

subject of appeal because the judges of the court appealed from were not unanimous in their opinions. But the section of the Supreme Court Act prohibiting appeals in case of unanimity is the only section which allows an appeal in any criminal case, namely, s. 68. As before pointed out, an appeal is given from the judgment of the court of final resort in a province affirming a conviction on indictment, and that only when the judges of such court of final resort differ. Indictment, conviction, and non-unanimous affirmance of such conviction are all essential to make a criminal case a proper subject of appeal, and it is declared in this case that one of them alone, difference of opinion, would effect that result. That position seems too untenable to call for serious notice.

The opinion of Mr. Justice Fournier in this case likewise presents certain features not often seen in the judgment of a court of such eminence as the Supreme Court of Canada. What is specially noticeable in his judgment is that it mainly deals with a matter never argued before the court or raised for decision, and one which would not have been an element in the case if it had been considered on the merits. The point in question was as to the right of a judge of the Supreme Court of New Brunswick to issue a rule *nisi* for a writ of prohibition to prevent the County Court judge from holding a recount of ballots in an election in Queen's County, N.B., the proceedings in such election and issue of said rule having formed the subject-matter of an attack by the defendant Ellis on the judiciary of that province, which was held to constitute a contempt of court. By his judgment Judge Fournier professes to overrule, as far as a single judge can, the decision of the Provincial Supreme Court in the case of *Re Steadman* (29 N.B. R. 200), holding that prohibition could issue, and making the rule absolute; but in this case of *Ellis v. The Queen*, in the court below, it was held by all the judges that whether there was jurisdiction to issue the rule *nisi* or not was immaterial. And necessarily so, for it would be impossible to contend that a judge could be abused and vilified for the issue of a judicial process, and the offender escape liability on the plea that such process was issued without jurisdiction. Unquestionably, the contempt is the same whether there was jurisdiction or not.

Notwithstanding these considerations, Mr. Justice Fournier