

## WRIT OF PROHIBITION

### Authority of Single Judge To Issue Order Nisi by Full Court—By Single Judge

The question has been asked, whether or not a single Judge of the Supreme Court can grant an order absolute for a writ of prohibition. It is of interest to note that Prohibition is a proceeding of which there are only a few reported cases in our Courts.

It is not questioned that the Court of Appeal can grant either an order nisi or an order absolute for a writ of prohibition. In *Ex Parte Allen* (1) an application was made before the full Supreme Court for a writ of Prohibition to restrain the Court of Common Pleas from certain actions. A rule nisi was granted and on its return the rule was made absolute. Similarly in *Ex Parte Currie* (2) an order nisi was granted by the Supreme Court returnable before themselves in a matter concerning expulsion proceedings from a church group.

In recent years it appears that there have been no reported cases on writs of Prohibition. However, the following cases seem to show that a single judge can only grant an order nisi returnable before the Court of Appeal.

*Ex Parte Boyne* (3) Weldon J granted a rule nisi returnable before the Full Court in a matter concerning election recounts under the Canada Temperance Act.

*Ex Parte Baird* (4) an order nisi was granted by Tuck J returnable before the Full Court in connection with the Dominion Election Act.

Comparing this practice with some of the other Provinces one learns that apparently in Nova Scotia only the Full Supreme Court can deal with a writ of Prohibition, as evidenced by the *King-v-Giles* (5), *re Walter Johnson* (6) and *Trenholm-v-The King* (7).

In Ontario it seems that a single judge can grant a writ or an order nisi returnable before himself. This may be deduced from *Johnson-v-Johnson* (8), *Rex-v-Thompson* (9) and *Re Miles Transport Company Limited* (10).

Manitoba and British Columbia also seem to allow a single judge to grant an order absolute for a writ of Prohibition. *Nichols-v-Graham* (11), *McKee-v-Halveison* (12) and *Greavas-v-Almas* (13).

1—2 *Allen* (NBR) 424. 2—26 NBR 403 (1886). 3—22 NBR 228 (1882). 4—29 NBR 162. 5—2 MPR 184. 6—4 MPR 446. 7—21 MPR 299. 8—7948 3 DLR 590. 9—1946 4 DLR 590. 10—1935 OWN 541 (also see 1943 OWN 67. 11—1937 3 DLR 795. 12—1938 2 DLR 201. 13—1936 2 DLR 191.

From Blackstone (14) one learns that Prohibition is a writ issuing properly only out of the Court of King's Bench being the King's prerogative writ, but for the furthering of Justice it may now be had in some cases out of the Court of Chancery, Common Pleas and Exchequer.

Worthington-v-Jefferies (15) and The Mayor of London-v-Cox (16) discuss the history of the writ in detail. From them one learns that: In reply to the 8th objection in Articuli Cleri of 3 Jac 1 it is stated, "Furthermore the Prohibition is quick and speedy for it is ordinarily granted out of court by any one of its judges in his chamber . . ."

Lord Esher in The Recepta (17) informs the reader that "When the practice with regard to moving for prohibition in the old courts is brought to mind —viz—that you might move for prohibition in one court and if it was refused you might move for prohibition in another and so on . . . Under the old system there was no appeal."

It is suggested that the common law power of the old Court of King's Bench is now vested in the King's Bench Division of the New Brunswick Supreme Court, and a single judge may exercise that power.

However, ever stronger is the contention that a single Chancery Judge may issue a writ of Prohibition.

The Yearly Practice of the Supreme Court (18) states that judges of Chancery have the power to hear and determine applications for writs of Prohibition at common law and under the English County Courts Act.

In Iveson-v-Harris (193) it is shown that a single judge of the Chancery Court had the power to issue the writ of Prohibition. Under the present Judicature Act (20) a judge of the Chancery Division of the Supreme Court has all the powers as is now as may be hereafter given a single judge. If a single judge of Chancery or Equity had the jurisdiction it is suggested that he still has the jurisdiction to grant a writ of Prohibition.

At any rate there seems to be no direct authority stating whether a single judge may grant an order absolute or not and the present practice seems to be he may only grant an order nisi. It is respectfully submitted that the Legislature be approached to ensure by legislation that a single judge do have the power to grant an order absolute for a writ of Prohibition. 14—Lewis' Blackstone Vol. 3. 15—10 C. P. 379. 16—2 L. R. H. L. 239. 17—1893 P5 255. 18—1931 p. 1247. 19—1 Ves. Jr. 252. 20—R. S. N. B. Ch. 113 Sec. 3.