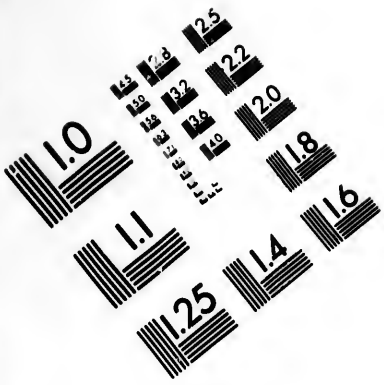

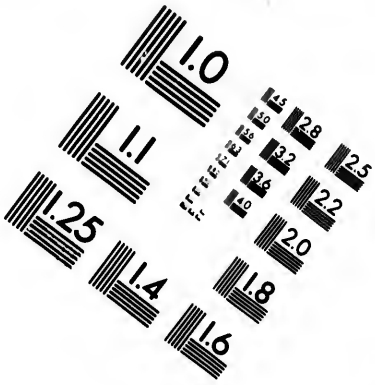

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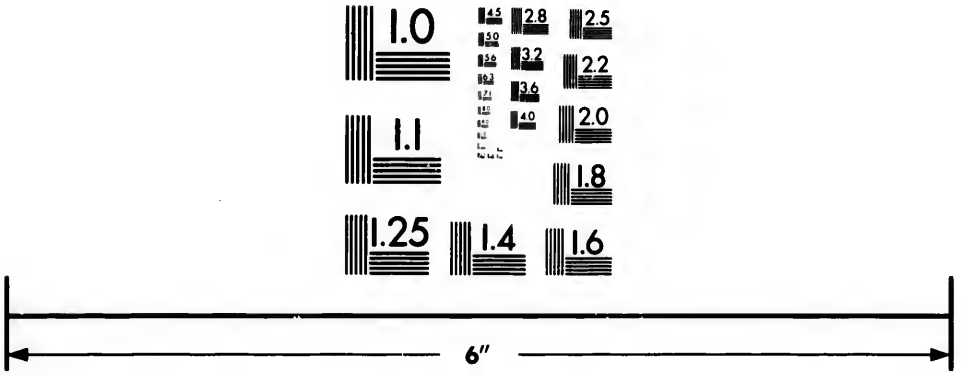

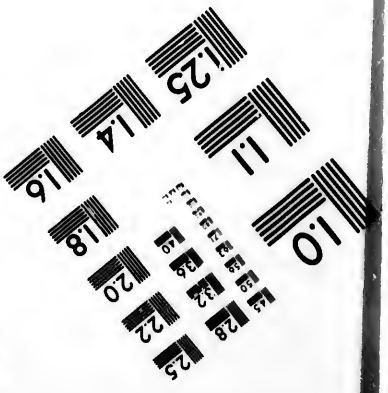

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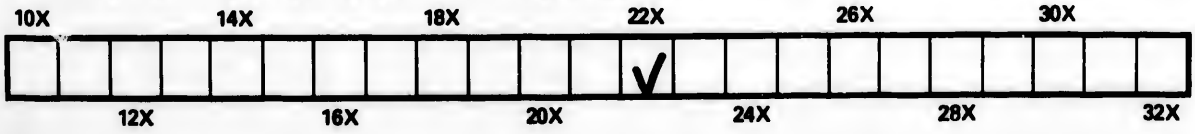

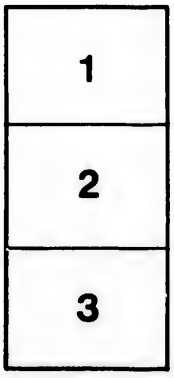

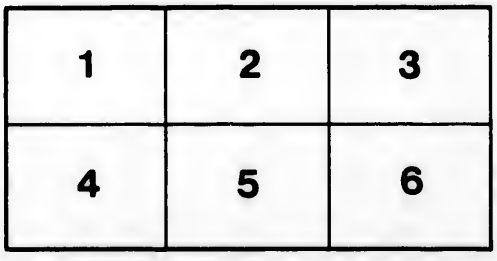

OBSERVATIONS

OF

THE CHIEF JUSTICE OF NEW BRUNSWICK

ON

A BILL ENTITLED "AN ACT TO ESTABLISH A SUPREME COURT FOR THE DOMINION OF CANADA."

Presented to Parliament on 21st May 1869, by the Hon. Sir John A. Macdonald, K.C.B. Minister of Justice, &c. &c. &c.

FREDERICTON:

G. E. FENETY, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1870.

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Under this Bill, though only one Court is proposed to be established, three entirely distinct and separate jurisdictions are raised; and though presided over by the same Judges, the Bill really creates three Courts, entirely different, one from the other, viz:—

1. An Appellate Court.
2. A Court for settling certain Constitutional questions, in the nature of a Court of Original Jurisdiction.
3. A Court of original Common Law, Equity and Admiralty Jurisdiction.

In dealing with the Bill, this must be kept clearly in view, and the Court of Appeal discussed independently of the Courts of Original Jurisdiction, or confusion is unavoidable.

"The British North America Act, 1867," is the Supreme Law of the Dominion, and must be universally and implicitly obeyed. All Acts of the Parliament of Canada, or of the Legislatures of the respective Provinces, repugnant to the Imperial Statute, are necessarily void; and of like necessity when cases come before the legal tribunals, it pertains to the judicial power to determine and declare what is the law of the land. It is said to be "a political axiom, that the judicial power of every well constituted government must be co-extensive with the legislative power, and must be capable of deciding every judicial question which grows out of the Constitution and Laws."

The Parliament of Canada is no doubt supreme in all cases in which it is empowered to act. If therefore the Constitution of the Dominion is "The British North America Act, 1867," we must look there for authority for constituting and organizing Courts.

The portions of the Statute which bear on this subject are—

Division VI.—*Distribution of Legislative Powers.—Powers of the Parliament.*

By section 91, it is enacted that "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; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding any thing in this Act) the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated."

Then follows the enumeration of twenty nine classes, one only of which refers to the matter in question, viz. the 27th—"The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

Under head—"*Exclusive powers of Provincial Legislatures*,"—Section 92 enacts that "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated." They are sixteen in number, of which is—

No. 1. "The amendment from time to time, notwithstanding any thing in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor."

No. 13. "Property and Civil rights in the Province."

No. 14. "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in Civil matters in those Courts."

No. 15. "The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

Under Division VII—"*Judicature*,"—after providing that the Governor General shall appoint the Judges of the Superior, District and County Courts in each Province; specifying the Bars from which they shall be selected; the tenure of office of the Judges of the Superior Courts; and that their salaries, &c. shall be fixed and provided by the Parliament of Canada; section 101 provides that "The Parliament of Canada may, notwithstanding any thing in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts *for the better administration of the Laws of Canada.*"

Under Division IX—"*Miscellaneous Provisions*,"—Section 129 enacts that "Except as otherwise provided by this Act, all laws in force in Canada, New Brunswick and Nova Scotia at the Union, and all Courts of Civil and Criminal jurisdiction, and all legal Commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless, (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

Section 133, after providing that either the English or French language may be used in debates of the House of Parliament of Canada, and of the Houses of the Legislature of Quebec, and that both should be used in the respective Records and Journals of those Houses, enacts that "*either of those languages may be used by any person, or in any pleading or process in, or issuing from* ANY COURT OF CANADA ESTABLISHED UNDER THIS ACT, and in or from all or any of the Courts of Quebec."

There are no other clauses or provisions that appear to me, to bear in any way on this matter.

With respect then to an Appellate Court,—this, without doubt, the Parliament of Canada has full power to establish. But I cannot help thinking that it would have simplified matters, if the organization of a general Court of Appeal had been dealt with in an Act by itself. This, it appears to me, section 101 seems to contemplate, leaving the establishment of "Additional Courts," if found necessary "for the better administration of the Laws of Canada," for separate legislation; even though such Courts should be placed under the administration of the Judges of the Appellate Court.

But this is a small matter compared with other questions which seem to me to present themselves on the whole Bill as worthy of consideration.

An efficient appellate tribunal as a Court of *dernier ressort*, and whose precedents would be a rule of decision for the Courts of all the Provinces, is without doubt much required. It should, I think, be so constituted as to secure its being at all times presided over by Judges in whose learning and character the Profession and Public have, from experience, confidence. It should be easy of access—speedy in its action—and, with a view to dispatch and cheapness, simple in its procedure. It should deal only with cases of sufficient magnitude, either in the amount or principle involved, to warrant further investigation and expense; and then, with the substance of the matter in controversy on broad principles of law and justice, to the discouragement of mere formal or technical objections which do not affect its merits.

Deficient in these particulars, it is more likely to become a burthen than a blessing.

If the Court is composed of those whose legal standing or experience is inferior to the Judges of the Court whose decision is appealed from, and a decision should be reversed by such a tribunal, possibly by fewer Judges in number than originally decided the case, the administration of justice must necessarily be depreciated, rather than elevated in public estimation. And if parties are delayed by being compelled to go to a great distance, and have to employ fresh counsel to obtain relief from decisions against, or to maintain decrees in their favor; or the merits of the case and substantial justice have to give way to technical objections, or objections on the ground of mere formal defects in procedure, or objections which were not raised in the Court below; or the expenses from these or other causes are made too costly; the Court in many cases, instead of rectifying errors, will only afford the litigious or the wealthy, facilities for defeating the ends of justice, by embarrassing and frustrating proceedings, and impoverishing parties, so as to render a final victory worse than submitting to an original defeat.

While the large strides made in legal reform within the last few years, and those which are now in progress, warn us not to adhere too rigidly to ancient modes of proceeding, still we must remember few changes have been made in the great fundamental principles of law, and the wisdom and learning of the ancient Sages of the law still remain as safe guides and beacons; and we should, I think, without unnecessarily departing from established insti-

tutions, endeavour to mould them to the altered state of society and the new phases presented by enlarged intercourse, new discoveries, and consequently more novel and intricate relations; and try to discover whether we have not within the system of jurisprudence of Great Britain and her Colonies, materials from which a tribunal adapted to our necessities, may be modelled, before attempting to experimentalize, or without looking to the neighbouring Republic; evidence of both, I think, is to be found in this Bill.

No doubt in framing the appellate portion, the Judicial Committee of the Privy Council and the Court of Exchequer Chamber were in the draughtman's mind; and I also would adopt these two Courts as the basis: only adhering much more closely to their constitutions than I think has been done.

The Exchequer Chamber, we all know, is a Court of Error for revising the judgments of the three Superior Courts of Law in matters of law, and is holden before the Judges of the two Courts not concerned in the judgment impeached.

The Judicial Committee was constituted by the Imperial Act 3 & 4 Wm. 4, c. 41, the Court of Appeal from the Court of Admiralty in cases of Prize, and from the Colonies; leaving however the Royal prerogative untouched. It is thus composed of the President for the time being, of Her Majesty's Privy Council, the Lord High Chancellor of Great Britain, and such of the members of the Privy Council as shall from time to time hold any of the offices following, that is to say—the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice or Judge of the Court of Queen's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all persons, members of the Privy Council who shall have been President thereof, or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned; with a proviso that the Crown might appoint any two other persons, being Privy Councillors, to be members of the said Committee.

Thus, we see the first of these Courts is composed wholly of Judges in the daily active discharge of judicial duties—and the latter, almost exclusively of Judges similarly situate, or such with others who have held similar offices.

To assimilate the proposed Court to either of these, in this most important feature of its constitution, section 4, relating to the qualification of Chief Justice and Judges, will have to be materially altered.

Unless the attendance of Judges from the different Superior Courts in the Provinces respectively, is secured, and thereby, as may perhaps be reasonably anticipated, greater legal experience and more diversified legal knowledge and talent obtained, a very dissimilar tribunal will be created.

There is no provision that the Chief Justice, or any one of the Judges who are to form this Court, shall have ever exercised judicial functions, orhad a day's judicial experience; but may be selected—the Chief Justice, from Barristers of fifteen years, and the Judges from Barristers of ten years standing; and that too, if the Government should so choose, from any one Province.

This startling departure from the models of the two leading appellate tribunals referred to, as also from the general principle prevailing more or less practically in all the appellate tribunals known to the English Law, including the last and highest Court of the nation, the House of Lords, where law Lords, all of whom have held the highest judicial situations alone decide, and who command the services of the Judges whenever required, presents itself

more forcibly, when the value and importance attached by eminent Jurists and Statesmen to this ingredient in the constitution of appellate tribunals is borne in mind.

I shall only select the testimony of two: but two alike experienced and learned as Jurists, and eminent as Statesmen—shining lights in Law and Politics, and whose testimony is not the less valuable, because through the greater portions of their lives politically opposed.

I refer to Lords Lyndhurst and Brougham. On the debate on Lord Campbell's Bill for transferring the Admiralty, Ecclesiastical and Colonial Appeals from the Judicial Committee to the House of Lords, the former, when Lord Chancellor, speaking of the Judicial Committee, said—

"He thought it was a tribunal admirably adapted for the business which came before it, and *for this reason*, there were various kinds of law agitated, discussed, and settled before it; there were questions of Civil and Ecclesiastical Law: and there were Judges who had been brought up in discussing and administering Civil and Ecclesiastical Law; and when questions of that nature arose their attendance was always required. Again, when questions of Equity arose, there were Judges from the Equity Courts, members of that tribunal; and when such questions were discussed their attendance was requested, and they formed part of the Court. There were questions of Common Law discussed, and there were members of the Court who were also Judges of Common Law, and they attended on these occasions to give sentences and decide. There were questions of Hindoo and Mahomedan Law discussed in cases, the results of which were often of the utmost importance to the parties concerned: and in cases of this nature the Court had the assistance of parties familiar with these laws, and who had acted as Judges in India. He asked the House if, considering what the nature of the questions which came before the tribunal in question, often was—he asked if whether he had not fully established the fact that the tribunal was admirably adapted to the performance of the duties it had to go through."

And Lord Brougham, when Lord Chancellor, on laying a Bill on the Table of the House of Lords, relative to the appellate jurisdiction of that House, in alluding to the difficulties which had to be overcome in effecting modifications of the existing Law, is thus reported—

"The first was the repugnance which he had naturally felt to alter the jurisdiction of their Lordships, and the next was the small number of Judges from whom he could select a certain number to hear appeals: for he held it to be indispensible that Appeals should be decided by Judges taken from other Courts, and not by Judges appointed for the express purpose of deciding such cases, and forming a separate and exclusive tribunal. The example of France, where there were two Courts exclusively for hearing Appeals, namely, the *Cour Royal* and the *Cour de Cassation*, proved nothing, for there were such a vast number of Inferior Judges, (fourteen or fifteen hundred), and they were of such an inferior class, that it would be most injudicious to call upon them to sit in Appeal. He thought that Judges who were only Judges of Appeal, would not be fit for any thing. What would the Lord Chancellor be worth as a Judge, if he sat forty or fifty days in the year to hear Appeals only, without being accustomed to the forensic *strepitus*, as it were, and without having heard the business done in the first instance, which afterwards became the subject of appeal? There never would be a Court of Appeal worth any thing, unless the Judges composing it sat also in the Courts below. On the one hand, it was necessary that the Judges of the Court of Appeal should not be those whose decisions were appealed against, and on the other, that they should be accustomed to preside in the Courts below. There was but one middle course to take, and that was judiciously to compose a due admixture of the various Judges with those whose decisions were appealed against—thus proceeding on the principle of analogy to the Courts of Common Law. When the Court of King's Bench, or the Court of Exchequer, or the Court of Common Pleas, went wrong, an appeal was made to the Common Law Judges; and so when all these Judges went wrong, an appeal took place to the House of Lords, which sent for the Judges, who intermixed with the Equity Judges, and applied their minds to the subject. It was upon this principle that the Judicial Committee of the Privy Council was constructed;"—

And it is the principle, I think, with slight modifications, admirably adapted to the Dominion.

Assuming, however, the contemplated Court, in its organization, correct in principle, I would venture to point out some difficulties which may arise in its practical working.

1st. The Bill does not seem to me to define with sufficient precision, from what Judgments, Rules, and Orders, parties may appeal.

2ndly. It allows Appeals in cases irrespective of the amount or principle involved.

3rdly. It gives too long time for Appeals.

4thly. It places the Appeal too far away for ordinary cases; entailing too much delay and expense; and

5thly. By retaining the present Appeal to the Judicial Committee of the Privy Council to its full extent, it unnecessarily multiplies Appeals, and those too of the most expensive character.

As to the first—Section 13 states, generally, that "Appeal shall lie to the Supreme Court, from *all judgments*" of certain Provincial Courts therein named; and

Section 15 allows a writ of Error to be brought in the said Court from the judgment in any civil action or criminal proceeding of any of said Provincial Courts, in any case in which the proceedings have been according to the course of the common Law of England.

Section 23 then directs, that proceedings in Appeals from *Decrees, Judgments or Orders* in Equity and Admiralty, shall, when not otherwise provided for, be as nearly as possible in conformity with the present practice of the Judicial Committee.

Now, taking these clauses together, what is intended? Are the Decrees, Judgments or Orders to be in the nature of a final sentence, or may any interlocutory proceedings be appealed from?

Section 13, that gives the Appeal, only mentions Judgments. Section 23 directs how proceedings from Decrees, Judgments and Orders shall be conducted; and Section 28 enacts that no appeal shall be allowed from any final Judgment, Decree, or Decretal Order, unless the same be brought within two years from the signing or pronouncing thereof, and that no Appeal shall lie from any interlocutory *Order* or *Rule*, unless the same be brought within six months from the making or granting thereof.

The inference from all this certainly is, that in the Courts of Equity and Admiralty, the Appeal is to be from Orders or Rules of an interlocutory character. Would it not be wise to define exactly what description of Rules and Orders may be appealed from?

It is said, with reference to the Judicial Committee, that "great difference prevails as to the nature of the Judgments from which Appeals should be admitted from the Courts in the Colonies. In the earliest Order of Council which is known on the subject, that of 13th May, 1572, relating to appeals from the Island of Jersey, it was directed that no appeal in any matter, great or small, be permitted or allowed before the same matter be fully examined and ended by definitive sentence; and the constant practice has since been in causes from that Island, to reserve the appeals from all orders in the suit "*en fin de cause.*" In the West Indies and American Colonies where the English Law prevails, the practice has always been to admit appeals from all interlocutory orders in Chancery, but not from those at Common Law."

As the jurisdiction of this Court will be purely statutory, we must bear in mind the unbending nature of a statute, and the necessity therefore of defining with precision and accuracy its jurisdiction and powers. It will be destitute of any aid from the "nursing" principles of the Common Law, or the inherent power of the House of Lords, or the general jurisdiction and large discretion which pertains to the exercise of the Royal Prerogative in appeals to the Queen in Council as the fountain of justice, whereby appeals are allowed or disallowed, or terms imposed, as the special circumstances of the particular case demand, or as may be from time to time directed by general regulations.

In this case, as the Statute is written, so it must be interpreted: *jus dicere et non jus dare*, is the maxim of Judges.

While it may be inexpedient to prescribe rules of practice by statute, nothing relating to the jurisdiction should however be left in doubt or to inference.

By Section 23, proceedings in appeals from Decrees, Judgments or Orders in Equity and Admiralty, &c., shall, when not otherwise provided for, be as nearly as possible in conformity with the present practice of the Judicial Committee. I can discover nothing with reference to proceedings on appeals from the other Courts. The inference, I presume, would be, that some difference was contemplated. If proceedings on appeals from the Equity and Admiralty Courts are to be according to the practice of the Judicial Committee, why should not the same practice prevail with respect to appeals from the other Courts? While a distinction is apparent, I cannot perceive that any other practice is substituted in lieu thereof.

As to the second point—Considering that there is in this Province an appeal to the Supreme Court from the Equity Court, the Court of Marriage and Divorce, Probate Courts, County Courts, and a general supervision over the proceedings of all inferior tribunals, not expressly taken away by Statute, where matters as well of the greatest magnitude as of very small amount, and involving no important principle, are constantly in controversy, to allow a suitor, in a case of the latter character, to drag his opponent to Ottawa on appeal from a judgment in which the whole matter in controversy might only range from £5 to £50, would only be affording means of gratifying a litigious spirit, or wearing out an adversary, and, in my opinion, conferring on all parties a curse rather than a blessing. By way of illustration, take the case of a cause tried in a County Court in which there is a verdict. The party against whom it is rendered applies in that Court for a new trial, it is refused; he appeals to the Supreme Court at Fredericton; the appeal is dismissed and judgment of County Court affirmed: surely in a matter ranging from £5 to £50, this is law enough; but under this Bill the party might of right appeal to Ottawa.

As to the third point—I cannot understand why periods so long should be allowed for appealing, either in cases of final judgments or interlocutory orders.

If, as provided by Section 36, no appeal shall be allowed upon special cases, or on points reserved, or in cases of new trials, unless notice in writing be given to the opposite party within twenty days after the decision complained of, or within such further time as the Court appealed from or a Judge thereof may allow, why might not the same rule apply to all other cases?

In addition to this, it seems to me that there should be stringent provisions that the Appeal shall be promptly proceeded with. After a party has the judgment of a competent Court in his favor, and perhaps realized his judgment, why should he be kept in uncertainty and doubt as to his right for two years? Surely he ought to have the right to say to his opponent, "The Court has given judgment in my favor; if you are not satisfied give me immediate notice, and proceed at once to have the judgment reviewed on appeal. Don't keep me in suspense and jeopardy for two years."

This applies with even more force to Interlocutory Orders or Rules. The Bill gives six months in such cases. In the meantime large expenses may be incurred and a final judgment obtained; while all this is going on, it would seem by this Bill a party may lie by till the six months are about expiring; and then, by appealing against some Interlocutory Order or Rule, possibly overturn all the subsequent proceedings.

In New Brunswick, Appeals from decisions in Equity must be made within twenty days. Appeals from Courts of Marriage and Divorce must be

entered in the Supreme Court on or before the first day of the term next after decision. Probate Appeals must be made within thirty days after decision. And even in Appeals to the Judicial Committee, by order of Privy Council of 27th November, 1852, a party desiring to appeal must, within fourteen days after decree or judgment has been pronounced, apply for leave to appeal, and if leave granted, security is to be completed within twenty eight days thereafter; and by orders of the Privy Council of 13th June, 1853, the appellant is required to prosecute his Appeal within three months after receipt at the Privy Council Office of the transcript of proceedings, or the Appeal stands dismissed without further order.

As to the fourth point—So far as litigants generally in New Brunswick are concerned, an Appeal to Ottawa is really almost practically as remote as an Appeal to London, and will burthen ordinary litigation with expenses very much disproportioned to the means of the ordinary run of suitors, and to the amounts generally in litigation. There must be in all cases, the Appeal, first to the Supreme Court at Fredericton, because it is a Common Law rule, that if there be a fixed ascending scale of inferiority affecting several Courts, an error in the judgment of the inferior Court, must in general be examined and determined in the Court next in order in such ascending scale, and will not lie *per saltum* to the highest tribunal. It now constantly happens, that in causes tried in the out Counties by members of the local Bar, fresh Counsel have to be retained at Fredericton to move or show cause—for the simple reason that the local practitioner, unless he has several cases to attend to at Fredericton, cannot afford (or rather his client cannot afford to pay sufficient to enable him) to visit Fredericton, and wait his chance of a hearing. If, after incurring this fresh expense, a suitor has to send his counsel, or to retain fresh counsel at Ottawa, to pursue or resist an Appeal, the amount at stake will require to be large to stand such an accumulation of counsel fees and expenses. But if after all this, he is liable to be dragged from the General Appeal Court at Ottawa to the Judicial Committee of the Privy Council in London, and there compelled to begin expenditure afresh, by not only retaining a new junior and leading counsel, but employing agents to employ Solicitors, and Solicitors to retain such counsel, what with the delays and expenses, I am afraid the unfortunate suitor will stand a chance of being a gray headed man with empty pockets, before he gets through.

Lastly, as to the Appeal to the Privy Council, while it cannot be disputed that the Judicial Committee is a most valuable and efficient Court, its constitution ~~receiving~~ the services of learned men of diversified legal attainments, in whose combined judgments there is every guarantee that sound decisions will be pronounced, and there may reasonably be a reluctance to give up such a tribunal, I think resort should only be had to it in very exceptional cases, in which questions of a national character are involved. Does it not sound very like a reproach to our Dominion to say that there is not sufficient legal talent within its boundaries to decide finally the legal rights of the parties in all ordinary suits? Does it not ignore the principle so largely conceded, that we are fit for Local self Government?

To say we are competent to legislate on all matters affecting the interests of the people of the Dominion, and yet incompetent to decide what those Laws are, and what are the rights of the people thereunder, seems to involve a contradiction not easy to be reconciled. Apart, however, from this, the delay, expense and inconvenience attending the practical working of such an Appeal, seem to be sufficient objections to justify its discontinuance. No doubt it will be said that this would be an interference with the Royal prerogative. But I should think there could be no doubt, that if it was for the interest

of the Dominion that appeals to the Privy Council should be abolished or limited, the principle, as it has been heretofore, would be readily conceded. And now that an Appellate tribunal is about being established within our immediate borders, the necessity for its continuance not only ceases, but its retention would subject our system to the imputation of encouraging a multiplicity of appeals, which is directly opposed to the policy of the law; for as said by Sir J. Nicholl, "although the law favors *the right of appeal*, yet it does not favor the multiplicity of appeals."

As to the Appeal in Criminal Cases—Section 41 says, "A person convicted of treason, felony, or misdemeanour, before the Court of Queen's Bench or Common Pleas, in the Province of Ontario, or before the Court of Queen's Bench in the Province of Quebec, or before the Supreme Court in either of the said Provinces of Nova Scotia or New Brunswick, or who has been convicted as aforesaid before any Court of Oyer and Terminer, or gaol delivery, and whose conviction has been affirmed by any of the hereinbefore mentioned Provincial Courts, *may appeal against the conviction or affirmation;* and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or *for granting a new trial*, or otherwise, as the justice of the case requires; and shall make all other necessary rules and orders for carrying such rule or order into effect; but no such Appeal shall be made unless allowed by the Superior Court appealed from, or by two of the Judges thereof, in term or vacation, nor unless such allowance has been granted, and the appeal has been (*quære* can be) heard within six months after the conviction was affirmed, unless otherwise ordered by the said Supreme Court; and any rule or order of the said Supreme Court shall be final."

In New Brunswick, the only jurisdiction, (independent of writ of Error), in the nature of appeal or review in criminal cases, is under the 22nd, 23rd, and 24th sections of Cap. 159 of the Revised Statutes, which have not been repealed by the Dominion Act 32 & 33 Viet. Cap. 36,—by which the Judge presiding at any Assizes (and the same power is given to a County Court Judge by 31 Viet. Cap. 13,) may reserve any question of Law which may have arisen during the trial, for the consideration of the Supreme Court, and shall, in a case stated by him, state the question of Law reserved, with the special circumstances, and transmit the same to the Supreme Court, which shall hear and finally determine such question, and reverse, affirm or amend any judgment given, or avoid such judgment, and order entry thereof to be made on the record, or arrest the judgment, or order judgment to be given thereon at some other Assizes, or make such other order as justice may require. This provision is taken from the Imperial Act 11 Viet. Cap. 78, of which statute Mr. Archbold, in his excellent book on Criminal Practice and Pleading, speaks as "the greatest improvement which has ever been made in the administration of our Criminal Law, so far as relates to indictable offences. It gives the defendant the full effect of a writ of Error, speedily, and with little expense to either party, and the doubt or difficulty being pointed out by the Judge who tried the case, affords the Judges of the Appeal Court the best assurance they can have that no frivolous objections will be submitted to them."

It is an established rule that no bill of exceptions will lie in criminal cases; and recent cases clearly establish that no *new trial* can be granted in felonies. In the latest case decided by the Judicial Committee, where an order for a new trial was reversed, the Court said, "If irregularity occurs in the conduct of a trial, not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law, or

commuting the sentence." Reg. *vs.* Murphy, Law Reports, 2 P. C. 535.—And though it is well established, that by inherent prerogative right, there is an appeal to the Queen in Council in all cases, criminal as well as civil, arising in the Colonies, the exercise of this branch of the prerogative in criminal cases will only be granted where a case raises questions of great and general importance in the administration of justice, and likely to occur often, and also where, if true, it shews the due and orderly administration of the Law interrupted or diverted into a new course, which might create a precedent for the future, and also where there is no other means of preventing these consequences. And so far have the Judicial Committee acted on these principles, that appeals have been refused though the Court were satisfied individual injustice had been done—leaving the party aggrieved to the clemency of the Crown. Thus—In Reg. *vs.* Mookerjee, 1 Moore's P. C. Cases, N. S., 295, Dr. Lushington, in delivering the judgment of the Court, says—

"With reference to the existence of the prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt on the existence of that prerogative, not only under the existing circumstances, but in others which might arise with reference to the other Dominions of the Queen which may have been acquired by conquest. They do not think it necessary that they should, on the present occasion, enter minutely into the considerations upon which the prerogative of the Crown is founded. They think it will suffice for the purpose of this case to assume that it does exist, and consequently that it is in the power of the Judicial Committee of the Privy Council exercising that prerogative right under the Crown, so to advise Her Majesty if they should think an appeal ought to be allowed on the present occasion. With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion, that justice has not been very well administered in the present case; and supposing it to have been a civil and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal, for the purpose of considering these proceedings and of doing justice to the party complaining.

"But this is a criminal case, and subject to very different considerations. Admitting therefore two things—admitting the existence of the prerogative of the Crown, and admitting that this, prima facie and presumptively, is a case of great grievance—their Lordships have now to determine whether, looking at all the circumstances attending the granting of appeals in criminal cases, it would be their duty to advise Her Majesty to grant this appeal or to withhold it.

"We must recollect in the first place *that by granting an appeal* is meant an examination of the whole of the proceedings which have taken place. It is not simply for the investigation of any legal question which might have arisen; it is for the purpose of examining *the whole of the evidence, and the whole course of the proceedings upon the trial, to enable us to come to a conclusion upon the merits.*

"Now it is of no small importance to bear in mind, that notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subject to Her Majesty, that in no instance whatever of any grievance however great, at any time has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case.

"We can easily call to memory very many instances which have occurred in the Colonies, in which it has been alleged that gross injustice has been done, and even lives sacrificed where they ought not to have been exposed to any danger; but no precedent of an Appeal of this nature has existed; and we think it is obvious on the least consideration of the consequences, how it is that no such precedent has existed, and how it is that no such precedent would have been created even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argue simply from consequences alone; but the consequences of granting an Appeal in cases of this description, are so exceedingly strong, they are so entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment. Now, if we were to advise Her Majesty to grant an Appeal on this Petition, how would the case stand? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases? What could be done in a capital case? Is there any distinction which can be drawn? If the prerogative of Her Majesty gives this individual the right of Appeal, could any rules or regulations be imposed whereby that right of Appeal could be governed or could be restricted? So you would go through the whole catalogue of cases, and there is no doubt whatever that whenever punishment was likely to ensue, there would follow an Appeal to Her Majesty in Council, and consequently not only would the course of justice be maimed, but in very many instances it would be entirely prostrated."

This case has been since acted on by the Judicial Committee, and the principles therein enunciated entirely assented to.

Now if, as Dr. Lushington puts forward as the judgment of the Judicial Committee, that the legal signification of granting an Appeal is not simply an investigation of any legal questions that might have arisen, but involves an examination of the evidence, and the whole course of the proceedings on the trial—is this intended by the 41st Section? The express power given to the Court to grant *new trials*, would seem to imply an exercise of discretion, as on an investigation of the merits and dissatisfaction therewith, or on the ground that the conviction was unsatisfactory by reason of some irregularity in the conduct of the trial. If the whole proceedings are open to re-examination, can it be doubted that Appeals will be encouraged? And will not the Court appealed from be slow to refuse Appeals? If such an Appeal was not contemplated, should not the section be more carefully worded? If it is intended, is it not worthy of consideration that the present mode of proceeding is plain and simple; and judging from experience, has produced no inconvenience or injustice, and has never (that I am aware of) called forth in this Province, any individual or public complaint of a failure of justice in the improper conviction of a prisoner? If such a case should arise, there is always ready the prerogative of the Crown to interfere. This, in a proper case, I feel assured, never has been, and never will be invoked in vain.

It cannot be denied that it is an anomaly, that in a civil suit involving no great principle, and of comparatively trifling amount, a new trial can be obtained, when the same is denied in cases involving liberty, reputation, life and death. Theory is clearly with the appeal. The question is, are there practical difficulties of an insuperable character in the way. If so, there is overwhelming force in the observation, that "If the thing is impracticable, and can be obtained only with such injury to the administration of justice as to outweigh all the advantages which can be anticipated, we must put up with anomalies, and be content with that which in theory is imperfect and unsatisfactory, but which in practice works well."

In 1860, when the subject of establishing a Court of Appeal in criminal cases was before the House of Commons, Sir George C. Lewis presented the difficulties in the way of establishing a Court of Appeal in criminal cases, with much force and ability, and shewed that the opinions of a majority of the Judges were opposed to it, and that the practice of the civilized world went generally against it. From this speech I take the liberty of extracting some of these opinions. He says—

"Before the Committee of 1848 Lord Denman said—'What I would state in one word, as my objections to the general power, is, that there would be no antagonism; there are no adverse parties as in civil cases;' and that principle is explained somewhat more fully in the letter of Mr. Baron Rolfe, now Lord Cranworth:—'With respect to the inexpediency of any right of appeal in criminal cases, I beg leave to add, in addition to what has been stated by Baron Parke, that a new trial would very rarely indeed be practicable. In civil cases the plaintiff has a direct personal interest in the result of his cause, and when a verdict obtained by him is set aside, and a new trial is ordered, he is obliged, in order to gain his suit, and save himself from the obligation of paying the defendant his costs, to take proper steps for bringing all necessary witnesses to a second trial. But this is not the case in criminal prosecutions; a large proportion of prosecutors come forward only because they are bound to do so; the whole proceeding is rather a burthen imposed on the prosecutor, than a measure which he voluntarily adopts, for the sake of personal redress, and I conceive that in nine cases out of ten, when a new trial is ordered, there would be so much difficulty in getting the prosecutor and witnesses together that no second trial could efficiently take place.'

Sir George then says—"It may be urged, however, that while there is some ground for the distinction between the two classes of cases, there is still a great practical grievance to be remedied. Will any gentleman present take upon himself to affirm the frequency of wrong convictions by juries in criminal cases? If not, the whole groundwork of the proposed measure falls. I will quote (he says) the views of one or two eminent legal authorities on this point.

"Baron Parke, now Lord Wensleydale, when examined before the Committee, said—'I think that the complaints of the present mode of administering the Criminal Law have little foundation, for the cases in which the innocent are improperly convicted, are extremely rare. Some

no doubt there are, and I consider it is impossible in any human system of administering justice, to avoid such misfortunes occasionally. There are many cases in which the guilty escape, but very few in which the innocent are punished; and having now had more experience upon the Bench in the administration of criminal justice than any other Judge, I can say for myself, that I can hardly call to my recollection any case with which I am personally acquainted, in which I think that a person really innocent has been convicted by the Jury.'

"Lord Denman expressed a similar opinion—'Juries are extremely unwilling to fall into the error of wrongly convicting. I believe there are a great many very wrong acquittals, and even conscientiously sometimes, from good motives and very respectable feelings, but unfortunately contradicting the truth, and bringing the administration of justice into some contempt, and giving impunity to great offenders.'

"Lord Brougham coincides in that view—'My impression and belief (he said) most undoubtedly is, that there are very rare occasions indeed on which there are wrong convictions.'

"Justice Wightman said—'As far as my experience goes, I entirely concur with Baron Parke in thinking that the conviction of a really innocent person is so rare that there is practically no sufficient necessity for applying a remedy which would be attended with such obvious impediments to the due course of criminal justice.'

"The weight of evidence is, therefore, in favor of the belief that wrong verdicts in criminal cases, at least when they are against the prisoner, are of rare occurrence. But if a wrong verdict is given, and the Judge is dissatisfied with it, what is the almost universal result? It is, that the Judge communicates his dissatisfaction to the Home Secretary; and I find it stated by Baron Parke, and assented to by Lord Lyndhurst and Lord Brougham, that such a report is universally acted upon. I maintain, therefore, that no proof of any practical and substantial grievance has been brought before the House, and that none really exists."

Again Sir George says—"I wish now to shew some of the probable consequences with which the Bill is pregnant, in the event of its being passed. These are, first the delay and uncertainty which it would import into the administration of Criminal Law. It is a maxim laid down by all writers on criminal jurisprudence, that punishment is effectual in proportion as it is speedy and certain, and the result of the proposed measure would therefore be to deprive the administration of the Criminal Law of much of its effect.

"Upon this point Lord Brougham said before the Committee of 1848—'The Criminal Law depends for the effect, more or less, which it has in delivering from crime by example of punishment, upon the speediness with which execution of the sentence follows trial. But in this case you would have a prisoner found guilty at York in the first fortnight in July, but no sentence, even in the most flagrant case of murder, ever could be executed till the middle of November following. For certainly in every case of capital conviction, and I believe in every serious case, the moving for a new trial would be a matter of course.' Another important feature in the question, is the expense which the multiplication of trials, and the necessary addition to the number of Judges, would cause. Lord Brougham gave the following opinion as to the probable additions to the Bench, that would be required in the event of Criminal Appeal being established:—'Another thing is this, for the present number of Judges to do it would be utterly impossible, and then you come to the great difficulty of materially increasing the number of the Judges. Supposing the Bar could furnish the increased number, which is perhaps doubtful, but supposing it could furnish six more Judges to be added to the present fifteen, I beg to know how those Judges could be kept up to the mark for their business?' I do not suppose, of course, that the Hon. and learned gentleman, or any member of this House, would be influenced by the prospect of business at the Bar being increased by the adoption of Appeals, but no less competent an authority than Lord Denman suggested that as a reason for the popularity of the proposal. His Lordship said—'*I think there is another reason for the outcry, which is a great desire, I think, on the part of many active and able persons attached to the law, to see a new Court, and a new course of practice which would be popular and striking, and give a new scope for the display of their talents.*'

"And again Lord Denman said—'I think there are grave objections to any thing which will give countenance to the opinion, that wrong convictions are of frequent occurrence, and that a new Court ought to be erected, or the present Courts empowered to correct them by motions for a second trial. One consequence of such a power might be, a degree of laxity of juries in considering their verdict, and less reluctance to convict on doubtful evidence, because the new trial might correct their mistake. And after all the second trial could not guarantee the security of the truth,—the second Jury is not more infallible than the first.'

"Lord Brougham said—'Most undoubtedly, if it were thought that you might set an error right by moving for a new trial, there would be a good deal less of that sort of awful feeling of responsibility, under which both Judge, prosecutor's and prisoner's Counsel, and Jury act; whereas at present they feel that what they are doing is remediless, if any error is committed. I am quite sure upon Jurors it would have an effect, and this is a question about Jurors rather than about Judges.'

And Sir George concludes thus—"There is a rule in English Law, which is never departed from—that a penal Statute must be construed strictly. If there is any doubt as to the verbal construction, that doubt always avails in favor of the prisoner. What would be the position of the prisoner if the rules of law, which the honorable gentleman seeks to establish, were substituted for the present law? The Counsel for the prosecution would be able to say with truth, 'Gentlemen of the Jury, if your verdict against the prisoner be wrong, he has an appeal, and it can be set aside, but if you acquit him, your verdict is irreversible, therefore pray incline to the side of severity, and not to that of mercy. If you are wrong, there is an appeal for the

prisoner at present at his own expense, though we hope soon it will be at the public expense, but if he is acquitted, the Crown and the prosecutor are precluded by your verdict, and the decision is unchangeable. The whole feeling of the Court, which every one familiar with the proceedings of a Criminal Court, knows is tender and merciful towards the prisoner, would be reversed, and there would be found not only a sentiment, but a rational ground for giving the advantage to the prosecutor against the prisoner.'"

As to the two last jurisdictions proposed to be established by this Bill, are they not *ultra vires* of the Parliament of Canada, and a direct invasion of rights secured to the individual Provinces by the Union Act?

I scarcely know how to discuss the subject, without apparently committing myself to the expression of opinions that may seem to militate against free judicial action hereafter; because I think I can foresee, if the Bill passes in its present shape, many questions of conflict of jurisdiction as likely to arise, on which the Supreme Court of New Brunswick will have to express opinions and pass judgment.

Alive to the caution a Judge should exercise, in confining any opinion he may publicly express to the legal construction of existing Acts rather than on prospective questions, I feel great delicacy in saying any thing that might be construed into a settled judicial opinion on the construction of this Bill, and therefore what I now say I desire may be considered as merely suggestive, and not as a deliberately formed opinion to be held of judicial weight, should the measure become a law; in which event I shall of course hold myself open to decide as I may consider right on a full judicial hearing and consideration of any matter submitted for adjudication. I assume the Parliament of Canada has no power to confer original jurisdiction other than is provided for in 'The British North America Act, 1867.'

By that Act the power of the Dominion Parliament to establish Courts is, as to appellate jurisdiction, apparently full and complete; as to original jurisdiction, limited and restricted. It is by virtue of the Imperial Statute alone that the Parliament of Canada obtains its legislative powers; and the Dominion Parliament and Local Legislatures are alike bound to confine their legislation within the limits therein prescribed. A grave objection then to this Bill would seem to be, that in many particulars it exceeds those limits.

And even if Parliament had the power, the establishment of the proposed Court of Original Jurisdiction would, I fear, be injurious to the interests of New Brunswick; and I wish to be understood in any remarks I have or shall make, as speaking only from a New Brunswick stand-point, leaving those interested in the subject in the other Provinces to deal with the matter in the way that seems to them best.

The effect of the Bill will be, I fear, to weaken and enfeeble the Supreme Court, by depriving it of many of its present powers, and rendering it substantially an inferior Court of comparatively limited jurisdiction; thereby crippling its usefulness, destroying its prestige, and necessarily lowering it in the estimation of the public; and, I fear, not substituting in its place a Court calculated to meet the necessities of the people, or to give that satisfaction which has hitherto been experienced from our present judicial system—a system which has been in operation since the foundation of the Province; which is a counterpart, as near as may be, of that of the mother country, which is well understood throughout the country; which has worked well, and against which I am not aware that there are any complaints; or if there are, none that the Local Legislature cannot redress. The Courts are accessible at comparatively trifling expense, being held in every County in the Province; and therefore the causes of suitors generally tried in the Counties in which they reside, and the proceedings open to revision before

all the Judges, and all conducted and judgment pronounced in a language they can understand.

The case will be very different in the proposed Court—a Court, we shall see, of very extensive original jurisdiction.

The cause—no matter what the amount, however great or however small—no matter in what part of the Province the cause of action arises, however near or however remote—must be tried at Fredericton, whither the suitors and their witnesses must repair.

Then the case will be tried by one Judge, the proceedings before whom will be open to revision within the Province, by two Judges only, the Judge who tried the cause being perhaps one of them—for there is no provision to the contrary—instead of five as the people have heretofore been accustomed to. If further redress is required they must go to Ottawa.

The pleading or process in the suit may be in, to the suitors, a foreign language, and the cause may be discussed at Fredericton, or in Ottawa, and judgment delivered in, what is to the large majority of the people of this Province, a foreign tongue; for we have seen that by section 133 of 'The British North America Act, 1867,' it is to be permitted to any person who may choose, to use either the English or French language in any Court of Canada established under the Act—which this Court most certainly is.

If the Courts of the Provinces, as established, have been recreant to their duty, if they have forfeited the confidence of the public, if it is necessary to substitute a new tribunal in their place, and if the Court proposed by this Bill, is the best that can be provided, the case is clear enough, and whatever inconveniences may arise, the public must, from necessity, submit to the change. But as I cannot conceive, at any rate as I hope, that any such case can be presented to Parliament, I humbly think that what is working well, and to which the public are accustomed, and with which they are satisfied, and against which no just complaints (that I have ever heard) have or (as I think) can be truthfully urged, had better be left untouched; believing, as I do, that it is time enough to administer medicine, or apply a remedy, when it is discovered, or there are reasonable grounds for believing that disease exists.

The administration of justice is a delicate subject, and will not stand much experimenting. Palpable evils should be guarded against, and practical grievances remedied. But is there not much truth in the words of Lord Campbell in the House of Lords—"If the present system works well, we are not, with a view to theoretical perfection, to resort to 'the lottery of legislation.'"

But coming to particular provisions—By Section 50, the Governor General, by and with the consent of the Privy Council, may direct a special case to be laid before said Court sitting in general Term, (that is at Ottawa), in which case there may be set forth any Act passed by the Legislature of any Province of the Dominion, and there may be stated for the opinion of such Court such questions as to the constitutionalty of said Act, or of any provision or provisions thereof, as the Governor General in Council may order; and by section 51, "said Court shall, after hearing counsel for the Dominion of Canada and for the Province whose Act shall be in question, (if the respective Governments of the Dominion and the Province shall think fit to appear), and also after hearing counsel for such person or persons whose interests may be affected by the said Act, who may desire to be heard touching the questions submitted for the opinion of the said Court, and who shall have obtained leave to appear, and be so heard on application to a Judge of the said Court in Chambers, certify their opinions upon the said special case to the Governor General in Council."

Two questions naturally arise—First, by what authority can Parliament establish such a tribunal as this? And secondly, what is to be the effect of this certificate? Is it to have the force of law, and to be from thenceforth binding and conclusive on the Dominion, the Province, and persons interested; or if pronounced *ex parte* at the instance of the Governor General, are all parties, whether cognizant or not of the proceedings, but who may claim to have rights under such laws, to be estopped by such decision, and debarred from any opportunity of asserting their rights, and being heard face to face with their opponents; or is the certificate only for the purpose of advising the Governor General, the better to enable him to exercise his discretion in any given case? But I pass on to the

ORIGINAL JURISDICTION,

which, to my mind, is a very objectionable branch of the Bill.

Section 53 provides that—"The said Supreme Court shall have and possess exclusive original jurisdiction in the Dominion of Canada, in all causes at Law and Equity in the Provinces of Ontario, Nova Scotia, and New Brunswick, and in civil causes in the Province of Quebec, as follows:"— * *

Before proceeding to the list of matters over which exclusive jurisdiction is proposed to be thus given, let us read this section by the light of the Imperial Statute, and see whether we are not approaching a conflict of law, and a clashing of jurisdiction—a state of things of which Lord Campbell in the House of Lords thus spoke—"Surely there cannot be a greater evil than the clashing of jurisdictions in the same State."

We have seen that by the Imperial Statute—Of the exclusive powers of Provincial Legislatures—"In each Province the Legislature may exclusively make Laws," coming within the subjects of—

13. "Property and civil rights in the Province."

14. "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

We have also seen that by the same Statute, the Parliament of Canada, independent of "a General Court of Appeal for Canada," is only empowered to provide "for the establishment of any additional Courts for *the better administration of the Laws of Canada.*"

By what authority then does this Act give exclusive original jurisdiction in causes at Law and in Equity, in matters touching the local laws of the Provinces respectively, as distinguished from the Dominion Laws, or "the Laws of Canada?" Or, touching property or civil rights in the Provinces? Or, by what authority does it interfere with the administration of Justice in the Province, including as before set forth?

Let us now look to the list of subjects, eight in number, and other matters in subsequent sections, exclusively confided to this proposed Court.

No. 1. In all cases in which the constitutionality of any Act of the Legislature of any Province of the Dominion shall come in question.

Is it not obvious, that if exclusive jurisdiction to determine questions, no matter what their nature may be, is vested in this Court, and so taken from the present local Courts, the exclusive rights professed to be secured to the Local Legislatures, are virtually and practically taken away? If so much of the jurisdiction of these Courts can be thus destroyed, why not the balance?

And is this principle not acted on throughout this portion of the Bill? We shall see.

No. 2. In all cases in which it shall be sought to enforce any law of the Dominion of Canada relating to the revenue.

This would seem to come within the power of Parliament, because it relates "to the Laws of Canada." But it practically and substantially sweeps away the Exchequer jurisdiction of the Supreme Court.

No. 3. In all cases in which the Crown, as representing the Government of Great Britain and Ireland, or the Government of any British Colony, or the Government of any Province of the Dominion, shall be a party, plaintiff or defendant.

This also denudes the Supreme Court of a large jurisdiction; and does it not affect "civil rights" and "the administration of justice, &c.?" If it is the right of Provincialists now to sue or be sued in such cases in local Courts—and have they not such a right—is it not a civil right? If so, where does the Dominion Parliament get authority to interfere with it?

The number of cases to which it may be presumed this paragraph will apply are many, including all bonds given to, or contracts entered into with the Government; all matters affecting the Crown Lands, Mining Leases, &c. &c.; all recognizances with which the Supreme Court has now special statutory power to deal under 33 Hen. 8, c. 39, as long since decided in this Province and constantly acted on.

No. 5. In all cases in which any Foreign State or Government shall be a party plaintiff.

It is not likely that many cases of this kind will arise. But the same objections present themselves.

No. 6. In all cases in which any Consul of a Foreign State shall be a party.

The same objections here apply. As matters are in this Province, may it not be fairly asked, why should parties, because they happen to hold the office of Consul, be limited to this new Court, or parties having dealings with them to any extent, however trifling or large, be prevented from asserting their legal civil rights, and from seeking redress in the ordinary and regular tribunals of the country?

In this Province there are, I think, some eight Consuls of Foreign States, besides a number of Consular Agents, all of whom, if I am rightly informed, except one, are permanent residents of the Province, and British subjects, and most, if not all of them, actively engaged in large mercantile and other business operations.

If it is intended to confine "all cases" to suits brought by or against them for acts done in their official capacity, is it so expressed? Is not the plain wording of the section and its grammatical construction, to the contrary; and if so, why should they, or those dealing with them in the ordinary business transactions of life, be placed in a better or worse position than their neighbors and fellow subjects?

No. 7 would seem to be strictly within the power of Parliament.

No. 8. In all cases in which any question shall arise under any Statute or Act of the Parliament of Canada hereafter to be passed, and by which exclusive original jurisdiction shall be conferred on the said Supreme Court.

Under this section, are not conflicts of jurisdiction almost unavoidable?

If the Parliament of Canada has only a limited authority to constitute Courts of original jurisdiction, can it have power, or can any such clause as this give the Courts it may establish, exclusive jurisdiction to say whether Parliament has or has not exceeded its powers?

Is it not as well the right, as the solemn duty of every Court in the Dominion, to pronounce what the Law is as declared by the Imperial Statute; and if the civil rights of the inhabitants, or the administration of justice in any Province, are interfered with, save by the Imperial Parliament, as possessing transcendent power, or the Local Legislature, to whom within the Dominion they are exclusively confided, will it not be the duty of the Provincial Courts to protect and enforce those rights, even at the risk of a conflict with a Court established regardless of the Union Act, and attempted to be supported by such a clause as this?

By section 57, exclusive original jurisdiction is given to the Supreme Court and the Judges thereof, to issue the writ of *habeas corpus ad subjiciendum* in cases of extradition.

This of course takes from the Supreme Court of this Province, and its Judges, the power they now possess. Unless some of the Judges of the new Court reside in the Maritime Provinces, for which no provision is made, delay and inconvenience must, I should think, ensue, if many cases of this description should arise. Hitherto, however, they have been very rare in this Province.

Section 58 provides—"That the said Supreme Court shall have and possess exclusive jurisdiction in Admiralty in cases of contract and tort, and in proceedings *in rem*, and *in personam*, arising on or in respect of the navigation of, and commerce upon the inland navigable waters of the Dominion, above tide-water, and beyond the jurisdiction of any now existing Court of Vice-Admiralty." This sweeps away a large jurisdiction from the Supreme, the County, and the Magistrates' Courts of the Province, and, unless I am much mistaken, will, before it is very long in operation, astonish not a little some of the merchants, traders, millmen, lumbermen, stream-drivers, steamboat, tugboat, woodboat, and raftsmen, and those dealing with them or suffering from torts committed by them, arising on or in respect of the navigation and commerce upon the inland navigable waters, &c. within this Province, when they discover, that for contract however small, or tort however trifling, and whether committed on or connected with waters in the neighborhood of Fredericton, or waters in the most remote parts of the Province, redress can only be had in this new Court at Fredericton, with an almost certain prospect of revision at Ottawa.

In addition to this exclusive jurisdiction, certain concurrent jurisdiction is likewise given; thus section 56 provides that "the said Supreme Court shall have in the several Provinces of Ontario, Nova Scotia, and New Brunswick, in causes at Law and in Equity, and in the Province of Quebec in civil causes, concurrent and original jurisdiction with the Provincial Courts in the following cases:—

"1. Where the plaintiff and defendant, or one of several plaintiffs, and one of several defendants, are domiciled in different Provinces of the Dominion.

"2. Where either the plaintiff or defendant, or one or more of several plaintiffs, or one or more of several defendants, are domiciled without the Dominion."

This is in no way limited or restricted as to Court or amount; so that for the smallest amount or matter cognizable in a Magistrate's Court, up to the highest cause of action justiciable in the Supreme Court in any of the above

cases, a party plaintiff may drag the defendant to Fredericton regardless of the amount in issue, or of expense, or distance. Here again arises the question of civil rights, &c.

Considering the great number of cases that are constantly before our Courts, where some or one of the parties are non-residents, the privilege here given the plaintiff (for the defendant has nothing to say as to the Court in which the plaintiff shall sue) of compelling a defendant, possibly residing in a most distant section of the Province, to defend himself at Fredericton and Ottawa, will entail great inconvenience and expense, and give plaintiffs a power and advantage over their adversary that will, I fear, in many cases, work great hardship, if not injustice. The case would be bad enough if the concurrent jurisdiction was confined to the jurisdiction of the Supreme Court; but when it is to be with the "Provincial Courts," without distinction or limit, the result and consequences will, I fear, be very unsatisfactory. As against this, I can discover no corresponding benefit.

An additional advantage is also given to plaintiffs in such cases, to which I can hardly think they are entitled, and which will in all probability cause the new Court to be often selected, viz: that by section 74, it is provided "That the process of the said Court shall run throughout the Dominion of Canada." This, under many circumstances, may clearly place a plaintiff in a better, and a defendant in a worse position, than those who have to sue and be sued in a Provincial Court, whose process only runs within its own Province.

By section 65 it is declared—"That the rule of decision in all civil actions (except causes in Admiralty) which may be brought in the Province of Quebec, shall be the law of the said Province, and the procedure in such suits shall be regulated by the Code of Procedure of the said Province."

And by section 66, that "the rule of decision in all actions at law, and suits in Equity brought or instituted in the said Court, in any of the Provinces of Ontario, Nova Scotia, and New Brunswick, shall be the law of England."

The first of these sections seems intelligible and reasonable, but section 66 has puzzled me not a little; and I must confess I am still at a loss to understand what is really intended, for I cannot think the only legitimate construction its language seems to bear, could have been contemplated. The rule of decision in Quebec is to be "the law of the said Province." But in Ontario, Nova Scotia, and New Brunswick, the rule of decision is to be the law of England. "*Expressio unius est exclusio alterius.*" Therefore while the law of the Province of Quebec is to prevail in Quebec to the exclusion of any other law; in Ontario, Nova Scotia, and New Brunswick, the law of England is to prevail—necessarily to the like exclusion.

In New Brunswick, why should the laws of New Brunswick, and the laws of the Dominion so far as applicable to New Brunswick, not be the rule of decision? And so in the other Provinces respectively.

Where does the Parliament of Canada get the power thus summarily to wipe away, in the mass of cases over which exclusive original jurisdiction is given, the laws of the Provinces? And in cases of concurrent jurisdiction, giving different rules of decision as the action may be brought in one or the other of the Courts, that is to say, if brought in the new Court, the rule of decision will be the law of England; if brought in the Provincial Court, the rule of decision will be the law of the Province.

Is the rule of decision to be the Common Law of England, or the Statute Law, or both combined? Probably the latter, as we find distinctions expressed where either is to be the rule alone. Thus, in section 15, the proceed-

ings there referred to are to be "according to the course of the Common Law of England." So in section 68, the trial of the issue there provided for, is to be "according to the rules of the Common Law of England." But by section 72, the procedure in actions against the Crown, is to be as nearly as possible "according to the Act of the Imperial Parliament, known as the Petition of Right's Act."

This 66th sect. as it stands, if it bears the construction indicated, is perhaps the most comprehensive, yet brief repealing and enacting clause to be found in the annals of Legislation, and renders, it seems to me, wholly unnecessary any adoption or enactment by the Local Legislatures of a uniform system of Laws; because a simple Act taking away the balance of jurisdiction left to the Provincial Courts, and giving it exclusively to this Court, with an enactment that the rule of decision shall be the law of England, or any other law, effects the object: for if Parliament can fix one rule, why not another ?—and uniformity is established.

But that Parliament has any such power, is a question which, with all humility I submit, will, in all probability, in some quarters be sternly denied, and therefore before any step is taken involving consequences not to be desired, all doubt should be removed.

Referring again to section 68, which declares that "issues of fact on the Common Law side of the said Court shall be tried according to the rules of the Common Law of England, by Jury." Read this in connection with section 66. Why should the laws of New Brunswick, and the improvements the Legislature of New Brunswick have made in the Common Law in regard to trials of issues of fact by Juries, be wholly ignored? When such special care has been taken to respect the law and procedure of the Province of Quebec,—(*vide* section 65 and the latter clause of section 89,) why should the system of seven jurors, and a decision (after two hours deliberation) by five, be abolished, and we be brought back in civil cases to the old Common Law system of twelve, and unanimity? I believe all parties connected with the administration of justice in this Province will admit the change has worked to a charm, and I once heard my most respected predecessor, Sir James Carter, speak of it as practically the greatest and best legal reform that had ever come under his observation.

Is this change no interference with civil rights in, and with the exclusive legislative power of the Local Legislature of this Province?

Supposing for a moment it was neither; why this retrograde movement? If our Legislators have had the boldness, and I think I may say, the intelligence, to inaugurate an improved system, and it has been found after fifteen years experience to work well, and to answer the most sanguine expectations, and if the people of this Province are entirely content with its operation, why take it away, and introduce the anomaly that must necessarily follow; that is to say—In one Court of exclusive jurisdiction in civil cases, parties will be compelled to try issues of fact by one rule and with one description of jury, and in other Courts of the Province, with no less important issues, a different rule and entirely different jury must dispose of the question. And in concurrent jurisdictions, if a party plaintiff chooses to take his opponent into the Court proposed to be established under this Bill, before such opponent can successfully defend himself and get a verdict, he must satisfy twelve minds; but if sued in other Courts of the Province, if he can convince five out of seven jurors that he is right, no harm can come to him, because he secures his verdict. Can it be said that "civil rights" are not affected by this operation?

But apart from this, is it not a violation of all correct principle, that in

the same Province there should be, in Courts having the same jurisdiction, two different rules of decision, and two substantially different modes of proceeding before juries; and that one side should have the arbitrary privilege, by selecting a particular Court, of choosing which rule and procedure shall be adopted, and the other side, without the chance of a hearing, and without appeal, be bound arbitrarily to submit to such selection.

The only other point on which I shall make any remarks, though it involves no principle, and is personal to the profession, is still one I feel of sufficient importance to be worthy of further consideration.—It is as to sections 87 and 88, by which a serious, and I think an unnecessary burthen is cast on the Barristers and Attorneys of the Provinces, by the condition on which they are to be permitted to practice in this Court, viz. by admission in general term, which is at Ottawa, and "upon paying such fees" as the said Court shall fix and determine, and upon signing a roll to be kept in the custody of the Registrar of said Court, who by section 77 is required to reside and keep his Office at the City of Ottawa.

The Act entitles Barristers and Attorneys to admission as of right; and it seems hard that to avail themselves of this right, they should all be required to make a journey to Ottawa, simply to pay fees and sign a roll; whereas a simple declaration in the Act that Barristers and Attorneys of the Superior Courts of the Provinces, so long as they shall properly conduct themselves as such, shall be Barristers and Attorneys of said Court, would seem to accomplish everything. If so, by simple operation of law, the journey, the roll, and the fees, are rendered alike unnecessary, and the profession exempt from what otherwise, I am sure, would be looked upon as a substantial grievance.

I feel I should be open to reproach if, after taking so many exceptions, I did not attempt to offer some scheme presenting fewer objections.

Without going into minute details, I will take the liberty of suggesting what I conceive would, in its practical working, be found to be an easily accessible, and, at the same time, simple, cheap, expeditious, and efficient appellate jurisdiction.

A Court of Appeal for Canada—pure and simple, without original jurisdiction—to be simply a Court of *dernier ressort*, to correct the errors of inferior tribunals.

In the high appellate Courts in England—the House of Lords—the Judicial Committee of the Privy Council—the Lords' Justices—the Exchequer Chamber—we find no union of appellate and original jurisdiction.

The Court of Appeal to be composed of the Chief Justice and Senior Judge (or one of the Judges) of the Queen's Bench of Ontario,	2
The Chief Justice and Senior Judge (or one of the Judges) of the Common Pleas of Ontario,	2
The Chancellor of Ontario,	1
The Chief Justice and Senior Judge (or one of the Judges) of the Queen's Bench of Quebec,	2
The Chief Justice and Senior Judge (or one of the Judges) of the Superior Court of Quebec,	2
The Chief Justice of the Supreme Court and Judge in Equity in Nova Scotia,	2
The Chief Justice and Senior Judge (or one of the Judges) of the Supreme Court of New Brunswick,	2
	13

We have various jurisdictions to be appealed from—Common Law, civil and criminal; Equity; Matrimonial; Maritime; Bankruptcy; Probate, &c. &c. Is it not desirable that as many Judges as possible, conversant from daily judicial connection with those matters, should form the Court of Appeal, rather than that untried men who have never had any judicial experience, should reverse or affirm the judgments of men so experienced.

The Court to be divided into

A General Appeal Court,

to sit at Ottawa twice a year, and if necessary, by adjournment, in vacation; to be composed of all the Judges—five to be a quorum; and

Circuit Appeal Courts,

to sit in each of the Provinces twice a year, and if necessary, by adjournment, in vacation; to be composed of any three of said Judges, not being members of the Court whose judgment is appealed from, or who shall not have taken part in the judgment appealed from.

Jurisdiction.

Appeals to be allowed from all the ~~Inferior~~ Courts of the Provinces of the Dominion, (on complying with the provision herein contained, and on security being given in all cases for costs, and in the discretion of the Court appealed from, for damages,) from any final decree, judgment, or sentence, or against any rule or order made in any civil suit or action having the effect of a final or definitive sentence; but an order which does not put a final end to the case, or which does not establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, to be considered interlocutory, from in which no appeal to be allowed. No appeal to be allowed in matters resting the discretion of the Court only; nor for mere technical or formal objections apart from the merits of the case; nor for objections not raised in the Court below, and on which a decision was made or omitted to be made, unless patent on the face of the proceedings, so that the Appellate Court may take judicial notice of the objections. It being the intention that all cases shall be decided on the merits, according to substantial justice, and not on technical objections of form not affecting the substance of the matter in controversy.

No appeal to be allowed under $400, or some other reasonable sum to be determined, unless in causes matrimonial or testamentary; or of Admiralty jurisdiction; or where the title to land is in question; or an important principle of law of general application is involved; or where the validity of an Act of Parliament, or of any of the local Legislatures, is in question; or where there is an apparent conflict arising under the laws of the Provinces, or between any of those laws and the laws of the Dominion. The appeal in the first instance to be to the Circuit Appeal Court of the Province in which the cause is pending—whose decision shall be final if judgment of the Court below was unanimous, and the judgment of the Circuit Appeal Court thereon is likewise unanimous; unless the Circuit Appeal Court in its discretion shall, with or without imposing special terms, allow an appeal to the General Appeal Court at Ottawa; and except that an appeal to the General Court be allowed of right in all cases in which the Queen, the Dominion, a Foreign State, or public ministers and officers in their official capacity, are interested; and in all cases in which the judgment of the Court below, or the judgment of the Appeal Court is not unanimous, or the judgment of the Court below is reversed. But in all such last cases, where the judgment is

not unanimous, only on giving security for debt and costs, or to abide the final determination, unless in such last cases, under special and exceptional circumstances, the Circuit Appeal Court shall allow an appeal, then upon such terms as such Court shall think just and expedient. A writ of Error to be brought in said Circuit Appeal Courts respectively, from judgments in any civil action of any of the Courts of said Provinces respectively, in any case in which proceedings have been according to the course of the Common Law, and appeals thereon shall be allowed from Circuit Appeal Courts in like manner and on like terms as are provided for appeals therefrom in ordinary cases; and such proceedings to be, as nearly as possible, in conformity with the practice of the Exchequer Chamber in England.

No appeal to be allowed in any case unless a notice of intention to appeal, containing the grounds of appeal, be given to the opposite side, and a copy thereof filed in the office of the Clerk of the Court appealed from within thirty days.

The appellant to comply with terms of appeal, and transmit to the Appeal Court within three months copies of all proceedings, with the decision appealed from, and the reasons therefor. Parties agreeing thereto, to be allowed to present their case to either Appellate Court by printed instead of oral arguments, the appellant stating his case, and furnishing a copy thereof to the opposite side, who shall, if he chooses, answer the same, furnishing the appellant with a copy thereof; the appellant to have the right of reply: copies of all of which to be filed in the Court below, and furnished to the Judges of the Appellate Court, who may give judgment thereon in like manner as if the case was argued orally before such Court.

Barristers and Attorneys of the Superior Courts of the Provinces to be Barristers and Attorneys of the Appeal Court.

The decision of the General Appeal Court to be final and conclusive, unless in cases involving questions of a national and perhaps a constitutional character, where the appeal to the Judicial Committee to be retained.

By this scheme, all matters of trifling value, involving no important principle, are left to the final decision of the local tribunals.

An appeal in other cases is furnished at the door as it were of the suitors, and is only final when the adjudication is the unanimous decision of the Supreme Court of the Province, and of the Appellate Circuit Court composd of three Judges who have had no connection with the original judgment, and even then, in certain exceptional cases, a further appeal may be had of right, and in others, if the Circuit Appellate Court think the same reasonable.

With reference to the extra duty this would throw on the Judges—with the number named I should think the labor would be comparatively light.

Speaking for New Brunswick, with the Court composed, as it has been for upwards of thirty years, of five Judges, I should think satisfactory arrangements could be made. If, from experience, the work should prove too burthensome, the difficulty could be easily obviated by strengthening the Local Courts.

Such an Appeal Court, with ample power to review all judgments rendered, would, without disturbing existing judicial institutions, and unsettling men's minds, in my opinion, without any additional Court of original jurisdiction, secure to the Dominion that appoints all the Judges of the Superior Courts, not only uniform judgment on the constitutionality and construction of all Dominion and Provincial Statutes, but a proper and uniform administration of all local laws, as well as the consistent execution of its own laws, as distinguished from those of the Province; a power no doubt essential to good order, and the avoidance of contradiction, confusion, and

conflict of authority, and at the same time essential to the efficient working of the general Government.

My strong opinion of the grave importance of this measure, must be my apology for my great prolixity. The objections I have suggested are conceived in no captious spirit, but are prompted solely by a desire for the general good.

Whatever legislation Parliament in its wisdom may adopt, I shall, so far as I can, cheerfully and loyally give effect to, in the Court over which I have the honor to preside. I am quite alive to the fact, that in the words of an English Jurist, "my duty is plain—it is to expound and not to make the law, to decide on it as I find it, not as I may wish it to be."

W. J. RITCHIE,

Fredericton, 1*st Feb.* 1870. *Chief Justice.*