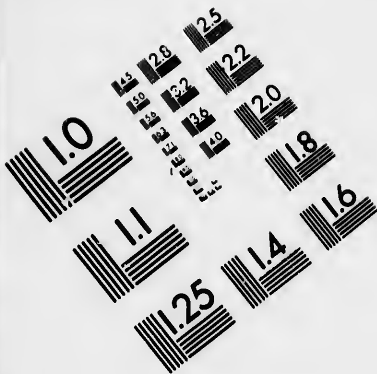

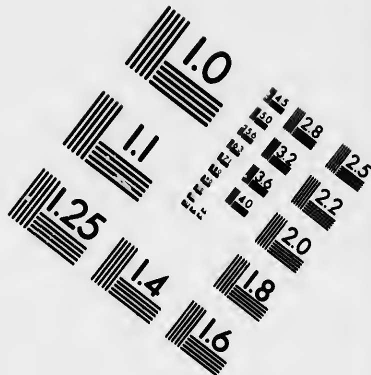

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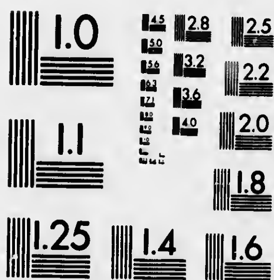

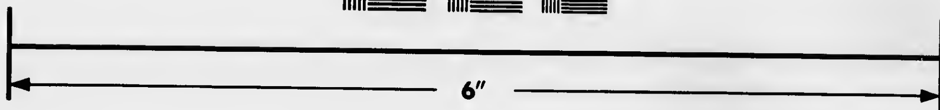

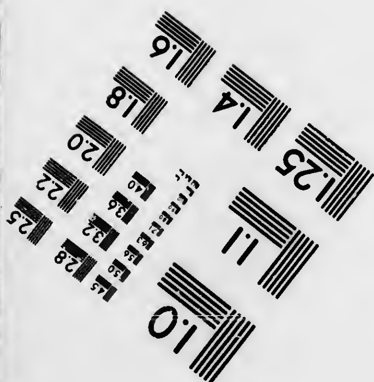

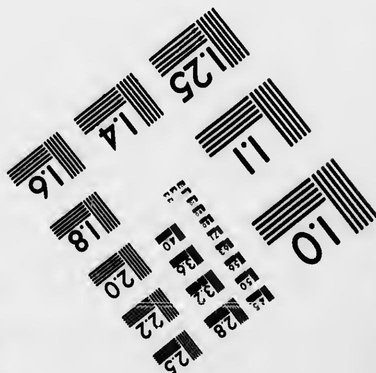

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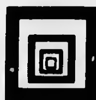

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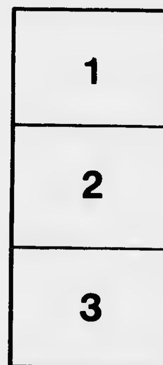

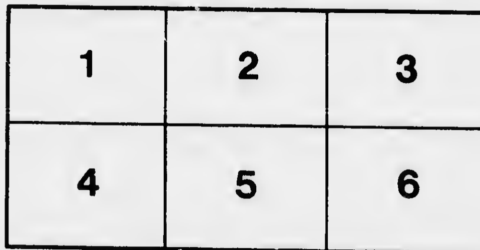

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OPINION OF

JUDGE STEADMAN,

OF THE YORK COUNTY COURT,

Delivered in 1868, upon the

POWER OF THE JUDICIARY

TO

DETERMINE THE CONSTITUTIONALITY

of a Law enacted by the Parliament of Canada or a Provincial Legislature, with his reasons therefor.

ALSO—observations upon two cases involving the same question since determined by the Supreme Court of New Brunswick.

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Delivered in 1868, upon the power of the Judiciary to determine the Constitutionality of a Law enacted by the Parliament of Canada or a Provincial Legislature. with his reasons therefor.

Also—observations upon two cases involving the same question since determined by the Supreme Court of N. B.

A question touching the constitutionality and binding force of laws enacted by the Parliament of Canada and the Provincial Legislatures having been raised before the legal tribunals in some of the Provinces, and an application involving the legality of a law passed by the Legislature of this Province in the Session of 1868 in amendment of the Insolvent Confined Debtors law, having been made before me, and I having declined to take jurisdiction to determine a question of that nature, I now propose to state the reasons, in as brief a manner as the great importance of the subject will admit, which influenced my judgment upon that occasion, with a few general observations upon two cases involving the same question, which have since been determined by the Supreme Court of this Province.

In stating my views I desire it to be understood, that I do so with the greatest possible respect for the admitted legal ability of the Court, and also with a proper deference to the opinions of a number of eminent legal gentlemen at the Bar who differ from me. But speaking respectfully, as I have not yet heard any reason advanced sufficient to convince me that the conclusion at which I first arrived was erroneous, I am induced to state the principles and reasons which it still seems to me ought to obtain in the determination of this (to the people of the Dominion) most important question.

It is necessary in order to a correct understanding of the nature of the question involved, first, to inquire in what character we are to view the British North America Act. Is it in the nature of a written constitution, adopted by the people of the Dominion as the foundation and basis of a new Government, by which several distinct bodies of Executive and Legislative authority are created, with limited and exclusive powers granted to each, and each executing its authority independent of the other, providing also for a judiciary, with extraordinary powers, reserving to themselves all other powers and authority not expressly granted?

Is it in the nature of an Act of Parliament by which the long established political rights and legislative authority of the people are swept away, and new and limited powers granted, and investing the judiciary with extraordinary powers, establishing a system of government different in its character from the British Parliamentary system?

Or shall we view it as an Act of Parliament not granting any new political rights or legislative powers not previously possessed by the people, but rather as establishing an additional body of Executive and Legislative authority, having relation to that already existing through the negative legislative power of the Governor General, and distributing the legislative authority between the Dominion and Provincial Legislatures for the greater convenience of each in the work of legislating for the peace, good order and government of the Dominion and Provinces, leaving the judicial power as it was before the passing of the Act, viz: an authority subordinate to the legislative, created for the purpose of interpreting and administering the laws?

It will scarcely be contended that the British North America Act should be regarded in the character stated in either of the first two propositions, but rather in that stated in the last proposition; that is to say, as an Act of Parliament passed for the purpose of reorganizing the several Provincial constitutions and governments then in existence, each possessed of complete and ample powers of legislation within the respective Provinces.

Viewing it then in this light, it is necessary to examine what were the powers of the several Provincial Legislatures, prior to the Act coming into force, and whether the legislative was in any way subordinate to the judicial authority.

The Parliament of Great Britain, consisting of the Queen, Lords and Commons, is the Supreme power of the nation, and whatever Parliament does no other power can undo. The Colonial Legislature, before Confederation, consisted of the Governor, Legislative Council and House of Assembly as the affirmative legislative authority within the colony, with the negative legislative power in the Sovereign. These four branches constituted the supreme legislative authority of the colony, possessed of the same power within the colony that the Parliament of Great Britain possessed within the United Kingdom, aud whatever the legislative authority enacted, no other power within the colony could refuse to give effect to; the negative legislative supremacy of the Sovereign being always presumed in the affirmative, until signified to the contrary. The judiciary of the colony could no more assume negative jurisdiction over the laws enacted by the Legislature than the judiciary of England, Ireland and Scotland could assume a negative jurisdiction over the laws enacted by Parliament.

The Royal Commission to the Governor, prior to Confederation, and the Royal Instructions accompanying it, (an authority not to be questioned), establish this proposition too plainly to be controverted. The Royal Commission

authorized the Lieutenant Governor, by and with the advice and consent of the Legislative Council and Assembly, to constitute and ordain laws, statutes and ordinances, for the public peace, welfare and good government of the colony, and the people and inhabitants thereof, &c., which said *laws, statutes,* and *ordinances* were not to be repugnant, but as near as local circumstances would admit agreeable to the *laws* and *statutes* of the kingdom.

The Royal Instructions expressly declare what the Imperial authorities intended by this statement of legislative powers contained in the Royal Commission, and the authority by which alone the Legislature was to be restrained in the exercise of such powers, and is expressed in the following words:— "Whereas great mischief may arise, from passing Bills of an unusual and extraordinary nature and importance in our Plantations, which Bills *remain in force there from the time of enacting until our pleasure be signified to the contrary,* we do will and require you, not to give your assent to any Bill or Bills of an unusual or extraordinary nature and importance wherein our Prerogative, or the property of our subjects may be prejudiced, or the *trade* and *shipping of our Kingdom* in any way affected, until you shall have transmitted unto us through one of our principal Secretaries of State the draft of such Bill or Bills, and shall have received *Our Royal pleasure thereupon,* unless you take care that there be a clause inserted therein *suspending and deferring the execution thereof* until our pleasure shall be known concerning the same." Trade and Shipping were always regulated by laws enacted by the Imperial Parliament applying to and having force in all the colonies. Yet by this authority either of them might have been affected by laws enacted by the Colonial Legislatures. And so it is laid down in Dwaris and Amyotts on Statutes "that all laws of the Colonial Legislature remain in force within the colony until disallowed by the Sovereign." The clause in the Royal Commission "which laws, statute, etc., are not to be repugnant but as near as local circumstances will admit agreeable to the laws and statutes of the Kingdom," is only directory, and the Colonial Legislature is to judge in the first place of the necessity according to the local circumstances of the Colony, subject to the approval or disapproval of the Sovereign.

There is no instance on record in any of the Provinces, that I am aware of, where the Courts before Confederation assumed jurisdiction to declare the *Sovereign will* and to disallow a law enacted by the Legislature. On the contrary the Courts in New Brunswick have recognized and acted under a law passed by the Legislature in 1850, which, after reciting a section of an Act of Parliament, having force in this Province, in express words declared it to be repealed and of no force or effect *within the Province.* It did not occur to any one at that time, not even the law officers of the crown, by whom all colonial laws are carefully examined, that the legislature had no power to legislate in that way, that is, by expressly repealing an Act of Parliament so far as it related to the Province. In the case of the Queen *vs.* Kerr,—determined by the Supreme Court of this Province, the late Chief Justice Chipman in delivering the judgement of the Courts, peaking of laws passed

by the Provincial Legislature said: "It is a thing unheard of under British institutions, for a judicial tribunal to question the validity, or binding force of any such law; when duly enacted, a law so passed goes into force, subject to be disallowed by the Sovereign." This fourth branch of the legislative authority of the colony was incorporated into the colonial constitution for the express purpose of preventing mischief or injury to the general interests of the Kingdom, and unnecessary conflict with the laws of Parliament. But the Colonial Legislative authority has often and repeatedly been exerted to alter and repeal laws enacted by Parliament, so far as they related to the colony, whenever it was deemed necessary in the interests of the colony. If the Colonial Legislature could not do this then there would be no such thing as Colonial self-government.

By the comity of nations, the laws of the country where a contract is made, and upon which an action is brought in a foreignc ountry, govern the Judicial Tribunals of that country. This rule has long been extended to the Colonies by the Courts in England, and if an action be brought in England upon a contract made in any of the colonies, the law of that colony where the contract was made obtains, unless it be repugnant to some law of Parliament made in regard to such colony, then the comity is denied and the law of the colony rejected because by the Act 7 & 8, Wm. III, it is made void in England. But the law within the colony is of binding force and is there enforced by the legal tribunals.

It is well established that no statute of the Imperial Parliament extends to the colonies unless it is expressly so declared. The Act 7 and 8 Wm. III, enacts that all laws, usages and customs *which shall be in practice* in any of the Plantations repugnant to any law made or to be made in this kingdom, *relative to the said plantation* shall be utterly void and of no effect. But it does not say it shall be utterly void and of no effect *within the* Plantation, and therefore it never was considered that that Act interfered with the Supreme constitutional power of the Sovereign to enact laws with the advice of the Legislature to be in force within such colony. Nor was it ever supposed that it could be inferred from the provisions of that Act that Parliament had invested the colonial legal tribunals, from the highest to the lowest, with jurisdiction over the Acts of the Supreme legislative authority of the colony, which possessed the power to constitute such courts and to add to and take from their jurisdiction as might be considered necessary or expedient.

It is laid down as the rule by the Commission of Legal Enquiry for the Colonies, that "*no colonial law can be disallowed except by order of the Queen in Council*, and when disallowed, and so signified by the mode pointed out in the Royal Instructions, it is void within the colony, as well as in England. This is the legal and constitutional principle upon which the Royal instructions are based, wherein it is stated that *laws passed in the Colony remain in force there until the pleasure of the Crown is signified to the contrary*; the Governor being directed not to give his assent to any Bills of an unusual or extraordinary nature or affecting trade and shipping.

By the Act of Parliament 28 and 29 Vic. the word "repugnant" as used in the 7 and 8, Wm. III. is explained, and it is therein declared that laws of a colony *repugnant* to an Imperial Statute relating to the colony shall be void only to the extent of such repugnancy, and shall be read subject to the Imperial Statute.

The Legislature of Upper Canada, in the year 1839, passed an Act providing for the sale and disposal of the Clergy Reserves, making provision for the application of the money arising from the sale thereof. Numerous petitions from the clergy and others interested were presented to the House of Lords in the Session of Parliament, 1840, praying that House to pass an Address to Her Majesty that the Act of the Legislature be disallowed. Four questions were submitted by the House of Lords to the Judges of England, one of which was, whether the Act so passed was repugnant to the provisions of the 7 & 8, Geo. IV, and consequently void. The Judges answered that it was, but did not say, neither were they asked to say, whether if the Queen did not declare her dissent to the law passed by the Legislature of Upper Canada, but left it to *its operation*, it would be of binding force or void in that Province.—Her Majesty disallowed the law and so declared it void *within the Province of Upper Canada.*

In an action brought in the Court of Queens Bench, England, against the late Governor of Jamaica, on account of excesses alleged to have been committed by him in quelling the rebellion that took place in that colony during his administration, under the Act of Parliament 11 & 12, Wm. III., which rendered him liable to an action in England for oppressive acts committed upon Her Majesty's subjects in the Colony while Governor thereof. The Legislature of Jamaica, after the rebellion, had passed an Act of Indemnity, relieving the Governor and all others from all actions brought against them for or on account of any act committed in putting down the rebellion. But it was contended on the part of the Plaintiff that the Act of Indemnity was repugnant to the Imperial Statute 11 and 12, Wm. III, giving the Plaintiff a right of action, in England, and must therefore be read by the Court subject to that Act, according to the provisions of 28 & 29 Vic., and not according to the rule of comity. It was never contended that the Act of indemnity was void in Jamaica because repugnant to the 11 and 12 Wm. III, or that it must be read by the Courts in Jamaica subject to the Imperial Act, had an action been brought there against any party engaged in quelling the rebellion. It was admitted that the Act would be an answer to any action brought in the Colony. The Court decided, as did the Court of Exchequer Chamber on appeal from the Queen's Bench "that the Crown as well as Parliament had power to establish a Colonial Legislature with supreme Legislative powers within the Colony over all acts done or to be done within its territorial jurisdiction. That the comity extended to the law of foreign nations must be extended to the law of the colony. But if a law passed by the Colonial Legislature was repugnant to an Imperial Statute relating to that Colony, it must be read by the Courts in England by the 28 and 29 Vic., subject to such

Imperial Statute, and that the right of action in the case before the Court must be determined by the law of Jamaica, which took away the right to bring the action and not by the law in England under the Statute 11 and 12 Wm. III, which gave the right to bring an action in England. If an action brought in any colonial court be taken by appeal to the Judicial Committee of the Privy Council, the controversy will be determined according to the comity, and the law of the colony where the cause of action accrued will be applied and not the law as in England

This being the rule before Confederation is there anything in the British North America Act, either expressed or implied, conferring upon the judiciary, in conjunction with the Sovereign, a *negative jurisdiction* to determine what laws passed by either of the legislative bodies of the Dominion shall or shall nor be of binding force?

It is true that the Royal Commission to the Governor of a colony, under which the two Houses of the Legislature were summoned, conferred general legislative powers. The subjects in regard to which it was not considerable desirable the legislature should pass any Bills were pointed out in the Royal Instructions accompanying the Commission, while the British North America Act names the particular subjects exclusively assigned to each of the legislative bodies. Although the rule which governs the construction of ordinary statute law is, that "what is exclusively given to one person to do is necessarily prohibited to all others," still without express jurisdiction is conferred upon the judiciary, it is not within their province to determine a question involving the constitutional exercise of that authority. By the Act the *negative legislative power* of the sovereign was preserved over laws passed by the Parliament of Canada, transferring the same power to the Governor General over laws passed by the Provincial Legislatures. It is a clear principle, that jurisdiction cannot be taken by one Court where it is expressly conferred upon another and a higher tribunal, which the sovereign authority is, possessing power to create a judiciary. It is not consistent to submit the judgment of a supreme sovereign tribunal to the investigation of any subordinate tribunal, however competent it may be to determine the question.

The British North America Act is not the supreme law in the sense that the constitution of the United States is the supreme law in that Republic. It *is* supreme in as much as it is the authority by which the different departments of our Confederate government are organized, and the central power created, and to which each must look for the authority which it is to exercise, and by which each department must, under the restraining control of the prerogative, be governed in the exercise of its particular functions. But it is not the supreme law in the sense that it controls through any inherent authority in the judiciary, all Statute Law of the Dominion Parliament and Provincial Legislatures. It could not be such without taking from the Constitution the principle which affirms the supremacy of the legislative authority. The object and aim of the Act is not to restrict the legislative prerogative of the Sovereign but to

extend that power. The legislative authority of the Dominion therefore can alter the British North America Act, as it can any other Act of Parliament, so far as it affects the internal government of the Dominion or any Province thereof, if not, self-government, the most vital principle of the British colonial system of government, is taken away. If Parliament had intended the British North America Act to work such a change in our Constitution, and to make it the standard by which the legal tribunals were to judge and determine all statute law, it would have been considered a matter of sufficient importance to have been made a subject of special enactment as involving a principle so entirely adverse to the theory of all British institutions. If the provisions contained in that Act had been enacted by each of the Provincial Legislatures instead of by Parliament, and had received the assent of the Sovereign, and the government of the Dominion had been organized under such laws, the judiciary would not have possessed any inherent power to place any limit to the legislative authority. Nor can it be argued that the Provincial Legislatures did not possess the right and authority with the assent of the Sovereign to organize of themselves the confederacy as now established, or in other words that the Crown had not power to establish the Parliament and Government of Canada. That the Crown possesses co-ordinate power with Parliament to establish a Legislature in any Province of the Empire is fully stated in the case of Philips *vs.* Eyre. Surelythen since it is established they have not lost the right, subject to the same assent, to alter or amend its constitution. There is no restriction in the Act. It was not from want of power in the Provinces that application was made to Parliament to pass the British North America Act, it was because of the great difficulty of bringing so many minds to agree upon the details of so important a subject.

By the Act of the Imperial Parliament for the Union of Upper and Lower Canada it was delared that each Province should have an equal number of representatives in the House of Assembly, with a proviso that the legislature of Canada, might alter the number if the Bill proposing such alteration should be adopted by a two-thirds vote of the members of the Legislative Council and House of Assembly. But for fear this restriction might not be sufficient, it was further enacted that it should not be lawful for the Governor to *assent in Her Majesty's name* to any Bill *altering* the *number of* representatives unless it was passed on the second and third reading with the concurrence of the two-thirds majority, and upon addresses of the Legislative Council and House of Assembly declaring that the Bill had been so passed. It was also provided in the Act of Union, that Her Majesty's assent should not be given to any Bill relating to Ecclesiastical rights and matters, waste lands of the Crown, etc., until such Bills were laid before Parliament. What was the object of these restrictions upon the Governor General? they must have been intended to serve some useful purpose. Is it not a recognition by the Imperial Parliament of the supreme legislative power of the Sovereign to enact any law, with the advice and consent of the Legislative Council and Assembly, to be in force within the Province of Canada? Were it not for these restrictions, had the Legislative Council and House of Assembly, though not by a two-thirds

vote, passed a Bill altering the number of representatives, or affecting Ecclesiastical rights, the Governor assenting and the Sovereign not afterwards signified her dissent, it would have become law in Canada, but it is not at all likely that either the Governor or Her Majesty would have assented to a Bill of that nature so passed. The hostile elements in these Provinces on the question of representation could not afford to leave anything in doubt in a matter of such vital importance.

An Act was passed by the Imperial Parliament 17 and 18 Vic., authorizing the Legislature of Canada to alter the constitution of the Legislative Council, not because the Legislature was without power, with the assent of the sovereign, to effect such change. But for the reason that the assent of the Queen could not be had to a Bill so repugnant to the Act of Union, and so opposed to the theory upon which all British Parliamentary institutions are based, without the authority of Parliament first obtained. Such measures are always the result of a party triumph, and usually adopted after a long party struggle.

If the Courts can declare a law of the legislative authority void, it ought to follow that they can exercise a control over the Chief Magistrate, who, by the advice of the Council and Assembly enacts the law, and it has been suggested by eminent counsel that the Lieutenant Governor might be compelled by a writ of Mandamus to do an official act within his official authority. If so it must follow that by a writ of prohibition he might be enjoined under pains and penalties not to do an act beyond the scope of such authority. It is true that the judiciary power of the United States, though possessing jurisdiction to declare a statute law void, have never exercised jurisdiction over the official acts of the Chief Magistrate of the State. But the jurisdiction there is expressly conferred by the Constitution, and does not include jurisdiction over the official acts of the Chief Magistrate. But the jurisdiction here is claimed as inherent in the original and constitutional powers of the judiciary. If so, as a natural result, the Supreme Judicial Tribunals must include both, and the rule applicable to municipal governments must apply in regard to both the legislative and executive authorities. There can be no doubt that the judiciary has jurisdiction to declare a law made by any municipal authority void, if repugnant to the law of the land, and that the Supreme Judicial Tribunals have jurisdiction over the official Acts of the chief municipal officers, and may compel them to do any official act within their authority and to prevent them from doing any act not within their authority, Now there is no very good reason to be assigned why if the Courts can take part of this jurisdiction as applicable to the legislative, they should not take it as applicable to the executive authority and all officers of the executive government. The clear result of the principles involved in these propositions are rather startling, and I think ought to convince all that the jurisdiction must fail in both cases and for like reasons.

Mr. Justice Story in his work on the Constitution of the United States, says, "The propriety of the delegation of jurisdiction in cases arising under

the constitution, rests on the obvious consideration that there ought always to be some constitutional method of giving effect to constitutional provisions. What, for instance, would avail restrictions on the authority of the State Legislatures without some constitutional mode of enforcing the observance of them. The States are by the Constitution prohibited from doing a variety of things. * * * * No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them. *The power must be either a direct negative on the State laws, or an authority in the national courts to overrule such as shall manifestly be in contravention to the Constitution.* The latter course was thought by the convention to be preferable to the former: and it is without question by far the most acceptable to the States. The same reasoning (he says) applies with equal force to cases arising under the laws of the United States." The soundness of the reason here given for some power in the Constitution capable of restraining the several legislative bodies within the constitutional limits cannot be questioned. But the reason which influenced the members of the United States convention when framing the Constitution, for vesting that power in the judiciary, instead of the highest executive authority of the nation, is not applicable to the British Parliamentary constitution, or to the British Colonial constitution. The prerogative power vested in the Sovereign, has always been found sufficient to restrain the colonial legislatures within proper limits, and to prevent unnecessary conflict with the laws of Parliament. In these days of constitutional government the prerogative is only exercised in the best interests of the people. If under the British North America Act the Judiciary can assume this negative jurisdiction, then we have two separate restraining authorities instead of one as heretofore.

It will be observed that the reason assigned by Mr. Justice Story for vesting in the judiciary of the United States, the jurisdiction to declare laws enacted by either of the legislative bodies void, when in contravention of the constitution, was the absence of any negative power in the constitution. If there had been any such power, and no express jurisdiction conferred upon the judiciary, it is quite clear from his reasoning that the courts would not have assumed it. This is a power greater than the legislative power and cannot be exercised by judicial supremacy. The question involved cannot be considered in the light of a conflict of laws, nor as a conflict between municipal authorities. A conflict of laws arises only where there is found to exist in different countries, or in different localities of the same country, rules of law conflicting with each other upon the same subject, or where two statutes are found in conflict in prescribing a rule of law in respect to the same matter. Now the British North America Act establishes no rule of law upon any of the subjects of legislation named in the Act. It only declares what authority may enact a rule of law in regard to such subjects. And until two different laws are enacted concerning some one subject, there can be no conflict. The conflict raised is purely on the question of legislative authority between the Parliament of Canada and the Provincial Legislature, and not a conflict with

an Imperial Statute, which has prescribed no rule of law and must be determined by the negative legislative power; in cases of doubt before the law is finally enacted.

There are abundant reasons for retaining the prerogative power in the confederate constitution of the Dominion; the absolute necessity for fixing with certainty the binding force of all statute law, which could never be if a final jurisdiction is to be exercised by the legal tribunals. For instance, a law may be enacted which in the judgment of the negative tribunal is entirely within the authority as declared by the British North America Act: the public accept it as law, individuals invest money under its authority, and important interests become involved; after a time a question is raised by some individual anxious to avoid a responsibility; the validity of the law is brought into question before the Courts and pronounced void, because in the opinion of the judges it is in contravention of the authority of the Act. It is needless to say that in such a case great injustice and great loss of property to individuals with great public injury is the result. Nor is it a sufficient answer to say that the best or only remedy for such a calamity is to be found in the legislature keeping strictly within the delegated authority, as that is next to an impossibility. Legislators like judges and all other men are fallible, and the question must be determined by mere opinion *not by facts*, and different minds may arrive at very different conclusions. However anxious then the legislators and the Sovereign power may be to keep within the constitutional provisions, they can only exercise their best judgement. It is impossible to know what the opinion of the Court will be if called on to pronounce upon the validity of their Act.

A case that arose in the Town of St. Stephen in this Province completely illustrates what I have just stated. The Legislature passed a law authorizing the inhabitants of that town to issue bonds to raise money and apply the proceeds to the Houlton Branch Railway; and authorized assessments upon the inhabitants from time to time for the payment of the interest and the ultimate redemption of the debt. The bonds having been issued an assessment was ordered. A case was brought before the Supreme Court, on an application for a writ of certiorari, with a view to quash the assessment on the ground that the law was *ultra vires* and therefore void. The Court determined that it was void and ordered the writ to issue. An application was made to the Dominion Parliament for a remedial Statute to enable the Town to keep faith with the bond holders, Parliament refused to pass any law for various reasons, one of which was that the subject involved in the Act in question was entirely within the powers of the Provincial Legislature; the ablest legal minds in Parliament entertaining an opinion different from that expressed by our Supreme Court. Now if the position assumed by the Court in regard to the jurisdiction, and the law as declared in this case, be correct, then a wrong has been done for which the Constitution and laws afford no remedy, and such cases must frequently occur if the *validity* of the law is to be made a subject of judicial investigation. The powers given to the Dominion Parliament to

levy taxes is confined to raising money for the general purposes of the Dominion. The power of levying taxes for a local purpose is exclusively assigned to the Provincial Legislatures. By the rule of construction adopted by the Court in the case referred to, any law enacted by Parliament in regard to local taxation must also be declared void.

Another reason why the courts should not asssume this jurisdiction is to be found in the fact that it must often bring them in direct collision with the legislative authority, certainly a state of things not very desirable. In the case of the Queen *vs.* Chandler, which arose under a law passed by the Legislature of this Province, in amendment of the Insolvent Confined Debtors Law, in which the Supreme Court granted a prohibition to Judge Chandler, forbidding him to discharge a confined debtor under the authority of the amended Act, for the reason that it was *ultra vires*, and therefore void. The Legislature being determined to defeat the action of the Court, passed another law requiring all sheriffs and gaolers to discharge from their custody all prisoners for debt who had been confined for a period of two years and upwards. An Act was also passed whereby all officers were indemnified from all actions or suits on account of such discharge, or of any other act done in pursuance of the authority and direction of the first Act. An injunction was granted forbidding the Sheriff of the City and County of St. John to discharge a debtor in his custody under the authority of that law. The Sheriff, however, did discharge the debtor in defiance of the injunction, and I think it was discovered that the Court was unable to enforce obedience or to effectually impose any penalties for the disobedience to its writ. It is hardly to be supposed that the legislature in such a case would be disposed to invest the Court with the necessary power of enforcement. Such a conflict of authority between the judiciary and the legislature ought never to occur. If it does occur it must cease whenever the latter chooses to assert its supremacy. If the legislature in the case of the Town of St. Stephen, should pass a law declaring the judgment of the Court void, and without force, (for which a precedent can be found in Imperial Legislation), and as in the case under the Insolvent Confined Debtors Law, pass an act of indemnity, and restrain the Court in the exercise of jurisdiction by injunction, or otherwise, and such law should receive the assent of the Governor General (of which there could be no doubt, His Excellency having already sustained the authority of the legislature by the assent to the first law) the Court would be powerless to interpose and prevent the collection of the assessment, or the application of the money. This is a proceeding that ought never to be resorted to unless the emergency of the case justifies it. In this case the bondholders have no right of appeal to the Judicial Committee of the Privy Council, the local authorities may not desire it, and the only Court of Appeal open by right to the creditors of the Town, is the Provincial Legislature. In this view then of the case any attempt on the part of the judiciary to restrain the legislative authority must fail for any useful or practical purpose.

Questions of great public importance must often arise in the legislation of the Parliament of Canada, as well as in the Provincial Legislatures, in which

the most important interests of the Dominion or Province may be involved, and if the validity of a statute is to remain in a state of uncertainty until determined by the legal tribunals it must necessarily lead to great public inconvenience, and it may be in the end to great confusion, preventing the successful carrying out of the most important laws.

It will be readily admitted that the legislative and judiciary power in every well constituted government should act in harmony with each other; the legislative always aiding the legal tribunals in the execution of judicial authority, the Courts interpreting and administering the laws enacted by the legislature. But under any government where the judiciary power exercises a control over the legislative, and a collision of authority occurs, the former (though it may be right) will be compelled to yield, as in the case I have stated, and as it was in the United States between Congress and the Supreme Court in regard to the duties to be performed by the Judges in the Circuit Courts. Is it wise then under our constitution for the judiciary to assume jurisdiction over the legislative power of the Dominion, especially as the British North America Act has provided an authority entirely independent of the legislative body capable of restraining each within the constitutional provisions, or, to adopt the language of Chief Justice Chipman, it retains in the Sovereign a legislative power distinct and separate from that of the legislative bodies, *and which affords a remedy for any improper legislation.* Jurisdiction in the judiciary to declare a law void can only be sustained upon the theory that the British North America Act has reduced the respective legislatures of the Dominion to the character and capacity of ordinary municipal governments. If the Superior Courts can take this jurisdiction, it follows as a matter of course that all inferior courts must take it also, and the constitutionality and binding force of every legislative act may be brought in question before a Justice of the Peace exercising civil or criminal jurisdiction, and the Justice like the Judges of the Superior Courts will be bound to determine according to his judgement whether a law enacted is within the exclusive legislative authority, or whether it is beyond that authority and so *absolutely void* It would appear very unseemly in a Justice of the Peace to declare a law, enacted by the legislative authority, void; but if the law be void and the courts have this jurisdiction, *it must n t be enfo'ced.* In point of fact then it is no more unseemly in a Justice of the Peace doing what his oath of office requires of him, viz: decide what the law is according to his best judgement, than in the Judges of the Supreme Court declaring a law void. Now it may be that the Imperial Parliament intended so to degrade the supremacy and power of the Parliament of Canada and of the Provincial Legislatures, as to render the exercise of their powers subordinate to the jurisdiction of the least or the highest in authority of the legal tribunals of the Dominion, but I have not yet heard a reason advanced, nor have I been able to discover any reason, upon which such an assumption can be founded.

I do not wish to advance anything that might have the appearance of ridicule in discussing a great question like this; but I cannot forbear saying that it

does not tend to elevate the character of the Provincial Legislature to hear Counsel learned in the law arguing before a legal tribunal upon the constitutionality of a permissive liquor license law passed by the Provincial Legislature, urging upon the court the profound argument, "that to prohibit the granting of a license to a country tavern, to sell liquor within the municipal authority, interferes with the regulations of *trade and commerce*, the right to export and to import, to buy and sell, in the foreign market; that it affected the general revenues of the Dominion and robbed the government of Canada of its just dues. That to impose a pecuniary penalty for selling liquor without a license, and imprisonment for its non-payment when imposed, was making the offence of so selling *in a legal sense* a criminal act under the term *Criminal Law* in the British North America Act, and therefore void." Truly weighty arguments to advance upon such a question, apparently forgetting that all trade and barter within the Province must necessarily be governed by the laws relating to property and civil rights, and that the only principle involved in such a law is the civil right of the subject to sell within the municipal jurisdiction; a civil right *the most important of all rights*, and forgetting also the sound principle that the greater right must never be merged in the minor right. If the two rights are inseparable, the minor must merge in the greater, which the Provincial Legislature has. Such occasions lead one to imagine that the Provincial Legislature is reduced to a mere Parochial Government, instituted for the sole purpose of regulating the sale of intoxicating liquors and like subjects within the limits of its Parochial Authority, and with very doubtful powers for even that.

The Dominion Parliament is supposed to pass no law except necessary in the general interests of the Dominion and of like effect in all the Provinces, except in a few instances in the case of Quebec. There ought, therefore, to be no arbitrary rule laid down by which any desired alteration in the laws of any Province could not be effected by its legislature, though such alteration in the opinion of some legal minds encroached upon the powers delegated to the Parliament of Canada, if, in the opinion of the tribunal invested by the British North America Act with *the negative* jurisdiction, such alteration did not infringe upon the powers so delegated. If experience should subsequently prove that the nature of any such alteration had been misapprehended, it would be in the power of either legislative body to correct the error, as was done in the case of a law passed by the legislature of this Province in regard to the Central Bank, which being found to conflict with the authority assigned to Parliament was repealed at the next session of the legislature.

Where a Bill is passed by the Legislative Council and House of Assembly, it is the duty of the Lieutenant Governor to declare that he assents thereto, or that he witholds his assent, according to his discretion, subject to the provisions of the British North America Act, that is as stated in Sections 91 and 92. He is required first to determine, which he does with the aid of the Attorney Genral, whether the Bill so presented for his assent is in contravention of the authority as declared in the two sections named. If so his duty is plain,

either to declare his dissent or reserve it for the consideration of the Governor General. When a Bill so reserved or assented to is presented to the Governor General, he also is required to consider the question of *ultra vires*, which he does with the aid of the Minister of Justice and Privy Council, and determines in like manner according to his discretion and either assents thereto or declares his dissent. In the language of Chief Justice Chipman, when a Bill is so assented to and duly enacted it goes immediately into force, and so remains, and the legal tribunals are bound to give effect to it. If disallowed (by the words of the Act as it was before Confederation), it must be signified by message to the legislature, if in session, or by proclamation, and the Act is declared to be null *after the day of such signification*, negatively declaring that *until such signification* the Act is valid, not only recognizing but incorporating into the Act the rule laid down in the Royal Instructions. The same rule is adopted with the Bills passed by the Senate and House of Commons, the Governor General acting with the aid of the Minister of Justice, instead of the Lieutenant Governor, and the Sovereign with the aid of the law officers of the Crown, and the Queen's Privy Council, instead of the Governor General.

It is urged that the consent of the Queen in the one case and of the Governor General in the other, cannot extend the powers of legislation or render valid a law not within the authority conferred by the British North America Act. It is not to be supposed that the exercise of the negative authority, in its assent or dissent, has the effect of extending or limiting the legislative jurisdiction. The office and purpose of the negative power is to determine what is within the powers conferred. And the Act having placed this jurisdiction in the Sovereign and Governor General, the question involved in the proposition does not arise. By the assent the law is declared and affirmed to be within the authority, and no other tribunal is created by the Act or invested with jurisdiction to question the correctness of that decision. It is wholly a question of legislative authority, and having been once determined by the jurisdiction specially named for that purpose, and always aided by high legal authority, *why raise it again?* Surely it will not be urged that Parliament intended to establish a constitution for the Dominion, out of which such a conflict (not of law) between the judiciary and legislative powers of the country should arise, and from which no possible good, but much uncertainty, confusion and injury would result

The Queen and the Governor General are not invested by Parliament with a negative legislative power for the mere purpose of exercising an arbitrary will over laws passed by the respective legislative bodies. It would be inconsistent to suppose that after conferring certain exclusive authority upon each legislative body, Parliament would confer any other power by which it might be intended that any act clearly within such authority could be arbitrarily defeated. It is much more rational to suppose that the Queen in the one case, and the Governor General in the other, were invested with this power for the purpose of determining what laws were or were not within the authority as declared by the Act, and so determine by either assenting thereto

or declaring their dissent, and thereby settle all doubt and finally determine that question. It is not the personal will of the Sovereign or of the Governor General that they are authorized by the Act to signify. It is the sovereign will of the people declared by express authority of Parliament, and when so declared it must remain until Imperial enactment, or the legislative authority within the Dominion, chooses to alter it.

It is said that the sections of the British North America Act relating to the allowance and disallowance of Bills only apply to such as the legislative body is empowered to pass. But this does not affect the argument. It is still a question of legislative jurisdiction which the *negative legislative power*, as before stated, is authorized to determine. If the Act had not preserved this power the judiciary could not assume jurisdiction to say what was or was not within the legislative authority, and to declare void a law which in the opinion of the Judges was *ultra vires.* The British North America Act is not declared to be the supreme law within the Dominion, not to be changed or altered except by the authority which enacted it. It is as before stated like all other statutes relating to the colonies subject to alteration in so far as it relates to the Dominion and the government thereof by the legislative authority of the Dominion, restrained only by the prerogative power. It is a question of a political nature, growing out of a conflict between legislative authorities, and therefore not within the sphere of ordinary judicial inquiry or judicial control.

Assuming for the sake of argument that if Parliament intended by the use of the word "exclusive" in the ninety first and ninety second sections of the Act, that all laws passed by either legislative body which in any way encroached upon the subjects of legislation so exclusively assigned to the other should be void, the legal tribunals would be called upon to ascertain and declare what law was void and what valid. Let us see whether we can be justified in implying such an intention in the absence of any express declaration to that effect. If that was the intention of Parliament the general rule of law which governs the courts in such cases is that "when exclusive authority is given to one person to do an act it cannot be executed by another," and when the same law confers exclusive authority upon one person to do a particular act and upon another person authority to do some other act, each is confined to the execution of his own authority, and cannot, as incident thereto, execute any part of the authority so exclusively given to the other. There is another rule that where a law directs a thing to be done in a particular manner, the direction must be implicitly followed. To this rule, however, there are some exceptions. For instance, if the law relates to an authority already held and exercised, and is only declaratory of another mode of executing some of such powers, any act done though not in strict conformity with the direction of the law, would not be void unless so expressly declared, or some strong negative words are used that necessarily render it void. The word "exclusive" in a law only declaratory of the authority is not sufficient. But there is another reason why the word "exclusive" does not render a law void because *ultra vires.* Parliament has expressly stated for what purpose the word is used. In

the ninety-first section it is stated, "and for greater certainty, but not so as to restrict * * * it is hereby declared that the exclusive authority of the Parliament of Canada extends etc., etc." The word is not therefore used for the purpose of rendering a law void not enacted strictly within the letter of the authority, nor in the vain hope of securing absolute certainty, but to enable each legislative body to ascertain with a *greater degree of certainty*, what may or may not be fairly and reasonably within its authority— Surely it is not used for the purpose of rendering the binding force of *all law uncertain.* The unavoidable uncertainty in the interpretation of the law is enough, we should not unnecessarily add thereto. The last named rule then is the one to be applied in the construction of the British North America Act. It is evident that Parliament did not intend that all laws should be void not enacted strictly within the authority conferred, for the reason, that in the subjects assigned to the Parliament of Canada, such only were selected in regard to which a uniformity of law was deemed requisite. But if the ninety-first and ninety-second sections of the Act are construed according to the two first named rules, it must follow that in regard to many of the subjects assigned to Parliament no uniform law can be enacted. In order to do so the authority must be exercised in conjunction with some of the powers expressly assigned to the Provincial Legislatures. In regard to "Bankruptcy and Insolvency" the Dominion Parliament could not exercise authority over "Property and civil rights" as incident to the enactment of a uniform law upon the former subject, the latter being exclusively assigned to the Provincial Legislatures. It would be compelled to confine legislation upon that subject to declaring what persons should be subject to the Bankrupt and Insolvent laws, what acts by such persons should be deemed acts of Bankruptcy, and what acts by bankrupt or insolvent debtors should be deemed criminal, leaving the respective Provincial Legislatures to deal with the liberty of the person and subsequently acquired property of a Bankrupt whose estate had been subjected to compulsory liquidation by the law of Parliament. The power to make laws relating to Bankruptcy and Insolvency cannot be construed into an authority to take away the right of a creditor who is neither Bankrupt or Insolvent, to pursue his remedy to recover his debt against either the person of his Bankrupt debtor or his future assets. What may be taken as incident to any subject under the last clause of the ninety-first section of the Act is a question that would necessarily lead to great diversity of opinion and endless legal conflict, if it be left subject to judicial inquiry.

Laws relating to "property and civil rights" are the most important and most sacred of all temporal laws by which a people are governed, and include more than all the other subjects named. The laws relating to bankruptcy and insolvency are so vastly inferior in importance, it cannot be contended for a moment that authority to deal with the latter subject can take with it, as incident thereto, the right to make laws upon the former subject; the minor right cannot merge the greater. The application then, of the two first mentioned rules of construction, would entirely defeat the clear intention of Parliament.

There is one case stated in the British North America Act, which renders a law enacted by either Legislative body null and void, viz: where a law passed by the Parliament of Canada is disallowed by the Sovereign, and where a law passed by any Provincial Legislature is disallowed by the Governor General; then such disallowance being signified to the legislature or by proclamation within the time stated in the Act, the law in each case is declared to be null from and after the day of such signification. In regard to the power given to the Parliament of Canada to provide for a uniform law in the three Provinces upon the subject of property and civil rights, it is expressly declared by the ninety-fourth section, that no law providing for such uniformity shall have any effect in any Province until the legislature thereof shall have enacted such law. Now it is not unreasonable to suppose that in an Act of the peculiar nature of the British North America Act, if Parliament had intended that laws enacted by either legislative body should in any other case be absolutely void and of no effect, it would have been stated. If the negative power is left to determine the question of legislative authority, that tribunal would not necessarily be bound by the construction which the judiciary might feel compelled to adopt, and would treat the sections named as declaratory only, and not in restraint of the general powers of legislation. Under this construction, it would be competent for the Parliament of Canada to deal with property and civil rights in the enactment of a uniform law on any of the subjects assigned to that body. But whichever construction may be considered most in accordance with the general rule for construing statutes, if there be any reasonable doubt of the intention of Parliament in regard to what laws should be void, or of the authority to determine what laws enacted are, or are not within the scope of the legislative authority, then I say public interest and public convenience require that such doubt should be given in favor of the legislative jurisdiction. By the legislative jurisdiction, I mean the negative power of the Sovereign and the Governor General, which Chief Justice Chipman in the case before cited said, was in the nature of a legislative power, retained for the express purpose of restraining and controlling the colonial legislatures.

There is another reason why we should not give to the word "exclusive" the full legal force claimed for it. We must not mistake the real nature of the authority conferred by the British North America Act upon the Parliament of Canada and the Provincial Legislature. It is not an authority to enact laws. It is only an "exclusive" right and authority to the Senate and House of Commons for the Dominion, and the respective Legislative Councils and Assemblies of the Provinces to tender advice and consent to the Sovereign to enact laws, in regard to the subjects named in the Act. The Sovereign ever did by the legislative prerogative power enact all law for the United Kingdom by the advice and consent of the Lords and Commons, and for the Provinces by the advice and consent of the Legislative Council and Assembly. The latter always had the right to give such advice and consent. No grant was therefore required for that purpose. The Lieutenant Governor now, as formerly, assents to Bills passed by the Legislative Council and Assembly in the

name of the Queen in the same manner as the Governor General by authority of the fifty-fifth and ninetieth sections of the Act.

In Cooley, on Constitutional Limitations, it is stated "where by the theory of any government, complete sovereignty is vested in the same individual or body to enact law, any law enacted could not be void, but if it conflicted with any existing constitutional principle must have the effect to modify or abrogate such principle instead of being nullified by it. This must be so in Great Britain, with every law not in harmony with pre-existing constitutional principles." This is an admirable illustration of the law making power under the British Constitution. Let us see how far it is applicable to the Dominion under the British North America Act. The same sovereign authority enacts all law for the United Kingdom, the Dominion, and the Provinces. In exercising the legislative prerogative power of enacting laws for the United Kingdom, the Sovereign is governed by the advise and consent of the Lords and Commons; for the Dominion, the Senate and House of Commons; for any Province by the Legislative Council and Assembly. Though the advice and consent is tendered by "exclusive" right and authority by respective legislative bodies of the Empire, the sole enacting power is centred in one and the same sovereignty. Hence whatever law is enacted by that sovereign authority either modifies or abrogates any pre-existing constitutional principle or law relating thereto. The *Legislative prerogative power* of the Sovereign can no more be subject to judicial supremacy when enacting laws for the Dominion or any Province, than when in enacting laws for the United Kingdom.

If we give to the word "exclusive" the full force claimed for it, it would carry us farther than any would be willing to go. The Lords and Commons by the British North America Act advised and consented that the Queen should confer upon the Senate and House of Commons for Canada the "exclusive" right and authority to advise and consent to the enactment of laws to be in force within the Dominion, and *in a legal sense* these two Houses of Parliament are as much excluded from the right to tender that advice and consent as the Legislative Councils and Assemblies in the respective Provinces, and cannot of *strict legal right* resume it. Therefore if a law enacted by the advice and consent of the Legislative Council and Assembly or Senate and House of Commons is subject to judicial supremacy, because repugnant to any "exclusive" authority conferred, the law enacted by the advice and consent of the Lords and Commons, alike repugnant, must also be subject to judicial supremacy. This is the fair *legal* result of the claim on behalf of the judiciary, not only to declare what the law is, but to restrain the sovereign authority which alone can declare what shall be the law. There are certain acts performed by virtue of the prerogative subject to judicial inquiry, but that of enacting laws is not one of them. There is nothing in the British North Ameaica Act that can be construed to render it so subject. On the contrary, the sovereign prerogative to enact the law in the fullest sense, to dissent from and declare null a law passed by either of the legislative authorities within the Dominion, is expressly preserved and confirmed by Parliament. If Parliament had said it *shall not* be lawful for the Queen to enact laws with the

advice and consent of the Legislative Council and Assembly of any Province, except upon the subjects assigned to each, and had not preserved the negative power for the purpose of determining what was within the subjects so exclusively assigned, there might be some force in the claim put forth on behalf of the judiciary to assume that jurisdiction.

None will deny that it is most desirable for each legislative body to confine its legislation to the subjects assigned to it by the British North America Act, so far as it is possible to do so, consistent with the general interest of the Dominion, or of any Province. But it would be very unwise in the commencement of our confederate system of government to surround the constitution with a *legal band* rendering it unable to yield to any public necessity or public pressure, save only that capable of rending it assunder and reducing it to its original fragments. It is not a sufficient answer to say that a remedy can be found to meet such a difficulty in an application to the Imperial Parliament. The people of the Dominion, through the Legislative authority, always did, and do now, possess the power within themselves necessary to effect any change they may deem desirable in the constitution or laws, and no other power within the constitution other than the negative power can prevent them.

The Constitution of the United States is a grant of executive and legislative and judicial powers and authority to these three departments of the Government organized under its authority, with certain specified subjects upon which no law is to be enacted, and reserving all other powers not expressly granted. It provides the mode of appointing and electing all officers of the state, and among a great variety of provisions an article is inserted declaring that the Constitution is the *supreme law of the land.* It makes special provisions in regard to the mode of proposing and effecting amendments to the constitution by the people through delegates elected for that pupose, and so *depriving the legislative authority* of any such power it expressly requires that the judiciary shall determine all questions according to the authority as declared by the constitution. The oath of office taken by the Judges before entering upon their judicial duties, compels them to decide every question by the standard of the constitution as the *supreme law.* The legislature under that constitution does not represent the people in the same sense in which Parliament represents the people under the British constitution, nor in the sense in which a colonial legislature represents the people under the colonial constitution. A rule of construction therefore applied to the former in regard to its restraining powers must not be applied to the British North America Act. That Act does not contain a grant of powers from the people to the legislatures, nor from the Imperial Parliament acting on their behalf to the legislatures, for the reason that Parliament does not act in its dealings with the colonies in a representative capacity, but as a sovereign power. The people of the colonies are not represented in Parliament. But the action of Parliament in regard to the colonies is governed by the same principles, as if it acted in a representative capacity, and therefore subject to be altered or repealed by the legislative authority of the colony to which it relates, in so far as it affects the internal

interests of that colony. The theory of the British Constitution is that Parliament represents the people in the fullest possible sense, and can do whatever the people themselves could do were they personally present. Parliament can add to or take from the constitution whatever it deems proper. The law enacted by the sovereign with the advice and consent of the two Houses of Parliament is the *supreme* law. The colonial legislature in like manner represents the people and may add to or take from the Colonial Constitution. All laws enacted by the Queen, (represented by the Governor) with the advice and consent of the Legislative Council and Assembly is the *supreme law within the Colony.*

The seventeenth section of the British North America Act says, "there shall be one Parliament for Canada," meaning for the people of Canada. Neither the term "Parliament" in the ninety-first section, nor the term "legislature" in the ninety-second section is used to designate a body distinct from, but as a body representing the people, and must be read in the same sense as if the words "the people in Parliament" and the words "the people in the legislature" had been used. Inasmuch, therefore, as all the powers of legislation mentioned in the Act were possessed before and at the time of its enactment, these sections are not to be taken as granting powers already possessed, nor in an arbitrary sense as restraining the exercise of such powers. Whatever language is used to express it, it must be taken as declaratory only in pointing out for the purpose of *greater convenience*, the particular subjects upon which the people, through each legislative body, are to exercise the legislative authority, to be controlled only by the negative legislative power of the Sovereign. In reading the Act then we must not treat Parliament or the legislature as distinct from the people, but like all statutes involving the rights of the subject or the public good, it must receive the most full and liberal construction the language and intention of the legislature will admit of, and best to attain that end. No man will be found to say that the public interests or the rights of the subject will be best promoted by the judiciary exercising jurisdiction to declare an act of the legislative authority void, thereby rendering uncertain the binding force of all statute law. All must agree that both objects will be best attained if that question be determined as heretofore, by the negative authority, and the binding force of the law, when enacted, rendered certain. Certainty in the binding character of the laws is a matter of the greatest importance in every well governed country. The judiciary ought not, therefore, to attempt to restrict the powers of Parliament or of the legislature in a mistaken belief that such restriction is necessary in the interests of the people, or the liberty of the subject.

Whenever, under any Constitution, the people cannot rely upon their representatives in Parliament to protect their personal liberties, their "property and civil rights" from unjust or oppressive laws, but are compelled to flee to the judicial authority for protection, depend upon it despotism reigns somewhere. We may rest assured, however, it has no abiding place in our Constitution.

The supreme authority of the Imperial Parliament will be as well guarded from intrusion, and the interests of the nation as well protected in the keeping of the Sovereign and Queen's Privy Council, as in the keeping of the Judiciary of any Province. If that high authority find no reason for the exercise of the royal veto upon the act of the Parliament of Canada, the constitution calls for no exercise of a judicial veto. The authority of the Parliament of Canada and the interests of the Dominion will be as carefully watched over and preserved from all undue interference by His Excellency the Governor General, and the Queen's Privy Council for Canada, as by the legal tribunals of any Province, and if that high authority in the Dominion find no reason for the exercise of the Royal veto by the Governor General upon the Act of the Provincial Legislature, the British North America Act requires no *legal* veto to be exercised by the Courts.

No Provincial Court can arrogate to itself authority to declare void any law enacted by the Queen, with the consent of the two Houses of Parliament or the two Houses of a Provincial Legislature, without assuming a jurisdiction and responsibility neither called for nor justified by the constitution. It is a weak argument to urge in justification of this jurisdiction that unless the courts take it, the Dominion Parliament may by its legislation override the authority of the Provincial Legislatures. The negative legislative power of the Sovereign over the Parliament of Canada (which has ever been exerted to protect the weak and maintain the right) will not permit any encroachment injurious to the Provincial authority, or to the interests of the people of any Province. Further the Provinces may safely rely upon each other to protect their respective as well as their mutual interests, the latter not created but united by the confederate compact. Their representatives constitute the Parliament of Canada, and it must be that the safety and permanency of the central power depends, constituted as it is, upon the protection afforded to the rights and powers secured to each of the several Provincial governments. It is asking too great a sacrifice of the legislative powers of the people to permit the exercise of any such negative jurisdiction in the judicial tribunals, in addition to the negative legislative power of the Sovereign.

Under a constitution which provides a constitutional system of government, combined with a direct executive responsibility, the judiciary is never called upon to say what Parliament is or is not authorized to do, but simply to interpret and determine upon what Parliament has done. The language of Chief Justice Chipman is, as applied to our confederate constitution, as it was to that of the Province at the time he gave utterance to it. If it be asked how this principle can apply under a constitution where the legislative authority is divided between two several bodies, each possessing certain designated powers, when a law enacted by the one is found to be in conflict with a law enacted by the other, the answer is plain. The question of legislative jurisdiction having been *once* settled by the authority before pointed out, there can be no good reason assigned why the rule applied to different statutes enacted by the same legislative body, should not be applied here, and prefer-

ence given to that law which is found to be last in order of time. If it should happen that any public inconvenience is occasioned by the passage of laws subsequently found to be in conflict, the legislative authority is, and always will be, the best adapted to remedy the difficulty, as was done in regard to the law relating to the Central Bank before referred to. If it be asked what rule is to be applied if an action should be brought in the Courts of this Province upon a contract made in Nova Scotia, if the law of Nova Scotia, by which it was claimed the matter in dispute should be determined, was found to be in conflict with the law of the Dominion, then, I think, as there is nothing in the British North America Act to restrain the Courts, the *Comity* should be extended to the law of Nova Scotia, and the cause determined according to the law in that Province; that in turn we may have justice administered to us by the Courts in Nova Scotia upon contracts made here according to the law as in New Brunswick.

The necessity for the adoption of this rule by the legal tribunals is obvious, that the conflict of law, which must inevitably occur, may be rendered as little *burdensome* and as little *uncertain* to the people of the Dominion in the prosecution of their individual rights as the constitution will admit.

There is nothing in the view which I have taken in regard to the supremacy of the colonial legislature within the colony, that derrogates in the slightest degree from the supreme legislative power of the Imperial Parliament over the colonies or over the Dominion of Canada. That Parliament may, if it choose, deprive the sovereign of the power to assent to a Bill passed by a colonial legislature repugnant to an Imperial Statute, as it did in the case of the Act 3rd and 4th Vic. for the Union of the two Provinces of Canada. It may enact any law upon any subject and declare that it shall be in force and binding upon the inhabitants of the Dominion. It may, if it will, repeal the Act of Confederation and all other laws in force in the Dominion. In short destroy all law and order and reduce society to a state of chaos. The sovereign is possessed of the same constitutional right to refuse to enact into a law any Bill passed by the two Houses of the Imperial Parliament, as any bill passed by the two Houses of the Parliament of Canada or the two Houses of any Provincial Legislature, and if the Lords and Commons of Great Britain should pass a Bill to overrule any law enacted or in force in the Dominion, Her Majesty may withhold Her assent, and protect from the power of the Imperial Parliament the rights of the people and legislature of the Dominion. The propriety of doing so might be questioned; not the constitutional right. And when a Bill is passed by the Senate and House of Commons of Canada or by the Legislative Council and House of Assembly in any Province, repugnant to an Imperial Senate, relating to the Dominion, the Queen may either enact into a law or withhold Her assent, and as before the propriety of the act in either case may be questioned, not the constitutional right.

But we need not be alarmed at this sovereign power. The wisdom of Parliament will bend its future policy towards the Dominion in quite a different direction. The Imperial Parliament will not be likely to take the trouble of

legislating for the Dominion unless desired by the legislative authority thereof to do so. It has constituted the Provinces of British North America a *Dominion* with full dominion powers within its territorial limits, and will leave it to the legislative authority to shape and direct its internal policy and prescribe such laws for the government of the inhabitants thereof, as may from time to time be deemed necessary, unrestrained by any imaginary power in any subordinate department of the government.

It is a political axiom that the judiciary power of any well constituted government must be co-extensive with the legislative power, and must be capable of deciding every judicial question which grows out of the constitution and laws. While we admit the truth and force of this axiom we must not forget the vast difference there is between interpreting and administering the law and determining what rule of law the sovereign authority shall or shall not prescribe. The latter is exclusively within the province of the Houses of Parliament and the two Houses of the respective Provincial Legislatures.

The legislative power is always the supreme and the creative power in any well constituted government. The judicial is a power created by and subordinate to the legislative. It does not appertain to the created power to make or to unmake the law; its duty is confined to interpreting and administering the law. If the judiciary can declare a law enacted by the legislature null and void, it must necessarily possess the greater power, and it ought to follow capable of being enforced in opposition to the legislative authority. This could not be because the judiciary must depend upon the legislature for the ability to enforce its decrees. This jurisdiction in the judiciary of the United States being expressly conferred by the constitution and deemed necessary under their peculiar system of government the courts were bound to accept it, and it is capable of being enforced over the State Legislatures, because the Supreme Court of the nation is aided by the power of the national government. Notwithstanding this power is given by the constitution, the court is utterly helpless when asserting its authority in opposition to that of the government. Whenever Congress asserts its authority the court must yield, whatever the opinion of the Judges may be of the constitutional right. It must submit to the power without the aid of which it cannot enforce its judicial authority. In short, it must execute the will of the national Legislature or do nothing. This jurisdiction in the judiciary is admittedly a weak point in the constitution, because it cannot always be enforced, and it renders the binding character of the laws uncertain. It can only be remedied by incorporating into the constitution two elements of the British Colonial system of government, viz: a negative legislative power in the Executive Head of the nation over all laws enacted by the state legislatures, (one of the modes suggested by Chief Justice Story), and the principle of direct Executive responsibility in the national government.

The British North America Act does not confer this jurisdiction upon the judiciary, nor could it be enforced if it did. The legislative authority of the Province always had, and still has the power to constitute courts for the

administration of Justice. It always had the power, and has now, to abolish entirely any court, and to constitute any other court in its stead with such jurisdiction as it may choose to confer.

It seems to me a strange proposition that the County Courts, created by the Legislature of this Province for the purpose of aiding in the administration of Justice, with such jurisdiction as it was deemed necessary in the wisdom of the legislature to confer upon them, should, because a branch of the judiciary power under the constitution, assume jurisdiction to declare void any act of the authority by which they were so created and by a single breath of which they may be swept out of existence. Yet this is the theory upon which all the legal tribunals are to take such a jurisdiction. The judiciary does by its original and constitutional powers possess jurisdiction to restrain the *individual* will and action of the people, but not the *sovereign will.* The sovereign power of the people or the major part of them, as declared through the sovereign head of the nation or its representative, may make lawful whatever it will, and every department of the government is bound to give effect to it.

If the Parliament of Canada should establish a Supreme Court of Appeal for the Dominion, and by the Act organizing the court should require the court to be governed in its judgments and decisions by the law enacted by Parliament, or by any Provincial Legislature, preferring that law last in order of time, and declaring that it should be deemed a good ground for the reversal of the judgment of any Provincial court if found to be in conflict with any such law, could there be any doubt that the court would implicitly obey the authority and execute t e powers conferred upon it by the law which created it. If not, could the courts in any Province resist the authority of the Court of Appeal upon the ground that the Parliament of Canada had no constitutional right or power to take away or destroy any of the jurisdiction inherent in the original and constitutional powers of the judiciary of the Provinces. It seems to me not If the attempt were made, it would fail for two reasons, firstly, the right could not be maintained upon any sound constitutional principle, and secondly, the court possesses no power within itself to enforce its authority The Provincial Legislature could not be relied upon for aid because the Court in the position assumed sets aside the latter authority also. If the British North America Act had expressly conferred this jurisdiction, though the power to enforce it in opposition to the will of the legislature would be wanting, yet it would be reasonable to suppose that as the constitution had invested the judiciary with this power, the legislature, in deference to the constitution, would yield a willing compliance to the opinion of the Judges, and provide the necessary authority to enable the judgments of the Courts to be put into execution. But if the judiciary in the entire absence of such an authority should refuse to administer the law as declared by the legislative authority, we need not be surprised if the legislature, acting in the best interests of the country, should feel constrained to assert its supremacy, and insist upon its administration without any question of the authority from which it emanated, leaving that to be determined by the only authority known to the Colonial

constitution and the one provided by the Act for that purpose This is a jurisdiction peculiar to the judiciary of the United States under their *constitution*, in which the prerogative power as known to our constitution forms no part. The written constitution is the prerogative authority through which the people have declared their will, which is paramount to that of their representatives expressed in any law. This high authority is not claimed by the Judges by virtue of judicial supremacy, but as administrators of the public will. This judicial jurisdiction is a theory altogether foreign to the spirit of the British constitution, by virtue of which the sovereign declares the will of the people in every law enacted in regard to the subjects embraced therein. Hence when the Judges in any Province claim to exercise this high authority by virtue of judicial supremacy, they act not as administrators of the public will but as restrainers of that will, declared by the only authority through which the people speak.

In conclusion, to use the language of Blackstone, "what Parliament does no power on earth can undo," and so what the Parliament of Canada does or the Legislature of any Province does, no power within the Dominion, save the legislative, can undo or successfully resist.

JAMES STEADMAN.
J. C. C.

Fredericton, February, 1873.