the person accused, and that he, his counsel or attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken; it shall be read as evidence in the prosecution without further proof thereof, unless it be proved that such deposition was not in fact signed by the justice purporting to have signed the same."

The difficulty so far as the Statute is concerned turns on the interpretation of the words "whose deposition has been taken as aforesaid" Do they refer to the previous section or only to the provisions of section 30?

I am of opinion that these words apply to both sections, otherwise the deposition might have no relation to any charge at all, and it might be taken in some civil proceeding, over which a magistrate might have jurisdiction, which is evidently not intended. Nor do I think the objection is lessened by the terms of sec. 58, 32 & 33 Vic., c. 29, which permits the deposition taken in one case to be used in another, for the case is "in the preliminary or other investigation of any charge against any person," and this I think means "charge of any indictable offence." (See Imp. Act 11 & 12 Vic., c. 42, s. 17, and *Reg.* v. *Beeston*, Dears. p. 405). Here it does not appear on the face of the deposition that any charge at all was made against the prisoner, and it appears he must be charged with some offence. (Mr. Greaves, Russ. 893). The great test of admissibility is clearly the opportunity given the prisoner to cross-examine; that is to say, the full right to cross-examine, he having the knowledge that it is his interest so to do. This he cannot have till he is charged with an indictable offence. I attach no importance to the deposition being called an information.

On our Statutes, then, I should have no hesitation in saying that the deposition was inadmissible if it were not for a case of the *Queen & Millar*, decided in New Brunswick, which is much in point. (5 Allen p 83.) If that case had been decided since Confederation I might perhaps have felt myself bound by the decision; but as it only has authority here as written reason, and as it was under a different Statute from that in force here; I cannot defer to it. If the Revised Statute of New-Brunswick is identical with our Act, the learned reporter says it is *substantially* the same, (Ib. Note, p. 93.) I cannot accept the reasoning of the learned judges, more particularly as it appears by the report (5 Allen, p. 92), that the majority of the Court joined in the judgment with great reluctance.

Radborne's case (1 Leach, C. C. 457) seems to have had great weight in the decision in Millar's case, but I do not think Radborne's case decides anything that can be applied to the case before us. We are not told why the deposition was admitted. Garrow for the Crown argued that it was admissible either as a dying declaration, or it was admissible because "anything that was said, either by a prosecutor, a prisoner or witness, in the presence and hearing of each other, although said in common conversation, was admissible evidence in all Courts both criminal and civil." If it was admitted as a dying declaration, it does not apply to the case before us, and if on the ground that whatever is said in presence of the prisoner may be proved, the argument is altogether fallacious. What is said in hearing of the prisoner is not admitted as evidence under oath of what took place before; it is admitted as evidence of how the prisoner acted when accused of guilt. By the production of the deposition it is intended to establish under oath the narrative of the witness who cannot be examined. It may, however, be said that the decision in Radborne's case was cited approvingly in Beeston's case, and that its applicability to that case depends on its being assumed that it, in effect, decided that a deposition where there was no charge might be admitted, and more so therefore when the question was as to the admissibility of the evidence taken on one *charge* in any other *charge*. If this be accepted as the expression of the state of the law after Beeston's case, then the disposition of our Statute 32 & 33 Vic., cap. 29, sec. 58, understates the law in a curious manner. I cannot, however, adopt this view, and I must therefore reject the deposition, although in fact, it appears, the prisoner did ask one question in cross-examination. It must be understood that this decision goes no further than to reject this deposition as taking the place of Nesbitt's narrative under oath of what occurred.

C. P. Davidson, Q.C., and *Ouimet, Q.C.*, for the Crown.

F. D. Monk and *Cornellier* for the prisoner.