Compilation of primary documents to assist in interpreting Administration of Justice and Courts in Section 92(14) of the *Constitution Act, 1867*

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92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

*14. **The Administration of Justice in the Province**, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.*

PART 1:

Section 92(14) in Successive Drafts, from the Quebec Resolutions, 1864 to the *Constitution Act, 1867*

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The Quebec Resolutions (1864)[1]

October 12, 1864: Notes on the Division of Powers

> Shall the [*illegible*] provided items be committed to the general government or to the local?
>
> General
>
> [a list of items follows, including]
>
> Administration of justice—Criminal
>
> Doubtful
>
> Civil Law?
> [*illegible*]

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Notes on the Division of Powers, October 12th, 1864 (MG 24, B 40, Vol. 21, p. 3764-3766). Click HERE.)

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October 12, 1864: Notes on the Division of Powers with Revisions

(**Note:** The left column seems to be federal powers, whereas the right column seems to be provincial powers. Neither column, however, is explicitly listed as being federal/local.)

> [Left column, a list of items follows, including]
>
> ~~*Adm. of Justice.*~~ *Criminal Law*
>
> [Right column, a list of items follows, including]

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[1] All transcriptions from the Quebec Resolutions are from *Charles Dumais, The Quebec Resolutions: Including Several Never-Published Preliminary Drafts by George Brown and John A. Macdonald, and a Collection of all Previously-Published Primary Documents Relating to the Conference, October 10, 1864-October 29th, 1864* (CCF, 2021).

> *Administration of Justice*
> *Civil Laws*

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Notes on the Division of Powers, October 12th, 1864 (MG 24, B 40, Vol. 21, p. 3768-3769). Click HERE.)

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October 21, 1864: Amended Federal Division of Powers

> That it shall be competent for the General Legislature to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England) and especially Laws respecting:–
>
> [a list of powers follows]
>
> 26. The Criminal Law ~~(except the Constitution of Courts of Criminal Jurisdiction.)~~

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Amended Federal Division of Powers, October 12th, 1864 (MG 24, B 40, Vol. 21, p. 3746). Click HERE.)

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October 24, 1864: Amended Provincial Division of Powers

> That it shall be competent for the local legislature to make laws respecting:–
>
> [a list of powers follows]
>
> 11. The Administration of Justice, and the constitution, maintenance and organization of the Courts, both of Civil and Criminal Jurisdiction.

(Source: George Brown Papers, Drafts of the Quebec Resolutions, Amended Provincial Division of Powers, October 24th, 1864 (MG 24, B 40, Vol. 21, p. 3747). Click HERE.)

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October 26, 1864: Working Draft No. 1

> That it shall be competent for the Local Legislatures to make Laws respecting: --
>
> [a list of powers follows]
>
> 11. The Administration of Justice, and the Constitution, maintenance and organization of the Courts–both Civil and Criminal Jurisdiction.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 1, October 26th, 1864, MG 26 A, Vol. 46, pp. 18164-18168. Click HERE.)

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October 26-27, 1864: Working Draft No. 2

18148

> ~~That it shall be competent for the Local Legislatures to make laws respecting:–~~
>
> [a list of powers follows]
>
> ~~11. The Administration of Justice, and the Constitution, maintenance and organization of the Courts – both Civil and Criminal Jurisdiction~~

18151

> ~~*That it shall be competent for the Local Legislatures to make Laws respecting:–*~~
>
> [a list of powers follows]
>
> [*renumbered to* 17] ~~11.~~ The Administration of Justice, ~~and~~ [*including*] the Constitution, maintenance and organization of the Courts – both of Civil and Criminal Jurisdiction [*and including also the procedure in Civil matters*]

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 2, October 26th-27th, 1864, MG 26 A, Vol. 46, pp. 18142-18155. This text is found on pp. 18148 & 18151. Click HERE.)

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October 27, 1864: Working Draft No. 3

> The Local Legislatures shall have power to make Laws respecting the following subjects:
>
> [a list of powers follows]
>
> The Administration of Justice, including the Constitution, maintenance and organization of the Courts -- both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil matters.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 3, October 27th, 1864, MG 26 A, Vol. 46, pp. 18156-18158. This text is found on p. 18157. Click HERE.)

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October 27, 1864: Working Draft No. 4

> *[43.]* ~~That~~ the Local Legislatures shall have power to alter or amend their constitution from time to time.
>
> [a list of powers follows]
>
> *[17.]* The Administration of Justice, including the Constitution, maintenance and organization of the Courts -- both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil matters.

(Source: John A. Macdonald, Drafts of the Quebec Resolutions, Working Draft No. 4, October 27th, 1864, MG 26 A, Vol. 46, pp. 18136-18138. This text is found on p. 18137. Click HERE.)

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March 14, 1865: Quebec Resolutions as adopted in the Legislature of the Province of Canada

> 43. The Local Legislature shall have power to make laws respecting the following subjects: --
>
> [a list of powers follows]
>
> 17. The Administration of Justice, including the Constitution, maintenance and organization of the Courts, -- both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil matters

(Source: John A. Macdonald, The Quebec Resolutions, 1864 as Adopted in the Legislature of the Province of Canada, Vol. 46, pp. 18210-18216. This text is found on pp. 18213-18214. Click HERE.)

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The London Resolutions (1866)

December 4, 1866: Version No. 1, Copy 1

> 43. The Local Legislatures shall have power to make Laws respecting the following subjects:
>
> [a list of powers, numbered 1 - 16, follows]
>
> 17. The Administration of Justice, including the Constitution, maintenance and organization of the Courts— both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil Matters.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 1, Copy 1, December 4th, 1866 (MG 26 A, Vol. 46, pp. 18184-18190). This text is found on p. 18187. Click HERE.)

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December 13-14, 1866: Version No. 2, Copy 1

This resolution is not changed in the second working draft.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 2, Copy 1, December 13-14th (MG 26 A, Vol. 46, pp.18176-18183). Click HERE.)

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December 14, 1866: Version No. 3, Copy 1

This resolution is not changed in the second working draft.

(Source: John A. Macdonald Fonds, Drafts of the London Resolutions – Version No. 3, Copy 1, December 14th, 1866 (MG 26 A, Vol. 46, pp. 18197-18209). Click HERE.)

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December 28, 1866: Final Version

> 41. The Local Legislatures shall have power to make laws respecting the following subjects :—
>
> [a list of powers, numbered 1 - 16, follows]
>
> 17. The administration of Justice, including the constitution, maintenance, and organization of the Courts, both of Civil and Criminal jurisdiction, including also the procedure in civil matters.

(Source: London Resolutions as found in Joseph Pope (ed), *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co. Ltd., 1895) at 98-110. This text is found on pp. 105-106. Click HERE.)

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Constitution Act, 1867

n.d. (probably early January, 1867): Rough Draft

> 42. The Legislatures shall have exclusive power to make laws respecting the following subjects, with the exception of Agriculture and Immigration, in regard to which Parliament shall have concurrent jurisdiction.

> [a list of powers, numbered 1 - 16, follows]
>
> 17. The administration of justice, including the constitution, maintenance, and organisation of the Courts—both of Civil and Criminal Jurisdiction, and including also the procedure in Civil Matters.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Rough Draft, n.d. (MG 26, A, Vol. 48, pp. 18768-18793). This text is found on pp. 18783-18785. Click HERE.)

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January 23, 1867: 23rd January Draft, Copy 2

> 37. In each Province the Superintendent may, by and with the Advice and Consent of the Provincial Assembly, make Ordinances in relation to Matters coming within the Classes of Subjects next herein-after enumerated, which Ordinances exclusively (subject to the Provisions of this Act) shall in relation to those Matters have the Force of Law in and for the Province, that is to say,--
>
> [a list of powers, numbered 1 - 13, follows]
>
> (14). The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts:

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 23rd January Draft, J.W. Ritchie's Copy, January 23rd, 1867 (MG 26, A, Vol. 48, pp. 18971-18988). This text is found on pp. 18980-18982. Click HERE.)

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January 30, 1867: 1st Draft

> *Only a partial copy survives of this draft, consisting of the first twenty sections of the draft Bill. Therefore, the wording of the relevant section in this draft is unknown.*

(Source: National Archives of Canada. John A. Macdonald Fonds, Drafts of the *British North America Act, 1867* – 1st Draft, January 30th, 1867 (MG 26 A, Vol. 48, pp. 19017-19021. Click HERE.)

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January 31, 1867: 2nd Draft

> 54. In each Province, the Lieutenant-Governor may, by and with the advice and consent of the Legislature, make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated: --
>
> [a list of powers, numbered 1 - 13, follows]

> (14). The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 2nd Draft, January 31st, 1867 (MG 26, A, Vol. 48, pp. 19022-19039). This text is found on pp. 19036-19037. Click HERE.)

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n.d. (between Jan. 31 & Feb. 2, 1867): 3rd Draft, Early Copy

> 66. In each Province, the Lieutenant-Governor may, by and with the advice and consent of the Legislature, make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 - 13, follows]
>
> (14). The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 3rd Draft, Early Copy, n.d. (MG 26, A, Vol. 48, pp. 19101-19124). This text is found on pp. 19119-19120. Click HERE.)

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February 2, 1867: 3rd Draft, Revised Copy

> 66. In each Province, the Lieutenant-Governor may, by and with the advice and consent of the Legislature, make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 - 13, follows]
>
> (14). The administration of justice in the Province, including the constitution, maintenance, and organisation of ~~Provincial~~ *[the]* Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 3rd Draft, Revised, February 2nd, 1867 (MG 26, A, Vol. 48, pp. 19125-19148).This text is found on pp. 19143-19144. Click HERE.)

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n.d. (1867): 4th Draft, Early Version

This draft does not discuss Section 92(14).

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Early Version, n.d. (MG 26, A, Vol. 49/1, pp. 19150-19181). Click HERE.)

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n.d. (1867): 4th Draft, Later Version

This draft does not discuss Section 92(14).

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Later Version, n.d. (MG 26, A, Vol. 49/1, pp. 19337-19367).Click HERE.)

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n.d. (1867): 4th Draft, Later Version, Revised Copy

> ~~93~~. In each Province, the Legislature may make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 - 13, follows]
>
> (14). The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Later Version, Revised Copy, n.d. (MG 26, A, Vol. 49/1, pp. 19399-19450). This text is found on pp. 19434-19435. Click HERE.)

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n.d. (1867): 4th Draft, Final Version

> 90.—In each Province, the Legislature may make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 - 13, follows]
>
> (14). The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – 4th Draft, Final Version, n.d. (MG 26, A, Vol. 49/2, pp. 19614-19664). This text is found on p. 19648-19649. Click HERE.)

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Local Constitutions Drafts Package (1866-1867)

n.d.: Early Package

> ~~6.~~ *[7]* The Local Legislatures shall have power to make laws respecting the following subjects:--
>
> [a list of powers, numbered 1 - 16, follows]
>
> 17. The administration of Justice, including the constitution, maintenance, and organization of the Courts, both of Civil and Criminal jurisdiction, and including also the procedure in civil matters.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Early Package, n.d. (MG 26, A, Vol. 49/2, pp. 19451-19461). This text is found on pp. 19452-19453. Click HERE.)

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n.d.: Early Package with Reilly's Notes

> *[93]* ~~19~~ ~~106. —~~In each Province, ~~the Lieutenant-Governor may, by and with the advice and consent of the~~ Legislature *[may]* make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 – 13, follows]
>
> (14.) The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Early Package with Reilly's Notes, n.d. (MG 26, A, Vol. 49/2, pp. 19462-19480). This text is found on p. 19466-19467. Click HERE.)

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n.d.: Revised Package

> 106.—In each Province, the ~~Lieutenant-Governor may, by and with the advice and consent of the~~ Legislature, *[may]* make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 – 13, follows]
> (14.) The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, n.d. (MG 26, A, Vol. 49/2, pp. 19500-19518). This text is found on pp. 19506-19507. Click HERE.)

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n.d.: Revised Package, Copy 4

> 106.—In each Province, ~~the Lieutenant Governor may, by and with the advice and consent of~~ the Legislature, [*may]* make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 – 13, follows]
>
> (14.) The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, Copy 4, n.d. (MG 26, A, Vol. 49/2, pp. 19576-19594). This text is found on pp. 19582-19583. Click HERE.)

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n.d.: Revised Package, H.B. Morse's Copy

> 106.—In each Province, the ~~Lieutenant Governor may, by and with the advice and consent of~~ ~~the~~ Legislature, *[may]* make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated:--
>
> [a list of powers, numbered 1 – 13, follows]
>
> (14.) The administration of justice in the Province, including the constitution, maintenance, and organisation of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.

(Source: John A. Macdonald Fonds, Drafts of the British North America Act, 1867 – Local Constitutions Drafts Revised Package, H.B. Morse's Copy, n.d. (MG 26, A, Vol. 49/2, pp. 19595-19613). This text is found on pp. 19601-19602. Click HERE.)

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PART 2:

Debates on Section 92(14) in the *Confederation Debates in the Province of Canada* (1865-1866)

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Province of Canada (1865)

February 6, 1865: Antoine-Aimé Dorion, speaking in the Legislative Assembly of Canada (click HERE to view a PDF of the 1865 edition of the Confederation Debates, then scroll to p. 267)[2]

> There is a provision that the nomination of the judges of the superior courts shall be vested in the General Government, but it would seem that the constitution of the courts is to be left to the local governments; and I put the question, What does this mean? Do you mean that the local governments are to establish as many courts as they please, declare of how many judges they will be composed, and that the General Government will have to pay for them? Is a local government to say, here is a court with three judges; we want five, and those five must be appointed and paid by the General Government? I have received no answer to this and to several other questions. I can well understand what is meant by the regulation of the law of divorce; but what is meant by the regulation of the marriage question? Is the General Government to be at liberty to set aside all that we have been in the habit of doing in Lower Canada in this respect? Will the General Government have the power to determine the degree of relationship and the age beyond which parties may marry, as well as the consent which will be required to make a marriage valid?
>
> **Some Hon. Members**—Hear, hear.
>
> **Antoine-Aimé Dorion [Hochelaga]**—Will all these questions be left to the General Government? If so, it will have the power to upset one of the most important portions of our civil code, and one affecting more than any other all classes of society. The adoption, for instance, of the English rule, whereby females at the age of twelve, and males at the age of fourteen, can contract a valid marriage without the consent of parents, tutors or guardians, would be looked to by the mass of the people of Lower Canada as a most objectionable innovation in our laws, as would also any provision to allow such marriages to take place before any common magistrate without any formality whatsoever.

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[2] Please note that there is a difference between the formatting of the original and that of the text in these reports. That is because the text portion comes from our publication, *The Confederation Debates in the Province of Canada* (CCF, 2022), which modernized the formatting of the text to current *Hansard* style. The content remains the same. However, if the user wishes to see the original, the hyperlink will bring them to the 1865 edition.

Some Hon. Members—Hear, hear.

Antoine-Aimé Dorion [Hochelaga]—Yet is there no danger that such measures might be carried, when you see the different feelings existing on these questions among the people of the different provinces?

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Hector-Louis Langevin, February 21, 1865, p. 387

The honorable member should have observed that by the powers conferred on the local governments, Lower Canada retains all her civil rights, as prescribed by the 17th paragraph of article 43, as follows:—

The administration of justice, including the constitution, maintenance and organization of the courts, both of civil and criminal jurisdiction, and including also the procedure in civil matters.

This is a privilege which has been granted to us and which we shall retain, because our civil laws differ from those of the other provinces of the Confederation. This exception, like many others, has been expressly made for the protection of us Lower Canadians. It was our desire, as the representatives of Lower Canada at the Conference, that we should have under the control of our Local Legislature the constitution and organization of our courts of justice, both civil and criminal, so that our legislature might possess full power over our courts, and the right to establish or modify them if it thought expedient. But, on the other hand, the appointment of the judges of these courts had to be given, as it has been, to the Central Government, and the reason of this provision is at once simple, natural and just.

In the Confederacy we shall have a Central Parliament and local legislatures.—Well, I ask any reasonable man, any man of experience, does he think that, with the ambition which must naturally stimulate men of mark and talent to display their powers on the theatre most worthy of their talents, these men will consent to enter the local legislatures rather than the Federal Parliament? Is it not more likely and more reasonable to suppose that they would rather appear and shine on the largest stage, on that in which they can render the greatest service to their country, and where the rewards of their services will be the highest?

Yes, these men will prefer to go to the Central Parliament, and among them there will be doubtless many of our most distinguished members of the legal profession. The members of this profession are often accused of going into Parliament for the purpose of monopolizing the representation. If this be the case at the present time, is it not to be supposed that they will do the same thing under Confederation? Were the appointment of the judges left to the local legislatures, the local governments would be subjected to a pressure which might be brought to bear upon them by the first advocate who would attain influence in the Local Legislature.

To get rid of an inconvenient member who might have three or four followers, the Local Government would have to take

- *(p. 388)*

this troublesome advocate of the second, third or fourth order of talent, and place him on the bench, whilst by leaving these appointments to the Central Government, we are satisfied that the selection will be made from men of the highest order of qualifications, that the external and local pressure will not be so great, and that the Government will be in a position to act more freely. It may be remarked, in passing, that in the proposed Constitution there is an article which provides that the judges of the courts of Lower Canada shall be appointed from the members of the bar of that section.

This exception was only made in favor of Lower Canada, and it is a substantial guarantee for those who fear the proposed system. Besides, the honorable member for Hochelaga [Antoine-Aimé Dorion], who fancies that he sees danger in the powers given to the Central Government, knows by experience, as having himself been a minister of the Crown, that in respect of every appointment of a judge the Cabinet always consults the ministers for the section in which the appointment is to be made, and accepts their choice.

The same practice would necessarily be followed by the Central Government, who would be forced to respect it, because behind the ministers from each section would be found the members from that section, and behind our ministers for Lower Canada will be found the sixty-five members whom we shall have sent to represent and protect our interests in the Federal Parliament. It is then advantageous, and there could be no danger in the provision that the judges should be appointed by the Central Government; indeed, it is for our interest, and the interest of all, that it should be so. And although it may be looked upon as a secondary consideration, yet it may as well be mentioned now, that by leaving the appointment of our judges to the Central Government, we are the gainers by one hundred thousand dollars, which will have to be paid for their services by the central power. This consideration will perhaps have some weight with the honorable member for Hochelaga [Antoine-Aimé Dorion], who makes such an outcry to alarm the people that we shall be obliged to have recourse to direct taxation to defray the expenses of our Local Legislature. Notwithstanding the advanced hour of the evening, I cannot pass over in silence another observation made by the honorable member, and I beg he will accord me his undivided attention at the present moment.

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Christopher Dunkin, February 27, 1865, p. 508

Christopher Dunkin [Brome]—There is another matter, intimately connected with this, to which also I must pass on. I said a little while ago, that the United States system was one of exceeding skill as regards the constitution of the judiciary. De Tocqueville, and every other writer who has treated of the United States, has awarded it this praise; and they are right. Each state has its own judiciary; and the United States have theirs; and the functions of the two are most carefully laid down, so that no serious trouble has ever arisen from their clashing. The judiciary of the United States is undoubtedly the most conservative and strongest bulwark of their whole system.

Some Hon. Members—Hear, hear.

Christopher Dunkin [Brome]—What then are we going to do on this head? Just as we have forgotten all about difficulties where the seat of government is concerned, so here. We are not quite sure whether we are going to have any distinctively federal judiciary or not. There is a power given

to have one—there may be one; but we are expressly told that perhaps there will not be. But what are we told on the other hand? Oh, there is no doubt whatever, according to the resolutions laid before us—no doubt whatever—that whether we have a Federal judiciary or not, the provincial judiciaries are to be a sort of joint institutions. And a very curious kind of co-partnership the Federal Government and the provincial governments—the Federal Legislature and the provincial legislatures—are thus to have in the judicial institutions of the country, generally. All the courts, judges, and other judicial officers of the provinces are to be, for all manner of federal purposes, servants of the Federal Government. There is an old saying, "No man can serve two masters."

But all these unfortunate courts, and ash their officers, and specially all their judges, must serve two masters, whether they can or not. All the Superior Court judges—and, in Upper Canada, the judges of the County Courts—are to be named and paid by the Federal authority, and are only to be removable by the Federal authority, on a joint address of the two Houses of the Federal Parliament. But, on the other hand, the provinces are to constitute the courts—

Some Hon. Members—Hear, hear.

Christopher Dunkin [Brome]—are to say what their functions shall be—what the number of the judges—how they are to perform their functions—are to give them more work or less—to make their work pleasant or disagreeable, high work or dirty work, as they like.

Some Hon. Members—Hear, hear.

Christopher Dunkin [Brome]—In this way they can wrong a judge just as much as they please; the only check on them being the power of the Federal Government to disallow their legislation. The Federal Government, forsooth, names the judges, and pays them, and alone can remove them. Does that take away the power from the local parliaments and governments, the power to change the constitution of the court, to change it in the way most distasteful to those judges, to legislate away the court altogether, to legislate down its functions in such a manner as may drive the judge to resign? And we are told there will be no clashing!

Some Hon. Members—Hear.

Christopher Dunkin [Brome]—I have no doubt the Hon. Attorney General East [George-Étienne Cartier] thinks he could manage courts on this system; could have one authority constituting the courts and another naming and removing the judges, and have the system work harmoniously. He may think so. I do not. I am satisfied if ever the scheme is tried, it will be found that it will not work. Human nature is human nature; and here is a first-rate lot of matters to quarrel over, and to quarrel over seriously.

Why, there is even a special refinement of confusion as to criminal matters. Criminal procedure is to be federal; civil procedure, provincial; criminal legislation, proper, is to be federal; but with a most uncertain quantity of what one may call legislation about penalties, provincial; civil rights, in the main, provincial; but with no one can tell how much of federal interference and over-ruling, and all with courts provincial in constitution, but whose judges hold by federal tenure and under federal pay.

I pity the poor man who is at once a criminal judge and a civil judge. Between the clashing of his

masters and the clashing

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of his book authorities, he had better mind what he is about, with the painful doubt rising at every turn whether provincial legislation may not be overridden by federal legislation.

His province may well have legislated on what it holds a local matter, while the Federal Parliament may have legislated on it, thinking it a federal matter. Anywhere there may well be some bit of federal legislation contradicting something in a local statute. And do our resolutions say that the federal statute shall always override the local statute? No, only in cases where there is concurrent jurisdiction. And yet our judge who is to decide these nice questions is paid by one power and removable by that power, and may have his functions taken away and be persecuted to the death by the other. He will have a bad time of it.

Well, Mr. Speaker, I have so far been dealing with matters, nearly all of which may be said to be general to every part of this great Confederacy; but now I must ask the attention of the House for a few moments, to some sources of misunderstanding which may more particularly make trouble, unless human nature ceases to be human nature within this Canada of ours. There are in Canada, and especially in Lower Canada, the two differences of language and faith; and there is no doubt that the real reasons which have rendered, or are supposed to have rendered necessary this plan of a sort of Federal Government, are referable to this fact. This machinery is devised, on purpose to meet a possible or probable clashing of races and creeds in Canada, and particularly in Lower Canada.

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Joseph Cauchon, March 2, 1865, p. 575

Joseph Cauchon [Montmorency]—I am not of the same opinion as the hon. member for Brome [Christopher Dunkin], who pretends to see in those clauses that the judges would be under two masters at the same time. If they could possibly be controlled at all, it would be by the Federal Government, which alone will appoint them, pay them, and have the power of dismissing them in certain cases. There is no anomaly here, because one thing follows another; all are linked together and harmonize perfectly. If anything could possibly arise, it would be danger. However, so far as we can see, there will be no danger in the administration of justice—the question of veto, and reserve with regard to legislation, being a totally different thing, and suggesting considerations of a different nature.

But here is the point to which I wish to draw the attention of this House. Among all the things guaranteed to Lower Canada in the Constitution, and in fact to all the provinces, we find their own civil laws. Lower Canada has been so tenacious of its civil code, that it is laid down in the project before us that the Federal Parliament shall not even be able to suggest legislation by which it may be affected, as it will have the right to do for the other provinces—The reason is obvious; the civil laws of the other provinces are nearly similar; they breathe the same spirit and the same principles; they spring from the same source and the same ideas. But it is not so with regard to those of Lower Canada, with their origin from almost entirely Latin sources; and we hold to them as to a sacred legacy; we love them because they suit our customs, and we find under the protection for our

> property and our families.

Joseph Cauchon, p. 576

> **Joseph Cauchon [Montmorency]**— […] Nevertheless, whatever the intentions of the delegates, their project does not define the attributes of this Federal court; and as there is some apprehension on this point, I would wish to put the following question to the Government:—If this Court of Appeal be established, will it be a purely civil tribunal, or a constitutional one? Or will it be at the same time civil and constitutional? If it be a civil tribunal, will it have jurisdiction over Lower Canada?

George-Étienne Cartier, p. 576

> **George-Étienne Cartier [Montreal East, Attorney-General East]**—[…] Accordingly, when we have lived some years under the Federal regime, the urgent need of such a Court of Appeal with jurisdiction in such matters will be felt, and, if it is created, it will be fit that its jurisdiction should extend to civil causes which might arise in the several Confederate Provinces, because it will necessarily be composed of the most eminent judges in the different provinces, of the jurists whose reputation stands highest, of men, in short, profoundly skilled in the jurisprudence of each of the provinces which they will respectively represent. Well, if this court is called upon, for instance, to give final judgment on a judgment rendered by a Lower Canada court, there will be among the judges on the bench men perfectly versed in the knowledge of the laws of that section of the Confederation, who will be able to give the benefit of their lights to the other judges sitting with them.
>
> I must observe to my hon. friend the member for Montmorency [Joseph Cauchon], that he disparages the civil law of Lower Canada in the estimate he makes of it; but he need be under no uneasiness on that head. He should not forget that if, at this day, the laws of Lower Canada are so remarkably well understood in Her Majesty's Privy Council, it is because the code of equity, which is a subject of deep study and familiar knowledge among the members of the council, is based on Roman law, as our own code is. All the eminent judges, whether in England, in the Maritime Provinces or in Upper Canada, are profoundly versed in those principles of equity, which are identical with those of our civil code.

François Evanturel & George-Étienne Cartier, p. 576

> **François Evanturel [Quebec County]**—I acknowledge the frankness which the Hon. Attorney General for Lower Canada [George-Étienne Cartier] has evinced in giving the explanations to the House which we have just heard; and I trust that the honorable minister will permit me to ask him one question. Paragraph 32 gives the Federal Government the power of legislating on criminal law, except that of creating
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> - *(p. 577)*
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> courts of criminal jurisdiction, but including rules of procedure in criminal cases. If I am not mistaken, that paragraph signifies that the General Government may establish judicial tribunals in the several Confederate Provinces. I should much like to be enlightened on this head by the Hon.

> Attorney General for Lower Canada [George-Étienne Cartier].
>
> **George-Étienne Cartier [Montreal East, Attorney-General East]**—I am very glad that the honorable member for the County of Quebec [François Evanturel] has put this question, which I shall answer as frankly as that of the hon. member for Montmorency [Joseph Cauchon]. My hon. friend will find, if he refers to the paragraph which he has cited, that it gives the General Government simply the power of providing for the execution of the laws of the Federal Government, not of those of the local governments.

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Province of Canada (1866)

August 2, 1866: Christopher Dunkin, speaking in the Legislative Assembly of Canada (click HERE to view a PDF of the 1866 edition of the Confederation Debates, then scroll to p. 73)[3]

> **Christopher Dunkin [Brome]** […] By reference to the 33rd resolution[4] of the Quebec scheme, it would be found that the control of the civil and criminal courts of all the Provinces, excepting Lower Canada, might be merged in the General Government, thus leaving a responsibility upon the Local Government of Lower Canada, which did not rest upon the others.

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[3] *Supra* footnote 2. For the original p. 73, scroll to the third PDF page in the link above.

[4] *Supra* footnote 2. The following footnote is from the aforementioned publication. Dunkin means Quebec Resolution 29 (33), which reads in full, *"The General Parliament shall have power to make Laws for the peace, welfare and good government of the Federated Provinces (saving the Sovereignty of England), and especially laws respecting the following subjects:—* […] 33. *Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, and rendering uniform the procedure of all or any of the Courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof."*

PART 3:

Debates on Section 92(14) in the *Confederation Debates in other Provincial Legislatures* (1865-1867)

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Newfoundland (1865)

28 February 1865: Mr. Whiteway (quoting an article from the *London Times*), speaking in the Newfoundland House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

p. 1 (April 13th report of proceedings):

> **Mr. Whiteaway:** […] We cannot find that the Local Legislatures have any exclusive power of legislation given them. They have power by the 43rd Resolution to make laws respecting seventeen subjects, the eighteen being—'And generally all matters of a private or local nature not assigned to the General Parliament.' It is exceedingly difficult to construe these provisions. First, general powers of legislation are given in the widest terms to the General Parliament; then a power is given especially to make laws on thirty-seven subjects, one of those being all matters of a general character not exclusively reserved to the Local Legislatures. Nothing is exclusively reserved to the Local Legislatures, and it would seem, therefore, that the effect of this clause is to cut the power of central legislation down to matters of a general character—a most vague and unsatisfactory definition, and one sure, if it be retained, to produce conflict and confusion. In the same way, what are matters of a private and local nature not assigned to the General Parliament? We have failed to discover any matters of a private and local nature which are so assigned, and therefore the power will be limited by the words 'private' and 'local;' so that the effect of these clauses will be that, beyond the subjects attributed to each, the Central Legislature will have jurisdiction over general matters, whatever they are, and the Local Legislature over local matters, whatever they are; while it is in the highest degree doubtful what the Courts would consider general and what local, and whether the Central Legislature, has any concurrent jurisdiction over private and local matters or no.
>
> "The inaccuracies are probably the result of a succession of compromises, and we can do no better service to the Federative movement than by thus early pointing them out. The Resolutions ask for the cooperation of the Local and Imperial Parliaments for the purpose of giving them effect, and we have no doubt that, before they assume, the form of law, they will have undergone consideration and scrutiny fully commensurate to their importance. Of the wisdom of the principle involved, we have no doubt, and we have much pleasure in, giving our tribute to the ability with

> which, on the whole, that principle has been worked out, in spite of difficulties and constructions, of which our own negotiations for the union of Scotland and Ireland can furnish us only with a very faint idea."

p. 2 (April 24th report of proceedings):

> We cannot find that the Local Legislatures have any exclusive power of legislation given them. They have power by the 43rd Resolution to make laws respecting seventeen subjects, the eighteen being—'And generally all matters of a private or local nature not assigned to the General Parliament.' It is exceedingly difficult to construe these provisions. First, general powers of legislation are given in the widest terms to the General Parliament; then a power is given especially to make laws on thirty- seven subjects, one of those being all matters of a general character not exclusively reserved to the Local Legislatures. Nothing is exclusively reserved to the Local Legislatures, and it would seem, therefore, that the effect of this clause is to cut the power of central legislation down to matters of a general character—a most vague and unsatisfactory definition, and one sure, if it be retained, to produce conflict and confusion. In the same way, what are matters of a private and local nature not assigned to the General Parliament? We have failed to discover any matters of a private and local nature which are so assigned, and therefore the power will be limited by the words 'private' and 'local;' so that the effect of these clauses will be that, beyond the subjects attributed to each, the Central Legislature will have jurisdiction over general matters, whatever they are, and the Local Legislature over local matters, whatever they are; while it is in the highest degree doubtful what the Courts would consider general and what local, and whether the Central Legislature, has any concurrent jurisdiction over private and local matters or no.
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> "The inaccuracies are probably the result of a succession of compromises, and we can do no better service to the Federative movement than by thus early pointing them out. The Resolutions ask for the cooperation of the Local and Imperial Parliaments for the purpose of giving them effect, and we have no doubt that, before they assume, the form of law, they will have undergone consideration and scrutiny fully commensurate to their importance. Of the wisdom of the principle involved, we have no doubt, and we have much pleasure in, giving our tribute to the ability with which, on the whole, that principle has been worked out, in spite of difficulties and constructions, of which our own negotiations for the union of Scotland and Ireland can furnish us only with a very faint idea."

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2 March 1865: Mr. Casey, speaking in the Newfoundland House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

p. 1 (April 27th report of proceedings):

> **Mr. Casey:** […] But besides the heavy taxation, and the giving over to the General Government of our mines and minerals, and of the power to legislate for our fisheries, the patronage of all the offices in our Customs. Post Office and Lighthouses, as well as in our Courts of Justice, would be vested in the General Government.

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New Brunswick (1866)

27 June 1866: Mr. Smith, speaking in the New Brunswick House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

p. 26:

> **Mr. Smith:** […] Another power given to this Parliament is to legislate on
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> "The criminal law, excepting the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."
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> I don't know what that means, so I shall pass on.

[…]

> **Mr. Smith:** […] We may also administer Justice "both of civil and criminal jurisdiction, and including also the procedure in civil matters." There is something here again I can't understand.

Samuel Leonard Tilley, p. 32:

> **Hon. Mr. Tilley:** Another objection raised was in reference to the Judges of the County Courts.
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> Now in Lower Canada the arrangement is different from that in Upper Canada. In Lower Canada they have no County Courts, but in Upper Canada much of the business in done in these Courts, and it is therefore right they should be provided for, and they only receive the same as the other Provinces.

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New Brunswick (1867)

29 May 1867: Mr. Smith starts a debate on the courts, speaking in the New Brunswick House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

p. 96:

> **Mr. Smith**.—I should like to know, then, how we can legislate on the County Courts? There is a Bill now before the House which contemplates the expenditure of large salaries for Judges, which is not provided for in the Act of Union. Sections 96. 97 and 100 say :

"96. The Governor General shall appoint the Judges of the Superior, District and County Courts, in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

"97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and the procedure of the Courts in those Provinces are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces."

"100. The Salaries, Allowances and Pensions of the Judges of the Superior, District and County Courts, (except the Courts of Probate and Nova Scotia and New Brunswick), and of the Admiralty Courts, in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada."

I would ask why the exception is made of the Courts of Probate, if it is not to show that we have power over these and no others? I would also ask if it is competent to make a Judge of Probate a Judge of a County Court? I think not —I do not believe we have the power to do anything of the kind. I am aware that section 92, clause. 14, gives to the Local Legislature—

"The administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil matters in those Courts."

But, still, we cannot pass an Act here to appoint Judges to the County Courts because the Act of Union gives that power into the hands of the General Government, both of Courts and Judges. And if we can create County Courts, why, I would ask, cannot we go on and create District Courts, too? That power, it seems to be conceded, is denied to us.

Hon. Mr. Tilley.—The exception was made of Courts of Probate because it was distinctly understood, and it is embodied in the Act, that no person appointed to those Courts could be paid out of the central funds. But suppose we chose to increase the number of Supreme Judges to seven, they would all have to be paid out of the general fund ; and, whether these Courts are established here now or not, the Act concedes to us the power to create the new Courts. There is no trouble at all about the spirit and sentiment of what was intended, nor I think about the law itself.

Hon. Mr. Wilmot.—I do not think the salaries we may fix will be binding upon the General Government, but so far as the creating of these Courts and the appointing of Judges is concerned, I think there is no doubt but that we have the power. I have long felt the necessity of such Courts here, as have long been established in England and in Western Canada, and I know it was distinctly talked about and settled by the Conference. I think also that we have a perfect power to take additional stock in Railways or to give a bonus right out, as we see fit, but I think that to do it after the passage of that Act, and thus increase our liability, would be to practice a fraud upon the General Government.

Mr. Smith.—Then there is prosecution for crime, that pertains, I see, to the New Dominion, as I understand it ; and I would ask the Attorney General if the criminal jurisprudence of the country belongs to the General or Local Government?

Hon. Mr. Fisher.—I shall not take up the time in answering these matters to-day, but when the County Courts Bill comes up, I will go into the whole question.

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30 May 1867: Mr. Smith on the courts, speaking in the New Brunswick House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

p. 98

Mr. Smith:

"The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal matters."

I ask what that means? Does it mean the administration of the Criminal Law of the country? I think it covers the whole. I find also that they have the establishment, maintenance and management of Penitentiaries. If they had not the administration of the Criminal Law, why take charge of the Penitentiaries? Therefore I think the Federal Parliament take charge of, and settle the Criminal jurisdiction of the country. We find among the subjects given exclusively to the Provincial Legislature:—

"The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts."

The Local Legislature seems to have the power to constitute the Courts of Criminal Jurisdiction, but the prosecution of criminals in that Court seems to be in the General Parliament. I would like to have the opinion of the Attorney General on that point, but I suppose he will answer that question as he did the other, by remaining silent. Not having information from him we are to a certain extent groping in the dark. We just act upon our own convictions in the matter. The Attorney General told us in introducing this Bill that he intended to supplement it with another Bill called the Divisional Court Bill. Both these Bills should be before the House before we pass this one.

[…]

Mr. Smith et al, p. 100

"The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the establishment of any additional court for the better administration of the Laws of Canada."

We have understood that the Court of Appeal was to be a court of Appeal for the various members of that confederation; but according to the language of this law, it is not a Court of Appeal for our Courts, but only for Canada. We are to be a portion of the Dominion of Canada, but we are separate and distinct from them in regard to regulating the Civil practice in our Civil Courts. But in regard

to the Criminal Law, I think when a man is convicted for crime it is incident to our position that he should appeal to the Court of the New Dominion. I have failed to elicit anything from the Attorney General in regard to the intention of the framers of the law as to the construction and interpretation of it. I will now appeal to the hon. member for Northumberland (Mr. Johnson) as he was one of the Delegates sent to England to frame that law, and he must surely know whether the Criminal Law is incident to the General Parliament or to our Local Legislature. In my judgement the Criminal Law is under the control of the General Government, even down to the smallest crime, for why should they take the control of the Penitentiaries unless they undertook the control of the Criminal Law.

The object of this Bill is to create offices, but I believe we have no power under the Imperial Act to fix the salaries of those officers. You are creating a new Court, and you limit the maximum power of the Court to actions not exceeding $200, but you ought to restrict it to a minimum. I understand the Attorney General to say that he intended to introduce another Bill which would provide substitutes for the jurisdiction of Magistrates, and I asked him about it, but he continues silent. If he intends to bring it we should have it before the House now, as it is connected with the administration of justice. I have always in this House advocated the propriety of increasing the jurisdiction of Magistrates to ten pounds.

There may be one or two Magistrates in each County who are trading men, but then you can have a Jury, and unless they are packed you are very apt to get justice done. If you can get rid of these trading Magistrates I doubt whether you could improve the method of collecting these small debts. Those Magistrates are all over the country, and a man does not have to travel very far to find one to issue a summons for him. We had better keep the jurisdiction of our Courts as it is, for the lawyers are now accustomed to it, and appoint a lawyer as Judge of the Court of Common Pleas, and then we will not be violating the Imperial Act. I do not think it was the intention of the parties who framed that law that we should have the power, at this session, before the Proclamation of Union takes effect, to create new Courts and re-cast the whole Judicial jurisdiction, and create new Judges with salaries of £650 a year. I do not think we are justified in doing it, and I do not think the interests of the people of this Country will be improved by it in the slightest degree.

Mr. Wetmore.—My hon. friend referred to a section of the Act of Union, which provides that "the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada." I understand him to say he had very serious doubts whether or not the Court of Appeal in Canada would be the Court of Appeal for our Province. I will direct his attention to the third paragraph in the Act of Union, which says:

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honorable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the name of Canada; and on and after that Day these three Provinces shall form and be One Dominion under that name accordingly.

I will also direct his attention to the latter part of the fourth Section and the fifth:

Unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Mr. Smith.—I am aware that these four Provinces are to constitute what is called Canada, but we have a distinct and separate jurisdiction from Canada. This Court of Appeal, as it must be interpreted, means a Court of Appeal in those matters which the whole of Canada has the power to legislate upon. Certain powers are taken from us and transferred to the General Government, and certain powers are left us. The Court belongs to us, and we have power to change its constitution, so far as its civil powers are concerned, and no one has a right to object to it, therefore that paragraph applies to the Courts of Canada, and does not apply to the Courts of New Brunswick.

Hon. Mr. Fisher—I refused to answer my hon, friend's questions, because it is unparliamentary to interrupt a gentleman when speaking. It is unparliamentary to put questions at that time; the proper course was for him to finish his speech, and then for me to answer him. When I opened the debate I made very few observations, but I thought I made myself intelligible. My intention was to bring the Bill before the House, and not to make a speech upon it. I think my hon. friend must certainly have Confederation on the brain. He complains that I did not answer his questions yesterday, but had promised to do so today, and had not done it. I did not promise to answer all his questions to-day. I said I believed we had the power to establish three Courts, and I went on to show there was no impropriety in doing it.

In regard to the Criminal Law, my opinion is that the administration of the Criminal Law devolves upon us, but the General Government have power to regulate criminal procedure and criminal law, so at a man may not be punished one way in Nova Scotia and another way in New Brunswick. The Criminal Law will be uniform in the whole Union, but the administration of it belong to us. Unless the question affects something before the House, it is unwise to answer all sorts of questions arising out of this Union Act. I have told him what my view of the law is. One thing I did omit in regard to this Bill. I stated the other day that we intended to bring in a Bill to provide for divisional Courts, and we did intend to do so, but we afterwards concluded not to prepare it. This Bill was prepared before we came to that determination. We intend to ask the House to pass this Bill, and we must make the appointments subject to the action of the General Government.

[…]

Mr. Johnson, p. 105

Mr. Johnson: […]

"The General Government shall pay the Superior, District and County Courts in each Province."

The Provincial Secretary reads that to mean District Courts and County Courts are to be created, but I read it as Courts then existing; therefore, as we had no County Courts in New Brunswick, no power was given to establish them. When we entered into this contract Canada agreed to give us $60,000 a year beyond Nova Scotia. Suppose we established County Courts here and called upon

Canada to pay the Judges' salaries— amounting to $6,000, or upwards,—they might say to us, We agreed to give you an additional bonus under existing circumstances, but as you have largely increased the amount we expected to pay you by appointing additional Judges, you will have to provide for their salaries yourselves.

If the General Legislature consider it is for the interest of the whole people that County Courts be established it is in their power to establish them by law, and then they will pay them. If I was afraid that the General Government of Canada would seek to do injustice to the Province, I would never had consented to have gone into Confederation. I always felt that the safety of the Province did not depend so much upon the number of the representatives as upon having a party Government. No Government could exist in Canada that sought to do injustice to any portion of the empire. There will always be a healthy opposition, and if the Government attempt to do injustice to any of the Provinces there will be a combination in that locality, and they will throw their power into the Opposition, which will cause the overthrow of the Government.

[…]

Samuel Leonard Tilley, p. 106

Hon. Mr. Tilley: […] The Act says the Provincial Legislatures shall make laws in relation to

"The administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in Civil matters in those Courts."

These powers are left to our Legislature after the Union takes place. It is also stated in the Act that the appointment of Judges and the fixing of their salaries shall be in the hands of the General Government; therefore the General and Local Legislatures have this power jointly, and there will be no conflict of interest if we pass this Bill.

My hon. friend from Northumberland (Mr. Johnson) says we cannot act upon conversations held, but must enforce the written agreement. I admitted that, and showed that a certain contract was made at Quebec in 1864, and then I showed that contract was changed in 1866, and it was not simply a verbal arrangement but a written agreement, showing that a change had been made and declaring distinctly that we had power to constitute these Courts. Possibly the hon. member was not paying any attention to me while speaking. My hon. friend from Westmorland says he knows this Bill will pass because any measure introduced by the Government would pass; he saw the arguments were too strong against the position he took, and the Bill would be accepted by the House, and, lawyer like, when he gets in a weak position, he breaks from the point.

He then turns upon the Provincial Secretary, and speaks of his vaunting ambition and of the position he wishes to fill. There was no necessity for this, for I was endeavoring to show that I had no personal interest in the matter. He says, of course, he would not take one of these Judgeships—he seeks for something higher; he wants to get an office at Ottawa with £1200 a year, and he now wishes to reward some of his supporters and friends and gain political strength and influence by it. If our appointments to office meet the approbation of the public it will show that they were properly made, and we will be more fortunate than our predecessors were in exercising patronage of this kind.

Then he goes on about the great expense thrown upon the country by establishing these Courts and the payment of Jury fees, and that was his answer to all the arguments in favor of establishing these Courts. Suppose they did incur additional expense, what is that compared to the sacrifice that is made by individuals, because the administration of justice is not speedy, thereby involving an enormous expense. In St. John the criminal business is not through, and cases where witnesses have been brought from a distance have been put off, causing great inconvenience. I know men who have debts of £20 owing them who would rather lose the money than go into the Supreme Court to collect those debts, and so it is with thousands of people throughout the length and breadth of the country. They have debts due them, but they will not go to the Supreme Court to collect them because of the time taken up and the expense to be incurred.

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31 May 1867: Debate on the creation of county courts, in the New Brunswick House of Assembly. Click HERE to see a PDF of the debates of the House of Assembly, as printed at that time.

Mr. Kerr.—This is a question of very considerable importance, and one that has occupied my attention a good deal, and I supposed this Bill would be supplemented by another, which would do away with the Magistrates' Courts all over the country. Having this impression, when I heard that County Courts were to be established here, the matter commended itself to my mind at once. The idea that because they have them in Canada, and that for the sake of uniformity we should have them here, and that their introduction at this time will give us a chance to share in the expenditures which will be made for this purpose, to my mind bears very little weight. The question is, are they needed? And if so, how can they best be established to accomplish the object desired? We all know that at present the great number of Magistrates' Courts held all over the country is a great source of litigation, and that a man who has a claim against another of a very trifling amount, can send here and there to bring his witnesses,

(p. 108)

causing much delay and expense, over a matter that is not worth talking about. By the introduction of these Courts, especially if the Government had determined to go on with the second Bill, the difficulties and anxieties caused by these petty trials, as well as the delay and expense, would be very much curtailed, and prove a great means of reducing litigation.

Mr. Caie, p. 108

Mr. Caie.—I am not a lawyer, and as I observe that some of our most eminent lawyers, statesmen and delegates differ upon this matter, I shall not offer any opinion as to whether we have power or not to legislate under the Imperial Act; but I must say that I entirely coincide with the remark of the hon. member for Northumberland, (Mr. Johnson) himself one of the delegates, that if we have a doubt on the matter we should pause before we act. But that hon. member goes on and says that undoubtedly power is left with the House to legislate upon this subject, but that we have not the right to do so.

I confess, Mr. Chairman, that I do not see the difference which the hon. member tries to make. I think that the *right* gives the *power*. It is true that the House has the power to say to a petitioner who had a most righteous claim against the Government or House, " We will not pay you," and the man has no redress; he must be quiet, for he can't sue and recover as in any other case. But because the House has that power, is it right they should therefore cheat a man of his just due? Certainly not; the power confers no right, it is the right which gives the power. I think that a change is very much needed in respect to our Magistrates' Courts, but I think it should be brought about, if possible, without increasing the costs of litigation.

Mr. Babbit, p. 108

Mr. Babbit.—Whatever may be the differences of opinion existing between lawyers and statesmen on this question we have, after all, individually to make up our minds and decide for ourselves. I think we have the right to legislate upon any subject which comes under our consideration. To me this is a mere matter of propriety. The question is whether, now and after we go into Union, the requirements of the country demands the establishment of these Country Courts or not. I am satisfied that a change is needed, but what should it be? And how can it be, effected?

Mr. Johnson et al, p. 109

Mr. Johnson.—We are now going to establish County Courts, the principle of the Bill is established, the main question is settled, and now having cast my vote unavailingly against it, I am prepared to do what I can to make its provisions as effective and satisfactory to the people as possible. We are, it seems, going to appoint five Judges, each Judge to hold a Court, having jurisdiction over three Counties, and then to appoint a separate Clerk for each Court; is that the intention? and that man an Attorney, a practising Attorney, who is able to go into the Court, and conduct cases whilst still holding his position! Well, I know that lawyers are generally pretty good men, but I think this House should not hold out inducements such as this. I really cannot think this is intended.

Hon. Mr. Fisher.—I sincerely hope the same spirit which has been expressed by the hon. member for Northumberland will influence all the hon. members present, and I thank him for the remarks he has made. Two propositions are laid down with regard to the Clerk. First, it is intended to appoint one for each Court, for it is believed that he will be needed. All the business could not be attended to by one Clerk for all the Courts, and from the fact that three Courts will be held by each Judge in the year, it will be seen that a distinct Clerk of the Court will be required, and prove advantageous.

Second, it is intended that he shall practice; if the House think that he should not, we can put that in, but it was thought that there would not be sufficient business of the Court to enable him to get along if he was excluded from practising. If it is thought desirable to make a change let a clause be inserted that he shall not practice in the County of which he is Clerk; this will cover the ground. The Clerk of the Court of Common Pleas is now allowed to practice in the same Court, and I see no very great evil that would arise from it in this case. However, wherein the Bill is defective we shall be thankful to hear suggestions of improvement, so that it may be remedied.

Mr. Johnson.—I would ask why the Clerks of the Peace now appointed cannot be appointed to be Clerks of the County Courts; thus saving the expense and not leaving the appointments in the hands of the Government?

Mr. Smith.—It is evident there is an overwhelming majority for this Bill, but there are certain portions of it which are most objectionable, and upon which I may say a few words. In Canada they have these County Courts, and they are said to have worked well; but it is very different there to the system about to be established here. There they have a Judge for every County, and in some Counties they have two. The Judge resides in the Shire town, he is always there to do his business; but how will it be here? By this section we are to have an ambulatory Judge, going about over three Counties, holding his Courts here and there, and I should like to ask how are we to get at him if he is wanted? How can we get access to him? How can we move for a new trial if he is moving about in this way, here to-day and gone to-morrow?

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PART 4:

Post-Confederation Debates on Section 92(14)

We have been able to locate a small number of post-Confederation debates, in the Senate and House of Commons, in which Section 92(14) has been discussed, or plays a role. Selections from these debates which seem to us to be particularly relevant are reproduced below; the full debates can be examined by following the provided links.

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April 7 1886, Debate in the House of Commons, pp. 559-569 (click HERE)

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> **Mr. Thompson (Antigonish):** […] It appears now that the hon. gentleman seeks to amend it in such a way as not to make it a Bill to amend the maritime law of Canada relating to maritime liens. I think that is very objectionable indeed, for several reasons. First, because the hon. gentleman seeks to introduce an amendment to that law under the title of the Bill which I have read. Second, because, the hon. gentleman would make one law for the Province of Ontario, in this respect, and another law for the other sections of the Dominion.
>
> […]
>
> **Mr. Weldon:** I quite agree with the Minister, that. it is rather anomalous that the proposals should apply to only one Province of the Dominion, and not to the others. But the hon. gentleman will recollect there is this peculiarity: The court which exorcises jurisdiction in Ontario, is a court created by this Parliament, whereas the court which exercises jurisdiction in Quebec and the Maritime Provinces is au Imperial court, created by Imperial Statute and regulated by the Vice-Admiralty Act of 1863. The United States courts have solved the difficulty which has been raised. The objection made, that admiralty jurisdiction did not extend to the great lakes and rivers of the continent, because they were not within the flow of the tide, has been overcome by the declaration that their admiralty jurisdiction extends over the lakes and great rivers. If legislation could be so framed cither by the Imperial Parliament or by this Parliament, by which jurisdiction would be uniform over the whole Dominion, the courts which have jurisdiction over the sea would have jurisdiction over the lakes, it would be practically of great benefit. The Session before last, I moved for the correspondence with respect to the maritime courts constituted under the Vice-Admiralty Act of 1863, and1 I think it le a great pity that some stops should not be taken to extend the jurisdiction of those courts so as to make them, in Canada, have concurrent and co-extensive jurisdiction with the High Court of Admiralty in England.

Under the Admiralty Act of 1861 the High Court of Admiralty has much more extended jurisdiction than that given the Vice-Admiralty Courts by the Act of 1863. With respect to this Bill, I agree with the Minister of Justice that it is unwise to give jurisdiction to the Maritime Court of Ontario which is not given t the Vice-Admiralty courts, either In the Lower Provinces or Quebec. The Admiralty Court has only jurisdiction when the owner or part owner does not reside within the jurisdiction of the court. In Quebec Admiralty Court jurisdiction can be had over a Nova Scotia and New Brunswick vessel when the owners live in those Provinces and no owner lives in Quebec. An improvement might be made in this respect. I do not see why the principle introduced by the mover of the Bill should not be the correct one and why we should not extend the power to the Vice-Admiralty Courts and

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give them power which they do not now possess.

[…]

Mr. Patterson (Essex): As I understand, the maritime law of the Maritime Provinces is regulated by British law. There was no maritime law for Ontario and we passed this special Act, and from time to time members representing constituencies bordering on our inland waters, desired that the law should be amended in the interests of the mercantile public. Some amendments were passed, and a few years ago it was promised that an attempt would be made to obtain from Great Britain a uniform maritime law for Canada, and we have been looking for some time for a fulfilment of that promise.

[…]

I think we should assimilate the Ontario maritime law with that of the United States, so that a lien might not only be imposed in the case of repairs, but also for necessary supplies furnished a vessel, such as coal, &c. […] I trust the Minister of Justice will not oppose this measure. Its apparent application to the whole Dominion is merely, as I understand, a clerical error, which the promoter of the Bill is willing to correct, so as to make it apply only within the jurisdiction of the Maritime Court of Ontario.

Mr. Cameron (Huron) This Bill, as I understand, is not pretended to extend beyond the Province of Ontario, and it is in that respect perfectly consistent with the Statute which it proposes to amend. All this Bill proposes to do is simply to extend the jurisdiction of the court within the Province of Ontario to vessels owned by parties who are domiciled in the Province of Ontario. I agree with the Minister of Justice that, as a general rule, it is right and proper that our laws should be made applicable to every portion of the Dominion, that there should be uniformity in this respect, but we know that this has not always been the case in the past. We know that last Session an Act was passed which does not apply in every respect and uniformity to all the Provinces of the Dominion. If the hon. gentleman will refer to the Franchise Act, he will find that the same franchise does not exist in the whole Dominion, and there are many other statutes in our Statute-book, the provisions of which do not extend equally to the whole Dominion.

[…]

Mr. McCallum. We had formerly a law in Ontario of this kind, but what we want now is an extension of its provisions.

Mr. Lister. The maritime law of Ontario is a special law passed by this Parliament. The maritime law of England does not apply to the inland lakes, and it was thought, in the interest of supply men, particularly in the Province of Ontario, that this maritime law should extend to them. The same jurisdiction was given to the Maritime Court of Ontario as existed in the courts of the Maritime Provinces, viz., when an owner or part owner of a vessel lvied in the Province no lien was given, but if we the owner resided outside of the jurisdiction of the court a lien was given.

[…]

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[…]

Mr. Thompson (Antigonish). I know the hon. gentleman did not, but he invited us to follow the legislation of the United States as going much further than this, while the principal objection I make against this Bill is that while Canada is a great maritime country, the Bill proposes to make the maritime law of one of the Provinces different from that of all the other Provinces. Will you find any instance in which the maritime legislation is different in one portion of a country from what it is in another?

[…]

I quite appreciate what the Ion. member for West Huron, (Mr. Cameron) said with regard to the necessity for departing from the principles of uniformity in many subjects of legislation; but if there is any subject upon which we should endeavor to make our legislation uniform, it is that which relates to the maritime law.

[…]

I do not agree with my hon. friend that there is any reason whatever why the Parliament of Canada should establish a different maritime law with regard to statutory liens in Ontario from that which prevails in the other Provinces. It is true that the Maritime Court of Ontario, is a court organised under the legislation of this Parliament, whereas the courts which exercise the like jurisdiction in the Lower Provinces arc organised under an Imperial Statute; but it is equally competent for this Parliament to say what shall constitute liens in the Maritime Provinces as in the Province of Ontario. Notwithstanding the fact that the judges, and perhaps the officers of the courts, in the Lower Provinces, are appointed by Imperial authority, while in Ontario they are appointed by the authority of this Government, it is quite in the competence of this Parliament to say what shall constitute liens in all the Provinces. Therefore, there is no argument in that contention.

[…]

But we have the definite assurance of the Government of that country, conveyed to us during the past summer, that the legislation with regard to these Imperial courts in the Maritime Provinces will be withdrawn by an Act to be passed during the present Session of the British Parliament, and we have reason to expect that before the Session is through, those courts will be placed under our own control. We shall have, in the meantime, if we pass this Bill, made greater, the want of uniformity and the want of proportion between the way in which the jurisdiction of those courts shall be

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operated in the two classes of Provinces, the Upper and Lower, and we shall establish a different maritime law in one Province notwithstanding the hon. member for St. John (Mr. Weldon) may call the one a maritime and the other a statutory lien-from that prevailing in the other four or five sections of the Dominion, with only the excuse that in the one we have the advantage of appointing the judge, registrar and bailiff.

[…]

Mr. Mulock: The courts of Ontario supply that remedy, without our seeking to have an additional court snob as the Maritime Court for that purpose. I think this Bill is plain and simple and easily understood, and it purports to declare that the jurisdiction of the Maritime Court of Ontario shall ho extended, so as to cover liens in respect of certain matters.

[…]

The Minister of Justice states, and gives it, as I understand, as his legal opinion, that we can confer jurisdiction upon the various Vice-Admiralty Courts, although they are created by an Imperial Act. If I understood him1 rightly on that point, it is the simplest possible thing to carry out the principle which has been admitted in argument here by the insertion of a few simple words. This Bill can be made to accomplish all that the Minister of Justice desires somewhat in this way. If you strike out the words in the second line "of Ontario under the Maritime Jurisdiction Act, 1877," and introduce the words "or Vice-Admiralty Court having jurisdiction in any Province," you meet the case.

[…]

The motion is, that the jurisdiction in a particular Province shall be enlarged. It is quite proper for a member to propose that the jurisdiction in an adjoining Province shall be enlarged, or that the jurisdiction in all the Provinces shall be enlarged. Last Session this was often done.

[…]

Mr. McCarthy: […] The Minister of Justice, as I understand, takes this position, that the Bill as introduced-and the title of the Bill tends in the same direction-simply confers jurisdiction on the existing court, whereas the amendment tends to change the law itself,

though limiting the change to the Ontario Court. I do not think my hon. friend from North York (Mr. Mulock) grasped the point of the Minister of Justice.

Mr. Mulock. Yes, I did.

Mr. McCarthy: If he did, he certainly did not leave that impression on my mind, and I do not think ho heft it on the minds of other members. I quite agree with the view taken by the Minister of Justice, and I think it would be an extraordinary proposition to accept, which is now presented to us, that the general law should be altered not only as far as one Province is concerned, but in regard to the whole Dominion.

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[…]

Mr. Weldon: The Minister of Justice says the law should be uniform. If this Bill is passed as it now stands, it will not be uniform in the Province of Ontario and in the Provinces in which the Maritime Court exercises jurisdiction ; but, if the hon. gentleman takes the Act which brought the Maritime Court into existence, he will find that Parliament undertook to give more extensive powers. The first clause of that Act is:

"All persons shall, after this Act comes into force, have, in the Province of Ontario, the like rights and remedies in all matters (including cases of contract and port, and proceedings in rem and in personam) arising out of or connected with navigation, shipping, trade or commerce, on any river, lake, canal or inland waters, of which the whole or part is in the Province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said Province."

Now the very first section of this Act makes certain exceptions, and the same power that enables them to except would enable them to extend. But there is a very important clause in the fourth section of the Maritime Act of Ontario which enables a person to follow a ship into the hands of a bond fide purchaser ninety days after the vessel changed hands. Now the Vice Admiralty Court gives no such power at all. As I have already pointtd out, there is a broad distinction between the meaning of the maritime lien and the statutory lien. By the maritime lien the parties may follow the vessel if she changes owners, but the express decision of the Privy Council has been that the statutory lien does not follow where the vessel passes into the hands of a third party, therefore, if a statutory lien is created, and a vessel subject to that lien is owned by A.B., and becomes next day the property of C.D., the vessel cannot be followed; but the Maritime Court of Ontario expressly states:

"No right or remedy in rem given by his Act only shall be enforced as against any subsequent bona fide purchaser or mortgagee of a ship, unless the proceeding for the enforcement thereof be begun within ninety days from the time when the same accrued."

Now the Vice-Admiralty Act of 1863 provides as follows:-

"Claims for necessary supplies, in the possession in which the court is established, to any ship or which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied."

These two claims, therefore, are statutory liens, created by the Vice-Admiralty Act of 1863, and the same privilege should be extended to the Province of Ontario.

[…]

Now they are met by this difficulty in Ontario, that because the owners reside within the Province of Ontario the Vice-Admiralty Court has no jurisdiction, and so far as the jurisdiction of the court is concerned, it is practically rendered nugatory.

[…]

Now, it seems to me that this Bill will make their jurisdiction of practical utility, because the shipping which comes under the jurisdiction of the Maritime Court of Ontario, I think I may say without exception, is owned by men residing in that Province.

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Mr. Thompson (Antigonish) […] The hon. gentleman's argument, if it amounts to anything, is this: That because differences exist between the procedure of the Vice-Admiralty Court of the Lower Provinces and Quebec, and that of the Maritime Court of Ontario, we ought to make the legislation as different as possible; that because there is a difference between the organisation of those courts it is desirable for us to make the principles, on which the rights of suitors in those courts are adjusted, as wide as possible, as if one suitor were in Austria and the other in England.

[…]

Mr. Mills: I cannot help expressing my surprise at the tone of the argument adopted by the Minister of Justice in discussing this question. The Minister knows very well the history of the Maritime Court of Ontario. He knows that before 1877 there was no Maritime Court, no court having admiralty jurisdiction in the Province. The remedy parties lad against vessels, whether for supplies or for repairs, was one in the ordinary civil courts, and that remedy exists and is in force to-day as much since the passing of this Act as previously. When the Act of 1877 was adopted there was a desire to adopt measures so far as they could be adopted to meet the wants of the people of Ontario. That was the intention of the Bill. We were not considering whether the law was to be precisely the same in every portion of Christendom or not. I apprehend that has not been the practice in this Parliament or the Local Legislatures.

[…]

That the law in the Maritime Provinces, where the Imperial court sits and where the Imperial law is administered, is not precisely the same as the law which my hon. friend has proposed to place on the Statute-book. The law is not the same now. The remedies

provided as regards liens are not the same as in any other portion of the Dominion. If one were to listen to the arguments of the Minister one would suppose, in ignorance of the facts, that we were endeavoring to break in upon that beautiful system of uniformity in which the hon. gentleman delights. The hon. gentleman is laboring under a misapprehension if he supposes that to be the case. There is no uniformity at the present time. By the third section of the Act which we placed on the Statute-book in 1877, it is provided that the courts shall not have jurisdiction in certain matters in which the Maritime Courts of the lower Provinces have jurisdiction. There is a very wide departure from the rule of uniformity, to which the Minister attaches so much importance, in the law as it at present stands. I could understand the arguments of the hon. gentleman if this were a uniform law and it were proposed to break in on that uniformity. That is not, however, the fact. We have a law which is supposed to be adapted to the particular circumstances of Ontario, situated as it is upon the inland waters, and the proposition we have to consider is what has been our experience in working out that law; what the experience of shipowners and those who supply them with necessary supplies ?

[…]

We have a different law in the Maritime Provinces, and because we have a different law which we have net soughs to change here, we will not permit you to make any change you deem necessary in the law of the Province of Ontario; we will not consider your rights and interests; until the people of the Maritime Provinces are prepared to make the change, we will not budge

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an inch to make the change yon think necessary. I confess, Sir, that that position is one which much astonishes me, because I would suppose that the hon. gentleman if he were such an ardent advocate of the principle of uniformity, would have come down with a measure to make the law uniform.

[…]

No, I will not favor it, because it does not give us uniformity throughout the Dominion. Well, Sir, uniformity is an excellent thing if we do not sacrifice the public convenience, and the practical necessities of the country, to uniformity. There is diversity in our circumstances, and I can easily conceive that a vessel situated on the lakes may be in a wholly different position from one situated in the Maritime Provinces. But I do not care how that may be. This I do know, that I think under a fair construction of the British North America Act, we ought to have had no Imperial maritime courts in this Dominion, after this Parliament was organised. The Imperial Government have, however, taken a different view, and they have contested our right to legislate on the subject of maritime law ; they have contested our claim to the establishment of maritime courts. The Minister of Justice says that we can alter the jurisdiction of there courts; we can give them powers they do not at present possess; we can alter the procedure, and so on. But the Imperial Government have taken a different view, they have denied our right, and the hon. gentleman himself has said that they have promised Imperial legislation, for wbat purpose? To abandon the jurisdiction they now claim.

[…]

Mr. Mills. No; but transfer jurisdiction from the Imperial Parliament to this. The hon. gentleman knows this: If it were perfectly clear, according to their view, that we had jurisdiction, then that would have power to supersede their courts. There can be no doubt about that, and if the hon. gentleman says they are legislating for the purpose of withdrawing their courts, does ho pretend to say that if a court is sitting under the Imperial Act, we have power under the law, as it now stands, to alter the jurisdiction of that court so sitting ?

[…]

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Mr. Thompson (Antigonish) […] I did admit that the judges of the courts of the Maritime Provinces are appointed by Imperial authority, and that they are Imperial courts. The hon. gentleman, however, went so far as to endeavor to represent me as stating that in consequence of that it would be impossible for us to make the law uniform; at any rate, he sought to drag the argument that far. He sought at least to drag the argument this far, that because the judges in the Vice-Admiralty Courts are appointed by Imperial authority, the Parliament of Canada cannot pass any law affecting their jurisdiction. I called his attention to the fact that the Parliament of Canada had already done so. In repeated instances, notably those relating to the collection of Customs penalties, jurisdiction has been conferred by the Parliament of Canada on the Vice-Admiralty Courts, although they are Imperial courts.

[…]

Mr. Thompson (Antigonish). They had not before the jurisdiction I have referred to, which was specially conferred on them by Statutes of Canada passed within the last few years. The right of the Parliament of Canada to pass any such Act was contested in the Supreme Court of Nova Scotia, and that court took the view which has been so profoundly urged by the hon. member for Bothwell tonight. It declared that the Parliament of Canada had no right to alter the jurisdiction of Imperial courts, and if that view is right, of course the hon. member for Bothwell is right to-night, that we cannot attempt to make the law of Canada uniform, and that we must submit to the humiliating spectacle of seeing the Maritime Provinces, as well as the Province of Quebec, governed by the maritime power in the world, but is not good enough for some section of the country for which the hon. member for Bothwell wants a special law.

[…]

[…] leaving aside what title this Bill bears, and by what pretence it has come to this stage—to have the maritime law one way in one section of the country and another way in another section; so that the moment a vessel comes to Canada, which is recognized as one of the great maritime powers of the world as regard her mercantile marine, a ship is to be subject to one kind of law in one section, and to another law in another; and I am sure that

argument is not at all affected by the simple circumstance that already we have the fact, undesirable as it is, that in one section of the country there is an Imperial judge and in another section a Federal judge. The good sense of the Parliament of Canada has already pronounced that although that may be undesirable, both the Imperial judge and the Federal judge shall administer the same law. To tell me that because one judge is an Imperial judge and the other a Dominion judge we should make the rights of suitors and the status of the vessels that sail the waters of Canada different, is simply to pervert the argument, and not to throw any light on the question at all.

[…]

Mr. Weldon. The best argument my hon. friend has made as to uniformity, he made just now. He said that Acts were passed by the Parliament of Canada giving power to the Vice-Admiralty Courts with respect to Customs and revenue. My impression was that they had that jurisdiction before; but I will accept his statement; and if it is so, that same Parliament of Canada has taken away that very jurisdiction from the Maritime Court of Ontario. Therefore, the lack of uniformity in the jurisdiction has been created by this Parliament itself. It expressly takes away jurisdiction from the Ontario court with regard to breaches of the Customs and revenue laws, which, he says, it has given to the Vice-Admiralty Courts of the Maritime Provinces.

[…]

It is true, that is not the case in the Province of Nova Scotia, because I believe that under the Imperial Act, the chief justice of Nova Scotia is the judge of the Admiralty Court, and that in New Brunswick and Quebec the case is different. In Quebec Mr. Irvine is the judge of the Admiralty Court. Therefore, there is not uniformity in this case, the admiralty judges in Quebec and New Brunswick being appointed by the Canadian Government, while in Nova Scotia the appointment is made by the Imperial Government.

Mr. Thompson (Antigonish). The judge in Quebec is appointed by the same authority as in Nova Scotia.

Mr. Weldon. The appointments may be subject to confirmation by the Imperial Government, but they are made on the recommendation of this Government.

Mr. Thompson. No.

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Mr. McCallum: […] What had we in Ontario before we got the Maritime Court, because the jurisdiction of the Vice- Admiralty Court only extended to Lido water? We had therefore in Ontario to have something or other to enable us to collect our debts. Of course uniformity is ail very well, if the hon. Minister would only tell us when we are going to have it. Are we to suffer in the meantime by having to go to the registry office where a vessel is registered, and see whether there is a mortgage on her and who is the owner, before we can furnish her with provisions and supplies ?

Mr. Mills: […] We have given in election cases jurisdiction to the provincial courts, and our right to do so was contested, but it was confirmed by the Judicial Committee of the Privy Council. But to give a court additional jurisdiction is .one thing and to change the jurisdiction of a court, to take away the power it already has, to decide that the rights which existed in a particular form shall be varied, is a wholly different thing. The Minister of Justice has spoken of the Vice-Admiralty Courts of the Maritime Provinces as if they were Canadian courts, as if the Imperial Government appointed the judges and had no other connection with them. The Vice-Admiralty courts are the creation of the Imperial Government, and not of this Legislature, and so far as they are created by Imperial Statute, and so far as jurisdiction is given them by that Statute, we cannot alter their jurisdiction, unless the whole power to deal with the subject were transferred from the Imperial Parliament to this one. The Imperial Parliament maintain, both with regard to the question of the creation of Vice Admiralty Courts and the question of merchant shipping, that these subjects are still subjects of Imperial legislation. And when the Merchant Shipping Act was amended in 1876, the Imperial Parliament contended that we had not the power to deal with he subject. It was made a matter of controversy. Sir William Vernon Harcourt entered into a controversy with the London Times upon this subject while the matter was before Parliament, and Lord Carnarvon, in a despatch which the hon. gentleman will find in the Department of the Secretary of State, denied the right of the Parliament of Canada to legislate upon that particular subject. So that, so far as the Vice-Admiralty Courts are concerned, they are the creation of the Imperial Parliament under an Imperial Statute, and so far as jurisdiction was given to them, we have not, under their interpretation of our constitutional authority, the power to change the law in that particular. I pointed that out, and, when the hon. gentleman said that the Imperial Government proposed legislation, I certainly supposed that they proposed it for some other object than simply to withdraw their power of appointing the judges of the Vice-Admiralty Courts. I supposed--and I think no one who will consider the law as it now stands can come to any other conclusion--that, if the Imperial Government intended to confer upon us any power, it must be more than the power of appointing the judges, it must be the power to create courts to exorcise vice-admiralty jurisdiction-a power which we could not effectively exorcise now, so long as the establishment of these courts is vested in the Imperial Government under the Imperial Act now in force.

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May 12, 1886, Debate in the House of Commons, p. 1228 (click HERE)

On section 5,

Mr. WELDON. The time mentioned in the third sub. section seems to be very indefinite, and the matter would depend entirely on the action of the Local Legislature.

Mr. THOMPSON. In some cases legislation has been carried forward which would require the action of one of the Local Legislatures. A few cases of that kind are pro. vided for. It is proposed, when the proper Legislature makes provision for the punishment of an offence by fine or imprisonment, that the former provision should stand repealed. These

are matters in respect of which the repeal could not be made by the Local Legislature now, but the repeal must be made here, because the offences are now criminal offences.

Mr. WELDON. If the Local Legislature had no power to repeal an Act passed before Confederation, how could they deal with it?

Mr. THOMPSON. The subject matter of the legislation is with them, but as the offences are now felonies or misdemeanors, the provisions making them so are within our jurisdiction.

Mr. MILLS. I think the rule laid down by the Judicial Committee is that where the subject-matter is under the jurisdiction of the Local Legislature, and there is no fine or punishment attached to it, then the offence is under provincial jurisdiction, and I do not think there is any limitation as to how the Local Legislature may characterise that offence. If the principal subject matter of which the crime is an incident, or the regulation for the enforcement of the law on that subject, is clearly within local jurisdiction,--then it seems to me that the offence is under local legislation even though the law were passed before Confederation. There was a division of Statute-Law made by the Act of Con. federation, and the Local Legislatures are just as competent to repeal what they would have the power to enact, even though it was passed before Confederation, as they would be if it had been enacted by themselves.

Mr. THOMPSON. I cannot fully agree with my hon. friend, that because the Local Legislature has power to legislate with regard to coroners' inquests, it would have a right to say that a person committing a breach of the peace, while an inquest was proceeding, would be guilty of a felony. We are not interfering with the legislation here; we are providing an effective rule for repealing Acts which it is not competent for the Local Legislatures themselves to repeal.

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