Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dow and others v. *Black and others, from the Supreme Court of New Brunswick; delivered Friday, March 5th*, 1875.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.
SIR MONTAGUE E. SMITH.

THIS is an Appeal against an order of the Supreme Court of the province of New Brunswick, making absolute a rule nisi that had been granted, and ordering that "the assessment made "upon the lower district of the parish of St. "Stephen, in the county of Charlotte, under "and by virtue of a warrant of assessment "issued to the assessors of the parish of St. "Stephen by the general sessions of the "peace in and for the county of Charlotte "on the 14th day of April 1871, directing the "said assessors to assess upon the lower district "of St. Stephen the sum of 958 dollars and "50 cents for payment of interest upon "debentures issued under the Act of Assembly, "33rd Victoria, cap. 47, intituled 'An Act to "'authorize the issuing of debentures on the "'credit of the lower district of the parish of "'St. Stephen, in the county of Charlotte,' "and the said warrant and all proceedings "upon which the said assessment is based be "absolutely quashed."

The ground upon which the majority of the judges constituting the Court proceeded, was that the Act of Assembly mentioned in the order

was itself null and void, inasmuch as it had been passed by the provincial legislature of New Brunswick, which, on the true construction of the Imperial Statute, "The British North America Act, 1867," had no power to make such a law.

It is necessary, in order to deal with the arguments which have been addressed to their Lordships upon this Appeal, to consider shortly under what circumstances this question arose. On the 10th of June 1867, and before the imperial statute just mentioned came into operation, the then legislature of New Brunswick passed an Act, by the 6th section of which it was provided,—"That the sum of 5,000 dollars "per mile, and not exceeding in the whole "17,500 dollars, should be granted for the "construction of a branch line of railway "to the boundary line of the state of Maine, "from the railway leading from St. Andrews "to Woodstock, to such person or persons or "body corporate as shall construct the said "road, upon its being proved to the satisfaction "of the Governor in Council that a good and "sufficient railway is constructed therein within "four years from the passing of this Act, and "in good working order for travel and traffic." That Act was followed by another passed a few days afterwards, viz.; on the 17th June, by which certain persons were made and constituted a body corporate under the name of the Houlton Branch Railway Company, and were authorised to make and construct a railway running from the intersection of the Woodstock line of railway with the New Brunswick and Canada Railway, being a place known as Debec, to the boundary line of the state of Maine and the province of New Brunswick. The 5th section of that Act contains the following provisions—"The president, "directors, and company for the time being are

" hereby authorised and empowered, by themselves or their agents, to exercise all the " powers herein granted to the corporation " for the purpose of locating and completing " said railroads and branches, and for the " transportation of persons, goods, and property " of all descriptions; and all such power and " authority for the management of the said " corporation as may be necessary and proper " to carry into effect the objects of this Act, to " purchase or hold within or without the province lands, materials, engines, cars, and " other necessary things in the name of the " corporation, for the use of the said road and " for the transportation of persons, goods, and " property of all descriptions, and to make " such connection with other railway companies " within or without the province, either by " leasing their road to other corporation or " corporations, on such terms and for such " length of time as may be agreed upon, or by " consolidating the stock of their road with " that of other railway companies or companies, " upon such terms as may be agreed upon;" and gives other powers to the new Company.

Hence, on the 7th July 1867, when "the " British North American Act, 1867," came into operation, the Houlton Branch Railway Company had been duly incorporated, and by the Act of a competent legislature had been duly authorised to construct a railway from Debec to the frontier that divides the province from the the state of Maine. Some years afterwards the Act, the validity of which is now called in question, being the 33rd Victoria, cap. 47., was passed.

Its preamble recites that the town of Houlton, which is in the state of Maine, had offered the Houlton Branch Railway Company a bonus of 30,000 dollars, upon condition that the said Houlton Branch Railway Company should con-

struct and suitably equip with necessary rolling stock a railway from the town of Houlton aforesaid to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec station, before the 1st of January 1872; that the Houlton Branch Railway Company were willing to undertake the building and construction of such connecting line of railway, &c., and to have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid within the time aforesaid, upon condition that the town of St. Stephen,—that being a town in the province of New Brunswick,—should give to the said Houlton Branch Railway Company a bonus of 15,000 dollars; and that the inhabitants of that portion of the said town of St. Stephen called the lower district, which was afterwards described, were willing and desirous to give the said sum for the said purpose, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable. It clearly appears from these recitals that there was a desire, both on the part of the inhabitants of Houlton, in the state of Maine, and the inhabitants of that portion of St. Stephen in the province of New Brunswick, or some of them, that this line of communication between the two places should be completed; that its completion was considered to be for the benefit of both communities; and that a portion, at all events, of the inhabitants of that district of St. Stephen, in order to effect the arrangement, were willing to be taxed for the purpose of raising the bonus of 15,000 dollars required by the Houlton Branch Railway Company. Accordingly the Act of Assembly provided for the carrying out of the arrangement in this way: It required the

Houlton Branch Railway Company to give reasonable and proper security to the justices of the peace at general or special sessions for the completion of the work; and provided that thereupon the 15,000 dollars should be raised by the issue of debentures to that amount payable 20 years after date, and carrying interest in the meantime. It further provided that the real and personal property of all persons resident in the lower district of St. Stephens, as defined by the Act, should be assessed in order to raise the interest on such debentures, and the principal when the latter should become due. But it also provided that the Act should not be in force until it had been accepted and approved by two-thirds at least of the ratepayers liable to be assessed thereunder, whose assent was to be obtained by the machinery thereby provided, and, when ascertained, was to be certified to the Governor in Council,—that is, the Governor-General in Council of Canada,—who was to announce the same by proclamation in the Royal Gazette. The Act in question was never disallowed by the Governor General of Canada; all the formalities prescribed by it appear to have been complied with, and the assent of the requisite proportion of ratepayers to have been duly notified in the Gazette.

In this state of things it is to be presumed that the minority of the ratepayers which dissented from the arrangement was unwilling to pay the rate assessed upon them in order to meet the interest on the debentures, and raised this question before the Supreme Court. That Court issued a *certiorari* to remove the proceedings, and, upon the return of the *certiorari*, made the order *nisi*, which the order under appeal has made absolute.

The grounds upon which the Supreme Court has pronounced this Act to be *ultra vires* of

the local legislature are entirely derived from sub-section *a.* of the 10th Article of section 92 of the Imperial Statute. Sections 91 and 92 purport to make a distribution of legislative powers between the Parliament of Canada and the provincial legislatures, section 91 giving a general power of legislation to the Parliament of Canada, subject only to the exception of such matters as by section 92 were made the subjects upon which the provincial legislatures were exclusively to legislate. The 10th article of section 92 among those subjects enumerates local works and undertakings other than such as are of the following classes. Then follow the exceptions, and the first of these is, lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province. A question touching the construction of this sub-section has been raised both here and in the Court below. The Respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of Canada are all railways which extend either beyond the limits of the province into other provinces within the Dominion or into foreign countries. On the other hand, the Appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-section *b.*, it will be found to apply only to railways extending beyond the limits of one province into another province of the Dominion.

Their Lordships do not think it necessary to determine upon the present Appeal this question of construction, or to affirm that if all the legislation that has taken place, including that for the incorporation of the Houlton Rail-

way Company, and empowering it to make a railway to the frontier or beyond it, had taken place after the Imperial Statute of 1867 had come into operation, such legislation would have been within the powers of the provincial legislature. They do not think it necessary to determine that question, because they are of opinion that the validity of the Act of Assembly, the 33 Vict. cap. 47, does not depend upon the sub-section in question. They are of opinion that the Act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the Company with its powers, and the construction of the railway up to the frontier, and therefore so far as any legislative power within the British dominions could determine that construction, had been already authorised by the Acts passed before the Imperial Statute came into operation. The Act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of Maine. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of Houlton, in the state of Maine, for the construction of the railway on the terms of the bonus of $30,000 which had been offered to them from Houlton, there would have been no legal objection to their carrying out that arrangement. The Act was merely one which enabled the majority of the inhabitants of the parish of St. Stephen to raise by local taxation a subsidy designed to promote a work which they considered to be the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from

a private Act authorising the trustees or guardians of a minor to let a warehouse to such a company. Supposing the work, instead of being a railway, had been a canal, and the inhabitants had been authorised to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject? Their Lordships are therefore of opinion that no objection to the validity of the Act is to be found in the sub-section in question.

Another question has been raised for the first time at this bar (for the objection does not appear to hav ebeen taken in the colonial court), whether there was power in the provincial legislature to pass an Act by which such an assessment as this could be imposed on the town of St. Stephen.

It has been argued that whereas the 91st section reserves to the Parliament of Canada exclusive power of legislation in respect of, amongst other subjects, "The raising of money by any mode or system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th articles of the 92nd section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorises direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province.

Their Lordships see no ground for giving so limited a construction to this clause of the Statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3rd article of sec. 91 is to be reconciled with the 2nd article of sec. 92, by treating the former as empowering the supreme legislature to raise revenue by any

mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes. Their Lordships are further of opinion, with Mr. Justice Fisher, the dissentient judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of sec. 92 of the Imperial Statute; and therefore one which the provincial legislature was competent to pass, unless its subject matter could be distinctly shown to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of the *L'Union St. Jacques de Montreal* v. *Dame Julie Belisle* decided on the 8th of July 1874.

On these grounds their Lordships will humbly advise Her Majesty that the order under Appeal be reversed, and that in lieu thereof an order be made discharging the rule nisi, which had been granted in Trinity Term, with costs. The Appellants will also have their costs of this Appeal.