CASE AND COMMENT.

CONSTITUTIONAL LAW—PROVINCIAL ACT REQUIRING MOTOR-CAR DRIVERS TO BE LICENSED—APPLICABILITY TO MILITARY OFFICER.—Are federal officers subject to provincial statutes? One phase of this question was before the Court of Appeal of Manitoba in *Rex* v. *Anderson*.[1] The defendant was summoned before a police magistrate of Winnipeg upon a complaint that he had operated a motor vehicle in contravention of section 6 of the Manitoba *Motor Vehicle Act*[2] which provides that "no person shall operate or drive a motor vehicle, unless he is (a) the holder of a certificate of registration delivered to him as owner of a motor vehicle, or (b) a chauffeur duly licensed thereunder." Anderson was a commissioned officer of His Majesty's Permanent Forces in command of the Winnipeg Air Station of the Royal Canadian Air Force, and was driving, in the performance of his military duties, a motor-car which was owned and provided by the Crown in the right of the Dominion. He had not complied with section 6. The magistrate dismissed the complaint, and on appeal, by way of a stated case, the Court of Appeal confirmed the holding of the inferior court.

Trueman, J.A., said: "Dominion sovereignty, within the sphere of its jurisdiction and powers, both by the constitution and inherent, is absolute at all points, and admits of no qualification at the instance of the province. Nothing is more trite and elementary. The argument the Dominion's position invokes is that supplied by Field, J., in *Wisconsin Central Railroad Co.* v. *Price County*,[3] in the statement that the law that a state has no power to tax the property of the United States within its limits, 'is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.'"

The foregoing statement of the learned judge warrants some comment. In the first place, it cannot be said truly that the reference to the United States cases upon constitutional questions is, in this respect, peculiarly a happy one. The Privy Council, speaking generally, has never accepted the doctrine concerning the exemp-

[1] (1930), 39 Man. R. 84.
[2] C.A. 1924, c. 131, as amended by 1925, c. 36, s. 6.
[3] (1889), 133 U.S. 496.

tion of federal instrumentalities from state interference and of state instrumentalities from federal interference, as enunciated in the American decisions, as applicable to the limitation of federal and provincial powers. It has in every case looked at the particular facts and given judgment in accordance with what it conceived to be the intention and meaning of the *British North America Act.*[4]

In the second place, notwithstanding the triteness and elementary character of the statement that, "Dominion sovereignty within the sphere of its jurisdiction and powers . . . is absolute at all points and admits of *no qualification* at the instance of the province," it must not be taken too literally. The doctrine that subjects, which in one aspect and for one purpose fall within the federal powers of section 91 of the Federation Act, may, in another aspect and for another purpose, fall within section 92 is now axiomatic in Canadian constitutional law. Banks, incorporated as they must be by the Dominion, are subject to provincial taxation.[5] Railways coming under the jurisdiction of the Dominion may, nevertheless, be subject to provincial laws.[6] Dominion officials must pay taxes to the provinces.[7] Dominion companies cannot refuse to obey the statutes of the provinces as to mortmain,[8] and they are subject to the powers of the provinces relating to property and civil rights under section 92 for the regulation of contracts generally.[9] It is, however, as definitely stated that a provincial legislature cannot validly enact laws which would sterilize or destroy the capacities and powers of a Dominion company.[10] To the extent that the *Motor Vehicles Act* purported to sterilize a Dominion agency in that it prohibited a member of the military service from operating a motor vehicle in the Province in the discharge of his duties unless he obtained a license from the Province, the statute is *ultra vires.* This prohibition is a qualification, and something more; it, in terms, purports to be a nullification of the legislative powers over the subject-matter of "militia, military, and naval service and defence" which is exclusively assigned to the Dominion. Robson, J.A., who also gave reasons for affirming the decision of the magistrate, stated that it was not necessary to follow through the many possible questions

[4] See *Bank of Toronto* v. *Lambe* (1881), 12 App. Cas. 575 at p. 587.
[5] *Bank of Toronto* v. *Lambe, supra.*
[6] *C.P.R.* v. *Bonsecours,* [1899] A.C. 367.
[7] *Abbott* v. *City of St. John* (1908), 40 Can. S.C.R. 597.
[8] *Colonial Building and Investment Association* v. *A. G. of Quebec* (1883), 9 App. Cas. 157 at p. 164.
[9] *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.
[10] *John Deere Plow Co.* v. *Wharton,* [1915] A.C. 330. *Great West Saddlery Co., Ltd.* v. *The King,* [1922] 2 A.C. 91.

as to the necessity for observance of local traffic regulations by such officers as the defendant. It may be that a regulation as to speed might in this respect be *intra vires* of the Province in so far as it is a qualification, but not a negation, of Dominion sovereignty.

S. E. S.

* * *

WILLS—SIGNATURE AT FOOT OR END THEREOF—EXCEPTIONS.—While it is perhaps true that courts would admit that a legislature says what it means, it seems that like the Mad Hatter in *Alice in Wonderland* they may still find that the legislature did not mean what it says. The *Wills Act* is quite explicit to the effect that a will must be "signed at the end or foot thereof."[1] In addition, to clear up any misapprehensions, *Lord St. Leonard's Act*,[2] was subsequently passed, and it provides, *inter alia*, that "no signature shall be operative to give effect to any disposition, or direction which is underneath, or which follows it." In spite of their seemingly clear expressions of policy, there are a number of cases of which *Palin* v. *Ponting*[3] is the most recent instance, in which the courts do give effect to provisions following after the testator's signature.

In the *Palin* case, the testatrix, scorning a solicitor,[4] had a friend draw her will. In doing so he used a printed form, and the front page contained a number of legacies and directions, under which the testatrix signed and two witnesses properly attested the signature. Unfortunately the front page was not sufficient to contain all the testatrix' dispositions, so along the margin of that page was written, "See other side for completion." On the other side were provisions with regard to other legacies and the residue. Despite what the *Wills Act* as amended says, the provisions of this second page, "underneath" or "following" the signature were probated.

There are numerous cases in which a testator has written his will on two or three pages, and, having signed only the first, the courts have felt constrained to probate only that which preceded the signature.[5] It was formerly argued,[6] and is the adopted rule in

[1] 1 Vict. c. 26, s. 9.
[2] 15-16 Vict. c. 24, s. 1.
[3] [1930] P. 185; 99 L.J. Prob. 121; 46 T.L.R. 310.
[4] See Bateson, J., in 46 T.L.R. 310: "One might almost say that the natural result is that the thing is in a mess."
[5] *Goods of Anstee*, [1893] P. 283; *Royle* v. *Harris*, [1895] P. 163; *Goods of Gilbert* (1898), 78 L.T. 762. *Goods of Gee* (1898), 78 L.T. 843; *Millward* v. *Buswell* (1904), 20 T.L.R. 714; *Goods of Martin*, [1928] No. Ir. L.R. 138.
[6] See *Sweetland* v. *Sweetland* (1865), 4 Sw. & Tr. 6: "The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will and treating it as an execution of all that preceded and granting probate of so much of the will to the disregard of the remainder."

some American jurisdictions, [7] that if a testator affixed his signature in the middle of what he intended to be his will, the whole document was bad. This has now been settled to the contrary.[8]

The cases in which courts have been able to avoid the rigours of the *Wills Act,* and to probate what follows the signature, may be roughly divided into two classes: (1) Those which proceed on the doctrine of incorporation by reference, and (2) those, like the *Palin* case, which prefer to treat what follows the signature as an interlineation which the testator "intended . . . should be introduced where he made the first mark."[9] While both exceptions seem contrary to the spirit of the Act, the requirements of the doctrine of incorporation seem much stricter than the loose practice of so-called "interlineation." Before parol evidence can be received to identify the document sought to be incorporated, the will must refer to a paper "*as then existing,* in such terms that it is capable of being ascertained."[10] On the ground that no sufficient reference had been made to satisfy this test, it was objected in the *Palin* case that what followed the signature should not be probated.[11] However, the Court stated that the problem of incorporation—with its strict rules—did not apply, and followed *In the Goods of Birt.*[12] In that case the testator had put an asterisk followed by the words, "See over," at the end of an incomplete sentence. On the page following his signature an asterisk again appeared, followed by "See over." The Court allowed the rest of the unfinished sentence to be probated as an interlineation. The present case seems an extension of that doctrine. Bateson, J., said that, "these words ['See other side for completion'] were clearly intended to join in the other clauses which were written on the back of the document." If it is a question of the testator's intention, it seems hard to discover why the same result was not reached in *In re Goods of Malen.*[13] There the testator, using a printed form of will, not having room to finish a sentence

[7] See *Appeal of Wineland* (1888), 118 Pa. 37; 12 Atl. 301.

[8] *Royle* v. *Harris,* [1895] P. 163; *Goods of Evans* (1923), 128 L.T. 669, and in cases cited *supra* note 5.

[9] *Goods of Birt* (1871), L.R. 2 P. & D. 214, cited with approval by Baterson, J., in *Palin* v. *Ponting,* [1930] P. 185.

[10] *Allen* v. *Maddock* (1858), 11 Moo. P.C. 427; *Goods of Smart,* [1902] P. 328; *Re Poole,* [1929] 1 D.L.R. 418 (P.E.I.).

[11] See for example *Goods of Dallow* (1866), L.R. 1 P. & D. 189 (to my executors "hereinafter named." Held insufficient); *Goods of Draile* (1878), 47 L.J. Prob. 45; *Goods of Martin,* [1928] No. Ir. L.R. 138 (both cases where the phrase "Turn over" or "P.T.O." which followed the signature was held incapable of incorporating the next page. *Quaere* whether if these words had appeared above the testator's signature they would have been sufficient.)

[12] (1871), L.R. 2 P. & D. 214.

[13] (1885), 54 L.J. Prob. 91.

above the place left for signature at the bottom of the first page, completed the sentence at the top of the second page. Certainly the mere continuity of the sentence showed the intention mentioned above; that is, that the words should be introduced where the sentence was broken off. The Court, however, following the *Wills Act*, granted probate only of that which preceded the signature. It is submitted that the same result should, in accordance with the Act, have been reached in *Palin* v. *Ponting*.[14] Otherwise, the whole doctrine of incorporation by reference seems to be rendered futile by the labelling of the process of statutory circumvention as "interlineation." There is certainly no reference to a paper *"as then in existence."*

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ATTORNEY-GENERAL AND MINISTER OF AGRICULTURE & MINES (NEWFOUNDLAND) v. G. JARDINE AND M. E. MARTIN—INTERESTING DECISION CONCERNING LABRADOR TIMBER LIMITS.—The Labrador Boundary dispute between Canada and Newfoundland, decided by the Privy Council in favour of the latter several years ago, was productive of much interest and comment. A case, recently decided before the Full Bench in the Supreme Court of Newfoundland, provides occasion for further interest, coming, as it does, as a sequel to the Privy Council decision.

An action was taken by the Attorney-General and the Minister of Agriculture and Mines against George Jardine and Michael E. Martin on the following set of facts: A license to cut timber over an area on Labrador, consisting of 1000 square miles, was granted in 1915 to the defendant, Jardine, and almost immediately assigned to the defendant, Martin. The license was of ninety-nine years duration, and the rental was two dollars per square mile, with a provision for royalty of twenty-five cents per one thousand, board measurement, feet cut. One of the conditions of the license was that the erection of a mill must be carried out within three years, or of a paper and pulp plant within five years, and true returns must be made from year to year on the quantity of timber cut. The *Crown Lands Act* expressly provided that the license could be forfeited for non-payment of rent or royalty, and pecuniary penalties were provided for other infractions. Since 1915, the only provision fulfilled

[14] [1930] P. 185.

by the defendants was that of payment of rent, and on November 5th, 1928, the rent was refused and the cheque for the amount was returned. The Attorney-General now asks for a declaration that the license was null and void, and claims for forfeiture and pecuniary penalties.

The defence rested mainly on the ground of waiver, and that the acceptance of the rent in each year, in spite of the fact that a sawmill was not erected within three years, or a pulp mill within five years, operated as a waiver of these conditions, the Government having elected to continue the license. The Labrador boundary, undefined until 1927, was ascertained only by the decision of the Judicial Committee of the Privy Council. A further point was made that forfeiture could only be had for non-payment of rent or royalty, and only pecuniary penalties could be recovered for other breaches, and that since the Government had waived the erection of a mill, there could be no question of royalties, as no timber had been cut. The defendant contended, therefore, that he was entitled to hold for the unexpired period of the license upon payment of the rent.

It was held by the Full Bench (Horwood, C.J., Kent and Higgins, JJ.) that the covenant to pay royalty was a continuing one, and could not be defeated by the acceptance of rental. The license was distinguished from the ordinary "building covenant" where, under a lease, a house is to be built within a certain period and rent is accepted after the covenant is broken. In the present case the defendant had not only to erect a mill, but to "work" the timber limit and to pay royalty. The covenant is analogous to a covenant under a lease to keep land in cultivation.

The Court further decided that the purpose of the *Crown Lands Act*, under which the license was issued, was to develop the timber resources of the country; the interest of the lessee is only usufructuary. Because of this fact, in the absence of express provision to the contrary, the license is forfeitable, not only for non-payment of rent or royalty, but for breach of any of the conditions; otherwise, the whole scheme and policy of the Act would be defeated.

The defendant contended that the present license was not subject to amendments of the *Crown Lands Act* passed in 1928 by which pecuniary penalties for breach were extended, the license having been granted in 1915. It was held, however, that, while the defendant could not be held liable under the amendment for a breach occurring before the date of the amendment, they were liable in rela-

tion to breaches that occurred after the date thereof, and the substituted sub-section applied.

In the present case all the judges concurred in the declaration of forfeiture of the license. On the point of pecuniary penalties no ruling was given, there being no clear proof of their nature. Leave to appeal to the Privy Council against the main judgment has been granted to the defendant, and leave for cross-appeal on the question of penalties granted to the Attorney-General.

The case is of interest, not only in Newfoundland, but in Canada and other countries, as large limits are being held by parties in other countries in substantially the same way as the license held by the defendants. The decision of the Privy Council will, therefore, be awaited with a great deal of interest.

R. GUSHUE.

St. Johns, Newfoundland.

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DOWER—WIFE LIVING APART FROM HER HUSBAND.—The decision of Kelly, J., in *Re Davidson*[1] raises a narrow but interesting question on the interpretation of section 13 of the Ontario *Dower Act*.[2] In this case the wife of the owner of a parcel of land was living apart from her husband and they had entered into a separation agreement by which the husband covenanted to pay the wife certain sums for her support. The husband wished to dispose of the land, and the question arose whether the wife was disentitled to alimony within the meaning of the Act so that a judge could dispense with her concurrence for the purpose of barring her dower.[3] The Court refused to make the order, holding that the section was not applicable to a case where the wife could not recover alimony because of an agreement; the Court took the view that the statute

[1] (1930), 65 O.L.R. 19.

[2] R.S.O. 1927, c. 100. Section 13 (1) "Where the wife of an owner of land has been living apart from him for two years under such circumstances as disentitle her to alimony . . . and such owner is desirous of selling . . . the land free from dower a judge . . . may dispense with the concurrence of the wife for the purpose of barring her dower. (3) The judge shall, unless the wife has been so living apart from her husband under such circumstances as disentitled her to dower, ascertain and state in the order the value of such dower and shall by the order direct that the amount thereof shall be paid into court or shall remain a charge upon the land or be secured otherwise for the benefit of the wife or be paid or applied for her benefit as he may deem best."

[3] The effect of the order asked for would not be to deprive the wife of her dower rights; it would merely dispense with her bar of dower in the conveyance. Her dower rights would remain a charge upon the lands or be protected by the creation of a fund in court out of the purchase moneys.

contemplated only a situation where the wife was disentitled to alimony apart from agreement, as, for example, by her conduct in deserting her husband without reasonable cause. The Court thus reached the same conclusion that had been reached in *Re Tolhurst*[4] even though since the decision in the latter case the section of the Act has been amended by the deletion therefrom of the phrase "by law" which had modified "disentitled."[5]

No doubt the circumstance that he would make the order as *persona designata* from whom there is no appeal weighed heavily on the learned judge's mind and justified a cautious approach to the problem. Nevertheless, it is respectfully submitted that the conclusion he came to in refusing to make the order was unduly conservative for the following reasons.

1. The order asked for would not completely deprive her of her dower rights. They would only be lifted from the land and transferred to a fund in court created out of a part of the purchase money. It is only where a wife has committed adultery that she is deprived altogether of her dower rights.[6]

2. The Appellate Division in interpreting the meaning of the word "entitled" in the section of the Judicature Act conferring jurisdiction on the Supreme Court of Ontario in respect of alimony[7] emphasized the right to recover the alimony by an action as the test as to whether or not a person can be said to be entitled to alimony.[8] If the same test had been used by the learned judge in working out the meaning of section 13 of the *Dower Act* and its application to the principal case it is perfectly clear that, with the agreement in existence, an action by the wife to recover alimony would have failed, and in that sense she was disentitled to dower.

3. The deletion by the Legislature of the phrase "by law" after the decision in *Re Tolhurst* indicated an intention on its part to change the law as laid down in the *Tolhurst* case, and it is suggested that greater significance should have been attached to the deletion of these words.

At all events the decision emphasizes the fact that dower is an intolerable nuisance which serves no purposes in our non-feudal

[4] (1906), 12 O.L.R. 45.

[5] See R.S.O. 1897, c. 163, s. 12, as amended by the *Dower Act*, (1909), 9 Edw. VII. c. 39.

[6] See sec. 8 of the *Dower Act*. For an example of a wife losing her dower because of adultery, see *Re Orford* (1920), 49 O.L.R. 25.

[7] *The Judicature Act, R.S.O.* 1897, c. 51, s. 34.

[8] *Scott* v. *Scott* (1929), 64 O.L.R. 422, in which it was held that a wife was not entitled by the law of England to restitution of conjugal rights within the meaning of the Act because by the law of England a written demand for such restitution must be made before presentation of her petition.

community of to-day. Although the whole body of Ontario real property law needs intelligent reconsideration by the Legislature, dower is probably the most troublesome of the archaic survivals in our land law. It is suggested that reform could take any one of the following possible courses.

(i) Abolish inchoate right to dower in legal estates by giving the wife dower only if her husband dies entitled thereto. Thus, the position of both legal and equitable estates as to dower would be identical.[9] (ii) Adopt the provisions of the English *Dower Act* of 1833[10] which provided that no widow is to be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will, or in which he shall have devised any estate or interest for her benefit unless (in the latter case) a contrary intention shall be declared by his will. (iii) Confine the wife's right to dower to the homestead as has been done in some of the western provinces.[11] (iv.) Abolish dower completely as was done in England by the *Administration of Estates Act* of 1925.[12] It is submitted that with the passage of the *Dependants' Relief Act* in Ontario in 1929[13] the last remaining argument in favour of the retention of dower vanished, and that the Legislature should now consider the abolition of dower.

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ASSESSMENT—ASSESSORS—BIAS. The judgment of the Supreme Court of Prince Edward Island in *Charlottetown* v. *Tanton** given by Mathieson, C.J., concurred in by Haszard and Arsenault, JJ., reversing a judgment of the County Court which had awarded the plaintiff, Lewis P. Tanton, $182.26 against the City of Charlottetown in an action for money had and received, has given rise to some questioning.

The plaintiff, Tanton, complained against the City because it had placed in the hands of the Sheriff of Queens County two certain documents issued out of the City Court, directing the Sheriff to sell certain lands of the plaintiff situate in Charlottetown, in order to satisfy the amount of the municipal taxes for the year 1928 which the plaintiff alleged the City had fraudulently, and without

[9] See *Dower Act*, R.S.O. 1927, c. 100, s. 3, as to dower in equitable estates.
[10] 3 & 4 Will. IV. c. 105
[11] E.g., see *Alberta Dower Act*, R.S.A. 1922, c. 135.
[12] (1925), 15 Geo. V, c. 23, s. 45(1)(c).
[13] (1929), 10 Geo. V., c. 47.

*[1930] 4 D.L.R. 61.

legal authority, assessed against him. The plaintiff, after his lands had been advertised to be sold, paid the amount of the levy, namely $182.26, under protest. The money so paid was received by the City before the action was brought.

A provincial statute incorporating the City and regulating its taxing power provides for the appointing by the City Council every third year of a board of three Assessors. Under that provision the City Council appointed three Assessors for the years 1925, 1926 and 1927, and in the early part of 1928 it reappointed the same parties for the years 1928, 1929 and 1930.

It became the duty of the Assessors to enter in a book supplied them by the City Council the names of the owners of real estate in the City liable to be rated and assessed, with the description and value of the property assessed, and to make return thereof to the City Council. The statute also directs that the real estate assessed shall include all buildings or other things erected thereon, and requires the Assessors to rate such property "at its full cash value." Upon such return the Council specifies the rate of assessment, and notice of the assessment must be given to the ratepayers.

An appeal from the Assessors' valuation to the Stipendiary Magistrate of the City was allowed, with a further appeal from his decision to the Supreme Court of the Province. If within the time prescribed for payment the ratepayer fails to pay, the City Collector is directed to publish for a specified time in a newspaper the names of all such defaulters with particulars of their properties and the amounts due from them, and at the end of such time the Collector can apply to the Judge of the City Court for judgment against the lands in respect of which default had been made. This judgment being given, a warrant can be issued under the hand and seal of the Judge, directed to the Sheriff of the County, authorizing him to sell such lands at public auction. There is also the usual validating section that no error in the assessing, etc., shall affect the validity of any assessment, and if no appeal be taken from any assessment it shall be deemed absolute and good and valid in every respect, providing it appears that notice of such tax was duly served in the prescribed manner.

The statute gives the City Council power to appoint from its members committees of such number as it thinks fit for the better transaction of its business. In pursuance thereof the said Council appointed as its first and most important committee a Finance Committee of three members. One of the important duties of this

Committee is the providing of ways and means for the raising of necessary civic revenue. Of this Committee T. W. L. Prowse, a member of the City Council, was Chairman during the years 1927, 1928 and 1929.

The plaintiff's evidence established that the City Council appointed A. Bowman Brown, James Eden and the late James W. Stewart City Assessors for the years 1925, 1926 and 1927, and that they performed their duties as such for these three years and were paid by the City for their services $2,300, and that they were reappointed as Assessors for the years 1928, 1929 and 1930. Brown and Eden testified that in an interview which they had with Prowse, the Chairman of the City Council's Finance Committee, before their reappointment in 1928, the latter promised them an additional sum to what was paid them in the previous years for their services if they would raise the assessments on the valuation of properties to the amount of one million dollars, Brown stating that the additional amount promised was $700, Eden stating that they were to be paid an additional sum, and both stating that they were paid $1,500 for 1928 instead of $800 as theretofore paid.

The plaintiff also proved by evidence that the Judge of the City Court, Kenneth J. Martin, who in his judicial capacity issued the warrants, and his son Kenneth M. Martin, the City's Stipendiary Magistrate, who heard the appeals from the Assessors' valuations, doing a law business as partners under the name of K. J. & K. M. Martin, were general solicitors for the City during the years 1927, 1928 and 1929, receiving as was shown, substantial amounts for such services.

There was an appeal from the Assessors to the Stipendiary Magistrate, who affirmed the Assessors' decision. The plaintiff took a further appeal to the Supreme Court, which, owing to the plaintiff not serving his notice of appeal in time, became ineffective as an appeal and was not proceeded with, and the case was heard by the County Court. The defendant offered no evidence whatever. Judgment was given for the plaintiff against the City for the above mentioned sum and costs. The defendant appealed from this judgment to the Supreme Court. The appeal was heard by the three judges above named. The defendant, as in the County Court, offered no evidence, and the Appeal Court heard and determined the case on the evidence which was given in the County Court. The appeal was allowed. The judgment of the County Court was reversed with costs in both Courts against the respondent Tanton.

The County Courts have jurisdiction to the amount of $300 in all actions such as this, whether maintained as for money had and received or for damages for illegal distress for taxes imposed without authority. Mathieson, C.J., gave as one of his grounds for reversing the judgment of the County Court that that Court possesses no supervisory jurisdiction over the municipality, its courts or executive officers. It is not easy to understand what the want or possession of supervisory powers has to do with the matter.

The plaintiff Tanton's position was quite clear. His case rested on the improper agreement between the Chairman of the Finance Committee and the City's Assessors disclosed by the evidence of Brown and Eden, and that any assessment made, following this agreement, was null and void, and on the impropriety of the Judge of the City Court and the City's Stipendiary Magistrate exercising their respective judicial functions in this case while being employed and paid by the City as its general solicitors.

In support of the conclusion arrived at by the Court of Appeal, Mathieson, C.J., seems to lay great stress on a decision given in *Shannon Realties Ltd.* v. *St. Michel.*[1] The two cases are easily distinguished. The *Shannon* case was an appeal from the judgment of the Supreme Court of Canada,[2] which held that if the valuation roll had been made within the powers of the municipal corporation and, in the absence of fraud, the party assessed can appeal only, and that, in that case, the valuation of the property was not fictitious or grossly excessive. The Judicial Committee of the Privy Council affirmed the judgment of the Supreme Court. They also excepted fraud, stating[3] that "The Board in this case has not to determine whether some further remedy might not be available in a case of fraud, for fraud is not now maintained and has been eliminated as a ground of action." It is quite true, as claimed by Mathieson, C.J., that Lord Shaw quotes with approval the statement of Duff, J.: "If it were shown that an Assessor had overvalued property in consequence of corrupt influence I cannot doubt that it would still be open to the municipality to correct the valuation by resorting to the statutory appeal."[4] Lord Shaw and Duff, J., were referring in this statement to an overvaluing, through corrupt influence, of a particular piece of property, and not to the case of Assessors whose valuations as a whole had become tainted by corrupt influence,

[1] [1924] A.C. 185.
[2] (1922), 64 Can. S.C.R. 420.
[3] [1924] A.C. 185 at p. 193.
[4] (1922), 64 Can. S.C.R. 420 at p. 436.

thereby disqualifying them from making any valuation. If they were corruptly induced to overrate certain properties, but not corruptly induced to raise others, they would have jurisdiction as to those others, and it would not be a case of their not having jurisdiction at all. If they were corruptly paid to raise all valuations they would be disqualified to make any assessment, and consequently would act without jurisdiction. The remarks in question, which are *obiter*, though coming from high authority, can have no application to a case of complete want of jurisdiction through the disqualification of Assessors to make any assessment. In such a case there is the "legal incompetency" referred to by Duff, J., as being an admitted cause for the invalidating of the assessment roll.[5]

There are numerous cases, decided by the Supreme Court of Canada and the Judicial Committee of the Privy Council, which hold that the assessment roll as finally passed by the Court of Revision is not conclusive as regards want of jurisdiction in the Assessors, or in cases where fraud is charged.[6] The Supreme Court in *Donahue* v. *St. Etienne*,[7] and after the Privy Council gave judgment in the *Shannon* case,[8] distinguished it from the latter, and followed the law as laid down by the Privy Council in *Toronto Railway Co.* v. *The City of Toronto*.[9] In *Nicholls* v. *Cumming*[10] Ritchie, J., said: "The principle of the Common Law is that no man shall be condemned in his person or property without an opportunity of being heard."

Is not the right to be heard before an impartial tribunal as great a common law right as the right to receive notice of a legal proceeding? If either principle is violated the acts of the tribunal are without jurisdiction and void. The Queens Bench Division of the High Court of Justice for Ontario had before it, in 1889, in *Commee* v. *Canadian Pacific Railway Co.*[11] a question similar to that raised in this case respecting the disqualification of the Judge of the City Court and the Stipendiary Magistrate. That case was referred by the Court to the award of certain persons who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. The finding and certificate of the

[5] (1922), 64 Can. S.C.R. 420 at p. 437.
[6] See *City of London* v. *Watt* (1893), 22 Can. S.C.R. 300. *Toronto Railway Co'y* v. *City of Toronto*, [1904] A.C. 809; *North West Lumber Co.* v. *Lockerbie*, [1926] S.C.R. 155; *Donohue* v. *St. Etienne*, [1924] S.C.R. 511.
[7] *Supra.*
[8] *Supra.*
[9] *Supra.*
[10] (1877), 1 Can. S.C.R. 395 at p. 422.
[11] (1889), 16 O.R. 639.

Arbitrators were set aside because, pending the reference and before the finding, one of the Arbitrators had received an offer of the solicitorship to the defendant company, and had, after the finding, accepted it, and was thus disqualified from acting. The judgment in that case goes into the question very fully, citing many authorities. Among these authorities was the case of *Walker* v. *Frobisher*,[12] where Lord Chancellor Eldon said: "This award cannot be supported. The Arbitrator is, ... I am well assured, a most respectable man, but he has been surprised into a conduct which upon general principles must be fatal to the award..... The Arbitrator swears that it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles." Lord Denman, C.J., in *Dobson* v. *Groves*[13] referring to Lord Eldon's observation added: "When once the case is brought within the general principle by a possibility that the Arbitrator's mind may have been biassed, there is a sufficient objection."

The Vice-Chancellor, Sir John Stuart, in giving judgment in *Kemp* v. *Rose*,[14] said: "A perfectly even and unbiassed mind is essential to the validity of every judicial proceeding. Therefore, where it turns out that unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court. Whether in fact the circumstance had any operation in the mind of the Arbitrator must for the most part be incapable of evidence . . . being perhaps even unknown to himself. It is enough that such a circumstance did exist." In *Proctor* v. *Williams*,[15] Earle, C.J., said: "It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal." To the same effect is the decision in *Sumner* v. *Barnhill*,[16] where Sir William Young, C.J., set aside an award on the ground that one of the Arbitrators was disqualified, having been regularly retained as solicitor of the estate of which the defendant was the executor, although the Arbitrator had not been engaged as counsel or attorney in the matter referred, and did not concur in the award.

[12] (1801), 6 Ves. 70.
[13] (1844), 6 Q.B. 637.
[14] (1858), 1 Giff. 258.
[15] (1860), 8 C.B. N.S. 386.
[16] (1879), 12 N.S.R. 501.

The case of *Frome United Breweries Co.* v. *Bath Justices*,[17] was decided by the House of Lords. The appellants were the owners and the licensees of a fully licensed hotel, known as the Seven Dials Hotel in the County of Bath. On their application to the licensing justices for the renewal of their old on-license the justices referred the matter to the Compensation Authority of the borough, and at a further meeting they resolved that a solicitor should be instructed to appear before the Compensation Authority and oppose the renewal on their behalf. The solicitor duly appeared and opposed, and the Compensation Authority refused the renewal, subject to payment of compensation. Three of the justices who sat and voted as members of the Compensation Authority had been parties to the aforesaid resolution of the licensing justices. Held, that the three justices were disqualified from sitting on the Compensation tribunal on the ground of bias, and the decision of the tribunal was set aside. Viscount Cave, L.C., in dealing with the question of disqualification, said, "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute, or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities, which though in no sense to be called Courts, have to act as judges of the rights of others." The other members of the House of Lords, in supporting the foregoing principle, used language equally strong..

It would seem that the evidence in the *Tanton* case makes it a stronger one for redress than the *Frome* case. The word jurisdiction is derived from the two Latin words, *jus* and *dicere*. It may be defined as "the authority or power which a man hath to do justice in causes of complaint brought before him." In view of the facts and circumstances of this case, can it be said that either the Assessors, the Judge of the City Court or the Stipendiary Magistrate were in a position to do justice in this case?

There are many cases that decide where a ratepayer pays taxes imposed without authority under protest he can recover them back

[17] [1926] A.C. 586.

under the count for money had and received.[18] The cases cited on this point by Mathieson, C.J., for instance, *Marriot* v. *Hampton*[19] and *Hamlet* v. *Richardson*[20] have no application to this case. They merely illustrate a proposition which has now become an established principle of law, attaining the authority of a maxim, which in this day is never questioned: *Interest reipublicae ut sit finis litium.*

W. S. S.

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THE DITCHES AND WATERCOURSES ACT — CONSTRUCTION OF DITCHES—SCOPE OF THE ACT.—An important decision regarding the scope of the *Ditches and Watercourses Act*,[1] has been delivered by the Drainage Referee in *Re Watt and Packard*,[2] on an appeal to him, as the final authority, from an award made by a civil engineer.

Under the Act, "the owner of land who requires the construction of a ditch thereon" may, after the preliminary proceedings required by the Act, file with the clerk of the municipality a requisition for the attendance of the engineer, appointed by by-law of the municipality to carry out the provisions of the Act. The purpose of the Act is to enable an individual owner to drain his land and to secure an outlet, and the duty of the engineer is to determine the location of the drain and to apportion the work. In this case the applicant did not ask for the construction of a ditch on his land, but for the diversion of a ditch on the lands of owners upstream from his own lands, and this diversion was what the engineer assumed to make in his award. The limit of one hundred and fifty rods from the sides and point of commencement of the ditch mentioned in section 6[3] of the Act has nothing to do with the location of the drain but only with the lands which may be liable for its construction. In this case the engineer apparently assumed that he was dealing with a situation, or providing drainage for an area, instead of for the lands of the owner who initiated proceedings.

[18] *Street* v. *Simcoe* (1862), 12 U.C.C.P. 284; *Canadian Pacific Railway* v. *Cornwallis* (1890), 7 Man. R. 1; afterwards affirmed by the Supreme Court, (1891), 19 Can. S.C.R. 702; *City of London* v. *Watt*, *supra*; *Sifton* v. *Toronto*, [1929] S.C.R. 484; *Maskell* v. *Horner*, [1915] 3 K.B. 106 at p. 124.

[19] (1797), 7 Term. Rep. 269.

[20] (1833), 9 Bing. 644.

[1] R.S.O. 1927, c. 316.

[2] (1930), 37 O.W.N. 327.

[3] Section 6 reads: "The land, the owners of which may be made liable for the construction of a ditch under this Act, shall be that lying within one hundred and fifty rods from the sides and point of commencement of the ditch."

One of the owners took exception to the award and appealed to the Drainage Referee to set it aside. The Referee has granted leave to appeal only in those cases where a question of law is involved, and the question of law in this case was whether or not the engineer had the right to go upstream from the lands of the applicant and determine how other owners should drain their lands. The Referee held that the engineer had no such authority under the Act, and the award was accordingly set aside.

This is the first decision on this particular point of law, and it emphasizes that the underlying principle of the Act is to enable a land owner to construct a drain and continue it to a sufficient outlet, and to require other owners to contribute to the work if their lands are affected.

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THE DITCHES AND WATERCOURSES ACT—ANOTHER VIEW OF THE SCOPE OF THE ACT.—The decision of the Referee in the case of *Re Watt and Packard*,[1] appears to limit the powers of the engineer more than is contemplated by the Act, if the Act actually means what it says, viz., that an engineer has authority to go one hundred and fifty rods from the commencement and the sides of the ditch. From this wording it would seem that an engineer appointed under the Act to improve drainage conditions would have authority to provide for a different lay-out within the one hundred and fifty rod limit.

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[1] (1930), 37 O.W.N. 327.