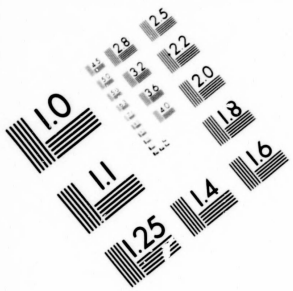

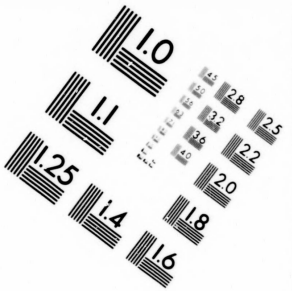

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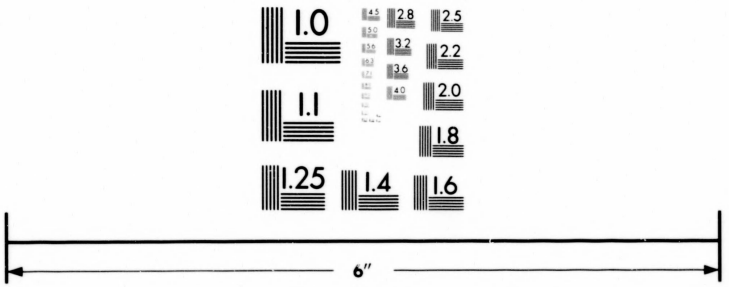

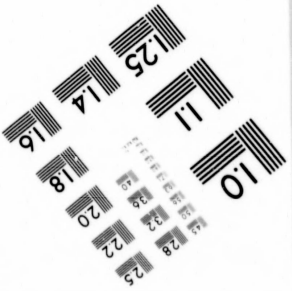

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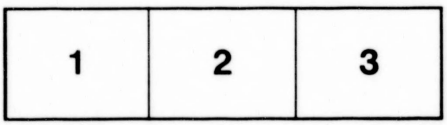

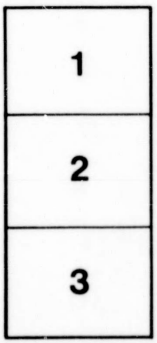

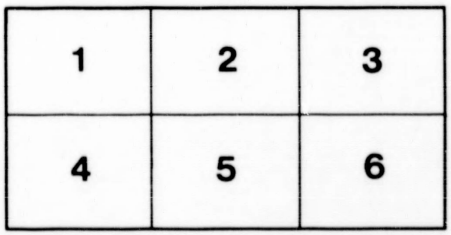

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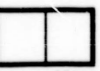

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ESCHEATS FOR WANT OF HEIRS;

THE PROVINCES ARE ENTITLED TO THEM.

THE ARGUMENT FOR THE PROVINCIAL VIEW,

IN THE

MERCER ESCHEAT CASE

Before the Supreme Court of Canada, March, 1881.

Toronto:
PRINTED BY C. BLACKETT ROBINSON, 5 JORDAN STREET.
1881.

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1881.

The Attorney-General of Ontario v. O'Reilly et al.

The facts of the case appear from the Report of the Attorney-General, dated February 20th, 1878, and printed at page 24 *post*, from the Sessional Papers. The property in question being situated in Ontario, and having escheated to the Crown for want of heirs, a suit was brought in Chancery to recover it. The Defendants in possession set up that such escheated property did not belong to the Province. The Decree of the Court of Chancery, and afterwards of the Court of Appeal, was in the Plaintiff's favour. From the Decree of the latter Court the Defendants appealed to the Supreme Court. Hon. Mr. McDougall, Q.C., and Mr. Lash, Q.C., argued the case for the Defendants. The following pages contain the argument in answer, by Hon. Mr. Blake, Q.C., and Mr. Bethune, Q.C., Counsel for the Province of Ontario, and Hon. Mr. Loranger, Q.C., who, by leave of the Court, argued on the same side in the interest of the Province of Quebec.

*MR. BLAKE, Q.C., did not intend to discuss all the questions which had been referred to by the learned Counsel for the appellant, but would endeavour to set before the Court what he believed necessary for the determination of this appeal. While entirely agreeing with Counsel on the other side that the importance of the case far outweighed the amount involved, he was unable to agree with them when they claimed that upon the decision of this case rested the ultimate fate of the scheme of Confederation. He failed to perceive how the connection of this country with the Empire could depend upon the question, whether the property of an inhabitant of Ontario or Canada who died without heirs was to be disposed of by the Dominion Government or by the Provincial Government. If the connection depended upon that, it was hardly worth retaining.

He would first refer to the position of the Provinces before the Union. He believed this right of escheat, which is improperly called a prerogative right, to be an incident of tenure in socage—a species of reversion. This right of escheat fell to the lord; and not to the Crown, unless the Crown happened to be also the lord of whom the land was held.

This view is confirmed by 2 Cruise's Digest, Title Escheat, p. 397: "This mode of acquiring an estate is called an escheat, which Lord Coke says is a word of art derived from the French word *eschier, quod est accidere;* for an escheat is a casual profit, *quod accidit domino ex eventu et ex inspirato*, which happens to the lord by chance and unlooked for. An escheat is therefore, in fact, a species of reversion, and is so called and treated by Bracton. When a power of alienation was introduced, the change of the tenant changed the chance of the escheat, but did not destroy it; and when a general liberty of alienation was allowed without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres.*"

In Attorney-General *vs.* Sands, Tudor's Leading Cases on Real Property (3rd ed.), p. 774, it is said: "In one case, however, lands in fee simple are not liable to escheat. For if land be given to a body politic or incorporate, as for instance to a Dean and Chapter, or to a Mayor and Commonalty, and to their successors, upon its dissolution the land will revert to the donor, and not to the lord by escheat, Co. Litt. 13*b*."; and at p. 773: "Where a person dies intestate without leaving any person who, according to our law of inheritance, can claim as heir, any estate of which he is seised in fee will escheat to the lord from whom the fee is held, the lord taking as *ultimus hæres.*"

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

This was the old law.

In 1791, by the Imperial Act, 31 Geo. III., Cap. 31, the Legislature of the Province of Upper Canada was empowered to make laws for the "peace, welfare and good government" of Upper Canada; but there was a limitation as to the general power of making

*NOTE.—Mr. Blake's argument was not reported in shorthand, and only a summary of it can be given, taken from the reporter's notes; nor has this summary had the advantage of Mr. Blake's revision, or in fact been seen by him before publication.

laws in any manner relating to or affecting "His Majesty's prerogative touching the granting of *waste lands*" of the Province, with regard to which no laws were to be made except with the sanction of the Imperial Parliament. This limitation is to be found in section 42, and it is clear that if this proviso had not been inserted, the Legislative Body could have made a law affecting the prerogative of the King touching the granting of the waste lands of the Province. By the 43rd section, the most pertinent to this question, all lands in Upper Canada were to be held in free and common socage, and legislative power was given to make "alterations with respect to the nature and consequences of such tenure of free and common socage." Now, though this tenure involved the right of the Crown as ultimate heir, it is as clear as day that the Legislature could have altered that tenure, and such legislation would necessarily have interfered with the Crown's right in respect of escheat. Such legislation would, no doubt, have been subject to disallowance by the Crown, but in this respect only were Provincial rights curtailed. The Provincial Legislature could not, without the sanction of the Imperial Parliament, have interfered with the prerogative with regard to "waste lands," but they could deal with the subject of escheat in regard to all other lands. The Act of Union, 1840, 3 & 4 Vic., Cap. 35, gave the same powers, and had the same reservations, and re-enacted section 42 of Geo. III., Cap. 31.

By the Act of 1854, 17 & 18 Vic., Cap. 118, "An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other purposes," section 42 of the Act of 1840, 3 & 4 Vic., Cap. 35, was repealed; so that so far back as 1854 the only remaining prerogative of "granting waste lands" was abolished, and full power was given to the Provincial Legislature to deal with this prerogative of granting waste lands, and with it power over escheat as respects such lands.

If it is found that by the Acts of 1791 and 1854 absolute legislative power was given to the Local Legislature to deal with this subject matter, we approach without difficulty the distribution of legislative powers under the B. N. A. Act. But before considering the B. N. A. Act it is necessary to refer to the Act of 1852, 15 & 16 Vic., Cap. 39, relied on by the other side. That Act was passed "to remove doubts as to the lands and casual revenues of the Crown in the Colonies and foreign possessions of Her Majesty," and allowed those revenues and lands to be lawfully appropriated for the benefit of the Colonies in which they existed. By the first section of the Act it was declared, that "the provisions of the said recited Acts in relation to the hereditary casual revenues of the Crown shall not extend or be deemed to have extended to the *moneys arising* from the sale or *other* disposition of the lands of the Crown in any of Her Majesty's Colonies." The phrase "hereditary casual revenues of the Crown" is a general expression, used in connection with the words "sale or other disposition of the *lands* of the Crown," and would include *all* lands, whether waste lands or lands falling to the Crown by escheat.

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

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

It is also contended that these sums fell into the Consolidated Revenue Fund; but on the 1st July, 1867, that Fund terminated, for, as the learned Counsel for the appellant had to admit, the legislative power over all lands was by the B. N. A. Act vested in the Local

* NOTE.—For the facts as to this, see Report of the Attorney-General for Ontario, printed in Appendix taken from Ontario Sessional Papers of 1878, No. 38.

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

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

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

T[illegible]e some points which seem tolerably well admitted.

[illegible]e need to know what were the rights of the different Provinces before the U[illegible]because it is necessary to apprehend where these rights have gone. If it is found t[illegible] a subject matter was before Confederation a proprietary right of the Provinces, it must be found existing in one of the identities which were created. There was no intention to surrender what had been granted by England to the Provinces before Confederation, and all proprietary rights existing before Confederation must after Confederation exist in the Government either of Canada or of the Provinces.

(2) It was the intention that each of the Provinces should stand upon the same footing as to constitutional as well as proprietary rights, and that what was done for Nova Scotia and New Brunswick was to be done for Quebec and Ontario. It is only because Ontario and Quebec had to be born, so to speak, that there are these different sets of powers. If that leading principle of construction is applied, all these sections can be made to harmonize in such a way as to give no more to Ontario and Quebec than to Nova Scotia and New Brunswick. Of course, it is not meant that Provincial tenures were to be assimilated, but what is meant is that the power to deal with them was intended to be the same in each of the Provinces.

If Confederation is so regarded, the construction of the B. N. A. Act involves the question, What is the real nature of the Union? One section cannot be taken by itself, but all must be read together in order that, by a broad, liberal and quasi-political interpretation, the true meaning may be gathered. The preamble recites the desire for federal union, etc. Then there are some curious provisions. By the third section the Provinces of Canada, Nova Scotia and New Brunswick are to be one Dominion under the name of Canada; and then they are divided into four Provinces. Then the twelfth section vests "all powers, authorities and functions which, under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces with the advice or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those Councils or with any number of members thereof, or by those Governors or Lieutenant-Governors individually shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the advice or with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada." The sixty-fifth section vests the same powers in the Lieutenant-Governors of Ontario and Quebec as far as the same are capable of being exercised after the Union.

It is clear then that whatever might have been done by any Governor fell to the Governor-General of Canada if the subject matter related to the Dominion of Canada, and fell to the Lieutenant-Governor if the subject matter related to the Province. There is nothing said of Nova Scotia and New Brunswick, because the 64th section deals with them. The Constitution of Nova Scotia and the Constitution of New Brunswick

were already created, and were simply continued. Sections 64 and 65 should be read together, for if Ontario and Quebec had been existing, section 65 would not have been inserted, and we would have found the Lieutenant-Governors having the right to exercise all the statutory powers they might have had. If the powers of the Lieutenant-Governors are interpreted by section 65 alone, see how narrow the words are. The constitution of the executive authority of each Province is implied from the fact of its existence before the Union. All the Provinces are placed upon the same footing, and in Ontario and Quebec as well as in Nova Scotia and New Brunswick, the power of dealing with all subjects which Nova Scotia and New Brunswick had prior to the Union was continued, subject to the alterations made by the Act. The consequence is that all the powers existing in the old Provinces, except such as are taken away, are grafted upon the new-born Provinces of Ontario and Quebec.

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

There is another mode of construing these sections; it is to interpret them as you would an ordinary grant. It is admitted that there is a general provision in favour of Canada, and in all matters not granted to the Province, and relating to the peace, order and good government of Canada, the power is there, yet it is not a power more paramount than the local power is over subject matters granted to it. Within its range each has an exclusive power. Local authority is legislative in its character and exclusive within its bounds. Among the branches of subject matters granted to the Provincial Legislatures is the sale and management of public lands. It is said that this is a limited power, but it is to be remembered that we are dealing with a legislative power, and it does not seem that anything has been left out or excepted. The intention of the Legislature clearly was to give the local authority most ample power.

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

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

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

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

Reliance is placed by the other side on this section 102, and it is said here is a revenue over which the Local Legislature had a right of appropriation, and not being re-

served to them in the Act, they have now no control over it. If this argument is correct, it would equally embrace the proceeds of sale of all the lands, for they are not reserved—and can it be said they are to go to the Consolidated Revenue Fund of Canada? Then, how can it be argued that the subject matters shall belong to the Local Legislatures and the proceeds of the same belong to Canada? Surely it was not necessary when the subject matter was appropriated to the Province to add and the proceeds thereof, if disposed of by the Local Legislatures. Therefore, if it should be held that the land itself is under the control of the Local Legislature, the revenue derived therefrom cannot be said to come within section 102. If the argument is good, then the Court will hold that all revenues of all lands belong to the Consolidated Revenue Fund.

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

Therefore, reading these different sections together, it is manifest that Canada got such property as was expressly given to her and the Provinces kept what was not given to Canada. How will the Provinces get a revenue from these lands, if not by sale, licenses, etc.? The power to deal with them is full, ample and complete, and the scope, sense and spirit of the Confederation Act is plain and obvious, viz.: That all lands situate within a Province in respect of which Her Majesty had any sort of right or interest continued to belong to the Province, with the exception of certain lands given to Canada.

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

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

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

The question is not one of any personal prerogative, but it is simply whether the Attorney-General for Canada, who is responsible to Parliament, shall advise as to the mode in which the escheat shall be applied, or whether the Attorney-General for Ontario, who is responsible to the people of Ontario, shall advise as to what shall be done with the escheat. To hold the former view involves a clashing of functions and of jurisdiction, which is abhorrent to those who desire the welfare and peace of the Confederation.

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

MR. BETHUNE, Q.C., followed on the same side :

The first question is, What is escheat? In addition to the authorities cited by the other side, I refer to Vol. 3 of Cruise's Digest, 4th edition, page 404, title 30, section 26, where it is thus defined by Lord Mansfield, in his judgment in Burgess *v.* Wheate, there cited : "It had been truly said that on the first introduction of the feudal law, this right was a strict reversion—when the grant determined by failure of heirs, the land returned as it did on the expiration of any smaller interest. It was not a trust, but an extinction of a tenure; as Mr Justice Wright said, it was the fee returned." The same learned judge further on, referring to the liberty of alienation which was given to tenants, says : "As soon as the liberty of alienation was allowed without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres.*"

In Ontario and in the former Province of Upper Canada, all lands were holden directly of the Crown in free and common socage. It is quite clear that escheat applied to lands held in socage. At page 401 of the same volume of Cruise, it is said "All lands and tenements held in socage, whether of king or subject, are liable to escheat."

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

Assuming that so far I am correct as to the nature and effect of an escheat, let me apply it to the matter in question ; and first let me apply it to a case of escheat upon lands granted by Letters Patent of the Province of Ontario since Confederation. We assume that on the 1st day of July, 1867, the Crown was possessed for the Province of Ontario and its use, of a lot of land which had passed to that Province under section 109, of the British North America Act, which is in the words following: "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." Before Confederation that land was vested in Her Majesty ; she held it for the use of the former Province of Canada ; after Confederation she still held it, but for the use of the Province of Ontario. Nothing in the Act had divested Her Majesty of the title to these lands. The same British North America Act continued certain laws in force, under which Her Majesty, through the instrumentality of the Commissioner of Crown Lands, was enabled to make a grant of this land. The grant is made under the Great Seal of the Province of Ontario. We assume a grant in fee simple. After this grant there would remain in Her Majesty her reversionary right in this estate. This reversionary right Her Majesty would hold for the benefit of the Province of Ontario. It could not be that, while the land before being granted was held by Her Majesty for the use of the Province of Ontario, yet upon or after the grant in fee simple the reversionary estate would be held by Her Majesty for the use of the Dominion of Canada ; nothing in the Act would warrant an inference that that reversionary interest should thus be disposed of. That being so, it would appear that, in the event of the failure of the title of the grantee, in such a case as I have put, and in the event of his dying intestate, Her Majesty in behalf of Ontario would become entitled to the land, for the use of Ontario.

The next question that arises is, whether there is any difference between a case in which a grant has been made by the Crown in the former Province of Canada before Confederation, and a grant made by Ontario since Confederation, in reference to the right of Ontario to the escheat? I submit that there is nothing in the British North America Act which indicates the slightest difference between these two cases. Under section 109, all lands, mines, minerals and royalties which belonged to Canada passed to the Provinces of Ontario and Quebec. The term land would include, I apprehend, any interest in land which the Crown might have had. The reversionary right, called escheat, is certainly

an interest in land. It is only a question of degree between that kind of reversionary interest, and the reversionary interest which the Crown possesses expectant upon the determination of a [illegible] for years. Where the Crown had, as in many instances it had, made grants for term. of years, it might as well be argued that the reversion of the Crown would not pass to the Province of Ontario because it could not be said that that Province had the land; it had only the reversionary interest in the land, expectant upon the determination of the term.

Another reason why I submit this escheat passes to the Crown is, that it is a matter appertaining to the title. It is quite clear that under the terms "property and civil rights," in section 92 of the British North America Act, s.-s. 13, a Provincial Legislature might by an Act abolish escheat as an incident of tenure; it might provide that the whole land should be granted, and that the Crown should never under any circumstances assert title to property which it had once granted; and such a law, if not disallowed, would be valid. It is argued on the other side, that under section 102 of the British North America Act, which is as follows:—"All duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund to be appropriated for the public service of Canada, in the manner and subject to the charges in this Act provided," this escheat passes as one of the "revenues" over which the Legislature of Canada had power of appropriation before Confederation. I submit, however, that the nature of the revenue must be taken into account in determining what is meant by the term "revenue," in section 102. Before Confederation the Crown Lands were sources of revenue; and it is quite clear that under that term, in section 102, the Crown lands did not pass.

So as, if possible, to remove any doubt upon this point, section 117, which is as follows, says:—"The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

From the two sections 109 and 117, it seems reasonably clear that it ought to be presumed that this property belongs to the Province, unless it comes clearly within that assigned to the Dominion

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

The other side argue that this is a prerogative right, and that none of the prerogatives of Her Majesty belong to the Provinces. I submit that the prerogatives of the Crown, so far as necessary to carry out matters to be executed by the Provincial authorities, have passed under the B. N. A. Act to the Province, and are to be executed by the Lieutenant-Governor as the proper representative of Her Majesty.

It has been assumed by the other side that the executive authority of the Queen does not extend to Provincial matters, but that a new kind of executive has been created, which is not part of the executive power of Her Majesty, but is a statutory right which has been created and vested in the Lieutenant-Governor. This view, I submit, is erroneous. Turning to the 9th section of the B. N. A. Act you will find it declared that "the Executive Government of and over Canada is hereby declared to *continue* and be vested in the Queen." The argument of the other side must narrow that section to mean over Canada as a body politic or as a subject of Federal Government; so that while the executive authority of the Queen *qua* Dominion matters extends over the whole of the

Canadian territories, as to Provincial matters it is not anywhere to be found in any of the Provinces. It would certainly require very strong words to abolish the prerogative right of Her Majesty as to any matter in respect of which it existed before Confederation. I submit that the true construction is that the executive authority of the Queen continues, and was to be carried out, in every part of Canada after Confederation, by the Governor-General in respect of Dominion matters and by the Lieutenant-Governors as her representatives in Provincial matters, precisely as such executive authority existed before Confederation. I call attention to the words "of and over Canada." The words "of and over" would be quite unnecessary if the section meant merely that the executive power of Canada, as the subject of Dominion Government, should continue in the Queen; the words "over Canada" would have no meaning if they did not apply to Canada territorially, and thus include within Canada the Provinces and their executive. I think that under the preceding sections this is reasonably plain. Looking at section 3, it is quite clear that one Dominion was to be formed under the name of Canada; and by section 4, Canada shall be taken to mean Canada as constituted under this Act, unless it is otherwise expressed or implied. By section 5, Canada is divided into four Provinces; but that division into Provinces quite consists with the continued existence of the prerogative over these Provinces, to be executed in matters as to which the new Provincial Governments were to be agents.

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

Under section 65, all the statutory powers and functions which were formerly possessed by the Lieutenant-Governors of Upper and Lower Canada, under Canadian or Imperial Statutes, are declared to be exercisable by the Lieutenant-Governors in these two Provinces of Ontario and Quebec. I submit that there can be no doubt that under the Upper Canada and Lower Canada Constitutions which preceded the Union of 1840, the Lieutenant-Governors were the proper depositaries of the "prerogative," so far as it appertained to the Government of the two Provinces of Upper and Lower Canada; and these are still to be exercised after Confederation by the Lieutenant-Governors of these two Provinces, in the same way as they had been exercised by former Lieutenant-Governors.

Then under section 64, the constitution of the Executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union, until altered by the authority of the B. N. A. Act. It cannot be doubted that before Confederation the Lieutenant-Governors of Nova Scotia and New Brunswick respectively possessed the right as representatives of Her Majesty to execute the prerogatives necessary to Colonial Government.

If this be so, then it would follow, under section 64, that these prerogative rights continued in these two Lieutenant-Governors; and the whole scope of the B. N. A. Act shews that there was not intended to be any difference in the powers of the Lieutenant-Governors of the various Provinces.

The reason why the B. N. A. Act is silent about the exercise of these prerogatives by the Lieutenant-Governors is very obvious. It is quite clear that the Governor-General is under the Act made the Deputy of the Queen, and that the Governor-General is enabled to appoint a further Deputy of the Queen for certain Provincial purposes. That Deputy is called a Lieutenant-Governor. He is appointed by an instrument in the name of Her Majesty, and, consistently with the law as to the execution of powers, it seems quite plain that if the Governor-General is an officer of Her Majesty, his Deputy is also an officer of Her Majesty as to the prerogative of Her Majesty in convoking the House of Assembly and in other matters. By section 82 it is said that the Lieutenant-Governors of Ontario and Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province. By section 72 the Legislative Council of Quebec is to be constituted of persons to be appointed by the Lieutenant-Governor, in the Queen's name, by instrument under the Great Seal of Quebec. By section 75: so often as a vacancy shall occur the Lieutenant-Governor, in the Queen's name, is to fill it.

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

Take another prerogative, namely, the prerogative of Justice. It is quite clear that the Administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts both of Criminal and Civil Justice, is committed to the Provinces. Courts of Criminal as well as Civil Jurisdiction have been created in Ontario by the Provincial Legislature. Are not these courts Her Majesty's courts? Does not the process of these courts run in the name of Her Majesty? If the prerogative of Justice is not to be invoked in aid of the Provincial Courts, what authority is there for the administration of Justice in Her Majesty's name? Was it not intended by the framers of this Act that Her Majesty's prerogative of Justice should continue in the courts established by the Provincial Legislatures, just as if these courts had been established by the Imperial Parliament? and if there exists a right to use Her Majesty's name in the administration of Justice, it must be because implied by the prerogative right in question being to be executed by the Provincial machinery.

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

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

The right in question is a common law right which ought to be governed by local laws. This right is called by different names; sometimes it is called an escheat, sometimes a reversion, and sometimes a *droit de déshérence*. It is nothing else than a fiscal

*Note.—Mr. Loranger's argument, owing to its great length, is given in a condensed form. The report in its present form has been prepared from a fuller report which had been revised by Mr. Loranger. The condensed report has not been seen or revised by him.

right engrafted upon the law of succession. Society being originally proprietor of all lands, they revert to society if the owner dies without heirs. The sovereign chosen by society holds the land in trust for the people, as a *fidei commissum*. The civil law theory of vacant property is this: If a man gave up property with the intention that some one should take, that person was entitled to it, while if he abandoned it for the sake and with the intention of abandoning it, then the first one who took possession would be entitled to retain it; but if the abandonment is without his will, then it goes to his heirs; and if he leaves no heirs, or they are unwilling to accept, then it goes to the people at large, and under the Roman law it went to the Roman Republic. That right was exercised by a public sale of the property.

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

(STRONG, J.: It is elementary law with us that this right belonged to the lord of the manor.)

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

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

How was this right to be exercised after Canada was ceded to England? Chitty on Prerogative, ch. 3, p. 25, distinctly says it must be settled by local laws. Then it was, and is, perfectly competent in this country for our Local Legislatures to deal with this subject matter. There was the *droit d'aubaine*, which formerly went to the king, but this has been done away with by legislation.

(STRONG, J.: The point you make is, that under the civil code the Crown takes by force of succession, under the heading of "successions irrégulières," which is private law under the control of the Local Legislatures.)

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

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

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

I contend that it belongs to the Local Government, because it is a subject matter over which the Province has legislative powers, otherwise you would have to conclude that the Federal Government could own property within the Provinces which the Local Legislatures by legislation could take away.

It having been established that the right of escheat being governed by the law of property, namely, by the law of succession, must, of necessity, fall under the control of

the Provinces, vested by the 13th paragraph of the 92nd section of the B. N. A. Act, with the power of legislation over "property and civil rights," it follows, that as a consequence, all public property, which at the time of Confederation belonged to these Provinces and which became subject to provincial legislation, must equally belong to them.

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

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

At the time of Confederation, all legislative and executive power, legal attributes, public property and revenues that are now the appanage of the Central Government and of the Provinces, belonged incontestably to the latter. The federal compact did not create a single new power. The part now belonging to the Federal Government was taken from the Provinces to be conferred upon this former power.

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

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

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

The relations between the Provinces and the Imperial Government remain, after the Union, what they were before. The Queen forms part of the Legislature of each Province, by the intermediary of the Lieutenant-Governor, it is in her name that the Houses are called and prorogued and that the laws are assented to. The sole change, in this respect, consists in the disallowance and disapproval of provincial Acts, which is made by the Governor-General, but this is not a legislative act.

The Executive Government resides in the person of the Lieutenant-Governor, as the first magistrate of the Province, and here again, he acts as the representative of the Sovereign.

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

The consequences to result from the solution of this conflict between the Provincial

and Federal claims are of great importance to the Provinces, and particularly to the Province of Quebec. In fact, if the federal pretensions prevail, and the principle of the inferiority of the Provinces and the subordination of their Legislatures to the federal power is well founded, less than fifty years will see their absorption in the Central Government; and, the annihilation of Local Governments having done away with the necessity of their existence, the Federal Government will give place to that legislative union which is so justly dreaded by the Province of Quebec, whom I represent. Although having no material and direct interest in the suit, the consequences of an unfavourable result might so prejudicially affect its political condition that it thought it proper to join with the Province of Ontario in asserting their common claim to the present right of escheat or *droit de déshérence*.

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

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

These Provinces, each of which was clothed with the totality of the powers now possessed separately by the Federal and Local Government, were therefore in the enjoyment of their complete political and legislative autonomy.

These constitutions, rights, and powers, and this autonomy, were guaranteed to them by treaties, and imperial laws which, in the relations between the British Government and the colonies, have the force of treaties. The constitution of the United Provinces of Upper and Lower Canada (to speak only of these two Provinces) had been granted to them by the Union Act of 1840; and the constitutions which each had enjoyed for three quarters of a century (with the suspension of a few years in the case of Lower Canada) had come to them by the Constitutional Act of 1791, not repealed by the Union Act of 1840, but simply modified to make it harmonize with the Union of the Provinces and the new system.

It is therefore to the Constitutional Act of 1791 that we must look for the origin of the powers of the Legislatures of the Provinces of Canada, which were in force at the time of Confederation, modified as has just been stated. These powers, with the reserve of imperial interests, were unlimited, and extended to every species of legislation, whether public or private, necessary for the good government and welfare of the country. Thus, as already stated, it extended to all the objects of legislation now divided between the Federal Parliament and the Local Legislatures.

A right or a power is not taken away from a nation or an individual, except by a law which revokes it, or by a voluntary abandonment. Is there, in the resolutions of the Conference of the Colonial delegates, held in Quebec, in October, 1864, or in the Federal Act itself, one word which repeals their powers or explicitly derogates therefrom? Certainly not. Does any one of these resolutions, or any section of this law, or the whole of either, imply an implicit repeal of such rights? Article 29 of the resolutions says, with respect to the Federal Parliament: "The general Parliament shall have power to make laws for the peace, welfare and good government of the Federated Provinces (saving the Sovereignty of England) and specially laws respecting the following subjects." The B. N. A. Act, section 91, enacts: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

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

Were these powers of the Provinces revoked by the Federal compact which became the B. N. A. Act? On the contrary the old Provinces preserved their corporate identity under Confederation. A distinction must here be made between the former Province of Canada and the other Provinces, as those of Nova Scotia and New Brunswick which entered into the Federal compact under their old corporate names. Under the old Constitutional Act of 1791, Upper and Lower Canada each formed a Province separately constituted, under the names of the Provinces of Upper and Lower Canada. Reunited by the Union Act of 1840, they formed only one Province, under the name of the Province of Canada. Under the B. N. A. Act of Union, they were again disunited and made into two separate Provinces, called the Provinces of Ontario and of Quebec; but did they again become in reality as each was under the Act of 1791, although having different names? Has this difference in name and in territorial boundaries effected a difference in their identity, and can it be said that they have become new corporations? Have they not rather remained as they were, as well as Nova Scotia and New Brunswick? The maxim of law *Nil facit error nominis, cum de corpore constat*, a maxim of universal application in all legal matters, and which declares that the name does not affect the thing, so long as its identity is apparent, seems to settle the question. The only difference in the result is, that, in place of entering the Confederation under only one name and as a single member of the Union, the two Provinces entered it under two different names and as two members of the Union. They are, moreover, each clothed with the same powers as before, and as the other confederated Provinces, each having one and the same constitution. I do not see, either in the resolutions of the conference, or in the Federal Act, any provision which would give a pretext to the pretension that, in entering Confederation, the Provinces lost their former identity to acquire a new one.

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

It was the identical old Provinces which united to form a new Government and to constitute a Federal Dominion, without losing their identity; and without ceasing to be what they had been, distinct Governments. It is not then from the Dominion that the Provinces arose, but it was the Provinces that created the Dominion and were transformed into a new political body, without ceasing to exist in their former condition.

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

It is necessary, first, to know what were the organic characteristics of the old constitution. Let us confine ourselves to the constitution of the Provinces of Upper and Lower Canada and to that of the Province of Canada. These constitutions were formed upon the model of the British constitution. The Executive power resided in the person of the Sovereign, represented by the Governor-General or a Lieutenant-Governor. The legislative power resided in a Legislature sometimes known as the Provincial Parliament, composed of three branches; the Govornor or Lieutenant-Governor representing the Sovereign, the Legislative Council, appointed by the Governor, and a Legislative Assembly or House of Assembly, elected by the people. The Parliament was convened by the Governor in the name of the Sovereign, it was prorogued in the same manner, and the

laws were assented to in the same name by the same officer. Let us see what are, on the same subjects, the provisions of the federal compact in the constitution of the Provinces.

Section 58, which immediately follows Title V., "*Provincial Constitutions, Executive Power,*" vests the Executive power in the person of the Lieutenant-Governor, whose appointment is provided for in these words: "For each Province there shall be an officer styled the Lieutenant-Governor, appointed by the Governor-General in Council, by instrument, under the Great Seal of Canada." 71, "There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec." 82, "The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's name, by instrument under the great seal of the Province, summon and call together the Legislative Assembly of the Province." 90, "The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada." 55, "Where a bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure."

It is objected to the analogy, which we find between the Executive and Legislative powers conferred upon Lieutenant-Governors and the Provinces of the Confederation, and the same powers conferred upon the former Governors and Lieutenant-Governors and the old Provinces, that under the new system, the Sovereign does not exercise the executive power as under the old, through the Governor who represents him, and by whom he was directly appointed; that under the new system the Lieutenant-Governor is appointed by the Governor-General, of whom, and not of the Sovereign, he is the representative. Secondly, that the Sovereign is not a branch of the Legislature of the Provinces, because the Lieutenant-Governor, clothed with secondary powers as just stated, does not represent the Sovereign as the first branch of the legislative authority.

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

According to the constitutional doctrine, all legislative and executive power granted by England to her colonies is a delegated power, the legislative power being delegated by the Parliament, of which the Sovereign is the first branch, and the executive power by the Sovereign alone, of whom the colonial Governors are the representatives in the Executive Government as well as in the Legislatures. The authority of the Governors appointed by the Sovereign is in no sense personal; it is in the name of the Sovereign that they exercise it, in virtue of a Commission, which might be assimilated to what is, in the civil law, an ordinary mandate.

In political as in civil law, in the absence of any provision specially applicable to the subject, recourse must be had to the common law, to ascertain the relations between the government and the governed. This rule is admitted in England, where, for instance, the publicists hold that the hereditary right to the Crown is governed by the law of ordinary successions. It was thus that on the death of Edward VI. without children, the Crown, like the large baronies, devolved, in default of other heirs male of the late

King Henry VIII., to his two daughters, Mary and Elizabeth, but the former excluded the latter, to avoid a plurality of sovereigns.

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

What are his functions? The executive power resides in his person, by section 58, as we have seen. He is assisted by an Executive Council (63).

Sec. 65. "All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are, before or at the Union, vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respective Legislatures of Ontario and Quebec."

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

Let me, however, continue the enumeration of the powers of a Lieutenant-Governor under the Federal Constitution. He forms, as we have already seen, the first branch of the Legislature (sec. 71). In Quebec he appoints by instrument under the Great Seal the legislative councillors, *in the name of the Queen*, and not in that of the Governor-General (a provision re-enacted from the preceding Constitutions of 1791 and 1840). If a vacancy in the Legislative Council of Quebec should occur, by resignation or otherwise, the Lieutenant-Governor, in the name of Her Majesty, fills the vacancy, by appointing a new

legislative councillor (75). He appoints the Speaker of the Legislative Council of Quebec (77). It is not here stated that it is in the name of Her Majesty, but was not that omitted to avoid a pleonasm? He fixes the time for the elections and causes the writs to be issued (secs. 84 and 89). No appropriation of the public revenues or taxes can be made by the Legislature, unless previously recommended by the Lieutenant-Governor (secs. 54 and 90).

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

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

I now come to the objection that the Legislatures are not called Parliaments.

What is a Parliament? A Parliament is, "a meeting or assembly of persons for conference or deliberation." In its judicial sense the word has only the value given it by the custom of different countries, and it has no accepted determined meaning, to signify the powers belonging to one or more Legislative Assemblies. Thus in Italy, Saxony, the Duchy of Baden, in Sweden, Roumania, England and in several of its Colonies, New South Wales, Queensland, South Australia, Tasmania and Victoria the Legislatures are called *Parliaments*; in Austria, the legislative body is called *Reichsrath*, *Rigsdag* in Denmark, *Reichstag* in Germany, Hungary and Wurtemburg, *Corps Législatif* in France, *Boulé* in Greece, *Cortes* in Spain and Portugal, *Congress* in the United States, and in several countries of South America, Brazil, Peru, Honduras, etc. If for the first named countries it is asked, is the Legislature a Parliament? the reply would be in the affirmative, and in the negative for the others.

In the old Provinces which now form the Canadian Confederation, the Provincial Legislatures were indifferently called Parliaments or Legislatures. It was held that they were *mutatis mutandis* clothed with the same power as the British Parliament, and (until the Union Act of 1840, which conferred upon the Legislative Assembly the absolute right of electing the Speaker) when the latter claimed from the Governor or Lieutenant-Governor the confirmation of his election, he claimed the parliamentary privileges which are recognized in the English Parliament.

The name of "Parliament" was given to the Legislatures of the old Provinces in a host of official, parliamentary and legislative documents; even in Acts of the British Parliament itself. The word "Parliament" as a synonym of "Legislature," was so familiar under the old system, that the resolutions of the Quebec conference make use of both terms jointly to signify the legislative body of the Confederation. "There shall be a general Legislature or Parliament for the federated Provinces, composed of a Legislative Council and a House of Commons," says the 6th of these resolutions. The 41st says: "The local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each shall think fit."

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

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

Nothing in the Federal Union Act rebuts the assertion that the confederated Provinces are identically the old Provinces, with the exception, however, of the Provinces of Quebec and Ontario, divided into two as they were before the Union Act of 1840, under the Constitutional Act of 1791.

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

And the Act continues thus to speak of the Provinces, whose existence, as old Provinces, it recognizes, without saying a word of the creation of new Provinces. We have just seen that the Legislatures are composed of the Queen, represented by the Lieutenant-Governor, and, for Quebec, of the Legislative Council and Legislative Assembly; that the executive power resides in the person of the Lieutenant-Governor, as representing the Sovereign, and that the organization of powers is the old provincial organization, notwithstanding the disallowance of the Bills of the Legislature by the Governor-General and the appointment and removal of Lieutenant-Governors by that officer. This organization of powers would alone be sufficient to shew that the constitution of the Provinces remained identically the same, but the Constitutional Act goes further and completes this proof, by declaring (section 88) that "the Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall continue as it exists at the Union."

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

The third paragraph of the preamble of the Union Act, which states: "It is expedient, not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared," and which does not extend this provision to the Provinces, corroborates this assertion. It was decided at the Quebec conference (Art. 41) that: "The local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each such Province shall provide."

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

This doctrine is contrary to all the political events, which preceded, accompanied and

followed Confederation; it is altogether improbable and we must say is repugnant to common sense. Why should the Province of Quebec, for example, have, on a direful day, with light-hearted gaiety abandoned its rights, the most sacred, guaranteed by treaties and preserved by secular contests, and sacrificed its language, its institutions and its laws, to enter into an insane union, which, contracted under these conditions, would have been the cause of its national and political annihilation? And why should the other Provinces, any more than Quebec, have consented to lose their national existence and consummate this political suicide?

This principle, that the Provinces retained their old powers when they entered Confederation, and have, under Confederation, continued to be governed by their former Constitutions, was judicially consecrated by the Court of Appeal in the Tanneries case. At least the majority of the Court decided in that sense. I will cite the opinions of Chief Justice Dorion and of Judge Sanborn.

"DORION, C. J.: We know that by the Confederation Act the Legislatures of the several Provinces are not merely ordinary corporations, in the ordinary sense of the word. They are, no doubt, corporations in one sense, who derive their authority from superior authority to which they are bound, but not in that limited sense in which we usually take the word corporation. There is no difference between the powers of the Local and Dominion Legislatures within their own spheres. That is, the powers of the Local Legislature, within its own sphere, are co-extensive with the powers of the Dominion Government within its own sphere. The one is not inferior to the other. I find that the powers of the old Legislature of Canada are extended to the Local Legislatures of the different Provinces. We have a Government modelled on the British Constitution. We have responsible government in all the Provinces, and these powers are not introduced by legislators, but in conformity with usage. It is founded on the consent and recognition of those principles which guide the British Constitution. I do not read that the intention of the new constitution was to begin an entirely new form of government, or to deprive the Legislature of any of the powers which existed before, but to effect a division of them some of them are given to the Local Legislatures, but I find none of them curtailed.

"In substituting the new legislation to the old, the new Legislature has, in all those things which are special to the Province of Quebec, all the rights of the old Legislature, and they must continue to remain in the Province of Quebec, as they existed under the old constitution."

"SANBORN, J.: The British North America Act, 1867, was enacted in response to the petition of the Provinces of Canada, Nova Scotia and New Brunswick, as stated in the preamble of the Act, to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. The powers of legislation and representative government upon the principle of the British constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late Province of Lower Canada was constituted a separate Province by the Act of 1791, with a Governor, a Legislative Council and a Legislative Assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law; in civil matters no powers that had been conceded were intended to be taken away by the British North America Act, 1867, and none, in fact, were taken away, as it is not the wont of the British Government to withdraw constitutional franchises once conceded. This Act, according to my understanding of it, distributed powers already existing to be exercised within their prescribed limits, to different Legislatures, constituting one central Legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the Provinces, or breaking the continuity of the respective Provinces. In a certain sense, the powers of the Federal Parliament were derived from the Provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The

Provinces of Quebec and Ontario are by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the Act, these Provinces are recognized as having a previous existence and a constitutional history upon which the new fabric is based. Their laws remain unchanged and the constitution is preserved. The offices are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same relation to the Province of Quebec that the Governor-General sustained to the late Province of Canada. I think it would be a great mistake to ignore the past governmental powers conferred upon and exercised in the Province, now called Quebec, in determining the nature and privileges of the Legislative Assembly of this Province. The remark is as common as it is erroneous, that the Legislatures of the Provinces are merely large municipal corporations. It is true that every Government is a corporation, but every municipal corporation is not a Government. Consider the powers given exclusively to the Provincial Legislatures. They have sole jurisdiction over education, property and civil rights, the administration of justice and municipal institutions in the Province, subjects which affect vitally the welfare of society. The very court which enables us to determine the matter now under consideration holds its existence by the will of the Provincial Legislature. No such powers were ever conferred upon mere municipalities in the ordinary sense. They are subjects which in all nations are entrusted to the highest legislative power. Legislatures make laws, municipal corporations make by-laws. If these legislative powers confided to Provincial Legislatures are not to be exercised in all their amplitude with the incidents attaching to them, they can be exercised by no other sovereign power, while our present constitution exists."

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

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

In the United States, the central power is subordinate to the Government of the States; it is from the States that Congress draws its authority, and all powers, not conferred by the constitution upon Congress, belong to the States. Canadian federalists wish to lay down this principle of the constitution of the United States as special and exceptional, contrary to the principles of all other confederations and notably to that of the Canadian confederation. We maintain, on the contrary, that this superiority of the

States over Congress is a general principle, and is derived from the nature of confederations themselves; that the same principle prevails in the Helvetian and Germanic confederation, and in all other possible confederations; that it is of the essence of the federal system; that the Central Government has only those powers which are conferred on it by the States, and the latter retain the remainder, for the very simple reason that the Central Government is the creation of the several Governments that have given it the form and the totality of powers which they deemed suitable, and no more.

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

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

The dominant idea of these two sections is to attribute the power of legislating upon matters of general interest to the Parliament of Canada, and the power over matters of local interest to the Provinces. It is this double idea which section 91 and sub-section 16 of section 92 set forth in stating, section 91: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons [that is to say the Parliament], to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces;" and section 92, in placing under the Legislative control of the Provinces "generally all matters of a merely local or private nature in the Province." These general and local powers of the Parliament and Legislatures extended to objects specially set forth. The line of demarcation is found in the limits assigned to the two powers. It is true that paragraph 37 of Article 29 of the resolutions of the conference assigned all general matters to Parliament, and paragraph 18 of Article 43 assigned local matters to the Provinces, but such assigning had no definite character. From the nature of things, all the legislative powers of a nation are local powers in so far as they do not extend beyond the territorial limits of the country. It is only when two countries join together and submit to a General Government, while preserving their Local Government, that the powers attributed to the Central Government become general, and those reserved to the individual Governments remain local.

Outside of this granting or concession, altogether arbitrary or conventional, there cannot be a general rule to establish the line of demarcation between these general and local powers. Thus, in stating that all matters of a general character, not reserved for the Provinces, belong to Parliament, and those of a local nature, not assigned to Parliament, should belong to the Legislatures, the draft of the Confederation Act stated nothing, or only repeated that which had been declared in the distribution of the special subjects assigned to each of the Legislatures by the remainder of article 29 and by article 43. As these articles, dealing with particular powers, might have omitted a large number, and as the working of the Governments might be impeded by these omissions, the authors of the Federal Union Act, who gave the finishing touch to the draft in England, felt that, to remedy this serious inconvenience, it was necessary to establish another line of demarcation and another rule of competence, by means of which they remedied this omission by having those omitted cases entered in one or the other category of powers; and, to attain this end, they amended the draft in the manner shewn by sections 91 and 92.

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

But, as these latter powers specially assigned to Parliament by section 91, were powers withdrawn from the Provinces, and before Confederation were local powers, to remove doubts upon the conventional nature of these powers declared to be general, section 91 adds: "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section (that is to say, to prevent those omitted powers from being considered otherwise than as powers of the Federal Parliament) it is hereby declared that (notwithstanding anything in this Act) the exclusive authority of the Parliament of Canada extends to all matters coming within the classes of subjects," etc.

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

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

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

I cannot overlook the difficulties in interpretation occasioned by a phraseology so intricate and so confused, and in order to understand it better, we might again further alter the wording of these articles, which might be summed up as follows: "With the exception of the matters enumerated in section 92 and of all which are of a local or private nature, which shall be within the competence of the Provinces, Parliament shall have power to make laws necessary for the good government of Canada, upon all other matters, including those enumerated in section 91."

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

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

I have stated that each of the Provinces was clothed with all the powers conferred upon the two Legislatures, the powers conferred upon Parliament were withdrawn from the Provinces. All the powers of the Provinces, I also stated, were powers of a local order, that which remained retained its nature and that which was withdrawn to be attributed to Parliament was only by a fiction called general, being in reality a particular competence. As a general rule, then, all powers belong to the Provinces and the powers of Parliament belong to it only as an exception; the powers of Parliament come from the Provinces, which are the source of all legislative authority in the Confederation, and the legislative power of Parliament is only a residue of the Provincial legislative power. In this order of ideas, it should be said that all power which is not federal has remained Provincial. To ascertain the nature of any power whatever, it is necessary, then, to examine all classes of local subjects, and it is only when this power does not enter into one of these classes and when it interests all the Provinces, that this power is a federal power. If it interests only one or more of the Provinces, without interesting all, it remains within the provincial sphere.

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

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

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

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

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

It does not always happen, however, that legislation takes such a decisive character; there are hosts of subjects which affect both general interests and the particular interests of the Provinces, and it is upon this frequent division of interests that the federalists have based their argument in favour of the Federal Parliament. They say, in cases of doubt, only those matters that are *purely* local, and within the terms of paragraph 16 of section 92 are of provincial competence and the rest is federal. But this reasoning is evidently based upon false conceptions of legislative principles; for, in legislation all the powers are divisible in the same way as the subject upon which they are exercised. If a law, clearly federal, affects a local interest, this interest is withdrawn from the jurisdiction of Parliament, however unimportant such interest may be, as compared to the general object of the law, and *vice versa* for the Province. For instance, let us suppose a commercial law; if this law affects solely the interprovincial interests of commerce, it belongs to Parliament, in the same manner as if it affected only the civil interests arising from commercial relations, it would belong to the Provinces, but if it affected both the interprovincial interests and private relations, giving rise to civil interests between traders, it would belong, for its interprovincial portion, to Parliament and for its local portion to the Provinces. To ignore this distinction and say, that in the cases omitted, or in the cases provided for, only matters of a *purely* local nature are within the competence of the Provinces, and that all mixed legislation belongs to Parliament, is to set up a principle contrary to daily legislative experience, for there is not in legislation any subject purely general or purely local and private. This would be to invade the rights of the Provinces. Paragraph 16, in qualifying as *merely* local the matters reserved to the Provinces, made use of a word that was void of meaning and altogether inapplicable. The end of section

91 had first simply called these same subjects local and private ; this corroborates the argument that the adverb *merely* which precedes them in paragraph 16 of section 92 has no value.

I have spoken of subjects that might be within the competence of both powers, on account of their double nature, general and local, in connection with the omitted cases in sections 91 and 92. In addition, there exists, for some of the subjects enumerated in those sections, a concurrent jurisdiction growing out of the very attribution of power which gave rise to them.

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

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

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

According to the organic principles of confederation, there is a connection between the legislative powers and the right of property. The Provinces entered into the federal compact with the entirety of their public property, as they entered into it with the entirety of their political rights and legislative powers. All public property, which was not granted to the Federal Government, remained with the Provinces. In addition to the property, which is disposed of between the Federal Government and the Local Government by the Act itself, section 117 states, "the several Provinces shall retain all their respective public property, not otherwise disposed of in this Act," a provision that shews, that the Provinces, in entering the Union, had not abandoned their rights of property any more than they had abandoned their legislative powers ; but that they had retained all that they had not resigned to the Federal Government. They also each have their separate Budget, and section 126 enacts that the duties and revenues over which the respective Legislatures of Canada "had before the Union, power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one consolidated revenue fund to be appropriated for the public service of the Province," and section 109 in addition to these provisions adds "all lands, mines, minerals and royalties, belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise."

It is objected, that the Provinces have not, as the federal power, a Civil List, but this is an error. Out of the consolidated fund, established by section 126, a certain sum is set apart to defray the civil expenditure of the Province, and, if it is objected that the Province has no Civil List, as was done by a judge in the question of an escheat mooted between the Federal Attorney-General and the Attorney-General of Quebec, that the Civil List is granted to the Sovereign in England for her personal expenses and that ours does not contain a similar grant, inasmuch as the Province does not defray the salary of the representative of royalty, we would answer that if we do not give a grant to the Sovereign, we pay the officers of the Civil Government, and that it is from this application of the public funds that the Civil List gets its name. Some French writers even think anomalous the English practice, which calls a Civil List the grant to a Sovereign who does not pay the civil expenses of his Government, expenses that are paid by the State. As with finances so with respect to legislation and government, the Provinces then are, with the exception of the cases provided for, and which we have enumerated above, independent

of the Federal Government and in the sphere of their property, rights and powers, they are on an equality with it. If it were not that the Imperial Sovereignty over-rides all our public organization we would say that they are sovereign in this sphere, as it is in its sphere. In conclusion, I hope that I have made good my two last propositions, as well as the first, and that judgment will go in favour of the Province of Ontario, the Respondent.

THE REPORT OF THE HONOURABLE THE ATTORNEY-GENERAL RESPECTING THE ESTATE OF THE LATE ANDREW MERCER.

[*Referred to Ante, p. 2. Taken from Ontario Sessional Papers for 1878, Vol. 4, No. 38.*]

20*th February*, 1878.

The undersigned has had under consideration the circumstances of the Estate of the late Andrew Mercer, of the City of Toronto, which has been adjudged by the Court of Chancery to belong to the Crown, and has thereby become the property of the Province, the said Andrew Mercer having died unmarried and intestate, without heir or next of kin.

The estate consists of real and personal estate, valued now at about $140,000 or more.

The said Andrew Mercer died on the 13th June, 1871, at Toronto. At the time of his death, one Bridget O'Reilly, by whom he had had a son, Andrew, 20 years before, was living with him as his housekeeper. The general supposition was that the deceased himself was illegitimate.

Young Mercer has lately been setting up that he was the lawful son of the deceased; but no such thing was pretended by him or his mother at the time of Mr. Mercer's death, nor for four years afterwards. When the claim was made, a trial was ordered and took place; it lasted several days; the claimant had able counsel, the evidence was fully gone into, and the decision was against the claim. The learned judge, in pronouncing judgment, said that he "had not a shadow of a doubt that there had never been a marriage, and that Andrew Mercer, junior, was not the legitimate son of the deceased." Having read the evidence, the undersigned concurs entirely in the view thus expressed.

During the first four years after Mr. Mercer's death, the young man was in frequent personal communication with the Attorney-General's Department under its successive heads, and with the successive solicitors who acted on behalf of the Province in the affairs of the estate; and it was always assumed in these communications and otherwise that there had been no marriage between the deceased and Bridget O'Reilly, and that Andrew was the natural son only of the deceased; and the only question as to the heirs of the deceased was whether he had left any unknown collateral heirs, or whether his estate went to the Crown. Accordingly, the papers of the deceased were taken possession of by Mr. Gamble, as Solicitor for the Crown. On the 7th December, 1871, a commission of escheat was ordered to be issued on the recommendation of the then Attorney-General, Hon. J. S. Macdonald. A commission was issued accordingly, and the Commissioner notified thereof on the 15th December, 1871. On the 23rd May, 1872, Letters of Administration were issued to the then Attorney-General, Hon. Adam Crooks, as representing the Crown; and on the 30th June, 1874, the administration was transferred by the Surrogate Court to the undersigned, who had succeeded Mr. Crooks as Attorney-General. The Letters of Administration in both instances recited that Mr. Mercer had died unmarried, and without lawful issue.

Meanwhile, the Solicitors for the Province advertised in the London *Times* (England), for the heirs and next of kin, if any, of the deceased; and steps were taken for getting in and securing the personal estate. Several persons made claim to be the heirs or next of kin; young Mercer was not amongst these claimants. He and his mother both were

permitted to remain in the occupation of the premises on which they had been living with the deceased during his life; and the son was allowed to receive the rents of certain other premises which Mr. Mercer had contracted verbally to buy for his benefit, but had died without procuring to be conveyed.

The young man having married, he pressed for some further allowance to be made for him out of the estate, on the supposition that it had gone to the Crown for want of heirs, but there was a difficulty in acceding to this request until it should be authoritatively determined that the intestate had no collateral heirs or next of kin.

In order to procure an adjudication on this point, the undersigned, with the concurrence of the son, made a Report for the information of His Honour the Lieutenant-Governor, bearing date 30th October, 1874, wherein the undersigned stated that he had had under consideration the claim of the said Andrew, therein described as the reputed son of the late Andrew Mercer, to a share in the estate left by his father, who died intestate and, as was believed, without leaving any lawful heirs or next of kin; that the sum of $7,751.46 was then in deposit in the Merchants' Bank of Canada to the credit of the undersigned as administrator of the estate; that no satisfactory evidence of title had been furnished by any of the persons claiming to be heirs of the deceased; that it appeared to be without doubt that the said Andrew was the son of the deceased; that it had been shewn to the satisfaction of the undersigned, that the deceased had intended to make some provision for the said natural son; that for that purpose, the deceased had entered into an agreement with the owner for the purchase of a farm, the conveyance whereof was to be made to the said Andrew; that Mr. Mercer's death had occurred before the intention and instructions were carried out; and the undersigned submitted, that, in the event of its being determined that the Crown was entitled to the real and personal estate whereto the said Andrew Mercer died entitled, a grant of some portion thereof should be made to the said Andrew (his reputed son); that the undersigned was of opinion that until such question should be determined by some Court of competent jurisdiction, it would be premature to consider what portion of the estate should be so granted; that the undersigned was of opinion that, if a portion of the said estate were granted to the said Andrew, to be paid over under the authority of the Court of Chancery, after enquiries respecting next of kin had been made according to the practice of the Court, and on its being judicially ascertained thereby that the said Andrew Mercer had died without leaving any next of kin—a determination of the said question might be hastened by such conditional grant; and the undersigned therefore recommended that, subject to the above condition, a grant of $1,000 out of the moneys belonging to the estate of the said deceased in the hands of the undersigned as administrator, should be made to the said Andrew.

An Order in Council was thereupon passed and approved by His Honour the Lieutenant-Governor, on 20th November, 1874, in the words following:—

"Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that your Excellency grant to Andrew Mercer, a reputed son of the late Andrew Mercer, of the City of Toronto, Esquire, the sum of one thousand dollars, portion of the personal estate of the said late Andrew Mercer, now in the hands of the administrator of the said estate: The same to be paid under the authority of the Court of Chancery after enquiries respecting next of kin, according to the practice of the said Court, and on its being judicially ascertained thereby that the said late Andrew Mercer died without leaving any next of kin."

The said Andrew accepted the said conditional grant, and in order to secure the benefit of it he procured a Bill to be filed by his own Solicitor, on the 3rd of February, 1875. His Bill stated, amongst other things, that the deceased had for a very long period been a resident in the City of Toronto, and was well known by and acquainted with many of the inhabitants of the said City, but that none of his friends or acquaintances had ever heard him speak of his family or relations, or of his previous history; that after his death his papers had been carefully examined, but that they furnished no information as to whether he had any relations; and that they gave no clue to his history previous to his coming to this Province; that for divers reasons it was believed by persons acquainted with him during his long residence in this City that he had no lawful heirs or next of kin.

The Bill of the said Andrew proceeded to state further, that the Plaintiff was the reputed son of the said Andrew Mercer, deceased, and that the Plaintiff's mother had not been lawfully married to the said Andrew Mercer. The Bill set forth the conditional grant of $1,000, and prayed that the amount should be paid, and that if necessary an enquiry should be made whether the said deceased left any heirs at law or next of kin him surviving.

An answer to the Bill was filed on behalf of the undersigned, submitting to pay the amount if it should be established before the Court that there was no heir or next of kin.

The Court thereupon, on the 11th February, 1875, on the motion of counsel for the Plaintiff, made a decree directing enquiries to be made whether the intestate left any heir at law or next of kin, and if so who they were. Advertisements were issued under this decree, and several claims had appeared, when, in August, 1875, Bridget O'Reilly and her son set up, for the first time, the pretence that she had been married to the deceased, that such marriage had taken place a month before the birth of the said Andrew, and that the said Andrew was himself the heir of the deceased. It was also pretended that an unwitnessed will of the deceased had been discovered accidentally in an old law book of his, in which alleged will reference was made to a wife and son, and to them his estate was thereby declared to be given. The executors named in the will applied to the Surrogate Court for probate of this paper, and, there being strong reasons for fearing that the pretended will was a forgery, and the estate being large, the matter was transferred from the Surrogate Court to the Court of Chancery on the 1st September, 1875.

On the 5th October, 1875, an Order was made by the Court of Chancery for the trial of the question, and in January following a trial took place, both as to the alleged will and as to the alleged heirship of the said Andrew, junior. After an exhaustive trial, the Court decided, on the 21st January, 1876, that the said Andrew was not the legitimate son of the said deceased, and that the pretended will was not the will of the deceased, as the undersigned has already stated. The learned Vice-Chancellor who heard the case was clear that there had been no marriage, and that both a pretended entry thereof in an old Register and the pretended will were fabrications.

Indeed, looking at the whole evidence, the matter is too clear for any reasonable question, and the said Andrew, as well as his mother, have acquiesced in the decision. The various claims of others having afterwards been disposed of, the Court, on the 13th September last, made a decree, declaring amongst other things, that Andrew Mercer died intestate, and without heirs or next of kin; that by reason thereof, the real and personal estate of the said intestate had become vested in Her Majesty, and that the Plaintiff was entitled, under the Order in Council, to be paid the sum of $1,000, less certain costs therein mentioned.

By the Revised Statute respecting Escheats and Forfeitures, the Lieutenant-Governor in Council is authorized to grant any land escheated to the Crown or any portion thereof or any interest therein, and to transfer personal estate going to the Crown, or any portion thereof, to any persons having a moral claim on the person to whom such land or personal estate had belonged.

With respect to Bridget, it has not been suggested that she has, under all the circumstances, any moral claim to any portion of the estate. Her bad conduct to Mr. Mercer in his latter years, is shewn by memoranda which he left among his papers ; and the fact that she has somehow possessed herself of $12,000 or more which belonged to him and which she now has, are sufficient to disentitle her to consideration, even if she had not been found to have been a party to a conspiracy to establish a forged will and a false marriage. The undersigned recommends that she be left in undisturbed possession of what she has thus obtained, but that no part of the other assets of the deceased be given to her. Indeed, she does not ask for any.

As to her son, the case is somewhat different. The only part of Mr. Mercer's estate which he is known to have got, is the farm in Etobicoke of 50 acres, which Mr. Mercer, a few months before his death, bought for him at a cost of $2,780, and procured to be conveyed to Andrew on the 30th September, 1870.

It further appears that shortly before his death, Mr. Mercer entered into a verbal agreement for the purchase of two adjoining lots (equal to 150 acres) for $9,770, though

the transaction was not completed at the time of his death. The cost of the two hundred acres which he thus appears to have designed as the said Andrew's portion would have been $12,550.

The undersigned has learned from the son that he has incurred debts amounting to about $1,300, besides a mortgage on the fifty acres above mentioned, on which a further sum of $2,000 or upwards is said to be due.

There is evidence that the deceased deliberately abstained from making a will, stating on one occasion that he had purchased land for his boy, and that he could manage to make a living out of it: that he had no relations and would leave his property to the Government; and saying on another occasion that he had provided or intended to provide for Andrew, and did not care what became of the rest of his property.

Mr. Mercer's manner of living is said to have been extremely simple and economical, and it appears that his personal and household expenses did not probably exceed $1,000 annually, including the support of Bridget and her son. Property which would yield an annual income of that amount would enable the son and his family to live in the manner in which the father had lived, and to have all the comforts which his father gave himself, and which the son had during his father's lifetime.

It is proper to add that the learned Vice-Chancellor was of opinion that the son was a party to a conspiracy for making out his legitimacy by the fabrication of the will, and by a pretended entry of the marriage in a register of marriages. It may be observed here that the fabrication of the former was so far plausible that, at first, some of Mr. Mercer's friends were deceived by it; and the fabrication of the entry was so nearly successful, that those having the custody of the register at the time of the trial, were led to think that the entry thereof was genuine, though, upon the whole evidence, it was afterwards established clearly to be otherwise. The Vice-Chancellor states that young Mercer refused to enter the witness-box, fearing evidently the result of the disclosures he might be compelled to make; and the learned Judge remarked, that it would go far to shake even a strong case, if, as here, after being called, and after having been warned that he would be needed, the Plaintiff walked out of Court when he was required for his examination, and when, in place of throwing by such personal examination what light he could upon the case, he had virtually abandoned it.

Still, and notwithstanding the young man's grave misconduct, the undersigned is disposed, for the sake of his father's memory, to recommend a humane and liberal view to be taken as to appropriating a portion of the estate for the benefit of the young man and his family. Where an estate comes to the Crown for the benefit of the Province, in consequence of the owner's death without heirs, it would be contrary to good morals and to public policy to recognise the right of an illegitimate son to the estate as if he were legitimate. Where an estate is small, and an illegitimate child is in need, it may not be necessary to withhold any of the estate from him. Where the estate is large, as the estate here is, and a portion of it would suffice to establish the illegitimate child in a condition corresponding with that in which he was brought up, the surrender by the Crown of much more than is sufficient for that purpose cannot be justified.

In view of all these considerations, the undersigned recommends that the sum of $5,000 be appropriated for the payment of the said Andrew's *bona fide* debts; that if they are found not to amount to so much, the balance be paid to the said Andrew; that the purchase of the 150 acres intended for him by the deceased be completed, and conveyed to trustees for the benefit of the said Andrew and his family; that a further sum of $15,000 in stock or securities be transferred to trustees on like trusts; or that in lieu of the said 150 acres the said Andrew have the option of a further sum of $10,000 in stock or securities being invested as aforesaid; making the whole amount $30,000.

These appropriations leave a large residue, the exact amount of which cannot be stated until the estate is realized.

The property of the deceased was the accumulation of a long life of economy and thrift. All bear record to his having been most just and upright in his dealings, and testify that he was a kind-hearted, humane, charitable and generous man.

The undersigned respectfully refers to the Report of the Inspector of Public Charities and Prisons which accompanies this report, and in accordance with the views expressed by

the Inspector, the undersigned recommends that out of the residue of the said estate the sum of $10,000 be appropriated towards the erection of a Provincial Eye and Ear Infirmary in connection with the Toronto General Hospital, to be called "The Andrew Mercer Eye and Ear Infirmary;" and a further sum of $90,000 to the erection of a reformatory institution to be called "The Andrew Mercer Ontario Reformatory for Females," such institution to be maintained and managed in the same way as the Reformatory at Penetanguishene, and to be for the reception of females, irrespective of age.

O. MOWAT.

20th February, 1878.

Agreeably to the recommendations of the above Report, an Act was passed by the Legislature of Ontario (7th March, 1878), containing the following provisions (41 Vic., chap. 1, ss. 2, 3):

2. Out of the estate of the late Andrew Mercer, deceased, which has escheated to the Crown, for the benefit of the Province, the sum of $5,000 shall and may be applied to the payment of the *bona fide* debts of Andrew Mercer the younger, the natural son of the said Andrew Mercer; and, subject thereto, the residue of the said sum of $5,000 shall and may be paid to the said Andrew Mercer the younger, and that a sufficient further sum shall and may be applied to complete the purchase of certain lots in the Township of Etobicoke, containing 150 acres, in respect of which the late Andrew Mercer entered into a verbal agreement, and which he intended for the said Andrew Mercer the younger; and such lots shall be conveyed to trustees for the benefit of the said Andrew Mercer the younger and his family, with all usual trusts and conditions in that behalf, to be settled by the Attorney-General; and that the further sum of $15,000 in stocks or securities be transferred to the trustees on like trusts; or that, in lieu of the said 150 acres of land, at the option of the said Andrew Mercer the younger, the further sum of $10,000 in stocks or securities shall and may be transferred to the trustees in manner and on the trusts and conditions aforesaid.

3. Out of the residue of the said estate of the late Andrew Mercer, deceased, the sum of $10,000 shall and may be applied towards the erection of a Provincial Eye and Ear Infirmary in connection with the Toronto General Hospital, to be called "The Andrew Mercer Eye and Ear Infirmary," and the further sum of $90,000 shall and may be applied to the erection of a reformatory institution at Toronto, to be called "The Andrew Mercer Ontario Reformatory for Females."

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