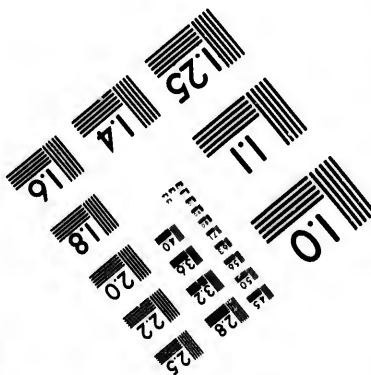
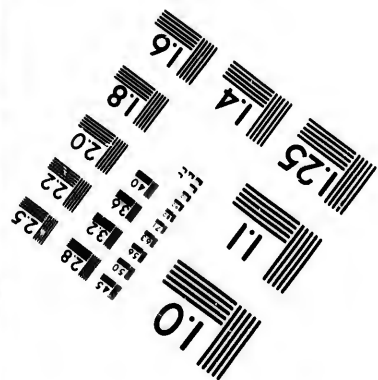
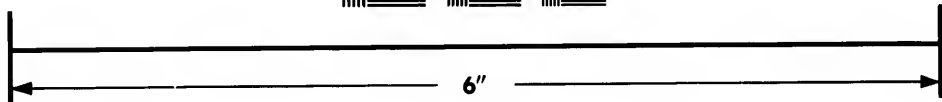
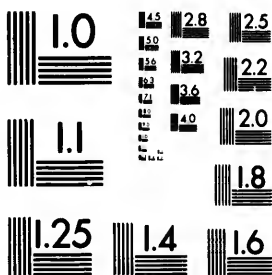


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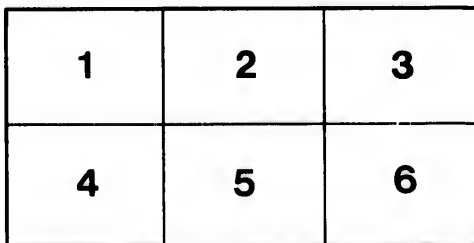
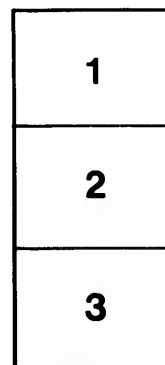
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TO HER MOST EXCELLENT MAJESTY
THE QUEEN.

THE HUMBLE PETITION of the undersigned the Honorable ELZÉAR BEDARD, one of the JUSTICES of the COURT OF QUEEN'S BENCH for the DISTRICT OF MONTREAL, in that part of the Province of Canada which formerly constituted the Province of Lower Canada.

Respectfully Sheweth:

That on the twenty-second day of February, in the year of Our Lord one thousand eight hundred and thirty-six, your Petitioner was appointed one of the Justices of the Court of King's Bench for the District of Quebec, by Letters Patent and Commission under the Great Seal of the Province, bearing date, at Quebec, the day and year aforesaid, and subsequently sanctioned by Warrant under the Royal Sign Manual and Seal of His late Majesty William the Fourth, bearing date, at Windsor, the Sixth day of April, one thousand eight hundred and thirty-six; in virtue of which your Petitioner assumed the duties of Judge of the Court of King's Bench for the District of Quebec, taking his rank immediately after the Honorable Mr. Justice Panet, his senior.

That under several Provincial Statutes, to wit:—34 Geo. III., chap. 6; 3 Geo. IV., chap. 17; 10 and 11 Geo. IV., chap. 7; 7 Viet. chap. 17, the Province of Lower Canada was, for the more convenient administration of justice, divided into five Districts, when Courts of King's Bench, having in each of these divisions the same powers and jurisdiction, were established.

That since his appointment, as aforesaid, your Petitioner has been from time to time called upon to sit, and has acted as Judge of the Court of Queen's Bench in four of the said Districts, namely, in the Districts of Quebec, Three Rivers, St. Francis, and Gaspé; and as such Judge of the Court of Queen's Bench, in the year 1843, your Petitioner became, under the operation of the Provincial Statute 7 Viet. chap. 18, one of the Judges of the "Court of Appeals for Lower Canada," whose jurisdiction extends to the whole Province of Lower Canada.

That up to the 26th day of April last, your Petitioner, whilst attending those several Courts, took, in virtue of his said Commission and Letters Patent, his rank and precedence in the Court of Appeals for Lower Canada both at Montreal and Quebec, and in the sittings in Banco of the Court

of King's Bench at Quebec, Three Rivers, and St. Francis, next immediately after Mr. Justice Panet, his senior on the Quebec Bench, and before Messieurs Justices Mondelet, Day, and Smith, whose Commissions as Judges of the Queen's Bench are posterior in date to the 22d February, 1836.

That when required to act under the 7th Vict. chap. 16, sec. 15, (authorizing in certain cases the Governor, by special instrument under his hand and seal, to appoint and empower any one of the Justices of one Court to sit *ad hoc* in another District,) the Judges have invariably taken their rank and precedence according to the date of their former Commissions as Judges in their own Districts, and not according to the date of the Commission appointing them Judges, *ad hoc*, in the other Districts in which they could claim no jurisdiction by virtue of their original appointment.

That on the 26th day of April last, at the City of Montreal, Letters Patent and a Commission under the Great Seal of the Province were issued, appointing your Petitioner one of the Justices of the Court of Queen's Bench for the District of Montreal; the said Letters Patent containing among others the following clause, to wit:—

“ AND WHEREAS, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and thirty-six, our Royal Uncle and Predecessor, the late King William the Fourth, did by certain Letters Patent and Commission under the Great Seal of our late Province of Lower Canada aforesaid, appoint you, the said *Elzéar Bedard*, one of the Justices of the Court of King's Bench for our District of Quebec, in our said Province, which office you held and enjoyed up to this day, with all its rights and privileges, it is our Royal will and pleasure, and *We* do hereby grant and declare, that you, the said *Elzéar Bedard*, shall have and take rank and precedence in our said Court of Queen's Bench for our District of Montreal, next after our Chief Justice thereof, and before the Honourable Charles Dewey Day, one of the Justices of the same, and in all and every our other Courts within the said part of our Province of Canada which formerly constituted our Province of Lower Canada aforesaid, where by law you may be entitled to sit as a member thereof next after the Honourable Philippe Panet, one of the Justices of our Court of Queen's Bench for our District of Quebec aforesaid, and before the Honourable Dominique Mondelet, Resident Judge of our District of Three Rivers in our Province of Canada aforesaid.”

That your Petitioner deemed it to be a duty he owed to Your Majesty's Government to accept the office conferred upon him, and having taken the usual oaths, he undertook the discharge of his judicial functions out of term and on circuit.

That on the first day of July now last past, being, since your Petitioner's appointment, the first day fixed by law for the sitting in Banco of the Court of Queen's Bench for the District of Montreal, your Petitioner laid before the Judges thereof assembled at Chambers his last mentioned Commission, which had been previously enregistered at full length in the Register of the said Court, and claimed as his just, legal, and vested right, to take rank and precedence in the Court of Queen's Bench for the District of Montreal, next after the Chief Justice thereof, and before the Honourable Charles Dewey Day, one of the Puisné Justices of the said Court;—whereupon the Honourable the Chief Justice Rolland and the Honourable Justices Charles Dewey Day and James Smith adopted, signed, and ordered to be entered of record in the Register, to remain upon the

files of Court, a certain "Determination, Rule, or Order," an authentic copy of which is hereunto annexed, to the following effect, to wit:—

"1st July, 1848.—IN THE JUDGES' CHAMBERS.

"Present:—The Chief Justice and the Three Puisné Judges.

"The Judges assembled for the purpose of enquiring into the question of precedence claimed by Mr. Justice Bedard in virtue of his Commission, and it was first proposed that they now decide thereon: whereupon the three Puisné Judges being of opinion, against the Chief Justice, that such is the right course,—it was determined by the majority of the Judges that they now pronounce on the validity of the grant of precedence given by the Crown to Mr. Justice Bedard over and above Mr. Justice Day and Mr. Justice Smith, his seniors on this Bench. And the majority of the Judges are of opinion, that the rank of a Judge being an incident of his office, it is not in the power of the Crown to deprive him of that rank, and that Mr. Justice Day and Mr. Justice Smith, being the Senior Judges on the Bench, must rank and take precedence accordingly, notwithstanding the clause contained in Mr. Justice Bedard's Commission giving him precedence, which grant, in the Letters Patent, the Judges are of opinion is void and of no effect, as being contrary to law. *Dissentiente*, Mr. Justice Bedard."

All which matters of fact will more fully appear by the authentic documents hereunto annexed.

That by the said "Determination, Rule or Order," (of which your Petitioner complains, as being unjust and contrary to law,) Your Majesty's Royal Prerogative is denied, the public administration of justice impeded, your Petitioner aggrieved and deprived of his just and legal rights, his rank and precedence in the Court to which he has been removed.

That considering the Despatch of the Right Honourable the Secretary of State for the Colonies, bearing date, Downing Street, 4th July, 1848, as containing evidence of a settled practice in England similar to that followed in relation to your Petitioner, he brought it under the consideration of his Honourable Colleagues, with a view of obtaining, upon what he considered a legal ground, a revision of this "Determination, Rule, or Order," but without success.

That there is no judicial tribunal in this Province under whose consideration, the said "Determination, Rule, or Order" of the first July, can be brought for the purpose of reversal on the ground of its injustice and illegality.

Your Petitioner trusting that his judicial conduct has ever been such as to entitle him, (to use the terms of a letter bearing date Downing Street, 27th March, 1839, from the then Secretary of State for the Colonies to your Petitioner), "to the credit of having discharged the sacred trust confided to him with a single-minded and upright desire to acquit himself of his duty to the Queen and to Her Majesty's subjects," cannot entertain the opinion that Your Majesty will sanction a determination which tends to place your Petitioner in a degraded position before the public, after twelve years of honest and faithful labour in his judicial capacity; nor can your Petitioner suppose that the readiness he evinced to place himself at the disposal of Your Majesty's Government, when called upon on public grounds by Your Majesty's Representative so to do, without any previous solicitation or demand on the part of your Petitioner, can be made to result in humiliation to your Petitioner, by the loss of a precedence enjoyed by him in all the Courts of the Province for several years past.

Wherefore your Petitioner humbly prays that Your Majesty may be graciously pleased to take into your Royal consideration the subject matter of the complaint contained in this humble Petition for redress; and by and upon a reference to the Judicial Committee of Your Majesty's Most Honourable Privy Council, or otherwise as to justice may appertain, cause right to be done to your Petitioner on this behalf.

Your Petitioner especially praying, in conclusion, that the said "Determination, Rule, or Order" of the 1st of July, 1848, be rescinded and declared null and void, as being unjust and illegal, and that the entry thereof made by the Prothonotary be declared of no effect whatever, or that such other relief in the premises be granted as in your Royal wisdom and justice Your Majesty may deem fit to allow.

And, as in duty bound, your Petitioner will ever pray.

MONTREAL, *August, 1848.*

REGISTER OF THE PROCEEDINGS had in Her Majesty's Court of Queen's Bench, holding Civil Pleas in and for the District of Montreal, during July Term, 1848.

SATURDAY, the FIRST day of JULY, One thousand eight hundred and forty-eight.

Present:

The Honorable Chief Justice ROLLAND.

“ “ Mr. Justice DAY.

“ “ Mr. Justice SMITH.

It is ordered that the following be entered of Record in the Register, and remain upon the files of this Court:

1st JULY, 1848.

IN THE JUDGES' CHAMBERS.

PRESENT:—The Chief Justice and the Three Puisné Judges.

The Judges assembled for the purpose of enquiring into the question of precedence claimed by Mr. Justice Bedard in virtue of his Commission, and it was first proposed that they now decide thereon: whereupon the three Puisné Judges being of opinion, against the Chief Justice, that such is the right course,—it was determined by the majority of the Judges that they now pronounce on the validity of the grant of precedence given by the Crown to Mr. Justice Bedard, over and above Mr. Justice Day and Mr. Justice Smith, his seniors on this Bench. And the majority of the Judges are of opinion, that the rank of a Judge being an incident of his office, it is not in the power of the Crown to deprive him of that rank, and that Mr. Justice Day and Mr. Justice Smith, being the Senior Judges on the Bench, must rank and take precedence accordingly, notwithstanding the clause contained in Mr. Justice Bedard's Commission giving him precedence, which grant, in the Letters Patent, the Judges are of opinion is void and of no effect, as being contrary to law.

Dissentiente, Mr. Justice BEDARD.

(Signed,) J. R. ROLLAND,
Chief Justice.

“ CHS. D. DAY,
J. B. R.

“ J. SMITH,
J. Q. B.

(Signed,) E. BEDARD,
Dissentiente.

True Copy.

MONK, COFFIN, AND PAPINEAU,
Prothonotary.

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REASONS submitted by Mr. Justice BEDARD, in obedience to the Order in Council bearing date the 12th February, 1845, shewing the grounds upon which he dissented from the "Determination, Rule or Order," pronounced by his Honorable Colleagues on the first of July last, and for the reversal, rescinding, and declaring null of which he has applied to Her Majesty the Queen.

First.—As to the course adopted by Mr. Justice Bedard, who, on the first day of the Term, claimed his precedence in virtue of Letters Patent, (the Chief Justice being of opinion that it was not the right course,) Mr. Bedard observes, that no other course was left to him, except the abandonment of his legal right, without even consulting the Judges. Entertaining no doubt on that point, he had to assert his legal claim either publicly on the Bench, or better, as he thought, in Chambers. Mr. Bedard's legal right of taking precedence could not be exercised against the will of the Judges, and the very seat which he was to occupy on the Bench became a preliminary question, which such of the Judges as felt themselves competent, were bound to decide. No other course was suggested by any of the Judges, save the proposition made by Mr. Justice Bedard, that he might take the rank he claimed, reserving to Messrs. Day and Smith their right of appeal, a proposition which did not meet with the concurrence of these gentlemen, or to take the opinion of the Chief Justice of the Province, and the Quebec Judges, a proposition which did not meet with the approbation of the Honorable Mr. Chief Justice Rolland.

Secondly.—As to the Determination, Rule or Order adopted, dissentiente Mr. Justice Bedard, it is to be observed, that it was never admitted by him, as stated in the Determination, that Mr. Justice Day and Mr. Justice Smith were his seniors on the Bench of Montreal. That statement assumes to be true the very question in controversy. Attempting to prove a proposition that is denied, by assuming the truth of the proposition itself, is what is termed in the schools "a vicious circle," nor can a claim of right be dealt with upon the bare assertions of either party. Had a Member of the Bar been placed over Messrs. Day and Smith, some plausible reasons of expediency might be given against such a nomination, as affecting the loss of rank, stated to be an incident of the Judicial office. But such is not the case. The present case is that of the removal of a Judge of the Court of Queen's Bench from one District to a similar Court in another. As to the exercise of that right by the Crown, we find the following citation in 1st Archbold's Practice of the Court of King's Bench, London Edition of 1826, p. 5:—"In the *Articuli super cartis*, (28 Ed., 1 c. 5,) it is provided, that the 'Justices of this Court shall follow the King, 'so that he may have always near unto him some that be learned 'in the laws.' For some centuries past, however, they have usually sat at Westminster, an ancient Palace of the Crown; but they would of course be obliged to follow the King into any part of the kingdom, if he should think proper to command them to do so; and there is even an instance, in the reign of Edward the First, of this Court having sat at Roxburgh, in Scotland.—M. 20, 21, Ed. 1. Hal. Hist. C. L. 200."

The question then is, which of the Judges is to take rank and precedence as senior? The answer is obvious. The one whom the law acknowledges to be so, either by its own operation, or through the exercise of a legal power in the Crown.

Either of these two propositions being proved, Mr. Bedard's right to take precedence is established. The principles according to which these propositions are to be decided are eminently those of the English Law. They involve a question of Public Law. But were it not so, it will be found that both the old French Law, as administered in certain matters in this country, and the present code in France, are in perfect accordance with English principle on this branch of the law.

First, as to the legal power of the Crown to establish rank and precedence amongst the Judges.

Passing by the old cases in England, such as that of *Master Richard de Abyndon*, to whom Edward the Second gave, by Letters Patent, the same place or precedence in the Court of Exchequer as he had in the time of his predecessor, Edward the First, (History and Antiquities of the Exchequer, p. 57,) it is now a settled principle, that "The King may grant place or precedence to any of his subjects as shall seem good to his Royal wisdom.—" 4 Inst. p. 361, and 1st Blackstone, p. 271. The King, by the Common Law, could have created a Duke, Earl, &c., and could have given him precedence before all others of the same rank, a prerogative not unfrequently exercised in ancient times, but it was restrained by 31 H. 8 c. 10, which settles the place or precedence of all the nobility or great officers of State. This statute does not extend to Ireland, where the King still retains his prerogative without restriction. Christian's note to 1 Black. p. 272." If, therefore, the King could at Common

Law thus deprive a nobleman of his precedence, held as incident to an inheritable title, by placing another over him, how much more must it be within the scope of the prerogative to deal with mere official rank, and that in his own Courts. Again: "It is impossible that Government can be maintained without a due subordination of rank, that the people may know and distinguish such as are over them, in order to yield them their due respect and obedience; and also, that the officers being encouraged by emulation, and the hopes of superiority, may the better discharge their functions; and the law supposes that no man can be so good a judge of the several merits and services as the King himself who employs them." Again, 1 Blackstone, p. 396: "All degrees of nobility and honour are derived from the King, as their fountain, and he may institute what new titles he pleases." These principles laid down in all the books, (Chitty's Prerogative, p. 107; Petersdorf's Abridg. v. Prerogative,) cannot be doubted, any more than that the King (as laid down in Western's Commentaries on the Laws and Constitution of England, p. 88,) "is the source of all judicial power in the State. He is the chief of all Courts of Laws, and the Judges are only his substitutes."

It is laid down in J. Chitty's General Practice, Part v. chap. 1, pages 5 and 6, that "The number of the Judges and Barons of each of the Superior Courts of Law at Westminster, viz.: King's Bench, Common Pleas and Exchequer, constituting the full Court sitting in banc, has varied at different times, according as it has been considered essential to exercise the prerogative unquestionably vested in the King; though according to modern practice, the Legislature, as in the late instance (of 1 William 4th, ch. 70, sec. 1) sometimes gives him express power;" and in a note: "In modern times it has been customary for the King very rarely to exercise his prerogative, but to delegate the expediency of every measure in the least affecting the public to the consideration of Parliament, so that most changes have been made by statute, though the King might of his own authority have effected the object."

These prerogatives in the Sovereign are a necessary consequence of the obligation imposed upon him, of administering justice to the State, a solemn obligation on his part, which alone entitles him to the allegiance of his people. To the Sovereign, then, must be left the means of judging of the best mode of administering that justice, and of choosing his substitutes, as (though in contemplation of Law the King is always present in Court) he cannot administer it but by his Judges.

These principles are those of the French law. "Toute justice émane du Roi; elle s'administre en son nom par des Juges qu'il nomme et qu'il institue," said the Constitutional Charter of France, in 1830. The able writer Proudhon, in his "Traité du Domaine Public," (p. 104, 1 vol.,) says: "Le pouvoir judiciaire, considéré dans sa source est aussi une participation du Domaine de Souveraineté, puisque ses décisions se rendent et s'exécutent au nom du Souverain." This is not new law in France. We find in the Répertoire de Jurisprudence de Guyot v. Préséance, Edition 4, p. 473, 1 vol. :—

"La volonté seule du Prince peut établir des préséances: il en est d'autres qui ne sont point arbitraires, telle que celle d'un Chancelier que sa dignité élève au dessus de tous les officiers qui sont employés dans l'administration de la justice."

"Autrefois l'âge était une raison de préséance:—les vieillards avaient des droits aux premières places: mais aujourd'hui le vieux militaire est précédé par un jeune homme favorisé de la fortune. L'Ancien Magistrat marche après un jeune président."

Domat, whom d'Aguesseau honours with the title of "Le Jurisconsulte des Magistrats," in his "Droit Public," livre I. tit. II. sec. 2, p. 10, No. 3, (Edition folio of 1745,) expresses himself thus:—

"Parmi ces droits du Souverain le premier est celui de l'administration de la justice qui doit être le fondement de l'ordre public soit qu'il la rende lui même dans les occasions qui peuvent l'y engager, où qu'il la fasse rendre par ceux à qui il donne ce droit." And No. 8:—"Comme il est de l'ordre général de la justice et de la bonne police d'un Etat que les services et autres mérites qui peuvent contribuer au bien public soient récompensés ou par des titres d'honneur ou par d'autres graces qui venant de la main du Souverain soient plus distingués; il a seul le droit de dispenser ces sortes de graces, c'est une suite du droit du Gouvernement et de l'Administration de la Justice." And the learned author, after having divided into three sources the causes of honour and dignities, adds, tit. ix. sec. I, No. 22, page 67:—"La volonté du Prince donne la dignité et à ceux qui n'ont pas de charges, et à ceux dont la naissance n'en donne pas." "Le Prince ayant en sa personne la dignité Souveraine à laquelle il est dû un respect entier et parfait, ce respect serait blessé, si on ne respectait à proportion ceux qu'il veut honorer." And elsewhere—lib i. tit. ix. sec. 3. No. 24, p. 78.—"Il faut ajouter pour une autre règle des rangs et des préséances la volonté du Prince qui peut y pourvoir soit lorsqu'il crée des charges; ou en d'autres occasions où il règle le rang des personnes. Ainsi plusieurs ont les leurs par l'ordre qu'il à lui même établi; et c'est toujours cette volonté du Prince qui fait la première règle de cette matière dans les cas où il a pourvu. Car comme c'est en lui, qui réside la dignité suprême, l'autorité Souveraine et le droit de régler tout ce qui regarde l'ordre public, celui des rangs des personnes, ne saurait avoir de règles plus naturelles que celle qu'il ordonne."

And again: No. 26, "Comme on a remarqué pour la première règle des rangs et des préséances entre personnes de divers ordres ou de différentes classes, la Volonté du Prince, elle l'est aussi par les mêmes raisons dans les cas de préséance entre personnes de même ordre ou de même classe."

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And elsewhere, p. 112, til. 16, sec. 4, No. 3: "Il y a cette difference entre les charges Municipales et les autres sortes de charges, comme celles des officiers de justice de finances et autres qu'on appelle officiers du Roi, que comme les fonctions de ceux-ci leur sont commises par le Roi ils en ont pour titre les provisions qu'il leur en donne, au lieu que les fonctions Municipales étant commises à ceux qui les exercent par les communes, managés que ces fonctions regardent ils sont appellés à ces charges par l'Élection de ceux qui ont droit de la faire."

To these citations from Domat, one of a more ancient date may be added from 1 vol. Baequet, Traité des Droits de Justice, ch. iv. pp. 9, 10: "On tient en France pour maxime certaine, que le Roi seul est fondé de droit commun en toute justice, haute, moyenne et basse par tout son Royaume. Et dit on que: *In eo tantum princeps summo omnes thesauri dignitatum reconditi sunt: et ab eo velut a fonte omnes jurisdictiones procedunt, sicut omnia flumini per meatus terre fluunt a mari et ad mare refluant.* Azo. in summâ de Jurisd. omnium jud. Bald. in parag. ad hor. de allod. in usib. feud. *ALSSI lege regis omne imperium in Casarem translata est; omnisque populi potestas in principem translata § item et quod principi de jure nat. gent et civi in Inst.*"

Et Baldus in cap. que sicut Regalis "et in c. unico de Naturâ Feud. in usib. feud., dit que *Rex et quicvis alius princeps qui est Monarcha in suo regno, est solus dominus sui territorii et solus fundatus in jurisdictione et imperio, allegat caput, ubi periculum de elect. in secto*: Partant plusieurs sont d'avis qu'aucun Seigneur ne peut prétendre droit de justice, en aucun fief Terre ou Seigneurie en France, sans titre particulier, concession, ou permission du Roy ou de ses prédécesseurs Rois de France.

"*Quia à principe tantquam à fonte omnes jurisdictionum rivuli sive jura manant: Et in Gallia jurisdictionem nemo habere potest nisi ex concessionis vel permissione principis: COMME DISENT NOS DOCTEURS COUTUMIERS, Maximè Chassanerus in consuetudinibus Burgundior, titulo DES JUSTICES in rubricâ, col. 94, et in titulo DES FIEFS, parag. 4. col. 41. ET LE TEXTE in cap. unico que sicut regalis in usib. feud. DIT QUE potestas constituendorum Magistratum ad justitiam expediendam, de Regalibus est.*"

And p. 10, No. 5: "*Quando jurisdictio est in Manu Regis est propriè in naturâ et substantiâ sui vel in esse suo: cum Rex de jure communi fundatus sit in omni jurisdictione.*"

These principles once admitted, and they do not seem to be denied, the only corollary to be drawn from them is, the unlimited right of the Sovereign to appoint whom he chooses as his substitute, and to assign to such substitute any rank or place, near him, as HE may deem fit, except when the prerogative in such matters has been specially restrained by Statute. Were it otherwise, the Sovereign could be no longer considered as the source and fountain of all justice and honors. He would cease to be the chief of all the Courts, and would be deprived of all power in his special domain.

So much for the right inherent in the Sovereign to assign precedence in virtue of his prerogative.

It now remains to be considered whether Mr. Bedard would have been legally entitled to the precedence which he now claims in virtue of his former commission of 1836, by the mere operation of the Law, even though his precedence were not specially maintained in his Letters Patent.

The principle laid down in Comyn's Digest, vol. iv. p. 579, Verbo Justices, is conclusive in the affirmative:—"If a Justice be removed from one Bench to the other, he shall have precedence according to his seniority;" so if a Baron of the Exchequer be removed to C. P. or B. R. 1 Sid. p. 408. This principle has never been controverted. Far from it; it was decided in cases adjudged before the rule was laid down by Comyn; and this rule has been acted upon ever since. In 1st Sidertin. in p. 408, is given the case of Sir Richard Rainsford, one of the Barons of the Exchequer, who, having been appointed a Judge of the Court of C. P. took his seat over Judge Morton. "Sans vulgar ceremony," says the author, "il seâ sur le Ba suprâ Morton seil. prit lieu de Morton justice quia il fuit fait Baron devant q Morton fuit fait Justice."

In 1628, there is the case of Mr. Justice Croke, who was removed from the Common Pleas to the King's Bench. "He had not a clause of saving superiority, precedency and antiquity; but all the Judges assembled at the Lord-keeper's house agreed that he needed not such saving, that he had never ceased to be a Judge, but was translated only. Yet for better security there was one made according to the precedent of Justice Jones's Patent, when he was removed out of the Common Pleas to be Judge of the King's Bench," which must have been with a clause like that of Justice Nichol's second Patent, mentioned in the same report of saving "superiority, precedency, and antiquity," and similar in effect to the one in question. Croke's Reports, anno 4, Caroli Regis, p. 127.

And that this has been uniformly acted upon ever since, the following cases will sufficiently shew. The reports from which they are taken do not, it is true, mention the form of the Patent. But they show the fact of the parties taking precedence according to their antiquity, and there can be no doubt the Patents were framed accordingly. In many of the cases, too, it is expressly stated by the reporters that the parties "resigned" their place "and" were appointed to their new seat; which shews that they were not in all cases "translated," as it is said in Mr. Justice Croke's case; and that thereupon they had for a moment actually ceased to be Judges. Indeed it is probable that this has been the uniform course since the Statute altering the tenure of the office; as the issuing a Patent to a person already a Judge, appointing him to a place on the Bench of another Court,

might perhaps look like an attempt on the part of the Crown to evade in some degree the Statute. But to proceed to the cases.

1. Mr. Justice Clive was originally appointed to the Bench as Baron of the Exchequer in 1744.—Table to 1 Wils. Rep. He was in II. T. 1753, removed to the C. P.—*Ibid.* The other Puisné Judges of this Court were at the time M. J. Bathurst, originally appointed to the Bench as Judge of the Common Pleas, 2d May, 1753 (see Woolych's Series of the Chancellors, Judges, &c., p. 89,) and Mr. J. Gould, originally appointed to the Bench as a Baron of the Exchequer in M. T. 1761.—Wool. 92. And we find by Wilson's Reports, that on such removal, Mr. Justice Clive took place before both these Judges.

2. Mr. Justice Gould was originally appointed to the Bench as Baron of the Exchequer in M. T. 1761.—Table to 1 Wils. and Wool. 92. He was removed to the C. P. in M. V. 1762.—2 Wils. 149, Wool. 92. The other Puisné Judges of the C. P. at the time, were Mr. Justice Clive, originally appointed to the Bench as Baron of the Exchequer in 1744, (Table to 1 Wils. and Wool. 87,) and Mr. J. Bathurst, originally appointed to the Bench as Judge of the Common Pleas, 2d May, 1753.—Wool. 89. And we find that on such removal, Mr. Justice Gould took place *after* both these Judges.

3. Mr. Justice Yates, originally appointed to the King's Bench II. T. 1764, (Table to 1 Wils.) resigned his seat there, and was appointed to the Common Pleas II. V. 1770, where he sat as junior Puisné Judge, although he had been senior Puisné Judge of the King's Bench, because his first commission as Judge of K. B. was posterior to those of the other Puisné Judges of the Court to which he was removed.—1 Wm. Black: Rep. 681.

4. Mr. Justice Buller was originally appointed to the Bench as Judge of the King's Bench, E. T. 1778, —Cowper, p. 753, 2 Wm. Black. 1185—Wool. 96. He resigned his seat in that Court, and was appointed a Judge of the Com. Pleas in E. V. 1794, 2 II. Black. 385. The Puisné Judges of the Com. Pleas at that time were, Mr. Justice Heath, originally appointed to the Bench as Judge of that Court, 19th July, 1779—Wool. 97; Mr. J. Rooke, originally appointed to the Bench as Judge of that Court 13th November, 1793.—2 II. Black. 211, Wool. 100. And by reference to 2d II. Black, p. 316, it will be found that Mr. Justice Buller invariably took place before both these Judges.

5. Mr. Justice Lawrence was originally appointed to the Com. Pleas II. V. 1794.—5th Term Reports, 549; 2 II. Black, p. 287. In the vacation after Easter Term, in 1794, he resigned, and was transferred to the King's Bench.—2 II. Black, p. 385. The Puisné Judges of the K. B. at that time were, Mr. J. Ashurst, first appointed Judge in the K. B. 22d June, 1769—Wm. Black. 719; 5 Burr. 26, 38; Wool. 95—and Mr. Justice Grose, first appointed Judge in the same Court 9th Feb. 1786; Wool. 99. Mr. Justice Lawrence, therefore, sat after both these Judges, as will be seen by reference to 5th T. R. He was, however, afterwards removed back to the Com. Pleas in II. V. 1808.—9 E. Rep. 329. The other Puisné Judges of this latter Court were then, Mr. Justice Heath, originally appointed a Judge in that Court 19th July, 1779, Wool. 97, and Mr. J. Chambre, originally appointed to the Bench as a Baron to the Exchequer in the long vacation 1798, 1 B. and P. 1. 8 T. Rep. 421, Wool. 102. On this occasion Mr. Justice Lawrence took place in the Com. Pleas, after Mr. Justice Heath, his senior, and before Mr. J. Chambre, his junior, according to their respective original appointments.

6. Mr. Justice Bayley was originally appointed a Judge in the King's Bench, II. V. 1808-9, E. R. 329; 1 Taunt. 295. He was transferred to the Exchequer, M. T., 1830; 1 B. and Ad. 377; 7 Bing. 231. The other Puisné Barons of the Exchequer at that time were Mr. B. Garrow, originally appointed to the Bench as Judge of K. B., May 1816, 1 Moore, 98; 1 Price, 1; 7 Taunton, 339; Wool. 107. Mr. B. Vaughan first appointed to the Bench as Baron of the Excheq. in II. V., 1827; 1 Y. and J. 344; and Mr. Baron Bolland first appointed to the Bench as a Baron of the Excheq. in M. T., 1829; 6 Bing. Rep. 348; and the reports shew that Mr. Baron Bailey, on such removal, took precedence as Senior Puisné Baron.

7. Mr. J. Abbott, afterwards Lord Tenterden, was originally appointed to the Bench as Judge of the Com. Pleas in II. T., 1816; 4 M. and S. 449. He resigned his place there, and was appointed to a seat in the K. B. in E. T., (3 May,) 1816; 5 M. and S. 1, 2, and 6 Taunton, 514-15, where he sat as Puisné Judge till his appointment as Chief Justice in T. V., 1818; 2 B. and Ald. 1. At the time of his appointment as a Puisné Judge of the K. B., the other Puisné Judges of that Court were Mr. J. Bailey, originally appointed to the Bench in that Court in II. V. 1808. 9 E. R. 329, and Mr. J. Holroyd, originally appointed to the Bench in that Court in II. V. 1816, that is, in the vacation of the very Term that he (Mr. J. Abbot) received his first appointment as a Judge in the Com. Pleas. The reports, 5 M and S. shew that Mr. Justice Abbott, on his removal, took precedence after Mr. Justice Bailey, who was his senior as a Judge, but before Mr. J. Holroyd, who was his junior as such, though but by a few weeks.

8. Mr. J. Vaughan was originally appointed Judge, as Baron of the Exchequer, in II. V. 1827; 1 Y. and J. 344. In E. T., 1834, he resigned that appointment, and was appointed a Justice of the Com. Pleas; 1 A. and E. 2. The Puisné Judges of the latter Court at that time were Mr. J. Allan Parke, originally appointed a Judge in the Com. Pleas in II. T., 1815; 4 M. and S., 449; 6 Taunton, 514; Wool., 106. Mr. Justice Gascole, originally appointed as a Judge in the C. P. 1 July, 1824, 2 Bing. Rep. 165, and Mr. Jus-

Justice Bosanquet, originally appointed in H. T., 1829; 4 M. and P. 1. Mr. J. Vaughan accordingly took place after J. J. Parke and Gaslee, and before J. Bosanquet.

9. Mr. B. Alderson was originally appointed as a Judge in the C. P. M. T. 1830, 7 Bing. 124, 234. He resigned his seat in that Court, and was appointed a Baron of the Exchequer, E. T. 1834, 1 A. and E. He found there Mr. B. Vaughan, whose first appointment as a Judge was to the Excheq. in H. V., 1827, 1 Y. and J. 344; Mr. B. Parke, whose first appointment to the Bench was to the K. B. M. T. 1828, 8 B. and C. 552, and Mr. Baron Bolland, whose first appointment was to the Exchequer, in M. T., 1829, 6 Bing. 348. He took place, therefore, as junior Puisné Baron.

10. Mr. J. Williams, whose original appointment was to the Exchequer, H. V. 1834, 1 A. and E. 2, on being transferred to the King's Bench in the following Term, 1 A. and E. 2, took place after J. J. Littledale, James Parke, and Taunton, all of whom were his seniors.

The first, sixth, seventh and eighth of the above cases were cases of transfer from a Court of inferior to one of superior rank. The case of Mr. J. Bedard is a transfer between Courts of precisely the same rank. And as far as the obligations of the eight Judges to discharge judicial functions together, as in the Exchequer Chamber, may be considered as bearing upon the question, an exactly similar obligation rests with the Judges of the two Courts here to meet in the discharge of such functions in the Court of Appeals.

The exercise of the prerogative right of the Crown appears to be of every day occurrence in England. It was exercised in the Commission set forth in 1 Deacon and Chitty's Rep. 2 and 3. And from the Despatch of the Right Honorable the Secretary of State for the Colonies, it would seem to be the constant practice in England, when a Judge of one of the Superior Courts is removed from one of those Courts to another, to insert in his new Patent a clause conferring on him "*the same place, precedence, seniority and antiquity,*" as he enjoyed in virtue of his original Commission.

Mr. J. Bedard observes that the practice must be admitted to be legal, or else it must be said in Canada, that the highest judicial authorities in England have for centuries past misconstrued the law.

It is immaterial whether these Judges took their rank by virtue of a saving clause in their Letters Patent or otherwise. If they did so under a saving clause, then the legal right of the Crown was acknowledged; if there were no such clause in their Letters Patent, then they can only have taken precedence in virtue of the Common Law laid down in Comyn. Anything like an acquiescence on the part of the Judges cannot be supposed without casting gratuitously on the Judges of England the odium of having, on the one hand, assumed a rank and precedence repudiated by the law of the land, and of having, on the other, sanctioned an act of usurpation.

And if the often misapplied Roman quotation, "*Inclusio unius est exclusio alterius,*" can be made use of in this instance, it will be found, on referring to the Provincial Stat. 7 Vic. ch. 16, sec. 6, authorizing the Governor, in case of illness or necessary absence, or of suspension from office of any Judge, to appoint some Advocate as an Assistant Judge, that the Legislature seems to have recognized the right of the Crown to grant rank and precedence to such Advocate, by providing "that nothing therein contained shall be construed to give precedence to any such Assistant Judge over any Puisné Justice of the Court."

As justice and reason are universal, French authorities and decisions may here be invoked.

Loyseau in his "*Traité des Offices,*" (Edition of Paris, 1678,) liv. I. chap. vii. p. 47, after having laid down the general rule of the French law that an "officer loses his rank after his resignation," uses the following terms:—

No. 77. "*Et toutesfois la maxime 'qui vient d'être proposée (Rang perdu ne se recouvre) reçoit une exception notable, 'a sçavoir que s'il y avait continuation sans intermission, non seulement de la séance honoraire, mais 'aussi de l'exercice parfait: alors la mutation d'office ne ferait pas perdre le rang à l'officier qui serait toujours demeuré 'vrai officier conjuncto revera munere utriusque militie. Et ainsi se pratique journellement, qu'un Conseiller 'd'Eglise, prenant un Office de Conseiller Laic, retient son ancien rang, pourvu qu'il soit si avisé que de présenter 'ses Lettres de Nouvel office auparavant, ou du moins quand et quand son résignataire; comme quand un 'Conseiller Laic et un d'Eglise permutent leurs offices ensemble, si tout en même temps ils présentent tous 'deux leurs Nouvelles Lettres de provision j'estime que tous deux, doivent garder leur ancien rang 'pource qu'il ne se peut quoter d'intervalle de temps auquel l'un ou l'autre ait été homme privé et non officier, et ainsi par continuation d'exercice ils ont conservé ce rang ancien.'" The words in Croke's Reports:—*

"Il a été jugé par arrêt de Bordeaux de l'an 1560 rapporté par Papon et par Chenu qu'un Conseiller de Parlement, qui avait été auparavant Conseiller d'un Présidial ayant depuis repris un autre office de Conseiller au mesme Présidial y retiendrait son premier rang: pourceque l'amplitude de la dignité de Conseiller de la Cour comprend en soi l'honneur de tous les officiers inférieurs. Majorque dignitas nulli debet circâ prius dignitatis privilegia præjudicium facere." 1 Loyseau, p. 48.

Another quotation from Domat, loco citato, p. 161 No. 8, applicable to Mr. Justice Bedard's rank and precedence in the Court of Appeals, which seems not to be denied him, on the ground, probably, that he has never ceased to be a Judge, may be cited: "Entre tous officiers de Justice, Police, Finance et de toute autre nature de qui le rang n'est pas fixé par les Regles qu'on vient d'expliquer (one of which is, que si le rang

“ d'une charge est réglé par la volonté du Roy, l'officier aura le rang que lui donne ce titre) il se règle par les différents égards qu'on doit avoir aux diverses causes qui donnent le rang, et comme ces causes sont la dignité, l'autorité, les fonctions, les droits et les privilèges des charges, et se rencontrent différemment en divers degrés dans les différentes espèces de charges : ce qui en fait une infinité de combinaisons, c'est par les vues de ces différentes combinaisons que se règlent les préséances : ainsi par exemple encore que la Justice ordinaire ait de sa nature plus de dignité que n'en ont les autres Jurisdictions, les officiers des Cours des aides précèdent les officiers des Présidiaux à cause que dans leur ordre ils ont plus d'autorité que n'en ont dans le leur les Présidiaux, et qu'ils ont aussi plus de privilèges, et c'est par de semblables vues et par de pareilles proportions que se règlent les rangs de toutes les charges.”

It now remains to be shewn that in the Province with the sanction of the whole of the Judges, the rank and precedence in one Court has invariably been regulated by the date of the first Commission, and not by the date of the last or the “locus” of the court.

In two cases reported, 1 vol. *Revue de Jurisprudence*, p. 122, Nos. 1066 and 1798, argued in the King's Bench at Quebec, the Quebec Judges being equally divided, the Honorable (now Mr. Chief) Justice Rolland was, by a special commission, wherein his antiquity and precedence had been omitted, named the Judge *ad hoc*, and came to Quebec and on “that Bench” took his seat, rank and precedence, and delivered his opinion next after Mr. Justice Bowen the oldest by Commission, and immediately before Messrs. Justices Panet and Bedard.

Mr. Justice Gale of Montreal, under similar circumstances, took his seat before Mr. Justice Bedard in the case of the Ursulines vs. Bothrell.

So in the case Cuthbert and Tellier, July, 1846. Mr. Justice Mondelet of Three Rivers, sitting in Montreal, took his precedence over Messrs. Justices Day and Smith.

Had the principle, now for the first time attempted to be laid down, been recognized, Messrs. Rolland and Gale at Quebec, and Mr. Mondelet at Montreal, should have ranked in these respective Benches after the last Puisné Judge, and according to the date of their respective special commissions. Neither of these gentlemen had ever been invested with any jurisdiction out of their own respective Districts. No acquiescence, any more than in the English cases, can be supposed. Mr. Justice Bedard repudiates the odium of having at any time sanctioned an usurpation, and takes this opportunity most distinctly to repel any imputation which may be cast upon him of having sought at any time to degrade any of his brethren, by seeking over any of the Judges a rank and precedence to which he was not fairly and legally entitled, and which he would rather be inclined to give up, were it not that such a surrender on his part might be properly construed into a dereliction of respect and duty towards his Sovereign, and a submission to an unmerited degradation before the public. The rank and precedence, heretofore, taken by the Judges in this Province, has been thus shown to have been in accordance with the principle laid down by Comyn.

The two propositions laid down as general rules being proved to be correct in law, Mr. Bedard's legal right must be admitted. If there be an exception to them, the *onus probandi* lies on the Exceptors.

No law can be cited limiting the Royal prerogative : nor can it be proved that any of the legal rights of Messrs. Day and Smith are violated or infringed by Mr. Justice Bedard's removal to Montreal with the same precedence he held formerly over these gentlemen, both in the Court of Appeals and in the Queen's Bench, at Quebec, Three Rivers, and St. Francis. The proposition stated in the determination adopted by the Montreal Judges that “the rank of a Judge being an incident to his office, it is not in the power of the Crown to deprive him of that rank”—if true, is equally applicable to Mr. Justice Bedard. But Messrs. Justices Day and Smith cannot complain of the loss of a rank which they have never had or enjoyed, and for which they can show neither a title from the Crown nor from the law. When they get it from either of these sources, then the principle laid down by Comyn may be applicable to them in case of removal, and it may not be then in the power of the Crown to alter their rank and precedence. Were the law relating to the independence of the Judges, which is the same in Canada as in England, to be construed so as to deprive Her Majesty of her Royal prerogative, and in this instance Mr. Bedard of his precedence, it could no more be said that rank is an incident of office, because then there would be on the part of the ancient Judge a real loss—the loss of a rank and precedence already enjoyed and possessed even in a superior Court, in virtue of a legitimate title recognized by law. The next claim of a Puisné Judge alleging his rank as a legal incident of his office, would be a legal title to the Chief Justiceship in case of vacancy, independently of the Royal prerogative. It cannot be said that the right to confer a special precedence necessarily involves a right to supersede and to deprive of the same precedence, for the purpose of shewing the abuses which might grow out of this right, when improperly exercised by a Government disposed to gratify its personal or political partialities and antipathies ; because the right to confer may very properly be in the Crown, and the right of superseding taken away by law. The right of the Crown of appointing for instance a Chief Justice from the Bar, and thereby overlooking the rank and precedence of the Puisné Judges, has never been doubted, and still it has never been imagined that this right of the Crown having been once exercised, it necessarily involved a right on the part of the Crown to supersede him :

and this for the plain reason that the law has limited in this respect the prerogative, and made its exercise final by making the Judges once named by the Crown independent.

What the Crown could do either in England or in Canada, before the Judges were made independent of the Executive alone, it can do now, so long as the incumbent remains in the undisturbed possession of his office during good behaviour. True, such a construction of that Statute would not give rise to promotion: but it was not to feed projects of advancement that the Legislature of the country in 1843 (like Louis XI. in 1567, and after him the English Parliament in 1700,) withdrew the Judges from the "domaine de la Souveraineté, or the exclusive power of the Crown, and declared them independent. All these Legislators must be presumed to have respected "Lo Sacerdoce Judiciaire," and not to have opened to the Judges a new field of ambition. Once named, the Judge becomes invested with a character that approaches the sacredness of religion. He is to have no other alliance but the one he has contracted with "*La Justice*." Far from him, then, all fear or hope which may cause him to forget his noble bride, and far from him any attachment which may even for a moment divert him from the love he owes to his chosen consort.

In the absence, then, of any law or acknowledged practice in England or in Canada to the contrary, the general principles of the law must prevail, and Mr. Bedard's legal right to claim precedence as Senior be acknowledged, and the present determination considered as a violation of the law of the land.

All which nevertheless is humbly submitted.

E. BEDARD.

PROVINCE OF CANADA,
District of Montreal.)

The Honorable Elzéar Bedard, one of Her Majesty's Justices of the Court of Queen's Bench for the District of Montreal, being duly sworn, on the Holy Evangelists, doth depose and say,—

That the matters of fact stated in the Petition to Her Most Excellent Majesty the Queen, and Reasons hereunto annexed, are true; and further saith not and hath signed.

(Signed,) E. BEDARD.

Sworn before me
this

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at the City of Montreal,
1848.

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APPENDIX.

ABSTRACT OF THE DOCUMENTS transmitted by the Petitioner, Mr. J. BEDARD.

No. 1.

COMMISSION appointing PHILIPPE PANET, Esquire, to be one of His Majesty's
 PUISNE JUDGES for the DISTRICT OF QUEBEC.

PROVINCE OF LOWER CANADA.

(Signed,) AYLNER.

WILLIAM THE FOURTH by the Grace of God, of the United Kingdom of Great Britain and Ireland, King,
 Defender of the Faith. To all to whom these presents shall come, or whom the same may concern,

GREETING :

KNOW YE, that confiding in the loyalty, integrity, knowledge, and ability of PHILIPPE PANET, of the City of Quebec, in our Province of Lower Canada, Esquire, We, of our especial grace, certain knowledge, and mere motion, have assigned, constituted, and appointed, and by these presents do assign, constitute, and appoint the said PHILIPPE PANET to be one of our Justices of our Court of King's Bench for our District of Quebec, in our said Province of Lower Canada—to have, hold, exercise, and enjoy the said office with all and singular the rights, powers, privileges, profits, and emoluments to the said office belonging, in as full and ample manner as the same by law may be held, exercised, and enjoyed for and during our pleasure, and the residence of the said PHILIPPE PANET within our said Province of Lower Canada.

In testimony whereof, we have caused these our Letters to be made Patent, and the Great Seal of our said Province of Lower Canada to be hereunto affixed. WITNESS, our Right Trusty and Well Beloved MATHEW LORD AYLNER, Knight Commander of the Most Honorable Military Order of the Bath, our Captain General and Governor in Chief in and over our Provinces of Lower Canada and Upper Canada, Vice Admiral of the same, &c. &c. &c.; at our Castle of Saint Lewis, in our City of Quebec, in our said Province of Lower Canada, the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and thirty-two, and in the third year of our Reign.

(Signed,) D. DALY,
 Secretary.

I hereby certify the foregoing to be a true and correct copy of the Record of the original Commission, with which it has been carefully examined by me.

R. A. TUCKER,
 Registrar.

PROVINCIAL REGISTRAR'S OFFICE,
 Montreal, 22d July, 1848.

No. 2.

LETTERS PATENT bearing date, at Quebec, 22nd February 1836, appointing ELZEAR
 BEDARD, Esquire, to be one of the JUSTICES of the COURT OF KING'S BENCH for the
 DISTRICT OF QUEBEC. *Same terms as in No. 1.*

No. 3.

COMMISSION bearing date, at Montreal, the 1st day of June 1842, appointing DOMINIQUE
 MONDELET, Esquire, to be RESIDENT JUDGE for the DISTRICT OF THREE RIVERS.
Same terms as in No. 1.

No. 4.

COMMISSION bearing date, at Montreal, the 21st day of June 1842, appointing CHARLES DEWEY DAY, Esquire, one of the JUSTICES of the COURT OF KING'S BENCH for the DISTRICT OF MONTREAL. *Same terms as in No. 1.*

No. 5.

COMMISSION bearing date, at Montreal, the 23rd day of April 1847, appointing the Honorable JAMES SMITH, a JUSTICE of the COURT OF QUEEN'S BENCH for the DISTRICT OF MONTREAL. *Same terms as in No. 1.*

No. 6.

COMMISSION appointing the Honorable ELZEAR BEDARD, one of the JUSTICES of the COURT OF QUEEN'S BENCH for the DISTRICT OF MONTREAL.

PROVINCE OF CANADA.

ELGIN AND KINCARDINE.

VICTORIA by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To our Trusty and Well Beloved the Honorable ELZEAR BEDARD, and to all others whom these presents may concern,

GREETING :

KNOW YE, that we having taken into our Royal consideration the loyalty, integrity, and ability of you, the said ELZEAR BEDARD, of our especial grace, certain knowledge, and mere motion, have assigned, constituted, and appointed, and by these presents do assign, constitute, and appoint you, the said ELZEAR BEDARD, to be one of the Justices of our Court of Queen's Bench for our District of Montreal, in that part of our Province of Canada which formerly constituted the Province of Lower Canada, in the room and place of the Honorable Samuel Gale, resigned; to have, hold, exercise, and enjoy the said office unto you, the said ELZEAR BEDARD, for and during your good behaviour, and your residence within that part of our said Province of Canada which formerly constituted our Province of Lower Canada, together with all and every the rights, profits, privileges, and emoluments unto the said place and office belonging, with full power, and all and every the rights, duties, and functions of a Justice of our said Court of Queen's Bench for our District of Montreal aforesaid, to exercise and execute in as full and ample manner as the same by law may or ought to be done.

And whereas, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and thirty-six, our Royal Uncle and Predecessor, the late King William the Fourth, did, by certain Letters Patent and Commission under the Great Seal of our late Province of Lower Canada aforesaid, appoint you, the said ELZEAR BEDARD, one of the Justices of the Court of King's Bench for our District of Quebec, in our said Province, which office you have held and enjoyed up to this day, with all its rights and privileges, it is our Royal will and pleasure, and we do hereby grant and declare that you, the said ELZEAR BEDARD, shall have and take rank and precedence in our said Court of Queen's Bench for our District of Montreal, next after our Chief Justice thereof, and before the Honorable Charles Dewey Day, one of the Justices of the same, and in all and every our other Courts within the said part of our Province of Canada which formerly constituted our Province of Lower Canada aforesaid, where by law you may be entitled to sit as a member thereof, next after the Honorable Philippe Panet, one of the Justices of our Court of Queen's Bench for our District of Quebec aforesaid, and before the Honorable Dominique Mondelet, Resident Judge of our District of Three Rivers, in our Province of Canada aforesaid.

In testimony whereof, we have caused these our Letters to be made Patent, and the Great Seal of our said Province of Canada to be hereunto affixed. WITNESS, our Right Trusty and Right Well Beloved Cousin, JAMES EARL OF ELGIN AND KINCARDINE, Knight of the Most Ancient and Most Noble Order of the Thistle, Governor General of British North America, and Captain General and Governor in Chief in and over our Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice Admiral of the same, &c. &c. &c. At Montreal, in our said Province, this twenty-sixth day of April, in the year of our Lord one thousand eight hundred and forty-eight, and in the eleventh year of our Reign.

By Command,

R. B. SULLIVAN,
Secretary.

I hereby certify the foregoing to be a true and correct copy of the Record of the original Commission, with which it has been carefully examined by me.

R. A. TUCKER,
Registrar.

No. 7.

CERTIFICATE of the OATHS taken by Mr. J. BEDARD.

No. 8.

COMMISSION appointing the Honorable D. MONDELET a JUDGE, *ad hoc*, in a certain case.

PROVINCE OF CANADA.

His Excellency Lieutenant General the Right Honourable CHARLES MURRAY EARL CATHCART, of Cathcart, in the County of Renfrew, K.C.B., Governor General of British North America, and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice-Admiral of the same, and Commander of Her Majesty's Forces in British North America.

To the Honourable DOMINIQUE MONDELET, Resident Judge for the District of Three Rivers,

GREETING :

WHEREAS in and by an Act of the Parliament of the Province of Canada, made and passed in the seventh year of Her Majesty's Reign, chapter sixteen, and intituled, "An Act to repeal certain Acts therein mentioned, and to make better provision for the Administration of Justice in Lower Canada," it is among other things enacted, that whenever the four Justices of the Court of Queen's Bench for the District of Quebec or of Montreal, shall be equally divided in any cause or matter, so that no judgment can be given therein, it shall be the duty of the Clerk or Prothonotary of the Court, when thereunto duly required in writing by any of the parties, to report the fact under his hand and the seal of the Court to the Governor of the said Province; and it shall be lawful for the said Governor of the said Province, by an instrument under his hand and seal, to appoint and empower any one of the Justices of any other of the said Courts of Queen's Bench or any Circuit Judge, to sit *ad hoc* with the Justices of the said Court so equally divided, for the purposes of hearing and determining the cause or matter in which they shall be so divided; and the Justice so appointed *ad hoc*, when acting as such, shall have, during the continuance of his appointment aforesaid, and with regard to such cause or matter as aforesaid only, the same powers and authority as any other Justice of the said Court of Queen's Bench, as in and by the said Act, reference being thereunto had, may more fully appear.

AND WHEREAS, it hath been duly certified unto me by the Prothonotary of the Court of Queen's Bench in and for the District of Montreal, that in a certain cause now pending before the said Court, wherein the Honorable James Cuthbert is the Plaintiff and Antoine Tellier is the Defendant, the four Justices of the said Court are equally divided, so that no judgment can be given therein.

NOW KNOW YOU, that in virtue of the authority conferred upon me in and by the said Act, I have appointed and empowered, and by this instrument under my hand and seal do appoint and empower you, the said DOMINIQUE MONDELET, to sit *ad hoc* with the said Justices of the said Court so as aforesaid equally divided, for the purpose of hearing and determining the said cause so pending in the said Court of Queen's Bench for the District of Montreal as aforesaid. To have and to hold unto you, the said DOMINIQUE MONDELET, during the continuance of your said appointment and with regard to the said cause, the same powers and authorities as any other Justice of the said Court of Queen's Bench during pleasure, subject in all things to the provisions, enactments, and requirements in the above-mentioned and in part recited Act contained.

GIVEN under my hand and Seal at Arms, at Montreal, in our said Province, this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and forty-six, and in the ninth year of Her Majesty's Reign.

CATHCART.

By Command,

D. DALY,
Secretary.

PROVINCIAL REGISTRAR'S OFFICE,
Montreal, 12th August. 1848.

I do hereby certify the foregoing, to be a true and faithful copy of the Record of the original Commission, with which it has been carefully examined by me.

R. A. TUCKER,
Registrar.

No. 9.

INSTRUMENT bearing date at Montreal, the 7th day of May 1834, appointing the Honorable JEAN ROCH ROLLAND, a JUDGE, *ad hoc*, in the case of MERCIER vs. BLANCHET, pending at QUEBEC. *Same terms as in No. 8.*

No. 10.

COMMISSION bearing date at Montreal, the 7th day of July 1845, appointing the Honorable SAMUEL GALE a JUSTICE, *ad hoc*, in the case of the URSULINE NUNS *vs.* THOMAS BOTHERELL, pending at QUEBEC. *Same terms as in No. 8.*

No. 11.

PROVINCE DU CANADA,
District de Montreal. }

COUR DU BANC DE LA REINE.

MARDI le Vingt-huitieme jour du mois de JUILLET, mil huit cent quarante six.

PRESENS :

L'Honorable Juge en Chef VALLIERES DE ST. REAL.

“ Mr. le Juge ROLLAND,

“ Mr. le Juge GALE,

“ Mr. le Juge MONDELET, Juge résident du District des Trois

Rivières, et nommé Juge, *ad hoc*, par Commission du vingt six de Mai dernier, en cette cause.

L'Honorable Mr. le Juge DAY.

No. 401.—L'Honorable JAMES CUTIBERT, Fenier, de la Paroisse de Berthier, dans le District de Montréal, Seigneur, Propriétaire, et en possession du Fief et Seigneurie de Berthier dans le dit District,

Demandeur :

vs.

ANTOINE TELLIER, Cultivateur, au dit lieu de Berthier,

Défendeur.

LA Cour après avoir entendu les parties par leurs Avocats, examiné la procédure, pièces produites et preuve et sur le tout avoir délibéré, considérant que le Défendeur à satisfait à l'obligation où il étoit de faire déclaration et reconnaissance à Terrier, sur laquelle est fondée la présente action, et ce par acte en forme authentique reçu devant Maître Jean-Baptiste Chabot, Notaire, le Commissaire à Terrier, nommé par cette Cour pour exécuter les Lettres de Terrier en question, et un autre Notaire, le dit acte en date du Deux Décembre, mil huit cent trente quatre, déclarant bien fondée l'exception péremptoire plaidée à cet égard par le Défendeur a débouté et deboute l'action du Demandeur avec dépens.

(Mr. le Juge en Chef Vallières de St. Real, et Mr. le Juge Gale ne concourant pas à ce Jugement.)

(Vraie Copie.)

MONK, COFFIN, & PAPINEAU,
Prothonotary.

No. 12.

PROVINCE OF CANADA.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

THE MEMORIAL of JAMES SMITH, of Montreal, one of the JUSTICES of Your Majesty's Court of QUEEN'S BENCH for the DISTRICT OF MONTREAL.

Humbly Represents:

That Your Majesty's Memorialist was, on the twenty-sixth day of April, 1847, appointed one of the Justices of Your Majesty's said Court, for the District of Montreal.

That by the law of this Province, the Justices of the Queen's Bench hold their Commissions during good behaviour, and take rank and precedence according to the date of such Commissions.

That on the retirement of the Honourable Mr. Gale (a Puisné Justice) from the Bench of Montreal, the Honourable Mr. Bedard was appointed to fill the vacancy. That for the purpose of supplying the vacancy created by the retirement of Mr. Gale, Mr. Justice Bedard, who had been before then one of Your Majesty's Puisné Judges of the Court of Queen's Bench for the District of Quebec, resigned his office and ceased to be a Judge.

That by the Commission appointing Mr. Bedard to be one of the Justices of the said Court in Montreal, precedence is given to him over Your Majesty's Memorialist.

That by the precedence thus given to him by his said Commission, your Memorialist humbly conceives that injustice is done to him, and that the rights and privileges conferred upon him by his Commission from Your Majesty have been infringed upon and violated, without any just cause or reason whatsoever being assigned.

Your Majesty's Memorialist most humbly represents, that his rank and position as one of the Justices of the Court in Montreal, a rank and position, as Your Majesty's Memorialist humbly conceives, which is secured to him by the law of the Province and by the universal practice followed in Your Majesty's Courts of Justice, cannot with justice be set aside without any reason or cause whatsoever. Your Majesty's Memorialist would humbly observe, that the granting such precedence is in truth a plain evasion and violation of the spirit and true meaning of the law of the Province, by which the rights and privileges of the Justices of Your Majesty's Court of Queen's Bench are secured; and that if vacancies in one Court are to be filled by the transfer of Judges from other Courts, independent of, and in no way connected with the one in which the vacancy occurs, with precedence over the remaining Justices, it would have the effect of degrading them in rank and in public estimation, and of depriving Your Majesty's subjects occupying similar positions of all hope of advancement in Your Majesty's service; and it would be, moreover, eminently detrimental to the public service and the administration of justice; and, above all, it would strike at the root of the independence of the Bench, by holding out hope of preferment from political partizanship or otherwise.

While Your Majesty's Memorialist fully recognizes the right of Your Majesty to raise to the Bench of Justice any person qualified to fill the office, and possessing the confidence of Your Majesty, Your Majesty's Memorialist humbly conceives, that the course and practice followed by Your Majesty in all Your Majesty's Courts of Justice, except in the cases of the Chief Justices, has never been, in appointing a Puisné Judge, to grant to him, by his Commission, precedence over the other Puisné Judges of the Court to which he is appointed.

Your Majesty's Memorialist therefore humbly submits his present remonstrance to Your Majesty's favourable consideration, and humbly prays that Your Majesty would disallow the Commission of Mr. Justice Bedard, in so far as the same grants to him precedence over Your Majesty's Memorialist.

And Your Majesty's Memorialist, as in duty bound, will ever pray.

(Signed,) J. SMITH.
J. Q. B.

Montreal, 30th May, 1848.

SECRETARY'S OFFICE,

MONTREAL, 6th June, 1848.

SIR,

I have it in command from His Excellency the Governor General, to acknowledge the receipt of your letter of the 30th May ultimo, addressed to His Excellency, enclosing a Memorial to Her Most Gracious Majesty the Queen, on the subject of the appointment of Mr. Justice Bedard, which Memorial you request His Excellency to transmit to Her Majesty's Secretary of State for the Colonies, to be laid before Her Majesty.

His Excellency commands me to inform you that your Memorial will be transmitted as you desire, and at the same time to state for your information, that, at the instance of Mr. Justice Day, His Excellency has already caused the same question that you have submitted, arising out of the terms of Mr. Justice Bedard's Commission, to be transmitted to Her Majesty's Government, the decision upon which question will be communicated to you as soon as received in this country.

His Excellency commands me to say, that in transmitting your Memorial he will feel obliged to state, for the information of Her Majesty's Government, in reference to that paragraph of your Memorial which represents "that by the law of this Province the Justices of the Court of Queen's Bench hold their Commissions during good behaviour, and take rank and precedence according to the date of such Commission," that His Excellency knows of no law of this Province which makes the Justices of the Court of Queen's Bench necessarily take precedence according to the dates of their Commissions, unless such a construction can be given to the Act for securing the independence of the Judges.

I have the honour, &c.,

R. B. SULLIVAN,
Secretary.

The Honourable Mr. JUSTICE SMITH,
&c. &c. &c.

A true Copy,

E. C. PARENT,
Asst. Secy.

No. 13.

MONTREAL, PROVINCE OF CANADA,
19th May, 1848.

TO HIS EXCELLENCY THE EARL OF ELGIN AND KINCARDINE,
GOVERNOR GENERAL, &c.

THE MEMORIAL of CHARLES DEWEY DAY, Senior PUISNE JUSTICE of the COURT of QUEEN'S BENCH for the DISTRICT OF MONTREAL.

Respectfully Shews:

That by the late resignation of the Honourable Samuel Gale, your Memorialist became the Senior Puisne Judge of the said Court, and was entitled to take precedence there, next after the Chief Justice of the District.

That your Memorialist has this day had communication of Letters Patent under the Great Seal of the Province, appointing to the office of Judge of the said Court the Honourable Elzéar Bedard, formerly Junior Puisné Judge of the Court of Queen's Bench for the District of Quebec, and assigning to him, in terms, precedence over your Memorialist.

That the order of precedence of Puisné Judges, according to usage and law, ought to be regulated by the dates of their respective Commissions; and any disturbance of this order, by conferring upon one Judge a special rank at the expense of another, is an interference with an acquired right inconsistent with the spirit of the Statute made for securing the independence of the Judges; and as your Memorialist humbly submits, is an unusual, if not an excessive, exercise of Executive power.

That the reason assigned in the said Letters Patent for depriving your Memorialist of his right of precedence, by thus preferring the Honourable Elzéar Bedard, is, in his humble opinion, unsound and insufficient. Mr. Justice Bedard has never heretofore held Judicial authority in any Court of original jurisdiction in this District—and moreover by his resignation of the office of Puisné Judge for the District of Quebec, as announced in the *Official Gazette*, he ceased to possess any Judicial rank or character whatever, and can now claim them by virtue and from the date only of the said Letters Patent.

That your Memorialist is aggrieved by this unexpected degradation from his rank of seniority. Upon a careful review of his Judicial conduct, he is unconscious of any act which has merited from the Provincial Government the indignity of which he complains; and he relies upon Your Excellency's sense of justice, and familiar acquaintance with the institutions of a country, where it is seldom claimed in vain, to extend a favourable consideration to his remonstrance, and to aid his endeavours to obtain redress.

Your Memorialist therefore prays, that Your Excellency will be pleased to transmit to the Imperial Government this his Memorial, (with such other documents and information as may be deemed necessary,) to be submitted to the proper authorities there, and for the decision of Her Most Gracious Majesty the Queen; and your Memorialist further prays that, in order to avoid the indecorum of a contest between Judges as to their right of precedence in Court, Your Excellency will be pleased to grant, either to your Memorialist or to Mr. Justice Bedard, if he desire it, leave of absence from the duties of the Superior Courts, until Her Majesty's pleasure in the premises be made known.

And your Memorialist has the honour to be, with profound respect,

Your Excellency's most humble servant.

(Signed.) CHS. D. DAY.

A true Copy,

E. C. PARENT,
Asst. Secy.

—o—

(COPY.)

SECRETARY'S OFFICE,

MONTREAL, 27th May, 1848.

SIR,

I have the honour to acknowledge the receipt of your letter of the 23d May instant, which was placed in my hands on the 25th, inclosing a Memorial to the Governor General on the subject of the order of precedence of the Puisné Judges of the Court of Queen's Bench for the District of Montreal, as the same is affected by the Commission lately granted to the Honourable Mr. Justice Bedard.

I have laid the Memorial before His Excellency, and am commanded to convey to you His Excellency's pleasure regarding the complaint you have addressed to His Excellency.

You complain that the Honourable Elzéar Bedard, formerly Junior Puisné Judge of the Court of Queen's Bench for the District of Quebec, has had assigned to him by his Commission precedence over you—you being, on the resignation of Mr. Justice Gale, Senior Puisné Judge of the Court of Queen's Bench at Montreal.

You say that, according to usage and law, the precedence of Puisné Judges ought to be regulated by the dates of their respective Commissions, and that any disturbance of this order, by conferring upon one Judge a special rank at the expense of another, is an interference with an acquired right, inconsistent with the spirit of the Statute made for securing the independence of the Judges, and an unusual if not an excessive exercise of Executive power.

You further state that Mr. Justice Bedard has never heretofore held Judicial authority in any Court of original jurisdiction in the District of Montreal; and moreover by his resignation of the office of Puisné Judge of the District of Quebec he ceased to possess any Judicial rank or character whatever, and can now claim them only by virtue of and from the date of his present Commission.

You pray His Excellency to transmit your Memorial, with such other documents and information as may be deemed necessary, to Her Majesty's Government in England, to be submitted to the proper authorities there, and for the decision of Her Most Gracious Majesty the Queen; and that in order to avoid the indecorum of a contest between Judges as to their right of precedence in Court, leave of absence may be granted to you or Mr. Justice Bedard until Her Majesty's pleasure shall be made known.

His Excellency commands me to say, that before deciding upon giving to the Court of Queen's Bench, in the District of Montreal, the advantage of the Judicial talents and experience of Mr. Justice Bedard, whose Commission as Judge of the Court of Queen's Bench for Quebec bears a much earlier date than yours for the District of Montreal, His Excellency considered whether this object could be accomplished without placing that gentleman in a lower position with regard to precedence than he was entitled to expect from his rank and length of service, relatively to others with whom he might exercise the functions of a Judge in this District; and being advised that the prerogative of the Crown intrusted to him, permitted the arrangement of rank and order of precedence in the Court, the place of Judge in the Court of Queen's Bench in the District of Montreal, with the precedence designated in his present Commission, was offered by His Excellency's command to Mr. Justice Bedard.

His Excellency sees no reason to doubt the correctness of the legal advice by which he was guided; but nevertheless he sees no objection to the transmission of your Memorial, with all necessary documents and information, to Her Majesty's Government; which transmission His Excellency commands me to inform you will take place without delay.

As regards your personal complaint of degradation in being placed next in order of precedence to Mr. Justice Bedard, viewing it apart from the legal question you have raised, the Governor General commands me to say, that I cannot agree with the opinion expressed in your Memorial, or think that any degradation of yourself or intention to degrade you is to be implied from the proceeding. He would indeed regret very much to find that he was prevented from the construction of law or by indelible usage, from availing himself of the services of Judges of the Superior Court of Quebec and Montreal, or that any rule existed which would limit the prerogative of the Crown as to the precedence of Puisne Judges in these Courts, which would require a Judge removed from one Court to another of greater labour in order to make his public services the more available, to descend in the order of precedence below others who had been long accustomed to precede in the exercise of Judicial functions in the Court of Appeals as well as at the sittings of the Court of Queen's Bench held at Three Rivers and at Sherbrooke, when the Judges of the Courts of Queen's Bench of Quebec and Montreal had been brought together.

His Excellency further commands me to say, that he has not sufficient doubt of the legal question which you state to be involved, or apprehension of an indecorous contest on the subject of precedence between two gentlemen exercising the office of Her Majesty's Judges, to induce him to comply with your request for a leave of absence, or suggest the absence of Mr. Justice Bedard. If there be a legal question remaining open, His Excellency cannot see how your rights can be compromised in any way by the order of precedence to be observed in accordance with the Commission of Mr. Justice Bedard, during any time which may intervene between this period and the final solution of the doubts you have submitted on the legal question stated in your Memorial. His Excellency is informed that the administration of justice and the rights of suitors in this extensive and important District, require the presence and active exertions of all the Judges, and His Excellency cannot permit these great interests to suffer by any personal contests on the subject of precedence between public servants.

I have the honour to be,
Sir,
Your most obedient servant,

(Signed,) R. B. SULLIVAN,
Secretary.

The Honourable Mr. JUSTICE DAY,
&c. &c. &c.

A true Copy,

E. C. PARENT,
Asst. Secy.

No. 14.

MONTREAL, 20th June, 1848.

TO HIS EXCELLENCY THE EARL OF ELGIN AND KINCARDINE, GOVERNOR GENERAL.

MAY IT PLEASE YOUR EXCELLENCY,

I take the liberty of addressing Your Excellency directly in continuation of the subject of my Memorial of the 23d of May last, complaining of the precedence granted to Mr. Justice Bedard, because the present communication, as well as the former, in so far as the legal question is involved, is intended for Your Excellency's consideration as the proper channel of communication with Her Majesty's Government.

To have submitted the matter to Your Excellency's legal advisers here would of course have been unavailing, for these gentlemen having already become responsible for the legality of the Letters Patent issued upon their advice, could grant me no redress without such plain acknowledgment of error as Governments must ever be unwilling to make.

The only portion of my Memorial upon which I expected a decision from the Provincial Government, was that soliciting leave of absence for myself or Mr. Justice Bedard, if he desired it, from the duties of the Superior Courts, until Her Majesty's pleasure could be known. In answer to this respectful solicitation, I am informed by a letter from the Honourable Secretary of the Province, bearing date the 27th day of May last, that Your Excellency commands him to say, that Your Excellency has not sufficient doubt of the legal question which I state to be involved, or apprehension of an indecorous contest on the subject of precedence between two gentlemen exercising the office of Her Majesty's Judges to induce him to comply with my request for a leave of absence, or to suggest the absence of Mr. Justice Bedard; that if there be a legal question remaining open, Your Excellency cannot see how my rights can be compromised in any way by the order of precedence to be observed in accordance with the Commission of Mr. Justice Bedard, during any time which may intervene between this period and the final solution of the doubts I have submitted on the legal question in my Memorial; that Your Excellency is informed that the administration of justice and the rights of suitors in this extensive District, require the presence and active exertions of all the Judges, and that Your Excellency cannot permit these great interests to suffer by any personal contest on the subject of precedence between public servants.

This answer, although it purports, in accordance with official observance, to be written by Your Excellency's command, evidently proceeds from Your Excellency's legal and constitutional advisers; and I must be permitted to deal freely with it as such, without being supposed to forget for a moment the duty which I owe to the Representative of my Sovereign. Mr. Secretary's letter was delivered to me but a short time before my departure for the Court of Appeals at Quebec, and both the matter and the manner of it were such as to induce me to suspend my reply until I could have an opportunity for deliberation, and a calm review of the whole subject. Upon the manner of the answer, which is certainly one of marked though possibly not intentional disrespect, I am not disposed to dwell; but with regard to the matter, I mean the refusal of the leave of absence and the reasons assigned for it, I must take leave to offer a few remarks.

The legal advisers of Your Excellency are pleased to treat my pretensions as so frivolous and unsubstantial as scarcely to make a question, and therefore it is implied that there is no occasion for leave of absence being asked or

granted. The present difficulty, however, is not to be so disposed of. A claim of right cannot be dealt with merely upon the unreasoned assertions of official authority. The question raised is a grave and important one, and is to be settled, not by any show of contempt for one opinion or of confidence in another, but by the sober application of the principles of reason and law. My conviction of the soundness of my pretension, formed after much reflection and research, is at least sincere; and it is a source of gratification and encouragement to me to know, that I am sustained in it by not a few of the best legal opinions in the country. Another reason assigned for the refusal of my request is, that my "rights cannot be compromised in any way by the order of precedence to be observed in accordance with the Commission of Mr. Justice Bedard, during any time which may intervene between this period and the final settlement of "the question." This is, I must confess, a doctrine quite new to me, and would sound oddly enough in a Court of Justice. How stands the proposition? It is incontrovertible that before the appointment of Mr. Justice Bedard I held rank as Senior Puisné Judge of the Court of Queen's Bench at Montreal: it is equally so, that by his special precedence I am deprived of this rank. I challenge his title to this precedence, declaring the Letters Patent granting it to be illegal and void—if I be right then his Commission gives him no title to occupy for an instant my Judicial place, and his doing so is an intrusion upon my office. To say then that, with the title of Seniority and actual possession in my favour, no right is compromised by being thrust from my seat and rank in Court for weeks or months by a stranger, upon a bad or at least a doubtful title, is certainly a view of the subject which an impartial mind will find it difficult to justify.

I allude no further to this portion of the letter, beyond saying that if it implies a charge that I have originated "personal contests on the subject of precedence," I most distinctly repel the imputation. The contest has not been sought by me, but forced upon me. I suggested to the Provincial Government a mode by which the indecorum of such a contest might be avoided.—Your Excellency's Advisers have not thought proper to act upon the suggestion: the responsibility therefore rests with them, not with me. The right to grant or refuse the leave of absence asked, is not to be questioned. I submit to the decision, but I also have rights which I am not disposed to surrender.

I proceed to offer a few observations upon the advice given to Your Excellency in Mr. Secretary's letter. As a law question, the only distinct legal proposition announced in justification of the course adopted is, that "the prerogative of the Crown entrusted to Your Excellency permitted the arrangement of rank and order in the Court." Before going on to show that this is a doctrine untenable in law, I advert to certain passages in the letter which seem to me to be urged rather in aid of the main proposition than as containing in themselves any matter of legal justification. It is said that Mr. Justice Bedard, by virtue of a Commission long anterior in date to mine, took precedence of me in the Provincial Court of Appeals, and whenever we were brought together in the Court of Queen's Bench for the District of Three Rivers and St. Francis. This is true; but I do not see how it bears upon the question. Because that gentleman had a right of precedence over me in certain Courts, it surely does not follow as a logical or a legal consequence that the precedence in other Courts to which heretofore he had no shadow of claim should be taken from me and given to him. The constitution of our Courts is without doubt peculiar and anomalous, but there is nothing in it to warrant such a pretension. The Judicial authority in the three Courts just named, is incidental to the Commission and office of Judge of the Court of Queen's Bench for the District of Montreal or Quebec, and the order of precedence there is of course regulated by the date of such Commission; but the Courts of Queen's Bench for Montreal and Quebec are perfectly distinct and independent tribunals; they are created by Statute with different local jurisdiction, and the authority of the one does not extend into the District of the other. The Commission of Mr. Justice Bedard as a Judge of the Queen's Bench for Quebec gave him no Judicial character in the same Court for Montreal; and his pretension to take rank by seniority here from his Commission in the former, is no better than would be that of a Judge of the Court of Canada West, or of any other of Her Majesty's Colonial or Metropolitan Courts, to claim precedence from his Commission in such Court. As a legal argument, therefore, the fact adverted to is of no value, and indeed it does not seem to be relied upon as such. But if it had been of a nature to affect the question, it would receive a ready and conclusive answer from Mr. Justice Bedard's resignation of office: by this resignation he ceased for a time to be a Judge at all; and having thus voluntarily annulled his former Commission, he can now claim no benefit of judicial rank under it. It may be said that he had an understanding and special agreement with the Government: but whatever may have been the nature of that agreement, it is evident that it cannot in any respect diminish or control my rights. All Mr. Justice Bedard's claims as a Judge must now be regulated by his last Commission, and it is only from its date that he can take rank in any Court. Nevertheless, had he been content with the precedence which he had under his former Commission, and not sought to degrade me from my place in my own Court, I should have raised no difficulty, as my object is not to obtain an advantage, but simply to protect myself in an acquired right, essentially connected with the independence of my office, and which as such I am bound to defend. But to return to the question, It is true that it is a prerogative of the Crown to grant a special precedence to one Puisné Judge over another, without reference to the respective dates of their Commissions? admitting the general principle that the Crown, as the fountain of justice and honour, was entitled by an absolute controul over the rank of its officers, including the Judges, it will not be difficult to show that this controul has by the Statute Law been qualified and limited, and does not now extend beyond a power to appoint and to remove in the cases especially provided. My business is to treat the subject as governed by our Colonial Laws, but I have no doubt that the Laws and usages of England will be found at least equally favourable with our own. By the Provincial Statute 34 Geo. III., c. 6, a Court of King's Bench is erected in each of the Districts of Quebec and Montreal, to consist of a Chief Justice, and three Puisné Judges, in each District. Since the passing of that Act, and up to the present time, mention is frequently made in our Statutes of the Senior Puisné Justice, in connection with the business of the Courts. Thus, for instance, by the 41 Geo. III., c. 7, all Writs of Summons are to be tested by him in the absence of the Chief Justice. The same provision is to be found in a recent Statute, 7 Vic., c. 17, with respect to Writs issuing in the District of Gaspé; and by another Statute, passed in the same year, establishing a Provincial Court of Appeals, the Senior Justice is made the presiding officer of the Court in case of the absence of both Chief Justices. It would be tedious, and is unnecessary, to multiply examples on this point; they have been cited to show that the rank and precedence of the Senior Puisné Judge is something recognised by Statute, and that particular functions devolve upon him in consequence, while no word is to be found of a Junior Judge assuming the same functions by virtue of a special precedence under Letters Patent, and it is certain that such an occurrence is no where contemplated in our Statute Book.

But the law which chiefly controls the Prerogative, in this matter, is to be found in the Provincial Statute 7 Vic., chap. 15, which secures to the Judges their tenure of office during good behaviour, restricting the Crown from removing them, except upon an address from both Houses of the Legislature. It is substantially the same with that passing in England, first in the Reign of William III., and afterwards in a more perfect form in the beginning of the Reign of Geo. III. The only material difference between the two laws is, one suggested by our position as a colony and consists in giving to a Judge who considers himself aggrieved by removal, an appeal within six months to Her Majesty in Privy Council. It would be idle to expatiate on the value and importance of this statute; every man must regard it as an inestimable part of our constitutional laws. Upon its fair legal construction and its application to my case I am content to rest.

The whole argument lies in a narrow limit, and may be thus simply stated:—He who takes an office takes it with all its legal incidents. His Commission as certainly and as perfectly conveys to him all that by law belongs to his office as it conveys the office itself. The right of a Puisné Judge to take rank according to his seniority is undoubtedly an incident of his office. If the Crown has a right to recall his Commission, then, as the greater power includes the less, it has also a right to regulate his precedence. But if the law have deprived the Crown of this power over his Commission, then it has also, by necessary implication, and as a legal consequence, deprived it of the power to take away the legal incidents of the office conferred by that Commission. A contrary doctrine tends to a palpable logical absurdity. The aggregate of every office is made up of its specific duties and rights; if, notwithstanding the protective law, one right legally incident to it may be taken away, then also another may. The rank first, the patronage (when, as in England, such exists,) next, the emoluments afterwards—and thus the honorable and lucrative place which is bestowed during good behaviour, and is by statute and for wise purposes put beyond the control of the Crown, may be redneed to a charge from the burdens and humiliations of which the incumbent would be glad to escape. But the same argument may be stated in another form:—the Letters Patent granted to Mr. Justice Bedard have a two-fold effect: the one is to settle his rank; the other is to degrade me from mine. The right then to confer a special precedence, necessarily involves a right to supersede and to deprive of the same precedence. The consequence is, that a Government disposed to gratify its personal or political partialities and antipathies might, by bringing up the Junior Members of the Bench, degrade the Senior Judge, if he happen to be obnoxious to the men in power, from the first place after the Chief Justice to the last in the Court. But the same Prerogative which had thus degraded him, might, in the hands of a succeeding Government more favorable or less unjust, restore him to his former place, thus destroying all right of precedence given over him. Can it be contended that such a power in the Crown is consistent with the independence of the Judges, or can co-exist with the Statute for securing that independence? It is plain that, with one of the most important legal incidents of their office (their rank) thus at the mercy of each successive administration (especially in the peculiar social position of this country) the purity of the Bench must be exposed to the corrupting influence of political favoritism and intrigue, and that the law will, in effect, be evaded and neutralized. It seems to me then, undeniable, that the statute which restricts the Prerogative from recalling the Commissions of Judges, deprives it also of all authority to interfere directly or indirectly with their relative rank. I would gladly continue the examination of this question, as affected by the precedents and usages to be found in the Courts of England, because I am anxious that it should be considered under all its aspects, and am satisfied that nothing adverse, in principle, to my pretensions can be found there. But the length which this letter has attained, and the knowledge that those for whose perusal it is intended, are more conversant with this branch of the subject than I can possibly be, deter me from giving it more than a passing notice. It appears that, on the removal of Judges in England from one Bench to another, they have in some instances, at least, retained in the new Court the precedence derived from their original Commissions. The reason assigned for this, in one of the old Reports Cro. car. 127, is that in coming from the one Court to the other, the party merely changes his Court, but never ceases to be a Judge,—the same reason applies to the case reported in Sid. 408. These cases, and several others to be found in the books, occurred before the passing of the Statute for securing the independence of the Judges. There are other cases of the transfer of Judges from one Court to another, to be found since that period, and I am informed that one of these, the exchange between Sir Francis Buller and Sir Soulden Lawrence, is relied upon as an authority against me. Sir Francis Buller was appointed Puisné Judge of the King's Bench in 1777, and the exchange alluded to by which he went into the Common Pleas and Sir Soulden Lawrence into the King's Bench, took place in 1794. There are facts connected with this case which are not satisfactorily ascertained, and without which it is impossible to draw any conclusion from it; one is, that it does not certainly appear where, or by what rule Judge Buller was placed in the Court of Common Pleas. In the report of the cases in which his name occurred it is for the most part, but not invariably, mentioned before that of Mr. Justice Heath, whose Commission in the Common Pleas was posterior to his in the King's Bench. It is also true, that in the absence of the Chief Justice, he usually delivered the opinion of the Court, but this he did also in the King's Bench, although Sir William Ashurst was by many years his senior there; and the certainty of the conclusion which might be drawn from these facts, is disturbed by an inspection of the list of Judges in the beginning of the volume of Reports, where we find his name placed last. Another fact not certainly known, relates to the manner in which he ceased to be a Judge of the King's Bench. The memorandum to be found in the 5th vol. of the Term Reports, page 638, states that "Mr. Justice Buller resigned his seat in this Court." I am not aware of the terms of the Letters Patent by which the judicial authority is conferred in England, but I doubt, whether by this is meant the formal resignation of his office of Judge. Such resignation, I apprehend, would be unnecessary, for nothing is more certain than that, by the common law, the acceptance of a second office determines the tenure of a former one with which it is incompatible. And it is undoubted that the office of Judge of the King's Bench is incompatible with the same office in the Common Pleas. The private history and details of the exchange can only be learned in the place where it occurred; but it is certain that some negotiation must have been had between the parties interested before the transfer was effected. Sir Francis Buller came down from a higher Court, the King's Bench, to a lower, and the Judges of the Common Pleas may for all we can see have consented to his taking a certain place among them. At all events, no objection appears to have been made, and it may be observed of this and of all other similar cases—that where no question is raised no legal principle can be considered settled by them. There is certainly nothing to be found in the English cases which in the least countenances the proposition that, "*the Prerogative of the Crown permits the arrangements of rank and order in the Court,*" or that *special precedence has ever been given to a Puisné Judge by Letters Patent.* And after a careful examination of all which I have been able to find bearing upon the subject, I am not prepared to say that I discover in them any principle, save that it is to be settled by Judicial and not by Executive authority, which materially affects it; either as tending to confirm or disturb the view I have already taken. But had it been otherwise, I am free to declare, that my opinion, resting on the authority and reasoning derived from our Colonial Laws would not have been changed.

The practice in England has grown up under a particular system, and amid circumstances peculiar to that system. The difference of origin and constitution of the Courts in the two countries, presents an obvious objection to reasoning from the one to the other. In England, there is an intimate connection and intermixture of the powers and jurisdiction of the higher Courts, their authority extends over the same locality and the same things, although each has a certain jurisdiction peculiar to itself; their Judges meet to settle points which arise before any of the Courts, not on appeal, but in the exercise of original jurisdiction; and on looking to their history, we find that in former times they were not so much separate and independent tribunals, as convenient divisions of one original Court. All these are features which distinguish the Courts at Westminster from those in this country, and show that the precedents and usage there, cannot be implicitly received as a rule for the settlement of the point under discussion.

I pursue the subject no further. Should the question, as I have raised it, be submitted merely for the opinion of the Law Officers of the Crown in England, I am not sanguine as to the result. It will of course be deemed inexpedient, particularly at this period of time, to interfere with an act of the Provincial Government; and I mean no disrespect to the gentlemen who hold those high offices there, when I say that an opinion on a law point, arising in a remote Colony, and turning upon the institutions which exist there, formed without hearing counsel, or the other aids which Judges

have, is not likely to be received as a satisfactory settlement of it. I must admit that the decision of Her Majesty, founded upon the judicial wisdom of the Privy Council, will alone convince me that I am in error. It is probable that this advantage can only be obtained by formal suit to that body as a Court of Appeal, a proceeding which, on the obvious grounds of expense and personal inconvenience, I am anxious to avoid; but I feel perfectly confident, that if this question comes to be settled by the learning and integrity of the Judges of England, I shall have no cause to regret the course which I have adopted upon it. I trust Your Excellency will regard the importance of the topic as a sufficient apology for the length of this letter; I earnestly solicit for it a favourable consideration, and that Your Excellency will be pleased to transmit it, in support of my Memorial, to the Imperial Government.

I have the honour to be,
With profound respect,
Your Excellency's
Most obedient and humble Servant,

(Signed,) CHS. D. DAY.

No. 15.

(COPY, No. 246.)

DOWNING STREET,

4th July, 1848.

MY LORD,

I have to acknowledge your Despatches, of the numbers and dates in the margin, [No. 69—30th May, 1848; No. 74—7th June, 1848,] with which you transmitted the Memorials of Mr. Justice Day and Mr. Justice Smith, Puisné Judges of the Court of Queen's Bench at Montreal, complaining of the precedence given to Mr. Justice Bedard over them, on the occasion of the removal of the latter gentleman to the same Court at Montreal from the Queen's Bench at Quebec.

I think that you acted with strict propriety in conferring on Mr. Justice Bedard on this occasion the rank to which the anterior date of his Commission as Judge to that of the gentlemen in question in your opinion entitled him. If a Judge on transference from the Bench in one division of the Province to the same Court in another division, were to lose his rank and take a subordinate position to that of his juniors in point of standing, such a rule would materially impede the power of Government to effect similar changes, which may, under particular circumstances, be very expedient for the public service; and the practice in England is entirely in accordance with this view of the case. It has frequently been found desirable, of late years as well as in former times, to remove Judges from one Superior Court at Westminster to another. Whenever this has been done, Her Majesty has conferred on the Judge so removed "the same place, precedence, seniority, and antiquity" (according to the words used in the Letters Patent) as he enjoyed in virtue of his original Commission. Instead of coming in as junior to those already on the Bench, he has been placed in the same rank which he would have filled if he had sat there since his first appointment, and consequently above other Judges junior to himself.

I have dwelt on this rule of English practice, not in order to lay it down as one necessarily to be followed in Canada, but merely in order that you may be enabled, by stating it, to remove any feelings of having been treated with disrespect or indignity which may be entertained by Mr. Justice Day or Mr. Justice Smith. When those gentlemen are made aware that you have only followed the system which is adopted in this country in the most analogous cases which can be found, I am convinced that they will not think themselves in any degree slighted or treated with injustice in the execution of your arrangement.

I have. &c.,

(Signed,) GREY.

Right Honourable the EARL OF ELGIN,
&c. &c. &c.

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PETITION

OF THE

HON. ELZEAR BEDARD.

One of the Justices of the Court of Queen's Bench for the
District of Montreal.

TO

HER MOST EXCELLENT MAJESTY

THE QUEEN.

Ac. Ec. Ec.

