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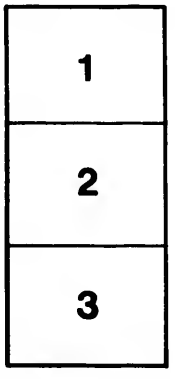

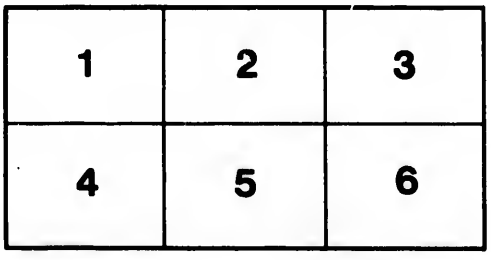

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4.

PREROGATIVE RIGHTS IN CANADA.

HEREDITARY REVENUES OF THE CROWN.

WHICH GOVERNMENT IS ENTITLED TO APPROPRIATE THEM?

ARGUMENT

OF THE

HON. W. MACDOUGALL, C. B.,

IN THE

MERCER ESCHEAT CASE.

BEFORE SUPREME COURT OF CANADA (FULL COURT).

Reported by ANDREW HOLLAND, Reporter for the Senate.

OTTAWA, 7TH MARCH,

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THE MERCER ESCHEAT CASE.

Hereditary Revenues of the Crown in Canada. Which Government, since Confederation, is entitled to appropriate them?

[*Speech of Hon. W. Macdougall, Reported by A. Holland, one of the Reporters for the Senate.*]

The Mercer Escheat Case has become a *cause célèbre*, for it not only involves the interests of the descendants of the deceased Andrew Mercer—a son and four grandchildren—but it raises the question of jurisdiction and right of property in the hereditary revenues of the Crown in Canada, as between the Provinces and the Dominion.

Andrew Mercer died at Toronto in 1871, intestate, and (as Vice-Chancellor Blake held on the evidence before him) without lawful heirs. He was supposed to be the illegitimate son of Chief Justice Scott, an English lawyer who came to Upper Canada about the time it was established as a separate province. The deceased Mercer was a thrifty man, of reserved habit, and, holding an office under Government for the greater part of his life, accumulated a considerable property. His female servant, who claimed to be his wife, bore him a son, whom he acknowledged and educated, and often spoke of, as entitled to his property, because he had no other relations. It is probable there was some pretence of marriage, for it was proved that the deceased and his servant, after the birth of the son, lived together as man and wife, and that he introduced her to certain of his friends as Mrs. Mercer. The evidence of actual marriage, however, was not, in the opinion of the Court of Chancery, sufficient according to the laws of this country. In the eye of Scotch law it would have been ample.

The Provincial Government, assuming that Mercer's property had escheated to the Crown, and that the province was entitled to collect and appropriate escheats, took possession of the personal property, con-

sisting of deposits in banks, stocks, mortgages, bonds, etc., and demanded the real property then in the possession of the widow and her son. According to the English law of procedure in escheat cases, the tenant in possession is entitled to the intervention of a jury—called an inquisition—and young Mercer was advised that the evidence of marriage, which did not satisfy a judge, might satisfy a jury (especially as additional witnesses had been discovered) that his father and mother were really man and wife, and that he ought to hold possession and compel the Attorney General to proceed by inquisition. But Mercer and his advisers soon discovered that a poor man is at a great disadvantage in a legal contest, when his adversary not only has the public purse at his command, but can repeal law and make law to suit the case as it goes on. Foreseeing the danger of a verdict in favour of the son of the intestate, should he be required to disprove the reputed marriage before a jury, the Attorney General introduced and passed an Act in 1874 authorizing him to take possession in the name of the Crown, of any lands or property escheated, or which he might suspect had escheated, "without any inquisition being first necessary." This Act was disallowed on the ground that the Federal, and not the local government, represented the Crown in matters of escheat. A political friend of the Attorney General having succeeded to the office of Minister of Justice, and a decision of the Court of Queen's Bench in Lower Canada having been rendered in favour of the provincial jurisdiction, an arrangement was made between the two law officers by which the province should seize and appropriate escheats for want of heirs, while the Dominion should deal with cases of forfeiture for crime. A new Act was passed in 1877, recognizing this division of casual profits, but abolishing "inquisition," or trial by jury, as in the first Act. The Attorney General now fyled an information in the Court of Chancery, demanding possession forthwith on the ground that the decree of the Court in the previous case had determined the whole matter. Under the advice of his present counsel, Mercer demurred on various grounds, and the case was carried to appeal. The Ontario Court of Appeal, though not agreeing with the Queen's Bench of Quebec as to the grounds of their judgment, held that the provincial governments are entitled, under the British North America Act, to recover and appropriate escheats.

Mercer, therefore, appealed to the Supreme Court on the point of jurisdiction, and the Minister of Justice, concurring in the view of Mercer's counsel, that the Hereditary Revenues of the Crown belong to

the Dominion, intervened, and the case was argued at the sitting of the Supreme Court in March, 1881. The Counsel were :—

For Appellant MERCER—
HON. W. MACDOUGALL, C.B.

For the Dominion—
Z. LASH, Q.C., *Deputy Minister of Justice.*

For Province of Ontario—
HON. E. BLAKE, Q.C., J. BETHUNE, ESQ., Q.C.

For the Province of Quebec—
Ex-JUDGE LORANGER, Q.C.

MR. LASH opened the case for the Dominion, basing his argument chiefly on the British North America Act, and the case of *Lenoir* vs. *Ritchie*, which denied the claim of the provincial authorities to represent the Crown in matters of prerogative.

HON. MR. MACDOUGALL followed with a speech that fixed the attention of court and spectators for several hours, as he reviewed the case from legal, constitutional, and historical points of view, closing with an eloquent and powerful appeal to the court from an Imperial and national stand point. The reporter regrets that by mistake he was absent during the greater part of the hon. gentleman's speech on the first day, but with the aid of the very full notes of Mr. Duval, the obliging reporter of the court, and a few corrections made by the learned counsel himself, he now presents to the reader the following able argument on one of the most important constitutional questions that has arisen since Confederation.

HON. MR. BLAKE replied with his usual ability, contending for the undoubted right of the provinces to claim and appropriate escheats, on the ground that all lands, estates, lordships, etc., were transferred to the provinces by the 109th section of the British North America Act. His argument was reported very fully in the leading newspapers at the time.

MR. BETHUNE followed with a more technical argument.

EX-JUDGE LORANGER, on behalf of Quebec, and provincial rights generally, traced the history of escheat from the rescripts of the Roman Emperors to the present time, contending that the right was a common law right, and therefore subject to provincial legislation.

MR. LASH closed the case on the part of the Dominion.

FIRST DAY.

SATURDAY, March 5th, 1881.

MR. MACDOUGALL said: I appear as counsel for the Appellant Mercer, the private party in this case. The judgment of the Ontario Court of Appeal from which we have appealed to this court, after expressing doubts as to some of the technical questions relating to procedure which were raised in that appeal, maintained the jurisdiction of the provincial authorities in all cases where lands escheat in this country for want of heirs. Believing that the judges of that court were mistaken, I advised an appeal, and the Attorney General for the Dominion, concurring in my view of the law, has intervened to maintain the rights of Her Majesty, as represented by the Governor General. It was agreed that in our arguments before this court we should confine ourselves mainly to the question of jurisdiction. I, therefore, occupy a double position, first as counsel for the private party, whose right of possession to his father's property has been attacked by the Provincial Government; and, secondly, to establish the right of Her Majesty as represented by the Government of the Dominion to institute proceedings for the recovery of escheats, and to administer this property if an escheat be prov d.

I will first ask your lordships to consider the position of the Crown in respect to "waste lands" in Canada—and indeed in all the North American provinces—prior to the Union Act of 1840. But, before I enter upon that inquiry, I desire to explain my client's position as between the two Governments. His interest in this contest, is not, in my view, entirely a question of jurisdiction. It is a direct pecuniary interest, for if the Local Government administers this property he will get very little; if the Dominion Government is entitled to represent Her Majesty in the matter of escheats, he and his children will fare much better, because it has been the uniform practice in England, for a long period, for the Crown to quit claim, or transfer escheated property to the natural relatives of the deceased* owner, where such relatives exist. This has also been the practice in Canada and the other provinces; therefore, I say my client's interest is not only a moral, but a legal interest, for in such matters custom makes the law. Even the Ontario Government admits that he is the natural son of the deceased Mercer, and if we succeed in proving that the jurisdiction is in the Dominion, I shall expect to receive from Her Majesty's representative in this country the same liberal treatment for my client that he would have received before Confederation.

Prior to 1837, as some of your lordships are old enough to remember, the control of the waste lands of the Crown, or, as they were called, "the casual and territorial revenues," was a subject of discussion and dispute between the Crown officials and the Local Assemblies in all the provinces. These revenues were not administrated or appropriated by the Local Legislatures, but by the Governor and his appointees. As

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*"Escheat is seldom called into action in modern times, as the Crown usually waives its prerogative by making a grant to restore the estate to the family," etc.—WHARTON, 350.

settlement went on these revenues increased, and it was found that the Executive Government could be maintained at the expense of the Crown without assistance from the legislatures, and that the people through their representatives could not obtain those reforms which they desired, nor exercise that influence which is now deemed essential to good government over officials who were practically independent of them. This was one of the subjects of dispute which culminated in the outbreak of 1837. The result was favourable to the popular demand, for Lord Sydenham was authorized to consent on behalf of Her Majesty to a transfer or surrender of the casual and territorial revenues of the Crown for a limited time, and on certain specific terms and conditions. In his speech to the Upper Canada Legislature, which will be found in the Journals of the Legislative Council for 1839, he said: "I am commanded again to submit to you the surrender of the casual and territorial revenues of the Crown in exchange for a Civil List, and I shall take an early opportunity of explaining the grounds on which Her Majesty's Government felt precluded from assenting to the settlement which you lately proposed."

It appears that the Upper Canada Assembly had proposed a transfer, without conditions which would have secured the salaries of the Governor, the judges, and other high officials against the hostile action of a possibly disloyal or domineering majority in the popular branch of the legislature. I find that in the session of 1837-38 the Assembly addressed the Governor for a copy of an Act which had been agreed to between the home authorities and the Legislature of New Brunswick, regulating the collection and disbursement of the casual and territorial revenues in that province. Your lordships will find this Act, or a copy of it, in the appendix to the Assembly Journals of Upper Canada for 1837-38, p. 391. It is to be found also in the Revised Statutes of New Brunswick, but much abbreviated, though in substance the same. I call your lordships' attention to the preamble, and especially to the 6th section, of this Act. It is a rule in the construction of statutes that they are to be interpretated by reference to former Acts *in pari materia*, "for it is presumed" (says Maxwell, p. 31) "that the Legislature uses the same language in the same sense when dealing at different times with the same subject."

The learned counsel then read several passages to show: 1. That the waste lands of the Crown in New Brunswick, and the hereditary revenues, including escheats, were not previously subject to the control of the Provincial Legislature. 2. That the transfer was conditional, and for a limited time. 3. That the right of the Sovereign to deal with escheats, to compromise, grant to relatives, or otherwise dispose of them, was expressly reserved. 4. That by the use of the words "lands, mines, minerals and *royalties*," as distinct from hereditary revenues such as escheats, it is seen that the construction put upon the word "royalties" by the Quebec Court of Queen's Bench is a mistake, for this New Brunswick Act was, no doubt, prepared by the law officers of the Crown in England.

THE CHIEF JUSTICE.—I remember very well that that Act was sent out from England, and caused a good deal of angry discussion.

MR. MACDOUGALL.—A Bill, founded on the New Brunswick precedent, was passed, but containing, as I believe it did, stipulations that

would have infringed on the prerogative rights of the Crown, it was not assented to. I have not been able to find a copy of the Bill, but I think I have suggested the true explanation of the language used by Lord Sydenham. As regards Upper Canada, therefore, it is evident that prior to the Union Act of 1840, both the casual and the territorial revenues of the Crown in that province were under the absolute control of the direct representative of Her Majesty in Canada, and that her title to the waste lands *jure coronæ*, and to the hereditary revenues from whatever source, had not been, and constitutionally could not be, affected by any act of the Provincial Legislature without Her Majesty's consent, under the authority of an Act of the Imperial Parliament. We start then with the Union Act of 1840, to ascertain the nature and extent of local legislative authority over Crown lands and Crown revenues in Canada, before Confederation. The first point to be observed is the extreme care taken by the Imperial Parliament to secure a permanent Civil List, especially in respect to the salaries of the Governor and judges, as fixed by Schedule A of the Act. The Governor (sec. 53) might abolish any of the political offices, and vary the sums payable for their services, mentioned in Schedule B, but the permanent offices could only be touched by an Act of the Legislature, which of course required the assent of the Crown. But as regards the waste lands of the Crown, we find this significant restraint upon the power of legislation in the 42nd section:—

"Whenever any bill or bills shall be passed containing any provisions which shall in any manner relate to or affect Her Majesty's prerogative touching the granting of waste lands of the Crown within the said Province, every such bill or bills shall, previously to any declaration or signification of Her Majesty's assent thereto, be laid before both Houses of Parliament," for 'thirty days,' and, if either House should think proper to address Her Majesty asking her to withold her assent, it would not thereafter be lawful for her to give it. Other formalities were required to prevent any covert legislation which if neglected rendered such legislation *ipso facto* void. It will be seen that under these restrictions, in connection with those in the 57th section, preventing the legislature from passing any vote to appropriate any part of the surplus of the Consolidated Revenue Fund, without 'a message' from the Governor, and in the 59th section, which requires the Governor to exercise *all* his powers and authorities in conformity with 'instructions' from Her Majesty, any law *divesting* the Crown of any of its prerogative rights, and *vesting* them in the Provincial Legislature, must emanate from, or be expressly confirmed by, the Imperial Parliament. Now, it will be for my learned friends to produce such a law prior to July, 1867, if they can. I have failed to discover it. By the Imperial Act of 1791 the tenure of free and common soccage was declared to be the tenure of lands in Upper Canada, when granted by the Crown, but the fee, estate, or title of the sovereign in the ungranted lands, has never been divested or transferred to any other power, Imperial or local. I contend that the power of the Canadian Parliament before 1867, and the power of the Local Legislatures since, in respect to the public lands, was and is simply a power of administration. I admit that an Act of the old Canadian Parliament, sanctioned and approved by Her Majesty as required by the Union Act of 1840,

might have transferred to the Canadian Government the absolute proprietorship, the prerogative right, of Her Majesty in the public lands, as well as the power to manage and sell, and collect and account for, the proceeds, but no such Act is to be found, and therefore the prerogative right remains as before. Such then is the general conclusion at which we arrive as to the legal and constitutional position and power of the Canadian Government prior to 1867, in respect to the prerogative rights of Her Majesty in the casual and territorial revenues and waste lands of the Crown. In addition to the sections I have cited from the Union Act of 1840. I refer your lordships to Forsyth's Cases and Opinions, p. 156, and to the same authority, p. 157, for the opinion of the law officers of the Crown, that escheats, in the colonies, cannot be granted before they accrue. The English Civil List Act, 1 and 2 Vic., cap. 2, and the Imperial Act, 15 and 16 Vic., cap. 39, passed to remove doubts as to whether hereditary revenues in the colonies had not been surrendered to the *Imperial* Consolidated Fund. From all these acts and authorities I contend it is clear that the jurisdiction of the Canadian Government, even when these lands and revenues were under the control of a Governor who was a direct representative of the Crown, was limited, conditional, fiduciary, and temporary; and that the power reserved by the 6th section of the New Brunswick Civil List Act, and by the 12th section of the Imperial Civil List Act (which are almost identical in terms) was reserved in the case of Canada, and that Her Majesty has never parted with her right to dispose of escheats by and through her representative, the Governor General. The 1st and 2nd Vic., cap. 2, in terms extends to the colonies and foreign possessions of the Crown, and the 15th and 16th Vic., cap. 39, to remove doubts, confirms my contention, because it leaves the 1st and 2nd Vic. to its operation in the colonies, except as "to monies arising from the sale of Crown Lands which might have been lawfully disposed of" if the Civil List Acts of Will. 4th, cap. 25 and 1st and 2nd Vic. cap. 2, had not been passed, and expressly provides that the surplus not applied to public purposes in the colonies "shall be carried to, and form part of, the said Consolidated Fund" (sec. 2). The doubt-removing Act is limited to the revenue from the sale of Crown lands; it leaves the hereditary revenues from other sources, and the prerogative powers of the Crown, in the same position as before, in all the colonies. When in 1847 the Canadian Parliament desired to make some changes in the restrictive provisions of the Union Act, and passed an Act for the purpose, what happened? It was reserved, and as it was expedient to pass it—the object not being contrary to the spirit of the compact between the Imperial and Colonial Governments—the law officers of the Crown found that it would be necessary to repeal certain clauses of the Union Act before the Canadian Act could become law. This was done, and the Canadian Act was appended as a schedule, and became, therefore, an Imperial enactment, unalterable by colonial legislation.

I now come to the British North America Act of 1867. The relative rights and powers of the Imperial and Provincial Governments and Legislatures, and the qualified, conditional and temporary assignment or loan of the hereditary *revenues*—not prerogative rights, or even "lands"—but "revenues," the "net produce" of which was to be "paid over" after all proper deductions (3 and 4 Vic. cap. 35, sec. 54) to

the Consolidated Fund of old Canada, have to be ascertained and considered in construing the Union Act of 1867. We must determine the effect and meaning of the provisions of the Act of July, 1867, by ascertaining the legal and constitutional position of the subject matter immediately before the passing of that Act. It is to be observed, in the first place, that the new legislative authority for the Dominion is declared to be a "Parliament"—it was only a "Legislative Council and Assembly" before—and the "Queen" is *eo nomine* declared to be a part of that Parliament. It "consists" of the Queen, the Senate and the House of Commons. But she is not a part of any other corporation or legislative body under that Act. The great powers of government are given to the Parliament of Canada, and only limited, enumerated and definite powers of legislation, on local and municipal subjects, are given to the Local Assemblies. By sec. 102, "all duties and *revenues*" over which the previous Provincial Legislatures had power of appropriation (except what is otherwise disposed of by the Act) are to constitute a Consolidated Fund for the public service of Canada. Now, I cannot understand the reasoning of the learned judges who say that by the word "land," in the 109th section, the absolute estate and prerogative right of the Crown—always theretofore reserved—in the waste lands of the Crown have been granted to and vested in the Provincial Legislatures. It is clear, from the qualifying expression "belonging" to the provinces "at the Union," that nothing more was intended to be given to the new, than had already been given to the old, provinces. Therefore, we come back to the proposition I have endeavoured to establish, viz, that under the Union Act of 1840 the Queen's prerogative right remained intact, and that neither the 109th nor any other section of the Act of 1867 has infringed upon or divested it. If we look at the 92nd section, which enumerates and limits the legislative powers of the province, we find these significant words: "The *management* and *sale* of the public lands *belonging to the Province*, and of the *timber* and *wood* theron." If it had been intended to extinguish the estate or title of the Crown, and to vest in the Legislature the absolute dominion over, and fee simple in the public lands, why specify "the timber and wood thereon?" In this grant of legislative power every word suggests agency, trusteeship, and limitation; not absolute ownership or undivided authority.

As this is a question of interpretation and intention, and as we sometimes derive great advantage from the light which is thrown upon doubtful words and phrases in Acts of Parliament—though I see nothing obscure or doubtful here—by ascertaining the views, opinions, and intentions of the framers of those Acts, and as the estate or title which "belonged" to the Province of Canada "at the Union" of 1867 is the estate or title which belongs to Ontario now with certain qualifications, I direct your lordships' attention on this point to the explanations of Lord John Russell, who introduced and carried through Parliament the Union Act of 1840. You will find the report in the *Mirror of Parliament* for 1840, vol. 4, pp. 3,722 and 3,725. Lord Stanley, who had previously held the office of Colonial Secretary, though at the time in opposition, approved generally of Lord John Russell's Union Bill. He held strong views as to the propriety of retaining the Crown lands under Imperial control, and he put the following query to Lord Russell:—

"I am not quite certain whether the Government intends to keep in their own hands the management of the lands of the Crown. I presume that they mean to do so, but upon this point I hope to have a distinct assurance from my noble friend. I hope to hear that the management of the Crown lands will continue in the hands of the Crown; and that it is not the Crown lands themselves, but the *revenue* arising from them, that it is proposed to transfer to the House of Assembly."

Lord John, replying to this point in Lord Stanley's speech, said:—

"Then, Sir, as to the management of the Crown Lands. He asks whether it will remain in the hands of the Crown? Sir, I believe it will. There is no provision to transfer it; and even supposing that the revenue arising in part from land might be somewhat diminished, under the circumstances, I do not think that there will accrue any great loss to the revenue from this cause; for as fast as land may be alienated the other parts of the land will become of more value, and other portions of the Crown's revenue yield a greater increase than they have done of late years. It may be said there is danger of an indiscriminate sale of the lands. To prevent that, however, I think there will be sufficient guards in the protection and superintendence of the Crown officers. I therefore do not think that the Crown revenue will be materially affected."

We have here a commentary upon the land and revenue clauses of the Act of 1840, by those who framed them, and explained their meaning to Parliament. It supports my contention that, as Lord Stanley puts it, "it is not the Crown lands themselves, but the revenue arising from them" that was transferred to the Canadian Legislature. It results from this view of the reservation of the prerogative right of the Crown in the waste lands of the Crown, under the Act of 1840, that the same right subsists, and was not intended to be granted to the Local Legislatures by the Act of 1867. The judgment of the Court of Queen's Bench for the Province of Quebec, in the Fraser escheat case (vol. 2, Quebec Law Reports, page 236), on which the Respondents also rely as a decision in their favour, is based on the assumption that the word "royalties" in the 109th section of the British North America Act transfers to the provinces the hereditary revenues accruing from escheats. I admit that these revenues did belong to the old Province of Canada, subject to the right of her majesty to quit claim to or release them in favour of relatives, as I have already pointed out. But the "net produce" of these revenues is all that was granted by the Act of 1840, and the 102nd section of the Act of 1867 gives these revenues to the Consolidated Fund of the Dominion, in express terms. The word "royalties" has no reference to these casual revenues, but to the rents or dues reserved for mining rights in the Maritime Provinces. "It is usual for the Crown to reserve a *royalty* on minerals raised from waste lands in the colonies," (Forsyth, p. 178.) Not only is this clear from the associate words, but the next sentence shows that such a construction was never contemplated by the framers of the Act, "and all sums then due or payable *for* such lands, mines, minerals or royalties shall belong to" the provinces. What "sums" could possibly be then due or payable "for" the prerogative right to inherit, as *ultimus hæres*, the property of persons dying intestate and without heirs? Are the *jura regalia* of the Crown things, commodities, that can be sold in the market place, and for which

"sums" of money may be "due or payable" by private persons? Surely not; yet, my lords, the Respondents quote the case of *Dyke* vs. *Walford* (5 Moore, p. 434) to support that proposition, for they say royalties here, means the same thing as *jura regalia*, there.

The Ontario Court of Appeal, though arriving at the same conclusion as to the jurisdiction, would not base their judgment on the word "royalties," as the Quebec Court had done, but discovered an intention to transfer—I will not say, to *sell*—the prerogative to the Local Legislature, in the words "all lands." But they overlook, or do not attempt to construe, the proviso at the end of section 109. The grant of "all lands," etc., is subject expressly to "any trusts existing in respect thereof, and to any *interest*"—that of the Sovereign, by virtue of her prerogative, as well as any—"other than that of the province in the same." This proviso qualifies the whole section. Private as well as public rights had to be considered in handing over the administration of the public lands to Local Legislatures. Sales had been made and rights acquired, which it became necessary to protect against unjust treatment by an arbitrary majority in legislatures which did not then exist. That proviso was intended to give a legal remedy against these new powers if they attempted to take away, or affect injuriously, the existing rights of any of Her Majesty's subjects in the old provinces. I trust this Court will not ignore the proviso.

The next point urged by the Respondent, and recognized by the Ontario Court as a correct inference in law, from the word "lands," is, 1st, that the estate, or interest of the Crown in escheats in Canada, is a "reversion," and, 2nd, that a grant of lands without more, in an Act of Parliament, conveys this reversion. I have tried in vain to find any authority for this doctrine as applied to lands in a colony. The Respondent, in his reasons against appeal, mentions no cases. Remembering the commendation of my legal preceptor in favour of an old book, which he said was the great storehouse of cases on the law of real property in England, especially concerning tenures, I resorted to *Touchstone*, and this is what I find there:—

"Grant of an estate in being by the king must recite the previous estate or else the grant of the new estate will be void."—*Shep. Touchstone, p. 76.*

"Misrecital of previous estate in a deed may pass the reversion in the case of a private person, but will be void in case of grant by the king."—*Ib. 77 and 245.*

"By grant of land in possession reversion may pass, but by grant of reversion land in possession will not pass." But this applies to private persons.—*Ib. 91 and supra.*

In Cruise's digest, vol. 5, p. 422, 423, I find it laid down that "where a reversion is vested in the Crown it could not be barred by common recovery, which barred reversions and estates tail," and again, "the Crown could not be deprived of any part of its property by ordinary conveyances which would divest subjects. An Act of Parliament expressly declaring that the reversion shall be divested out of the Crown is necessary." It is clear from all the authorities that nothing will be inferred or implied against the rights of the Crown. The reigning sovereign cannot even abandon a prerogative unless authorized by statute to do so.—(*Queen vs. Alloo Paroo*, 5 Moore, P.C. 303).

In the case of Mines, (*Plowden* 330 b.,) it was laid down, and has been followed as good law ever since, that if the king granted "lands and mines therein contained" it passes only certain mines, and not mines of gold and silver. The grantee will not take anything not expressly mentioned. (See the *King vs. Capper*, 5, Price 217). And as it is an equally well established rule that no Act of Parliament can affect or take away the Crown's prerogatives, unless by clear and express words, I do not see any justification in law or logic for the claim of the Respondent in this case that the words "all lands" in the 109th section of the B.N.A. Act, even if they were not explained and limited by the succeeding words, include and were intended to grant away forever the prerogative rights of the Crown, whether you call it a royalty, a reversion, or a caducary succession.

[The Court, having sat till half-past four o'clock, adjourned till Monday.]

Second Day.

Hon. Mr. Macdougall—(Continued)—On Saturday I was endeavouring to establish the position that the hereditary revenues of the Crown in the colonies, and especially in British America prior to 1840, were under the direct control, management and disposition of the Crown, through its direct representative in each colony; that at the union of the two provinces of Canada in 1840, the prerogative rights and the disposition of the hereditary revenues of the Crown were still retained by its representative, subject to certain provisions and temporary arrangements contained in that Act. Those clauses I read at length to your lordships, and they form the basis of my argument in behalf of the continuation of that right under the new system created by the Act of 1867. I need not further refer to the argument upon that head. The question turns now, I apprehend, upon the express words and the intention to be collected from those words, as used by the Imperial Parliament in the Act of 1867. The first provision to which I drew your lordships' attention bearing on this point is the 102nd section, in which "all the duties and revenues" which belonged to the provinces before 1867, or, to quote the precise language of the clause—"over which the respective legislatures had and have power of appropriation," were transferred to and "*shall*"—the Act declares—"form *one* consolidated revenue fund to be appropriated for the public service of Canada." But for the exception in this clause there would be no doubt, I apprehend, as to the present position of the hereditary revenues of the Crown in Canada. It would be clear—beyond question—that these "revenues" as well as the "duties" arising under existing laws from various sources, were transferred to, and intended to form part of the Consolidated Fund of the Dominion, for the purposes of the Dominion, and that conclusion would be all the more evident from a consideration of the special object for which this transferrence was made. It was made in order that the new Government should have the means from the same sources as before, and in pursuance of an existing contract, of providing for certain

services, for certain salaries, and for certain public establishments. That duty is transferred to the Dominion. The Imperial Act having cast upon the Dominion the *burden* of these services, it would be only reasonable and natural to suppose that the framers of this Act would provide the Dominion with the *means*, from the same sources as had previously furnished them with funds to meet those charges. But the excepting clause, according to some authorities, raises the question involved in this case: "Except such portions thereof as are by this Act *reserved* to the respective legislatures of the provinces." I would call your lordships' attention to the peculiar language of that clause. The Act does not say that any revenues are reserved for appropriation by, or subject to the control of the provinces or their local governments, but a portion is reserved to the "legislatures" of the provinces. The legislatures are the only power, newly constituted, to which this reservation is made; therefore, it is a legislative power. Their power of disposition or control is derived exclusively from their functions as a legislature. They must pass a law; they must dispose of whatever is under their control by an act of legislation. It is to them in their corporate, legislative capacity, that this power of control is given by the Imperial Act. When we look at the section of the Act which assigns to them their legislative powers, we do not find, I contend, any sufficient words to convey to them the power to intermeddle with, or dispose of the hereditary revenues of the Crown. As I pointed out on Saturday "the *management* and *sale*" of the waste lands of the Crown, or, as they are called in this Act, "the public lands" (which, I contend, means the same thing) is given to them legislatively. They have power to make laws "respecting the management and sale of the public lands, and the wood and timber thereon." Now, that is a limited grant. By its very language we see that a particular power is given to them and nothing beyond that power. They have not had assigned to them by the Imperial Act the absolute dominion over the subject matter. It is a qualified power, and, therefore, we have to consider the history and circumstances of this new legislative creation in order to see how far its legislative authority goes. I argued on Saturday, briefly, the question with regard to the position of Lieutenant Governors. I contended then, and I contend to-day, that the Lieutenant Governor is not the representative of the prerogatives of the Crown in this country, except in a very limited sense. The Lieutenant Governor is appointed by the Governor General as other officers are appointed by him. He is a high official; he has important functions unquestionably, but among them is not included the power of representing the prerogative rights of Her Majesty in respect to Her hereditary revenues. As Lord Carnarvon stated in his despatch of January 7th, 1875, written under the advice of the Law Officers of the Crown in England, he is a "part of the colonial administrative staff." He is, therefore, subject to the direction of the Governor General, who is advised, in respect to questions of Dominion import, by the Responsible Ministers of the Crown in this country. He is appointed by the Governor General, not by the Queen: he is commissioned by the Governor General, not by the Queen; he is instructed by the Governor General, not by the Queen; he is subject to dismissal, under certain circumstances, by the Governor General; he is not subject to dismissal by the Queen. And, if I am permitted to refer for the purpose of my argument and in illustration of

my case to a recent political event, he is subject to dismissal in consequence of a vote of censure by the Parliament of Canada, even against the opinion, so far as it could be ascertained, of the Governor General himself. The correspondence in that case and the action that followed clearly prove that my construction of the Act in regard to the office of the Lieutenant Governor, is the true one. We have not had a judicial decision upon the point, but, so far as executive action and official opinion are concerned, that case proves that the Lieutenant Governor is regarded as a local officer appointed by the Governor General, and in no manner subject to direction, approval, or disapproval by the Imperial authorities. He is to all intents and purposes a local colonial officer and nothing more. If that is so, it is absurd to suppose that he can, by virtue of his office, in any manner undertake to represent or exercise Imperial functions, or dispose of the revenues resulting from the exercise of the prerogative rights of the Crown. If you could find in this Act language which showed a clear intention on the part of the Imperial Parliament for convenience or for any reason of state, to clothe this officer, appointed by the Governor General, with authority to deal with this particular property or revenue, I would in that case admit, as the power of the Imperial Parliament is supreme, that he was properly exercising the functions of his office in collecting and disposing of the revenues resulting from the enforcement of the hereditary right of the Crown in the case of escheats. From the evidence of intention which we find in the Act itself, from the judicial commentaries and expositions it has received, from the action of the Imperial Government through the Secretary of State, from the action of the Governor General in this country, from the action of our own Parliament—from all these, I contend, it is established that the Lieutenant Governor is a local and not an Imperial officer, and can in no way intervene in proceedings for the recovery of escheats. On this point I would call your lordships' attention to the fact, which I did more at large on Saturday, that in the case of the civil list in England, the hereditary revenues of the Crown are surrendered to Parliament in consideration of a permanent civil list of fixed amount during the life of the sovereign. In the case of William IV, and in the case of Her Majesty (and those Acts are still in force in Great Britain, and as far as they apply are in force in the colonies of Great Britain) we find that Parliament expressly reserved to the Sovereign, or in other words to the Crown, the right as against Parliament and the Government of the day, in respect of these revenues, to grant escheats of this description to relatives of the deceased—to those who were not, under strict construction of law, entitled to enforce their rights as legitimate heirs. That right to evince the benevolent disposition of the Crown towards the natural relatives of a deceased person who may have left his property subject to escheat, is reserved in express terms, and, in order to prevent any possibility of misconstruction, it is reiterated *ex majori cautela* that the reservation is made to the intent and for the purpose of enabling the Crown independently of those Acts, and of the disposition that was apparently made of all the hereditary revenues, to deal with this particular class of revenues as it should please the Royal will. The same discretion and power must be held to remain in Her Majesty in respect to these revenues in the colonies, for that Act, 1st and 2nd Vic., cap. 25, relates to the colonies and foreign possessions of the Crown, as

well as to Great Britain and Ireland. The construction that is suggested respecting the Union Act of 1867, would utterly destroy the object and purpose of that reservation of authority in Her Majesty with respect to escheats in Canada. It would place that kind of property which is expressly reserved to the Crown in England, under the control absolutely of whom? Of the local assembly, the provincial representatives of the people. And how are they likely to exercise that control? What does this very example show of the disposition of such a body? In this case about $150,000 worth of private property belonging to the deceased, Mr. Mercer, accumulated by himself, not resulting from free grants or anything of that kind—which might, perhaps, have justified a feeling in the public mind that his property ought to revert to the public for public purposes—but the private earnings and accumulations of this person, are taken from the possession of his own son by the Local Government, by the vote of a bare majority of the Local Legislature, and appropriated to public uses. The local officials, with a voracity that was revolting, seized it for the purpose of gaining credit to themselves with their partizans, and, ignoring the moral, and, as I contend, the rightful claims of the admitted son and four grand-children of this deceased person, appropriate their patrimony to the use of abandoned women, to the erection of an asylum, a reformatory for prostitutes—and, adding insult to injury, with cruel sarcasm, they gave this reformatory the name of ANDREW MERCER! Now, my lords, I say that, looking through these Imperial statutes and the reports of transactions of this kind in Great Britain, we find that Her Majesty has never acted in that spirit or in that manner in dealing with escheated property. I remember a case, and no doubt some of your lordships have met with it, which happened two or three years ago in England, where a person was killed by a railway accident. He happened to be without heirs. His estate consisted of personal property. I think he lived in the Town of Bristol, and the property was taken possession of as an escheat to the Crown. The money was, by order of Her Majesty, appropriated for some public purpose in the town in which the man had lived. It was appropriated for the benefit of his neighbours and friends. Under the provisions of the Civil List Act, and under the influence of those moral considerations which have induced the Crown to act leniently and unselfishly in matters of this kind, the money was given in that case, not to relatives, because the man had none, but it was devoted to public purposes in the town in which he had accumulated his property. It was not permitted to reach the public treasury. I refer to that case as showing the spirit which prevails, and the policy which directs in the disposition of such properties in England, and that the representative of Her Majesty in this country will, presumably, exercise this mild and generous prerogative power in dealing with properties of this kind which legally come to the Crown in Canada. The argument of convenience and inconvenience is, I perceive, made use of by the respondents in this case, as if some weight ought to be given to it in a court of law. I think, therefore, I am justified in directing your attention to the public policy which is involved in this question, in view of the uniform practice of the Imperial authorities. At all events, it will operate to this extent—that it will cause your lordships to look into the matter with great care to discover the meaning and purpose intended,

and the conditions imposed, in the transfer of these revenues to Old Canada in 1840, and will sustain my contention that they were transferred to the jurisdiction and control of the Dominion Parliament by the Act of 1867, under the same conditions. Now, I will call your lordships' attention, at this stage, to a case decided in this Court, which involved the question of authority to exercise the prerogative right of the Crown under our present constitution: I refer to the case of *Lenoir* vs. *Ritchie*, and, although it bears upon another branch of the prerogative, yet the doctrines propounded, and cases cited by some of the learned judges who delivered judgments in that case are, I think, doctrines and authorities which are applicable to the question which is now under your consideration. On page 610 of the report of the case, Supreme Court Reports, vol. 3, I find Hon. Justice Henry made these observations:—

"The Local Legislatures are now simply the creatures of a statute, and under it alone have they any legislative powers. The Imperial Parliament, by the Union Act, prescribed and limited their jurisdiction, and in doing so has impliedly but virtually and effectually prohibited them from legislating on any other than the subjects comprised in the powers given by that Act. The right of the Imperial Parliament when conferring legislative powers on the Local Legislatures to limit the exercise of them cannot be questioned, and any local act passed beyond the prescribing limit, being contrary to the terms of the Imperial Act, must necessarily be *ultra vires*."

Then, on page 613, the question of the assent to, or acquiescence of the Crown in, local acts is discussed. It may be argued on the other side that because an Act of the Local Legislature respecting escheats was, by a kind of agreement between the then Minister of Justice and the local Attorney General, allowed to go into operation, or speaking, more correctly, was not disallowed by the Governor General, there is a kind of assent or acquiescence by the Crown——

MR. BLAKE—I do not intend to argue that.

MR. MACDOUGALL—My learned friend says he will not argue that, but I shall read the passage I have marked, which deals not only with that point in the case, but also with the doctrine which I am endeavouring to sustain as to the position of Local Legislatures. It is as follows:—

"As the Sovereign is the source of all honours and dignities, it is argued that the royal assent to the Act, however otherwise *ultra vires*, must be taken as a legislative declaration of the waiver and transferrence of the Sovereign's functions. Several difficulties, however, present themselves: the first is that by such a conclusion the Act of the Imperial Parliament would be extended, if not in part repealed; second, if the Local Act be *ab initio* void, it cannot become law merely by the assent of the Sovereign. It might as well be claimed that an ordinance of a City or County Council, of the same tenor, giving power to a Mayor or Reeve to appoint Queen's Counsel, if assented to by the Queen, would be valid. By the provisions of section 90 of the Imperial Act, the Governor General and not the Queen assents to local Acts made in his name as provided. The Lieutenant Governors are appointed not by the Queen but by the Governor General in Council. It cannot therefore be successfully contended that the Queen has assented to the local Act in

question ; nor can it be with greater success contended that by assenting to it, the Governor General had any power in doing so to interfere with the royal prerogative in question."

I am sorry that I am not sufficiently familiar with the French language to read the passages in the judgment of Hon. Justice Fournier bearing upon the same point, but the judgment of Hon. Justice Taschereau contains two or three passages to which I shall take the liberty of directing your lordships' attention. The first which I have marked in the report (page 619) is the following :—

"If this statute is taken as vesting the Lieutenant Governor with Her Majesty's prerogative rights of appointing such Queen's Counsel, I hold, then, that it is *ultra vires*, and an absolute nullity. I need hardly add that the Sovereign has this prerogative of conferring honours and dignities over the whole of the British Empire, and that by the B. N. A. Act, the Crown has not renounced or abdicated this prerogative over the Dominion of Canada, or any part thereof."

My learned friend will argue that the B. N. A. Act gives Local Legislatures the power to legislate on Her Majesty's prerogatives. I ask him to point out which part of section 92—which sub-section or clause—authorizes the legislature, as a legislature, to interfere with or concern itself about the prerogatives of the Crown? The learned Judge continues :—

"Under the rule that Her Majesty is bound by no statute unless especially named therein, and that any statute which would divest or abridge the Sovereign of his prerogatives in the slightest degree does not extend to or bind the King unless there be express words to that effect, it remains in Her Majesty and in Her Majesty alone, as the Imperial Statute does not specially give it to the Legislatures." (p. 621).

The citation there is from Chitty on Prerogatives, 383. In looking over the cases bearing upon this question, I have met with a judgment pronounced by the Judicial Committee of the Privy Council in the case of *Theberge* vs. *Landry*, in which that doctrine is reaffirmed, although the court in that case distinguished as to the subject matter, and refused to advise the exercise of Her Majesty's prerogative right to hear appeals. As it is the latest decision on the point, by the highest court in the empire, I ask your lordships to take a note of it. It will be found in Appeal Cases, vol. 2, Council of Law Reports, 106 :—

"Their lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away, except by express words, and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

This is a judgment upon the *British North America Act*, and supports my contention that when I have shown that the prerogative as to escheats "existed" in this country prior to 1867, precise words must be found in the Union Act of 1840 and in the Confederation Act of 1867 to take away that prerogative. Now, my lords, there are no such words in either of these Acts. There is another point with reference to the Act of 1867, which I omitted to notice on Saturday in consequence of the order of my argument being somewhat disturbed, but to which I desire particularly to call your lordships' attention : The first sub-section

of the 91st section of the B. N. A. Act gives to the Dominion Parliament—but I may as well read the introductory words to justify the inference I intend to draw from them :—

"It shall be lawful for the Queen, by and with the advice of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to *all* matters,"—no more comprehensive language could be used than this. But there is one exception—"to all matters not coming within the classes of subjects *by this Act* assigned exclusively to the legislatures of the provinces."

Now, my lords, it is the plain meaning of the language used by the Imperial Parliament in this section, that the Dominion Parliament should have full, complete, and, so far as a subordinate legislature can have, absolute authority to deal with every matter of legislation in Canada, except those special matters that are assigned to these local bodies. The whole field of legislation, the whole scope of legislative power, is placed in the hands of the Dominion Parliament, and may be exercised over the lives, liberties and property of the people of this Dominion, except in those specially provided cases in which this subordinate sectional legislative power is conceded to the Local Legislatures. And to impress still more strongly and clearly on those who are to read this Act, and the courts which are to interpret it, that they are not to question this general exclusive authority of the Dominion Parliament to legislate upon every matter concerning the people under its jurisdiction, except in those special cases in which certain questions are expressly assigned to provincial authorities, it is provided :—

"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 anything 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."

And certain subjects are then enumerated for the purpose of explanation and suggestion to people about to be placed under a new constitutional system. It might have been inferred from the enumeration of excepted matters, if this first enumeration had been omitted from the Act, that the powers of the general parliament would after all be largely limited ; but with this enumeration they would see at a glance the great multiplicity of matters upon which the Dominion Parliament have unquestionably the right to legislate. And for fear that the specification of particular powers might, according to a well known rule, operate as a restriction of the Dominion Parliament, the following is added :—

"And any matter coming within any of the classes of subjects"—not the particular subjects, but the "classes" of subjects—"enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." Although in the enumeration of local powers it might seem that some of those assigned to Parliament were included, you are not to include them. The very first subject over which the Dominion Parliament is given exclusive authority is "the public debt, and," as I interpolate, *the public* "property." "The public debt and property" must be read as if the word "public" had been inserted before

"property," because no other property can be intended. That is the power with which the Dominion Parliament is endowed. It includes the "public property" of every kind which is not expressly assigned to the provinces. The 102nd section, as I have pointed out, covers everything so far as duties and "revenues" are concerned. The power to manage and sell the waste lands which were under provincial jurisdiction at the union, and collect the monies or "sums" in respect of previous sales which were then uncollected, were under the 109th section, given to the provinces. So there is no difficulty about that. Now, that power of legislation conferred upon the Dominion Parliament by the 1st sub-section, taken in connection with the general authorization in the 91st section, and taken in connection with the 102nd section relating to "all duties and revenues" seems to me, my lords, to give to the Dominion Parliament, beyond any question whatever, the power of dealing with the subject matter involved in this case, unless it is found to have been conveyed or transferred to the Local Legislatures by some other section. Now, with reference to that contention, I shall have to examine with some detail the judgments in the first place, of the Queen's Bench of Lower Canada, before whom this point was first debated, and by whom it was first decided. In the Fraser case to which I refer, it appears that in the first instance the question came before the learned judge who now so worthily fills his place upon this Supreme Court Bench, Hon. Justice Taschereau. The judgment given by him in that case affirmed the jurisdiction of the Dominion Parliament and the Dominion Government in matters of escheat. That was appealed against, and the case came before the Court of Appeal of Lower Canada. As I pointed out on Saturday, the learned Chief Justice of that Court admitted that he found nowhere in the B. N. A. Act of 1867, any direct and express transfer of lands or revenues escheating to the Crown in Canada, to the Local Legislatures. I have made notes of a few points of his argument:—

"All rights and revenues of the several provinces are by section 102 transferred to the consolidated fund of Canada, except those reserved by that Act to the provinces" (Quebec Law Reports, vol. 2, p. 238). He admits that property derived from escheats would, therefore, belong to the Dominion Government, "unless specially reserved," or "unless it came within the category of rights received in virtue of the powers conferred by the Act."

He admits that none of the sections distributing assets, viz, sections 107, 108, 109, 113 and 117, together with schedules 3 and 4, reserve escheats specially to the provinces. But he contends that as the Provincial Legislatures may "enlarge or curtail the right of escheat by extending or restricting the class of persons who may inherit it," and so abolish escheat altogether, they may collect the revenue and appropriate it.

My learned friends will rely upon that judgment. It was followed by Vice-Chancellor Proudfoot in this case, but he took good care not to commit himself to the argument further than was necessary. He says: "The learned counsel made an able argument to show that escheats belong to the Consolidated Revenue of the Dominion and not to the Local Legislatures, that so far as there is any power in Canada of appropriating these revenues under Imperial Acts, the Federal Parliament alone can

deal with them; that the casual revenues of the Crown in Ontario (as distinct from territorial) are Federal revenues applicable to Federal purposes, and payable to the Receiver General of the Dominion. The question has been the subject of judicial decision in the Court of Queen's Bench in Quebec, on appeal from the Superior Court at Kamouraska, in a case in which the Attorney General for Quebec was appellant and the Attorney General for the Dominion was respondent, and it was determined that the escheat accrued to the benefit of the Province of Quebec, and not of the Dominion. While not absolutely bound to follow that decision, yet, considering that it was the unanimous decision of judges of great eminence of one of the Confederate provinces sitting in appeal, and construing the same acts and legislative provisions now brought into question, it would be unseemly in me to venture to give a contrary opinion, and I have, therefore, concluded to follow that decision until it be reversed by some higher tribunal, *without endeavouring to construe the various acts that were referred to.*"

I cannot gather from the judgment of Vice-Chancellor Proudfoot whether he approved of it as a correct interpretation of the law or not, but at all events he assented to it in the language I have read. Then, the Court of Appeal, having referred to the judgment of the court in Lower Canada, although differing from that court in some of the grounds on which they base it, also follow that judgment. It becomes necessary, therefore, to review carefully the arguments and positions of the Queen's Bench. I return, for a moment, to the Chief Justice. He argues:—

"From what I have already said, escheats seem to come within that class of revenues which are derived from the exercise of the powers specially conferred on the Provincial Legislatures. If these legislatures have the power to enlarge or curtail the extent of this right by extending or restricting the range of parties to whom the estate of deceased persons may be transmitted, or if they can abolish it altogether, then the existence of this right to escheats is subject to the authority of the Provincial Legislature, and the revenue derived from it is collected in virtue of the powers specially conferred on them by the Act, since it depends upon their action whether this source of revenue shall be maintained, and to what extent, or whether it shall be abolished altogether, (p. 238.)"

That is the argument of the learned Chief Justice of the Court of Queen's Bench. It does not commend itself to my judgment. He draws an inference from a proposition of law which has not yet been decided—which may not be the proper interpretation—which, in fact, the judges of the Court of Appeal in Ontario have disputed. They refuse to agree to that proposition. They declare that he is begging the question when he takes that ground—for it is not in the statute on which he bases his judgment. To that argument I answer, that the Parliament of Canada, having exclusive power to legislate on "all matters coming within" the subject of Marriage and Divorce (sec. 91, sub-sec. 26), the Provincial Legislatures are excluded from the matters of heirship or inheritance which are a consequence of the marriage relation. "The accessory right follows the principal" (Co. Litt, 152, a.) "The incident shall pass by the grant of the principal." (Broom's Maxims, 203). In Stephen's Commentaries, vol. 2, p. 279, we are told that

"the doctrines which relate to the matrimonial relation, depend, not exclusively on the general law of the realm, but partly on the canon law as administered in the ecclesiastical courts."

I cite that passage because of the remark of one of your lordships on Saturday, that this case was possibly included under the term "civil rights" as part of the civil law. My opinion is that the laws respecting marriage and inheritance were, in their origin, canon law—ecclesiastical law—and we have to regard that fact in the history of the case, when we come to place an interpretation upon any terms found in the Act of 1867, which seem to endow the legislatures of the provinces with power over any particular subject, which has been assigned in general terms to the Dominion. We must see that it comes strictly within the context as well as the text of the Imperial Act. The "subject" of marriage, and the rights which flow from it, would not therefore *come within* "property and *civil* rights in the province" under a strict construction, even if they had not been assigned to the Dominion by section 91.

Then, Mr. Justice Ramsay delivers a judgment in which his lordship admits that escheats in the provinces are legally vested in the sovereign. He complains of the difficulty that results from double enumeration of subjects in the British North America Act. I think if he had given his attention more closely to the introductory clause of the 91st section, and the other sections bearing on the matter, he would not have found so much difficulty as he appears to have met with. He confounds the "duties and revenues" mentioned in the 102nd section with the public property referred to in the 117th section, and makes confusion worse confounded by attempting to reconcile the earlier and later sections by reference to the 109th section. The "public property" referred to in the 117th section consists of gaols, court houses, asylums, etc., not disposed of by other sections of the Act, nor included in the schedules. He admits that the word "Royalties" must not be used in its "largest sense," and then makes it include all the minor prerogatives of the Crown, confessing at the same time that the conclusion he arrives at is open to objection. In a foot note, which I presume he has himself supplied, he expresses an opinion that the use of the title "Governor General" is a remnant of former ideas, themselves confused, and thinks the use of the Queen's name in sections 72 and 77 (75 he probably means) is an uncorrected error.

I think those who were concerned in the framing of that Act and in the discussion of it before the public in its original form, as well as those who explained it to the Imperial Parliament, will not agree with his lordship in his construction or his criticism.

Mr. Justice Sanborn begs the whole question in his judgment. He says:—

"Escheats of the nature of the one in question are subject to the control of the Provincial Legislatures."—(p. 245.)

He makes the same assumption and draws the same inference in regard to the power of the Local Legislatures to alter descents, as the Chief Justice. He says: "It is competent for the Parliament of Quebec to establish the law relating to descents," etc., etc. Overlooking the 91st section, and ignoring the 102nd section, he declares that "the public property given to the Dominion is given in express terms (section 108) and specified in the 3rd schedule."

I have called your lordship's attention to the first sub-section of the 91st section, in which legislative power over public property, generally, is given to the Dominion Parliament. So far as the enumeration of certain properties of the Dominion in the third schedule is concerned, the rule *expressio unius exclusio alterius* does not apply. I notice that that argument has been used elsewhere. If anything is attempted to be made of it here, I would call your lordship's attention to the fourth schedule, which enumerates provincial property, from which the same inference may be drawn, for the one is as suggestive of exclusion as the other. Mr. Justice Sanborn does not say, however, which Government has the right to act for the Queen, or if both have. That question is put on one side. Now, with reference to the judgment of the Court of Appeals for Ontario, it is unfortunate that we have not the advantage of having before us the judgment of the late learned chief justice of that court, because every lawyer in Ontario and in all the other provinces, who enjoyed the acquaintance of that learned judge, would say at once that his opinion and his authority upon a question of this character would deservedly carry very great weight. Unfortunately, by an untimely event, he has been removed from the bench which he adorned, and his judgment in this case, if formally prepared, is not accessible. It is not printed in the case, for it was not available to counsel or solicitors in the preparation of the appeal books. We have only the judgments of Mr. Burton and Mr. Patterson, two of the judges of the Court of Appeal, and I shall have to direct your lordships' attention for a few moments to some of the positions which they have taken. Mr. Justice Burton begins by laying down this proposition:—

"I find no warrant in the Act for the assertion so frequently made that all rights or property not expressly given to the Province pass to the Dominion; on the contrary, I take it to be clear that the Provinces retained all property and rights which were previously vested in them under the constitutional Acts then in force, except those which by the Confederation Act are taken from them, and transferred to the Dominion."

Now, I contend his lordship has misconceived the language, policy and intention of the Confederation Act. I feel sure that your lordships will agree that the very opposite interpretation is the clearly expressed intention of the Imperial Parliament, viz.: that jurisdiction over every possible subject of legislation is, in general words, assigned to the Dominion Parliament, and that the exception, so far as it extends, is something taken or carved out of that power, and is all that is given to the Local Legislatures. The entire legislative authority, as it existed in the various provinces before Confederation, was dealt with by the Imperial Parliament. No one can doubt the power of the Imperial Parliament to have deprived Canada (so far as an Act of Parliament could do it) of representative government altogether. It might have converted, or reconverted, our provinces into Crown colonies, with some new experimental system of colonial government, as a matter of mere legislative authority. Probably it would not have been well received. They might have found Boers in Canada, as well as in South Africa; but, as a matter of law—as a matter of argument before a court of law—I contend that the whole subject was completely within the control of the Imperial Parliament. They could assign such

powers of legislation for the future as they pleased, without respect to the "rights" of the past. There were no rights in the question which a court of law can recognize. The people of the four provinces, united together in the new form, were endowed with even greater rights and larger powers than before, but the legislative control and direction of affairs were placed under two distinct legislative bodies. The greater power was that of the Dominion. The full and complete exercise of that power was vested in the Parliament of the Dominion, but certain geographical distinctions were retained, and the provinces were allowed, under the machinery provided in the Act, to legislate upon certain specified local subjects as a matter of convenience. Now, I cannot understand what the learned judge means when he talks about political rights which remained in, or belonged to the Province of Ontario. What rights could Ontario have had? There was no such political entity or corporation; there was no such province in a legal sense. It was a geographical expression. It is true you will find that our statutes from 1840 down, were applicable, some to Lower, and some to Upper Canada. The old distinction was kept up to limit the operation of certain statutes in consequence of local laws that had previously existed in the provinces. So far as the people of Lower Canada are concerned, I admitted on Saturday and I admit to-day, that from the peculiar circumstances under which the French inhabitants of Quebec were dealt with after what the English call the "conquest," and they call the "cession," certain privi leges and rights were reserved or secured to them by a so called treaty. But those rights were not secured to Quebec according to her present limitary lines. They were conceded to the French population who were scattered at that time over the whole northern part of this continent. The cession was not restricted to the Province of Quebec as bounded at present. These boundaries were established under English jurisdiction; the French never bounded their province on the north; therefore, when rights were reserved to the French inhabitants of this colony, they extended to the *people*, and not to any geographical or territorial circumscription or boundary. So, the pretence that there ever was any grant or reservation of particular rights to British immigrants who came to Canada since the cession, and are now living within territory formerly part of the Province of Quebec, is altogether unwarranted in the history or reason of the case. But starting out with that wrong assumption—that mistake as to the very origin and foundation of the legislative power of the provinces and of the Dominion—I am not surprised that his lordship falls into error in that, as well as in other respects. He says:—

"The term 'all lands' must be held to include any interest which the province then held, or was entitled to in the lands, including any reversionary interest, or interest incident to the tenure." What lands? Those which belonged to the province "at the union." Did Mercer's lands belong to the province in 1867? Certainly not. The learned judge admits that if he is mistaken on this point, then "no disposition whatever is made of such interest, and it will remain in Her Majesty."

His lordship would seem inclined to adopt the *role* of legislator, and not of judge, in this part of his judgment. However, he refuses to follow the Court of Queen's Bench in the reasons and grounds of their judgment. He says:—

"I prefer to place my judgment on the ground I have indicated above, rather than that adopted by the Court of Appeal in Quebec."

Now, so far as I understand the judgment of Mr. Justice Burton, it would seem that he rests his conclusion as to the ownership and destination of this property chiefly, if not altogether, upon his interpretation of the nature of the estate in escheats. The doctrine that it is a reversion, in the ordinary sense, seems to be relied upon both by Mr. Justice Burton and Mr. Justice Patterson, and it is also stated in the reasons against appeal, by the learned gentlemen who prepared the case, that they rely upon that doctrine of reversion. I have just this to say with respect to that theory: it does not apply in this case. I am not going to occupy the attention of your lordships with a discussion upon tenures, because it seems to me the feudal relation is not involved in the argument here. I did go into that question at some length before the Court of Appeal. I had carefully examined the authorities, because it was a matter of some historical as well as legal interest. The origin of feudal tenure, the mode in which property was transferred under that tenure, the relation of lord and tenant, the rights of tenants, and the successive changes made by Parliament as to these rights; first, their right to sell; secondly, their right to devise by will, and thus put other tenants in their places, without the lord's consent, destroying thereby the right of escheat in the lord to a great extent; and, lastly, the right of the Crown in the absence of a mesne lord: all these questions were and are very interesting as a historical study, but it seems to me they have very little weight in this discussion, because in Canada we have a tenure the character, incidents, and bearings of which, are well understood even by laymen, from the frequent discussions and expositions in the courts—I mean free and common Soccage. That was established in Upper Canada in 1791—and we have to deal with this question in the light of doctrines applicable to the tenure of free and common Soccage. I contend, as a matter of plain, elementary law, that it is neither in accordance with modern decisions nor the reason of the thing, to say that when the Crown grants waste lands in a colony to private persons, or authorizes a Colonial Legislature to grant them, the rights of the Crown as *ultimus hæres*, or if you please, the reversionary right of the Crown arising from escheats, is granted at the same time. That sovereign right is not granted; that is the "seigniory" which is always reserved. Let us suppose it to have been granted once in a particular case, and that a subsequent owner happens to die intestate and without heirs, what becomes of that seigniory? The Crown having granted the reversion cannot resume it. It has ceased to exist. Therefore, the reversion here is not that kind of reversion which lies in grant. Lord Mansfield said, in the case of *Burgess* vs. *Wheate*, that it was a caducary succession, a "sort of reversion," that is to say, it reverted, it came back to the lord or king, but in contemplation of law it was not the reversion which is granted, or may be granted by the owner of a prior estate, if he uses language to show that he intends to grant the reversion. It is not a part of the inheritance, it is something which springs into existence by accident, and is no part of the original estate or fee, which is always vested in some person, and may descend successively through unending generations. Therefore, I contend that the judges of the lower courts treating it as a part of the inheritance, known as a reversion, have entirely mistaken the fundamental principle on which the doctrine of

reversions is based. In the present case the land comes to the Crown as the last heir. In the colonies that now form part of the United States, as well as these provinces, and also in India, the Crown has always been treated as the ultimate heir, the person to whom property descends or passes that is vested in no one else, and it is by virtue of that doctrine that this property fell to, and is now vested in Her Majesty. It is not vested under any doctrine of reversion found in the old books with reference to feudal tenure. Perhaps it will be as well at this point to give your lordships the authority on which I rely, and which, in my judgment, is conclusive. I quote from Cruise's Digest, edition of 1835, vol. 3, in which the law on this subject is summed up with great clearness. The citation will be found at page 397, "An escheat is a casual profit. When the power of alienation was introduced the change of tenant changed the chance of the escheat but did not destroy it, and when a general liberty of alienation was allowed without consent of the lord, this right became a sort of *caducary succession*, the lord taking as *ultimus hæres*." The same doctrine is laid down by Lord Mansfield in *Burgess* vs. *Wheate*, 1 Wm. Blackstone, 163. The Master of the Rolls in the same case said, "The difference of taking by prerogative and escheat (*i.e.* feudal escheat) is material, and Lord Hale makes the distinction." 1 Wm. Black., 144.

That expresses very clearly the doctrine with respect to title by escheat since the abolition of military tenures. In New Brunswick it was held, on the authority of the law officers of the crown, that the wild lands of that province belonged to the Crown, *jure coronæ*, and were disposable by the representative of the Crown, and not by the Provincial Legislature. (Forsyth, 156.) I hold that the waste lands in Canada are still Crown lands in the same sense, and that only the *revenue* has been granted to the provinces, and only "the management and sale" entrusted to their legislatures. The pretence that this land, which has come to the Crown by the accident of escheat, was included or contemplated in the word "lands," as used in the 109th section, cannot be sustained as a matter of law, in my humble opinion, for a single moment. That it was not conveyed or transferred under the word "royalties" I hope I have succeeded in convincing your lordships. The learned judges of the Court of Queen's Bench were misled by Brown's Law Dictionary. Their attention was not directed to the use of this word in the provincial statutes. Upon that point I would direct your lordships to an opinion expressed in another place by a distinguished lawyer and politician. I refer to the Premier of this Dominion, who was one of the framers of the B.N.A. Act. It will be found in the House of Commons Debates for 1880, page 1,185. In the course of a debate on the fisheries award, he said:—

"The argument of my hon. friend is based principally on the language used in the British North America Act, which provides that all lands, mines, minerals and royalties belonging to the several provinces at the union, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated or arise. Fisheries are not lands, mines, or minerals, nor do they come within the term "royalties." We know what "royalties" mean. My learned friend has quoted some authorities showing that sovereignties and regalities are the same things. But "royalties" has a distinct sig-

nification at law. The word in this application and its evident use in the B. N. A. Act is limited by the ordinary use and signification of the term. In its large or general sense the word "royalty" signifies all that belongs to the sovereign; in its colloquial sense in the English language, "royalty" means all that pertains to the royal person, dignity, rank and prerogative. In the legal sense it arose in this way; we know that in England, no matter who may be the owner of the soil, still under the law of England the royal mines mean those mines of gold and silver belonging exclusively to the sovereign, and the fact that the owner of the soil may have the fee simple in the land does not give him any right or claim to the gold or silver mines on his estate; those belong to the sovereign, and when grants were made either to the owner of the soil or to strangers, the Crown was in the habit of claiming and insisting upon an annual compensation, or a compensation as to quantity, which in either case was called the "royalty," and was a recompense to the sovereign for handing over that portion of the royal mines. Hence the expression "royalty," and this expression has been extended to every kind of charge of that nature, whether by the sovereign or by the owner of a mine of any kind, whether of gold or silver, or of iron, of copper, or any other mineral whatever. The word has come to be applied to the rental, charge, or compensation made for the use of a mine. I say, therefore, that this word "royalty" was evidently so used in the British North America Act."

That is the opinion of a distinguished statesman, and one who has been conversant with legislation and political affairs in this country for a great many years; who was chairman of the convention which planned, elaborated, and finally succeeded, with the co-operation of the Imperial Government, in carrying through the Imperial Parliament the Confederation Act—that is an opinion which I venture to say is entitled to great weight even in a court of law. My learned friend who, as Minister of Justice, acquiesced in the decision of the Quebec Court, will contend, I presume, that their interpretation of the word "royalty" is according to the intention of this Act, or that because the word happens to be found there, your lordships may by a large construction make it cover the royal prerogative of escheats. I submit that even if the word is capable of that meaning it cannot be held to include the hereditary revenues from escheats, if by a consideration of the whole Act it is clear that it was not intended—

JUDGE HENRY—Your position is that if the word "royalty" could cover something else it does not cover escheat?

MR. MACDOUGALL—We say that the word "royalty" has some meaning there. We say it refers to the rents or charges for mines in Nova Scotia and New Brunswick. There were none reserved in Ontario and Quebec. Those who are familiar with the preliminary stages of the Bill, are aware that the word "royalties" was inserted after the first draft, at the suggestion of gentlemen from Nova Scotia and New Brunswick, lest these rents or sums payable to the Crown under the name of "royalties" should be held not to be included; and thus the word was added. By the well known maxim *noscitur a sociis*, you are to interpret words of this kind by reference to those with which they are associated; and according to the doctrine also that the prerogative rights of the Crown cannot be conveyed or granted unless by express words,

you must be satisfied that it was undoubtedly the intention of the Imperial Parliament to grant them in this case. Unless that is clear, you must give a limited signification to the word "royalty." The Court in Quebec based their judgment principally on that word. The Court in Ontario founded their judgment upon the doctrine of reversion, being of opinion, as we must assume, that it was the intention of the Imperial Parliament to convey to the provinces by the use of the word "land" this so called reversion. That construction, I submit, is in direct conflict with the old, and heretofore. unquestioned doctrine with respect to the prerogative rights of the Crown in England and in the colonies. In *Theberge* vs. *Landry*, the doctrine that Her Majesty's prerogative in her colonies must not be infringed, must not, in any manner be affected by any Act of Parliament, except by precise words, is reaffirmed by the highest court in the empire. I contend that even Her Majesty, without the express sanction of Parliament, cannot grant away the hereditary revenues of the Crown from her successor. In all the Acts relating to that subject since Parliament was established, there is evidence of extreme care when dealing with hereditary revenues of the Crown, and prerogative rights of the Crown, to preserve them intact for the successor; otherwise the Crown would not be worth fighting for.

JUDGE HENRY—A despatch from the Colonial Secretary would not be sufficient to transfer them.

Mr. MACDOUGALL—I think not. No subordinate power can touch the prerogative. If the Parliament of Great Britain should choose to turn the Sovereign out and convert the country into a republic, as once happened, I suppose Parliament could do it. I do not know that lawyers would agree that Parliament, without the consent of the Sovereign, could do it. With that assent Parliament is supreme. But, I apprehend, even my learned friends will agree that such an Act must contain words which clearly evidence the intention. My lords, there is nothing to evidence that intention here. It is only an inference at best, and that inference is contradicted by all the expressed objects of the Act. Treating this question for a moment from a political standpoint, I regard the preservation of the prerogative rights of the Crown in this country, as essential to the happiness, prosperity, and safety of the people who inhabit this country. Why? Because by it we are assured of the protection of a powerful empire. We are a part of that empire. The Queen who rules over our distant fellow subjects rules over us. Her protecting armies are ever ready to shield us. She has certain rights of sovereignty here that we recognize, and have always been ready to defend. The correlative duty is cast upon her to use the whole power of the empire for the protection of the rights and privileges, the freedom and independence, of the people of this part of her dominions. If it should turn out that my learned friends are right in their contention that the Imperial Parliament has cut that link which hitherto bound, and, as I think, still binds us to the Mother Country, I will not undertake to say in a court of law what the immediate consequence of the affirmation of such a doctrine would be on the minds of the people. I hold fast by this doctrine of visible, potential prerogative, because I believe that it is the living evidence of the Imperial relations which happily exist between the Mother Country and the Dominion. It is not in the slightest

degree a hardship upon us. Surely it is a trifling thing to allow the Queen's representative in this country, as a matter of authority, as a proof of the existence of that authority, to dispose of any properties which may, by the death of the existing owners, be escheated. It is a light burden, and my learned friends wish to deprive us, not only of the fact, but even of the sentiment, which is inspired by the existence of the fact, and to cut the last—almost the last—link which binds Canada to the Mother Country. I say it would be a most fatal result if it should turn out that the Imperial Parliament meant to extinguish the sentiment of loyalty, where it has hitherto inspired to noble deeds, by removing forever from the eyes of our youth this sign, this badge of the Royal authority. Certainly it is not the expressed meaning of Parliament. I am satisfied it was not the intention. My lords, if such an intention had been avowed, that Act would never have passed the Parliament of Canada, much less the Parliament of the Empire. My learned friends must go that far. They must admit that the surrender is for all time; that this Act is perpetual; that it has no limitation; that it is a complete and final transfer to the subject, of the power of asserting the prerogative rights of the Crown in Canada. They must say that the Crown of England is no longer entitled to claim any rights whatever in the casual or territorial revenues which previously did accrue and belong to that Crown, in Canada. I deny that there is a word in the Act to support their construction. I leave the case there. It is an important one. Its importance is not by any means to be measured by the amount of money involved, or the private interests directly concerned. It is a question whose decision will settle the relative powers and rights of these two legislative systems in this country. It is the first case, so far as I have observed in looking through the judgments of this high court, in which the question of prerogative jurisdiction has been squarely presented. Though I am here representing private parties in this matter, I have felt it my duty to draw your lordships' attention—perhaps to a greater extent than would be warranted in an ordinary case—to the public interests that are involved in it. I expect, and the country expects, that this high court will interpret the law correctly and impartially. As a public man I have had occasion to say in another place, and I said it because it is true, that I am perfectly satisfied with the judgments of the Supreme Court of Canada in their interpretation of the present constitution. I believe they have rightly apprehended its spirit, and have rightly interpreted its terms, in the cases that have come before them. It would be idle to suppose that any remarks which may fall from me could have a misleading effect on the minds of the reverend judges of this court, but I may be permitted to say that it is our good fortune to have in this country a court above all improper influences—superior to the ebb and flow of political feeling—capable of dealing with all questions which come before it, whether emanating from the side of the Dominion, or from the side of the Provinces, in the light of the Imperial Act of Union, and delivering their judgments upon its terms and meaning according to their reason and their conscience, unaffected by any considerations or influences outside of these walls. Under that conviction, I feel that I am entitled to the judgment of your lordships against the decision of the Court of Appeal of Ontario.