35, K

2nd Day

IN THE PRIVY COUNCIL.

Council Chamber,

Whitehall.

December 13th, 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 and Co., 8, New Court, Carey Street, W.C.)

Second Day. 13 Dec. 1911

Sir ROBERT FINLAY:- I was reading the judgment of the Chief Justice at page 18 of the Record, and I had just got to the middle of the page: "Could better words be used to convey the widest discretion of legislation with respect to the all embracing subject 'the better administration of the laws of Canada'?" I commented on that and pointed out that it was not "administration of the laws of Canada" to answer such questions as these. Administration refers to the work of the Court, but, secondly, my Lords, if it were administration it is certainly not "administration of the laws of Canada," when the questions relate to the Provinces and to the law of the Provinces. I cited to your Lordships purely for that purpose the case of L'Association St. Jean-Baptiste in the 31st Supreme Court Reports, where in the judgment the Court points out that as a Court of Appeal the power is not restricted as in the case of additional Courts of First Instance to the administration of the laws of Canada. "The laws of Canada" mean the law of the Dominion.

LORD MACNAGHTEN:- Is that so very clear? I am not quite sure about that. I should have thought "the laws of Canada" might embrace the laws of the several Provinces too. It is not against you.

Sir ROBERT FINLAY:- May I give your Lordships my reason for making that submission? It is this. The administration of the laws of the Provinces is confided to Provincial legislatures. This is a power given in the 101st section to provide additional Courts for the administration of the laws of Canada. If that comprised the administration of the laws of the Provinces, it would be in conflict with the exclusive power given to the legislature of the Provinces under section 92. My submission is that the second branch of section 101 is confined to the erection of Courts for the administration of laws of the whole Dominion as such. For instance, the creation of Courts of Admiralty, the creation of

Courts of Exchequer, the creation of the Railway Board, the creation of Courts for the trial of Election Petitions relating to elections to the Dominion Parliament.

LORD MACNAGHTEN:- Now, what do you say with regard to the laws of Ontario, Nova Scotia, and New Brunswick, because the Dominion Parliament has got power to bring about uniformity in those laws? I am not at all sure that it is a material point at all, but I think there might be something said on the other side.

Sir ROBERT FINLAY:- Yes, my Lord. Your Lordship refers I think to section 94: "The Parliament of Canada may make provision for the uniformity of all or any of the laws relative to Property and Civil Rights in Ontario" etc. That is to say, there is this special power conferred by this section to render these laws uniform. Then as regards the administration of the laws my submission is that that is confided to the Provincial Legislature in each Province.

LORD ATKINSON:- The last two lines of section 94 are: "but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof."

LORD MACNAGHTEN:- When they have adopted it --- I do not know whether they have or not --- I do not think it is necessary --- there is a good deal to be said on the other side. It is rather a bye point.

Sir ROBERT FINLAY:- I feel strongly that it is not the administration of the law at all.

LORD ATKINSON:- The importance of it is as to that law, it is in effect if it is adopted by an Act of the Province .

Sir ROBERT FINLAY:- That is so undoubtedly.

LORD MACNAGHTEN:- It really is a bye point.

Sir ROBERT FINLAY:- It is. Even if it were so, it relates only to rendering the laws uniform: it does not touch the

administration of the laws by the Courts of Justice, and section 101 unless the second branch of it were confined in the manner I have suggested, would trench upon the exclusive power given under head 14 of section 92 to the Legislatures of the Provinces, that head being "The administration of Justice in the Province including the constitution, maintenance and organisation of Provincial Courts."

That is my submission, my Lords., on that point.

Now I pass on to line 28: "It cannot now be doubted either in view of the decision of the Privy Council in Valin v. Langlois, 5 Appeal Cases, 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.'" My Lords, it would not be a Court that would be created: it would be a Committee of Reference, an advisory Committee, and section 101 as I have submitted prevents such duties being thrust upon the Supreme Court.

LORD ROBSON:- Is that a quotation: "The distinction between": etc.?

SIR ROBERT FINLAY:- It is in inverted commas: I do not know where it comes from.

LORD ROBSON:- Does that come from Valin v. Langlois in 5, Appeal Cases?

Sir ROBERT FINLAY:- I will have it looked up. "If any doubt remains as to the legislative jurisdiction of Parliament in the premises, a reference to Section 91 of the British North America Act, which provides that the Parliament of Canada may from time to time make laws for the peace, order, and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces should

dispel that doubt." My Lords, of course section 91 could not under that head authorise their doing anything which was in conflict with the true construction of section 101, and, secondly, this would interfere with section 92, head 14, the due administration of justice in the Provinces, a matter which is assigned exclusively to the Provincial Legislatures. The only object of sending these references to the Supreme Court is to get the opinion of highly competent men and the prestige of opinions proceeding from those who will afterwards have to deal with the matter judicially if it should arise in any case. My Lords, the delivery of such opinions as proceeding from such a Court must tend to embarrass the Provincial Courts in the administration of justice, as Mr Justice Maule pointed out in that passage which I read yesterday.

LORD SHAW:- I suppose there is no difference on the two sides of the Bar on this proposition, that, whatever they say, that, quoad its judicial function, has no effect whatever?

Sir ROBERT FINLAY:- There would not be.

LORD SHAW:- Both sides agree to that?

Sir ROBERT FINLAY:- Undoubtedly. In practice beyond all question it would have a very important effect. One of the best illustration is that bigamy case that I referred to, where two decisions being in conflict a question was stated for the opinion of the Supreme Court under section 60, and the answer of the Supreme Court has been treated since that ----------

THE LORD CHANCELLOR:- That is the general point that you have been making the whole time.

Sir ROBERT FINLAY:- One sees it in various lights and from different points of view as one goes on, but it always comes back to the same point.

The LORD CHANCELLOR:- You have always the central light upon it.

Sir ROBERT FINLAY:- Then line 40: "Lord Halsbury, delivering

the judgment of the Judicial Committee in Riel v. Regina" (etc., etc., reading extracts down to the words) "power has not been vested in the Executive." Then his Lordship read section 37 of the Supreme Court Act as originally enacted. That is from the Act of 1875, and he goes on at line 12: "In view of doubts expressed by members of this Court at different times as to whether the intention of the Legislature had been clearly expressed, changes have been made widening the scope of that section until we finally have Section 60 of the Supreme Court Act, which is in the following terms" --- and then his Lordship reads it. Then on page 20, line 10: "It is to be observed that this section" (etc., etc., reading extracts down to the words) "3 & 4 William IV, chapter 41" --- and then his Lordship reads that. Then: "In re Schlumberger, 9 Moore P.C. 1 at page 12, speaking of this section, the Right Honourable Dr Lushington said, dealing with an objection to the jurisdiction of the Privy Council to hear and consider a petition referred to them by order in Council: 'the only construction that can be placed upon the section above quoted is a construction which shall give to the words therein contained their complete meaning, without limitation whatsoever,' and further 'that the Judicial Committee were not entitled to put any limitation on these words in any matter referred to them by the Crown.' In addition to those above mentioned, constitutional cases of great importance to a colony have been referred by the Sovereign to the Judicial Committee, such as to the power of the legislature of Queensland in respect of money bills and the validity of Protestant Marriages in Malta and upon their report have been decided by the Governor in Council." That is a different question altogether. There the Imperial Parliament whose competency was undoubted and to which no doctrine of ultra vires can apply had directed these references. "Objection was taken by some of the judges of this court to the hearing of the reference re Sunday Legislation, 35 Can. S.C.R. 581. At the

argument on the appeal to the Privy Council, it appears from the report that Mr Newcombe, in reply said: 'Then my Lords, Mr Riddell has questioned the jurisdiction under the Supreme Court Act to make the reference, I do not know whether your Lordships desire me to reply to that.' To which Lord Macnaghten said: 'I think we know the terms of the Act. They are wide enough to embrace it.'" That is with regard to the Supreme Court Act. It is not the point of ultra vires at all. "The sections of the Supreme Court Act to which I think useful reference may be made are: Section 3, which constitutes the Supreme Court as a general court of appeal and as an additional court for the better administration of the laws of Canada; Sections 35 to 49 inclusive, defining the appellate jurisdiction of the Supreme Court; Sections 60-67 inclusive which define the special jurisdiction of the Supreme Court, which includes not only references by the Governor in Council but also references by the Senate and House of Commons, 'Habeas Corpus' and 'Certiorari' and cases removed by Provincial Courts. In addition we have Section 55 of the Railway Act R.S.C. 1906, chapter 37, which provides that the Railway Commissioners may refer questions for the opinion of the judges of the Supreme Court."

THE LORD CHANCELLOR:- Is that a question for the particular litigation?

Sir ROBERT FINLAY:- Yes.

THE LORD CHANCELLOR:- That is on points of law, I suppose?

Sir ROBERT FINLAY:- Yes. My Lord, I have it here: it is the Revised Statutes of Canada, 1906, chapter 37, section 55: "The Board may of its own motion or upon the application of any party and upon such security being given as it directs or at the request of the Governor in Council state a case in writing for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law. The Supreme Court of Canada shall hear and determine the question or questions of law

arising thereon and remit the matter to the Board with the opinion of the Court thereon."

THE LORD CHANCELLOR:- That is in a particular litigation, is it?

Sir ROBERT FINLAY:- So I understand it. It is in a group of sections headed "Practice and Procedure." The Montreal Street Railway case last week my friend reminds me came under that.

Mr NEWCOMBE:- No, it did not come under that.

THE LORD CHANCELLOR:- Of course it is very common, an Arbitrator can state a case, and Justices can state a case in this country. If that is the kind of thing, it does not help us. If that is the kind of thing, this section would not affect the argument.

Mr ATWATER:- The Montreal Street Railway case came direct on appeal from the Board of Railway Commissioners.

Sir ROBERT FINLAY:- The Montreal Street Railway case came under section 56, I am told.

Mr ATWATER:- It came on appeal from the Railway Board.

Sir ROBERT FINLAY:- Then line 5: "This power has been freely exercised by the Commission and we have never to my knowledge refused to answer the questions submitted. Can it now be successfully argued that the Railway Commissioners have the power to make references to this Court and that the Parliament, that created the Commission, has not got that power? Section 55 of the British North America Act provides that a bill may be reserved for the signification of the Sovereign's pleasure. Before exercising this prerogative of rejection would it not be within the power of the Home Government to refer the question involved to the Judicial Committee under the 4th section of 3 and 4 William IV, chapter 41, above quoted? If so, by analogy, may we not argue that the same principle would apply to the case of disallowance which may be exercised in connection with the power of supervision over Provincial Legislation entrusted to the Dominion Government, as provided for in Section 60 of the

British North America Act? If a Provincial Act is reserved by a Lieu-tenant Governor for the consideration of the Governor-General in Council, the opinion of the members of this Court as to its constitutionality might well be taken for the guidance of His Excellency. If this may be done after an Act has been passed, why should it not be competent to seek such advice in advance of legislation?" I submit, my Lords, that does not advance the argument one bit. It is merely stating that he thinks that they might take the opinion. "For all these reasons I hold" (etc., etc., Reading further extracts down to the end of Mr Justice Girouard's Judgment.) Your Lordships see that Mr Justice Girouard thought that that part of the questions, the very large part of course that related to the laws of the Provinces, was bad: so far as it related to the Federal Statutes or Federal matters it might be good. My contention of course is wider than that.

Mr Justice Davies says: "Questions with regard to the legislative powers of the Dominion Parliament" (&c. reading extracts down to) "The first step necessary to determine whether in authorising questions to be put to this court on important constitutional and legal points by the Governor in Council, Parliament acted beyond its powers is to determine whether Section 60 is in conflict with the powers exclusively assigned to the provincial legislatures. If it is not in such conflict then in my opinion the objection is entirely disposed of."

Lord ATKINSON:- Do you concur in that?

Sir ROBERT FINLAY:- No I do not, I differ very strongly. "The Federation Act, as was said by the Judicial Committee in Bank of Toronto v. Lambe, 12 Appeal Cases 575 at page 588, 'exhausts the whole range of legislative power and whatever is not thereby given to the provincial legislatures rests with the Parliament'."

Lord ROBSON:- That is a proposition affirmed by the Privy Council, "The Federation Act exhausts the whole range of legislative power" &c.

Sir ROBERT FINLAY:- I think that is quoted from 12 Appeal Cases in the Bank of Toronto v. Lambe. That of course is the whole power of legislation in conformity with the terms of the Act. It comes back to the effect of Section 101. "Sub-section 14 of Section 92 of our Constitutional Act" (&c. the learned Counsel reads extracts down to) "In point of fact and law, these powers of legislation, Dominion and provincial, are so interlaced that one can hardly be considered apart from the other." I will not stop to comment at length on that, I have already more than once made my point that Section 101 clearly contemplates only a Court of law, a Court of Appeal, and secondly a Court for the better administration of the laws of Canada. It would not be acting in either of these capacities

when it is answering questions of this nature. The "administration of the laws" means the judicial administration of the laws. Then on page 24 Mr Justice Davies continues: "If I am right in my construction" (&c. the learned Counsel reads extracts down to) "Governor General in Council to ask." (Line 10.) I ask, suppose Section 101 simply authorised the creation of a general Court of Appeal for Canada how could it be said that to put such questions was asking that Court to discharge a function as a Court of Appeal for Canada? "But Parliament has made this Court more than a mere general Court of Appeal" (The learned Counsel reads further extracts down to) "These facts by no means conclude the question. At the same time they show what the opinion of many of Canada's most distinguished jurists has been and it is hard to believe that such a point as that now raised, if well taken, could have escaped the observation of all the distinguished counsel who have argued the question on the many references made, and the jurists who constituted the Board of the Judicial Committee and decided those of them which were appealed to that Board." The jurists engaged in these several cases did not take points I presume which their clients did not desire to have raised. What they wanted I suppose was, in the particular case, to have the question decided. With regard to your Lordships' Board, it would have been a very difficult position if your Lordships' Board had taken a point which nobody raised, which had not been argued in the Courts below, and had insisted on having that argued. Probably it would have involved an adjournment for the first time before this Board, none of the parties desiring to take the point.

Lord SHAW:- No doubt it is true as you say, but my difficulty is that this Board have not only gone the length of correcting or affirming, as the case may be, what has been done in Canada but they have stepped out of their way, so to speak, to instruct

that the correct answers to these questions should be so and so instead of so and so. That surely assumes, at all events in practice, that this Board thought it was within its own province. It is a strong thing to say to this Board that it has been acting in an unconstitutional sphere all the time. You see the difficulty that is in my mind?

Sir ROBERT FINLAY:- I perfectly follow, but surely is not the answer to that this, that all the parties were there, they had all come over and they were anxious to have the points determined; nobody objected to jurisdiction and it would have been very embarrassing if your Lordships had mero motu brought forward this point and insisted on an argument upon it. That is my respectful submission in reply to what your Lordship has said. Then the Judgment proceeds: "If the power of Parliament" (Line 30) (&c. the learned Counsel reads further extracts down to the end of Mr Justice Davies' Judgment). My short answer to the argument that underlies the whole of that Judgment is first that Section 101 most certainly does not authorise such references. More than that I say it is inconsistent with such reference and that therefore the general powers as to the "peace, order and good government of Canada" cannot carry a power to make an Order which would be inconsistent with the terms of a portion of the same Act.

Lord ATKINSON:- If "peace, order and good government" did enable you to pass enactments inconsistent with the specified purposes of the Act I do not see any use in their specification at all.

Sir ROBERT FINLAY:- That general power would override everything.

The LORD CHANCELLOR:- It is always understood in all the cases surely, is not it, that that must not be so: that the general words are to be taken in the context of the Acts?

Sir ROBERT FINLAY:- Yes, my Lord.

The LORD CHANCELLOR:- They are very large powers and it is intended that all the powers should be given to one or the other.

Sir ROBERT FINLAY:- Yes, my Lord, subject to the terms of the Constitution itself. If I am right in saying that Section 101 indicates that the functions of the Supreme Court were to be confined to those first of a Court of Appeal for the whole Dominion, and secondly to those of a Court for the better administration of the laws of Canada in the sense of judicial administration, then ------

The LORD CHANCELLOR:- I agree, but it is not, I suppose, contended that the words "peace, order and good government" involve the faculty of rewriting the whole Constitution?

Sir ROBERT FINLAY:- No, and yet that to some extent I think is involved perhaps in some portions of this Judgment. It is true that the first point of the learned Judge is that Section 101 authorises this sort of thing. His second point is that it at all events does not forbid it, and that if there is any ambiguity in it they can fall back on the general power. My submission is that the Section forbids it. Then Mr Justice Idington dissented. He says: "The jurisdiction of this Court to answer the questions submitted by these references has been challenged by the motion made. I respectfully dissent from the conclusion arrived at by a majority of the Court. I agree in regard to our jurisdiction to answer some of the questions submitted. But the decision as a whole implies not only that Parliament has, but also has exercised, the power of commanding this Court originally constituted and established a Court of Common Law and Equity, never supposed to have been constituted by virtue of any other power than Section 101 of the British North America Act." Then at line 42 he says: "I desire at the

outset to make clear that the References which have the sanction of the provincial government to their submission by the Dominion Government are within the jurisdiction of this Court. Section 101 of the British North America Act does not so clearly as it might cover the ground of authority for the creation of a Court of quasi original jurisdiction to dispose of such constitutional controversies as said references imply between the Dominion and Provinces. But said Section 101 and Subsection 14 of Section 92 of the British North America Act, coupled together do lay such a foundation of authority and followed by Section 67 of the Supreme Court Act, and the correlative provincial legislation provided for therein, do seem to me sufficient to confer jurisdiction within the limits thus assigned." I respectfully dissent from that portion of the Judgment for the reasons I have already given. Then "However that may be" (&c. The learned Counsel reads the Judgment of Mr Justice Idington).

My Lords, I respectfully submit that there is a very great deal in that Judgment which is very weighty indeed with regard to the question. The only criticism I venture upon it is this - the learned Judge points out that the power under the second branch of Section 101 relates to creating Courts for the administration of the laws of Canada. He says that means the laws of the Dominion as distinguished from the Provinces, and he rests part of his Judgment upon that. But then he seems to assume in that part of the Judgment that the administration of the laws of Canada would cover putting such questions. I must respectfully deny that, and I say that the utmost it means, as he says, indeed using the phrase he uses in another part of his Judgment, is the judicial administration of the laws of Canada and that only, and that anything extra judicial such as references of this kind is entirely outside the purview and contrary to the construction of Section 101.

THE LORD CHANCELLOR : You go as far as to say that no question whatever may be put ?

SIR ROBERT FINLAY : Yes, I do my Lord - no questions whatever. That is my first contention. Of course I do not throw over the other contentions.

THE LORD CHANCELLOR : That is your thesis.

SIR ROBERT FINLAY : Yes, that is my ~~route~~ case - my primary contention. Then, my Lord, Mr. Justice Duff says "The objection taken in limine by the provincial governments is that the questions in so far as they expressly call for an expression of opinion" -(the learned Counsel read the Judgment). Then Mr. Justice Anglin says : "If the jurisdiction of the Parliament of Canada to enact it depended upon Section 101" - (the learned Counsel read the Judgment to the words "Section 91 of the British North America Act empowering

Parliament." So far, my Lords, that portion of the Judgment of Mr. Justice Anglin is entirely in my favour. I now come to the portion of his Judgment in which he takes the contrary view :"To make laws for the peace, order and good government of Canada "- (the learned Counsel read the remainder of the Judgment.)

THE LORD CHANCELLOR : All those Judgments, every one of them seem to me to say that there may be no questions put.

SIR ROBERT FINLAY : Yes.

THE LORD CHANCELLOR : I am only speaking as to the extent that Section 60 is ultra vires, but they all seem to think that there is nothing unconstitutional in putting questions, though they also seem to think, taking the words of the Chief Justice, "If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the Executive, for that reason, not to insist upon answers being given;" or, in other words, as Mr. Justice Anglin says, if they could not and should not be answered; it all comes to that.

SIR ROBERT FINLAY : It does.

THE LORD CHANCELLOR : There is one more thing. The protest which was made by the Provinces which is at page 14, is a protest "against the Court or the individual members thereof entertaining or considering the questions referred to it by the Executive Council" (we know what the questions referred were) "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." It does not raise the broad and big question, namely, in no circumstances can any question be put. That is rather the view I take.

SIR ROBERT FINLAY : I respectfully submit that the Notice of Motion covers the broad point.

THE LORD CHANCELLOR : It may be so.

SIR ROBERT FINLAY : And I think my friend, Mr. Newcombe, in the course of my argument with reference to some part of it said the argument in the Court below was exclusively directed to the question of jurisdiction to put any questions. That was what my friend Mr. Newcombe said just now.

THE LORD CHANCELLOR : It is perfectly open to you no doubt to raise the big question, and I do not want to deprecate your raising it; on the contrary, it will have to be considered, but as I understand it all the Judges seem to think that some questions may be put and that some questions may be refused an answer.

SIR ROBERT FINLAY : Certainly; and I respectfully ask your Lordships to say that to that extent even those Judges who are in my favour as to some part of my case, went wrong, and I was about to say a very few words by way of summing up my argument upon that head.

As regards the terms of the Motion, I submit it is wide enough to cover the jurisdiction, and that was the point which was mainly at all events argued in the Court below. Taking the last Judgment, the Judgment of Mr. Justice Anglin, the whole of the first paragraph on page 37 is an adoption of a great part of the argument I have submitted to your Lordships. Then he proceeds to say that he thinks some of the questions are objectionable;

he proceeds to deal with the point raised as to whether these questions, or some of them, were objectionable as conflicting with the exclusive jurisdiction of the provincial legislation under Section 92, subsection 14, and he gets rid of that, as he thinks, by saying that the Parliament of Canada has not said that the answers of the Supreme Court to the questions are to be binding on the provincial Courts, and therefore they will not be embarrassed. I most respectfully submit that there is a great fallacy there ~~throughout~~. It is true they are not legally binding, but why is it that it is absurd to submit these questions to the Supreme Court ? For this reason - that the answers given by the Supreme Court have a weight and prestige attached to them that answers given in any other quarter would not have. It is not merely because they want to get advice; it is because they want advice which is published that they put these questions, because these answers are published like ordinary Judgments, and they form the subject of appeal. They desire to have opinions from the Supreme Court publicly delivered on account of the weight which they carry, and as a matter of fact I have given your Lordships at least one illustration of the way in which points on which the provincial courts had differed have been submitted to the Supreme Court and decided in this way.

LORD ATKINSON : All the proceedings are judicial, or bear the form of judicial proceedings. The Attorney General may appear to represent such other interests as are deemed necessary to be represented and an appeal will lie.

SIR ROBERT FINLAY : Yes.

LORD SHAW : That is all subject to this, is it not - that Section 60 itself says that these opinions given are merely advisory ?

SIR ROBERT FINLAY : It does undoubtedly, my Lord. But take the effect produced by an opinion publicly delivered by the Judges of the Supreme Court that the business of an insurance company ~~exists~~ outside the province where it was constituted was ultra vires.

LORD ATKINSON : The proceedings of this Board are advisory; we advise the King.

LORD SHAW : If I may say so, I do not think the two things are analogous at all; the proceedings of this Board are advisory in the sense that the King acts upon them in the interests of all parties concerned, but the word advisory here is used with ~~a~~ precisely opposite consideration - to show that the parties interests are not concerned either locally or finally.

SIR ROBERT FINLAY : I freely concede that as regards the legal aspect of the case; but what I am dealing with is the practical effect. Why is it that the Dominion Government insists on this right to refer to the Supreme Court and to have opinions delivered as if they were judgments, and published in the same way ? Indeed, in fact, even such learned people as those who report for your Lordships' Board in one instance in a head note spoke of the opinion of the Judges in such a reference as a Judgment - I called attention to it when reading the head note - "The Judgment appealed from" - but it is not a judgment except that it is a judgment for the purpose of appeal. But my point is the effect which undoubtedly such opinions so expressed must have in the provinces upon those concerned. With regard to one other point which was mentioned just now by the Lord Chancellor, as to the possible right to refuse answers to particular parts of a question : if this section is intra vires, I do not very well see how the Supreme Court can refuse, because it is precise in its

terms -"They shall answer each of the questions", and, dropping all other business, they must apply their minds to the composition of a treatise on the question.

THE LORD CHANCELLOR : As at present advised, I rather agree; but what I want to point out is that the Judges in principle seem to entirely agree on two ~~propositions~~ propositions, though they find in different ways.

SIR ROBERT FINLAY : Yes, my Lord. The last observation I shall make is this : I take Mr. Justice Anglin's Judgment; I illustrate the point arising in the other Judgments also. He attempts to get rid of interfering with the exclusive jurisdiction of the provinces and the administration of justice in the provinces by saying, "Oh, the opinion of the Supreme Court is not binding upon them." I have attempted to answer that. But what he does not deal with is that Section 101 is inconsistent, or it is inconsistent with the terms of Section 101 to ~~give~~ giving this power under the head of "peace, order and good government of Canada" and comes into conflict at once with the very terms of Section 101, and it is certainly no part of the work of a Court of Appeal, but, on the contrary, it is repugnant to the work of a Court of Appeal.

LORD ROBSON : Your contention is that the provinces are entitled to have as part of their constitutional privilege a general court of appeal for the whole of Canada ?

SIR ROBERT FINLAY : Yes.

LORD ROBSON : And I suppose what you say is, if you make it more than a court of appeal and give it extra judicial functions, you are making it something ~~xxxxx~~ else ?

SIR ROBERT FINLAY : Yes, and it approaches its judicial functions in fetters.

LORD MACNAGHTEN : You say it should be a court of appeal unbiassed by any expression of opinion ?

SIR ROBERT FINLAY : Just so, my Lord.

LORD SHAW : It is the psychological aspect of it that appeals to me. It seems to me they have shunted themselves on to a certain siding by an advisory opinion given, and a certain wrench is required to get back again.

Fldr
1.
folws
Mill

SIR ROBERT FINLAY: Very great indeed, and I should hope every man is ready, if he is convinced that an opinion he has deliberately formed is wrong to retract it. . . .

LORD SHAW: I think it was a Scotchman who put in on the proper lines when he said: "Having regard to the person who asked me I should say so and so, but I reserve liberty to myself to change my mind".

SIR ROBERT FINLAY: As regards the second branch of Section 101, Courts for the administration of the laws of Canada, it is clearly not for the administration of any law whatever. Administration means judicial administration.

LORD ATKINSON: You disfigure the Court of Appeal to which the Provinces are entitled.

SIR ROBERT FINLAY: You do.

LORD ROBSON: Of course the privilege which is given the Provinces of a separate and Supreme Court of Appeal is enacted in a rather significant way in the Act itself. Sections 91 and 92 deal with the distribution of legislative powers, and they there allocate to the Provinces under Section 14 exclusive control over all the provincial Courts. Now they make a section and do not distribute legislative power in the same sense and way, and in the same section as they distribute legislative power over the other functions of government.

SIR ROBERT FINLAY: Exactly.

LORD ROBSON: Because they are there apparently taking something out of the general terms "peace, order and good government" and making it applicable to both the Dominion and the Provinces as a separate branch of their constitutional position.

SIR ROBERT FINLAY: It is a separate head, and a special provision of that head necessarily qualifies any general words; and those words on which so much stress is laid in some of the Judgments, "Notwithstanding anything in this Act contained" at the beginning of section 101, I take it, have references almost entirely to the provision that the

8

provincial legislature shall have exclusive authority with regard to the administration of justice in the provinces. It might be supposed to interfere with that if you created a Court of Appeal from the Provinces--it would in fact; so section 101 begins by saying, notwithstanding that enactment about the exclusive jurisdiction as to justice in the Provinces, and notwithstanding anything else, if there be anything else in the Act, a Court of Appeal is created for Canada. I submit it destroys the Court of Appeal; certainly it is not establishing a Court because it is not a Court at all for this purpose--it is not establishing a Court ~~xxxx~~ for the administration of the laws of Canada.

MR NESBIT: My Lords: I shall not keep you long, but I have one or two observations to make with reference to what his Lordship, the Lord Chancellor, has said about the point not ~~x~~ having been raised on the trial in the Court below as it has been raised here. I think my friend Mr Newcombe will agree with me that the arguments here are practically the same on the point of jurisdiction.

THE LORD CHANCELLOR: All I wanted to convey was that the point raised admits of being answered either by saying there can be no question, or by saying that these questions ought not to be required to be answered.

MR NESBIT: If your Lordship pleases. If you will look at Page n 12 of the Record the Court allowed a document ~~limit~~ to be put in as the point was very important.

MR NEWCOMBE: They ~~xxxx~~ put it in here but they said it should not form part of the record; it was put in under the Queen's Order for the same reason.

MR NESBIT: All I am saying is that their Lordships allowed it to be put in. No one suggested that it was part of the Record in that sense. I will read it: "It is submitted, therefore, that the action demanded of this Court by Section 60 of the Supreme Court Act, is an action of an

9

entirely advisory and non-judicial character and is not an action by way of the exercise of the functions of a Court of Appeal or of a Court for the administration of the laws of Canada and is not, therefore, within the terms of Section 101 of the British North America Act." It may, however, be urged that the Dominion of Canada has, if not under the terms of Section 101 of the British North America Act, yet otherwise the right to obtain the advice of any person upon any subject of interest to it. This may very well be true, but it has no jurisdiction to demand or compel the giving of this advice by the members of the Supreme Court of Canada, who once duly appointed are no longer in any sense under the orders of the Parliament except in so far as that Parliament has jurisdiction to legislate for that Court as a Court". Then if your Lordships will look at Page 34 of the Record you will see that Mr Justice Idington at least understood what our suggestion was. I am reading from lines 44 and 45: "In conclusion I hold that if we have jurisdiction we are in duty bound to answer so far as our knowledge and understanding enable us to". His Lordship there apparently was of the view that my suggestion is the correct one, that if it is intra vires of the Governor in Council to ask these questions so far as the Supreme Court of Canada is concerned it is their duty to obey the language of the Act, and they are bound to answer any questions which may be submitted. Very different considerations, perhaps, apply to your Lordships' Board, (though as to that I desire to read a passage from 3 and 4 William the IV) if your Lordships entertain any appeal at all. I did not argue as it has been argued here that granted they were bound to answer questions those questions were in a form they were not bound to answer, because my conception of the matter was, as Mr Justice Idington said, that if the act is intra vires, if the Governor in Council

10

has a right to say to the Court "You shall answer", as he has said--if the act is intra vires as tothat it is intra vires as to the other. But supposing an appeal lies to this Court, I ask your Lordships' attention for a moment to the language of 3 and 4 William the IV even as to your Lordships' Court. "All appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any Court, Judge, or judicial Officer, and all such appeals as are now pending and unheard, shall, from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and that such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for His decision". Now, assume the case that they have answered all the questions as in duty bound, my suggestion is that perhaps your Lordships might feel yourselves bound under that language to give a report and recommendation on all those questions and answers.

THE LORD CHANCELLOR: It rather seems to me this does permit entertaining under the law an appeal from the Court which has to administer exactly the same law as was considered by the Supreme Court. If that be so, arguing backwards, it would rather seem that if this Board refused to answer certain questions it would import that there was a right to embody them among the questions in the Court in Canada.

MR NESBITT: If the Court has answered, look where it leaves the question, as in the Fisheries Case, where this Court refused ~~proceeded~~ to answer the question as to the right of the riparian proprietors. The result has been that you have the view of the Supreme Court--no expression of opinion--the view of the Supreme Court on everything else; and supposing it

//

is said by this Committee to be wrong, left untouched, it certainly does embarrass the administration of justice.

THE LORD CHANCELLOR: It may be, but the point really is, and as far as I can see at present it is partially in favour of your contention--if the Board here decline to answer it must be upon the ground that they think the Court below ought not to answer.

LORD ATKINSON: Was there any suggestion as to, on what ground the Court is not obliged to answer any particular question--it must be the mischie-vous effect, or it must be that there is no jurisdiction to put the question?

MR NESBIT: That, so far as I know, my Lord, has not been discussed in the Court in Canada. I think it was rather put on the ground suggested in 35 Supreme Court cases, that as this Court had said in the Hamilton Case, the question was hypothetical, they took advantage of that suggestion and said: "This is a hypothetical question, and we will not answer it". The point is new to me which has been made by your Lordships.

LORD ROBSON: They have been all hypothetical under Section 60, have they not?

LORD ATKINSON: I can understand their not answering a hypothetical question, but as to being asked to advise I cannot understand.

MR NESBIT: The discussion here yesterday was to me absolutely new. Is it the new? contention is that there is no right to put any question at all. If that is right the whole thing is at an end, but compatible with the right to put questions, it is quite compatible that the Executive in Canada should have a right to put questions, but that the judicial body themselves are to determine whether those questions are to be answered.

The Lord Chancellor

MR NESBIT: That suggestion your Lordship made yesterday, and that suggestion, so far as I know, has not been made in

12

Canada, except you adopt the language in 35 Supreme Court Cases, because this Committee had said certain questions were hypothetical and should not be answered, and they, as a matter of policy, would not answer them.

THE LORD CHANCELLOR: Did not all the Judgments proceed upon this, that some questions might be put, and other questions might not be put. The Judgment of Mr Justice Idington does not I suggest, except that even he, notwithstanding the language I have pointed out to your Lordship on Page 34, said that when the questions related purely to the law of Canada he found there was jurisdiction.

THE LORD CHANCELLOR: As far as I can see all the judges seemed to think that there are certain classes of questions which may be put, and that there are certain classes of questions which ought not to be answered, which imports that they ought not to be put; and it also seems that the Court itself is to say whether they are to be answered or not. That seems to me to be the effect of the Judgments. I do not say it is hostile to your argument.

MR NESBITT: I think, with respect, your Lordship is right with this qualification--that Mr Justice Idington apparently said if there is jurisdiction to put a question-that is if there is a question relating to the laws of Canada which can be put, "We are in duty bound to answer it".

LORD ROBSON: Then he would say the section was intra vires so far as the questions relate entirely to the scope of Dominion legislation, and ultra vires when they begin to trench on the sphere of provincial legislation.

MR NESBITT: With this qualification--providing the Provinces consent to the reference; in other words that the previous references which have taken place, all of which have been of that character, I think, except as to Manitoba--and he points out the distinction there, and that is the reason he brings in the Manitoba case--have all been by consent, and

jurisdiction has been given just as if it was a stated case.

LORD ROBSON: But for the questions to be left either to be answered or refused without regard to respective limits of jurisdiction between the Provinces, ~~and that~~ would mean that they would be left to say whether on any particular question within Section 60, Section 60 was ultra vires or not.

MR NESBIT: It would be a difficult position because the Judges would then be judges of policy.

THE LORD CHANCELLOR : Will you refer to Mr. Justice Idington's Judgment at page 27, line 9 - he says "I am therefore prepared to hold that if and in so far as this Court has been or may be duly given jurisdiction to administer any laws of Canada, and so far as the proceedings in question can be brought thereunder, we are bound to observe and discharge such judicial functions as implied therein. In the submission in re Criminal Code, made to us last term (see 43 Can. S.C.R.434) though inclined to think the reference pushed the power and duty to the verge of the reasonable limits Section 101 of the British North America Act would permit, I, with some doubt, agreed the questions might fall within the words of that section," - so there you see he does.

MR NESBITT : That is what I said, my Lord, that in so far as Section 60 is intra vires, which he thinks it is in reference to the laws of Canada pure and simple, he is bound to answer any question no matter what it is because it is imperative and that is intra vires, but in so far as it relates to provincial statutes then it is ultra vires, and his duty is not to answer at all. He also says that in a case where the province and the Dominion joined in asking the Court to answer the question, it is in the nature of a stated case, and by consent they give jurisdiction and they are answered. He differs the Manitoba case. He says all the others have been dealt with under that practice except the Manitoba case, and he differentiates that case which is under another section of the British North America Act, the education section. I merely wanted to draw your Lordships attention to those facts, if one may so describe them.

Now in this particular matter there are one or two other submissions I would like to make. Your Lordships have heard for the first time as far as I am aware the Dominion asserting a jurisdiction asking through the Governor in Council for the advice of the Supreme Court, in conflict with the interest of every single province. Every province you have now before you saying "without our consent at any rate", and many of them saying "with or without our consent, and we object entirely."

MR NEWCOMBE : No, not at all.

MR NESBITT : "We object entirely to your utilising the machinery of the Supreme Court for the purposes of advice." There is a conflict of interest therefore between the Crown as represented by the Governor in council and the provinces as represented by the Lieutenant Governor.

MR NEWCOMBE : my learned friend is not correct. Saskatchewan is one of the provinces that refrains from holding that view, and British Columbia.

MR NESBITT : British Columbia object, as we heard yesterday, and I thought it was plain - at any rate, it is sufficient for my argument that as to seven of the provinces the observation is correct.

Then, my Lords, I submit that that indicates that such a thing having arisen it may well have been in the minds of the framers of the British North America Act that the method of obtaining advice if desired, which should be adopted in cases of conflict between the Dominion and the provinces was contained in 3 and 4 William IV - that is that the King in council here might well upon suggestion or request through the Colonial Office or the Foreign Office ask this Committee here for advice on the subject.

16.

LORD SHAW : But suppose a case in which, being asked for advice, they gave it with the caveat which is usual and proper that that shall not affect the numerous private interests which will possibly have to come before them - suppose that case, and suppose it comes to this Board on appeal and this Board affirms the judgment, what is the position of private litigants who have not been heard. Would not they be in a very confused and embarrassed position ?

MR NESBITT : The practical position, my Lord, is that no one would ever advise them to go on with the litigation either before this Board or in the Supreme Court.

LORD SHAW : You see the Judges are going back upon their own opinion, and upon opinion which has been formed in a situation in which there has not been contentious litigation.

MR NESBITT : And remember, my Lord, in this particular case what makes it more objectionable is that these questions which your Lordships have heard are entirely framed by the parties seeking the advice, and your Lordships know how easy it is to get a certain - shall I say squint of the law - by framing a question in a particular manner. I suppose the custom is not unknown here of a man asking an opinion not for advice but for newspaper publication. That is a good deal the same as this type of thing. These questions are framed by the other side with a design running all through them which I need not trouble to discuss, but which I could easily point out.

THE LORD CHANCELLOR : It seems to me you are coming right up against an old fundamental doctrine of the English Courts of Justice - differing from the Roman system - that the Courts here never give an opinion except on the actual facts of the case, and that is the way in which the law

has been ~~administrated~~ administered in this country. But alongside that remember there has been a certain licence to the Executive Government and also to the House of Lords, rather undefinable, to ask the opinion of the Judges in regard to any particular questions. It is rather vague, you see, and I do not think any case has arisen since the time of Lord George Sackville in the year 1760.

MR NESBITT : I think that is so. On that point my Lord, the Lord chancellor said you did not want to hear anything of the American Constitution to which Mr. Justice Idington referred in his Judgment, but I should like to make this suggestion - the language of the constitution there as far as pertains to this point is that ~~xxxx~~ the judicial power of the United States shall be vested in one Supreme Court.

THE LORD CHANCELLOR : That is in the Constitution.

MR NESBITT : Yes, that is in the Constitution. Construing that language, Chief Justice Marshal (who I assume your Lordship will say was a very great authority) said, the reason that the Supreme Court declined to answer questions was because the very language ~~of~~ itself of the Constitution contemplated a judicial body in a Supreme Court, and it was inconsistent with its duties once clothed with ~~the~~ that function, to take on the duties of an advisory body; therefore throughout the United States you will find the idea prevalent that where advice of this kind is sought for there must be express authority for it in the written constitution. Now, that is of some weight I submit to your Lordships.

THE LORD CHANCELLOR : I only wanted to indicate the point - of course different countries, different constitutions. What is the reference to that ?

18

MR NESBITT : The language is in Article 3, Section 1 of the Constitution. Your Lordship will find it in Story on the Constitution, Volume 1,XXV. Then in the same work, Story on the Constitution, volume 2, page 373, Note 2, your Lordship will find the reference.

THE LORD CHANCELLOR : Is the opinion of Chief Justice Marshal there referred to ?

MR NESBITT : Yes, my Lord. The main decision, I think, is in the case of Marbury v. Madison which, speaking from recollection, contains a very elaborate judgment, and is reported in 1 Cranch's Reports, page 137, and particularly at page 171. I will read the note :"President Washington in 1793 requested the opinion of the Judges of the Supreme Court on the construction of the Treaty with France in 1778, but they declined to give any opinion on the ground stated in the text." That is the ground I have put to your Lordships. Now if that view meets with your Lordships' approval, I ask you to apply it to this Section. You have Section 91 giving the Parliament of Canada under the head of "peace, order and good government", which by the way as far as Canada is concerned comes from the Treaty of Paris I think and was for years the only power under which most of the corporations were created and so on - you have the general power given, but that must be read, my submission is, and harmonised with the special powersx, namely, the powers of Section 101 which is self-contained, and which as far as the early part of it is concerned - that is as to the general court of appeal for Canada - is in almost precise language with the Act I have referred to, the Constitution of the United States. The judicial power of the United States is vested in one Supreme Court. Therefore the same reasoning would apply to that, and if that is so, when you get the Judges

19/5.

when appointed clothed with judicial functions for the appellate courts of the province, is it not idle to say if you clothe them with other and differing powers which shackle and fetter their ability to carry out the powers with which they are properly clothed, namely, by putting them in a position of having expressed opinions and so on, that that is not an interference with the exclusive administration of justice in the province.

LORD SHAW : There is a long and somewhat involved sentence in Mr. Justice Idington's Judgment which I have been trying to unravel and which seems to me to express in two lines your view. Would you mind looking at it; it is on page 25, and I will read it as I have attempted to unravel it. He dissents from the conclusion that Parliament has "the power of commanding this Court to become an advisory adjunct of the department of justice and filled the place usually held by subaltern law officers of the Crown." Now that was Chief Justice Marshal's view as I happen to know, and I take it that is the view which you would like us to affirm, and which could not be affirmed in broader terms than that, dissenting from the view that Parliament had "the power of commanding this Court to become an advisory adjunct of the department of judicature" - that is the Supreme Court. That is your argument, I suppose, in a nutshell.

MR MESBITT : That is my argument in a nutshell, my Lord, and it has been throughout. I read Sections 91 and 92 together and endeavour then to harmonise them from that point of view. Then I was answered by one of the Judges with this : "That is all very well, but what do you do with the latter part of Section 101 which enables the Dominion to create additional Courts. Valin v. Langlois says they may name

any individual and create him a court." ? My answer to that was, as has been put more than once to your Lordships here, that you are not dealing with them as a court - that is a court for a particular purpose - for the administration of the laws of Canada. I care not whether you mean by the laws of Canada the laws of Canada including the provinces, or the laws of Canada, but it means a court of administration.

Mill. Mr Martin fols.

(After a short adjournment.)

21

Mr NESBIT:- With reference to the effect of the Judges once being clothed with the Judicial Office, and the interest of the Province, so to speak, in them, will your Lordships let me refer again to how that has been viewed in the Supreme Court of the United States, in Story, which I have already given you. It is Section 157, and at page 373 he says "We have seen that by law the President possesses the right to require certain advice and opinions of his Cabinet Ministers upon all questions connected with their respective departments. But he does not posses a like authority in regard to the Judicial Department. That branch of the Government can be called upon only to decide controversies brought before them in a legal form, and therefore are bound to abstain from any extra judicial opinions upon points of law even though solemnly requested by the executive"

LORD MACNAGHTEN:- That is not Chief Justice Marshall; it is Story the author, is it?

Mr NESBIT:- Mr Justice Story was a colleague of the Chief Justice. I am not able to answer your Lordship's question, because the reference is to 5 Marshalls Life of Washington, Chap. 6, and that is not to be seen here.

THE LORD CHANCELLOR:- Was Story one of the colleagues of Chief Justice Marshall when he delivered judgment in Margery v. Madison?

Mr NESBIT:- Yes, I think so. He died in 1841.

LORD MACNAGHTEN:- He was a great authority.

Mr NESBIT:- He was for many years a colleague. This is purporting to state the substance, whether the exact language, or not, I cannot say.

In further reference to that, might I ~~seek~~ ask your Lordships attention to this, that where it is found in the British Constitution necessary to provide, as you do find provided in 3 and 4 William iv., that this body, even, shall

be called upon in an advisory capacity, you have the express legislative enactment to that effect. Nothing of the sort is found in the British North America Act. You find, on the contrary, that the tribunal which they have asked the question to be submitted to here is a specially constituted tribunal with special appellate powers for the administration of the laws coming up from the Province by way of appeal; and I think your Lordships have given sufficient intimation for me to say that I take it to be your Lordships view that the 'additional Courts for the administration of Justice' means administration of Justice in the sense that Sir Robert has argued for. I think my friends on the other side will argue, and must argue, that if there is the right in the Governor in Council to ask these questions, when you find, in the same legislation, the express command that they shall be answered, it is their duty to answer. Let me give your Lordships the history which you have already had about that. The Act, as it stood in 1891, did not contain the language which you find in the Act of 1906, that is, touching any questions of law or fact, whether the legislation was in existence or prospective. The Supreme Court in the Lords Day Case declined to answer certain of the questions, or at least raised the question that as it was an Act that was proposed to be established only by the Provincial Legislative of Ontario it did not fall within the language of the Supreme Court Act, Section 60, as it then was. In order to make certain that there could be no doubt about the duty of the members of the Supreme Court in the future, the next session an Act was passed which contained the provision that whether the Legislation was in existence, whether it was a Legislation they desired to have an opinion upon, or as to what its legality would be when passed—no matter what it was—it was their duty to answer the questions and they must give their reasons there for. I cannot conceive how the Supreme Court, if there is

jurisdiction as to any question whatever, have any right to say "As Judges we decline to answer this" because it presupposes they are not being asked as Judges and the duty is cast upon them in some other capacity.

Now as to the suggestion that they may be a consultative body,—that, just as they could appoint a Conservation Commission or Immigration officers; they could appoint any people they thought fit and make them such a body, as, says my friend Mr Newcombe, in advising the Crown in his legal capacity. But that is not what this Act is. It is time enough for us to borrow that trouble when they attempt to do that. I venture to say that Parliament, if it cannot get the advantage of the opinions of the Supreme Court, as a Supreme Court, in an advisory capacity, will hesitate long before they appoint any separate consultative body. They will probably do, as they do now, employ Counsel, trained experts in the law, to whom they will pay something for advice so as to know what the law is, or for the best view they can give them. But the effect of this is that the Court having been appointed to which every citizen has a right to bring his case, either first getting the opinion of the Trial Judge with his local knowledge, and then of the Appellate Court of the Province, and all that brought in a proper legal form before this body as a Court of Appeal——he has a right to have that brought up unhampered by previous opinions which may have been given upon questions similar in principle, if not exactly in point, and ~~that~~ an Appeal taken further on here. As it is, hampered and fettered as you find that body by such a procedure as this, it is no longer the Court of Appeal designed by Section 92 of the Act, and is therefore an interference with the exclusive rights of the provincial subjects to have their affairs administered through their provincial Courts.

I submit therefore that the point was properly taken, and well taken.

(Adjourned for a short time)

F3 24

Mr NEWCOMBE:- My Lords, I should like to explain, in the first place, the Notice which is on page 7 of the Record under which this question came up in the Supreme Court. You will see at line 18: "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 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". That first enumeration defines the present reference, the reference which is here under appeal. Two others are mentioned. Paragraph (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". Now it happened as a mere coincidence, not because there was any connection between these cases whatever, in mere point of time, that these three references were made by his Excellency in Council to the Supreme Court at about the same time. The questions in the first one have been read to your Lordships, and those are the questions now under consideration. The second reference as to the powers of the Legislature of British Columbia in respect of their fisheries was a reference made by the Governor in Council by agreement and after consideration with the Government as a desirable proceeding for the purpose of obtaining the opinion of the Court upon certain conflicting views as between the two Governments with regard to the fishery rights of the Province, notably in the Railway belt, which has been under discussion in respect of waters and in respect of minerals before your Lordships on two occasions. Then the third reference was with respect to the validity of a certain

clause of the Insurance Act, which provided that Insurance Companies could not carry on business in Canada without license from the Governor in Council to be issued upon compliance with certain conditions. Then the curious thing happened that these references were joined in one motion by my learned friend with a view to have it declared that the Parliament had no jurisdiction to authorise these references, and the Provinces were divided upon the subject. Of course, the Province of British Columbia were advocating the decision of No. 2, and No. 3 was really a matter in which, so far as I am aware, the Provinces did not take very much concern, but upon the decision being given they confined their application and subsequent proceedings to reference No. 1 which embraces the questions your Lordships have heard. The appeal is upon this reference only. Now this appeal, I submit, involves a mere question of jurisdiction based upon the consideration as to whether it was within the enacting authority of the Parliament of Canada to enact section 60 of the Supreme Court Act. In the Record at page 15 your Lordships will see the Judgment. My learned friend has read the Reasons of the respective Judges, the Judgment is on pages 14 and 15, page 14 contains the usual recitals of the Judgement of the Supreme Court, and at the top of page 15: "This Court doth declare that it has jurisdiction to hear these references". That is the Judgment of the Court, that it has jurisdiction to hear these references. That is all that was decided. That is the only question that was debated before the Supreme Court and that is the only question which arises for your Lordships' consideration upon the appeal. The Memorandum, which has been printed in the Case, and which my learned friend, Mr Nesbitt refers to, was handed in by my learned friend during the argument in the Supreme Court in support

of his Motion. It was a printed Memorandum produced there and it has found its way into the Record, but it is valuable now as showing the grounds upon which the Motion was deliberately put there. It opens with the statement that "It is submitted that this Court has no jurisdiction to consider and reply to the questions referred, and that it should refrain from doing so". Then on page 9, line 20: "The jurisdiction of the Dominion of Canada to enact the section above quoted must be supported, if at all, under the terms of Section 101 of the British North America Act, which reads as follows", and that is argued out, and the conclusion of the Memorandum is on pages 12 and 13, showing, I need not read those pages, that the point involved was a question of jurisdiction merely, and so, looking to the Judgment, which my learned friend has read, on page 15, "The question, and the only question", says the Chief Justice, "we have now to dispose of, is a preliminary objection which has been taken to our hearing and considering these references made to us by Order in Council, on the ground that notwithstanding anything contained in the British North America Act, 1867, the Parliament of Canada cannot impose upon this court the duty" and so on. Then on page 21 at line 25 he holds: "That it is the duty of the members of this Court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter that to answer such questions might in any way embarrass the administration of justice". Mr Justice Girouard in the following line said: "As to the motion to quash, I would prefer to wait for judgment till the matter is discussed on the merits". The matter was not discussed on the merits. Mr Justice Davies on page 25, at the conclusion of his Judgment, says: "I say nothing

4

whatever about the particular questions now before us awaiting argument. Whether they go further than they should must be determined later". Then going on to the Judgment of Mr Justice Duff at the foot of page 36: "I should perhaps add that I do not wish to be understood as expressing any opinion upon the propriety of the questions now before us. I confine myself to the precise point raised by Mr Nesbitt",

and Mr Justice Anglin, at the conclusion of his Judgment,

says: "I reserve consideration of whether and how far each

of the several questions included in the present reference

falls within the purview of Section 60 and can be or should

be answered, until we have had the advantage of argument and

discussion upon them".

So that all that matter of the character of the questions, the propriety of the questions and the expediency of answering them was not discussed or considered by the Supreme Court and is outside of any question which I submit is presented for your Lordships' consideration, the point being really that which my learned friend, Sir Robert, has argued so fully as to whether it is constitutional that the Parliament should authorise the Governor in Council to submit any questions for advice to the Supreme Court.

Now my Lords, this jurisdiction, as my learned friend has stated and proved so fully by reference to the authorities, is a jurisdiction which has been from the constitution of the Court very frequently exercised, and my learned friend has referred to a number of the cases. There are some other cases, and perhaps to complete the list I might refer to them. There is the case of in re New Brunswick Penitentiary referred to in Cameron's Supreme Court Practice 1907 at page 267, which seems not to be reported; then the case in re Canada Temperance Act 1878 and County of Kent in Cassell's Digest of the Supreme Court decisions, at page 106, and in re Canada Temperance Act and the County of Perth in Cassell's Digest 105. Then I am not sure that my learned friend referred to the case of the Grand Trunk Railway Company and the Attorney-General of Canada, which is known as the contracting-out case, with which your Lordships are familiar.

Sir Robert FINLAY: I think I did.

Mr NEWCOMBE: I omitted to make a note of that if he did. That was determined by the Supreme Court and on an appeal by this Court (reported in 1907 Appeal Cases 65). Then there is the very latest case of the Grand Trunk Pacific Railway Company v. The Attorney-General of Canada, the implementing case, which was decided by your Lordships so recently as last month, which was referred by the Council to the Court under this very power.

Section 55 of the Railway Act my learned friend referred to which puts a corresponding power, in another Act, into the Railway Commission to make references for opinion. Now my Lords not only is there this long line of authority in the way of practice and decision under this section which was first enacted in 1875 so far as the Dominion is concerned, but in, I think, all or most of the leading Provinces there is corresponding legislation with regard to references, by the local Governors, to the Provincial Courts. I would refer to the Revised Statutes of Nova Scotia 1900, Volume 3, Chapter 166. That is entitled: "Of the decision of Constitutional and other Provincial questions", and it provides that "the Governor in Council may refer to the Supreme Court of Nova Scotia for hearing or consideration any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same. The Court shall certify to the Governor in Council its opinion on the matter referred with the reasons therefor which are to be given in like manner as in the case of a Judgment in an ordinary action, and any Judge who differs from the opinion of the majority shall in like manner certify his opinion with his reasons therefor to the Governor in Council. If the matter relates to the constitutional validity of any Act which has heretofore been or hereafter is passed by the legislature of this Province or of any provision in any such Act the Attorney-General of Canada 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 and such persons shall be entitled to be heard. Where any interest affected is not represented by counsel the Court may in its discretion request counsel to argue the case in such interest and the reasonable expenses thereby occasioned shall be paid out of

"the general revenues of the Province. The opinion of the Court upon any such references although advisory only shall for all purposes of appeal to the Supreme Court of Canada or to Her Majesty in Council be treated as a final Judgment of the Court between parties". That is the provision of the Legislative Assembly of Nova Scotia. Then my Lords in Chapter 84 of the Revised Statutes of Ontario, 1897, Volume 1....,

Lord SHAW: They seem to have got into the habit of it in not only the Dominion Government but the Provincial.

Mr NEWCOMBE: Yes my Lord. It is "An Act for expediting the decision of Constitutional and other Provincial questions". It is the same with some variation. It begins with the provision "The Lieutenant Governor in Council may refer to the Court of Appeal or to the High Court for hearing or consideration any matter which he thinks fit to refer and the Court shall thereupon hear or consider the same.(2) The Court is to certify to the Lieutenant Governor in Council its opinion", and so on. There is provision for notice to the Attorney-General of Canada where it might affect his interests; provision to direct any person or class of persons to be represented on the argument. "Where any interest affected is not represented by counsel the Court may in its discretion request some counsel to argue the case in such interest and the reasonable expenses thereof shall be paid out of the Suitors Fee Fund or otherwise.(6) The opinion of the Court shall be deemed a Judgment of the Court and an appeal shall lie therefrom as in the case of a Judgment in an action". This Statute differs from the Dominion Statute and from the Statute of Nova Scotia in that it does not contain the statement that the opinion shall be advisory merely. The provision is that the opinion shall be deemed a Judgment of the Court.

Lord ATKINSON: It is the same here. Here although advisory it is to be taken as a Judgmeht for the purposes of appeal.

Mr NEWCOMBE: For the purposes of appeal, but this does not

7/ say that it shall be advisory only. 7/ "In case of the matter being appealed from the High Court to the Court of Appeal, sections 2,3,4, 5, & 6 shall apply in like manner as if the original reference had been to the Court of Appeal. An appeal to Her Majesty in her Privy Council from a Judgment of any Court on a reference under this Act shall not be subject to the restrictions contained in the Revised Statute of this Province respecting appeals to Her Majesty in her Privy Council". The Statute of Quebec has this title: "Questions referred to the Court of King's Bench by the Lieutenant Governor in Council". That is in Volume 1 of the Revised Statutes of Quebec, 1909, articles 579 to 583. These Revised Statutes of Quebec differ from other Revised Statutes in that their sections are known as "articles", and they run all through from the beginning consecutively, so that the number of the articles gets rather large. This article 582 contains the provision: "The opinion of the Court upon any question referred to it under this Chapter is advisory only and cannot be appealed from". It begins with the statement that 579 "the Lieutenant Governor in Council may refer to the Court of King's Bench, appeal side, for hearing and consideration any question which he deems expedient, and thereupon the Court shall hear and consider the same. 580 The Court shall send to the Lieutenant Governor in Council for his information its opinion duly certified upon the questions so referred ---".

The LORD CHANCELLOR: They are all the same in kind.

Mr NEWCOMBE: Yes my Lord. I will not take up time to refer to those particularly. These are examples of them - I have referred to Nova Scotia, Quebec and Ontario - Chapter 5 of 1909, section 16 of the New Brunswick Judicature Act 1906; Chapter 33 of the Revised Statutes of Manitoba 1902; the Supreme Court Act of British Columbia, 3 & 4 Edward VII, Chapter 15; Chapter 57 Revised Statutes Saskatchewan 1909, which is a re-enactment of Chapter 11

of 1901 of the Ordinances of the North-West Territories. The new Provinces of Saskatchewan and Alberta were recently carved out of the North-West Territories, and the North-West Territories had previously a legislature of their own constituted by Dominion Statutes, and under that they had legislated for these references, and the Province of Saskatchewan, having revised its legislation, has brought that section into its Revised Statutes. The original Statute, however, I presume, remains in force in Alberta, where they have not proceeded with their revision.

Now that is the condition of the legislation in the Provinces.

LORD ATKINSON:- Were these Statutes referred to in the argument before the Supreme Court, because there is no notice taken of them in the Judgment?

Mr NEWCOMBE:- Not in detail. I think it was mentioned that the Provinces did have similar legislation. It is well known there, and it is a matter of frequent occurrence, to have these references in the Provincial Courts. I will not detain your Lordships by referring to the various cases in the Provinces which have been referred; but as one example of the exercise of that jurisdiction provincially I might refer to the case of The Attorney General of Canada v. The Attorney General of Ontario in 1898 Appeal Cases at page 247. That is familiarly known as the ~~Pre~~ Queen's Counsel case. That was a reference made by the Lieutenant-Governor of Ontario, under the Statute which I have read, to the Court of Appeal to determine whether a Queen's Counsel appointed by the Governor General had precedence in Provincial Courts. It was really a question of precedence as between Dominion and local Queen's Counsel involving the question as to whether the Dominion had the right to make these appointments ~~and~~ or whether the Provinces had the right to make them, so far as Provincial Courts were concerned. That question was determined favourably to the Provinces by the Court of Appeal and the Judgment of the Court of Appeal was sustained by your Lordships' Board (in 1898 Appeal Cases). Although the Courts naturally always expressed reluctance to take up and consider and determine these references, involving the difficulties which are inseparable from the consideration of questions stated more or less in the abstract, and although all objections I think which ingenuity could suggest were raised from time to time against the propriety of these proceedings, it was never thought of until the Lord's Day case, to which I am going to refer in a moment, that there

was any doubt about the Constitutional authority of the Parliament to make such a provision. There were two Lord's Day cases, the first ~~xxx~~ case my learned friend has referred to, it was an example of another reference by the Lieutenant Governor of Ontario to the Court of Appeal under the local Statutes. It is in the Appeal Reports here under the name of Hamilton Street Railway and Attorney General of Ontario. Questions were put as to the validity of a Statute known as the Lord's Day Act and answered and came on appeal to this Court and your Lordships' Board answered one of the questions and made the remarks which my learned friend has ~~said~~ read as to the inexpediency of answering the others, and then it was that certain questions were referred by his Excellency in Council, which are reported in 35 Supreme Court of Canada Reports at page 581, and when that reference came down for hearing to the Court, Mr Blackstock, who appeared for the Canadian Copper Company, which was a Company apparently interested in maintaining the principle of breaking the Lord's Day, raised objection to the hearing of these questions, and his argument is reported on page 589. He makes this point: "It is obviously not only a most inconvenient practice that is here resorted to, but it constitutes a very grave and serious invasion of the rights and powers of all those authorities among whom are partitioned the various legislative functions distributed by the British North America Act".

The Court proceeded to determine those questions notwithstanding that, although they did answer, protesting that questions as to hypothetical legislation, legislation not actually in force did not come within the purview of Section 60, but they did not suggest that there was any absence of legislative authority in the Parliament to put it there, and even my learned friend who was there in another capacity did not at that time attempt to assert the views which he is advocating here. Now, my Lords, the questions relate to nothing but the interpretation of the British North America Act, and they are within the letter and intent of Section 60, I do not know that that is disputed, the Section according to the words of it authorises the putting of these questions.

The LORD CHANCELLOR:- I do not think the contrary was argued. If Section 60 can stand, then these questions are within it.

Mr NEWCOMBE:- Yes, and I say they relate merely to the question of the distribution of powers under the Imperial Statute as between the Dominion Parliament and the local Legislatures. Now what we submit upon that is that the Section is <u>intra vires</u> under Section 101 of the British North America Act, or the general words of Section 91, and I do not think for the purpose of my argument that it is really necessary to distinguish between those powers.

The LORD CHANCELLOR:- You have referred to all these different Provincial Statutes as well as the Dominion Statute authorising references of this kind. Has it been a familiar practice in Canada? The Statutes exist but have they been regularly made use of.

Mr NEWCOMBE:- Yes, not infrequently.

The LORD CHANCELLOR:- Both by the Provinces and by the Dominion?

Mr NEWCOMBE:- Yes, my Lord.

The LORD CHANCELLOR:- For a considerable time.

Mr NEWCOMBE:- For a considerable time, my Lord, and I am aware of several cases in British Columbia --- I referred to ~~Quebec~~ two in the Province of Ontario ---several times in Quebec, my learned friend who belongs to that Bar informs me, and I think these provisions authorise a practice which right or wrong has been found very convenient, and is, I may say, frequently resorted to by the Executive for their assistance in the administration of the Constitution and their Government. Now, my Lords, the only observation I have to make with regard to Section 101 is this. My learned friend has said that it is divided into two parts, (1) Provision for the constitution of a Court of Appeal, and (2) for the establishment of any additional Courts for the better administration of the laws of Canada. This, of course, cannot be contended very well I suppose to be appeal jurisdiction, there is no appeal about this, there is no resort from any other Court, Your Lordships have expressed perhaps a view unfavourable to the power being included under the "establishment of any additional Courts for the better administration of the laws of Canada." I should have thought with all deference that the "administration of the laws of Canada" is a very broad expression; it is not merely the Courts who are engaged in the administration of the law; the Executive Government is also engaged in the administration of the law.

Lord MACNAGHTEN:- How is it a Court at all for the purpose of answering these questions?

Mr NEWCOMBE:- I do not know precisely what is involved in the word "Court", but it is a broader Constitution than mere Courts of Justice.

In the case of the Royal Aquarium v. Parkinson, in 1892, 1 Queen's Bench, at page 446, Lord Justice Fry says in consideration of a question as to whether a statement made by a County Councillor in the County Council was privileged: "Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word 'court'" --- that is the word "tribunal" --- "because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a military Court of inquiry, 'though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted and recognised in the articles of war and many Acts of Parliament.' I do not desire to attempt any definition of a 'court.' It is obvious that, according to our law, a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not Courts of justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of Justice, but whether it is a Court in law. Wherever you find a Court in law, to that the law attaches certain privileges, among which is the immunity in question." So that in the broad definition of the word "court" I submit my Lords that it is not inconsistent with the qualities of a Court that it should entertain this advisory jurisdiction, and as to the "administration of the law" it is for the better administration of the law to aid in the administration of the law, to assist the Executive if you like in a remote degree as to the administration of the law which falls upon them. The provision is, your Lordships will

notice, that the Parliament of Canada may notwithstanding anything in this Act: so that this is an overriding provision. I am not disposed to differ from my learned friend that perhaps those words were put in to make room consistently with this section for the provision in section 92 item 14 ~~for~~ of the Provincial powers which provide for "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." However notwithstanding that provision and notwithstanding any other provision which there may be in the British North America Act, the Parliament may do this. It was perhaps I say necessary to put in that provision having regard to section 92, head 14. Therefore I say that this is done for the better administration, and as to the "laws of Canada" whatever those may include, whatever the extent of that description is, I submit it must include the British North America Act, which is the fundamental law of the country and these references are made as I have stated for no other purpose than to interpret that Act, but while I think, as his Lordship, Lord Macnaghten, said, that it is really a bye point, the Courts, take the Exchequer Court, for instance, which is a Court of original jurisdiction, the trial Court for Dominion causes, is engaged in the administration not only of the general Statutes and general Law of the country, but the special laws of each Province in nearly every case which it undertakes. Let me illustrate. We have a Statute which is construed to render the Crown liable for the negligence of its officers and servants in the discharge of their duties. Now when a Petition of Right arises against the Crown for negligence, it necessarily arises in some Province. Take the Province of Quebec: there the law is quite different with regard to negligence and measure of damages to what it is in Ontario. The law of common employment prevails in some of the Provinces: in others, it does not. When the learned Judge does

to try an action which has arisen in the Province of Quebec he gives a very different judgment depending on the law of the Province, from what he would under similar cirmumstances if the accident had taken place in Ontario, and he is there considering the law of the Province: but I submit it is also "the law of Canada": it is a law by which Canada is bound and which, in its administration, results in a declaration that damages are, or are not, payable by the Crown.

The LORD CHANCELLOR:- Do you maintain, Mr Newcombe, that under the section which is under your consideration the establishment of additional Courts does not mean the establishment of additional Courts of Law or Equity? Does it mean a Court in a different sense?

Mr NEWCOMBE:- Not confined to Courts of Law and Equity.

LORD MACNAGHTEN:- What is it an addition to?

Mr NEWCOMBE:- Additional to the Supreme Court, I should submit to your Lordships. The words are "A general Court of Appeal for Canada and for the establishment of any additional Courts." Suppose for instance they had had no thought of putting in a provision to provide for a Court of Appeal, I presume the enactment would have been that the Parliament of Canada may provide for the establishment of Courts for the better administration of the laws of Canada. It seems to me "additional" is only worked into the section having regard to the fact that a Court has already been named there.

The LORD CHANCELLOR:- Do not you notice that from Section 96 down to and including 101 of the British North America Act is under the heading of "Judicature"?

Mr NEWCOMBE:- I did notice that and I am subject to whatever disadvantage arises to my argument because of that heading, but notwithstanding that I do not think the Courts have carried those words, which are put in there by the draughtsman for the purpose of facility of reference, very far in the way of limiting the construction.

The LORD CHANCELLOR:- It does not go a very great length but it indicates what it is, does not it?

Mr NEWCOMBE:- It is an indication that they are Courts of Judicature.

The LORD CHANCELLOR:- You see the scheme of the Act is, among various other things, to separate executive power, legislative power and judicature.

Mr NEWCOMBE:- Yes, my Lord.

The LORD CHANCELLOR:- You are really, I think, in your argument as to Section 101, purporting to contend that under the use of the general word "Court" that would include something which is of an executive character.

Mr NEWCOMBE:- No, my Lord, advice, judicial in its nature, to the Executive. It is connected, remotely perhaps, but it is connected with the administration of the law.

The LORD CHANCELLOR:- Be it so. You referred to the word "administration" in Section 101 and said that that was not merely judicial but that there were other kinds of administration. Do not you think that it is rather straining the last words to suggest that "administration" in the sense of any other than judicial administration is admissible within Section 101? It does not conclude your argument at all; it is only one point of it. Of course you know best.

Mr NEWCOMBE:- I do not want to press that too far against your Lordship's view.

The LORD CHANCELLOR:- I was only suggesting my own misgiving.

Lord ATKINSON:- This group of Sections, beginning with Section 95, is the only group of Sections specially dealing with the appointment of Judges by the Dominion at all.

Mr NEWCOMBE:- Yes, my Lord.

Lord ATKINSON:- Because I see that in head 27 of Section 91 they have only to deal with the Criminal Law, except the constitution of Courts of Criminal jurisdiction. Then when you come to Section 92 it gives them power as to the administration of justice in the Province, including the Constitution, maintenance and organisation of Provincial Courts both of Civil and of Criminal Jurisdiction. No doubt in that provision they refer to Courts, ordinarily so called, where matters are judicially determined one way or the other. Then come Section 96 and the following Sections which are the only Sections dealing with the power of the Dominion to erect Courts at all.

Mr NEWCOMBE:- I might say under head 14 they put the Constitution of the Provincial Court unreservedly, I think, into the hands of the local Legislatures.

Lord ATKINSON:- Those Courts are evidently Courts for the decision of cases.

Mr NEWCOMBE:- Quite so, my Lord, but does your Lordship suggest that under that power the local Legislatures could not confer the power which they have conferred in the Statutes corresponding to this Dominion Statute to which I have referred, "the constitution, maintenance and organisation of Provincial Courts." The same words are used in Section 101 "For the constitution maintenance and organisation of a general Court of Appeal for Canada and for the establishment of any additional Courts."

Lord ROBSON:- That means a Court of Law, does not it?

Lord ATKINSON:- Surely that means a Court of Law?

Mr NEWCOMBE:- It goes on to say: "for the better administration of the laws of Canada." That is what it says and, in construing that clause, you must not be too rigid with it. A Court,as Lord Justice Fry says, is a Court which exercises various functions.

Lord ROBSON:- What sort of functions? Apparently this is a function to advise the Attorney General.

Mr NEWCOMBE:- This is a function to advise judicially.

Lord MACNAGHTEN:- To write a treatise on any subject that the Executive requires to be instructed in.

Mr NEWCOMBE:- I think that is perhaps putting it rather in the extreme.

Lord ATKINSON:- You must contend that they had a right to institute a Court that did nothing but advise them.

Mr NEWCOMBE:- It is admitted that they could do that, except that they say, I think, that they could not call it a Court.

Lord ATKINSON:- It must be an "additional Court". According to your argument it must be that they could establish a Court that did nothing but advise them?

Mr NEWCOMBE:- They could establish a tribunal.

Lord ATKINSON:- Establish "additional Courts for the better administration" of the law. If that be so they could establish a Court solely for the purpose of advising them.

Lord ROBSON:- Is advising as to the law the same thing as "administering the law."?

Mr NEWCOMBE:- No, my Lord, but it assists in the "administration" of the law. That is my point.

Lord ROBSON:- It is not the same thing?

Mr NEWCOMBE:- It is a part of the administration of the

law, it is a part of the process, it may competently be made a part of the process of the administration of the law, I submit.

Lord ROBSON:- Is it? Is Counsel's advice part of the "administration" of the law?

Mr NEWCOMBE:- Are not the Law Officers engaged in the "administration" of the law, their duty mainly being to advise the Departments of the Government who are executively concerned in carrying out what the law is. They are all part of the administration.

Lord ATKINSON:- The Court which pronounces the opinion, and the Sheriff who executes the Court's decree are both engaged in the "administration" of the law; but they have very different functions.

Mr NEWCOMBE:- They are different functions. At any rate, that is my submission upon Section 101 taken by itself. But, however the case may stand as to Section 101, we have the broad power in Section 91 in the opening paragraph "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."

Lord ATKINSON:- Must not any legislation that you pass under that be consistent with the different Sections of the Act?

Mr NEWCOMBE:- No doubt the whole Act must be taken together.

Lord ATKINSON:- If they did not do that they could practically repeal all the Sections.

Mr NEWCOMBE:- Certainly, my Lord, but except in so far as a legislative power is especially conferred upon the Provinces, the whole field of legislation is open to the Dominion under those general words of Section 91. Now, my Lords, when they constituted the Court in 1875, they gave it appeal jurisdiction. They gave it original jurisdiction because at that time it was the Supreme and Exchequer Court of Canada and the two Courts were combined. The Judges went on Circuit, and tried the

Exchequer Court cases. It was afterwards separated I think in 1887 and they gave it advisory jurisdiction, the jurisdiction which we are now considering. If these were incompatible, all being enacted at the same time, why should the Court stand for one of these jurisdictions more than another? Suppose my learned friends were interested to say that this Court had no appellatejurisdiction and approached it from that point of view, here they would say is a tribunal created with the power to advise; it has the power to advise, which they admit the Parliament can confer upon it, by one of the Provisions. Then by other Provisions it has the power to hear appeals, and determine original cases. It is inconsistent, they say, it is incompatible that one tribunal should have all those functions; therefore this Court cannot have an appellate jurisdiction. It cannot have original jurisdiction; it has the advisory jurisdiction, Parliament having the undoubted power to confer that, and that inasmuch as that cannot be grouped with the appellate, the appellate must fall. I submit, my Lords, that my learned friend's argument would apply equally to deny any appellate jurisdiction to the Supreme Court as it does to deny the advisory jurisdiction.

Sir ROBERT FINLAY:- No, certainly not.

Mr NEWCOMBE:- Well, I am submitting that. My learned friend may be quite right, but I confess I do not see why his argument would not have been quite as forcibly directed to the denial of appellate jurisdiction. The constitution of the tribunal is nothing but a bundle of powers. Here they are grouped together in one Statute. Now he says you cannot put all these together; therefore he rejects the one I want to sustain.

Lord ROBSON:- I should have thought that the use of the word "Court" would make some difference. You say either

branch, ~~advoßry~~ advisory, or legal, is open to attack, but there is the use of the word "Court".

Mr NEWCOMBE:- The word "Court", I think, is the same as "tribunal". It is easy to see what the Legislature is doing.

The LORD CHANCELLOR:- When you have a Court, under the head of "Judicature" provisions, if you choose one instance of that, what is generally meant by "Court of Justice" or "Court of Law", or "Court of Equity", that carries with it, does not it, ~~that~~ a bundle of traditions and customs attached to it. Remember, we are speaking about the Constitution. One knows what is implied by an appellate Court of Justice, a Court to hear appeals from another Court. It is a very different thing, when you come to consider it in the larger meaning of the word "Court", and may not it well be that a part of the duties ascribed to it in the Act of 1875 are perfectly valid and that other parts might be ultra vires.

Mr. Newcombe:

Of course one must consider this particular section about the advisory jurisdiction as one that has been specially emphasised, because after the original enactment that section was repealed and re-enacted in a somewhat different form showing the particular intention of Parliament that this particular power should be vested in the tribunal. Now when my learned friend admits that Parliament has the power to constitute a body of men, a commission as he terms it, who have the duty of advising, and Parliament has shown unmistakeably its intent that this power shall be exercised as shown by a later Act, by the Supreme Court, why should not this particular power prevail, happen what may to the other jurisdiction of the Court ? My Lords, as to the suggestion that the provinces have a right to the court of appeal as a court of law, is not that rather approaching the question from the point of view that this British North America Act had provided the constitution of the Court ? If the British North America Act had said there shall be and there is hereby constituted a supreme court with certain jurisdiction, then it would be a fixture and the provinces would no doubt have a vested right in it, but it is not necessarily contemplated and the Act did not require that there should be a court. The Act said the Parliament of Canada may constitute a court if it see fit. It may, ~~in addition~~, constitute a court, ~~for some time~~ and it may disestablish ~~the~~ a court, and as to the character of the court, so long as it is a court, it is just as much a court as the Parliament of Canada sees fit to constitute and the provinces have nothing to do with it. Your Lordships determined so late as 1908 Appeal Cases that the legislation of the provinces could not extend to affect

Mull Fols. Mr. Lehmann

the right of appeal in the case of the Crown Grain Company V. Day, which your Lordship will find reported in 1908 Appeal Cases, page 504. There there was an attempt on the part of the Legislature of Manitoba to authorise a proceeding and judgment to be given which ~~could~~ should not be appealable to the Supreme Court and they expressed that in terms, but your Lordships held that the constitution of the Court, its powers of jurisdiction, were entirely a matter for the Dominion and could not be affected by provincial legislation. There the court is a court entirely in the judgment of the Parliament; it may be a good court or it may be a poor court; it is just such a court as the Parliament provides for; it is subject to their exclusive jurisdiction.

LORD ROBSON : But you will admit, I suppose, that section 101 is a qualification by the Dominion Legislature upon the exclusive administration of justice that it gave to the province under subsection 14 of section 92, because the formation of a court of appeal to some extent limits their provincial autonomy.

MR NEWCOMBE : Yes.

LORD ROBSON : Therefore the Legislature has said, "We will qualify that to some extent by making the Dominion establish a court of appeal." Do you say under those words the Dominion might still further qualify the rights of the province by establishing not merely a court of appeal in the ordinary sense, but by establishing a court of inquiry into the propriety of provincial legislation, because that is what you are contending for ? The question you put as to the interpretation of provincial legislation amounts to this ; that the Court established under section 101

may approve or condemn - it cannot of course repeal - such legislation after inquiry into it. Is not that a very extensive addition to the qualifications the Dominion may put upon provincial power ? It is one thing, you know, to say the Dominion may establish a court of law, and another thing to say it may establish a general court of inquiry or investigation into the misdoings of the provinces.

MR NEWCOMBE : It has established a court of appeal and a divisional court for the better administration of the laws of Canada, and consistently with that it has power to pass laws for the peace, order and good government of Canada generally. Now your Lordship's suggestion is that it is incompatible with the constitution of that court as such to have this jurisdiction cast upon it. I would like to refer your Lordship to the case of Ex parte County Council of Kent, reported in 1891, 1 Queen's Bench Division, reading particularly the observations of the Lord Chancellor, Lord Halsbury, corroborated again at page 728. Now, my Lords, that arose on a clause of the Local Government Act 1888 which provided that"if any question arises, or is about to arise, as to whether any business, power, duty, or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of Court may be directed by the Court; and the Court; after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question." - a very similar authority I submit to that contained in section 60 of the Supreme

Court Act, and perhaps the statement "without prejudice to any other mode of trying it" is not/equivalent to the statement that the decision should be advisory only. Then Lord Halsbury said :"And now, dealing with the subject matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative. In the first place, it is not necessarily a question that has arisen, but one which may be about to arise. It is to be a question of the transference of the 'business, power, duty, or liability'"- just as in this case the question is as to the distribution of legislative power - "It is to be a question of the transference of the 'business, power, duty, or liability' from one set of authorities to another, and it appears to have been thought convenient, without any existing legislation justifying the intervention of a Court of Justice, that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such ' business, power, duty, or liability.' We have used the words 'might be consulted', because, although the actual language is 'submitted for decision', it is a question which might be ' about to arise'; and can, therefore, only be decided in the sense of expressing the opinion of the Court how it ought to be decided when it does arise. It is to be 'Without prejudice to any other mode of trying it', and it can only be submitted 'on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned.' So far as we can see, there is no obligation on the High Court to hear anybody who might be interested

as a matter of fact in the decision of the question. And when one sees that the only parties to such a consultation are the authorities which may be charged with the administration of the 'business, power, duty, or liability', it is to our minds clear that the legislature did not contemplate an actual dertermination of an existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a Court of law, but was solely dealing with the question of which set of authorities should be charged with such and such portions of administration. The legislature sufficiently guarded private rights by saying that such an application to the High Court should be without prejudice to any other mode of trying it. They gave discretion to the Court to hear such parties as the Court itself should think just, and confining the decision, as we think they did, to the High Court of Justice, they appear to us to have carefully avoided the use of any language, or any forms of procedure which involve a right of appeal."

THE LORD CHANCELLOR : Substantially, although I believe not in form, this is in the nature of a special case to be decided by the High Court as regards questions which are about to arise as well as questions which have arisen.

MR NEWCOMBE : Yes.

THE LORD CHANCELLOR : It has some resemblance I think to the Statute we are now considering.

MR NEWCOMBE : Yes.

LORD SHAW : Whether a particular "business, power, duty or liability" is, or is not, transferred.

MR NEWCOMBE: The only question is here the British North America Act came in, constituted a federal government,

and distributed the powers. Now as I have said before the only question that is submitted here is as to the distribution of those powers. It arises in a number of ways, and a number of considerations would come up if we are dealing

with the question on the merits, but that is the principle

of the reference, that is the object of the reference,

to obtain a construction of the Act or things in respect

of these particulars.

THE LORD CHANCELLOR: The chief value of this case for your argument seems to me to be this; that it was not treated at all events by Parliament in England, as an unconstitutional thing to take the ~~judgments~~ Judges of the High Court, and to authorise specified people to apply to them in regard to questions which are about to arise.

MR NEWCOMBE: Yes, my Lord, and without giving a decision it would be advisory only, and it would not prejudice the suitor when it came up in actual litigation.

THE LORD CHANCELLOR: My impression is that it would be conclusive upon the people concerned. You see it is about the distribution of powers.

MR NEWCOMBE: Yes, but if these powers were executed to the prejudice of an individual, he would not be bound by that advice if he brought his action.

THE LORD CHANCELLOR: I agree.

MR NEWCOMBE: Therefore he is protected here, and it seems to me the two provisions are very much alike, and shew that there is not that incompatibility between these powers which your Lordship suggests. That consideration is also dealt with very well I think, in the judgment of Mr Justice Duff, which my learned friend has referred to. Now my learned friend Mr Nisbett referred to the Constitution of the United States, Article 3.

THE LORD CHANCELLOR: May I draw your attention first to this difference, because I think it is rather an important one. Of course it is a question of distribution of power, duties or liabilities, and whether or not they are referred to a County Council or Joint Committee. The consequence is, as the Court has power by rules to direct the manner of trial, they would be able to be certain that all persons interested would be before them.

MR NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: So if it has to decide on a question about to arise, or arising between A, B and C, specified persons, the Court is able to notify those persons, and see that all interests are before them. I do not say it deprives the case of the significance which you attach to it, but it limits it in that way.

MR NEWCOMBE: So far as that feature of it is concerned I do not know whether it affects your Lordship's view, but the judges of the Supreme Court have power to make general rules and orders for regulating the procedure of the Supreme Court, and so on.

THE LORD CHANCELLOR: What is the reference to that?

MR NEWCOMBE: That is chapter 139 of the Revised Statutes, 1906. Under the Supreme Court Act they have the power to make rules, and in pursuance of that power they have made rules for dealing with these references--general rules which provide for the directions being given as to notice, and service, and so on. In this very case already, there are certain outside interests which have intervened with the permission of the Court to support the propriety of the questions, and perhaps there are others the other way--I do not know. There is the Manufacturer's Association which is on the Record, and I think there is an Order somewhere--

MR NISBET: They were allowed to be ~~here~~ heard.

LORD ROBSON: These provisions only shew that the Dominion Parliament behaved reasonably--that is all.

MR NEWCOMBE: It only shews, my Lord, that there are provisions intended, as far as foresight can determine, to provide that every person shall have reasonable opportunity of being notified, and represented.

Then, my Lords, as to my learned friend's obser-

vations with regard to the Supreme Court of the United States, and provision being made in the Constitution that there shall be one Supreme Court, what happened there was that the President proposed to consult the Court, very much as in those days the King would have consulted his judges, and it was said by Chief Justice Marshall that that was inconsistent with the Constitution.

THE LORD CHANCELLOR: I have been looking at this case of Marbury v Maddison to see if I can learn something from it, but I do not see the passage in question in Chief Justice Marshall's decision in which he speaks about the question.

SIR ROBERT FINLAY: I do not think it does occur there, my Lord; it must be in one of the other references. That is the only volume referred to in the Note to Story which we have, and I think the Chief Justice's opinion must be under some other reference.

MR NEWCOMBE: Apparently it is in the Life of Washington.

SIR ROBERT FINLAY: Yes, probably, we could not get the book.

THE LORD CHANCELLOR: As I gather, the principle was certainly acted upon in the United States.

MR NEWCOMBE: I think it is very likely, for this reason, that there is this distinction, and it is a broad distinction, between our Constitution and theirs; The Federal Legislature of the United States has only those limited and express powers which are conferred upon it by the constitution, as a grant by the States which are regarded as sovereign powers, and ~~is~~ who subject to that grant ~~which they say~~ use them, so must be strictly construed and ~~attained~~ contained by legislative powers. Now it is the other way in the Dominion; all legislative powers are vested in Parliament, except those specially enumerated, which are with the Provinces, and where there is any conflict, the Dominion legislation prevails.

3.

THE LORD CHANCELLOR: I agree that, but what do you say about this-- the ratio deci dendi did not relate to any question of whether the powers which were delegated, were from the centre, or came from the circumference--they turn upon the essential need of the judicial tribunal.

MR NEWCOMBE: I agree--I think so my Lord--they were to constitute one Supreme Court, that is all that they could do. Their grant is to be strictly construed. It was not necessary to ~~give~~ that all, and perhaps not usual; we might say that there should be an advisory jurisdiction to the Executive vested in the tribunal--that is all that is involved in Chief Justice Marshall's statement, I submit. But it would be quite otherwise if he had found in the Constitution a provision that the Courts could make all laws for the peace, order and good government of the country, excepting in respect of those special matters which were committed to the States.

Now my learned friend referred to, but did not quote from Dr Lushington's judgment In Re Schlumberger, 9 Moore, Privy Council, page 12. That was the case under the Statute of 3 and 4, William iv, section 3. I only want to read a passage from it to shew that Dr Lushington considered that the construction of section 3 which says: "Shall be lawfulfor 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". And he said: "Now these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion that it

did not come before the public, that they were not entitled to put any limitation upon these words in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships on the present occasion, namely that they are bound to advise Her Majesty as to Her revoking the Order in Council, and anulling any warrant which Her Majesty may have caused to be made for the making of any such letters patent as prayed in the Petition. Their Lordships are of opinion that there is enough in this reference, not merely to justify, but absolutely to require them to proceed, because this is referred to them by an Order in Council which refers it to them, falls within the purview of the provisions of the Statute, 3 and 4 William iv , chapter 41, section 4, which enacts, and proscribes what shall be their duty, and in compliance with that duty they must entertain the prayer of this Petition, and hear it". I refer to that in order to shew that it was not, although his Lordship suggested it may have been, unnecessaryto enact that Statute, and perhaps His Majesty would have had the power to call upon His Privy Councillors for advice independently. Yet the Statute was passed, and it was not in respect of the Constitutional, or common law right of His Majesty that Dr Lushington was speaking, but on the construction of the Statute, which is inx terms very much in correspondence with this one.

Now, my Lords, with regard to the generality and scope of the powers of Parliament under the general words of section 91, in the case of Hodge v The Queen, 9 Appeal cases, pages 131 and 132, your Lordships speaking of the constitution of the local assemblies said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assemby should have

exclusive authority to make laws for the province, and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. With these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion"--- "authority as plainly and ample as the Imperial Parliament possessed and could bestow". Then in 5 Appeal Cases, page 118, in the case of Valin v Langlois, Lord Selborne, referring to the distribution of powers, said: "In the present case their Lordships find that the subject matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament, is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made; upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions, has been competently or incompetently exercised, The only ground on which it is alleged to have been incompetently exercisedis that by the 91st and 92nd clauses of the Act of 1867, which distribute Legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the provinces". Then

in the case of the Bank of Toronto v Lambe, 12 Appeal Cases, pages 187 and 188, Lord Hobhouse says: "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution". And in Brophy v The Attorney General of Manitoba, 1895 Appeal Cases, at page 222, Lord Herschell said: "It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act.

In all other cases legislative authority rests with the Dominion Parliament".

7.

Fldr
1.
flws
wgk

THE LORD CHANCELLOR: There is no doubt I suppose that if you can only draw the line of demarcation, which is not always easy, there is a distribution of all the power between Provincial and Dominion?

MR NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: But at the same time when you look at those powers have you not to remember that there is also a duty ~~always a judicature~~ set up by the British North America Act, and I suggest to you whether it might not be that the judicature also has its limits by reason of its being a judicature in a constitution similar to that of the United Kingdom.

MR NEWCOMBE: Not a limit; I submit it includes the incapacity to exercise a power conferred by the Parliament such as this. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the Provinces--all subjects of legislation; and in the case of Reil v The Queen, reported in 10 Appeal Cases, Page 675, the Lord Chancellor (Lord Halsbury) referring to these words "peace, order and good government", said: "The words of the Statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to". Now broader language than that I submit could not be used, and if, as I argue, it is incompatible, it certainly is not unusual. We have had ancient practice and we have had modern practice in this country for the summoning of the Judges, and the requirement that they shall answer these questions. We have a constitution based on that of the Mother Country in pursuance of that, and, following that example, Parliament has legislated to authorise the executive to make these references; and therefore I submit whether the Court is acting as a Court or is acting as the nominee of Parliament for the purpose of doing this, they are doing it within their constitutional powers. The Court and its members of course, like other

subjects,are bound by the Statutes; they are not immune from legislative authority; and it does seem to me that the Parliament of Canada, constituted under the British North America Act, with all the powers which it possesses, and has been supposed to possess, is really a pretty small affair if it cannot impose upon the Court the duty to answer questions respecting the distribution of power under the British North America Act. If that is compatible with the constitution of the Court, ~~xxxxxxx~~ apparently there is no objection, and apparently that is the end of the case; if it is incompatible, it is the intention of Parliament that they should do it--the rest goes but that remains.

THE LORD CHANCELLOR: You mean supposing the Court be, by Canadian Statute, authorised to be a Court of Appeal in the ordinary sense, and also authorised to discharge this function of answering questions, do,you say that the second must prevail come what may; and if it is incompatible with the judicial function, then the judicial function is ultra vires?

MR NEWCOMBE: Yes, if Parliament has manifested that intention and it does nothing else, I submit when it deliberately enacts this, it is so.

LORD ATKINSON: Could they enact that they shall not hear appeals, but shall execute their own decrees--that would be all in the administration of justice. Surely you cannot say that the Legislature, under this power of "peace, order and good government" can practically tear up the sections of the British North America Act.

LORD SHAW: That would be a distinct repeal of Section 101 which was passed for the provision of, and the organisation of a general Court of Appeal.

THE LORD CHANCELLOR: I can see your point, Mr Newcombe, but might ~~xxxxx~~/I suggest the difficulty which is in my mind? In England, admitting and supposing that a Court of Justice,

according to the principles of the Constitution which you have adopted in Canada, namely, the Act of 1867, does import certain things--I mean it does import that it shall act, and not be prohibited from acting judicially and so forth--supposing that to be so, do you say, according to the judicial position as prevailing in England, and as is constitutional in England, there is included the practice of, under some circumstances, answering ~~certain~~ questions which are asked, not in the litigation, and that being so the Canadian Parliament can properly legislate with regard to the form and mode of asking questions which it is constitutional, both in England and Canada, to ask. That I understand to be your argument.

MR NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: And there is a great deal of force, no doubt, in it; but then comes this: in the Canadian Act it says the Judges must answer--it is put upon them as an imperative duty. That may be lawful or not, but is not that going further than the English precedent.

MR NEWCOMBE: It may be so, but that question does not arise. That question has not been debated. They can put the questions, and the Court has jurisdiction to entertain argument as to whether they should answer those questions or not. That is the position in which it comes before your Lordships, and we would be entitled to have the views of the Supreme Court of Canada upon the question as to whether they are bound to answer this question before it is considered by your Lordships on appeal.

THE LORD CHANCELLOR: That is why I want to probe the real position you are arguing for. Is your position this: we can ask any question and treat it as a breach of Statute whatever the consequences may be, and say: "You disobey the law, you Judges, if you do not answer? Or is your answer that we can put the questions; but if there is any

reason why, as Judges, you think it is incompatible with the administration of justice that you should answer them, then we acknowledge that you are not ~~obliged~~ compelled to answer them.

MR NEWCOMBE: That is a point of it; Judges are entitled to ask to be heard.

LORD ROBSON: The second point is not one you have considered, or rather is not one you maintain here. Are you contending that the Judges must answer whether they like it or not, or that they have some discretion as to the character of the questions put to them, and may refuse to answer?

MR NEWCOMBE: We do not deny the right to exercise a discretion, but we say we are entitled to be heard to show it is expedient to answer the questions.

THE LORD CHANCELLOR: I thought that was your position: "We say we have a right to ask the questions; and we have a right to be heard before you as to whether you are bound to answer them. We acknowledge you are the authority to say whether you are entitled to answer them or not".

MR NEWCOMBE: Yes, my Lord, and we are met at the outset by the statement that there is no power to put the question.

LORD ATKINSON: Do you consider the Act means "and shall if they think it right answer the questions"--because your argument must come to that. Is it to be read "shall if they think fit", or "if they think right".

MR NEWCOMBE: The Judges have always exercised the power to discriminate and point out reasons, if there be reasons, why a question cannot be conveniently answered.

LORD ATKINSON: Certainly, if that was the object of the Act it was most inaptly exprssed, because it says "Shall answer".

THE LORD CHANCELLOR: Would you mind, Mr Newcombe, considering a point which is to me very crucial and important, namely, what is the exact position you want to take up in argument with regard to that--whether it is that there is an obligation to ask, and a duty to answer in all circumstances?,

or whether it be that there is a right to ask, but a right also on the part of the Court to say "We think this interferes with the administration of justice".

MR NEWCOMBE: I will consider that, My Lord.

(Adjourned to tomorrow, 11 o'clock).

In the Privy Council.

35, 1912

Between

The Attorney General for the Province of Ontario + ors

— and —

The Attorney General for Canada.

— and —

The Attorney General for the Province of British Columbia

December 13th 1911.