecting her Majesty's prerogative touching the granting of waste lands of the Crown, could receive the royal assent, it was required to be laid before both houses of the British Parliament for thirty days; and that if either house, during that period, should pass an address asking her Majesty to withhold her assent, it would not thereafter be lawful for her to give it. And also that any law divesting the Crown of any of its prerogative rights, and vesting them in the provincial legislature, must emanate from, or be expressly confirmed by the Imperial Parliament. The latter provision, I take, governed the province of *Canada* up to the Confederation Act, and when on one occasion a provincial act was assented to—as I presume inadvertently—without the act having been laid before both houses of parliament as required, a ratifying act of the Imperial Parliament was passed as necessary to validate it. I can find no legislation of the Imperial Parliament since to change that position of the matter.

It is contended that, inasmuch as the management and sale of crown lands is vested in the local legislatures, it is more reasonable to assume it to have been intended to include the right to acquire a title again by escheat, rather than that the Dominion should take it. That was however a matter more for those who procured the passage of the act, and for the parliament that passed it, than for us. We are not to say what the provision should have been, but what it is. If I were satisfied that the prerogative right in question was in reality transferred by the confederation act, I should be much more inclined to conclude that it was to the Dominion, by force of the general terms of the grant to it, than to the provinces by the restrictive terms of the grant to them. By section 102 it will how-

ever be seen that the grant to the Dominion is limited to the "duties and revenues over which the respective legislatures of *Canada*, *Nova Scotia*, and *New Brunswick* had and have power of appropriation." If therefore the legislatures of those provinces had not, before or at the union, the right to deal with the subject-matter now in question, it cannot be contended that it passed to the Dominion by virtue of that section. If such should be found to be the case it will, I have no doubt, be found to make no practical difference, as we have every reason to assume the right will be exercised by the sovereign as recommended and suggested by her representative in the Dominion.

The Imperial Parliament has never, as far as I have been able to discover, attempted to deal with the peculiar prerogatives of the Crown until previously voluntarily surrendered by the sovereign; and with that now under consideration the British parliament has not in any way interfered. If the province of *Ontario* should be found right in dealing with it, a position will be attained by it which, as far as I can discover, has not been reached in any other part of her Majesty's Dominions.

It is admitted that up to 1840 the prerogative right to escheat in cases like the present vested in Her Majesty the Queen. If previous to that an estate was left without heirs, the Queen would take the title. She would not, however, take it merely as a source of revenue, for such was seldom appropriated for that purpose. Up to that time the title and control of all public or waste lands was in the Queen. The province had no title thereto, and the patents were from the Queen. Under what rule or upon what principle could the province claim, through an escheat, an estate it never before owned. Escheat is by law defined to be "an obstruction of the course of descent and a conse-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

" quent determination of the tenure by some unforeseen " contingency, in which case the land naturally results " back, by a kind of reversion, to the original grantor or " lord of the fee." If that definition be correct, and I cannot think it will be doubted, then in respect of all lands granted, or patented, previous to 1840, the province could, by no possibility that I can discover, claim as the original grantor, or lord of the fee. If, indeed, the patent had been shown to have issued since 1867, when the Confederation Act was passed, it might be more interesting to consider and apply to it the doctrine of escheat than under existing circumstances, and to decide whether or not the act transferred the right claimed. If, however, we were expected to decide that question it should have been submitted to us by evidence showing the patent to have issued since the Confederation Act came into operation. That is not the case before us, and I need not speak positively as to it, but will content myself by saying that for other reasons given, I am of opinion that, even in that case, the respondent would fail in sustaining his claims.

It was contended on the part of the respondent that it could not be, that while the land, before being granted, was held by her Majesty for the use of the province of *Ontario*, yet upon, or after, the grant in fee simple, the reversionary estate would be held by her Majesty for the use of the Dominion of *Canada*. The answer to that proposition is, that after the grant her Majesty had no substantial interest, such as a reversion on the expiration of a lease. The whole estate was transferred without any reserve, or any provision for a reversion. Her Majesty held not the smallest estate known to the law in it. By the unforeseen accident of the failure of heirs, or by a forfeiture, she again becomes entitled; but in the meantime is neither the owner nor the trustee of any other in regard to it. She takes it in her

own right as the original grantor, having had before the forfeiture or failure of heirs no title whatever. By English law and practice she can dispose of that title when accrued as she pleases, independent of parliamentary control. In the large majority of cases, however, as others lose by the accident which gives her title, she refuses the personal benefit caused by it, and restores, or rather grants, the subject-matter to those who, but for the accident, would most probably have succeeded to it. The power to remedy the injurious result of such an accident in many cases that happen, must be highly prized by any right feeling sovereign; and it is one not yet controlled by Imperial legislation. It must, therefore, have been considered wise and proper that such should continue to be exercised.

On the part of the respondent it was presented to us simply as a matter of revenue, as between the Dominion and the provinces. I view it very differently; and think myself bound to uphold a prerogative right, the exercise of which is more likely to be less exacting than if otherwise held—and which has been so long enjoyed with apparent satisfaction in the United Kingdom—until it is made satisfactorily to appear that it no longer exists.

I think such transfer should not be adjudged by a speculative construction of a doubtful statute, but by a most clear and positive enactment. Besides, it is a well known rule that the sovereign is bound by no statute unless specially named therein, and that any statute affecting adversely the prerogative rights of the sovereign does not bind him unless there are express words indicative of that object. If that rule of law be not violated, the grant of the lands, mines, minerals and royalties belonging to the provinces at the Union in 1867 cannot be adjudged to affect in any way the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

royal prerogative through which lands, by escheat for want of heirs, become vested in the sovereign. That doctrine was acted upon and declared in force by the Privy Council in a comparatively late case (1), and cited by the counsel of the appellants at the argument.

Again it is claimed that the right in question is given to the provinces through the transfer by the act of the subject-matter termed "royalties." The objections last urged will apply with equal force to that subject. The term "royalties" is of very general import and very comprehensive; but it cannot be contended in this case that it includes the transfer of all that might come under that designation. "Royalties" as to mines is well understood in *England* to be the sums paid to the sovereign for the right to work the royal mines of gold and silver; and to the owner of private lands, for the right to work mines of the inferior metals, coal, &c. In *Nova Scotia* and *New Brunswick*, if not in the other provinces, mines and minerals were at the time of the Union being worked; and, in *Nova Scotia*, a revenue therefrom was derived by the government and which, in the acts of that province, were called "royalties." That the income thus derived should be continued to that province, it was necessary that provision therefor should be made; and the use of the term was apparently intended for that purpose, and, at the same time, to give to the other provinces the continuance of the same right, where such was previously enjoyed. The provision of the act had therefore sufficient in the fact I have stated to furnish a subject-matter to which it could be referable, and upon which it could operate without giving it any additional or more extended application. The object was to secure to the provinces someting at once available for revenue to be appropriated by them in their legislatures,

(1) See *Théberge* v. *Landry*, 2 App. Cases 106.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Henry, J.

and by their several governments, for public purposes. It does not, however, follow that the words used in the provision should be adjudged to include the prerogative right of the sovereign in respect of any title she might obtain by the accident of a person dying intestate without heirs. Such an assumption as the latter is quite unnecessary to give operation to the provision; and for the many reasons I have given, I think it does not include what is claimed; nor can I arrive at the conclusion that such was intended. These views are in accordance in many respects with those I expressed in the case of *Lenoir* v. *Ritchie* (1). I may add, that in that case they were not alone my views, but those of all my learned brethren who heard and decided it; and I have heard nothing since tending to change or weaken them. After giving my views, as I have done, in reference to the right in question, I need hardly say that I consider the act of the province of *Ontario* in relation thereto *ultra vires*. I must, therefore, in accordance with those views decide that the respondent has not established the position upon which his right to recover in the suit is based; that the judgment appealed from should be reversed, and that our judgment should be for the appellant, with costs.

TASCHEREAU, J.:—

Though I have not failed to give the able argumentation of the learned counsel heard before us on the part of the respondent in this cause the consideration it deserved, I have been unable to alter my views on the question submitted as I expressed them in the *Fraser* case (2), where the same question was before me in the Superior Court of *Kamarouska*, and I am still of opinion that under the *British North America Act* the right to escheats *propter*

(1) 3 Can. S. C. R. 575. (2) 1 Q. L. R. 177.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Taschereau, J.

defectum sanguinis belongs exclusively to the federal power. As this last case is fully reported, I have not written down at full length the reasons upon which I have come to a conclusion in the present case. This however would, under the circumstances, have been useless. I concur entirely with what my brother *Gwynne* says on the construction to be given to the word *royalties*, and to the word *lands* in section 109 of the *British North America Act*, as well as with what he says on the doctrine of reversion relied upon by the respondent. I may remark that this doctrine of reversion and the reasons given in the present case by the *Ontario* Court of Appeal applicable to real estate, do not support the *Quebec* Court of Appeal in the *Fraser* case, where the question as submitted related to personal as well as real estate. To say, as has been said, that as escheats fall within the words "property and civil rights in the province," they belong to the local power, is a *petitio principii*. It is taking for granted that they do not belong to the Crown, to the federal power; for, if they belong to the federal, they, of course, do not fall under the words "property and civil rights in the province," and they cannot in any shape whatsoever be legislated upon by the local power. Section 117 of the *British North America Act*, relied upon by some of the judges in the *Quebec* Court of Appeal, has nothing to do with the question, and was not relied upon by the respondent before this court. As to the word *royalties*, to be found in section 109 of the *British North America Act*, which word, according to some of the judges in the *Quebec* Court of Appeal, in the *Fraser* case, transfers and reserves escheats to the provincial governments, the respondent has, rightly, in my opinion, been unwilling to base his case upon it in his argument before us. To my mind section 102 of the *British North America*

Act is conclusive. The legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, before and at the union, had power of appropriation over the revenues arising from escheats. Such revenues have not by the *British North America Act* been reserved to the provincial legislatures. Neither can these revenues be said to be raised by the provincial legislatures, in accordance with the special powers conferred upon them by the said *British North America Act*. Then, they form part of the consolidated revenue fund of the Dominion, according to this section 102. This is so for real as well as for personal property, as I read the Act. The argument of the respondent, based upon the doctrine of reversion, seems to me defective in that it leaves the personal property of a person deceased intestate without heirs to the federal government, whilst it gives his real property to the local government.

Any argument which leaves *Mercer's* personal estate, which is very large, to the federal government, whilst it gives his real estate to the local government must, as I view it, be wrong, and contrary to a sound interpretation of the *British North America Act*. The Imperial authority cannot have intended such a division of the revenues from escheats. I may also remark that in the province of *Quebec* the laws relating to escheats under art. 637 of the Civil Code are not derived from the feudal system, and are anterior to the feudal ages, so that this doctrine of reversion could not apply there. It seems to me that any argument which under the *British North America Act* does not and cannot apply equally to all the provinces must be contrary to the spirit and intent of the *British North America Act*. This doctrine of reversion seems to me also defective in that it cannot apply to lands which did not belong to the provinces at the time of the union. Lands which did not form part of the public domain at the union were not given to the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Taschereau, J.

provinces by section 109 of the Act. Lands of persons dying intestate without heirs in any one of the provinces before confederation did not re-vest in the province, but escheated to the sovereign, and belonged to him. He alone had the title to them. The provinces had been given by the sovereign and possessed at the union power of appropriation over the revenues arising from this right of escheat (the revenues only, not the prerogative right itself, which always remained and remains in the person of the sovereign), and these revenues by section 102 of the Act have been given to the Dominion Government. All duties and revenues over which the provinces had, before confederation, power of appropriation are by said section 102 given to the Dominion Government, save and except only such portions of said duties and revenues which are by the Act reserved to the provinces. Section 126 distinctly enacts that the provinces shall have for the future such portions only of said duties and revenues which are by the Act reserved to them. This is clear. For the Dominion, *all* duties and revenues, except those expressly reserved to the provinces. For the provinces, none of said duties and revenues but such *portions* thereof as are express reserved to them. The provinces have consequently to establish that the Act reserved to them the revenues from escheats. The *onus probandi* is on them. I fail to see that in any part of the Act these revenues have been so reserved to them.

As to the argument, that as section 102 enacts that the duties and revenues therein mentioned shall form part of the consolidated revenue fund of the Dominion, it would be impossible for the Crown to relinquish its rights to revenues from escheats in favor of illegitimate children of the deceased or otherwise, it may be remarked that this argument, if good, would apply equally to the statute ch. 10 C. S. C. sec. 5, in which it was also enacted

that the duties and revenues, including escheats, would form part of the consolidated revenue of the province of *Canada* as constituted before confederation. Yet, under the said Act, it has never been doubted that the Crown could relinquish its rights to escheats when it wished so to do.

The question submitted to us by one of the learned counsel for the respondent as to whether the Queen forms part of the local legislatures seems to me to have no practical bearing on this case. That, when anything which, according to the principles of the British Constitution, must be done in her Majesty's name, has to be done by the Lieutenant Governors of the provinces, under the *British North America Act*, they are authorized to do it in her Majesty's name, and are deemed then to act for her Majesty, has not, that I remember, been denied by the appellant. But they are not her Majesty's direct representatives, as the Governor General is. They have never been considered as such by the Imperial authorities.

"The Lieutenant Governors of the provinces of the Dominion, however important locally their functions may be, are a part of the colonial administrative staff, and are more immediately responsible to the Governor General in Council. They do not hold commissions from the Crown, and neither in power nor privilege resemble those Governors, or even Lieutenant Governors of colonies, to whom, after special consideration of their personal fitness, the Queen, under the great seal and her own hand and signet, delegates portions of her prerogatives and issues her own instructions," says the Earl of *Carnarvon* in a despatch to Lord *Dufferin*, dated January 7th, 1875 (1).

That the Lieutenant Governors are considered by the Imperial authorities as officers of the Dominion Govern-

(1) Vol. 8, No. 7 Sessional Papers, 1875.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Taschereau, J.

ment seems also clear by the proceedings in the *Letellier* affair, and the despatch of Sir *Michael Hicks-Beach* to the Marquis of *Lorne* on the subject, dated July 3rd, 1879 (1).

The following despatch of the Duke of *Buckingham* and *Chandos* to Lord *Monck*, is written in the same view of the Lieutenant Governor's position.

DOWNING STREET, 19th October, 1868.

MY LORD,—I have under my consideration your Lordship's despatch, No. 170, of the 9th September, submitting the question whether the Lieutenant Governors of the provinces within the Dominion of *Canada* are entitled to salutes from H. M. ships and fortifications within their respective provinces.

I have the honour to acquaint you that under the circumstances of the case, the Lieutenat Governors of the provinces holding their commissions from the Governor General, will not be entitled to salutes.

I have the honor to be,

&c., &c., &c.,

(Signed,) BUCKINGHAM & CHANDOS.

The Viscount Monck.

Another despatch from the Secretary of State for the Colonies, dated 7th November, 1872, though it recognizes the Lieutenant Governors should be *deemed* to be acting directly on behalf of Her Majesty on certain occasions, treats them on ordinary occasions as representing the Dominion Government.

* * * And with reference to the question asked by Sir *Hastings Doyle*, and submitted by Lord *Lisgar* for my decision, namely, "whether the Lieutenant Governors are supposed to be acting on behalf of the Queen," I have to observe that, while from the nature of their appointment they represent on ordinary occasions the Dominion Government, there are, nevertheless, occasions (such as the opening or closing of a session of the provincial legislature, the celebration of Her Majesty's birthday, the holding of a levee, &c., &c.,) on which they should be deemed to be acting directly on behalf of Her Majesty, and the first part of the National Anthem should be played in their presence. * * *

(Signed,) KIMBERLEY.

(1) Accounts and Papers, Imp. H. C., Vol. 51, p. 127, session 1878, 1879.

A reference to the order of precedence established for *Canada* by Her Majesty shows that the Lieutenant Governors do not take rank and precedence immediately after the Governor General, but only after the general commanding Her Majesty's troops, and after the admiral commanding Her Majesty's naval forces on the *British North America* station.

I do not cite these documents as conclusive evidence for a court of justice, but as worthy of consideration, and to show that the Imperial authorities and her Majesty herself consider the Lieutenant Governors as not generally representing the sovereign.

However, as I have already stated, though the question has been raised and argued at some length before us, I do not think it can, in any manner, affect this case as I view it. As I have said, I fail to see that the *British North America Act* reserved or gave to the provinces the revenues arising from escheats. They consequently must belong to the federal power, and upon this ground, I am of opinion to allow this appeal with costs.

I am glad to understand that it was agreed between the parties that whatever should be the judgment of this court on this question, the case would be carried to the Privy Council. Though these revenues from escheats must amount in fact to a trifle in each of the provinces, I think it but right for obvious reasons that the final and authoritative determination of controversies on the construction of the *British North America Act*, which is an Imperial statute, should emanate from an Imperial judicial authority.

GWYNNE, J.:

This case was argued before us as one raising a question of the respective rights of the dominion and provincial authorities, and as such we have had the advan-

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

tage of hearing a learned counsel who appeared before us in the interest of the province of *Quebec*, as well as two learned counsel who appeared in the interest of the province of *Ontario* on the one side, and, upon the other side, learned counsel who appeared before us in the interest of the dominion.

The particular question is, whether lands in the province of *Ontario* escheating to the Crown *propter defectum sanguinis* come under the management, control and enjoyment of the dominion or of the provincial authorities? This question, however, involves the consideration of all property both freehold and personal in the several provinces of the dominion which escheats to the crown, and whether such escheat accrues *propter defectum sanguinis* or *propter delictum tenentis*, and the conclusion in both cases must be the same.

The learned counsel who appeared before us in the interest of the province of *Quebec* addressed to us an argument replete with ability and research for the purpose of establishing a position which he took, namely, that the title which the crown has to property by escheat is not derived from the feudal tenure, but from a much more ancient law, namely, the old Roman law; but from whatever source derived matters not, for, whatever may be its origin, the learned counsel admitted, as indeed he could not do otherwise, that whether escheat in lands be or be not a species of reversion, whether the title accrues as a sort of caducary succession, the Sovereign taking as *ultimus hæres*, whether it is of the nature of a title by purchase, or by descent, or partakes of both, whether it accrues *propter defectum sanguinis* or *propter delictum tenentis*, whether in short the escheated property accrues as an incident to tenure or in virtue of the prerogative royal, and whether it be real or personal property

which escheats, all property escheating to the Sovereign does so *jure coronæ*. The question with which we have to deal is one simply of the construction of the *British North America Act*, namely, what disposition has that Act, (which is the sole charter by which the rights claimed by the dominion and the provinces respectively, can be determined,) made of property escheating to the Crown? and has it made any distinction between property escheating *propter defectum sanguinis* and tha which escheats *propter delictum tenentis*? In construing this Act, however, it will be convenient to consider in what manner, and under what designation or form of expression, property of the description in question had been dealt with in prior Acts of parliament, and what was the precise condition in which that particular species of property was regarded to be, and was, at the time of the passing of the *British North America Act*. By so doing we shall obtain light to assist us in construing the latter Act.

In 1st *Anne*, stat. 1, c. 7, s. 5, property of this description is spoken of as lands, tenements and heredita ments which may hereafter escheat to her Majesty, her heirs and successors, and to the end that the land revenues of the Crown might be preserved, improved and increased for the best advantage thereof, it was enacted that no grant should be made of any manors, lands, tenements, tithes, woods or other hereditaments within the Kingdom of *England*, Dominion of *Wales* or Town of *Berwick-on-Tweed* then belonging or thereafter to belong to her Majesty, her heirs or successors, whether the same should be in right of the Crown of *England* or as part of the Principality of *Wales* or of the Duchy or County Palatine of *Lancaster*, or otherwise howsoever, unless for 31 years or 3 lives, &c., &c., &c

Sec. 6, made special provision as to buildings which,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

as they might require reparation, were allowed to be granted for 50 years or 3 lives.

Sec. 7, made all other grants which should be made contrary to the provisions of the Act to be void without any inquisition or *scire facias*. Provided always *that* "the Act or any thing therein contained should not "extend to disable her Majesty, her heirs or successors "to make any grant or restitution of any estate or "estates thereafter to be forfeited for any treason or "felony whatsoever."

The 39 and 40 *Geo.* 3, c. 88, was an Act passed to remove doubts whether real estate purchased by his Majesty out of his privy purse was subject to the provisions of the above stat. of 1st *Anne*, and it declared that such lands so purchased, or any other lands which might accrue to his Majesty, his heirs or successors, by gift, or devise, or by descent, or otherwise, from any of his ancestors, or *any other person not being* a King or Queen of *Great Britain*, were not affected by the above Act, and it provided for the free disposition of all such lands by his Majesty, his heirs and successors.

By the 12th sec. of that Act it was enacted as follows:

And whereas divers lands, tenements and hereditaments have become and may hereafter become vested in his Majesty, his heirs and successors *by escheat or otherwise in right of the Crown* which in the hands of his Majesty's subjects would be chargeable with certain trusts or applicable to certain purposes, and his Majesty, his heirs or successors might be desirous that the same should be applied accordingly, notwithstanding any right which he or they may have to hold the same discharged from such trusts, or without applying the same to such purposes, but by reason of the provisions contained in the said Acts of the first year of her said late Majesty Queen *Anne* and the thirty-fourth year of his Majesty's reign, doubts may be raised whether his Majesty, his heirs or successors, can direct such application thereof; and whereas divers lands, tenements and hereditaments as well freehold as copyhold have escheated and may escheat to his Majesty, his heirs or successors, for want of heirs of the persons last seized thereof or entitled thereto, or by

reason of some forfeiture or otherwise, although not forfeited for treason or felony, and it is expedient to enable his Majesty to direct the execution of any such trust or purposes as aforesaid, to make any grants of any such manors, lands, tenements or hereditaments as aforesaid notwithstanding the provisions contained in the said recited Acts—Be it enacted that it shall be lawful for his Majesty, his heirs and successors, by warrant under his or their sign manual to direct the execution of any trusts or purposes to which any manors, messuages, lands, tenements or hereditaments which have escheated or shall escheat to his Majesty, his heirs or successors shall have been liable at the time the same so escheated respectively or would have been liable in the hands of any of his Majesty's subjects, and to make any grants of such manors, lands, tenements and hereditaments respectively to any trustee or trustees or otherwise for the execution of such trusts, and to make any grants of any lands, tenements or hereditaments which have escheated or shall escheat as aforesaid to any person or persons, either for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any persons or person making discovery of any such escheat, as to His Majesty, his heirs or successors respectively shall seem fit; anything in the said Acts or any of them to the contrary notwithstanding.

By 47 *Geo.* 3, c. 24, which was passed to explain and amend 39 and 40 *Geo.* 3, c. 88, and to remove doubts which had been raised whether the 12th section of that Act applied to the Duchy of *Lancaster* (the title of the kings of *England* to which is separate from the Crown of *England* (1), and grants of lands in which were, by a statute of *Henry* 5th, valid only when executed under the Seal of the Duchy (2),) it was enacted that *in all cases* in which his Majesty, his heirs or successors hath or shall *in right of his Crown* or of his Duchy of *Lancaster* become entitled to any freehold or copyhold manors, messuages, lands, tenements or hereditaments, *either* by escheat for want of heirs, or by reason of any forfeiture, *or* by reason that the same had been purchased by or for the use of or in trust for any alien,

(1) See *Dyke* v. *Walford*, 5 Moore P. C. 434.

(2) See 17 Viners abr. p. 73.

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

it should be lawful for his Majesty, his heirs and successors, by warrant under his or their sign manual, *or* under the seal of the Duchy or County Palatine of *Lancaster* according to the title of such manors, messuages, lands, &c., &c., to make grants thereof (as in 12th sec. of 39 and 40 *Geo.* 3rd, c. 88), anything in 1st *Anne* and 34 *Geo.* 3, c. 75, or any other Act to the contrary notwithstanding.

By 59 *Geo.* 3, c. 94, which was passed to explain and amend 39 and 40 *Geo.* 3, c. 88, and 47 *Geo.* 3, c. 24, and to remove doubts which had arisen in certain cases of grants by his Majesty under the said recited Acts, it was enacted that in all cases in which his Majesty hath, or shall *in right of his Crown, or* of his Duchy of *Lancaster*, become entitled to any freehold or copyhold, manors, &c., &c., either by escheat for want of heirs, or by reason of any forfeiture or by reason that the same had been or shall be purchased by or for the use of or in trust for any alien, it shall be lawful for his Majesty, his heirs and successors (as in the former acts) to make grants of such manors, &c., &c., or of any rents and profits then due and in arrear to his Majesty in respect thereof respectively, to any trustee, for the execution of any trusts, *or* for the purpose of restoring the same to any of the family of the person whose estate the same had been, or for carrying into effect any intended grant, *or* for rewarding discoverers, *or* to the families of aliens or other persons *unconditionally*, or in consideration of money, *or* to a trustee to sell, and that the rents and purchase monies to arise by any sale should be applied in payment of any costs, charges and expenses incident to any commission for finding the title of his Majesty, and to the making of any such grant, and for carrying the same and the trusts thereof into execution, or in rewarding any person, or the family of any person making discovery of any such escheat,

forfeiture, or purchase by an alien or of his Majesty's right and title thereto, or in discharging the whole or any part of the debts due from an alien or any person whose estate or property, any such manors, messuages, &c., &c., have been; *or* for the use or benefit in whole or in part of any such alien or of his family, or of any person adopted by such alien or considered as part of his family, *or* of any person whose estate or property any such manors, &c., &c., have been, or his family; or of any person adopted or considered by such person as part of his family, *or* for all or any of the purposes aforesaid as to his Majesty, his heirs and successors shall seem fit; and all previous grants which would be good under the provisions of this Act, are made good and effectual to all intents and purposes as if made under this Act, notwithstanding anything to the contrary in any previous Act.

By the 3rd section it was enacted, that in every case where any surplus should remain of any monies which should arise from any such sale or sales, or which should be paid under the authority of the Act by any person, after satisfying all such purposes as shall have been ordered and directed by his Majesty, his heirs or successors, under the provisions of this Act, shall be paid to the commissioners of his Majesty's land revenue for the time being to be applied by them in the same way and manner as the monies arising from the sale of any manors, messuages, lands, tenements or hereditaments of or belonging to his Majesty by the several Acts now in force for the management and improvement of the land revenue of the Crown or any of them, directed to be applied and disposed of.

By the 14th sec. of 1st *Geo.* 4, c. 1, it was enacted, that an annual account of all monies which shall or may hereafter arise and be received for or in respect of any *droits* of Admiralty *or droits of the Crown*, &c., &c., &c.,

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Fwynne, J.

and *from all surplus revenues of Gibraltar, or any other possessions of his Majesty out of the United Kingdom, and from all casual revenue or revenues, whether arising in or from any foreign possessions*, or in the United Kingdom, and of the application and disposition of all such monies or revenues, shall be laid before parliament on or before the 26th day of March in each year, if parliament shall be then sitting, or, if parliament shall not be then sitting, then within 30 days after the then next meeting of parliament.

By 6 *Geo.* 4, c. 17, the provisions of 59 *Geo.* 3, c. 94, were extended to Leasehold lands, &c., &c., &c.

In 1829, 10 *Geo.* 4, c. 50, was passed. This was an Act to consolidate and amend the laws relating to the management of the land revenue of the crown within *England* and *Ireland*, and by the 126th sec. of that Act it was enacted that nothing in the Act should extend or be deemed, or construed to extend, to repeal, interfere with or in any manner affect, any of the powers and provisions of 39 and 40 *Geo.* 3, c. 88, or of 47 *Geo.* 3, c. 24, or of 59 *Geo.* 3, c. 94, or of 6 *Geo.* 4, c. 17.

And by the 128th sec. it was enacted, that nothing in the act should extend, or be construed to extend in any wise to impair or affect any rights, or powers of control, management or direction, which have been or may be exercised by authority of the Crown, or other lawful warrant relative to any leases, grants, or assurances *of any of the small branches of his Majesty's hereditary revenue*, or to any suits or proceedings for recovery of the same, or to compositions made or to be made on account of any of the said small branches, or to fines taken, or to be taken, or to rents, boons and services reserved or to be reserved upon such grants, leases and assurances, or to the mitigation or remission of the same, or to any other lawful act, matter or thing which has been or may be done touching the said branches, but that the

said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same had been or might have been enjoyed by his Majesty up to the time of passing of this Act.

From this last section it appears to be clear that lands which should escheat to the crown whether *propter defectum sanguinis* or *propter delictum tenentis*, or which should become forfeited as purchased to the use of or in trust for an alien were not, and were not regarded as being, part of what were known as "the small branches of his Majesty's hereditary revenue" and that in parliamentary, that is to say in statutory phraseology, this latter term did not comprehend revenue derived from such escheated or forfeited lands.

The law affecting lands accruing to the Crown by escheat and forfeiture remained as appearing in the above recited acts until the accession of his Majesty King *Wm.* 4th to the throne in 1831. It will be observed that the above Acts do not profess to affect any personal chattel property escheating to the Crown which continued to be at the absolute disposal of the Sovereign. It will be observed also, that the above recited Acts of 39 and 40 *Geo.* 3, 47 *Geo.* 3, 59 *Geo.* 3, and 6 *Geo.* 4, were not passed for the purpose of vesting in the Crown, rights in respect of lands accruing by escheat or forfeiture which the Crown never had before had, but for the purpose of removing the restraint which the provisions of 1st *Anne* had imposed, or might be supposed to have imposed, upon the power of the Crown over such lands which, but for that statute would have been absolute. The effect of the recited Acts was to cause to be paid over to the commissioners of his Majesty's land revenues the surplus only of the revenue which might be derived or arise from the sale of any such escheated

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

or forfeited lands, after the full and free exercise by the Crown of its prerogative right of disposing at pleasure and *ex speciali gratiâ* of the whole of such lands, or of the proceeds of the sale thereof, to all or any of the purposes mentioned in the recited Acts ; they were, in fact, Acts passed for the purpose of maintaining the prerogative right of the Crown of graciously restoring such lands to persons who were, or who were considered as being of, or adopted into, the family of the person whose estate the property had been; that gracious exercise of the Sovereign's prerogative right those statutes maintained and preserved.

Whether the language of 30 & 40 *Geo.* 3, and of the subsequent Acts in amendment thereof, extending as it did to "all cases in which his Majesty, his heirs "or successors, hath or shall in right of his Crown "become entitled by escheat, &c.," was sufficient to include lands in the colonies escheating to the Sovereign for the time being in right of the Crown, is of no importance at the present day, nor is it necessary for the purpose of this case to enquire and determine, for, from what I have already said, it follows, that if those Acts did not apply to lands escheating to the Crown in the colonies the prerogative right of the Crown over such lands to dispose of them at pleasure, and consequently to the gracious purposes indicated in the above recited Acts remained absolute and unaffected by any Act of parliament at the time of the accession of his Majesty King *Wm.* 4 to the throne, for the statute 1st *Anne* was confined expressly in terms to *England* and *Wales* and the town of *Berwick-on-Tweed,* and no similar Act affecting the property belonging or accruing in the colonies to the Sovereign *jure coronæ* had been passed.

I have named above the accession of his late Majesty King *Wm.* 4th to the throne as being the period when first any revenue derived from the casual source of

property, whether real or personal, escheating to the Crown either *propter defectum sanguinis* or *propter delictum tenentis*, was surrendered by the Crown and was incorporated into and made part of the consolidated fund of the United Kingdom.

By 1st *Wm.* 4th, c. 25, after reciting among other things that his Majesty had been graciously pleased to signify to his Majesty's faithful Commons in parliament assembled, that his Majesty placed without reserve at their disposal his Majesty's interest in the hereditary revenues of the Crown and *in those funds which may be derived from any droits of the Crown* or admiralty—from the West India duties, or *from any casual revenues either in his Majesty's foreign possessions or in the United Kingdom*, it was enacted that *the produce* of all the said hereditary duties, payments and revenues in *England* and *Ireland* respectively, &c., &c., &c, *and also* the small branches of the hereditary revenue, *and the produce of* the hereditary casual revenues arising from any *droits* of admiralty *or droits of the Crown*, &c, and from all surplus revenues of *Gibraltar*, or *any other possession of His Majesty out of the United Kingdom, and from* all other casual revenues arising either in the foreign possessions of his Majesty or in the United Kingdom, which have accrued since the decease of his said late Majesty, and which shall not have been applied and distributed in the payment of any charge thereupon respectively, or which shall accrue during the life of his present Majesty, shall be carried to and made part of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland*, and from and after the decease of his present Majesty, *all* the said hereditary revenues, shall be payable and paid to his heirs and successors; and by the 12th clause it was enacted, that nothing in this Act contained should extend, or be construed to extend, in any wise to impair, affect or prejudice any

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

rights or powers of control, management or direction which have been or may be exercised by authority of the Crown, or other lawful warrant, relative to any leases, grants or assurances of any of the said small branches of his Majesty's revenue, *or* to any suits or proceedings for the recovery of the same, *or* to any other lawful matter or thing which has been, or may be, done touching the said branches, *or* to the granting of any *droits* of admiralty or any *droits* of the Crown or any part or portion of any such *droits* respectively, as reward or remuneration to any officer, or other person, giving any information relating thereto, *or* to the granting or disposing of any freehold or copyhold property, or the produce of, or any part of the produce, or amount or value of, any freehold or copyhold to which his Majesty, or any of his royal predecessors, have, or hath, or shall become entitled, either by escheat for want of heirs, or by reason of any forfeiture, &c., &c., *or* to the granting or distributing of any personal property devolved to the Crown by reason of the want of next of kin or personal representative of any deceased person, but that the same rights and powers shall continue to be used and enjoyed in as full and effectual manner as if this Act had not been made and as the same might have been enjoyed by his late Majesty King *George* the 4th at the time of his decease, subject nevertheless to all such regulations as were in force by virtue of any Act or Acts of parliament in relation thereto at the time of the decease of his said late Majesty, *it being the true intent and meaning of this Act that the said rights and powers shall not in any degree be abridged, restrained, affected, or prejudiced in any manner whatsoever, but only that the monies accruing to the Crown, after the full and free exercise of the enjoyment of the said rights and powers, subject as aforesaid, shall, during his Majesty's life be*

carried to and made part of the consolidated fund of the United Kingdom.

Now it will be observed that from the passing of the above statute of *Anne* until the passing of this Act of 1st *Wm.* 4, that branch of the revenues of the Crown which arose from escheated or forfeited lands is never spoken of in any Act of parliament under any other designation or description than as the proceeds of lands "which may hereafter escheat" or of lands "wherein "his Majesty hath or hereafter shall become entitled "in right of his Crown by escheat or forfeiture." Never in any Act is such property spoken of or dealt with under the bald description of "Lands belonging to his Majesty." A distinction also was in statutory phraseology drawn between property known under the name of "the small branches of his Majesty's revenue" and lands accruing to his Majesty by escheat or forfeiture. In 1st *Wm.* 4, c. 25, the revenues arising from all lands and personal property devolving upon the Sovereign in right of the Crown by escheat or forfeiture, *as well as* all revenues arising from "the small branches of his crown revenue" are dealt with under the name and designation "casual" revenues of the Crown, and henceforth under this term "casual revenue," the proceeds of all property, whether real or personal, devolving upon the Crown by escheat is dealt with by parliament.

The language of this Act 1st *Wm.* 4, appears to be abundantly ample to comprehend under its operation the territorial and casual revenues accruing to the Crown in the colonies, and in the conflict which arose between the colonial and Imperial authorities, for the purposes of obtaining for the colonies control over those revenues, certain of the Imperial authorities from time to time questioned the competency of the Crown to assent to any bill passed by the colonial assemblies

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

affecting to deal with those revenues. In April 1837 as appears by Mr. *Forsyth's* work intituled "Cases and Opinions on Constitutional Law," p. 156, the then law officers of the Crown in *England*, Sir *John Campbell*, afterwards Lord *Campbell*, and Sir *R. M. Rolfe*, afterwards Lord *Cranworth*, in answer to a question submitted to them by Lord *Glenelg*, then Colonial Minister: "Whether it is in point of law competent for his "Majesty, with the advice and consent of the Legisla- "tive Council and Assembly of *New Brunswick*, to "render the tracts of wildland in the colony which 'belong to his Majesty *jure coronæ* subject to the "appropriation of the legislature of the province for a "fixed period or in perpetuity in return for a civil list "to be settled on the Crown for a similar term, or in "perpetuity as may be thought best?" gave it as their opinion that it was competent for his Majesty to make such appropriation of his hereditary revenues in the colony of *New Brunswick*.

The colony of *New Brunswick* possessed a constitution, not created by Act of the Imperial Parliament, as that of *Lower* and *Upper Canada* was, but created from time to time by the Kings of *England* in the exercise of their royal prerogative, the legislative authority in which, as in the Imperial Parliament, consisted of the Sovereign, acting with the advice and consent of a Legislative Council and Assembly, the limits of jurisdiction of such legislature not being prescribed by any written charter. Accordingly, in pursuance of this opinion and in the month of July, 1837, an Act framed upon the model of the Imperial Act, 1st *Wm.* 4th and prepared in *England* was passed by the legislature of *New Brunswick*, 8 *Wm.* 4th, c. 1, whereby after reciting that "his most gracious Majesty had been pleased to signify to his faithful Commons of *New Brunswick*, that his Majesty would surrender up to

their control and disposal, the proceeds of all his Majesty's hereditary, territorial and casual revenues, and of all his Majesty's woods, mines and royalties, now in hand, or which may hereafter during the continuance of this Act be collected in this province, on a sufficient sum being secured to his Majesty, his heirs and successors for the support of the Civil Government, in the province,"—it was enacted that the proceeds of all and every the said hereditary, territorial and casual revenues, and the proceeds of all sales and leases of Crown lands, woods, mines and royalties, which have been collected and are now in hand, or which shall be collected hereafter, during the continuance of this Act, except the monies which shall be expended in the collection and protection thereof, as specially provided for by the 4th sec. of this Act, shall immediately be payable and paid to the Provincial Treasurer, who is hereby authorized to receive the same for the use of the province; and from and after the expiration of this Act the proceeds of all the said hereditary, territorial and casual revenues, and of the said lands, woods, mines and royalties, shall revert to and be payable and paid to his said Majesty, his heirs and successors. The Act then granted a civil list of £1,400, per annum, for 10 years, from 31st December 1836, when the Act should expire.

The 4th section above referred to provided for the payment of the expenses of management out of the gross revenues, and by the 6th sec. it was among other things enacted that nothing in the Act contained should extend or be construed to extend in any wise to disable his Majesty, his heirs or successors, to make any grant or restitution of any estate or estates, or of the produce thereof, to which his Majesty hath or shall become entitled by escheat for want of heirs, or by reason of any forfeiture, or by reason of the same having been purchased by or for the use of any alien, or to make any grant or

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

distribution of any personal property devolved to the Crown by reason of the want of next of kin or personal representatives of any deceased person, and that the said rights and powers shall continue to be used, exercised and enjoyed in as full, free, ample and effectual manner to all intents and purposes as if this Act had not been made, and as the same had or might have been heretofore enjoyed by the Crown, it being the true intent and meaning of this Act that the said rights and powers shall not be in any degree abridged, or restrained or affected in any manner whatsoever, but only that the monies arising from the full and free exercise and enjoyment of them shall be carried to and made part of the joint revenues at the disposal of the General Assembly of the province,

The provisions of this Act were re-enacted and made perpetual by Revised Statutes of *N.B.*, title 3, ch. 5, sec. 7.

The connection in which the words "Crown lands, woods, mines and royalties" are used in this Act plainly shews that under these words is meant to be designated wholly different property from any accruing to the Crown by reason of escheat or forfeiture, and that the word "*royalties*" is intended to describe and cover merely monies, or part of the produce of mines, arising from lease or other disposition of mines. Upon the accession of her present Majesty the Act 1 and 2 *Vic.*, c. 7, was passed which is identical in its terms with 1st *Wm.* 4, c. 25.

That the Imperial Parliament at the time of the reunion of the provinces of *Lower* and *Upper Canada* was determined not to vest in the Legislature of United *Canada* the same power and control over the Crown revenues in the province as the law officers of the Crown had in April, 1837, pronounced to be vested in the Legislature of *New Brunswick* appears from the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

Constitutional Act 3 & 4 *Vic.*, c. 35. For the Imperial Parliament by that Act itself constituted a consolidated fund and a civil list for the province of United *Canada* and made a special disposition of the revenues at the disposal of the Crown, and restrained the Crown from assenting to any bill passed by the Legislative Council and Assembly, which should in any manner relate to or affect her Majesty's prerogative touching the granting of waste lands of the Crown within the province, until 30 days after the same should have been laid before both Houses of the Imperial Parliament, or in case either of the said Houses of Parliament should within the said 30 days address her Majesty to withhold her assent from any such bill. The clauses providing for a civil list, namely, the 52nd and 54th, enacted that out of the consolidated revenue fund there should be payable permanently to his Majesty, his heirs and successors £45,000 for defraying the salaries of the Governor, Lieut.-Governor, and of the Judges, and Attorney and Solicitor General, and the expense of the administration of justice, and during the life of her Majesty and for 5 years after the demise of her Majesty a further sum of £30,000 for defraying the expenses of the civil government, and that during the time for which the said several sums were payable the same should be accepted and taken by her Majesty by way of civil list *instead of all* territorial and other revenues now at the disposal of the Crown arising in either of the said provinces of *Upper Canada* or *Lower Canada*, or in the province of *Canada*, and that three-fifths of the *net* produce of the said territorial and other revenues now at the disposal of the Crown within the province of *Canada* should be paid over to the account of the said consolidated revenue fund, and also during the life of her Majesty and for five years after the demise of her Majesty the remaining two-fifths of the *net* produce of

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

the said territorial and other revenues should also be paid over in like manner to the account of the same fund.

The Legislative Assembly of the province persisted still in endeavouring to procure the recognition of the principle for which they contended, namely, that the colonial legislature should exercise the like control over the territorial and casual revenues of the Crown arising in the province as was exercised by the Imperial Parliament over the like revenues arising within the United Kingdom. Accordingly, in 1846, a bill passed the Legislative Assembly and Legislative Council of the province which, as coming within the provision of the Act of Union, was transmitted to *England* for the purpose of being laid, and was laid, upon the table of both Houses of the Imperial Parliament.

By this bill it was recited among other things as follows:—

> Whereas your Majesty has been most graciously pleased to declare to your faithful Canadian Commons, in provincial parliament assembled, your Majesty's gracious desire to owe to the spontaneous liberality of your Canadian people, such grant by way of civil list as shall be sufficient to give stability and security to the great civil institutions of the province, and to provide for the adequate remuneration of able and efficient officers, in the executive, judicial and other departments of your Majesty's public provincial service, the granting of which civil list constitutionally belongs only to your Majesty's faithful Canadian people in their provincial parliament.

The bill provided for the establishment of a consolidated revenue fund for the province of *Canada*, in the same terms as had been provided by the 50th sec. of 3 & 4 *Vic.*, c. 35. It then charged upon that consolidated fund permanently a sum not exceeding £34,638 15s. 4d. cy, in lieu of the £45,000, by the 52nd sec. of 3 & 4 *Vic.*, provided, and during the life of her Majesty and for 5 years after the demise of her Majesty, a sum, not exceeding £39,245 16s. cy, in lieu of the

£30,000, by the same 54th section provided; and after making provision for alteration in the salaries to be attached to certain offices, it enacted that:—

During the time for which the said several sums mentioned in the said schedules, are severally payable, the same shall be accepted and taken by her Majesty, by way of civil list instead of all territorial and other revenues now at the disposal of the Crown, arising in this province, and that three fifths of the *net* produce of the said territorial and other revenues, now at the disposal of the Crown, within this Province, shall be paid over to the account of the said consolidated revenue fund; and also that during the life of her Majesty, and for five years after the demise of her Majesty, the remaining two fifths of the *net* produce of the said territorial and other revenues now at the disposal of the Crown within this province, shall also be paid over in like manner to account of the said consolidated revenue fund.

By the Imperial Act, 10 and 11 *Vic.*, c. 71, her Majesty was authorized, with the assent of her Privy Council, to assent to the above bill, and it was enacted that if her Majesty, with the advice of her Privy Council, should assent thereto then the clauses numbered respectively from 50 to 57, both inclusive, of 3 and 4 *Vic.*, c. 35, should be repealed upon and from the day on which the said reserved bill (being first so assented to by her Majesty in Council) should take effect in the province. The bill was subsequently assented to and became an Act 9 *Vic.*, c. 114, of the provincial legislature.

The object of the provincial authorities in procuring the passage of this bill and the royal assent thereto as an Act of the provincial legislature, was to obtain the recognition of the principle so long contended for and which is set out in the above extract from the preamble, namely, that the Crown should owe the provincial civil list to the provincial Commons, and that in return therefor the Crown should surrender to the provincial legislature the same control and management of the territorial and casual revenues accruing to the Crown within the province as was exercised and enjoyed by

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

the Imperial Parliament over the like revenues arising within the United Kingdom. To have greater control was never contended for. We can therefore, I think, affirm with great confidence that by the passing of the bill into an act the local legislature never contemplated obtaining, nor, by authorizing the Royal assent to be given to it, did the Imperial Parliament contemplate conferring, on the provincial legislature, any greater control over, or interest in, the revenues arising from property devolving upon the Crown by escheat or forfeiture, than was exercised and enjoyed in *England* by the Imperial Parliament over the like revenues there, under the 12th section of 1st *Wm.* 4, c. 25, and 1 and 2 *Vic.*, c. 2, by which the jurisdiction was limited to the surplus or "net proceeds" as they are called in the Canadian Act, and in 3 & 4 *Vic.*, c. 35, of those revenues, after the full and free exercise by her Majesty of her royal prerogative of grace and bounty, as expressed in those sections; and yet it is certainly true that no section similar to the 12th section of the above Imperial Acts is inserted in 3 & 4 *Vic.*, c. 35, or in the Canadian Act. This latter Act, however (if the question of her Majesty's right to have exercised in *Canada* such her royal prerogative of grace and bounty after the passing of that act and at the time of the passing of the *British North America Act* should be material to the determination of the question now before us) will have to be read in the light of three Imperial statutes subsequently passed, viz.: 15 & 16 *Vic.*, c. 39, 17 & 18 *Vic.*, c. 118 and 28 & 29 *Vic.*, c. 63. The same observation may be applied to the act of the legislature of *Nova Scotia*, passed in the year 1849, by which the territorial and casual revenues of the Crown arising in that province were surrendered to the provincial legislature. That Act, which appears to have been drafted by a draftsman of a peculiarly and indeed of an excessively cautious cast

of mind, after providing for the surrender of all monies arising from the Crown lands, mines, minerals or royalties, of her Majesty within the province, proceeds to enact, so as to make assurance doubly sure, that "so soon as the Act should come into operation all the right and title of her Majesty, whether in reversion or otherwise, of, in, to and out of all and singular the mines of gold, silver, coal, iron, ironstone, limestone, slate-stone, slate rock, tin, copper, lead *and all* other mines and minerals and ores within the province, which by Indenture of lease, dated 25th August, 1826, were granted, demised, etc., by his late Majesty King *Geo.* 4 to the Duke of *York* for 60 years, at and under certain rents and renders therein contained, and also all rents and arrears of *rent and returns* due or to become due by virtue of the said lease, with all powers, rights and authorities, whether of entry for forfeitures, or breach of condition, or otherwise, in the said lease reserved or contained, and also all the estate, right and title of her Majesty, reversionary or otherwise of, in and to all such coal mines in the Island of *Cape Breton*, and to all such reserved mines at *Pictou* as were agreed to be demised by his said late Majesty at £3,000 per annum to a company called the General Mining Association; and also the said £3,000 and all other rents and reservations by the said agreement reserved or payable; and also all mines of gold, silver, iron, coal, iron stone, lime stone, slate stone, slate rock, copper, lead and all other mines, minerals and ores within this province, including the Island of *Cape Breton* of which the title is now in his Majesty, shall be, and the said several enumerated premises are hereby respectively assigned, transferred and *surrendered to the disposal of the General Assembly* of this province to and for such public uses and purposes as in and by any Act of the General

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

Assembly for the time being shall be ordered and directed.

For the purpose of giving effect to this Act, two Acts were subsequently passed by the General Assembly of the province, the one to be found in the second series of the Revised Statutes of *Nova Scotia*, chapter 27, intituled "of The Coal Mines," and the other in the third series of the Revised Statutes, chap. 25, intituled "of Mines and Minerals," in both of which the Legislature of *Nova Scotia* shews its understanding of the term "*Royalties*" to be that which is ordinarily attached to it. By the 23rd section of the former Act it is enacted that "the *royalties* reserved under any lease granted in "pursuance of this chapter shall not be less than those "now paid by any party holding a lease under the "Crown of any mines or minerals in this province," and by the 47 section of the latter Act it is enacted that "on all leases of gold mines and prospecting licenses "to search for gold there shall be reserved a *royalty* "of three per cent. upon the gross amount of gold "mined," by the 55 section that "each licensed mill-"owner shall separate from the yield or produce of gold "of each lot or parcel of quartz as crushed, *three* parts out "of every hundred parts of such yield as the portion "thereof belonging and payable to her Majesty *as* "*royalty*."

By sec. 69, "The lessee of each mine shall be liable "for *royalty*, upon all gold obtained from his mine in "any other way than from quartz crushed at licensed "mills, but he shall be exempted from any claim in "respect of gold obtained from quartz so crushed, the "liability of the mill-owner for such *royalty*, being "hereby substituted, instead of that of the lessee," and by sec, 102—"All licenses and leases of mines and "minerals, other than gold mines shall be subject to "the following *royalties* to the Crown, to the use of

" the province on the produce thereof, after it has been " brought into marketable condition, payable yearly " from the period of their respective dates, " that is to say—of five per cent. on all such ores and " minerals except gold, iron and coal—of eight cents " on every ton of iron and of ten cents on every ton of " 2,240 lbs. of coal, which said *royalties* shall be paid " to such person or persons at such times and in such " places, as the licenses or leases shall respectively " stipulate, or as the Governor in Council may from " time to time direct."

By the Imperial Act, 15 and 16 *Vic.*, c. 39, after reciting 1st *Wm.* 4th, c. 25, sec. 2, and 1st *Vic.*, c. 2, sec. 2, and that from the time of the passing of the said Act of 1st *Wm.* 4th, *the lands of the Crown in the colonies* (save where special provision has been made in relation thereto by other Acts of parliament) have been granted and disposed of, and the monies arising from the same whether on sale or otherwise, have been appropriated by or under the authority of the Crown and by and under the authority of the legislatures of the several colonies as if the Acts 1st *Wm.* 4th, and 1st *Vic.*, had not been passed, and whereas doubts have arisen whether the monies arising as aforesaid in the said colonies may not be considered hereditary casual revenues " within " the meaning of the said Acts, and whether all or any " part of other revenues arising within the said colonies " and being hereditary casual revenues within the " meaning of the said Acts may be lawfully appropriated " to public purposes for the benefit of the colonies within " which they may have respectively arisen," and to remove such doubts it was enacted that,—

1st. The provisions of the said recited Acts in relation to the hereditary casual revenues of the Crown shall not extend or be deemed to have extended to the monies arising from the sale or other disposition of the lands of the Crown in any of Her Majesty's colonies or foreign possessions, nor in any wise invalidate or affect

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J

any sale or other disposition already made or hereafter to be made of such lands or any appropriation of the monies arising from any such sale—or other dispositions which might have been lawfully made if such Acts or either of them had not been passed.

2nd. Nothing in the said recited Acts contained shall extend or be deemed to have extended to prevent any appropriation which if the said Acts had not been passed might have been lawfully made by or with the assent of the crown of any casual revenues arising within the colonies or foreign possessions of the Crown (other than *droits* of the Crown and *droits* of Admiralty) for or towards any public purposes within the colonies or possessions in which the same respectively may have arisen, *provided always that the surplus not applied to such public purposes of such hereditary casual revenues shall be carried to and form part of the said consolidated fund.*

From the debate which took place in parliament at the time of the passing of this Act, its object appears to have been to authorize the appropriation to colonial purposes of the Crown revenues in the colonies arising from waste lands or from mineral treasures, which the Acts of 1st *Wm.* 4 and 1st *Vic.* were regarded as appropriating to the consolidated fund of the *United Kingdom*, and to confirm the appropriations which had then already been made of those revenues by Acts of the colonial legislatures, and to make the above named Imperial Acts apply only to directing the appropriation to the consolidated fund of the *United Kingdom* of any surplus remaining after the application of whatever might be necessary for the advantage of the colony. What surplus there was expected to be after the appropriation by the colonial legislatures of what they should by Act of parliament assented to by the Crown declare to be necessary to be expended for the benefit of the colony, it is difficult to understand, but the Act expressly declares that such monies arising from such revenues as shall not be applied to the public purposes of the colony shall be carried to and form part of the consolidated fund of the *United Kingdom.* The Acts of 1st *Wm.* 4 and 1st *Vic.*, being by this Act held

to apply so far to such surplus monies arising from the surrendered Crown revenues within the colonies, it would seem but reasonable to hold that the proviso in the 12th section of those Acts which saves to the Crown the exercise of its prerogative royal of grace and bounty should apply also if the question was whether the Crown did or did not possess that prerogative right in *Canada* immediately before the passing of the *British North America Act*. There are moreover two colonial Acts of those referred to in the preamble of 15 & 16 *Vic.*, c. 39, as disposing of the lands of the Crown in the colonies notwithstanding 1st *Wm.* 4 & 1st *Vic.*, which it will be proper to refer to in this connection, namely, 4 & 5 *Vic.*, c. 100, and 12 *Vic.*, c. 31 of the Acts of the legislature of *Canada*. By the former of these Acts entituled "An Act for the disposal of *Public Lands*," after reciting that it was "expedient to provide by a law applicable to all parts "of this province for the disposal of *public lands* "therein," it was in the 2nd section enacted that except as thereinafter provided "no free grant of public land shall be made to any person or person whomsoever," and by the latter, after reciting that it was expedient to amend and extend the provisions of the former Act as well as to remove certain doubts which had arisen as to the intention and meaning of some of the provisions of the said Act; and whereas by the 2nd section of the said Act it is enacted with certain exceptions hereinafter provided "no free grant of public land shall be made "to any person or persons whomsoever; and whereas "doubts have been entertained whether the same does "not preclude her Majesty from the exercise of her "royal grace in the relinquishment of her rights to "escheats and forfeitures in favor of those near of kin "or otherwise connected with the parties last seized "thereof, and it is expedient to remove all such doubts,"

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

it was "*declared* and *enacted* that the 2nd section "of the said Act extends and shall be deemed to have "at all times extended *to such lands only* as no patent "deed had ever been issued for, and not to such as "having been once granted by letters patent had "subsequently become vested in her Majesty either by "act of the party or by operation of law."

We have here a plain definition of the term "public lands" of the province as understood by the legislature, a term which has ever since been used and understood in the same sense, and from the preamble to this Act we can gather that the same legislature which recited as a reason for passing it, that it was desirable to remove doubts which had been entertained whether the 2nd sec. of 4 & 5 *Vic.* c., 100, did not preclude her Majesty from the exercise of her royal grace in the relinquishment of her rights to escheats and forfeitures in favour of those near of kin or otherwise connected with the parties last seised could never have intended by the Act of 9 Vic. c. 114 to preclude her Majesty from the like exercise of her royal grace; this Act in fact seems to involve a recognition of the right of her Majesty to exercise such right in the case of lands become escheated or forfeited in *Canada*. By the 6th sec. of 17 and 18 *Vic.*, c. 118, which was an Act passed to empower the legislature of *Canada* to alter the constitution of the Legislative Council of that province, the restraint imposed upon the legislature of *Canada* by the 42nd sec. of 34 *Vic.*, c. 35, was removed, that section was repealed, and it was enacted, notwithstanding anything in 3 and 4 *Vic.*, c. 35 or in any other Act of Parliament contained, it should be lawful for the Governor to declare that he assents to any bill of the legislature of *Canada* or for her Majesty to assent to any such bill if reserved for the signification of her Majesty's pleasure thereon, although such

bill shall not have been laid before the said Houses of Parliament, and no Act heretofore passed or to be passed by the legislature of *Canada* shall be held invalid or ineffectual by reason of its not having been laid before the said Houses or by reason of the Legislative Council and Assembly not having presented to the Governor such address as by the said Act of Parliament is required.

By 28 and 29 *Vic.*, c. 63, sec. 2, intituled "An Act to remove doubts as to the validity of Colonial Laws," it was enacted that,—

"Any colonial law which is or shall be in any respect "repugnant to the provisions of any Act of Parliament "extending to the colony to which such law may relate, "or repugnant to any order or regulation made under "authority of such Act of Parliament, or having in the "colony the force and effect of such Act, shall be read "subject to such Act, order or regulation, and shall to "the extent of such repugnancy, but not otherwise, be "and remain absolutely void and inoperative."

We find then, that immediately preceding the passing of the *British North America Act*, all Acts of Parliament dealing with this subject, from 1st *Wm.* 4, dealt with it as forming part of the hereditary casual revenues of the Crown within the colonies which had been surrendered by the Crown provisionally in return for a civil list, in which revenues the Crown retained a reversionary interest, after the times named during which the civil lists contracted for were granted. We find also that the statute of the legislature of *New Brunswick*, which had dealt with the subject, specially reserved to the Crown the prerogative right of exercising the royal grace and bounty by making any grant or restitution of any property, real or personal, or the produce thereof to which the Crown should become entitled by escheat for want of heirs or next of kin, or

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

by reason of any forfeiture as 1st *Wm.* 4 and 1st *Vic.* had done in *England*, and the first position taken by Mr. *Mc Dougall* in his very able argument, as I understood it, was—that the effect of that Act, as well as of several of the Imperial Acts above cited, was to maintain inviolate to the Crown the same exercise of the royal grace and bounty in respect of property devolving upon the Crown by escheat and forfeiture in *Canada* and *Nova Scotia*; the conclusion drawn being that the power of appropriation of the legislatures of the old provinces prior to confederation is to be regarded as affecting only so much, if any, of such revenues as should remain after the full and free exercise by the Crown of its prerogative right of making grant and restitution of all escheated or forfeited property or of the produce thereof (after deducting the expenses attending finding the property of the Crown) to any person having claims upon the person whose estate the escheated or forfeited property was, and that since confederation the exercise of such prerogative right cannot be interfered with by any provincial authority, or by provincial legislation. But the question, as it appears to me, is not whether before the passing of the *B. N. A. Act*, the Crown did or did not retain the royal prerogative right within the provinces of *Canada*, *Nova Scotia* and *New Brunswick*, but had the several legislatures of those provinces power of appropriation over escheated and forfeited property within these respective provinces—that is to say, in other words, could the Queen, by and with the advice and consent of the Legislative Councils and Houses of Assembly of those respective provinces, have made any appropriation of those revenues as should seem fit to them, although different from what appropriation had already been made by legislation over such revenues accruing within those provinces respectively? And I

think that in view of the long contention maintained by the Legislative Assembly of *Canada* upon the subject, which is so emphatically asserted in the preamble of the *Canada* statute 9 *Vic.*, c. 114, which had been assented to by her Majesty upon the authority of the Act of the Imperial Parliament specially passed for that purpose, the position asserted in the preamble of the *Canada* statute must be taken to be admitted by the Imperial Act passed to give it effect, and in view of the provisions of 17 and 18 *Vic.*, c. 118; and in view also of the practice which had become engrafted upon the colonial constitutions with the sanction of the Imperial Parliament, it cannot, I think, now be questioned, that the respective legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, that is to say, her Majesty, by and with the advice and consent of the Legislative Councils and Houses of Assembly of those respective provinces, had before the passing of the *British North America Act* power of appropriation over all the territorial and casual revenues of the Crown accruing within those respective provinces, whatever may have been contemplated by the equivocal reservation of the very contingent surplus which the Imperial statute, 15 and 16 *Vic*, c. 39, intended to appropriate to, and make part of, the consolidated fund of the *United Kingdom*.

Now, that the *British North America Act* places under the absolute sovereign control of the Dominion Parliament all matters of every description not by the Act in precise terms exclusively assigned to the legislatures of the provinces, which by the 5th section of the Act are carved out of and subordinated to the Dominion, cannot, in my judgment, admit of a doubt. It was admitted by the learned counsel who represented the provinces in the argument before us, that this was true with respect to all matters of *legislation*, but it was contended that when the Act deals with "*property*"

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

the rule was inverted and that the provinces take "*all property*" not by the Act in precise terms given to the Dominion.

The sole foundation for this contention appears to me to be based upon an assumption which in my judgment is altogether erroneous, namely, that the *British North America Act*, transfers as it were the legal estate in the Crown property from the Crown and vests it in the Dominion and the provinces respectively as corporations capable of holding property, real and personal, to them, their successors and assigns for ever; but the Act contemplates no such thing; its design as to "properties," as to every thing else which is appropriated to the use of the provinces and therefore placed under the legislative control of the provincial legislatures, is to specify those properties which being still, as before, vested in the Crown shall be under the *exclusive control* of the provincial legislatures. And so likewise with respect to the properties assigned for the purposes of the Dominion — control and management over property vested in the Crown for public purposes is what the Act deals with, not with the legal estate in such properties, divesting the Crown thereof and transferring the legal estate in some to the provinces and in some to the Dominion as corporations, and indeed what we are called upon to adjudicate upon, is a question directly affecting the legislative jurisdiction of the provinces, namely, is or is not the Act of the legislature of *Ontario*, which professes to deal with the property in question which is admitted to have devolved upon her Majesty, *jure coronæ* by escheat, *ultra vires* of the provincial legislature?

Neither can it admit of a doubt, as it appears to me, that the jurisdiction which is expressly given to the provinces by the 12th item of sec. 92 of the Act over "*property and civil rights in the province*," can

have no bearing whatever upon the question before us for, 1st, the property with which we have to deal is, unless the *British North America Act* by clear enactment makes it otherwise, property accruing to her Majesty *jure coronæ*, it therefore cannot be taken from the Crown except by express enactment. These words therefore "property and civil rights in the province" cannot affect the property of her Majesty. We must seek therefore in some other clause of the Act for authority to affect this property; and secondly, these words have no effect whatever to restrain the jurisdiction of the Dominion Parliament over property and civil rights in all the provinces, in so far as any of the matters comprised in the enumeration of subjects in sec. 91 of the Act requires control over "property and civil rights in the provinces." Those words therefore must be construed as conferring upon the provinces jurisdiction only over the *residuum* of property and civil rights in the provinces, not absorbed by the jurisdiction over that matter involved in the complete and supreme control over the matters specially placed under the control of the Dominion Parliament. Now, among the items so placed we find "the public debt and property" specially mentioned in the first item of sec. 91, and for payment of the public debt it is to be observed that the consolidated fund of the respective old provinces of *Canada*, *Nova Scotia* and *New Brunswick* (created by the *British North America Act* the Dominion of *Canada*) had been formed, and in this fund and as part thereof, as the "public property" appropriated to meet the public debt, was comprehended, as we have seen, the casual revenues of the Crown accruing within the respective provinces, in which casual revenues, as we have also seen, was comprised all property real and personal devolving upon her Majesty *jure coronæ* within the

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

provinces, whether *propter defectum sanguinis* or *propter delictum tenentis*. Now, of this property so forming part of the revenues constituting the consolidated fund of the old provinces, which was the fund upon which the debts of those provinces were charged, we find a most plain and unequivocal appropriation made by the 102nd sec. of the Act, namely: "All "duties and revenues over which the respective legis- "latures of *Canada*, *Nova Scotia* and *New Bruns-* "*wick* before and at the Union had and have power of "appropriation, *except* such portions thereof as are by "this Act reserved to the respective *Legislatures* of the "provinces or are raised by them in accordance with the "special powers conferred on them by this Act shall "form one consolidated revenue fund to be appro- "priated for the public service of *Canada* in the manner "and subject to the charges in this Act provided," and among those charges in section 104 we find the general interest of the public debts of the several provinces of *Canada*, *Nova Scotia* and *New Brunswick* at the Union.

We have here then, expressed in precise and unambiguous language, appropriation made of everything which formed part of the consolidated funds of the several provinces before confederation, (except what by the Acts is particularly and expressly excepted thereout and placed under the control of the legislatures of the provinces created thereby) for the formation of the consolidated fund of the Dominion of *Canada*, in return for the assumption by the Dominion, (which the old provinces were erected into and created) of the public debts of those old provinces. The question is therefore simply reduced to this: does any other, and if any, what other part of the Act which constitutes the sole charter alike of the Dominion and of the provinces, *except* any, and, if any, what part of such consolidated

fund of the Dominion of *Canada* from that fund, and place such excepted part under the control of the legislatures of the provinces. It is worthy of note here, in connection with what I have already said in relation to the argument as to the appropriation of *property* as distinct from "legislative functions," that the excepted part, whatever it be and in whatever clause of the Act it is found, is spoken of as being "reserved to the respective *legislatures* of the provinces" that is as matter placed under the legislative *control of* and not as *estate vested in* the provinces.

Now, the only clause of the Act which can be contended to involve the exception referred to in the 102nd section is the 109th, namely :—

> All lands, mines, minerals and royalties belonging to the several provinces of *Canada, Nova Scotia* and *New Brunswick at the union*, and all sums *then due* or payable for such lands, mines, minerals, or royalties shall belong to the several provinces of *Ontario, Quebec, Nova Scotia* and *New Brunswick*, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same.

We cannot, as I have already observed, read these words "lands, mines, minerals and royalties *belonging* to the several provinces of &c., &c., at the Union" as meaning that the *estate and property* in those subjects shall be divested out of the Crown and be transferred to and vested in the provinces as corporations, but, inasmuch as this clause is to be read as expressing the *exception out* of the consolidated fund referred to the 102nd section, that these sources of revenue, constituting portions of the territorial and casual revenues of the Crown forming the consolidated fund of the Dominion of *Canada*, shall be excepted from the general appropriation of all revenues in that fund, and shall be regarded as the excepted parts which are by the 102nd section said to be "reserved to the *respective*

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

legislatures of the provinces" and placed under their control.

Now, what lands, mines, minerals and royalties can with propriety, having regard to the manner in which those words have been used in other legislative language above quoted, be said to have *belonged* to the several provinces of *Canada*, *Nova Scotia* and *New Brunswick at the Union*? None at all, it is plain, in any other sense than that the revenues arising from such properties *belonging* to the Crown had been made part of the consolidated funds of the old provinces now constituting the *Dominion* of *Canada*, for the public uses of these provinces. "Lands" which had been already granted by the Crown and were at the time of the Union vested in the grantees thereof, or in their heirs or assigns, cannot with any degree of propriety be said to have been lands "belonging to the several provinces of, &c., &c., at the Union," and it is only such lands granted which could devolve upon her Majesty *jure coronæ* by escheat and forfeiture, and for this reason it was that the legislature of *Canada*, which was the chief of the parties to the framing of the *British North America Act* and to the petition to the Imperial Parliament to pass it, and within the limits of which province the property now in question is situate, declared by 12 *Vic.*, c.31, that the term "public lands" in the province, which is but an equivalent expression to "lands belonging to the provinces at the Union" did not comprehend lands accruing to the Crown by escheat or forfeiture, and that they did comprehend only the *ungranted lands of the Crown in the province*, in which sense they have ever since been understood.

These waste ungranted lands of the Crown, the revenues derived from which constituted part of the consolidated funds of the provinces before the Union, were, as we know, appropriated to the public uses of

the provinces; but the lands so appropriated did not constitute all the ungranted lands of the Crown in the provinces. There were other lands of the Crown, the monies arising from the sale or other disposition of which did not form part of such consolidated funds; these lands were set apart and appropriated for the actual residence thereon and occupation thereof by certain Indian tribes by whom they were surrendered to and became vested in the Crown, and others were surrendered by the Indians to and vested in the Crown for the purpose of being granted by the Crown and that the monies arising therefrom should be applied for the benefit of the Indians. These lands are by item 24 of sec. 91, placed under the control of the Dominion Parliament. The custom in the grants by the Crown of these lands was the same as in the grants of all other Crown lands, namely, to reserve all mines and minerals, but the reservation thereof would accrue, as was provided with respect to the monies arising from the sale of the lands, to the benefit of the Indians for whose benefit the lands were set apart; such mines and minerals, or the royalties accruing from the disposition thereof, could not have been appropriated to the public uses of the provinces, the "lands" therefore which are referred to in sec. 109 of the *British North America Act* can only be construed to mean those ungranted or public lands belonging to the Crown within the several provinces of *Canada*, *Nova Scotia* and *New Brunswick*, the revenues derived from which before and at the Union effected by the *British North America Act* had been surrendered by the Crown and made part of the consolidated funds of the provinces; and the words "mines, minerals and royalties" being in the same 109th sec. added to the word "lands," this latter word must there be construed in a limited sense, that is to say, as exclusive of the "mines and minerals"

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

therein, which, if those words had not been added, the word "lands" might have been sufficient to comprehend, but the section "reserves for the legislatures of the provinces," not only the mines and minerals, and royalties *in* or arising out of such lands but also "all mines and minerals, and royalties" belonging to the several provinces of &c., at the Union—that is to say, not only all mines and minerals in the ungranted lands of the Crown in the several provinces the revenue derived from which had been surrendered to and made part of the consolidated funds of the provinces for the respective uses of the provinces, but also all mines and minerals in the granted lands and which by the grants had been reserved by the Crown, the revenues derived from which had been also made part of the said consolidated funds: the intention, however, of the 109th sec., was to "reserve for the legislatures of the provinces," created by the *British North America Act*, not only the "lands, mines and minerals" as above described, but also the monies accruing to the Crown by way of royalties in mines already being worked under leases or licenses from the Crown, (which monies had also been appropriated to and formed part of such consolidated funds,) of which there were many in *Nova Scotia*, to regulate which, as we have seen, Acts had been passed by the legislature of that province: the word "*royalties*," therefore was added—the whole thus comprising all "lands" being the ungranted lands of the Crown as they were accustomed to be granted, the revenue derived from the sale of which had been made part of the said consolidated funds, *and* "all mines and minerals," as well those in such lands as also in all lands already granted, the revenues from which mines and minerals had been appropriated in like manner, *and* "the royalties" derived from such mines and minerals, or (to which may be added) from timber cut upon public lands, under

licenses for that purpose, which had also been in like manner appropriated, and all monies *then*, that is, at the Union, due and payable for any of such lands, mines, minerals and royalties, these words mines, minerals and royalties being used all in their natural and ordinary sense, and in the sense in which they were used in the above quoted statutes of the province of *Nova Scotia* relating to "mines and minerals." We have thus a plain, simple, rational and natural construction put upon the clause in which these words, constituting the exception referred to in sec. 102, are found, and which accords with the provisions of all of the above quoted Acts relating to the same subject, and with the sense in which the same words are used in some of those Acts.

By giving to the words in the 109th section their plain, natural and ordinary construction, we need not resort to the construction pressed upon us by the learned counsel for the provinces, which I must say appears to me to be strained and unnatural and to have been put forward as expressing what, in the opinion of those learned counsel, should have been the disposition made in the *British North America Act* by the framers thereof, rather than what has been made, of property accruing to the Crown by escheat or forfeiture. It is with this latter point alone that we have to deal. In view, however, of the disposition attempted to have been made of the property in question by the legislature of the province of *Ontario*, in derogation of the claims of the woman who had lived for so many years with the deceased as his wife, and of the young man their son who, though illegitimate, had been brought up by the deceased as, and with the expectations of, a son and under the name of the deceased, and in derogation also of the right of her Majesty to exercise her prerogative of grace and bounty to repair the wrong done to those

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

injured persons, who to all seeming, though not in law, filled the places of wife and son of the deceased (a prerogative which in like cases had never been known to fail), we may be permitted to venture the opinion, that those may be excused who doubt whether the placing the claims of such persons under the control of the local legislatures would have been more prudent in any sense, or more calculated to promote the interests of justice and humanity, and to procure redress of the wrongs of the parties already cruelly injured by perhaps the unintentional accident of the deceased having died without a will, or best adapted to advance the real good of the public, than to leave the matter still to be dealt with by her Majesty as it had always hitherto been for the protection of the injured, controlled only by the legislative authority vested in her Majesty by and with the advice and consent of the Parliament of the Dominion. For the reason, however, already given I entertain no doubt that control over all property in the several provinces of the Dominion becoming escheated or forfeited to the Crown is placed under the exclusive control of the Dominion Parliament by the 102nd section of the *British North America Act*, and that no other clause or part of the Act exempts such property from such disposition,—the Act therefore of the province of *Ontario*, 40 *Vic.*, c. 3, which affects to deal with such property is *ultra vires* and void, and the appeal in this case should be allowed with costs.

As it did not appear to me to be necessary for the determination of the question before us, I have not followed the learned counsel in all their adverse criticism of the frame of, and of the expressions used in, the *British North America Act*. I may, however, say that it is not, in my opinion, justly chargeable with the defects imputed to it, or open to the construction put upon it by the learned counsel who represented the provinces.

In my judgment it expresses in sufficiently clear language the plain intent of the framers of that Act to have been, that the plan designed by them of federally uniting the old provinces of *Canada*, *Nova Scotia* and *New Brunswick* into one Dominion under the Crown of the United Kingdom of *Great Britain* and *Ireland* with a constitution similar in principle to that of the United Kingdom, was, to confer upon the Dominion so formed a *quasi* national existence—to sow in *its* constitution the seeds of national power—to give to it a national Parliament constituted after the pattern of the Imperial Parliament, her Majesty herself constituting one of the branches thereof, and to constitute within that national power so constituted and called the "Dominion of *Canada*," certain subordinate bodies called provinces having jurisdiction *exclusive* though not "Sovereign" over matters specially assigned to them of a purely local, municipal and private character, to which provinces, by reason of this juridiction being so limited, were given constitutions of an almost purely democratic character, of whose legislatures her Majesty does not, as she does of the Dominion, and as she did of the old provinces, constitute a component part, and to the validity of whose Acts, the Act which constitutes their charter does not even contemplate the assent of her Majesty as necessary. The jurisdiction conferred on these bodies being purely of a local, municipal, private and domestic character, no such intervention of the Sovereign consent was deemed necessary or appropriate, so likewise the power of disallowing Acts of the provincial legislatures is no longer, as it was under the old constitution of the provinces, vested in her Majesty, but in the Governor General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by her Majesty in right of her

1881

MERCER v. ATTORNEY GENERAL FOR ONTARIO.

Gwynne, J.

prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power *by statute* vested in the Dominion authorities (the royal prerogative being for that purpose extinguished) and to enable the Dominion authorities to prevent the legislatures of the provinces, carved out of and subordinated to the Dominion, from encroaching upon the subjects placed under the control of the National Parliament by assuming to legislate upon those subjects which are not within the jurisdiction of the provincial legislatures.

The Appeal must be allowed with costs, the order overruling the appellants demurrer to the information filed by the Attorney General of the province of *Ontario* in the Court of Chancery of that province discharged, the demurrer allowed and the said information dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *McDougalls* and *Gordon.*

Solicitors for respondent: *Edgar*, *Ritchie* and *Malone.*