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IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall.
December 12th, 1911.

Present:

The LORD CHANCELLOR (Lord Loreburn)
The Rt.Hon. Lord MACNAGHTEN
The Rt.Hon. Lord ATKINSON
The Rt.Hon. Lord SHAW of Dunfermline, and
The Rt.Hon. Lord ROBSON.

BETWEEN:

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO
THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC
THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA
THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK
THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA
THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND
THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA — Appellants.

AND

THE ATTORNEY-GENERAL FOR CANADA — Respondent.

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA — Respondent.

(Transcript of the shorthand notes of Marten, Meredith & Co.,
8 New Court, Carey Street, W. C.)

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Counsel for the Appellants: The Rt. Hon. Sir R. Finlay, K. C., Mr W. Nesbitt, K. C., Mr A. Geoffrion, K. C., and Mr Geoffrey Lawrence (instructed by Messrs Blake & Redden.)

Counsel for the Attorney-General for Canada: Mr E. L. Newcombe, K. C., and Mr A. W. Atwater, K. C. (instructed by Messrs Chas. Russell & Co.)

Solicitors for the Attorney-General for British Columbia: Messrs Gard, Rook & Co.

Sir Robert FINLAY: My Lords, this is an appeal brought by the Attornies-General of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta, against the decision of the Supreme Court by a majority to hear and decide on a reference of certain questions to them under the Judicature Act of the Dominion.

The Province of British Columbia, your Lordships will see, is not an Appellant, but is entered as a Respondent. I believe no-one appears for the Province of British Columbia on the present occasion.

Mr NEWCOMBE: No.

Sir Robert FINLAY: A letter has been written by the agents for the Province of British Columbia saying that their attitude is that they object to any such reference without consent of the Provinces interested. Our contention goes further than that. We not only share that view with British Columbia, but we say that the reference is in itself unconstitutional.

The motion, my Lord, which was decided by the Supreme Court and to which this appeal relates will be found at page 7 of the Record. This is the Notice of Motion: "In the matter of certain references by His Excellency the Governor-General-in-Council to the Supreme Court of Canada pursuant to Section 60 of the Supreme

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"Court Act of certain questions for hearing and consideration, (1) As to the respective legislative powers under the British North America Act of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of Companies and as to the other particulars therein stated. (2) As to the powers of the Legislature of British Columbia to authorise the Government of that Province to grant exclusive rights to fish as therein mentioned. (3) Relating to The Insurance Act, 1910. Take notice that on the opening of the Court on Tuesday, the 4th day of October, 1910, a motion will be made on behalf of the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta by way of protest against the Court or the individual members thereof entertaining or considering the questions referred to it by the Executive Council and that the inscription thereof be stricken from the list, and that the same be reported back to the Executive Council as not being matters which can properly be considered by the Court as a Court or by the individual members thereof under the constitution of the Court as such nor by the members thereof in the proper execution of their judicial duties". Your Lordships are aware that there have been a certain number of references of this nature, questions put not arising in any judicial proceeding, to the Supreme Court, and in some cases there have been protests by the members of the Court and in some cases the matter has come up before your Lordships' Board on appeal. In some of these cases your Lordships' Board has expressed the opinion that the questions were of a nature which ought not to be answered, but the present reference is of such a nature that there has been a sort of constitutional revolt by the Provinces, and I shall ask your Lordships to say that the attitude of the Provinces is thoroughly justified. Would your Lordships be good enough to look at page 3 of the Record, and there your Lordships will find what the questions

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sent to the Supreme Court are: "In the Supreme Court of Canada. P. C. 877. A Report of the Committee of the Privy Council, approved by His Excellency the Governor-General on the 9th May, 1910. The Committee of the Privy Council have had under consideration a report, dated 2nd May, 1910, from the Minister of Justice, stating that important questions of law have arisen as to the respective legislative powers under the British North America Acts of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of Companies and as to the other particulars hereinafter stated, and it is expedient that these questions should be judicially determined. The Minister accordingly recommends that under the authority of Section 60 of the Supreme Court Act, Revised Statutes of Canada, 1906, Chapter 139, the following questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration, namely: 1. What limitation exists under 'The British North America Act, 1867', upon the power of the provincial legislatures to incorporate companies? What is the meaning of the expression 'with provincial objects' in Section 92, article 11 of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation? 2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by Section 92, article 11 of 'The British North America Act, 1867', power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose? Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province? 3. Has a corporation

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"constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts (A) within the incorporating province ~~xxxx~~ insuring property outside of the province; (B) outside of the incorporating province insuring property within the province; (C) outside of the incorporating province insuring property outside of the province? Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country? Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province? 4. If in any or all of the above-mentioned cases, (A), (B) and (C), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, Revised Statutes of Canada, 1906, Chapter 34, as provided by Section 4, Subsection 3? Is the said enactment, Revised Statutes of Canada, 1906, Chapter 34, Section 4, Subsection 3, intra vires of the Parliament of Canada?" Your Lordships will find in a second order of the Privy Council that that fourth question is modified so as to have relation to a Statute of 1910.

Mr NEWCOMBE: Which was passed in substitution of this one.

Sir Robert FINLAY: Yes.

The LORD CHANCELLOR: Substantially the same.

Sir Robert FINLAY: Substantially the same. "5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by - (A) The Dominion Parliament? (B) The legislature of another province? 6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying

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"on business within the province unless or until the companies obtain a licence so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licences? For examples of such provincial legislation see Ontario, 63 V. Cap. 24; New Brunswick, Cons. Sts., 1903, Cap. 18; British Columbia, 5 E. VII., Cap. II. 7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada, for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province? Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province? Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?" Then the next order of the Privy Council makes the substitution to which I have referred of the Act of 1910 for the Act of 1906 under the fourth question in the first Order. Then there is a further Order of the Privy Council making a verbal alteration.

Mr NEWCOMBE: Merely to correct a clerical error.

Sir Robert FINLAY: Yes. Section 3 is erroneously described as Section 23. It is merely a clerical error. My submission to your Lordships will be that answering such questions as these is really inconsistent with the functions of a Court of Justice.

These questions raise points of very great difficulty which materially affect business men throughout all the Provinces and throughout the whole Dominion, and points which certainly must come before first the Provincial Courts and in all probability afterwards this same Supreme Court in the ~~XXXXXXXX~~ course of ordinary litigation when they are properly raised.

I submit to your Lordships that, in the first place, the questions with which we have to deal here are not the sorts of questions that ought to be sent to any Court. They are absolutely different from any questions that have ever been sent to your Lordships' Board under the 3rd and 4th William IV. They require the Supreme Court to write a sort of treatise upon a number of questions, hypothetical questions, with regard to incorporation of Companies, insurance business, the business of various Companies, and a number of other points which may be interesting, but certainly are wholly unsuited for discussion in this shape before a Court, but I go a great deal further than that, and I shall respectfully submit to your Lordships that the whole of these references of abstract questions to the Supreme Court is unconstitutional and that section 60 of the Supreme Court Act of Canada which purports to authorise such references is ultra vires.

LORD MACNAGHTEN:- This Board has often declined to answer hypothetical or academic questions.

Sir ROBERT FINLAY:- Yes, my Lord, repeatedly, and I submit that these questions are of a class which no Court should answer.

LORD MACNAGHTEN:- Because the answer binds nobody.

Sir ROBERT FINLAY:- It binds no one.

LORD MACNAGHTEN:- It may prejudice, but it does not bind.

Sir ROBERT FINLAY:- And one point I shall submit to your Lordships is this, it may cause the greatest unrest among business

men if opinions are expressed by the Supreme Court on a point which vitally affects their interest. It is perfectly true that I suppose in theory the Supreme Court would not be bound by their own answers to these questions, but it would be extremely disquieting if there were a series of answers given on the vast number of difficult points which are raised by these questions which I have just read, and it appeared that these answers if they proved ultimately to be correct would very seriously affect business relations throughout all the Provinces.

LORD MACNAGHTEN:- And if they were incorrectly answered might discredit the Supreme Court.

Sir ROBERT FINLAY:- Yes. References of this kind are really inconsistent with the duties of a Court of Justice: the references to your Lordships' Board under the Statute of William IV have been carefully guarded. To begin with they are under an Act of the Imperial Parliament. Definite questions have been put which arose and your Lordships have had no difficulty in dealing with them: but questions of this kind belong to another category altogether and now that the attempt is being made to use the power in this way, the Provinces have had to reconsider the whole position and although in the past they have in some cases not protested and in other cases consented to the questions being raised in that form, they now say that the jurisdiction really does not exist, and they ask your Lordships' Board to say that the opinion of the minority of the Supreme Court to that effect is the correct one.

THE LORD CHANCELLOR:- What is the date of the Canadian Act under which the reference is made? I see this Act is 1906, but was that the first, or was that a continuation of previous legislation?

Sir ROBERT FINLAY:- The first Act was in 1875.

The LORD CHANCELLOR:- It is a very long time ago.

Sir ROBERT FINLAY:- Yes, my Lord.

Mr NEWCOMBE:- When the Court was constituted.

Sir ROBERT FINLAY:- Then there have been two or three variations altogether I think in the form that was adopted in 1875.

Now I will call your Lordships' attention presently to these previous Acts and to the cases of reference which have occurred under them and to the occasional protests which have been made, but I desire in the first instance to call your Lordships' attention to the British North America Act, the Statute defining the constitution of the Dominion, with a view to throwing light on the question whether this section 60 of the Supreme Court Act is constitutional at all. I think your Lordships will find the material sections set out in the Appellants' Case at page 2. Sections 91 and 92 and then 96 to 101 are the material sections. Your Lordships have been very familiar within the last few days with sections 91 and 92 and to some parts of these sections I have again to call attention. Section 91 of the British North America Act is: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say - . . . . 27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. . . . . 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to

the Legislatures of the Provinces.xxxxAnd any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." Then 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 - . . . . 11. The Incorporation of Companies with Provincial Objects. . . . 13. Property and Civil Rights in the Province. 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts." Then 96, under the head "Judicature": "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. 98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province. 99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons. 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in 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." Then comes section 101, which is perhaps the most material one in this connection: "The Parliament of Canada may, notwithstanding

anything in this Act, from time to time provide for the Constitution, maintenance, and Organisation 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."

Now your Lordships will see that that section has two branches: the subject of the Court of Appeal for Canada is dealt with in the earlier lines of the section. The Parliament may provide for a general Court of Appeal for Canada. It has been held and as I submit rightly held that that means that the Court of Appeal for Canada was to take cognizance of the Provincial Laws. If a case came from a Province they were to decide that case according to the Law of the Province in their capacity as a Court of Appeal, but then the second branch of the section is concerned with the law of Canada: the power to establish additional Courts for the better administration of the laws of Canada cannot be exercised with regard to the "better administration" of any Provincial Law, that branch of the section relates to such Courts as Admiralty Courts, the Exchequer Court, the Railway Board, and Courts for the trial of Election Petitions with regard to elections to the Dominion Legislature. There is a sharp contrast between the two ~~limits~~ limbs of the section, the first relates to the functions of the Supreme Court as a Court of Appeal, the second to any functions that may be entrusted to it by way of administering the laws of Canada which mean the laws of the Dominion as distinguished from the laws of the Provinces, and what I shall submit to your Lordships is that this section 101 deals specifically with the constitution and functions of the Supreme Court and in such a way as to show that the attempt which was made to impose upon that Supreme Court the duty of answering questions sent by the Governor-General in Council is unconstitutional. I shall submit to your Lordships that having regard to the well known fact that such a power was conferred on the King with reference to your Lordships' Board by the section of the Act of 3rd and 4th William IV

to which I have already alluded, having regard to the fact that it was well known that the Supreme Court of the United States declined to answer questions of this nature sent to them on one occasion by a President on the ground that by the constitution they sat as a Court and not as an advisory Board, having regard to the notoriousness of these facts, it is impossible to suppose that it was not intentional that any power of this kind was omitted and if the subject was considered it would probably be thought that the power of the King here to refer a question to your Lordships' Board might be called into play in any great question. No provision is made and I am going to ask your Lordships to say that in the absence of any provision of that kind in the constitution the enactment which the Parliament of Canada has passed providing for such references was beyond their power.

Now I pass to the Supreme Court Act of the Parliament of Canada. The extracts here given from the Supreme Court Act are from the Revised Statutes of Canada for 1906, chapter 139. I have got the Revised Statutes here, but I am reading from the Appellants' Case: "The Court of Common Law and Equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general Court of Appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a Court of Record." Your Lordships see the same distinction is kept up, ~~with~~ a Court of Appeal for Canada and an additional court for the better administration of the laws of Canada. Then section 60 is the section on which this case turns: "Important questions of law or fact touching- (A) The interpretation of The British North America Acts, 1867 to 1886; or, (B) The constitutionality or interpretation of any Dominion or Provincial legislation; or, (C) The appellate jurisdiction as to educational matters, by The British North America Act, 1867,

or by any other Act or law vested in the Governor in Council; or, (D) The powers of the Parliament of Canada, or of the Legislatures of the Provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed; or, (E) Any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question; may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question. When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature of any Province, or of any provision in any such Act, or in case, for any reason, the Government of any Province has any special interest in any such question, the Attorney-General of such Province shall be notified of the hearing, in order that he may be heard if he thinks fit. The Court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon. The Court may, in its discretion, request any

counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties." Then section 67: "When the Legislature of any Province of Canada has passed an Act agreeing and providing that the Supreme Court of Canada shall have jurisdiction in any of the following cases, that is to say:- (A) Of suits, actions,or proceedings in which the parties thereto by their pleading have raised the question of the validity of an Act of the Parliament of Canada, when in the opinion of a judge of the Court in which the same are pending such question is material; (B) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the Legislature of such Province, when in the opinion of a judge of the Court in which the same are pending such question is material" ---

The LORD CHANCELLOR:- This section 67 is not in point of fact raised in this case.

Sir ROBERT FINLAY:- No, my Lord, it is only printed for this reason, that it shows that provision is made in a regular and proper way for sending any point that arises in litigation with regard to the constitutionality of any such Act. That is the only reason, my Lord, why I refer to it --- "the judge who has decided that such question is material shall, at the request of the parties, and may without such request if he thinks fit, in any suit, action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of

the matter in dispute, and the case shall be removed accordingly. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the court or judge whence it came to be then and there dealt with as to justice appertains."

THE LORD CHANCELLOR:- This section relates to actual litigation.

Sir ROBERT FINLAY:- To actual litigation.

THE LORD CHANCELLOR:- And concrete questions arising in the particular litigation, so that it is on quite a different footing from the other sections.

Sir ROBERT FINLAY:- On an absolutely different footing, and it is by reason of the contrast that I invite your Lordships' attention to section 67. Then: "3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case. 4. This section shall apply only to cases of a civil nature." Then in the next paragraph follows a list of the Statutes which were formerly passed and which have resulted with modifications in the enactment in the Revised Statutes of 1906. I shall call your Lordships' attention to these earlier Statutes in their order and to any references that arose under them, but I desire in the first instance before going into details to submit to your Lordships broadly that the whole powers of the Parliament of Canada with regard to the Supreme Court are contained in section 101, and that these references are inconsistent with the duties of the Supreme Court as prescribed in section 101. It is a general Court of Appeal for Canada. It cannot be pretended that it comes under that. It is not an appeal from any Court in the Provinces for the establishment of any additional Courts for the better administration of the laws of Canada --- I submit it cannot come under that. In the first place, it is not the administration of law at all: in the second

place, it is not the administration of the law of Canada so far as it relates to Provincial questions. The administration of the law means dealing with matters in the due course of law when they arise in a suit. A concrete question arises in a suit: that is dealt with: the administration of the law proceeds on such lines as these and only on such lines. This is asking that the Supreme Court shall write a sort of treatise on a very great number of questions which it is apprehended may arise under the constitution. That is not the administration of the law at all. Secondly, even if the first difficulty could be got over and it could be considered as in some way falling under the head of administration of the law, which I submit is not the case, it certainly would not be the administration of the law of Canada. The "law of Canada" in this section means the law of the Dominion as a whole; it does not mean the law of the various Provinces which form the Dominion, and the references here relate very largely to the question of the Provincial Laws and the powers of the Provincial Legislatures and of the Provincial Governments with regard to the incorporation of Companies and other matters. So that on both these grounds I submit that it cannot fall within this second limb of section 101. But I go further: I respectfully submit that section 101 shows that the Supreme Court was to be a Court and a Court only, and that to cast upon it such advisory functions as the Supreme Court Act purports to throw upon it is inconsistent with the duties of a Court. The Court would be most grievously hampered in its functions as a Court, and I put it to your Lordships that to throw upon the Supreme Court, the authority for the creation of which is found in section 101, such duties as section 60 of the Supreme Court Act attempts to impose upon it is inconsistent with its duties under section 101. It is not merely that the constitution, the British North America Act, is silent as to the power to send questions of this kind. I submit

that any power to send such questions is really inconsistent with the British North America Act because it is inconsistent with section 101 which defines what the Supreme Court is to be and under which the Parliament of Canada proceeded when it created this Supreme Court. And, my Lords, an attempt was made to justify the action of the Governor-General in Council in sending such questions by the authority of this section 60 by reference to the earlier words of section 91. Your Lordships will remember that in those words which were read so often last week it is made lawful for the Sovereign "by and with the advice and consent of the Senate and House of Commons" --- that is for the Parliament of the Dominion --- "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." I am not here to deny of course that it would be perfectly competent for the Parliament of Canada to provide that questions of this kind might be sent to any body of experts that they chose to nominate for the purpose. They might provide for any advisory help that they thought desirable. What I do say is that they cannot in face of section 101 turn the Supreme Court into that advisory body because it is inconsistent with the functions which the constitution, the British North America Act, throws upon the Supreme Court.

LORD ROBSON:- You do not suggest that the Provinces would have power to make any such provision as that of which you now complain?

Sir ROBERT FINLAY:- I submit not, my Lord.

LORD ROBSON:- You say there is no such power in the Provinces either?

Sir ROBERT FINLAY:- No, that is to say to throw it on a Court. They might get any assistance that they thought fit. I should think a power of this kind might be beneficially exercised, and if exercised in the proper way might provide employment for members of the ~~Board~~ Bar

who are ~~actually~~ not much engaged in Court but who are admirably qualified to deal with constitutional matters, but I say that to throw it upon a Court so as to hamper that Court in its proper work ---------

THE LORD CHANCELLOR:- You have to put it, have you not, that to employ ~~the~~ a Court of Justice in this is incompatible with it being a Court for the administration of the law?

Sir ROBERT FINLAY:- Yes, that is to say, that it tends to hamper it in its functions and does hamper it in its functions as a Court of Justice and that it cannot be done because the constitution is not merely silent as to any such power but it has made provision which tends to show that no such power was meant to be exercised.

LORD ATKINSON:- Paragraph (E) of section 60 entitles the Governor-General to put any question he likes on any subject whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations.

Sir ROBERT FINLAY:- Yes: the point upon that section, my Lord, is that that is ultra vires of the Parliament of Canada. Nothing could be wider.

LORD ATKINSON:- I do not see at present how a question on any subject the Governor General chooses to submit can have anything to do with the better administration of the laws of Canada.

Sir ROBERT FINLAY:- It cannot possibly. With regard to sub-head (E) to which your Lordship referred, a gallant attempt was made on one occasion I believe to maintain that although sub-head (E) said that it might relate to any other matter whether or not ejusdem generis with the foregoing enumerations, the last words of the sub-head really brought it back to being ejusdem generis, because it goes on "with reference to which the Governor in Council sees fit to submit any such question," and it was argued that that limited the astonishing generality of sub-head (E) by showing that it must be some such question and therefore it would be after all ejusdem generis.

THE LORD CHANCELLOR:- "Such question" means a "question of law or fact." Section (E) may be open to strictures on the grounds specified by Lord Atkinson, but your contention is a wider one.

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- You would not be satisfied with the view, for instance, that sub-section (E) was ultra vires?.

Sir ROBERT FINLAY:- No I should not.

The LORD CHANCELLOR:- You wish to preclude the asking for advisary assistance from the Court in regard to abstract questions; that is your real point?

Sir ROBERT FINLAY:- I do, my Lord, that is the first and broad contention.

Lord ATKINSON:- Of law or fact; it is not confined to questions of law?

Sir ROBERT FINLAY:- No; any important question of law or fact; any question of historical research.

Lord ROBSON:- They might use the Supreme Court as a Commission to make inquiries into quasi political matters.

Sir ROBERT FINLAY:- Yes, my Lord, a sort of standing Royal Commission.

Lord ROBSON:- The question is whether they have power to do that under the words "peace, order and good government". That is the real question; it turns entirely upon Section 91 of the British North America Act.

Sir ROBERT FINLAY:- Under "peace, order and good government", thay may appoint any Royal Commissionsto give assistance by way of advice, but I say they cannot constitute the Supreme Court which is formed under Section 101 into such a Royal Commission, and I say Section 60 is ultra vires. That is my first important broad contention.

But, secondly, I shall submit to your Lordships that the questions in this particular case are of such a nature that the Court ought not to answer them, and that is covered by the Notice of Motion on page 7 of the Record which I have read.

The LORD CHANCELLOR:- Law of this kind has been in operation for 36 years?

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- Have matters so referred been appealed to this Board?

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- And no question of jurisdiction has arisen?

Sir ROBERT FINLAY:- No question of jurisdiction has arisen or has been raised before this Board. The question of jurisdiction has more than once been raised by Members of the Supreme Court themselves but, all parties consenting, the questions have been answered and any objection that has proceeded has been either ~~that~~, from the Supreme Court on its own account, or from this Board, pointing out that the questions were hypothetical or might affect private rights and that this Board declined to answer them.

The LORD CHANCELLOR:- Has the attitude of this Board been this. Notwithstanding the generality of the words applicable to the Canadian Court, that they shall answer, has this Court said that they decline to answer them unless they are appropriate to their functions?

Sir ROBERT FINLAY:- Yes, my Lord, on more than one occasion.

Lord SHAW:- Would you allow me to ask you, under this procedure which has been adopted, I presume that the opinion of the Court may be had upon subjects intimately affecting private rights?

Sir ROBERT FINLAY:- Yes, my Lord.

Lord SHAW:- Assume a litigation subsequent to that, and ignoring that opinion, what is the attitude of the Supreme Court in consequence of its having issued its ab ante opinion?

Sir ROBERT FINLAY:- It was said by the Chief Justice in the Supreme Court that the opinions they express in answer to such questions bind nobody, not even themselves, so that theoretically the Supreme Court would approach an appeal raising

the very same point with its hands free, but in practice it would be far otherwise.

Lord SHAW:- If I do not interrupt you, the view which was occurring to me was this, that when it is a real litigation all contesting parties are, of course, fully heard out, but when it is not so, when it is a question in abstractum, or ex hypothesi then all parties may not be heard.

Sir ROBERT FINLAY:- They may not.

Lord SHAW:- That may be, of course, extremely awkward with regard to a question of law reaching down to the foundations of the Constitution, but it may also be still more awkward with regard to questions of fact.

Sir ROBERT FINLAY:- Certainly, my Lord. May I, in illustration of what your Lordship has said, refer to a point that came up in a case which I am going to cite to your Lordships. There was a Statute passed in the Parliament of Canada providing for the punishment of bigamy although the second marriage took place outside the Dominion of Canada, and it provided that in the case of persons, British subjects, resident in Canada, if they left the Dominion for the purpose of contracting such a second marriage abroad they might be punished for bigamy in Canada. The point whether that Statute was intra vires was raised by a question sent under this Section 60 to the Supreme Court. Nobody appeared on the other side. It was argued for the Dominion, and the Supreme Court with some hesitation held that it was intra vires. One of the Judges pointed out, as I submit very shrewdly, that the real offence, inasmuch as the power is only to legislate within the Dominion, is leaving the Dominion with the intention of contracting the marriage, and that was not the indictment; but the inconvenience of this procedure is, I am told, illustrated by the fact that that opinion so expressed, I think I am right in saying, without argument on the other side at all, and the Chief Justice

dissenting, has been acted upon. Your Lordships are aware that a similar enactment in Australia was held to be ultra vires. There there was no clause limiting it to British subjects resident in Australia.

The LORD CHANCELLOR:- Resident or domiciled.

Sir ROBERT FINLAY:-"Resident" is the word of the Statute, I think, Subsection 4. Your Lordships' Board held in the case of McLeod, which I will refer to presently, that an enactment of that kind in general terms in Australia must be confined to cases of the second marriage occurring in Australia; otherwise it would be ultra vires. Here it was held that such an enactment, applied to British subjects resident in the Dominion, was good although the marriage was outside the limits of the Dominion. That is a question of enormous gravity, and I submit anything more inconvenient than that the law should be supposed to be laid down by an opinion of that kind expressed without hearing both sides cannot be imagined.

The LORD CHANCELLOR:- Of course it is not binding.

Sir ROBERT FINLAY:- It is not binding.

The LORD CHANCELLOR:- It illustrates the incongruity.

Sir ROBERT FINLAY:- It illustrates the extraordinary inconvenience.

The matter is of so great importance that I was about to put your Lordships in possession of the successive enactments which have taken place beginning in 1875, and the cases that have arisen under it. The first is the Supreme Court Act which was passed on the 8th April 1875. By that Act there was established the Supreme Court by Section 1. It is the 38th of the Queen, chapter 11. The Act is entitled: "An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada." The first Section provides: "There are hereby constituted, and established, a Court of Common Law and Equity, in and for the Dominion of Canada, which shall be called 'The

Supreme Court of Canada', and a Court of Exchequer, to be called 'The Exchequer Court of Canada'." Then there is provision as to the Judges and so on, and then comes Section 52, which is the material Section in this connection. It is under the heading: "Special cases referred to the Court." "(52) It shall be lawful for the Governor in Council to refer to the Supreme Court for hearing or consideration, any matters whatsoever as he may think fit; and the Court shall thereupon hear and consider the same and certify their opinion thereon to the Governor in Council: Provided that any Judge or Judges of the said Court who may differ from the opinion of the majority may in like manner certify his or their opinion or opinions to the Governor in Council." And then Section 53 contains a provision for reporting by the Court on private Bills or Petitions. With that we are not concerned at the present moment.

Lord ROBSON:- That last provision, Section 53, would equally fall within your objection.

Sir ROBERT FINLAY:- I think it would, but that does not arise here.

Lord ROBSON:- No.

Sir ROBERT FINLAY:- It is an attempt to utilise the Supreme Court for another purpose altogether.

Mr NEWCOMBE:- Did you read Section 53?

Sir ROBERT FINLAY:- My friend desires that I should read Section 53, I stated its effect but I will read it. "(53) The said Court, or any two of the Judges thereof, shall examine and report upon any private Bill or petition for a private Bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons." That would fall under my objection but my objection would apply I am bound to say with far less force to that because you could not have on a private Bill

questions of such general and far reaching importance and with so many ramifications as the questions which might be submitted under Section 52 relating to the constitutionality.

Lord ATKINSON:- Does that limit at all the questions which may be put upon a private Bill?

Sir ROBERT FINLAY:- No, it is merely that they may report upon it.

Lord ATKINSON:- Whether it was desirable to have legislation in the manner proposed by the Bill would be a question of "good government".

Sir ROBERT FINLAY:- However the objections would be much less forcible I think to reporting on private Bills, though I do not think it would be right, than to questions of this kind.

Lord MACNAGHTEN:- The Judges do report on private Bills in this country, do not they --- the House of Lords?

Sir ROBERT FINLAY:- The House of Lords has always power, and I shall refer to that by and by, in connection with any legislation to ask the Judges their opinion upon a point of law.

Lord ATKINSON:- Is not that upon what the existing law is which it is proposed to change?

Sir ROBERT FINLAY:- What the existing law is. Even with regard to that limited power Mr Justice Maule expressed himself somewhat forcibly on the occasion of a reference of that kind; he pointed out the great inconvenience of questions in that abstract form; but a question as to the existing law is another thing altogether. This may be on any important question of law or fact.

Lord ATKINSON:- That case you referred to established there that they would only answer on the question as to what was the existing law on the particular subject?

Sir ROBERT FINLAY:- Certainly, my Lord.

The LORD CHANCELLOR:- I am speaking from recollection and

from general reading, my impression is, that at one period, questions of law were not unfrequently put by the Executive Government to the Judges; and some of the answers are in the form of resolutions.

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- I am under that impression.

Sir ROBERT FINLAY:- I am sorry to say at one time it was the habit of the Sovereign to ascertain beforehand what decisions the Judges were likely to give in cases which came before them.

The LORD CHANCELLOR:- That was an abuse. I mean, not as an abuse, but it was the practice. I do not say it was necessarily a good Constitutional practice.

Sir ROBERT FINLAY:- Perhaps it might be convenient if at this moment I gave your Lordships the references which I have with regard to that practice. It lies on the threshhold of this subject, I think it would be convenient to do it now. There is one case, Lord George Sackville's case, reported in 2 Eden at page 371. That was a case with regard to a Court Martial proposed to be held in the very celebrated case of Lord George Sackville who had been in command of the British Cavalry at the Battle of Minden and who, for some reason, refused to charge when he was ordered to, and, when he afterwards expressed his readiness, was very suavely informed by the Commander-in-Chief that it was now too late. Of course it was a very serious matter. His name was struck off the list of Privy Councillors, and the King himself said that the punishment was worse than that of death. This was a case as to the power to hold a Court Martial upon him when he had resigned his commission. This is a certificate of the Judges respecting the Court Martial proposed to be held on Lord George Sackville, and there is a letter of Lord Mansfield to the Lord Keeper enclosing the Certificate in 1760. "In obedience to your Majesty's commands, signified to us by a letter from the Right

Honourable the Lord Keeper, referring to us the following question, 'Whether an officer of the army having been dismissed from his Majesty's service, and having no military employment, is triable by a Court Martial for a military offence lately committed by him while in actual service and pay as an officer?' We have taken the same into consideration, and see no ground to doubt of the legality of the jurisdiction of a Court Martial in the case put by the above question. But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the court has no jurisdiction; or if the Court should refuse to proceed, in case the party thinks they have jurisdiction; we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient. All which is humbly submitted to your Majesty's royal wisdom." Then that is signed by the Judges. Then there is a note here: "A similar consultation took place a few years prior to it in the case of Admiral Byng, and another in the reign of George 1st, as to the right of the sovereign to the education and marriage of the children of the Prince of Wales. The proceedings upon the latter of these are in Lord Fortescue's Reports, 401: and more fully in 15 Howell's State Trials 1195. The former of these works also contains several early precedents, in which this mode of proceeding has been resorted to, and authorities by which it is justified, page 386 et seq. Mr Hargrave, however, in a note to his edition of Co. Lit. 110 a, n. 129, has, on the great authority of Lord Coke, expressed some serious doubts as to the propriety of these extra-judicial consultations: and, indeed, many of the precedents given in the books are extremely objectionable. As in the instances mentioned by Kelynge, 9 & 10, preparatory to the trial of the regicides, the judges met at the request of the Attorney

General, to advise the King not only as to framing the indictments, but in relation to overt acts and evidence, Fortescue 390. So in the case of Francis Francia, in 1717, a conference was held among the judges, three of whom who were to try the prisoner, at which the Attorney and Solicitor General, who were to conduct the prosecution next day, lent their assistance, Foster, 241; Fortescue, 390. Lord Bacon, in a letter to James 1st, gives curious account of his management in endeavouring, according to the king's direction, to obtain the opinion of the Judges of the King's Bench separately and privately, previous to the trial of Mr Peachman, a minister, indicted for certain treasonable passages in an unpublished sermon, and of Lord Coke's honourable reluctance to give the desired answer. Bacon's Works, vol. 4, 595; Kippis, Bio. Brit. vol.3, 682. It appears also not only from the guarded manner in which the present answer is expressed, but, from Lord Mansfield's letter to the Lord Keeper, in which it was inclosed, and which is here subjoined from the original amongst Lord Northington's papers, that the Judges felt considerable disinclination to have their opinions called for in this mode. A similar degree of caution was exhibited in a great case which occurred in the reign of Queen Anne, in the year 1711. Upon the revival of the Arian heresy by Whiston, doubts were entertained whether the convocation could in the first instance proceed against a person for heresy; and the queen, in consequence of an address from the Upper House, took the opinion of the judges. Four of the judges thought that the convocation had no jurisdiction. The remaining eight (who, together with the Attorney and Solicitor General, gave their opinions in favour of the jurisdiction, &c.) expressly reserved to themselves a power to change their mind, in case, upon an argument that might be made for a prohibition, they might see cause for it." Then here is the letter of

Lord Mansfield to the Lord Keeper enclosing the Certificate which I have read in Lord George Sackville's case. "My Lord, I laid his Majesty's commands before the judges. They are exceedingly thankful to his Majesty for his tenderness in not sending any question to them till the necessity of such reference became manifest and urgent. They have considered the point, and they all agree. In general, they are very averse to giving extra-judicial opinions, especially where they affect a particular case; but the circumstances of the trial now depending ease us of difficulties upon this occasion, and we have laid in our claim not to be bound by this answer. Mr Justice Clive is now at York upon the circuit, so that there was no opportunity to have his concurrence." It is subscribed by Lord Mansfield.

There is a passage relating to the practice in the time of the Stuart Kings in England which occurs in a volume of the Massachusetts Reports where historically this subject is dealt with at some little length.

It is in the 12th volume of Lathrop's Massachusetts Reports, volume 126 of the Massachusetts Reports generally, at page 561. I will just read a few passages. It is in the Supplement. It is the opinion of the Justices to the Senate and House of Representatives. I only cite it for this historical passage: "The practice of the Stuart Kings in taking extra judicial opinions of the Judges upon questions about to come before them judicially was an unconstitutional abuse of the Royal Authority in this respect. But since the Revolution of 1688, so sturdy an asserter of the independence of the Judges as Lord Holt joined with the other Judges of the time in opinions to King William III upon the extent of the power of pardon, and to Queen Anne upon the question whether a writ of error should be granted as of right; and as late as 1760 Lord Mansfield, Chief Justice Willes, and other Judges, gave an opinion to King George II upon the jurisdiction of a Court Martial to try an officer, after his dismissal from the Army for a military offence committed while in actual service". Then they go on: "We are not aware of any instance since 1760 in which the Crown has exercised the power of asking the opinion of the Judges". That is Lord George Sackville's case. "But the right of the House of Lords to put abstract questions of law to the Judges the answer to which might be necessary to the House in its legislative capacity has been often acted on in modern times".

The LORD CHANCELLOR: "In its legislative capacity"?

Sir Robert FINLAY: Yes, my Lord, and I propose to refer your Lordships now to the cases with regard to the power of the House of Lords to consult the Judges.

The LORD CHANCELLOR: Judicially they can, obviously.

Sir Robert FINLAY: Judicially, but also in a legislative capacity. This is in the matter of the London & Westminster Bank in 2 Clark & Finnelly, 191. In that case: "Certain persons having united themselves together under the name of the London &

"Westminster Bank Company applied to Parliament for a bill to incorporate them under that name. The bill passed the House of Commons and on being brought up to this House was read as a matter of course a first time. When it stood for a second reading it was moved and agreed to that counsel should be heard at the bar of the House on the subject of the bill. It was then moved and agreed to that the Judges be ordered to attend the House". Then the order is set out. The Judges attended, and at the bottom of page 192 Lord Wynford interrupting counsel says: "That the Judges had communicated to him that they felt some difficulty as to the possibility of their answering the question which had been submitted to them by their Lordships". That was: "Are the provisions of this bill inconsistent with the Bank of England's rights as secured to it;" under the acts enumerated. Lord Wynford "moved that they should retire, for the purpose of considering whether they could answer the question. The Judges having retired, remained absent above three quarters of an hour, when Lord Chief Justice Tindal, on their return, said, 'His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer'. Lord Wynford intimated that he had before thought it doubtful whether the Judges could answer the question." That shows how strictly the Judges when consulted by the House of Lords confined their answers to the strict legal construction of existing laws.

Lord ROBSON: But you do not dispute that, if Parliament directed them by Statute to give answers to questions of this kind, ~~that~~ that legislation would be good.

Sir Robert FINLAY: No, I should not dispute that for a moment.

Lord ROBSON: Is not the question here whether the Dominion

Parliament has the same power in relation to that subject matter as the British Parliament?

Sir Robert FINLAY: Yes, my Lord. Of course the British Parliament is omnipotent. The Dominion Parliament can only act within the limits of the Constitution.

Lord ROBSON: The whole question here is whether these come within the limits of the Constitution, as laid down in the British North America Act?

Sir Robert FINLAY: Yes, my Lord.

Lord ROBSON: The legislation may be very impolitic, and open, as it obviously is, to great abuse. That may illustrate the problem but it does not decide it.

Sir Robert FINLAY: That is on my view a reason for thinking that it is ultra vires. The power is not given in express terms, and the very grave inconveniences which attend the exercise of such a power - and which really could not be better illustrated than by the questions put in the present case - are, I submit, reasons for thinking that the omission from the Constitution was designed, and it was never intended that they should have such a power.

Then my Lords, there is a note here from Mr. Coxe's Manuscripts to this case: "Michaelmas, 27, George 2. A question having been started on occasion of the late Act of Parliament concerning the naturalisation of the Jews, which Act was repealed this session, whether Jews are entitled to purchase and hold lands in England, Lord Temple after the repeal of the Act, moved in the House of Lords that some method might be taken to ascertain this question, and that for this purpose the Judges might be desired to attend and give their opinions upon it; which was opposed and the motion rejected for many reasons, but particularly because the Judges are not obliged to give their opinions to the House upon ~~this~~ such extra judicial questions, and where no Bill is depending."

LORD ATKINSON : "where no Bill is depending".

SIR ROBERT FINLAY : Yes, my Lord. "And the Duke of Argyll mentioned a case in Queen Anne's time where sucha question being put, the Judges, Lord Chief Justice Holt in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such question; and his objections thereto were allowed by the House"; so that it was really confined in that case between the House of Lords and the Judges to judicial pro~~test~~ceeding, appeals pending, and pure questions of law.

LORD ATKINSON : I suppose the idea is if you are about to change the law you should first ascertain what the existing law is.

SIR ROBERT FINLAY : Yes, my Lord.

THE LORD CHANCELLOR : Apart from any particular appeal ~~or all~~, or not.

SIR ROBERT FINLAY : Apart from any particular appeal or not. First, that the case for putting the question must have arisen on an appeal pending; second, that the question must be a proper question of law. I think that is the result of the authorities. Then in M'Naghten's Case, which is reported in 10 Clark and Finnelly at page 200, where the rule as to the appeal pending and as to that being necessary was trenched upon because there had been a trial and an acquittal on the ground of insanity. Then at page 202 it is stated :"This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords (the 6th and 13th March 1843; see Hansard's Debates, vol.67, pp. 288, 714), it was determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th May, all the Judges attended their Lordships, but no questions were then put. On the 19th June, the Judges again attended the House of Lords; when (no argument having been had) the following questions of law were propounded to them" - then various instances as to what is the law as to insanity excusing a man for a crime are given; and then on page 204 Mr. Justice Maule says this : "I feel great difficulty in answering the questions put by your Lordships on this occasion :- First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular

purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions : this difficulty is the greater, from the practical experience both of the bar and the Court being confined to questions arising out of the facts of particular cases : ✝ Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument:- and Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions; but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned; fearing that my answers may be as little satisfactory to others as they are to myself." He then proceeds to give his answers, with which I do not trouble your Lordships. Then Lord Chief Justice Tindal, at page 208, begins thus : "My Lords, Her Majesty's Judges(with the exception of Mr. Justice Maule, who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships' House, think it right, in the first place, to state that they have foreborne entering into any particular

discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions. They have therefore confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions seriatim, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships." Then follow the answers.

MR NEWCOMBE : Would you mind reading Lord Brougham's Judgment on page 212 ?

SIR ROBERT FINLAY : Certainly; these answers having been given by the Judges, on page 212 Lord Brougham says this : "My Lords, the opinions of the learned Judges, and the very able manner in which they have been presented to the House, deserve our best thanks. One of the learned Judges has expressed his regret that these questions were not argued by counsel. Generally speaking, it is most important that in questions put for the consideration of the Judges, they should have all that assistance which is afforded to

them by an argument by counsel : but at the same time, there can be no doubt of your Lordships' right to put, in this way, abstract questions of law to the Judges, the answer to which might be necessary to your Lordships in your legislative capacity. There is a precedent for this course, in the memorable instance of Mr. Fox's Bill on the law of libel; where, before passing the Bill, this House called on the Judges to give their opinions on what was the law as it then existed." Then Lord Campbell says: "My Lords, I cannot avoid expressing my satisfaction, that the noble and learned Lord on the woolsack carried into effect his desire to put these questions to the Judges. It was most fit that the opinions of the Judges should be asked on these matters, the settling of which is not a mere matter of speculation; for your Lordships may be called on, in your legislative capacity, to change the law; and before doing so, it is proper that you should be satisfied beyond doubt what the law really is. It is desirable to have such questions argued at the bar, but such a course is not always practicable. Your Lordships have been reminded of one precedent for this proceeding, but there is a still more recent instance; the Judges having been summoned in the case of the Canada Reserves, to express their opinions on what was then the law on that subject." Then what Lord Cottenham says is very short, but I think it is worth reading : "My Lords, I fully concur with the opinion now expressed, as to the obligations we owe to the Judges. It is true that they cannot be required to say what would be the construction of a Bill, not in existence as a law at the moment at which the question is put to them; but they may be called on to

assist your Lordships, in declaring their opinions upon abstract questions of existing law." Lord Wynford says : "My Lords, I never doubted that your Lordships possess the power to call on the Judges to give their opinions upon questions of existing law, proposed to them as these questions have been. I myself recollect, that when I had the honour to hold the office of Lord Chief Justice of the Court of Common Pleas, I communicated to the House the opinions of the Judges on questions of this sort, framed with reference to the usury laws. Upon the opinion of the Judges thus delivered to the House by me, a Bill was founded, and afterwards passed into a law." And the Lord Chancellor says: "My Lords, I entirely concur in the opinion given by my noble and learned friends, as to our right to have the opinions of the Judges on abstract questions of existing law." So that there, my Lords, in that case the right was carried a step further. It was not confined to an actually pending appeal, but the House proceeded on the view that where legislation was probable, or even possible, they had the right as a preliminary before embarking upon an actual appeal, to have the view of the Judges as to what the law was.

LORD ATKINSON : It might be interesting to know what was proposed in the debate; was it proposed that the law should be changed ?

SIR ROBERT FINLAY : I do not think it is stated. A reference is given to the debate in Hansard, but I do not think that that is stated. The reference will be found in Hansard, Volume 67, pages 288 and 714 of the debates on the 6th and 13th March 1843.

Then of course, my Lords, there is the well known case of O'Connell in 11 Clark and Finnelly, page 156.

THE LORD CHANCELLOR : That was strictly judicial.

SIR ROBERT FINLAY : Yes, my Lord, that was strictly judicial.

THE LORD CHANCELLOR : I mean there is no doubt whatever.

SIR ROBERT FINLAY : No, my Lord, it never has been doubted, as far as I know.

THE LORD CHANCELLOR : And that of course was a Court of law.

SIR ROBERT FINLAY : That was a court of law. I think these are the cases at common law in England. Then I ought in this connection to give your Lordships the terms of the Section of the Act of 3 and 4 William IV. Section 4 of the Act of 3 and 4 William IV, Chapter 41, the Act of 1833, is the Section which regulates the constitution of the Judicial Committee, and what it says is this :"And be it further enacted, That it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid." Your Lordships see that Section 4 provides for a reference of any other matters that His Majesty may think fit. That refers of course to Section 3, which had provided that all appeals, or complaints in the nature of appeals, which may be brought before His Majesty in Council, should, after the passing of the Act, be referred by His Majesty to the Judicial Committee of the Privy Council.

THE LORD CHANCELLOR : Which Section is that ?

SIR ROBERT FINLAY : That is Section 3, the immediately preceding Section. Section 3 deals with appeals to be referred to the Judicial Committee, and Section 4 is the Section which is repeatedly put into operation providing that any other matters may be referred by the King to the Judicial Committee. I am citing from Safford and Wheeler's book on

Privy Council Practice, and if I may I should like to refer to the note in it upon Section 4 - it is Note N, on page 33 :"The Judicial Committee have no power to place any limit as to the matters which may be referred to them by the Crown." (And for that Schlumberger's Patent in 1853 is cited.) "Before this provision there was apparently a power in the Privy Council to place a limit (Ninth Moore, 1) on the matters which would be considered by them." (For that the case of the Army of the Deccan, 1883, in 2 Knapp, is referred to.) "No judgment or report in open Court is delivered in matters referred for advice under this Section."

THE LORD CHANCELLOR : You must ~~remember~~ remember with regard to that Act, the Judicial Committee of the Privy Council consists of members of the Privy Council, and their judicial functions are regulated, but in their position ~~as members of the Council~~ of British Council they are bound to give the advice.

SIR ROBERT FINLAY : Exactly, my Lord.

THE LORD CHANCELLOR : And Section 4 only means that it shall be lawful for the King to apply to the Committee.

SIR ROBERT FINLAY : Precisely.

THE LORD CHANCELLOR : I am not at all sure it was necessary.

SIR ROBERT FINLAY : I do not think it was, but it was thought expedient to enact that; by becoming members of the Judicial Committee, they did not necessarily become Privy Councillors for all purposes. That is what it really comes to. The omission of any such power from the Canadian Constitution, from the British North America Act, I submit, was intentional. It was known that there was this power existing if any question of great gravity arose affecting the Dominion or the Provinces, and that the King had power to ask the opinion of the Judicial Committee upon it. That is a power which has been exercised sparingly and has only been exercised in suitable cases.

THE LORD CHANCELLOR : I suppose that the Dominion Parliament could pass a section analogous to Section 4, saying that the Privy Councillors of Canada might be consulted even although they happened to be members of the Judicial Tribunal.

SIR ROBERT FINLAY : Yes; in their individual capacity.

THE LORD CHANCELLOR : They do not seem to have a Court in Canada which consists of members of the Privy Council.

SIR ROBERT FINLAY : No, I think not , my Lord.

THE LORD CHANCELLOR : That is the analogy, no doubt.

SIR ROBERT FINLAY : I am told by my learned friend that the Judges are not members of the Privy Council, but I ought to qualify that by saying that some of the members of the Supreme Court have been Members of the Government and

sworn of the Privy Council and do not cease to be members of the Privy Council on becoming members of the Supreme Court.

THE LORD CHANCELLOR : But they do not constitute a Court of themselves.

SIR ROBERT FINLAY : No. Then I submit to your Lordships that the existence of this power exercised within the limits within which it has been always exercised in this Country to refer matters to the Judicial Committee might be a very good reason indeed for not inserting any such power in the Constitution of Canada - anyhow it has not been inserted.

My Lords, I resume the consideration of the successive Statutes. The Act of 1875 by Sections 52 and 53 made the provisions which I have read to your Lordships, and I might mention that under this Act it was decided in Sproule's Case (12 Supreme Court Reports, page 140) that that Act did not constitute the individual members of the Court separate courts; ~~Of course~~ it was one Court under that Act of 1875. Now my Lords, in 1883 there took place a Reference in what is known as the Thraser Case with regard to British Columbia. The only report I have got of it in in Coutlay's Digest, a Digest of the decisions of the Supreme Court of Canada, Folio 1, page 273. There was a Reference by the Governor General of questions as to the status of the British Columbia Supreme Court and the validity of certain Acts, and the questions were answered. No objection appears to have been taken at all. I do not desire to plunge into the particulars of all these cases, but your Lordships will see on glancing at the Report, columns, 273 and 274 of Coutlay's Digest, that the questions were of this nature : The first was :"Is the Supreme Court of British Columbia a Provincial Court within the meaning of the fourteenth sub-Section of Section 92 of the British North America

Act ?" and the answer of the Supreme Court was that it was such a Court. I need not read the other answers. The only importance of it is that questions of that nature were asked and were answered. That was in 1883.

LORD SHAW : What was the question ?

SIR ROBERT FINLAY : The question was a question as to the status of the Supreme Court of British Columbia; that was the first question, and the second question was : "Has the Legislature of the Province exclusive authority over the procedure in all civil matters in the Supreme Court; if not, to what extent has it such authority ?" There are five questions altogether.

THE LORD CHANCELLOR : And they were answered ?

SIR ROBERT FINLAY : Yes, they were answered. Then the next Reference was not under the section that I have read from the Act of 1875, but was under a special enactment contained in the Liquor Licence Act of 1883.

THE LORD CHANCELLOR : What year was that ?

SIR ROBERT FINLAY : 1884, my Lord. The report of that case will be found in the same Digest at page 797. The Liquor Licence Amendment Act contained a Section, Section 26, which gave an express power to refer questions as to the validity of the Liquor Licence Act of 1883. On page 797 your Lordships will find the Section is sufficiently referred to and a Reference was made under that Section. Of course the same question would arise as to the validity of that Section 26 as I raised with regard to the validity of Section 60. That was a Section in a special Act providing for a reference of certain questions to the Supreme Court, and if it were material I should raise the same objection to the provisions as I should to the more general provisions contained in Section 60.

LORD ATKINSON : The Statute of 1883 was a Dominion Statute.

SIR ROBERT FINLAY : Yes, it was a Dominion Statute. Now that case came up to your Lordships' Board. It is not reported, but I have here the Order that was made. The Judicial Committee reported to the King in reply to the two questions referred to them :"Do ultimately agree to report to Your Majesty as their opinion in reply to the two questions which have been referred to them by Your Majesty, that the Liquor Licence Act, 1883, and the Act of 1884 amending the same, are not within the legislative authority of the Parliament of Canada. The provisions relating to adulteration, if separated ~~from~~ in their operation from the rest of the Act, would be within the authority of Parliament, but, in their Lordships' opinion, they cannot be so separated. Their Lordships are not prepared to report to Your Majesty that any part of these Acts is within such authority."

THE LORD CHANCELLOR : Was that a Reference under Section 4, or under the Canadian Act ?

SIR ROBERT FINLAY : It was a reference under Section 26 of the Liquor Licence Amendment Act. This came on appeal from the Supreme Court.

THE LORD CHANCELLOR : That is what I meant.

LORD MACNAGHTEN : There was no formal Judgment given ?

SIR ROBERT FINLAY : There was no formal Judgment given. Lord Herschell, who was then Lord Chancellor, says in the volume I have containing the proceedings with regard to this Act :"Their Lordships will consider the matter; there will be no Judgment delivered here, but their Lordships will report to Her Majesty", and I have read the terms of the report from the Order in Council which is dated 12th December 1885.

Then, my Lords, the next Act was the Supreme Court Act of 1886--that is in the revised Statutes of Canada for 1886, chapter 135. In that Act, section 52 of the Act of 1875, was re-enacted as section 37--it is precisely in the same terms, and it is a mere alteration of the number of the section. No cases, as far as I am aware, arose further under that Act, so that we have under the Act of 1875, and the Act of 1881, which is identical really, only the one case, namely the Thrasher case. Then came the Supreme Court Act of 1891, 54 and 55 Victoria (Canadian Act) chapter 25. That Act repealed section 37 of the Act of 1886, which represented section 52 of the Act of 1875, and substituted another section for it. It is the fourth section of this Act of1891 which contains the enactment in question: "Section 37 of the said Act is hereby repealed, and the following is substituted there for:-- 37 Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the British North America Act, 1867, or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred by the Governor in Council to the Supreme Court for hearing or consideration, and the Court shall thereupon hear and consider the same. (2) The Court shall certify to the Governor in Council for his information, its opinion on questions so referred, with the reasons there for, which shall be given in like manner as in the case of a judgment pending appeal to the said Court, and any judge who differs from the opinion of the majority, shall in like manner certify his opinion, and his reasons." Then there was a provision for giving notice to the Attorney General

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of any province which may be affected by the questions and to parties interested for the appointment of Counsel by the Court, and there is a provision that the opinion of the Court, though ~~advisedly~~ advisory only shall for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between the parties, and a provision that general rules may be framed. Your Lordships will see that that is much less detailed in its specification of the class of question which may be referred.

THE LORD CHANCELLOR: If you are right on one, you are right on the other, and if you are wrong on one, you are wrong on the other--is not that what it comes to?

SIR ROBERT FINLAY: Yes, but I thought your Lordships should be in possession of that Statute, because one point made against me is that this has gone on for a long time. I say the fact that it has gone on for a long time, does not make it constitutional for ~~its~~ it is outside the power.

THE LORD CHANCELLOR: What strikes me is this, that the Act of 1875 began on the analogy of section 34.

SIR ROBERT FINLAY: It is similar.

THE LORD CHANCELLOR: Then it seems that the Act of 1891 was in the nature of a dilemna, and diminishes the width of the language of the Act of 1875.

SIR ROBERT FINLAY: Now, my Lords, in the last edition, it has come round to being as extensive as anything can be, because although it enumerates a certain number of things specifically, it winds up by saying: "Any other matter or thing", whether ejusdem generis, or not.

THE LORD CHANCELLOR: But it could not be more general than the 1875 Act.

SIR ROBERT FINLAY: It could not. Now under the Act of 1891, which I have just read, there have been nine cases of reference. The first was in 1892, in a case reported in the 21st Volume of the Supreme Court of Canada reports,

page 446. That was a Special Case referred by the Governor General in Council, in Re the County Courts of British Columbia. It was a case in which the question was put as to whether the power given to the provincial governments to legislate, regarding the constitutionality and so on, of the provincial Courts, included the power to define the jurisdiction of such Courts territorially, as well as in other respects, and to define the jurisdiction of the judges who constituted such Courts. The question was answered, and it was answered in the affirmative. At page 454 your Lordships will find that the Province of British Columbia appeared, and had been heard. Mr Justice Strong gave the answers of the Court, and he begins his judgment at the top of page 453, by saying that he is of opinion that both the sections referred to were within the powers of the Legislature of British Columbia. Then he proceeds to answer.

THE LORD CHANCELLOR: Does he do more than answer the questions?

SIR ROBERT FINLAY: No, my Lord, but Mr Justice Taschereau did, at page 454. Mr Justice Taschereau said: "I do not take part in this consultation. I have some doubts on the constitutionality of some of the enactments contained in 54 and 55 Victoria, chapter 25, and on the power of Parliament to make this Court an Advisory Board to the Executive Board, or its officers, or as it seems to me to have done in some instances by constituting a Court of original jurisdiction." Mr Justice Gwynn, and Mr Justice Patterson merely expressed their concurrence with Mr Justice Strong, and did not say anything on the point which Mr Justice Taschereau raised.

The second case was in the year 1893, in the matter of certain statutes of Manitoba relating to education.

The case is reported in the 22nd Volume of the Reports of the Supreme Court of Canada, at page 577. That was a reference under the same section, raising certain points with regard to education. The Counsel for the Attorney General of Manitoba is stated to have appeared. Your Lordships will find the passage on page 625. Mr Robinson says: "I appear under the Statute, by direction of the Court". The Court under the power which your Lordships know exists, had power to direct that Counsel should attend under any interest affected, and Mr Robinson said: "I appear under the Statute by direction of the Court. (MR JUSTICE TASCHEREAU) You represent Manitoba, Mr Robinson; it is just as well to know whom you represent. (THE CHIEF JUSTICE) You appear under the Statute, Mr Robinson? (MR ROBINSON) I appear under the Statute by direction of the Court". Then Mr Wade said: "I appear on behalf of the Province of Manitoba; I desire to state that while Manitoba appears here, it is simply to acknowledge that the Province has been served with a copy of the case by the Clerk of the Privy Council, and not to take any part in the argument. I appear out of deference to the Court to acknowledge that the Province has been served. I may say further my Lords, as to Mr Robinson, that the province does not know him in the matter"--he represented the minority, ~~and he~~ who might have been affected by the Education Acts.

MR NEWCOMBE: He represented a Province.

SIR ROBERT FINLAY: Then on page 652 the Chief Justice explains the procedure which had been followed. He says: "The matter was brought before the Court by the Solicitor General on behalf of the Crown, but was not argued by him. On behalf of the Petitioners and Memorialists, he had sought the intervention of the Governor General, Mr Ewart, Q.C. appeared. Mr Wade Q.C. appeared as Counsel on

behalf of the Province of Manitoba. When the matter first came on he declined to argue the case, and the Court then in exercise of the powers conferred by 54 and 55 Victoria, chapter 25 section 4 (substituted for the Revised Statute of Canada, chapter 635, section 37) requested Mr Christopher Robinson, Q.C., the senior member of the Bar practising before this Court, to argue the case in the interests of the Province of Manitoba, and on a subsequent date the matter was fully and completely argued by Mr Ewart, and Mr Robinson". Then he proceeds to deal with the questions, and onpage 677, Mr Justice Taschereau again expressed his doubts as to the jurisdiction. He said: "I doubt our jurisdiction on this reference or consultation. Is section 4 of 54 and 55 Victoria, chapter 25,which purports to authorise such a reference to this Court for hearing 'or' consideration intra vires of Parliament? by which section of the British North America Act is Parliament empowered to confer on this Statutory Court any other jurisdiction than that of a Court of Appeal, under section 101 thereof? This Court is evidently made in the matter a Court of first instance, or rather I should say an Advisory Board of the Federal Executive substituted pro hac vice for the Law Officers of the Crown, andnot performing any of the usual functions of a Court of Appeal--nay, of any Court of Justice whatever. However, I need not at present further investigate this point. It has not been raised, and a similar enactment to the same import, has already been acted upon. That is not conclusive, it is true, but our answers to the questions submitted will bind no one, not even those who put them--nay, not even those who give them--no Court of Justice, not even this Court. We give no judgments, we determine nothing, we end

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no controversies, and whatever our answers may be, should it be deemed expedient at any time by the Manitoba Executive to impugn the constitutionality of any measure that might hereafter be taken by the Federal authorities against the Provincial Legislation, whether such measure is in accordance with, or in opposition to the answers to this consultation, recourse in the usual way to the Courts of the country, remain open to them. That is, I presume, the consideration, and a very legitimate one I should say, uponwhich the Manitoba Executive acted, by refraining to take part in the argument on the reference".

LORD SHAW: Is there anything in any of the judgments equivalent to an admission or a statement of any learned judge, that the equivalent of a res judicatur, would be ~~incurred~~ inferred by a pronouncement of the Court.

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: Mr Justice Taschereau is the only one apparently, who says anything about it; do any of the other judges say anything about it?

SIR ROBERT FINLAY: They say nothing about it, my Lord. Then he goes on: "That is, I presume, the consideration, and a very legitimate one I should say, upon which the Manitoba Executive acted, by refraining to take part in the argument on the reference. A course that I would not have been surprised to see followed by the Petitioners, unless indeed they are assured of the interference of the Federal Authorities, should it definitely result from this reference, that statutory power to interfere with the provincial legislation, as prayed for, exists. I think if, as a matter of fact of policy in the public interest no action is to be taken upon the Petitioners submission, even if the appeal lies, the futility of these proceedings is apparent. Assume then that we had jurisdiction, I will try

to give as concisely as possible the reasons upon which I base my answers to the questions submitted". Then that reference was brought on Appeal before your Lordship's Board, and is reported in Appeal Cases, 1895, page 202, under the name of Brophy v The Attorney General of Manitoba. The head note is: "Where the Roman Catholic minority of Manitoba appealed to the Governor General in Council against the Manitoba Education Acts of 1890 on the ground that their rights and privileges in relation to education had been affected thereby. Held, reversing the judgment of the Supreme Court on a case submitted to it". That is inaccurate, because it was not a judgment at all: "held (a) That such appeal lay under section 22, sub section 2 of the Manitoba Act 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof". I need not go through the other answers. No point was taken as to jurisdiction, and nothing is said about it.

LORD ATKINSON: What form did the appeal take to this Board?

SIR ROBERT FINLAY: It was an appeal from the answers of the Supreme Court to the questions submitted.

THE LORD CHANCELLOR: But you see the dissenting judgment, or rather the criticisms of Mr Justice Taschereau were in the shape of a judgment in that case, and it therefore would have been before the Privy Council.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: But there the point was not raised before the Council, and it was not raised before the Board.

SIR ROBERT FINLAY: It was not mentioned at all, apparently, my Lord. It was desired to get answers, and the answers given by the Supreme Court were dissented from by your Lordships' Board.

THE LORD CHANCELLOR: On page 210 and on page 229 there are long and most elaborate passages giving ~~the reasons~~ answers which could only be given under the Statute which you now say is unconstitutional.

SIR ROBERT FINLAY: Yes, my Lord.

LORD CHANCELLOR: It is a matter of observation.

SIR ROBERT FINLAY: It is a matter of observation, I admit, but I submit that that observation is answered by this consideration, that here there was a question of enormous importance, like all questions affecting education and religion; it excited intense feeling; it was felt that there was ground for reconsideration of the answers given by the Supreme Court, and that re-consideration was invited. Your Lordships did not decline to consider the question, No one objecting, and came to the conclusion that the answers given by the Supreme Court had been quite wrong. So that I submit not much can be said in the way of affirmance of the jurisdiction by that ~~course~~ Court. It certainly could not confer jurisdiction, and I submit that it cannot be treated as a decision by your Lordships' Board that that jurisdiction exists.

THE LORD CHANCELLOR: Certainly, but not a decision; I have no doubt it was not raised, and it was not held.

SIR ROBERT FINLAY: Nobody wanted it raised really; they wanted really to get this ~~appeals~~ burning question reviewed in a calmer atmosphere.

Then, my Lords, the third case is a case in 1894 in Canada-- and I am simply giving the order in which it took place. It is reported in the 24th Volume of the Supreme Court Reports, at page 170. It is headed: "In Re Provincial Jurisdiction to Pass Prohibitory Liquor Laws" There wasxa reference of that under the section by the Governor General as to the power of the provincial

legislators with regard to the prohibition of the sale of liquors, and Ontario, Quebec and Manitoba, were represented at the hearing. That appears at page 172; the District Counsel appearing for several parties, as well as for the Dominion of Canada, who appeared by the Solicitor General. The questions were answered; no question as to jurisdiction was raised, and Mr Justice Taschereau was absent, so that the matter passed without any protest of any kind. The case was taken on Appeal to your Lordships' Board, and it is reported in Appeal Cases 1896, at page 348. This case was cited before your Lordships last week in the railway case before you, and it was in this case that Lord Watson delivered a somewhat elaborate judgment, a great part of which was read to your Lordships the other day. There again, my Lords, the questions were answered, no question being raised.

The fourth case is the Fisheries case, reported in 26 Supreme Court Reports at page 444. That was in the year 1895: "In the matter of jurisdiction over Provincial Fisheries". There, as appears at page 449, Ontario, Quebec, Nova Scotia and British Columbia were represented, and the Court answered the questions in conformity with a previous decision of its own given in a former case which came before it judicially.

LORD ATKINSON: And there was no question of jurisdiction?

SIR ROBERT FINLAY: No, I do not think there is a word raised about jurisdiction from beginning to end. That case came before your Lordships' Board, and it is reported in Appeal Cases, 1898, page 700. Again no question was raised as to the jurisdiction, and the questions were answered, but at page 717, there is a passage in which Lord Herschell states refusal on the part of the Board to answer certain questions.

9.

LORD SHAW: Before you go to that, will you allow me to express a certain difficulty which I have with regard to the previous case. I have been looking at Lord Watson's judgment on page 371, ~~and agree~~ where, as with ~~what~~ you say, ~~that~~ the question of jurisdiction was not raised, but this Board then advised His Majesty to discharge the Order of the Supreme Court, and to substitute there for several answers to the several questions submitted. So that this Board was as it were, stepping into the shoes of the Privy Council of Canada, so that it is stronger than merely saying that the question was not raised.

SIR ROBERT FINLAY: Of course where the parties argue a question, and ask the opinion of the Board on the question, the form to which your Lordship refers follows really almost as a matter of course, unless the Board itself were going to say "We decline jurisdiction". Of course one can perfectly understand how these things go on in a particular case where great interests are concerned, which come to your Lordships, and are anxious to get an Opinion. There might be very naturally, and very properly, I submit, great reluctance to send them away empty, when they had come from Canada desiring to have reversed opinions which they thought carried with them considerable injustice.

LORD MACNAGHTEN: The point was never suggested.

SIR ROBERT FINLAY: No, it was never suggested. Then, my Lords, in the case reported in 1898 Appeal Cases to which I was about to refer, the expression by Lord Herschell at page 717 is this: "Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions

of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors". Now that observation has a very great bearing indeed upon the questions submitted in the present case, and may I ask your Lordships again to refer to the questions appearing in the Order of the Privy Council at page 4. Your Lordships recollect that in the British North America Act, by section 92, under head 11, power is given to the Legislature of each Province exclusively to make laws in relation to certain class of subjects, the 11th clause dealingwith the incorporation of companies with provincial objects. Now there are a great many companies incorporated in that way, and your Lordships will see at page 4 that we have this group of questions: "First, under 'The British North America Act, 1867' upon the power of the provincial legislatures to incorporate companies? What is the meaning of the expression 'with provincial objects' in section 92, article 2 of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation? (2) Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92 Article 11 of 'the British North America Act 1867' power or capacity to do business outside of the limits of the incorporating province. If so, to what extent, and for what purpose?".

LORD SHAW: They embrace every kind of thing.

SIR ROBERT FINLAY: Yes, my Lord, it reminds one of that most exasperating form of question which one has had put so many times "And to advise generally on behalf of the infants". "Has a corporation constituted by a provincial legislature with power to carry on a fire insurance

business". There there is a question about power or capacity to buy, grind, or sell grain outside the incorporated province. Then there is a series of questions about insurance companies, whether they have power or capacity to rescind contracts (A) within the incorporating province insuring property outside of the province (B) Outside of the incorporating province insuring property within the province. (C) outside of the incorporating province insuring property outside of the province? Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country? Do the answers to the foregoing enquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province". Now my Lords, every one of these questions will vitally affect the rights of companies which have been incorporated by the Provincial Legislature.

12.

LORD ATKINSON: I see it is asked whether a provincial corporation can insure foreign property; that is a question which is not touched by the law of Canada at all.

SIR ROBERT FINLAY: That is covered by Head (e).

LORD ATKINSON: But it is not touched by the law of Canada.

SIR ROBERT FINLAY: That is so, my Lord, and I desire particularly to call your Lordship's attention to the extraordinary inconvenience of adopting this course. Here you have a series of detailed questions which I venture to say it must be almost impossible to answer, but the answers if they are given, and it is said the Supreme Court is ~~open~~ bound to answer them, would vitally affect vast numbers of companies which are in existence and carrying on business. It is said it has no binding effect, but it is impossible not to realise what the effect on the prosperity of those companies, and on the value of their shares in the market would be if the Supreme Court pronounced the opinion that they had no right to carry on a class of business from which most of their profits are derived.

THE LORD CHANCELLOR: Referring to Page 717, what Lord Herschell there in fact said was: "You have no right to ask the question", but he did say he was not bound to answer, and gave his reasons.

SIR ROBERT FINLAY: Yes; I have read your Lordship the terms of the Motion.

THE LORD CHANCELLOR: Section 60 says "Shall".

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: But you see without objection made, the Courts have hitherto answered the questions.

SIR ROBERT FINLAY: Yes, they have, my Lord.

THE LORD CHANCELLOR: It being thought that the answer had a constitutional result, but Lord Herschell thought the Board had a right to decline.

SIR ROBERT FINLAY: Yes. The Supreme Court is of course in some difficulty owing to the wording of Section 60. I was about

to say earlier in the argument on this same point that there may be a distinction between the case of your Lordships' Board and the case of the Supreme Court, because no Statute of Canada could possibly be binding on your Lordships' Board, and it could have no jurisdiction to say that your Lordships' Board shall answer, nor has it affected to do so. The Statute however has enacted that the Supreme Court shall answer, and my first observation is that such an enactment is unconstitutional, and that they have no power to impose it; secondly, that if the point arose, I should submit that with regard to questions fraught with such very serious consequences, and so extraordinarily detailed in their character, it would be the duty of the Supreme Court, and I ask your Lordships to ~~do~~ say so if the point arises--~~to say~~ "We decline to answer".

MR NEWCOMBE: May I interject this remark, that the only questio debated or raised in the Supreme Court ~~was raised~~, or raised by my friends in their case here, is the question of jurisdiction. The question of the power of the Parliament to enact this ~~xxxxxx~~ section, the question as to the propriety of the questions, and as to whether they should be answered or not, or what view the Court will take, is not before us.

THE LORD CHANCELLOR: The point is that there is the word "shall" in the Statute.

MR NEWCOMBE: Certainly.

LORD SHAW:

~~SIR ROBERT FINLAY:~~ ~~Then~~ Am I not right in saying that a perusal of these questions shows at each stage the very facts?

SIR ROBERT FINLAY:

They appear at every turn. May I refer my friend to the terms of our Notice of Motion. I read it at the beginning of my opening, but I think I had better read it again having regard to his interposition. Your Lordships will find it at the bottom of Page 7 of the Record. "Take notice that a motion will be made on behalf of the Provinces of Ontario,

Nove Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta by way of protest against the Court or the individual members thereof entertaining ~~xx~~ or considering the questions referred to it by the Executive Council and that the inscription thereof be stricken from the list, and that the same be reporrted back to the Executive Council as not being matters which can properly be considered by the Court as a Court or by the individual members thereof under the constitution of the Court as such nor by the members thereof in the proper execution of their judicial duties". Of course my first point is that the whole thing is unconstitutional, and my second point is that these particular questions are such that the Court ought not to answer them.

THE LORD CHANCELLOR: In the argument before the Dominion ~~XXXX~~ Court was the question discussed as to whether the Court could say consistently that these were questions of a kind which they felt it their duty as Judges not to answer.

Was that point raised?

SIR ROBERT FINLAY: I think both my friends Mr Newcombe and Mr Nesbitt were present, but I do not know how far that was so; my friends I have no doubt will be able to agree about it.

THE LORD CHANCELLOR: I want to know first is it constitutional to make such a law as Section 60 at all, though it uses the word "shall" and is it constitutional to insist upon a point depriving the Judges of the right of saying "We think it is interfering with private rights". Was that discussed?.

SIR ROBERT FINLAY: I cannot tell your Lordship how far it was touched upon. No doubt the first question, the big question of constitutionality bulked much more largely; whether and to what extent, if any, the second was touched upon my friend Mr Nesbitt will be in a position to tell your Lordships. But your Lordships will observe the terms of Section 60 of the Supreme Court Act of Canada in the second paragraph are very imperative. "When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred". It is very specific--when any questions are put Parliament says to the Supreme Court: "It shall be your duty to hear and determine and answer each question that is put".

The next case to which I refer is a very important case relating to the law of bigamy which I mentioned to your Lordships by way of illustration at an earlier period. It is reported in the 27th Volume of the Supreme Court Reports, Page 461, and it is headed: "In the matter of the Criminal Code, 1892, Sections 275-6 relating to bigamy. Special case referred by the Governor-General in Council". The point had arisen in two inferior courts, in the King's Bench and Chancery Courts, and different views had been taken upon the question, and then a question was sent by the Governor-General under section 60. It was held, or rather it was answered that Sections 275-6 of

the Criminal Code respecting the offence of bigamy are intra vires of the Parliament of Canada. ~~The chief~~ Mr. Strong Justice dissented. Section 275 your Lordships will see defines bigamy: "Bigamy is the act of a person who being married goes through the form of marriage with any other person in any part of the world". Then sub-section (4) ~~xxxx~~ says: "No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada unless such person being a British subject resident in Canada leaves Canada with intent togo through such form of marrSage"..

THE LORD CHANCELLOR: This is the basis of the decision.

SIR ROBERT FINLAY: This is the basis of the decision, my Lord.

THE LORD CHANCELLOR: ~~Upon its relation to the~~ The point really on the constitutional question was that a question was asked as to the meaning of it?

SIR ROBERT FINLAY: Exactly, my Lord. Of course I refer to this case in the first place as showing that it is another instance of a reference being made. It was my duty to mention it in that connection, but I further mention it as showing the extraordinary importance of the question, and, as I submit, the extraordinary inconvenience of allowing a question ofthis kind to be, for practical purposes, decided in this manner. ~~The~~ Two Courts had differed; the point was not taken by way of appeal; Counsel were not heard, but the Governor-General sent a question to the Supreme Court under the alleged powers of Section 60, and no Counsel appeared to oppose the validity of the said section. There was ~~xxxxx~~ nobody interested, and the Court could not authorise the appearance of Counsel on behalf of any person who might possibly think of committing bigamy. I mean to say there was no class of persons who could appear, and the result was that it was argued without any cause being shown at all.

THE LORD CHANCELLOR: Was the constitutional question raised and discussed?.

SIR ROBERT FINLAY: No.

THE LORD CHANCELLOR: The significande of it is the fact that the question was answered, which you say illustrates the gravity of it.

SIR ROBERT FINLAY: Yes, my Lord. My friend Mr Newcombe was the only Counsel who appeared, but he appeared for the Government of Canada, and, of course, did not question the validity of the reference which the Governor-General had made. I am not going to launch out into the subject of bigamy, but I mention McLeod's case from Australia in order to illustrate the gravity of the question.

(Adjourned for a short time).

Mr Lehmann follows

29.

Sir Robert FINLAY: Before your Lordships rose Lord Atkinson called attention to the fact that in McNaghten's case the Lord Chancellor announced in his Speech in the House of Lords that he proposed to introduce a measure in a few days dealing with the subject, and then he went on to say that it would be a great advantage if the law could be declared to the House by the Judges before that measure was discussed; so that that does not diverge very far from the rule which was supposed to have existed that it should be with regard to a pending Bill.

I was about to say a word or two with reference to the effect of the answer given in that case with regard to bigamy. Your Lordships are aware that in the case of Macleod a similar question came from Australia, and it was argued before your Lordships' Board. It is reported in the Appeal Cases for 1891 at page 455.

The LORD CHANCELLOR: Is that the bigamy case?

Sir Robert FINLAY: Yes my Lord. It came from New South Wales, the Appellant being Macleod, the person who had been convicted of bigamy, the Respondent being the Attorney-General for New South Wales, and the point raised by the Appellant was that he could not be convicted in respect of a marriage outside of Australia. Section 54 of the Criminal Law Amendment Act of 1883 of Australia provided that: "'whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years'. Held, that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America".

The LORD CHANCELLOR: This is no more than a decision of what is the state of the law relating to bigamy. What your Lordships held on appeal was that the Australian Statute must be construed

Sir ROBERT FINLAY:-

as relating to second marriages taking place in Australia; otherwise it would be ultra vires. Then in the question submitted to the Supreme Court in Canada they had to do with a Statute which contained a general provision of that kind, but qualified it by saying that it should apply, if the marriage took place outside of the Dominion, only to persons resident in the Dominion who left the Dominion for the purpose of contracting the marriage - words to that effect - and I am told that that answer, given without argument on the other side, without there being any judicial proceeding whatever, there having been two conflicting decisions in the Courts before, has governed the subsequent practice. My friend Mr Nesbitt tells me that that is so, and I submit to your Lordships very respectfully that it is a very good illustration of the extraordinary inconvenience of this practice. I told your Lordships that in the Canadian case the Chief Justice dissented, and at page 478 occurs the expression to which I referred: "Had the offence created by the act been confined to leaving the Dominion with intent to go through a bigamous marriage in a foreign country, in which case an act committed in a foreign state or without the jurisdiction would not have been essential to the completion of the offence, which would in that case have been wholly local, it would in my opinion have been within the jurisdiction of the Dominion Parliament, but as I have shown above in the legislation before us the criminal act is the marriage without the jurisdiction preceded by the act of leaving the Dominion with intent to celebrate it".

The Lord CHANCELLOR: That really relates only to the law of bigamy.

Sir Robert FINLAY: Certainly my Lord. I only read it by way of showing that an answer of that kind - the Chief Justice dissenting and no party having been heard on the other side - has regulated the practice ---

The LORD CHANCELLOR: That is obvious, on the practice you can

ask a question on the law of bigamy and get an answer, but, whatever authority it has, it does not show whether it is constitutional or not.

Sir ROBERT FINLAY: The sixth case of reference under the Statute of 1891 is in the matter of representation in the House of Commons, reported in the 33 Supreme Court Reports at page 475. There there was a reference at the request of the Provinces of New Brunswick and Nova Scotia, the Provinces concerned. The dispute was as to the unit of representation, and whether the Provinces had ceased to have right to so many members in the House of Commons. The reference went ultimately to your Lordships' Board and is reported in the Appeal Cases for 1905 at page 37. No objection was taken there, nor in the Privy Council. At that page in the Reports of the Appeal Cases is reported the decision on appeal from the New Brunswick and Nova Scotia cases and also of the Prince Edward Island case on a similar point, which is reported in the same volume of the Supreme Court Reports, volume 33 at page 594.

The LORD CHANCELLOR: That is another one.

Sir Robert FINLAY: That is another one, but they are both dealt with in the same Report in the Privy Council.

Then my Lord the seventh case was a case relating to legislation with regard to abstention from labour on Sunday. It is in the 35 Supreme Court of Canada Reports at page 581. There a new question arose. Your Lordships will observe that in the Act of 1891 there are no words such as occur in the present Act with which your Lordships are concerned dealing with the right to refer questions as to legislation, whether it has been carried out or not, in other words to put questions regarding pending bills or proposed bills or possible bills. There is no power to put such a question, although that is conferred by the section as amended in the Act now before your Lordships, and in this case with regard to abstention from labour on Sunday, at page 581 it was held that

that section that I have referred to of the Act of 1891 does not empower the Governor-General to refer questions as to possible legislation which may or may not be enacted, and the contention about head (E) as to cases ejusdem generis that I referred to before was disposed of in that case. Then the questions that were put were answered by Mr Justice Girouard, Mr Justice Davies, Mr Justice Nesbitt, and Mr Justice Sedgewick, by the three former on account of the practice of the past, but under protest, following the Attorney-General for Ontario and the Hamilton Street Railway Company. Now the protest your Lordships will find at page 591.

This is the passage. "The Judgment of the Court was as follows: After the fullest consideration of the 37th Section of the Supreme and Exchequer Courts Act under which this reference is made to us and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company reported on appeal to the Judicial Committee (1903 Appeal Cases 524)" -----

The LORD CHANCELLOR:- You have not given us that.

Sir ROBERT FINLAY:- No, my Lord, that was a Provincial reference.

The LORD CHANCELLOR:- "to the Judicial Committee".

Sir ROBERT FINLAY:- Yes, but it was a reference made not by the Government of Canada but by the Government of the Province of Ontario to the Provincial Court, and then the answers of the Provincial Court were brought to your Lordships' Board on appeal under a corresponding Provincial Statute. "After the fullest consideration of the 37th Section ..... and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company reported on appeal to the Judicial Committee at page 528 as to the principle, convenience and expediency, of Courts of Justice answering hypothetical questions submitted to them as distinct from those arising in concrete cases, we are of the opinion that the questions submitted to us, as to whether certain supposed or hypothetical legislation which the Legislature of one of the Provinces might in the future enact would be within the powers of such Legislature, are not within the purview of the Section. Questions as to the Constitutionality of existing legislation are clearly within the meaning of that 37th Section, and the general words 'touching any other matter' must be

considered as within the rule ejusdem generis and may well refer to Orders in Council by the Governor General, or Lieutenant Governors, as the case may be, passed pursuant to the Dominion or Provincial legislation the constitutionality of which may be in question, or to departmental regulations authorised by Statute. These Orders in Council cover a very large legislative area and include regulations on the subjects of navigation, pilotage, fisheries, Crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views from which Mr Justice Sedgewick dissents. As, however, the practice of this Court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominion or the Provinces, and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the Section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the Courts on similar references and proceed to answer the questions as follows." The protest there related to the fact that the questions related not to any existing legislation but to proposed legislation. Then there is one passage in the Judgment of Mr Justice Idington at page 594 to which I desire to call attention. Mr Justice Idington says: "The questions are raised here of the right of the Governor General in Council to ask and the jurisdiction of this Court to answer questions of a speculative character touching the Constitutionality of proposed or possible future legislation by the Parliament of Canada or the Legislature of any of the Provinces of Canada and having no relation to actual existing legislation enacted by any of these bodies. It is urged that the 37th Section of the Supreme and Exchequer

Courts Act gives this right to ask and this power to answer, and it is said that even if this be not so it has been the practice heretofore to answer such questions, and that such practice should be now followed. I cannot find that such a practice has been so followed or followed for so long a time as to constitute it an established usage that has grown thereby to be law that must govern the conduct of this Court. It must be admitted that the deliberate adoption by the Court of such a practice when that adoption could not be attributed to any authority but this Section 37, or that for which it is substituted should be looked upon as an interpretation of these Sections, or one of them, which now should bind all the Judges of this Court." And then Mr Justice Idington reviewed the cases. I think I have mentioned the cases to which he referred, and at page 604 he says this: "I am not concerned here to lay down, nor do I try to lay down, any course of duty to be pursued by Parliament in that regard but it seems to me that to adopt such an innovation it ought to be made clear beyond doubt as the will and intention of Parliament before I presume to attribute to it the innovating purpose that assuming jurisdiction here would clearly involve. I desire to abstain from, and to be understood as abstaining from, any expression of opinion as to the power of Parliament in Canada to exercise any such innovating power and ~~ka~~ establish in this or any other Court such a jurisdiction as we are asked here to exercise in that regard." That all relates to future possible legislation, and then he refers to the practice in other countries, the United States and the separate States of the United States. Then the passage which was referred to in the Judgment of the Privy Council occurs in the report in the Appeal Cases for 1903 beginning at page 524. The Lord Chancellor, Lord Halsbury, says this at page 529, and this is the passage I think to which the Supreme Court

referred: "With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to giveany judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary toprinciple, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

Then, my Lord, the eighth case, and there is only one other under this Statute, is In re The Railway Act in the 36th Volume of the Supreme Court of Canada Reports at page 136.

The LORD CHANCELLOR:- In the case you last gave us this Board did answer the first question.

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- It discriminated?

Sir ROBERT FINLAY:- It discriminated.

The LORD CHANCELLOR:- It refused to answer the others. Does not that look like an opinion that it was lawful to ask but not imperative to answer?

Sir ROBERT FINLAY:- The question had never been raised, and of course on the very face of the questions there arose this further objection, that the question was of a speculative nature

on a hypothetical state of facts, and for that reason Lord Halsbury said it was very inexpedient to answer it and they would not answer it although the point was not raised at all as to the Constitutionality of the reference. I submit that it does not amount to a decision.

The LORD CHANCELLOR:- No, I do not say it does. It looks like an opinion.

Sir ROBERT FINLAY:- It is passed by --- I must admit that in many of these cases, where the parties consented, the matter has been allowed to go through.

Lord ATKINSON:- If they had jurisdiction to ask, were not the Judges bound to answer?

Sir ROBERT FINLAY:- Section 60 of course could not apply to your Lordships' Board.

Lord ATKINSON:- No.

Sir ROBERT FINLAY:- But it would apply to the Supreme Court, and that is, as I submit to your Lordships, a very strong reason for holding that the whole Section is ultra vires, because there is no limit to it: Any question however complicated, however momentous the consequences to private individuals may be, if the Governor General in Council puts it to the Supreme Court under the Statute, if that Statute be intra vires, the Supreme Court is bound to answer. I submit, my Lords, it is a strong reason for holding that the enactment itself is unconstitutional and ultra vires of the Parliament of Canada.

Lord ATKINSON:- Because it says it shall be the duty of the Court to hear and consider it and to answer.

Sir ROBERT FINLAY:- And to answer each of the questions.

Lord ATKINSON:- Each of the questions.

Sir ROBERT FINLAY:- So that it is extremely specific.

The LORD CHANCELLOR:- It is quite true the Statute says so. If it be true that it is not imperative to answer ----

I do not say that it is --- it means that to that extent at least the Statute is ultra vires, it involves that, so far as it is an obligation which is unconstitutional it is ultra vires, but that is not the same thing as saying that it is ultra vires to authorise the Executive Government to ask the question.

Sir ROBERT FINLAY:- My submission covers the whole ground, I submit any reference of this kind to the Supreme Court is ultra vires. I quite conceive they might establish any body of experts they like to advise them on such points, but I submit it is ultra vires to ask any such question in this way of the Supreme Court. Further, there arises that question of whether it is ultra vires to impose the obligation as they have affected to do on the Supreme Court to answer.

Lord ROBSON:- Your contention is, Sir Robert, that nothing but questions as to existing law can be referred by the Governor General of Canada to the Supreme Court?

Sir ROBERT FINLAY:- I should not concede even that, my Lord. That is the law here with regard to the Judges being consulted.

Lord ROBSON:- I put it this way, that your contention is that they have no Constitutional authority to pass an Act which will entitle any questions at all except questions of law to be put?

Sir ROBERT FINLAY:- No, not even questions of law.

Lord ROBSON:- The Supreme Court must deal only with questions of law brought before it in the ordinary course.

Sir ROBERT FINLAY:- In the regular way in the course of administration of justice.

Lord ROBSON:- I do not at present see --- I daresay you will deal with it --- why do not the words "peace, order and good government" cover a power of that kind? The English Parliament clearly may refer questions of that kind to the

Privy Council; it has jurisdiction to do it within the Constitution, but why has not the Parliament of Canada the power to do the same thing? I can understand this, that the Dominion Parliament would not have power to make the Supreme Court deal with questions that might be in excess of the jurisdiction of the Dominion Parliament. For instance, I see among the heads put in Section 60 are the interpretation of Dominion Statutes, I can quite understand that there should be some limitation upon the power of the Dominion Parliament to submit this very wide range of questions to the Supreme Court, but I do not at present see why the Dominion Parliament should not have power in regard to matters well within its jurisdiction to refer them to the Supreme Court under the head of "peace, order and good government". It may be very impolitic legislation --- I think it is -- it is not only impolitic but open to the very gravest abuse.

Sir ROBERT FINLAY:- The reason I submit for that contention is that the Supreme Court is constituted under the authority of Section 101 of the British North America Act.

Lord ROBSON:- Section 101 does not override the generality of Section 91. Section 91 gives the jurisdiction to deal with "peace, order and good government", and it gives that in the widest terms. It points out in that Section that the generality of that power is not to be limited by the mere enumeration that follows it. The doctrine of ejusdem generis is expressly excluded, so that you have got to deal with nothing but the words "peace, order and good government" in their widest sense, and that sense is not to be restricted by any succeeding enumeration, or by any succeeding Section.

Sir ROBERT FINLAY:- But your Lordship will see in the first place that power as to "peace, order and good government" is to be exercised, according to the very terms of Section 91,

only "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Lord ROBSON:- Certainly; in other words they cut out there an exclusive sphere of action for the Provinces.

Sir ROBERT FINLAY:- But they are claiming by this Section to refer to the Supreme Court questions which relate to purely Provincial matters.

Lord ROBSON:- I put that a moment ago. I said I could understand that argument -- I could understand that Parliament should not be empowered to refer questions like that in Section 60, (of course I am not expressing any opinion upon it) on the interpretation of Provincial legislation. I can understand an argument arising on that, which I say nothing about, that that is ultra vires, but I want to have your contention. Do you say as to matters not within the scope of Section 92, matters which have nothing to do with Provincial legislation but merely to do with Dominion legislation, the words "peace, order and good government" would not entitle the Dominion Parliament to refer such matters, matters within their own jurisdiction and competence, to the Supreme Court for advice?

Sir ROBERT FINLAY:- I do, on account of Section 101, because the Supreme Court is specifically dealt with by Section 101, and it is under Section 101 that the Supreme Court has been erected.

Lord ROBSON:- Yes, but how do you get over the difficulty that Section 101 is not to be taken to limit the generality of the power given under the words "peace, order and good government"? Section 101 undoubtedly specifies what before is merely general, in the words "peace, order and good government", but if the Dominion Parliament likes to constitute a Supreme Court and to take, if it pleases, those very persons

and constitute them a Commission, and then, if it likes to combine the powers of the Supreme Court with a Commission, why does not that power come under the heading of "peace, order and good government"?

Sir ROBERT FINLAY:- There are two answers to that. In the first place they have not done that. Section 60 in terms says that the reference is to be to the Supreme Court, that they are to hear it argued, give Judgment and the reasons, and that it shall be a Judgment for the purposes of appeal; so that they have not treated it as a Commission at all. If they had treated it as a Commission no appeal to the Privy Council would have been possible. Then secondly, I say that the functions of the Supreme Court are defined and exhaustively defined in Section 101, which is the Section under which it has been created. Now if your Lordship would look at Section 101 you will see that its functions are two-fold. The first is a Court of Appeal, that is purely sitting as a Law Court to decide actual cases in which points have been raised, secondly to act as an additional Court for the better administration of the laws of Canada.

Lord ROBSON:- They are both Law Court purposes.

Sir ROBERT FINLAY:- Both law court purposes, and that is all. I say that is an exhaustive definition of the functions of the Supreme Court which by section 101 the Parliament of Canada is authorised to create. They cannot go outside that, and I go further and I say that the imposition of such duties as answering questions in the abstract is repugnant to the functions of a Court of Justice. The Supreme Court if it is to have questions of this kind sent to it is fettered in its discharge of its duties as a Court of Justice. And I therefore say, in the first place, that the exhaustive definition of the duties of the Court in section 101 excludes such references: in the second place that such references are in their nature such as to hamper the efficiency of the Court and, therefore, cannot be imposed.

LORD ROBSON:- I was going to make another point rather in your favour. Your observations about the functions of the Court being exclusive do not impress me at present very much, but there is this to be considered: the Supreme Court is there authorised to be constituted for the benefit both of Dominion and Provinces. The Provinces have a right to have a Supreme Court. They have a right to have it merely to decide their questions of law, but to be there deciding apparently nothing but questions of law. If the Dominion Parliament had the authority which they contend for, it might be said you are not giving the Provinces what the Statute directs you to give them, that is a pure and proper Court of Law.

Sir ROBERT FINLAY:- Exactly. That is exactly my contention, and I was about to say and it bears directly on that point and on what your Lordship has said as to the power to legislate for the peace, order, and good government of Canada: that I do not for a moment question the right of the Parliament of Canada to appoint any commission or body of experts to whom they might refer such questions. What I say is they cannot make the Supreme Court that body.

LORD ATKINSON:- Does not your argument come to this, although the "peace, order, and good government" provision may enable you to supplement the things specially enumerated, you cannot make use of it to repeal the enumerated clauses?

Sir ROBERT FINLAY:- Exactly: that is my submission, and here you have two broad facts: first, that section 101 contemplates a Court of Law in the most proper sense of the term whether sitting in appeal or by way of original jurisdiction.

LORD ATKINSON:- That is if one of the enumerated clauses sets up a Court of Law, you cannot make use of the "peace, order, and good government" provision to turn it into an advisory body which would amount practically to a repeal of this: indeed, it would change its nature.

Sir ROBERT FINLAY:- Yes, my Lord, and it goes further because I submit such duties are so inconsistent with the nature of a Court and so calculated to hamper it, that it is really setting the Act at defiance to impose it.

LORD ATKINSON:- Practically a repeal pro tanto.

Sir ROBERT FINLAY:- Yes, my Lord.

I was about to refer to a case in the 36th Supreme Court of Canada Reports, at page 136. It is enough to say that the reference there was as to the validity of an Act of the Parliament of Canada providing that Railways should not be relieved from liability for personal injuries to any employée by any notice or condition. No protest was made. The question was answered. No objection was taken by anyone and with some difference of opinion the Court answered the question that the Statute was intra vires of the Parliament of Canada. That came up before your Lordships' Board in the Appeal Cases for 1907, at page 65. It was held to be intra vires. Again, no point was taken.

Then the last case under the Act of 1891 is the Provincial Ferries case in the 36th Supreme Court of Canada Reports at page 206. There Counsel appeared for the Dominion of Canada and for the

Province of Ontario, and the Act was held to be intra vires. Again, the point was not taken, and no protest was made.

Now these are all the cases that I am aware of with reference to the Act of 1891.

Before I pass to the new legislation of 1906 which introduced words so as to enable the Governor-General to refer questions with regard to any possible future legislation, the Act containing words to that effect, may I mention one other case on an incidental point which I think is not unimportant in the construction of section 101? It is the case of L'Association St. Jean-Baptiste de Montreal v. Brault, in 31 Supreme Court of Canada Reports, at page 172. That was not the case of a reference at all, and the question was as to whether appeals could be entertained from the Provincial Courts on questions of the Provincial Law. The point was taken, it seems rather a startling one, and was rejected by the Court, that the Supreme Court could only administer the Canadian Law, and that, therefore, an appeal on the Provincial Law was invalid. That was rejected of course by the Court: they pointed out that so far as the Supreme Court is to act as a Court of Appeal, it must of course administer the law prevailing in the Province from which the appeal arises, but that so far, under the second limb of section 101, as it is to administer justice under the Law of Canada, it administers the Law of the Dominion not any Provincial Law, but that the Courts to be erected under that are Admiralty, Exchequer, and so on, Acts relating to the administration of the general Law of the Dominion. I need only read a very few lines of ~~those~~ this.

THE LORD CHANCELLOR:- What is the point raised there?

Sir ROBERT FINLAY:- The point raised was that the appeal from the Provincial Court was incompetent on the ground that the Supreme Court was to administer the Law of Canada and that this appeal related to the Provincial Law. That contention, of course, was rejected.

THE LORD CHANCELLOR:- I understand that: I only meant, what is the bearing of it?

Sir ROBERT FINLAY:- I only cite it for this reason, that the second head of section 101 as to original jurisdiction, power of any Court to be created under section 101, does relate to what is only the Law of Canada: that is the Law of the whole Dominion. Your Lordships see section 101 first provides for a Court of Appeal.

The LORD CHANCELLOR:- Yes, besides that a general Court of Appeal for Canada is for all the Provinces of Canada.

Sir ROBERT FINLAY:- And with reference to all the Law, and under the second head it administered the Law of Canada.

The LORD CHANCELLOR:- Canadian Law.

Sir ROBERT FINLAY:- Canadian Law. That is the only bearing of that case.

Then I pass on to the Supreme Court Act of 1906, which is the Act with which we have at present to deal. It was originally the 6th Edward VII, chapter 50, section 2: now it is re-enacted in the Revised Statutes of Canada for 1906, chapter 139, section 60. That is the section which is before your Lordships.

LORD ATKINSON:- Is not the result of all those authorities this: that the Judges have power to refuse to answer?

Sir ROBERT FINLAY:- Yes, my Lord, at all events, that has been laid down most particularly by the Judicial Committee so far as their functions are concerned and their example was followed in that case to which I referred last but one by the Supreme Court. The Supreme Court did assert their independence to that extent by saying that they were not bound to answer.

LORD ATKINSON:- I did not catch as you went through the Acts, were there any words in those other Acts before the Act of 1906, section 60, equivalent to those words "it shall be the duty of the Court to hear and consider it and to answer"?

Sir ROBERT FINLAY:- I think so.

LORD ATKINSON:- They held that notwithstanding those words, they were not bound to answer.

Sir ROBERT FINLAY:- I beg your Lordship's pardon, the words are not exactly the same: the words are these. I will read them. It is the second sub-section of section 87 as enacted by the Act of 1891: "The Court shall certify to the Governor in Council for his information its opinion on questions so referred with the reasons therefor which shall be given in like manner as in the case of a judgment upon an appeal to the said Court and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons."

LORD ATKINSON:- Does it come to this, that all those authorities establish that notwithstanding that imperative language, they were still entitled not to answer?

Sir ROBERT FINLAY:- In one case they did assert that. Of course that could not have any binding effect upon your Lordships' Board. I think I went a little too far --- my learned friend, Mr Nesbitt reminds me the point taken in that case to which your Lordship is referring and to which I referred specially was that the question did not refer to any existing legislation, but was a question merely as to what would be the effect of possible legislation, and what the Supreme Court held was that that was not within the terms of the Act as it then stood --- which dealt only with existing legislation. That was the precise decision, so that I ought to have limited my answer to what your Lordship asked to that extent.

LORD ATKINSON:- The ground was that it was outside the Act.

Sir ROBERT FINLAY:- Outside the Act. So that I cannot say and I doubt whether the Supreme Court could say, if this legislation is intra vires at all, that the command to answer is not binding upon it.

THE LORD CHANCELLOR:- I am not at all sure about that.

The use of the power must be constitutional, but there are certain constitutional rights in the Provinces. It is a Court of Appeal from them and in which they are interested. They may say, You cannot depart from the constitutional position of judges and you cannot compel judges to answer questions which would be contrary to the constitutional usage. In England, for instance, I should have thought it would be regarded as what we call unconstitutional to compel the Judge to exercise any function inconsistent with his impartiality and with being able to discharge his duty.

Sir ROBERT FINLAY:- Yes, my Lord, to exercise any function which would involve his publicly expressing an opinion on a point on which he might afterwards have to adjudicate in his judicial capacity.

LORD ROBSON:- In short, the Provinces have a right to a real Court of Appeal, not a Court of Appeal performing non-judicial duties.

Sir ROBERT FINLAY:- Yes, my Lord. The truth is that on all the most burning questions, the appeal to the Supreme Court might become absolutely useless because by putting a series of interrogatories to the Supreme Court on every point that was likely to arise, the Dominion Government would have made sure of her ground.

THE LORD CHANCELLOR:- Yes, but it seems that the Court including this Board have for a period of a good many years been in the habit of considering these questions, and notably this Board on at least two occasions declining to answer questions because they thought they were not appropriate questions. In the Canadian Courts it may be they have not quite taken that attitude although they go very near it. That is about asking questions and the convenience of asking them, and it may be convenient to get answers. The other point is whether you can compel the answer.

SIR ROBERT FINLAY:- That is so: the points are distinct to that extent.

THE LORD CHANCELLOR:- What is your proposition as far as the first is concerned? The Provinces as well as the Dominion have repeatedly availed themselves of it without the least objection.

Sir ROBERT FINLAY:- I say that the whole thing is wrong, and that no convenience in particular cases leading to consent or acquiescence, can confer jurisdiction if there is no jurisdiction. That is my submission, and that there is no indication of an opinion by your Lordships' Board on the question.

THE LORD CHANCELLOR:- It is a difficult thing rather to say that a thing is unconstitutional which has been in practice acted upon by this Board for a good many years?

Sir ROBERT FINLAY:- Not where you are dealing with a written constitution. I agree if it were the case of an unwritten constitution long practice would be a most valuable element. Here we have the constitution in writing in a modern Act of Parliament.

The LORD CHANCELLOR:- If it can be made to depend on section 91 that is an answer, but if you have to invoke what is a constitutional position of a Court of Law in the administration of Justice, it may be that it is not quite so easy.

Sir ROBERT FINLAY:- I agree. Practice is valuable in determining what an unwritten constitution is, but in construing a written constitution of recent date, I submit it is no help. There are a hundred reasons why the point was not taken: it was convenient to get an opinion from your Lordships' Board. The point was never argued, and it is not your Lordships' practice to raise points which are not taken by the parties who have come at great expense to get the opinion of this Board. My main point is that, consent or no consent by the Province or the Dominion or both of them, there is no power in the Parliament of Canada to pass such an Act as this authorising any reference of any question to the Supreme Court in an advisory capacity.

LORD ATKINSON:- If they are compelled to answer, it makes the

thing so much stronger.

Sir ROBERT FINLAY:- It makes it so much the worse. It is another argument for holding the section ultra vires. That is my main proposition. The Provinces now are beginning to taste the fruits of their acquiescence in having the points brought up in this way when they thought it convenient to have these points so decided. Now they find themselves with this recoiling upon them and that a series of questions the answers to which would have a most vital effect upon Provincial enterprise and Provincial Legislation are being put which would really tie the hands for all practical purposes of the Supreme Court as a Court of Appeal. It would be necessary in every such case if it arose judicially to omit going to the Supreme Court, because it would cease to be valuable for this purpose, and to go straight to your Lordships' Board. That was not the intention of the framers of the Supreme Court, and I say that this use of the Supreme Court is in violation of the very terms of section 101.

The LORD CHANCELLOR:- That is the end of the cases in the Supreme Court?

Sir ROBERT FINLAY:- There are one or two more under this later Act, but what I was about to call your Lordships' attention to was the fact that in this Act the most recent Act, in the Revised Statutes of Canada 1906, chapter 139, as it is set out at page 4 of the Appellants' case words were introduced under head (D)

"Important questions of law or fact touching . . . . (D) The powers of the Parliament of Canada, or of the Legislatures of the Provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed."

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LORD SHAW: That completely ~~remedies~~ removes it.

SIR ROBERT FINLAY: Yes, my Lord, absolutely, and dispels the difficulty which was experienced by the Supreme Court in that case with regard to the proposed legislation.

Now, my Lords, under this Act there have been only two cases the first of which is reported in the 43rd Volume of the Supreme Court Reports, Page 434; and the second is the present case. The case in the 43rd Volume of the Supreme Court Reports is headed: "In re ~~the~~ Criminal Code. In the matter of an Order of Council respecting section 873(a) of the Criminal Code, and Section 17 of the Lord's Day Act" The Alberta and Saskatchewan Provinces, which were interested in some of the questions, were represented, ~~on~~ and the question as to the validity of certain provisions. The Provinces were really moving in the matter, and they wanted to get a sort of informal trial in this way.

MR NEWCOMBE: The request was made by His Excellency at the request of the Attorney General.

SIR ROBERT FINLAY: Yes, so that it could not be expected that there would be any objection; and the Dominion, of course, raised no objection at all. On Page 441 of the report--I am not troubling your Lordships with the precise points raised in these cases--Mr. Justice Idington said: "The creation of this Court has been generally supposed to have been extended as an exercise of the powers given by the British North America Act, Section 101, which is as follows: 'The Parliament of Canada may notwithstanding anything in this Act from time to time' "--and he reads the section. Then he goes on:- "It was constituted as a Court of Law and Equity. It was given an appellate and other jurisdiction. ~~In~~ consequence of doubts expressed in re the legislation respecting abstention from labour on Sunday. (2) The Supreme Court Act was amended by 6 Edward VII, Chapter 51 (now section 60) of the Act. I must be permitted to doubt if it can as suggested be made a Court or Commission of general inquiry, as the amendment

seems to read. The words used in Section 101, i.e. 'the better administration of the laws of Canada' may, however, cover a pretty wide field. If this inquiry extends beyond that field it probably is ultra vires. Assuming, but doubting, if in some such way the inquiry falls properly within the second part of the above section 101, it becomes pertinent thereto at the threshold to try to understand what Parliament was about when amending the Criminal Code by Section 873(a)" and so on. Then Mr Justice Duff at Page 451 makes some observations on the same topic. "To the questions submitted I answer 'No'. For my reasons I refer to the opinion of my Brother Davies. I desire, however, to add one or two observations on the legal quality and effect of these answers and the opinions upon which they rest. The practice of asking the extra-judicial advice of the Judges on questions of law is an ancient practice. Seemingly the last recorded instance in England in which, without Statutory authority, such advice was sought by the Crown occurred in 1760 when a question arising out of the proceedings against Lord George Sackville was submitted through Lord Mansfield and answered. In that case, as in many previous cases, the Judges expressly declared that if the question should afterwards be brought before them judicially they should be ready, though with difficulty, to change their opinion. It has long been settled that the House of Lords is entitled to require the answers of Common Law Judges upon questions as to the existing state of the law, whether arising out of the litigation pending before the House or not. But in such cases the opinions of the Judges have not in themselves the authority of judicial precedent."

THE LORD CHANCELLOR: I think we should remember in this connection that the House of Lords in theory is a judicial body in itself.

SIR ROBERT FINLAY: It is.

THE LORD CHANCELLOR: The whole of it.

SIR ROBERT FINLAY: The whole of it, my Lord, and of course the judicial functions of the House of Lords were discharged by the whole body. Very important cases were decided by the House of Lords--one I think was Ashby v Wood which was decided by the House generally acting on the opinion of the Chief Justice.

THE LORD CHANCELLOR: I only wanted to point that out to you.

SIR ROBERT FINLAY: At the same time, I suppose, the judicial functions of the House of Lords are separate from its legislative functions. It might be sitting judicially or legislatively, but it could not necessarily, because it had the right to get the opinion of the Judges in a judicial matter, take the opinion of the Judges in a legislative matter.

THE LORD CHANCELLOR: No, they are distinct powers.

SIR ROBERT FINLAY: Then Mr Justice Duff goes on: " In Head v Head, at Page 140, Lord Eldon said:- 'The answers given by the Judges therefore, although entitled to the greatest respect as being their opinions communicated to the highest tribunal in the Kingdom, are not to be considered as judicial decisions'. LordEldon is here speaking of opinions given in answer to questions arising out of contentious litigation actually pending before the House, and given after full argument. The view of a very able and experienced Judge touching the value of such opinions, where there is no cause and no argument, may be gathered from the following passage in the opinion of Maule, J., in Mc Naghten's case." Then he reads what I have already read and says: "In more recent times it has been held that the Jurisdiction of the High Court of Justice upon questions submitted to it under Section 29 of the 'Local Government Act' is consultative only and not judicial. (Exparte County Council of Kent and the Council of the Borough of Dover.)" With regard to questions submitted under the Dominion Statute the course of the Judicial Committee has, I think, been very instructive.

The authority conferred by the Statute has been sometimes used for the submission of specific points in controversy between the Dominion and the Provinces upon the construction of the British North America Act which, as bearing upon the validity of specific Statutes it was thought desirable to have determined; both sides to the controversy having accepted the issue, and the tribunals having the benefit of the fullest argument upon it. Even in such cases the Board has usually refused to pass upon questions touching private interests not represented (the question relating to the rights of riparian proprietors for example), or to answer questions, the replies to which might properly be influenced by the circumstances in which the questions arise for actual judicial decision. The questions submitted in this case relate to the construction of Statutes governing criminal procedure, and the answers to which could not well be affected by the circumstances of any particular case in which they might arise; and they are therefore not open to the same objections as may be taken to purely hypothetical questions. But the Court is called upon to answer them having heard argument from one point of view only; and in these circumstances it is clear that the opinions expressed in the answers given cannot have the weight attached either to a judicial deliverance, or to an extra-judicial opinion pronounced after hearing the possibly diverse views of the questions presented in argument. Indeed there is not a little danger that such answers may, as Maule, J. said in the passage already quoted, tend 'To embarrass the administration of justice' (not only in this Court if, as is most likely we should hereafter be called upon to answer the same questions when raised litigiously), but in other Courts also, whcih may naturally feel greater delicacy than this Court on a proper occasion would feel in treating the questions passed upon as res novae notwithstanding

such opinions".

Then Mr Justice Anglin refers to this point also in the course of his Judgment on Page 454: "Parliament has advisedly denied to the Crown the right of appeal to this Court in criminal cases from Judgments of the provincial Courts in favour of Defendants. Because the review of the Judgment of the Supreme Court of Saskatchewan in the case of The King v Duff is unavoidably involved in the dispodition of the present case, and also because of the strong disapprobation expressed by the Judicial Committee of the Privy Council of the practice of procuring judicial opinions upon abstract questions, the Court answers now with reluctance and diffidence solely in obedience to the imperative provisions of the Statute (Supreme Court Act, Section 60) and in defereene to the Order of the Governor General in Council".

LORD SHAW: Was the question of jurisdiction raised in that case by the parties?.

SIR ROBERT FINLAY: I do not think it was, my Lord.

LORD SHAW: Because it is almost as if the Courts recognised that they were confronted by a large question.

SIR ROBERT FINLAY: Yes. Your Lordship will recollect that earlier protests were made by Mr Justice Taschereau. He made them once and repeated them in another case.

LORD SHAW: One cannot listen to the Judgment of Mr Justice Taschereau without seeing how thoroughly he had gone into it.

SIR ROBERT FINLAY: Yes, the truth is that only lately the importance of the point has been recognised in its full gravity. Before, the parties were content with getting particular questions answered.

THE LORD CHANCELLOR: For a long time they found it an extremely convenient thing, and no one objected.

SIR ROBERT FINLAY: Except Mr Justice Taschereau.

THE LORD CHANCELLOR: Then they found that it might be a very incon-

venient thing.

SIR ROBERT FINALY: Yes; and whether convenient or inconvenient the naked question remains, is it authorised by the constitution; and that is totally unaffected, I submit, by all the changing current of feeling which has influenced the Courts in this matter.

There is only one other sentence I want to read from Mr Justice Anglin's Judgment, and it is this: "It must be understood that as this opinion is given without the advantage of argument except on behalf of the Provincial Attorney General, it would not be proper that it should be deemed binding in any case which may hereafter arise, whether in this Court or in any provincial Court".

Now your Lordships see that Mr Justice Anglin points out that Parliament had advisedly denied to the Crown the right of appeal to this Court in criminal cases, but the Crown takes it--not in a particular case, but if a decision is given which they consider is wrong they can submit the question under Section 60. I submit it is a most inconvenient and unconstitutional power. It may be convenient to state that the case of "In re references by the Governor General in Council" is reported in the same volume of the Supreme Court Reports, Volume 43 at Page 536, and the Judgments are stated in the Appendix to this case. I propose to read them to your Lordships, but before reading them I should like to make one or two observations with regard to the practice in the United States, which it is impossible to suppose was not in the view of those who framed the constitution under the British North America Act. Now, in the United States it is well known the Supreme Court only gives Judgment---

THE LORD CHANCELLOR: Is not this rather wide?

SIR ROBERT FINLAY: I will not go into detail at all; I will only say this that the Supreme Court of the United States under the constitution does not deal with any abstract questions, and has refused to entertain them.

THE LORD CHANCELLOR: Yes, very likely. We will take it as a fact as you state it; but surely it is not necessary to go into detail about it. It ~~xxx~~ is a different law.

SIR ROBERT FINLAY: It is a different law, and all I meant was this-----that it is hardly possible to suppose that those who drew up the British North America Act had not in view that fact, and knowing that fact they abstained from introducing any such power here.

It may be convenient, my Lords--I will not read the passages--but merely as a matter of reference to mention that this matter is discussed at very great length in reference to the Australian Constitution in two Treatises of Messrs Quick and Groom on Judicial Power, and Messrs Quick and Garron on the Australian Constitution.

THE LORD CHANCELLOR: That is a living author commenting on an Act which we all of us remember.

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SIR ROBERT FINLAY : Then, my Lords, I will not occupy your Lordships' time with it. It is really a discussion on a general question in which the disadvantages of such a power are pointed out.

Now I will proceed to deal with the Judgments in the present case; they begin in the Appendix at page 15. The first Judgment is the Judgment of the Chief Justice; he says :"The question, and the only question we have now to dispose of is a preliminary objection" -(the learned Counsel read to the words "is vested in the Queen") Here, my Lords, I should like to refer to the preamble of the British North America Act in reference to what the Chief Justice says. It is merely this :"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be Federately united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar to that in principle of the United Kingdom."

LORD SHAW : It is not necessary for your argument to claim the exact accuracy of those three lines on page 16, is it ?

SIR ROBERT FINLAY : No, my Lord, I should submit it is not; there is no trace of the importation of that part of our Constitution.

THE LORD CHANCELLOR : This you say is all one continuous thing which may be liable to misinterpretation from time to time.

SIR ROBERT FINLAY : Yes, my Lord.

LORD SHAW : The British North America Act is a tribute to that Committee itself; it says similar in principle.

SIR ROBERT FINLAY : Yes. I submit that it is straining the words and the meaning they bear. A Constitution really grows, and although there is no definite moment perhaps when you can say a change has taken place, at the end of

a hundred years it is hardly recognisable. I suppose some theorists would say that our Constitution was the same under the Plantagenets as it is now. Well, that of course would be extravagant. Things practically have changed, and of course that attitude of mind has been very much intensiffied by the way in which the popular cause was advocated in the seventeenth century, when it was asserted that the change which was insensibly in progress was merely recovering for the people their ancient liberties. It really was a beneficial change I daresay, but still it was a change for all that.

THE LORD CHANCELLOR : I do not suppose it will be stated that in 1867 in the British North America Act of that day it would be quite accurate to say that the Judges in England were the council and advisers of the King in matters of law.

SIR ROBERT FINLAY : No.

THE LORD CHANCELLOR : It would be overstating it.

SIR ROBERT FINLAY : It would be overstating it altogether.

Then the Chief Justice goes on :"In England the practice of calling on the Judges for their opinion as to existing law is well established. Evidence of its existence will be found as far back as history and tradition throws any light on British legal institutions. Beckman v. Mapelsden. O. Bridgman's Reports, p. 78. After quoting the section of the constitution of Massachusetts which provides for taking the opinion of the judges by the Executive or legislative department, Chief Justice Gray says : 'This article, as reported in the convention that framed the constitution, limited the authority to the governor and council and the Senate, and was extended by the convention so as to include the House of Representatives, and, as may be inferred from

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the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial or their legislative capacity, had the right to demand the opinions of the twelve judges of England.' The case in which the Lords in their judicial capacity called for the opinion of the judges, is a very familiar one. I might mention O'Connell's case in which the decision of the Lords was against the opinion of the majority of the judges. A well known precedent may be cited of McNaghten's case, 10 Clark and Finnelly, 200. Here not only was there no litigated question before the Lords, but not even any pending legislative question." (That must be taken subject to what Lord Atkinson pointed out). "The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the Central Criminal Court, but not in any way before them, a case developing interesting questions in the law relating to insanity, conceived that they would like to know a little more accurately what the law on those points was. They accordingly put a set of 'abstract questions' to the judges - questions not arising out of any business before them, actual or contemplated." That is a mistake; it did arise out of the contemplated appeal. Then he goes on : "One of the judges protested against this proceeding and his objections bear a close resemblance to those urged in support of this preliminary objection, e.g. that the the questions put 'do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms, that he had heard no argument;' and that he feared 'that as the questions relate to matters of criminal law of great importance, the answers

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to them by the judges might embarrass the administration of justice when they are cited in trials.' The Lords took notice of this, and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on 'abstract questions of existing law.' 'For your Lordships,' said Lord Campbell, 'may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is.'" I do not know whether it is contended that the House of Commons has any similar power, and they are at least as important in regard to legislation as the House of Lords. "These words of Lord Campbell are absolutely applicable to this reference. In anticipation of possible legislation on the important subjects of Insurance, incorporation of joint stock companies and control of fisheries, the Executive of Canada desires to be advised as to the constitutional limitations upon its legislative power. In McNaghten's case Lord Brougham refers to the case of Fox's libel Act when the judges answered questions about the existing law of libel. Lord Campbell cited an instance where the judges were called on to give their opinion upon the questions of law propounded to them respecting the Clergy Reserves(Canada) Act. One of the questions was whether the Legislative Assembly of United Canada had exceeded their lawful authority in legislating with respect to the sale of the Clergy Reserves. Lord Wynford said he did not doubt the power of the House to call on the judges and to have their opinion as to existing law. He recalled the instance when he was Lord Chief Justice of the Court of Common Pleas that he communicated to the House the opinion of the judges with regard to the usury laws, and

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the House subsequently passed a law on the subject. The Lord Chancellor (Lord Lyndhurst) concurred 'as to our right to have the opinion of the judges' on existing law. In a previous case the judges begged to be excused from giving an opinion, requested by the House of Lords, upon the question whether a pending Bill was in conflict with previous Acts relating to the Bank of England. The questions were argued by counsel on both sides; but the judges said that the inquiries were not 'confined to the strict construction of existing Acts of Parliament.' This is not a case in which we are called on to express an opinion by anticipation on causes actually depending before the courts," (that may be, but such a case may come up any day) "nor is it to be supposed for one moment that we will consider ourselves bound by the opinions given in answer to the questions submitted to us if the principles involved are brought before us in due course of law." But if a man has expressed publicly an opinion on a point which has been referred to him by such a question as that, he may say, as the Judges said in Lord George Sackville's case, "We will change our opinions." But I defy any man to change a deliberate opinion which he has formed without difficulty. He may be convinced that he was wrong and change his mind, but it is idle to say that a man is in the same position to appreciate a point judicially as if he had not formed and publicly expressed an opinion upon the very same point before. Then I go on :"As Lord Mansfield said in the Sackville case" (the learned Counsel read to the words "carrying out its provisions.") I refer to these inconveniences as the reason for not conferring any such power and for excluding it. "These words were subsequently quoted with

approval by Chief Justice Sir W. Meredith in Langlois v. Valin, 5 O.L.R.1, at page 16, and they are specially applicable in the present circumstance. This court was established by the Parliament of Canada 'as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada." Then he reads Section 101, and goes on. "And we are asked to answer certain questions submitted to us by the Executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian Constitution." My Lords, it is not in the process of the administration of the law that the Court answers these questions at all. What the purpose of the questions is we do not know; it may be with reference to possible legislation; it may be in order that the Government may be informed in advance of what the limits are within which these companies, formed provincially, may trade.

LORD ATKINSON : I suppose it might be in anticipation of a prosecution or some civil action taken by the Government against some company that traded outside its own grounds.

SIR ROBERT FINLAY : Exactly. I need hardly say I have had occasion to know how very important this question to the companies in the Dominion is. It is a question of extraordinary importance, what the intentions of the companies incorporated by the provincial legislation are and how far they extend for provincial objects. Your Lordships see it is capable of almost indefinite ramification and development, and it is a burning question of a most practical nature.

LORD ATKINSON : One can well understand a company carrying on business in the provinces being utterly shaken.

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SIR ROBERT FINLAY : Yes, utterly shaken, and thousands of individuals ruined by an answer given by the Supreme Court to such a question which, as they say, does not even bind themselves, but which would certainly affect the minds of other people who do not realise that the answers to such questions have no weight, and which although in point of law have no weight, for all practical purposes possess great weight.

Then he goes on :"And we are asked to answer certain questions submitted to us by the Executive for the express purpose of obtainigg information which may assist in the administration of the fundamental law of the Canadian Constitution." From that the learned Chief Justice means to argue that therefore the question is put and is answered in the course of the administration of the law. I submit there is a complete non sequitur there. "Dealing now with constitutionality of those provisions of the Supreme Court Act, under which this reference has been made, that Act was drafted and passed through Parliament when Hon. T. Fournier was Minister of Justice and was brought into force by a proclamation issued by Hon. Edward Blake, his successor in office. The general legal presumption that a legislature does not intend to exceed its jurisdiction is strengthened in this case by the fact ~~that~~ that constitutional lawyers of such eminence as Blake and Fournier are responsible for the legislation the validity of which is now challenged. I presume it will not be suggested that the Imperial Parliament could not constitutionally confer upon the Canadian Legislature the power to establish a court competent to deal with such references as we have now before us; and, if not, how could more apt words be found to express their intention to confer that power ?

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Could better words be used to convey the widest discretion of legislation with respect to the all embracing subject 'the better administration of the ~~xxx~~ laws of Canada'"? With very great respect to the Chief Justice, I submit that not only do these words not bear the meaning he puts upon them, but that they are absolutely incapable of bearing it, and they negative it. The proper administration of the law means administering it when the point arises judicially in the course of the law, and it does not,because it has a reference to the law which is to be afterwards administered, in the slightest degree follow that this question or the answer is in the course of its administration. "It cannot now be doubted either in view of the decision of the Privy Council in Valin v. Langlois, 5 A.C. 115, that if the Parliament of Canada might have created a new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new jurisdiction to this court. 'The distinction between creating a new court and conferring a new jurisdiction upon an existing Court is but a verbal and non-substantial distinction.'" I respectfully submit Valin and Langlois does not bear that out in the slightest degree. That was the case as to the Election Judges. There it was held that Courts might be constituted for the purpose of trying election petitions and that there was nothing unconstitutional about that, and that their decisions might be made final. That has no bearing, as I submit, at all on the questions with which your Lordships have now to deal. In the case of Valin and Langlois the Courts were created for the purpose of administering the law relating to elections, but that is a different thing altogether from asking general questions of this kind.

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THE LORD CHANCELLOR : When the section says "Courts for the better administration of the laws of Canada" it does not mean the executive administration of the law in Canada, but judicially.

SIR ROBERT FINLAY : Certainly, my Lord.

THE LORD CHANCELLOR : I do not say that is so, but I am asking you.

SIR ROBERT FINLAY : I submit that it is so, and that disposes really of the whole argument which we have had so far from the Chief Justice.

LORD SHAW : It is administration through a Court ?

SIR ROBERT FINLAY : Yes, that is it exactly.

LORD SHAW : That is to say the word "administration" is distinguished from the word "administrative."

SIR ROBERT FINLAY : Yes, my Lord; it is the administration of justice or the judicial administration of law. That is what I submit the words manifestly mean, and so far from being capable of the construction which the Chief Justice puts upon them, I submit they actually negative the conclusion at which he arrives.

ADJOURNED to to-morrow at 10.30 o'clock.

"First Day

In the Privy Council

Dec^r 12/11

Between 35, 1912

The Attorney General
for the Province of
Ontario & ors

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The Attorney General
for Canada

— and —

The Attorney General
for the Province of
British Columbia.