The Legal News.

Vol. V. DECEMBER 2, 1882. No. 48.

LIABILITY FOR NEGLIGENCE OF CONTRACTOR.

The decision of the English Court of Appeal in a much debated case—*Percival* v. *Hughes*—is of interest, and touches a point which is likely to recur in cities where old buildings are being replaced. The defendant was the owner of a house standing at the corner of two streets, between a house belonging to the plaintiff and a house occupied by B. The defendant being desirous of rebuilding his house employed a competent architect and competent builders to rebuild it. The defendant's new house was a story higher than the old house and the basement was lower. After the house had been nearly finished, the workmen employed by the builders began to fix a stair-case. In doing this they negligently, and without the knowledge of the defendant or his architect, cut into a party wall dividing the defendant's new house and B.'s house. The consequence was that the defendant's house fell, and the girders having become displaced, injury was done to the plaintiff's house, for which he sued the defendant. The fixing of the stair-case was not in itself a hazardous operation, if it had been carried out with ordinary skill. On these facts the Queen's Bench Division held that an action was maintainable against the defendant for the injury done to the plaintiff's house. The Court said: "The case appears to us to fall within the principle of *Bower* v. *Peate*, 1 Q.B.D. 321, which must now be taken to have superseded *Butler* v. *Hunter*, 7 H. & N. 826, so far as the cases are in conflict." The defendant appealed from this decision, and the judgment has been affirmed by Lords Justices Baggallay and Brett,—Lord Justice Holker dissenting—(L.R., 9 Q.B.D. 441) It was admitted that it is no defence to an action for intentionally interfering with a right of support, that the wrong-doer employed a competent contractor; and that was the ruling in *Bower* v. *Peate*; but it was contended by the defendant in the case of *Percival* v. *Hughes*, that there was no intention to invade the neighbour's right, and the injury was attributable to carelessness in executing a piece of work in itself harmless. Lord Justice Brett, however, did not think this distinction was sustainable. "The duty," he observed, "was so to do the work of rebuilding as not to injure the adjoining owners. The defendant was bound to take all reasonable means to avert danger. The duty began immediately after he undertook the work and ended only when the house was so built up and finished as to be a support to the plaintiff's house. During that time is the defendant liable only for the things which he has done, or at least has ordered to be done? The defendant cannot delegate his duty so as to get rid of his liability. A negligent act was committed in the course of re-building; the workmen of the contractors employed by the defendant tampered with the party-wall so as to cause injury to the plaintiff's house. The negligent act was committed long after the undertaking was commenced, in fact it was nearly concluded; but the negligent act was committed before the whole intention was carried out. The workmen did something which they were not ordered to do; but they did it with the intention of doing work for the benefit of the defendant; the result is the same as if the architect himself had ordered the act to be done; for the wall was tampered with before the whole undertaking was finished."

This decision appears to be in accordance with the rules of our Code. See, also, the case of *McRobie* v. *Shuter*, 25 L. C. J. 103, in which Mr. Justice Papineau, in the Superior Court, held the proprietor responsible for an accident arising from the failure of a contractor to put a railing round an excavation which was made for the purpose of laying a drain.

IMPROVEMENT OF STREAMS.

The Supreme Court, on the 28th ult., unanimously reversed the decision of the Ontario Court of Appeals in the case of *McLaren* v. *Caldwell*, and affirmed the decree of the Court of Chancery, which granted to McLaren an injunction restraining the defendant Caldwell from making use of the improvements on certain streams. These streams, in their natural state, where they passed through McLaren's property, were non-floatable, and could not have been used for the purpose of transporting saw

logs, &c., to market. McLaren, at his own expense, effected improvements which enabled logs to be floated down. The question was as to the right of other parties to avail themselves of these improvements.

Vice-Chancellor Proudfoot had granted an injunction to restrain the defendant from interfering with or using the improvements placed by the plaintiff on certain streams of which he claimed to be seised in fee simple, and the use of which the defendant contended was a common right under the common and statute law of Ontario. The Court of Appeal of the Province, by a majority, reversed this decision, Chief Justice Spragge, Justices Patterson and Morrison concurring in over-ruling the Court below, and Mr. Justice Burton dissenting from their view. The present appeal was from the judgment of the Ontario Court of Appeals and was argued at a former time.

The following is a report of the substance of the observations made by the Chief Justice:—The plaintiff contended that the stream, where it passed through his property, was by nature non-navigable and non-floatable at all seasons of the year, but that he had by artificial means placed upon his own property certain improvements which enabled him to convey logs and other timber down the stream. The main question at issue was—had the appellant the legal right to prevent the respondent, as he sought to do, from driving his logs through these improvements and so utilizing the streams which were the appellant's property, or were those streams part of the public highway and therefore open to the respondent in common with the appellant and the public generally? It could not be disputed that, if the portions of the streams in which the improvements were made were incapable of floating lumber, and if the fee simple of the streams was in the plaintiff, the public had no right at common law and the plaintiff had the sole right to deal with the bed and soil of the stream, and to place such improvements thereon as he might choose. While it seemed to be admitted that the public had no right to make improvements on the plaintiff's property, it was claimed that in Ontario where streams of the character mentioned were capable of being navigated by such improvements made by the owners of the soil whereby timber could be floated, the public had an absolute common law right to use such improvements and to deal with the streams as if they had been naturally floatable, that was, floatable without the aid of artificial improvements, and this right, it was also claimed, was conferred upon the public by virtue of the Act, 12 Vict., cap. 87, sec. 5, which was repealed by the Consolidated Statutes of Canada in 1859, but practically re-enacted by cap. 48 Consolidated Statutes U. C., sections 15 and 16. There could be no doubt that statutes which encroached on the rights of the subject, whether as regarded person or property, should receive strict construction, and, if a reasonable doubt remained, which could not be satisfactorily solved, the subject was entitled to the benefit of the doubt. In other words, he should not be injured in person or property unless the intention of the Legislature to interfere with the one or take away the other was clearly and unequivocally indicated. If the appellant's contention were correct, they were met at the outset with the incongruity of the Legislature enacting that it should be lawful to float saw-logs, etc., down streams which from the nature of the saw-logs, etc., should be floated down. In other words, it seemed most unreasonable to suppose that the Legislature intended to legislate that it should be lawful to do what in the very nature of things could not be done. Was it not more reasonable to assume that the Legislature was dealing with a subject matter capable of being used in the manner in which it was declared that it should be lawful to use the same, and that its language had reference to all streams on or through which sawlogs and other lumber could be floated either at all times or during the spring, summer or autumn freshets? In his opinion the object of the Legislature was in the interest of the lumber business not to interfere with or take any private rights, but to settle by statutory declaration any doubts which might exist as to streams incapable of being navigable by boats, etc., but capable of floating sawlogs and timber at certain seasons of the year. Having established this right, the Act went on to prevent the obstruction of such streams, subject, nevertheless to the restrictions imposed in respect to erections for milling purposes on such streams. It was not, however, intended to interfere with private property and private rights to streams which were

not by nature floatable at any season of the year. If the Legislature contemplated what was now contended for and intended the enactment to apply to streams non-floatable at all seasons, as there was no pretence for saying that the Legislature had conferred any right on the parties to enter upon private property and make the non-floatable stream floatable, and as they could not be made practically floatable by operation of law, what was the precise legal right conferred on the public by the statute? Was it not obvious that the only effect of the enactment could be in such case to confer upon the public the right to use private property and the improvements thereon without making any compensation therefor? Was it then possible to infer any such intention from this section? Had it been present to the mind of the Legislature, it should have been, and he thought would have been clearly and unequivocally expressed. It was not possible to attribute to the Legislature an intention so unreasonable and unjust unless the language was so unambiguous as to admit of no doubt of the construction. He could not appreciate the force of the parallel drawn by Mr. Justice Patterson in regard to public highways, which appeared to him entirely to beg the question. Dealing with the contention for the right to use the improvements of a proprietor, by which he had made the stream floatable, the Chief Justice said the proprietor of a non-floatable stream who made it floatable for his own use did no more than if he had made a canal through his property. He did not interfere with his neighbor. He took nothing from the public, who could neither use the stream as it was nor improve it except by the permission of the proprietor, and to whom, having no right or property therein, the improvements of the proprietor did no wrong. It had been urged that to allow an individual to shut up a stream 100 miles long because he might own small portions of the stream not floatable in a state of nature, would be unreasonable, but it seemed to him to be forgotten that it was not the individual who shut up the stream. It was closed by natural impediments which prevented such portions being used for floating purposes, and as it was admitted that the public had no right to enter upon such portions and make improvements whereby the stream might in those parts be made navigable or floatable by reason of its being private property, the stream is as effectually shut up by the refusal to permit an entry and improvements to be made as if the proprietor himself made the improvements and prohibited the use thereof by the public. If the use of the non-floatable portions was as necessary for carrying on lumbering operations as had been urged, the obvious means to secure the right to use private improvements would seem to be to obtain on payment of an adequate consideration the proprietor's permission, or if the streams were unimproved, to secure from the proprietor the privilege of making such necessary improvements, or failing the ability to accomplish this, if the development of the public domain, the exigencies of the public, or the business of the country was of such paramount importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public interest, the remedy should be sought at the hands of the Legislature through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain. There was nothing to justify the conclusion that the Legislature intended in this provision to exercise its right of eminent domain and expropriate the property of owners of streams not by nature navigable or floatable, or any property or improvements the owners might make or place thereon. His Lordship cited the case of *Horrock* v. *Worship*, Best and Smith's Reports, and pointed out that he was strengthened in the conclusion at which he had arrived by the weight of judicial opinion in Ontario, as expressed in the *Boyle* case by Chief Justice Draper, Chief Justice Richards, Justices A. Wilson and J. Wilson, in *Whelan* v. *McLachlin*, and *McLellan* v. *Baker*, by Chief Justice Hagarty and Justices Gwynne and Galt, and in this case by Vice-Chancellor Proudfoot and Mr. Justice Burton, while Chief Justice Spragge and Justices Patterson and Morrison had over-ruled the previous decisions on the point. There were thus three Chief Justices and five Justices in support of the conclusion at which he had arrived, and one Chief Justice and two Justices taking a different view. In 1877, in the Revised Statutes, the Legislature, after all the decisions to which he had referred in previous cases had been given, re-enacted chapter 48 of the Consolidated Statutes of Upper Canada, passed in 1859, in almost the same words as follows:—"All persons may during

the spring, summer and autumn freshets float saw-logs and other timber, rafts and crafts down all streams, and no person shall, by felling trees or placing any obstruction in or across any such stream, prevent the passage thereof. In case there is a convenient apron, slide, gate, lock or opening in any such dam or other structure made for the passage of saw-logs and other timber, rafts and crafts authorized to be floated down such streams as aforesaid, no person using any such stream in manner and for the purpose aforesaid, shall alter, ignore or destroy any such dam or other useful erection in or upon the bed of or across the stream, or do any unnecessary damage thereto, or on the banks thereof." Considering, then, that up to the time of the passing of this Act all the decisions of all the judges with no dissenting voice from 1863 to 1876 placed upon this enactment the construction now contended for by the plaintiff, if such construction was so clearly contrary to the intention of the Legislature, so opposed to the development of the Crown domain, so antagonistic to the interest of the public, and so disastrous to the lumbering business of the country, as had been so strongly urged before this Court, could it be supposed that the Legislature, in revising the statutes after such a series of decisions, and only one year after the latest decision, would not have corrected the judiciary either by a declaratory Act or by new legislation, and have indicated in unmistakable language that private improvements of non-floatable streams should be subject to public user, and more particularly so if such user was to be without compensation? As they had not done so, did not this case come with great force within the canon of construction, that where a clause of an Act of Parliament which had received a judicial interpretation in a court of competent jurisdiction was re-enacted in the same terms, the Legislature was to be deemed to have adopted that interpretation? In this case he thought there was unusual cause for treating a re-enactment of this nature as a legislative approval of the judicial interpretation, and for holding that such interpretation should not be shaken when it was considered that the Legislature from such judicial proceedings must have known that property was purchased and held, and investments made, based on the claim that by such judicial proceedings private rights and property had been established and secured. As was said by Lord Ellenborough a long time ago, it was no new thing for a Court to hold itself precluded in matters respecting real property by former decisions upon questions in respect of which, if it were *res integra* they would probably have come to a different conclusion, and if an adherence to such determination was likely to be attended by inconvenience, it was a matter to be remedied by the Legislature, which was able to prevent mischief in future and obviate all inconvenient consequences which were likely to result from it as to the purchases already made. For all these reasons he was of opinion that the contention of the plaintiff should be sustained, and that the decision of the Court of Appeal of Ontario was not correct, and the judgment of Vice-Chancellor Proudfoot should be affirmed. His Lordship further held that the Vice-Chancellor was right in rejecting evidence to prove that all streams in Upper Canada were non-floatable at the time of the passing of the various Acts; he could find nothing to justify him in saying that the Vice-Chancellor arrived at a wrong conclusion from the evidence, and declared, in reference to the contention that the Attorney-General should have been made a party to the suit, that if this was private property the Attorney-General had no more right to do with the question than any other member of the community, and there was no more reason why he should be made a party than in any other controversy between private individuals as to the rights of private property.

The other Judges (Strong, Gwynne, Henry, Fournier and Taschereau) concurred.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 20, 1882.

DORION, C. J., MONK, RAMSAY, TESSIER & CROSS, JJ.

MACKINNON (deft. below), Appellant, and THOMPSON (plff. below), Respondent.

Trade-mark—Use of name.

The business of a biscuit maker was sold, "with the goodwill and all advantages pertaining to the name and business" of the vendor. Held, that

this included the trade-mark, and the vendor could not continue to use a trade-mark exactly like that formerly used by him, though it consisted of his own name and arms stamped on the biscuit.

The appeal was from a judgment of the Court of Review, reversing a judgment of the Superior Court. (See 1 Legal News, p. 64, for judgment in Review).

The action was by Thompson, to restrain Mackinnon from using a label and trade-mark on biscuit. Mackinnon, in 1876, transferred his business as a biscuit maker to S. J. Thompson, and the assignment included the goodwill and all advantages pertaining to the name and business. But Mackinnon after so assigning his business, started a new business as manufacturer of biscuits, and used a stamp similar to that previously employed by him, which bore the name of "*Mackinnon's*," under which was engraved a boar's head, holding a bone in its jaws. The Court of first instance was of opinion that Mackinnon did not, and could not, convey the right to the exclusive use by another of his name, and the action was dismissed. But the Court of Review reversed this decision, and condemned Mackinnon to pay the sum of $400 damages. The appeal was from the latter judgment.

RAMSAY, J. This suit began by an injunction to prevent the appellant using as a trade-mark on biscuits the word "Mackinnon's," under which there was a stamp of a boar's head holding a bone in its jaws. It appears that respondent purchased from appellant his stock-in-trade as a biscuit manufacturer, "with the good will and all advantages pertaining to the name and business" of the vendor, appellant, in said business. The appellant, before the sale of the business, used the words and stamp as above, and respondent continued to use them after his purchase. Subsequently appellant commenced business as a biscuit manufacturer, and used a stamp precisely like that he used before. Now, two questions arise: First. Did respondent, by the purchase of the good will of the business, *in the terms used*, purchase the appellant's trade-mark? Second. Does the use of the name and the armorial bearings of a family in a trade-mark alter the character of a trade-mark?

I cannot fancy there can be any difficulty as to the first question. The words cover the advantages to be derived from the name and business of the said John Mackinnon, and it is not contended that the stamp and label used were not part of his business.

As to the second question, it has been ingeniously asked—Did Mackinnon cease to have a right to use his own name and the arms of his family? I think that would be carrying the interpretation rather far, and further than is necessary on this appeal. It is not a question here whether he abandoned the use of his own name and arms; but whether he can so combine them, as a biscuit baker, as to make a stamp exactly like that of his old trade-mark. And on this point I have not the least hesitation in saying he cannot, and that being his own name and arms does not in the least affect the question. If he finds any advantage or satisfaction in the special use of his name and arms, he must combine them in such a way as not to interfere with the trade-mark he has sold. I am to confirm.

DORION, C. J., concurred in the judgment, purely and simply on the contract between the parties.

Judgment confirmed.

Butler for appellant.

Wotherspoon, Lafleur & Heneker for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 24, 1882.

DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, JJ.

LORANGER, Atty. General, (intervenant below), Appellant, and REED (plff. below), Respondent.

Taxation, Direct and Indirect—Tax on Exhibits—Powers of Local Legislature—Proceeding for contempt.

The tax on exhibits imposed by 44 Vict. (Que.), cap. 9, was within the powers of the local legislature.

The proper mode of bringing up a judgment on a rule for contempt against the Prothonotary is by writ of error.

The appeal was from an order made by the Superior Court, Montreal, Mackay, J., March 10, 1882, by which a rule for contempt against the Prothonotary was made absolute. See 5 Legal News, p. 101, where the observations of the learned Judge appear in full.

RAMSAY, J. This appeal gives rise to some embarrassment, to my mind, however, to little difficulty. There is a technical point to which I may at once refer. The action is taken against the Prothonotary by way of a proceeding for contempt, and the judgment condemns the Prothonotary to go to gaol. This is evidently irregular. If it be a question of contempt the way to bring it up before this Court is by Writ of Error. Our Statutes give in express terms this remedy. However, without the condemnation as for a contempt, it is an order in a case, from which there might be leave to appeal granted on special application. It has not come up to us in that shape. We might, therefore, perhaps dismiss the appeal without adjudicating on the important subject on which it was evidently the intention of the parties, including the Attorney-General of the Province of Quebec, to have a decision.

Although I think it is a wise policy on the part of Courts, generally, to abstain from going further in delivering judgment than is absolutely necessary to settle the differences between the parties, still there are cases where the nature of the question is such as to require a more ample treatment. This occurs when the question involved is of public interest, and where both parties have acquiesced in the proceedings and over-looked the technical difficulty. To the people of this country the settlement of questions arising on our statutory constitution is of the utmost moment, and the delay of litigation, even for a year, may have the most disastrous results. I think, therefore, we should be neglecting our duty if we failed to deal with this case on its intrinsic merits.

The Legislature of the Province of Quebec passed an Act (43 & 44 Vict., Cap. 9), by the 9th section of which it is enacted: "There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issued out of any County Court, Circuit Court, Magistrates' Court, or Commissioners' Court in the Province; *and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and filed before the Superior Court, the Circuit Court or the Magistrates' Court, such duties payable in stamps.*" This Act is declared to be an amendment and extension of an Act of the old Province of Canada, 27 & 28 Vict., Cap. 5, "An Act for the collection by means of stamps, of fees of office, dues and duties payable to the Crown upon law proceedings and registrations." (Sec. 20.)

The duties levied under this Act are to be "deemed to be payable to the Crown." (Sec. 3, sub. sec. 2.) These last words might perhaps give rise to verbal criticism. It would seem by the terms of the B. N. A. Act that the Queen forms no part of the Provincial Governments. Indirectly the Sovereign nominates the Lt.-Governor, but he is not the representative of Her Majesty. He acts by virtue of his office, and not by virtue of his commission, in this respect unlike the Governor General *or other officer administering* the Government of Canada. But although I think this criticism well-founded, as a fact the old language has been continued both in sanctioning legislation, and in carrying on those branches of administration which have devolved on the local Governments.

I take it, therefore, that this legislation intended and did, in effect, so far as it could, declare that in addition to the duties hitherto authorized to be levied by stamps on judicial proceedings in the Province of Quebec, ten cents should be charged for each promissory note produced and filed in the Superior Court, and that this duty should be collected by stamps and should form part of the general revenues of the Province.

It appears that by the 27 & 28 Victoria, fees collected in this way for judicial purposes were credited to a particular fund; but they were declared to be fees payable to the Crown, and I cannot see that this statutory rule of accountability, it is really no more, can have any bearing on the question before us, except to show that they were fees collected for a local object.

Subsequent to the passing of this Act of the 43 & 44 Vic. by the Legislature of the Province of Quebec, the respondent produced, and attempted to file a promissory note, without any stamp of ten cents being affixed. The prothonotary refused to take it without the stamp, and the respondent refused to pay the duty on the ground that the statute was beyond the powers of a local Legislature.

It is not contended that the revenues to be collected in the Province of Quebec under the

27 & 28 Vic. cap. 5, do not belong to the Government of the Province, or, as I understand it, that the Government of Quebec may not apply the proceeds of these duties to its general purposes, but the duties so fixed prior to Confederation, cannot be altered, or at all events cannot be extended.

A rule producing results so obviously inconvenient, naturally challenges scrutiny. It is difficult to realize the idea that the Legislature should have intended to charge the local governments with the support of the administration of justice, and at the same time to deprive them of the power to extend the means then recognized by law of providing therefor. The argument, however, is this: the local governments have only two means of raising money by taxation; one is, not by licenses, (as I have already observed in the case of *Sulte* v. *The Corporation of Three Rivers*),* but by legislation with relation to matters coming within the class of shop, saloon, tavern, auctioneer, and other licenses, in order to the raising a revenue for provincial, local, or municipal purposes, and by "direct taxation within the Province" for a like purpose.

Now, it is said that this ten cents stamp is not a license, and it is not direct taxation.

It is not pretended that it is a licence,—and even if it were admitted that it was not direct taxation, I do not think the judgment sustainable.

There is, however, a case of *Angers* v. *The Queen Insurance Co.*,† which it is contended implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation. It has been said that to reverse the judgment of the Court below was to over-rule the ruling of the Privy Council in *Angers* v. *The Queen Insurance Co.* I am not prepared to carry the authority of precedent so far as to say, that I should be governed by a single decision of a higher Court, which appeared to me to be clearly against principle, even if that Court drew its inspiration from the same sources that we do. Still less should I be bound by a single *arrêt* of the Privy Council, which clearly misinterpreted our law. This does not seem to be a revolutionary or turbulent mode of performing one's duty.

To this I may add that so soon as the Privy Council lays down as a proposition of law, the issue being clearly before them, that the local Governments have no power to tax otherwise than by licenses and direct taxation, and that direct taxation means certain taxes, and no more, then I shall accept the decision as conclusive and conform my judgments to it, although I know that its effect must be to break up Confederation. But I am not going to discuss anew, or to question what was there decided, but critically to examine what really was decided, and not what, in the gross, may seem to have been said. It appears to me that the report thus examined, does not support the view taken by the learned Chief Justice, but only that the duty sought to be collected in that case by a so-called license was in reality an ordinary stamp act, and indirect taxation. Their Lordships say: "The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provisions for avoiding the policy, renewal or receipt, in a Court of law, if the stamp is not affixed—is or is not direct taxation." It is true they say afterwards, in referring to the English and American decisions mentioned by Mr. Justice Taschereau, "They (the decisions) all treat stamps either as indirect taxation, or as not being direct taxation." That is, these cases decide that the particular stamp Act referred to in each case was indirect taxation, else these are *obiter dicta*, precisely as the case of *Angers* v. *The Queen Insurance Co.* would be an *obiter dictum* if it decided what it is contended it did. No one can seriously contend as an abstract question, I should think, that the *form* of collection, the evidence of payment, can determine as to the nature of the impost. If there was a poll-tax on each elector, and the law said that each elector should take a receipt therefor on paper bearing a penny stamp, it would hardly be said that the penny stamp was a different kind of taxation from the poll-tax.

So far as my recollections carry me, there is not the unanimity of opinion attributed to the economists as to the definitions of direct and indirect taxation. It seems to me they are generally dealt with as relative rather than as positive terms. They are used to express economic results. One of the best known rules is that taxation is direct when it is paid by the party who is impoverished by it. Thus a duty on imports is regarded as indirect taxation, because

*5 Legal News, 330.

†1 Legal News, 410; 22 L.C.J., 307.

the consumer and not the importer, usually bears the burthen. But if the consumer imports his own boots, the tax is as direct as it can be. Again, if this rule were dogmatically true, it would include a license to shoot game, which might very well be accorded by a stamp.

It is very true that the term *direct taxation* being used in a statute in a positive sense, it is the particular function of Courts, by their decisions, to give it a positive meaning. In dealing with this term the operation is one of considerable difficulty, and we must take care in performing it not to out-ride our commission inadvertently. We have to decide what direct taxation is within the meaning of the Act, but there is absolutely no warrant in the B. N. A. Act for our deciding, that the local governments are prohibited from collecting direct taxes by one form or another. As to licenses it is different; the *form* there is material. It therefore appears to me to be indubitable, that we have authority to say that direct taxation in the Act, means a poll or a property and income tax and no more, but we have no authority to say how it shall be levied.

While generally admitting the utility of reference to writers on political economy, judgments, dictionaries and cyclopædias for such enlightenment as they may furnish, it seems to me that there are other guides to interpretation quite as safe. As an example, I may quote from a still more recent decision of their Lordships the following sentence: "It becomes obvious as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited." *The Citizens Ins. Co. & Parsons*, (5 Legal News, p. 28.)

I do not think it necessary to pursue the criticism further on this point, for the power of the local legislature to enact the 43 & 44 Vic. appears to me to be beyond question, even if we were to hold that the tax under consideration was indirect taxation. We have, therefore, happily nothing to limit or to modify. Sub sections 14 and 16 give the right to the legisture of the Province to pass the law in question. In proceeding to explain this proposition, it is proper to make two preliminary remarks: First, that the power of the local governments to tax is nowhere confined to licenses and to direct taxation, as has been assumed. They are specially permitted to impose these taxes, that is all; but this differs essentially from a prohibition to impose any other taxes. Secondly, the sub-sections of section 92 must be read with the general heading to avoid misconception. Thus read, sub-section 14 enables the local governments to make laws in relation to "The administration of Justice in the Province, including the constitution, *maintenance*, and organization of Provincial Courts, both of civil and criminal jurisdiction," &c.

Is not the law impugned a law for the maintenance of justice in the Province, nay more a law modeled on the law existing at Confederation for its maintenance? We have held in *Sutle & Three Rivers*, that municipal powers were to be delimited by what then existed. Is it not a similar principle we now invoke?

Again, I would ask is this tax for the performance of a duty by a local functionary not a matter of a merely local nature in this Province? Does it conflict with any Dominion power? Can it be contended for an instant that the power to raise money by any mode or system of taxation can be held to signify that the Dominion Parliament could raise money on the duties to be performed by local officers?

I have said that it has been assumed that the local legislatures had only power to impose taxes by way of direct taxation, by license, I mean assumed in discussion, for the practice, as is frequently the case, is more logical than the didactic utterances regarding it. As an example, a turn-pike on a local road is a tax precisely of the same kind as this. It is an exaction for a service rendered. So, when the Government exacted passage money on the North Shore Railroad it was a tax of a like kind; and I may add, moreover, it was levied by a stamp.

I am to reverse.

DORION, C. J., delivered a dissenting opinion, in which the case of *Angers* v. *The Queen Ins. Co.*, (cited above), was relied on in support of the judgment.

Judgment reversed.

Hon. A. Lacoste, Q.C., for the Appellant.
Maclaren, for the Respondent.*

* An appeal has been taken to the Privy Council.