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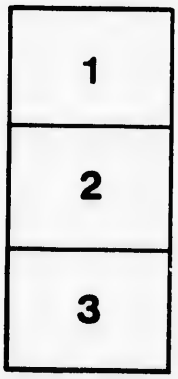

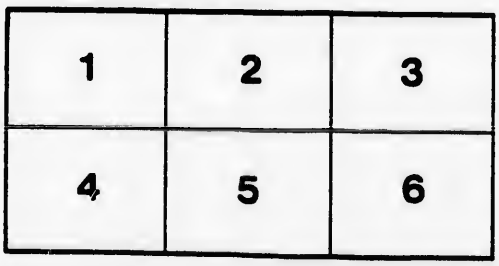

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COPY of a Report of the Minister of Justice, approved by His Excellency the Governor in Council, on the 22nd day of January, 1889, in reply to a despatch from the Government of Quebec, on the subject of the Disallowance of the Act of Quebec relating to "District Magistrates," passed in the Session of 1888.

The undersigned has had referred to him a despatch from His Honour the Lieutenant Governor of the Province of Quebec, dated the 2nd day of October last, transmitting a copy of an Order in Council, passed on that day by His Honour's Government, on the subject of the Disallowance of the Act of the Province of Quebec to amend the law respecting District Magistrates, being chapter 20 of 51-52 Victoria.

The undersigned has the honour to make the following observations on this Order-in-Council:

The disallowed Act recited that "In the Judicial District of "Montreal the number of cases in civil matters, before the Superior "Court and the Circuit Court" was "so great that notwithstanding "the permanence of the sittings of such Courts, the Judges presiding therein" were "unable to hear and determine them all with "the despatch that would be suitable to the parties interested," and that "To remedy this state of things, and in the interest of the "administration of justice, it had become necessary, so as to permit "of the Judges of the Superior Court attending exclusively to the "affairs more immediately connected with that Court, to abolish "the holding of the Circuit Court in the District of Montreal and "to establish there a District Magistrate's Court before which all "the cases, proceedings, matters and things" then "within the "jurisdiction of such Circuit Court" might "be brought."

After these recitals the dissallowed Act made the following, among other provisions:—

(1.) That the Lieutenant Governor in Council might, "by pro-"clamation, abolish the Circuit Court sitting in the District of "Montreal and establish in the City of Montreal, for the said "District, a special court of record under the name of 'District "Magistrate's Court of Montreal.'"

(2.) That such court should "be composed of two Justices, called "'District Magistrates of Montreal,'" who should be "advocates of "ten years' practice, be chosen from among the members of the Bar "of the Province, and be appointed under the Great Seal by the "Lieutenant Governor in Council."

(3.) That no property qualification should be necessary to the Magistrates, but that they should be ineligible to be Senators or members of the House of Commons, Executive Council, Legislative Council or Legislative Assembly of the Province, or for "any other office under the Crown."

(4.) "That such Magistrates should hold office during good "behavior" and be irremovable "except on the Joint Address of "the Legislative Council and Assembly."

(5.) That the Magistrates should receive a salary of three thousand dollars per annum, each.

(6.) That all the powers possessed, at the time of the passing of the Act, "by the Judges of the Superior Court, and the duties "imposed on them respecting the affairs" * * * "within the jurisdiction of the Circuit Court sitting in the District of Mon- "treal," should be imposed and conferred upon the District Magistrates of Montreal.

(7.) That the jurisdiction of the District Magistrates Court should be the same, *mutatis mutandis*, for civil matters as that which had been exercised by the Circuit Court of the District of Montreal.

(8.) That all the provisions of the Code of Civil Procedure, and other provisions respecting the Circuit Court of the said district, should, *mutatis mutandis*, be applicable to the Magistrates' Court thereby established.

(9.) That the words "Circuit Court of the District of Montreal," "Circuit Court of Montreal," "Court" and "Circuit Court," whenever referring to the Circuit Court sitting in the District of Montreal, wherever found in the Code of Civil Procedure, or in any other law, should mean and include the District Magistrates Court of Montreal. Also that the words "Judge of the Superior Court," "Judge," or "Judges," whenever referring to their powers and duties respecting matters connected with the Circuit Court sitting in that District, should mean the District Magistrates of Montreal.

This Act was disallowed on the seventh day of September, 1888, for reasons which were then communicated to His Honour the Lieutenant Governor of Quebec, the principal of which were that the provisions which professed to confer upon the Lieutenant Governor in Council the power to appoint these Judges and which professed to regulate their tenure of office, their qualifications for office, and their mode of removal from office were in excess of the powers conferred on Provincial Legislatures by the British North America Act, and were an invasion of the powers conferred upon the Governor General and the Parliament of Canada by that Act.

Among other powers conferred by the British North America Act on Provincial Legislatures is, (sec. 92, sub-sec. 14), the making of laws in relation to "The Administration of Justice in the Province, "including the constitution, maintenance and organization, and "Provincial Courts, both of Civil and Criminal Jurisdiction, of "including Procedure in Civil matters in those Courts." In no other provision is any power conferred on the Legislatures of the Provinces in respect of Courts or Judges, or the appointment and qualification of Judges.

All other powers than those expressly enumerated by section 92, as conferred on the Provincial Legislatures, are conferred on the Parliament of Canada: and by section 96 it is, besides, expressly provided that the Governor General shall appoint the Judges of the Superior, District and County Courts, in each Province, except those

of the Courts of Probate in Nova Scotia and New Brunswick. The Royal Instructions convey to Your Excellency the power to appoint some Inferior Judicial officers.

By section 97, it is enacted that "Until the laws relative to "property and civil rights in Ontario, Nova Scotia and New "Brunswick, and the Procedure of the Courts in those Province, are "made uniform, the Judges of the Courts of those Provinces, "appointed by the Governor General, shall be selected from the "respective Bars of those Provinces."

By section 98 "the Judges of the Courts of Quebec shall be "selected from the Bar of that Province."

By section 99 "the Judges of the Superior Courts shall hold "office during good behavior, but shall be removable by the Gov- "ernor General, on the address of the Senate and House of "Commons."

By section 100 "the salaries, allowances and pensions of the "Judges of the Superior, District and County Courts, (except the "Courts of Probate in Nova Scotia and New Brunswick), and of "the Admiralty Courts in cases where the Judges thereof are, for "the time being, paid by salary shall be fixed and provided by the "Parliament of Canada."

At the time of the passage of the British North America Act, and ever since, the Circuit Court has been a Court of Record in the Province of Quebec, held every year in certain districts, including the District of Montreal. It had jurisdiction up to $200. All powers vested in the Superior Court, or the Judges thereof, as to various kinds of procedure, were vested in the Circuit Court and the Judges by whom the same was held. As to certain proceedings the Circuit Court was entrusted with concurrent jurisdiction with the Superior Court.

The Circuit Court was held by one of the Judges of the Superior Court.

The Circuit Court was, therefore, at the time of the Union, in one sense, a branch of the Superior Court. The powers and duties of Superior Court Judges included the powers and duties of Circuit Court Judges. When the Governor General appointed a Judge of the Superior Court under section 96 of the British North America Act, the appointment carried with it an appointment as Circuit Court Judge.

The Judges of the Circuit Court, were, therefore, among the Judges who, under section 96, were to be appointed by the Governor General. They were among the Judges whose qualification was prescribed by section 98, as being simply membership of the Bar of the Province.

The Circuit Court Judges, inasmuch as they were Superior Court Judges, had their tenure of office prescribed by section 99. They were to hold office during good behavior, and were to be removable by the Governor General on the joint address of the Senate and House of Commons. They were among the Judges whose salaries, under section 100, were fixed and provided by the Parliament of Canada.

The disallowed Act not only empowered the Lieutenant Governor in Council, as before stated, to abolish the Circuit Court, but to appoint, instead of Judges of the Superior Court, *quoad* the Circuit Court, officers who would be, in every sense, Judges, in relation to matters within the Jurisdiction of the Circuit Court, as fully as the Judges of the Superior Court had been, although bearing the name of District Magistrates.

As to Judges of the Circuit Court, therefore, the appointing power was taken from the hands of Your Excellency and transferred to the Lieutenant Governor in Council of Quebec.

The prohibition against the new Judges sitting in the Senate and House of Commons is so obviously beyond Provincial powers, that it would seem impossible that the Legislature of Quebec really designed, by the third section of the disallowed Act, to declare that the District Magistrates should be ineligible to be Senators and Members of the House of Commons. It is easier to believe that the intention was that the new Judges should lose their offices if they became Members of Parliament, although such meaning failed to find expression.

The provisions of section 4 of the disallowed Act, in so far as the tenure of office was made to depend on good behavior, is the same as section 99 of the British North America Act, but while section 99, of the British North America Act had the effect of making the Judges of the Circuit Court removable by Your Excellency, on the address of the Senate and House of Commons, section 4 of the disallowed Act declared that they could not be removed from office except on the address of the Legislative Council and Legislative Assembly of Quebec.

Section 5 of the dissallowed Act fixed the salaries and emoluments of the new Judges and made them payable out of the Consolidated Revenue Fund of Quebec, although section 100 of the British North America Act declared that those salaries and emoluments should be fixed and provided by the Parliament of Canada.

At the time of the passing of the disallowed Act, the Judges appointed by Your Excellency's predecessors, under section 96 of the British North America Act, were sitting in the Circuit Court;—Section 6 of the disallowed Act professed to strip them of all their powers, relieve them of all their duties, and impose both powers and duties on the newly created Magistrates, who, in the opinion of the undersigned, if the Act was valid, by necessary implication were made Judges, although called Magistrates, and although appointed by the Lieutenant Governor.

The Legislature of Quebec, however, did not suffer the matter to rest upon implication, but in one of the concluding sections of the Act under consideration declared that the words "Judges of the Superior Court", "Judge" and "Judges", wherever used in reference to the Circuit Court, should mean the District Magistrates of Montreal attempted to be created by that Act.

If such powers can be exercised by a Provincial Legislature, it is difficult to see what is to prevent the Legislature from asserting the power to appoint Judges of all the Provincial Courts and regulate their qualifications for office, their salaries and their tenure of office,

The change of name is so easy of accomplishment as not to present any difficulty, especially as the device just described made the terms "Judge" and "Magistrate" interchangeable.

The undersigned deems it unnecessary to advert at any length, in this place, to the provisions of the disallowed Act abolishing the Circuit Court, as affecting its constitutionality.

Reference to that point would seem wholly unnecessary, excepting for the assumption indicated in the Order in Council under consideration, that every kind of Provincial Legislation which has not been distinctly questioned is admitted to be correct; and but for the fact that the power to abolish is stated by the Order in Council to have been "not even questioned by the Minister of Justice." In passing, it may therefore be proper to say that instances may perhaps be suggested in which the power of Your Excellency and of Parliament to remove Judges might be usurped by Provincial Legislatures in the exercise of their authority as to the constitution and organization of the Courts. Cases may be suggested in which in the exercise of this power, a Court might be abolished for the purpose of removing one or more Judges, and, no doubt, in such a case, the control of the Federal authority would be called for, and the power of disallowance would be exercised.

In the consideration of the Act which is at present the subject of discussion, it has been assumed by the undersigned, and is still assumed, that the abolition of the Circuit Court was not for the purpose of usurping the power of removing Judges, but was done to accomplish the setting up of a new tribunal. He does not therefore deem it necessary to place undue stress on the fact that the disallowed Statute had the effect of abolishing the Circuit Court.

It seems necessary, however, to call attention to the important misconception, which seems to prevail throughout the reasoning presented by the Order in Council of the Quebec Government, that the allowance of Provincial Legislation is, in all cases, an admission of the validity of such legislation, and an admission which has the effect of depriving the Federal authority of the right or power of disallowing Statutes similar to those which have been permitted to go into operation.

No such inference can properly be drawn. It is apparent to any person conversant with the subject that many Provincial Statutes which have been left to their operation contained provisions beyond the powers of the Provincial Legislatures, and that many others which have been left to their operation contained provisions of very doubtful validity.

The reasons for this are not difficult to find. In the early history of Confederation the Provincial Legislatures were naturally inclined to follow the lines of legislation which had, for so many years, been pursued in the Parliament of the Provinces. The provisions of the British North America Act were novel. Its operation had not been illustrated by the precedents which have since marked out with greater distinctness the difference between the authority of Parliament and the authority of the Legislatures, and in the early years of the Union, interference with Provincial Legislation was perhaps

a more delicate task than it should be considered now, when the relative positions of the Legislatures and Parliament are better understood, and the principles which should guide both have become more familiar.

The most remarkable instance in which Provincial Legislation has over-run the limits of Provincial competence has been the legislation in reference to the Administration of Justice. It has been common for the Provinces to enact from time to time what the qualifications of the Judges who were to be appointed by the Governor General, should be, although this seems to the undersigned to be an attempt to control, by Provincial Legislation, the power vested in the Governor General by the British North America Act.

The most plausible argument offered in defence of such legislation has been the contention set up in one quarter that, inasmuch as it is for the Provincial Legislatures to say whether the Court shall be constituted or not, it is proper for them to say that the Court shall be constituted, provided Judges of certain qualifications are appointed to preside therein. This seems to the undersigned to be erroneous in principle. It is an attempt to provide that the power of the Governor General shall be exercised only *sub modo*, and if the principle were recognized it would be competent to provide that Provincial Courts should only be established, provided the Judges should be those nominated by the Provincial Executive or taken from a class nominated by that Executive.

Again, in reference to this subject, doubtful legislation has been adopted in nearly all the Provinces, setting up Courts with civil and criminal jurisdiction, with Judges appointed by Provincial or municipal authority. In some instances, and with respect to some of these tribunals, it would seem that the doubts as to their constitutionality have been lessened or removed by the Dominion Parliament from time to time, recognizing them, or conferring jurisdiction upon them. As regards others of them, the legislation may still be open to grave question, although in most cases, as in the case of Quebec, now under consideration, the Legislatures have been careful to avoid conferring the title of "Judges" upon the officers whom they have really undertaken to clothe with judicial powers.

In legislating upon this subject, the enactments have followed a course which it has been difficult to control without seeming to infringe unnecessarily on Provincial action, and without seeming, at least, to impugn a series of Provincial Statutes which have frequently been left to their operation.

In other instances the promoters of this kind of legislation have been disposed to assume that the organization of a tribunal with small civil and criminal jurisdiction, presided over by a Judge or Magistrate appointed by the Provincial Executive, would be within Provincial authority, and that such a tribunal having been established, its authority and jurisdiction could be widened and increased under the powers which the Provincial Legislatures possess to regulate the administration of justice in the Province "including the constitution, maintenance and organization "of the Provincial Courts, both of criminal and civil jurisdiction, and "including procedure in civil matters in those courts."

A reference which will presently be made to reports of preceding Ministers of Justice on this and kindred subjects will show how necessary it seemed to the predecessors of the undersigned, in times past, to prevent encroachments by this means, upon the appointing power of the Federal Executive, and how necessary it was deemed to prevent the confusion and injustice which must ensue when a tribunal, to which suitors have resorted for justice, has been deciding upon the rights of parties without having had jurisdiction.

The Order in Council under review, in presenting to Your Excellency what is claimed to have been the law respecting District Magistrates in the Province of Quebec, before the passage of the disallowed Act, refers to a series of enactments, which are not unlike the class of Statutes which has last been adverted to.

In the year 1869, the Legislature of Quebec, by chap. 23 of that year, declared that the Lieutenant Governor in Council might appoint one or more persons to be District Magistrates, with the power of Justices of the Peace and Judges of Sessions of the Peace. Their salary was not to exceed $1,200, and their civil jurisdiction was limited to $25, excepting as to tithes, taxes, penalties and damages recoverable under the Lower Canada Municipal Act and under certain other Acts of Quebec. In these enumerated cases their jurisdiction was unlimited, provided the defendant resided within the county in which the Court was held, or that the debt was contracted therein and the defendant resided within the district.

The same Act purported to confer power on the Lieutenant Governor in Council to establish additional Magistrates in the District of Saguenay, with jurisdiction up to $200. This Act may be contended to have had validity as applying altogether to a Provincial Court of lower rank than any of the courts in respect of which the appointing power has been given to the Governor General in Council by the British North America Act; or it may possibly be sustained on other grounds, which it is unnecessary to seek for at present. It cannot be supposed, however, to have had validity from the fact that it was left to its operation by the Federal Executive, although this is almost the sole ground on which its validity is assumed in the Order in Council under review. No argument can be drawn from this Statute as to the validity of the disallowed Act, because the Act of 1888 differed from it in essential points, some of which have already been enumerated and may be referred to hereafter. The Act of 1869, however, contains provisions which clearly illustrate the remarks before made as to the disposition to encroach upon the powers of the Federal Parliament and Executive, in regard to the administration of justice. Some of its provisions would hardly be repeated by the Legislature now, in the light which has been thrown upon our Constitution by twenty years of experience. Such, for example, are the provisions of the 9th section, which conferred on each of the Magistrates, powers which the Parliament of Canada had declared should be exercised only by two Justices of the Peace, or by certain other specified officers, the District Magistrate not being one; and section 10, which undertook to extend to District Magistrates the provisions of an Act of the Parliament of Canada

respecting Justices of the Peace; also section 28 which appropriated the moneys received from penalties, forfeitures and fines imposed by a District Magistrate in such manner, and at such times, as the Lieutenant Governor might direct, although the greater portion of those fines and penalties would, according to the Act, be recoverable under Dominion Statutes and belong to the Dominion of Canada.

In the next year, by chap. 11 of 1870, assented to 1st of February, 1870, an attempt was made to withdraw the meaning of the obviously objectionable provisions of the Act just referred to, by adding a section, declaring that that Act should "be construed as "intended to apply to such matters only as" were "within the "exclusive control of the Legislature" of the Province, &c. Under ordinary circumstances such a provision would be unnecessary. It is obvious that no Provincial Statute can be construed as extending to anything outside of Provincial powers, but the adoption of the section is somewhat significant, and leads to the belief that some of the provisions already referred to were pointed out between the Sessions of 1869 and 1870, as being objectionable.

In the following year, by chap. 9 of 1871, assented to 23rd December, 1871, the limit of civil jurisdiction was raised from $25, to $50. Jurisdiction was given to the District Magistrates in certain cases "to annul or to rescind a lease," and to award "damages for breach of the stipulation of the lease." Power was given also to award costs on the tariff of the Circuit Court, and to sell Immovables for sums exceeding $10, according to the practice of the Circuit Court.

Thus, the court having been established with a Magistrate appointed by Provincial authority, the process of expanding its jurisdiction began.

It went on in the year 1874, when by chapter 8, assented to 28th January, 1874, it was again enacted, with great particularity, that every District Magistrate should have the power vested in one or more Justices of the Peace and of a Judge of Sessions, and that such Magistrate should "exercise all such functions proper to a District Magistrate, as required or authorized by any Act or Acts of the Province of Quebec, or by any law whatever," and should "act in any case or matter, and in any or every manner authorized or required by law." By three of the sections of the same Act the provisions of several Statutes of the Parliament of Canada, (which, of course, could only be extended by the Parliament of Canada), were extended, for the purpose of making the meaning of the Legislature clear to confer on those officers the powers which Parliament had conferred on other officers.

The fines and penalties recoverable before the Magistrates were again dealt with as belonging to the Province, and the tenure of office was established by the provision that removal from office should not be made without the reasons being assigned in an Order in Council.

In the following year, by chap. 31 of 1875, assented to 24th December, 1875, there is a declaration that the Act of 1874 had not enlarged the Jurisdiction of the District Magistrates Courts.

In the following year, by chap. 12 of 1876, assented to 28th December 1876, the jurisdiction was altered in such a way that

residence within the district was not necessary to jurisdiction in some of the exceptional cases where the jurisdiction had not been limited by the Act of 1869, and it was declared sufficient that the defendant should live in the Province.

By chapter 15 of 1885, assented to 9th May, 1885, in the County of Gaspé and part of the County of Saguenay, the civil jurisdiction was raised to $99.

The extent to which this Court possesses jurisdiction in respect of specially enumerated cases may be seen from the fact that in the suit of the Corporation of St. Guillaume vs. Corporation of Drummond, in 1876, reported on appeal in (7 Revue Légale 562), judgment was rendered for municipal taxes by the District Magistrate, (appointed by the Lieutenant Governor in Council), for $1,880.

Finally, by the disallowed Act, the "District Magistrates Court," in so far as the District of Montreal was concerned, (and this includes the City of Montreal and eight counties besides), having matured its growth by being made a court of record with such extensive powers, with its Judges holding office during good behavior, and removable only on the joint address of the Legislative Council and Assembly, with the salaries of its judges raised to $3,000; all the powers and jurisdiction of the Judges of the Superior Court in respect of the Circuit Court having been conferred upon those Magistrates, the new tribunal which had been eighteen years in reaching maturity, was ready to take the place of the Circuit Court. The Circuit Court was then abolished in the District of Montreal and the places of its Judges, commissioned by the Governor General, were taken possession of by the District Magistrates.

The veil was still to be kept up over the title of the judicial officer, and had "District Magistrate" inscribed upon it, but it was provided that this should have no legal effect, by the enactment that although "District Magistrate" might not mean "Judge," the word "Judge," appearing everywhere, should mean "District Magistrate," in relation to the Circuit Court affairs and jurisdiction.

It seems to the undersigned evident:

(1.) That the Government of the Province of Quebec are not warranted in assuming that because this series of enactments, in reference to District Magistrates Courts, was permitted to go on without disallowance, the Statutes are therefore *intra vires* of the Legislature of Quebec.

(2.) That if, by a gradual increase of jurisdiction, a new court can be substituted for the Circuit Court, the Legislature would have the right, in the same way, to go on extending the jurisdiction, until the Court should be sufficiently equipped to take the place of the Superior Court, and that by the same process the Executive of the Province could obtain control of every court in the Province, the same device, if necessary, being used to conceal the word "Judge."

(3.) That even if this mode of proceeding by the Provincial Legislature be not *ultra vires*, it should be controlled by the power of disallowance, vested in Your Excellency, because it eventually results in a transference of the Judge-appointing power, from the Dominion to the Provincial Executive.

The undersigned therefore cannot agree with the statement contained in the Order in Council under consideration that because this series of enactments was made by the Province of Quebec, "it is "therefore evident that before the sanction of the Statute in ques- "tion, the Lieutenant Governor had, and that he will have, after "the coming into force of the disallowance, the power to appoint "District Magistrates and to establish Magistrates Courts in every "county," &c., "with the civil jurisdiction already mentioned," and that "in declaring the power of appointing Judges *ultra vires* "the Dominion authorities deny to the Executive of this Province "a power it possesses and has exercised since 1869, that it possesses "and exercises actually, and will continue to possess and exercise "in the future, by virtue of laws anterior to the disallowed Statute."

To show that the view hereinbefore expressed is not a novel view to take of such enactments, and to show likewise that the Government of the Province of Quebec is not justified in assuming that the Federal Executive admits the validity of all acts which it leaves to their operation, and loses the power of Disallowance over similar Statutes thereby, the following references may be made to some of the reports which have been presented by the predecessors of the undersigned, on Provincial Legislation of this character:—

A Statute of Ontario, assented to 23rd January, 1869, chap. 22, made provision that Judges of the County Courts of Ontario should hold their office during pleasure and should be subject to be removed by the Lieutenant Governor for inability, incapacity, or misbehavior, and was specially reported on by the Honorable Sir John A. Macdonald, then Minister of Justice, and, being referred at his suggestion to the Law Officers of the Crown in England, the latter on the 4th May 1869, reported that it was not competent for the Legislature of the Province of Ontario to pass the Act. The report was signed by Sir Robert Collier and the present Lord Chief Justice of England. It would seem that the Legislature of Ontario had acted in pursuance of the theory that its power to make laws in relation to the administration of justice in the Province, "including the constitution, "maintenance and organization of Provincial Courts," involved the power to limit the tenure of office, and to constitute the court with a proviso, in effect, that the appointing power of the Governor General should be exercised *sub modo*.

The Minister of Justice of that day, and the Law Officers of the Crown in England, maintained that that could not be done.

On the 19th January, 1870, the same Minister of Justice reported in favor of the disallowance of the Supply Bill of the Province of Ontario, because it supplemented the salaries of certain of the Judges of that Province, and the Act was disallowed accordingly.

On the 14th April, 1873, the same Minister of Justice took exception to an Act of Manitoba imposing a fine upon Judges for neglecting to perform any duty, and recommended that the attention of the Legislature of Manitoba be called to the objectionable enactment. In the same report it is recommended that the Government of Manitoba should be given to understand that the Governor General did not consent to the limitation of his power of selection of Judges.

contained in the Act of Manitoba, which pretended to define the qualification of the persons who should be appointed to the Bench. The Government of Manitoba was informed that the Governor General would not feel bound by that Act in any appointments to the Bench. In approving that report the Governor General added in his own hand the words: "I conclude that the recommendation to be conveyed to the Lieutenant Governor is a sufficient security for the amendment of these Acts."

On the 2nd September, 1874, the Honorable Mr. Justice Fournier, then Minister of Justice, commented on an Act of the Province of New Brunswick, chap. 29 of 1873, as being in fact an appointment by local authority of a Judge. Correspondence led to the amendment of that Act in accordance with his view. On the 18th November, 1874, the same Minister of Justice reported that the provisions of an Act of the Legislature of Ontario, with respect to the qualifications to be possessed by certain Judges, was *ultra vires*, as placing a limit on the discretion of the Governor General which was not to be found in the British North America Act, and he declared that such a provision was ineffectual and that the Governor General would not be bound by it.

On the 9th of March, 1875, the same Minister of Justice recommended the disallowance of a Statute of British Columbia, because, after the appointment of County Court Judges in particular districts, the Statute reported on empowered the Lieutenant Governor to appoint the places at which the County Court Judges should preside from time to time, the Minister declaring that this was practically assuming the power of the appointment of Judges, and the Act was disallowed accordingly.

On the 13th of October, 1875, the Honorable Edward Blake, then Minister of Justice, reported against a similar Statute of the same Province. He said that "the consequence of permitting the "Act now under consideration to go into operation would be to "permit the Lieutenant Governor in Council to arrange the boundaries of these districts and to alter them at his pleasure, and so, "practically, to determine, at his pleasure, the places within which "the County Court Judges should have jurisdiction."

He contended that such an enactment was objectionable "as the "alterations thereby authorized might practically result in the "appointment, by the Local Government, of a County Court Judge "to a new District or Judgeship, thus transferring to the Local "Government a part of the power of appointment vested in this "Government under the Constitution," and he added "so long as "the Local Legislature keeps within its own hands the division of "the Districts, and the alteration of their boundaries, this Government has, by virtue of the power of Disallowance, some measure of "control over such action; but should this Act go into operation, "no such control could thereafter be exercised here."

On the 29th September, 1877, the Honorable R. Laflamme, then Minister of Justice, called attention to various Acts of British Columbia, relating "to the Gold Commissioner, and his powers as "Judge of the Mining Court and to the danger of allowing legislation which increases, from time to time, the jurisdiction of the

" Court, the Judge of which has not been appointed by the Gov
" ernor General."

He proceeded to relate the various Acts by which the jurisdiction was gradually accumulated, until, in the opinion of the Minister, the Court had, at length, become, by five successive enactments, a Court, within the meaning of the 96th section of the British North America Act.

He thought it was not "necessary, in order to bring a court " under the provisions of this section, that it should be called by the " particular name of 'Superior,' 'District,' or 'County Court,'" and although he did not recommend the disallowance of the Statute, he recommended its repeal or amendment by the Provincial authorities, and expressed this view: "It will be readily seen how easy it " would be for the Local Legislature, by gradually extending the " jurisdiction of these Mining Courts, and by curtailing the juris- " diction of the County Courts, or Supreme Court, as now established, " to bring within their own reach, not only the Administration of " Justice in the Province, but also, practically, the appointment of " the Judges of the Courts in which justice is administered."

On the 3rd of October, 1877, the same Minister reported against an enactment of the Province of Ontario to provide that the Stipendiary Magistrate of the Territorial Districts of Muskoka, Parry Sound and Thunder Bay should act as a Division Court Judge, with like jurisdiction and powers as were possessed by County Court Judges in Division Courts in the Counties, as being in conflict with the 96th section of the British North America Act.

He refrained from recommending disallowance of the Act, as Acts previously passed by the Provincial Legislature, conferring certain judicial powers in civil matters on Stipendiary Magistrates, in relation to Division Courts in Ontario, had been left to their operation, and those powers had not been substantially extended by the Act then under his review, but he pointed out that the same danger which had received his notice, in the case of British Columbia, might ensue from this class of legislation.

The jurisdiction of the Court which he referred to only reached $100, excepting when the consent of parties was given for the disposal of cases of larger amounts. He took special exception, however, to the provision that all enactments from time to time in force in Ontario, relating to Division Courts in Counties, should apply to the Division Courts of these Districts, stating that while it might be "quite within the Legislature of Ontario to increase the jurisdic- " tion of the Division Courts in Counties, as such Courts are now " presided over by Judges appointed by the Dominion," the attempt to exercise that power in relation to Division Courts, presided over by Judges appointed by Ontario, would be objectionable, and he intimated that the Act would be disallowed unless amended. The same objection was conveyed in a report of the same Minister in reference to New Brunswick Legislation on 22nd December, 1877.

On the 14th June, 1879, Chief Justice McDonald, then Minister of Justice, took exception to an Act of Prince Edward Island, which allowed a small fee for costs taxed by the County Court Judge, as being a breach of the provisions of the British North America Act in relation to the emoluments of Judges.

On the 20th January, 1880, the same Minister called attention to an Act of Ontario, in amendment of a similar Act to that relating to the Territorial Districts of Muskoka, Parry Sound, and Thunder Bay. This Act gave the appointment of the Judge to the Lieutenant Governor, fixed the salary and enlarged the civil jurisdiction, but was not different in principle from the Statute which had been commented on in 1877. This Act was disallowed.

On the 30th January, 1882, Sir Alexander Campbell, then Minister of Justice, reported that an Act of Ontario, (Chap. 5, 1881), consolidating the Superior Courts, and establishing a uniform system of Pleading, Practice, &c., contained provisions which appeared to be *ultra vires*, as being in effect, an assumption of the appointing power, by the Provincial Legislature, and he caused Commissions to be issued to the Judges, on the reorganization of these Courts, in order to place their authority beyond question.

In the same report he took exception to a provision to constitute the Judges of County Courts Official Referees and Local Masters.

On the 8th May, 1883, the same Minister called attention to the legislation of the Province of British Columbia, conferring jurisdiction on Gold Commissioners appointed by the Lieutenant Governor of British Columbia, and the Act was disallowed.

In a report of the 13th April, 1887, the undersigned felt himself obliged to state that the provision of a Manitoba Statute, to the effect that for certain misconduct the County Court Judge should forfeit his office, was *ultra vires* of the Provincial Legislature.

The contention is, however, made, in the Order in Council under review, that the Court of Appeal of the Province of Quebec has recognized, as constitutional and *intra vires*, in two cases, the legislation for the appointment of such District Magistrates.

One of the supposed cases, referred to, is that of the Corporation of St. Guillaume *vs.* Corporation of Drummond, (7 Revue Légale 562). It seems remarkable to the undersigned that reference should have been made to this case, for this purpose, especially by the emphatic statement that the judgment of the Judge of first instance was unanimously confirmed in the Court of Appeal, by Judges Tessier, Monk, Sanborn and Ramsay. The most careful scrutiny of this case fails to detect anything to bear out the statement that in that judgment the enactments for the appointment of the District Magistrates was "recognized as constitutional and *intra vires*." A judgment had been rendered by Mr. Justice Plamondon for $1,880; an appeal was asserted, (1) on the ground that the Judge was himself liable to contribute to the defendant corporation towards any amount for which judgment might be given, and that he had been recused, and, (2) that the amount claimed was above the jurisdiction of the Court. The judgment on the appeal was delivered by Sanborn J. on these two points only, and the question of *intra vires*, or constitutionality of the Legislation, was not raised, considered, or even referred to.

The second case on which reliance is placed is that of Regina *vs.* Horner in 1876, (2 Cartwright's Cases 317), and the brief judgment delivered throws no light upon the question. The Court, (per Ramsay J.), while admitting that difficulties might exist "as to the conflict of the powers as an abstract question," the difficulty was practically disposed of by the case of Regina *vs* Coote (L. R. 4, P

C. 599). The Court, (per Ramsay J.), stated; "The case of Coote "decided in the Privy Council, directly recognizes the power of the "Local Legislature to create new Courts for the execution of crimi "nal law, as also the power to nominate Magistrates to sit in such "court. We have therefore the highest authority for holding that, "generally, the appointment of Magistrates is within the powers of "the Local Executives. So much being established, almost all "difficulty disappears." Turning now to the case of Regina *vs* Coote, which the Quebec Court of Queen's Bench had relied on as solving all difficulties, as to the conflict of powers, it is matter of regret to find that it really has no bearing on that subject whatever. The single passage in that judgment which bears upon any constitutional question is contained in the following extract from the judgment delivered by Sir Robert Collier: "The objection taken at the trial "appears to have been that to constitute such a court as that of the "Fire Marshal was beyond the power of the Provincial Legislature, "and that consequently the depositions were illegally taken. "Subsequently other objections were taken in arrest of judgment "and the question of the admissibility of the depositions was reser- "ved. It was held by the whole Court (in their Lordship's opinion, "rightly,) that the constitution of the Court of the Fire Marshal, "with the powers given to it, was within the competency of the "Provincial Legislature."

There was no contention at the argument, and no decision by the Court, as was supposed by Mr. Justice Ramsay, that the "power to nominate Magistrates to sit in such courts, is within the power of the Local Executive." No solution, therefore of the difficulty noticed by the Court of Queen's Bench in the case of Regina *vs* Horner is to be found in the decision of the Privy Council in Regina *vs.* Coote.

The fact is that the Statute then under review created officers called "Fire Marshals," with the power of making investigations concerning fires, and their power, in so far as it came under the consideration of the Judicial Committee, was merely that of summoning witnesses, and of committing suspected persons for trial. How then could it have been supposed that this was a decision, even in favor of the principle that Local Legislatures could "create new courts for the execution of the criminal law," as stated by Mr. Justice Ramsay, much less a decision affirming "the power" of the Local authorities to appoint "the Judges to sit in such courts"? The power "to create new Courts for the execution of the criminal law" was expressly conferred by the British North America Act, and fortunately, it does not rest on the case of Regina *vs.* Coote. As to the suggestion that the Local Legislature had even attempted, by the Act then under consideration, to create a new "court for the "execution of the criminal law," it is not only apparent from the references of the Judicial Committee that no such attempt had been made, but the Court of Queen's Bench itself had decided, in 1872, (*ex parte* Dixon 2 Revue Critique 231), that the Statute in question had no connection with criminal procedure.

The only remaining passages in the judgment of Regina *vs.* Horner are an attempt to work out the theory on which it was imagined that the case of Regina *vs.* Coote had been decided, and the case

altogether may be considered as far from a conclusive authority, without disrespect for the eminent tribunal which pronounced the decision. The decision, whatever its value, only had in view the District Magistrates Court as it existed in 1876.

Having put forward these two cases as the only ones which could be relied on as judicial confirmation of any Act of the character of that which has been disallowed, the Order in Council proceeds to set up the contention that similar laws are in force in all the Provinces of the Dominion. If that contention were correct, in point of fact, it would hardly have much bearing on the question of constitutionality. But it is not correct. One instance given in the Order in Council is a Statute of the Province of New Brunswick which provides for the establishment of "Parish Courts" with civil jurisdiction up to $40. This New Brunswick Statute, it must be admitted, is similar to a number of other Provincial Statutes, but it differs in all the points to which importance has been given in the previous parts of this report, from the disallowed Statute.

Reference is made in the Order in Council under review, to a decision of the Supreme Court of New Brunswick, in the case of *Gaynong vs.* Bayley, (1 Pugsley and Burbidge 321), as sustaining the "Parish Courts" Act.

The undersigned desires not to be understood as undertaking to discuss here the legality of Statutes like the New Brunswick Statute just referred to. The wide difference which has been already pointed out between those Statutes and the disallowed Act, as to criminal jurisdiction, as to the extent of the civil jurisdiction, and as to the attempt to transfer certain of the powers of the Superior Court Judges to Provincially appointed Judges, makes it unnecessary to enter upon such a discussion, but it may be proper that he should notice the New Brunswick decision just mentioned, because it may be supposed that although the Statutes were different, the principles affirmed by the Court may have been sufficiently wide to cover the disallowed Statute, as well as the Statute of New Brunswick, which was then being considered. The question before the Court was whether the New Brunswick Act, (39 Vic. chap 5), intituled. "An Act to establish Parish Courts", was *ultra vires* of the Local Legislature, as to the section which provided that the Commissioners, (who are the Judges in those Courts), should be appointed by the Lieutenant Governor in Council.

As already stated, the Parish Court was a Court for the recovery of debts under $40. Two of the Judges of the Supreme Court of New Brunswick, out of five, denied the validity of the enactment. Two of the Judges who affirmed the validity of the enactment did so on the ground that all the powers of the Provincial Legislature and Executive which existed before the Union of the Provinces remained to the Provincial Legislature and Executive, after the Union, except is so far as altered by the provisions of the Union Act.

This principle, without which there would not have been a majority of the Court to uphold the provision of the Parish Court Act, would not now be affirmed, since the Judicial Committee of the Privy Council, (as well as other tribunals), has so clearly established that no powers are possessed by the Provincial Legislatures except such

as are conferred by section 92 of the British North America Act, and that all other powers are vested in the Parliament of Canada. It may be that such Statutes as that regarding the Parish Courts are *intra vires* the Provincial Legislature, without the disallowed Statute being so, but if they are *intra vires*, it can hardly be from the weight of the New Brunswick decision just quoted or from the reasoning given by the majority of the Court.

Another of the Statutes referred to in the Order in Council, as being similar to the disallowed Act, is one passed by the Legislature of Ontario, and which conferred jurisdiction on Stipendiary Magistrates in Territorial and temporary Judicial Districts.

The undersigned has, however, already shown that the provisions of this Act were distinctly excepted to in the report of the Honorable Mr. Laflamme, and that a request was made that it should be repealed before the time for disallowance should expire; that this request was unheeded, and that a subsequent enactment of a like character, but going a little further in conferring jurisdiction, was disallowed. Legislation of that kind has not been continued in Ontario, but the Legislature has, in recent years, avoided doubtful ground, by establishing the Court merely, and leaving the appointment of the Judge to the Dominion Executive.

The Order in Council now under consideration, after presenting the reasoning which has been herein reviewed, with regard to the constitutionality of the Disallowed Act, proceeds to give a statement of facts which seems to the undersigned to have no bearing upon the question and no relevancy to the question of disallowance. It refers to the fact that in 1887 the Legislature of Quebec authorized the appointment of two additional Judges of the Superior Court, and calls Your Excellency's attention to the fact, according to a principle acknowleged by the Dominion authorities, and especially by the Right Honorable the First Minister, in a speech in Parliament, in 1880, that the wish of the Provincial Legislature on such a subject should be respected. On this point there need be no controversy. A representation made by a Provincial Legislature as to the necessity for an increase in the number of Judges, or on any other subject, is entitled to very great respect, and it was not necessary, in order to obtain this admission, that the speech of the First Minister, made under widely different circumstances from those presented in the Province of Quebec, and in relation to a state of affairs in British Columbia on which the opinion of the Provincial Legislature was peculiarly important as there was but little question as to the fact (the controversy turning largely on a matter of opinion as to the best policy to be pursued in organizing the judicial staff of that Province), should be referred to.

Without digressing into a consideration of the weight which the representations of the Provincial Legislatures should have, under various sets of circumstances that may arise, the undersigned would suggest that, inasmuch as the authority for the appointment of Judges of the rank provided for in the Quebec Act of 1887, is vested in Your Excellency, and the provision for the salaries, allowances and pensions for such Judges can alone be made by Parliament, the responsibility of recommending the necessary provision to Parliament is not wholly removed from Your Excellency

Advisers by the action of the Provincial Legislature. It would seem proper that your Excellency's Advisers should be informed of the facts which make the appointment of additional Judges necessary, so that they may present to Parliament sound reasons, if any exist, for the increased expenditure asked for. This has not been done by the Executive of Quebec since the passage of the Act of 1887, but nevertheless, in the Session of Parliament of 1888, provision was made, at the request of Your Excellency's advisers, for one of the two additional Judges, and the appointment of that one had already been made when the Order in Council under review was passed.

It may be that a careful examination of the facts and statistics connected with the administration of Justice in the Province of Quebec will make is proper that Parliament should provide, before long, the salary of the other Judge for whom a place was made by the Quebec Act of 1887. If so, the undersigned will esteem it an agreeable duty to recommend compliance with the wish implied in the passage of that Act, and he does not desire to be regarded as wanting in respect for the representations of the Quebec Legislature because he has deemed it his duty to advise that a Statute, which he believes to be in excess of the powers of that Legislature, should not be allowed to go into operation.

It seems unnecessary to say, however, that the fact of a Provincial Legislature having done its part towards enlarging the number of Judges and the circumstance, if such exists, of additional Judges being needed, cannot justify the attempt on the part of the Provincial Legislature to seize the appointing power. Yet such seems to be one of the reasons put forward in justification of the Disallowed Act.

The Order in Council of the Quebec Government then proceeds to show that the Legislative Assembly of Quebec, in passing the Disallowed Act, adopted a resolution "that the new District Magistrates "should only be appointed one month after that Act" should have been "assented to, in order to allow the Federal Government to "appoint the two additional Judges whose appointment had been "authorized," and should not be appointed if the increase in the number of Superior Court Judges should be made. The Order in Council then goes on to show that, on the 14th of July last, copies of the Disallowed Act and of the Resolution, just referred to, were transmitted to the Minister of Justice by the Attorney General of Quebec, that the Proclamation putting the Act into force was made on the 30th August only, and that the appointment of the District Magistrates was made only on the 30th August last.

The object of these statements seems to be to present a complaint, that the action of Your Excellency's advisers in deciding to recommend the disallowance of the Act of 1888 was unduly delayed and that the Quebec Executive were, in consequence, allowed to proceed to the appointment of the Magistrates on the assumption that the additional Superior Court Judges would not be appointed and that the Provincial Act would be left to its operation.

This complaint, if the undersigned is right in assuming that such a complaint is intended, appears to be founded on a misapprehension of the facts. The Act was assented to by the Lieutenant Governor of Quebec on the 12th July, 1888. It contained no provision as to

the date when it should come into force. Chapter 4 of the Quebec Statutes of 1871, provides, (and it is re-enacted by Revised Statutes, 1888, art. 5) that a Statute of that Province "whenever its commencement is not otherwise therein provided for shall, if it be not "reserved, come into and be in force, on and from the sixtieth day "after the day on which it was assented to." The Disallowed Act, therefore, even without any interference by the Federal Executive, could not come into effect until the 10th day of September, 1888, and the Executive of Quebec would not have power, until that date, to issue the Proclamation abolishing the Circuit Court, or to appoint the District Magistrates, or to do any other of the matters provided for by the Disallowed Act. Notwithstanding this, the Proclamation was issued and the Magistrates were appointed eleven days before that date.

Your Excellency's Advisers could hardly have assumed that the Executive of Quebec would desire to do, before the 30th of August, acts which they were only empowered to do on the 10th of September at the earliest.

That Your Excellency's Advisers did not unduly delay their action in respect to the Disallowed Act, is further apparent from the following circumstances: the authentic copy of the Disallowed Act, on which authentic copy alone action has to be taken, if taken at all, in respect of disallowance, was only received by the Secretary of State, and referred to the undersigned on the 8th day of August last. Although the time for disallowance would not expire for twelve months from the latter date, the report of the undersigned was made on the 3rd day of September, and Your Excellency was pleased to approve thereof, and to order the disallowance of the Act on the 7th day of September. Immediately afterwards, the undersigned sent, by telegraph, an intimation to the First Minister o Quebec, that this had been done, in consequence of that gentleman having requested the undersigned to give him the earliest possible information as to the action which would be taken in reference to that Statute.

The Quebec Order in Council next proceeds to state a grievance, which seems to differ materially from the one just noticed, inasmuch as it is a complaint that in dealing with the Disallowed Act, Your Excellency's advisers acted with too much expedition. Reference is therein made to a memoradum of the Minister of Justice, dated the 9th day of June, 1868, recommending the course which should be pursued in reference to a review of Provincial Statutes, and the Government of Quebec declare that in the present case of disallowance those rules have not been observed.

The only rule to which this complaint can refer, by any possibility, is the following:—

"That where a measure is considered only partially defective, or "where objectionable, as being prejudicial to the general interests of "the Dominion, or as clashing with its legislation, communication "should be had with the Provincial Government with respect to "such measure, and that in such case the Act should not be disal- "lowed if the general interest permit such a course, until the Local "Government has had an opportunity of considering and discussing

"the objections taken and the Local Legislature has also an oppor-
"tunity of remedying the defects found to exist."

The undersigned does not understand that the adoption of those general rules in 1868 in any way limited or controlled the exercise of Your Excellency's power of disallowance. They were suggestions for the guidance of the Minister of Justice of that time, and for his successors in office, and, in so far as Provincial Governments were concerned, they were merely indications of a line of action which Your Excellency's advisers at that period thought suitable to be adopted. They were not in any sense an agreement with Provincial Governments, and at any time when they may be departed from it would seem that the Provincial Executives have no reason to complain of the exercise of Your Excellency's powers by any other method. In the present instance, it seems apparent that the complaint of departure from these rules is hardly well founded. It can hardly be contended that in dealing with the objectionable Statute, the Provincial Executive was at liberty to proceed with the utmost expedition, but that the Federal Executive was bound to pursue a course of remonstrance and delay which would have led to great confusion and public injury if the view held by the Federal Executive was right. It can hardly be contended that if Your Excellency's Advisers thought the important provisions of the Disallowed Act to be unconstitutional, and in excess of the powers of the Legislature, they should have allowed the Act to be proclaimed, the Judges to be appointed by the Lieutenant Governor, the Circuit Court to be abolished by Proclamation, the new tribunal to exercise its large powers in a great section of the Province of Quebec without authority, suitors to be involved in expense, judgments to be rendered and enforced, seizures made, property sold, personal liberty restricted, while Your Excellency's advisers would be remonstrating with the Provincial Executive and waiting for the Legislative session of 1889, in order to give that Legislature "an opportunity of remedying the defects "found to exist."

It seems to the undersigned that, quoting the language of the rule which, it is claimed was violated, "the general interests" did not "permit such a course."

Under the circumstances which the undersigned has presented in this report he ventures to submit that the Government of the Province of Quebec was under an erroneous impression in supposing that in disallowing the District Magistrates' Act of 1888, Your Excellency's Government was actuated by any disposition whatever to limit the actual right of that Province "to adopt any law deemed necessary "for the good Government and prosperity of the Province, within the "limits of its powers and attributes."

(Signed) JNO. S. D. THOMPSON.
Minister of Justice.