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Good Day

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IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL.

Council Chamber, Whitehall.
Thursday, 14th December, 1911.

Present:-

The Rt Hon. The LORD CHANCELLOR,
The Rt Hon. LORD MACNAGHTEN,
The Rt Hon. LORD ATKINSON,
The Rt Hon, LORD SHAW of DUNFERMLINE,
The Rt Hon LORD ROBSON.

Between

The Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta . . . . . .Appellants

and

The Attorney-General for Canada . . . Respondent

and

The Attorney-General for the Province of British Columbia . . . . . Respondent.

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(Transcript of the Shorthand Notes of Messrs Marten, Meredith & Co, 8, New Coutt, Carey Street, London. W.C.)

THIRD DAY.

Third Day : 14. Dec. 1911

MR NEWCOMBE: My Lords, with regard to the inquiry which your Lordship, the Lord Chancellor, made as the Court was adjourning yesterday as to Section 60, the direction of the Parliament is that questions of the character defined here may be referred by the Governor in Council to the Supreme Court for hearing and consideration, and that it shall be the duty of the Court to hear and consider the reference, and to answer each question so referred. Then later on it says: "The opinion of the Court shall be ~~an~~ advisory ~~opinion~~ only"-- that is that the Court are to advise upon these questions; but it never occurred to me, and it has never been suggested in any of these arguments or in this case-- though the stage has not been reached--to argue that the Court, regardless of all considerations which might appeal to them to the contrary, were bound to answer categorically and in substance every one of those questions.

LORD MACNAGHTEN: But the Act says so.

MR NEWCOMBE: In effect it says the Court shall advise upon them.

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LORD MACNAGHTEN: "Shall answer each question".

MR NEWCOMBE: It is a matter of construction--if your Lordship puts that construction upon it---

LORD MACNAGHTEN: I am not putting any construction upon it-- those are the words.

MR NEWCOMBE: Yes, those are the words.

LORD MACNAGHTEN: How do you propose to qualify them.

MR NEWCOMBE: Simply having regard to the enactment that they shall advise--that it shall be an advisory opinion. They deal with each question and advise upon it, and is it not competent for them to advise that it is not expedient for them to answer this and that question in substance because it is coming up in a case to be argued tomorrow in which it will be decided inter partes. It seems to me with submission, my Lord, that that would be a perfectly proper answer for a Court to return to any question. That is my submission

upon it, and that is I think apparent, although the question was not discussed, because as I say we have not reached that stage of this reference yet. Yet it is asserted, as far as the views of the Judges are stated, and the Judges whose opinions have been read, ~~that they~~ entertain the same view, because they either held that in reserve or they said that in certain circumstances it would be open to them to report that it was not desirable to return answers in substance at the present time. My Lords, all that has been decided so far is--and I submit it is the only point before your Lordships--the point as to the power to make the reference and as to the jurisdiction of the Court to entertain it. No one doubts, I suppose, that the Imperial Parliament may pass such a Statute as this with regard to the Court of Appeal or any Court in this country; and if such a Statute were passed here, the court would have the power--whether it would enlarge the power of the Court I do not know - because it seems the Judges have from ancient times been summoned to advise--but suppose it confers an additional power the Court would still remain, and the Court of Appeal would be none the less a Court of Appeal in England because this power was conferred upon them by the Parliament. The effect of Imperial Legislation would be precisely the same, I submit, as to the Court of Appeal as the Canadian legislation is with regard to the Supreme Court. In either case the Court still remains. It may be said that it is not a good Court, that the Judges are liable to be biassed by reason of having previously formed opinions; that it may be more difficulty for a suitor in an imaginable case to get the Judgment reversed than it would otherwise be; but the Court remains and its power remains, and therefore there is still a Court of Appeal. The Court of Appeal for Canada is not abolished or affected by this power which the Parliament of Canada casts uppn it for the peace, order and good government of the country in respect of matters unquestion-

ably not committed to the local legislatures, and the Parliament has, within the ambit of its powers, authority as plenary as the Imperial Parliament, and it confers these powers with the express declaration that they are not to affect the administration of justice in the Province because it says the opinion is to be advisory only. It does not bind. It has been interpreted and reported on all through by the Judges, ~~and it has been held~~ that it does not bind any of the parties, and not even the Court. Therefore it seems to me that my learned friend's argument really comes to nothing beyond this, that the legislation is unwise and inexpedient.

THE LORD CHANCELLOR: With that we have nothing to do.

MR NEWCOMBE: No, my Lord, because it has been said in the Fisheries Case by Lord Herschell, reported in Appeal Cases 1898, "that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected". And in another case--the case of the Union Colliery, ~~Bryden,~~ Lord Watson said that the exercise of the power need not be discreet. The Court has nothing to do with that.

THE LORD CHANCELLOR: I do not think you need labour that.

MR NEWCOMBE: The constitution of the Court is for the Parliament in the broadest terms, and if the Parliament enacted, for instance, that the Judges should hold office during pleasure, of course it would not be a very satisfactory court, but I take it it would be within the power of the Parliament to do so, and to constitute the Supreme Court in that way.

THE LORD CHANCELLOR: But that would be contrary to the Act, would it not?

MR NEWCOMBE: That might raise a question.

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THE LORD CHANCELLOR: It would be the reason of it. If it was not ultra vires it would be because it was upsetting the constitution in one of the Articles.

MR NEWCOMBE: Yes, in one of the Articles. This is certainly a side question. The Judges of the ~~Supreme~~ Superior Courts shall hold office during good behaviour is supposed to refer to the supreme provincial courts in 1896 and not to qualify the powers the Parliament has under Section 101 to constitute a Supreme Court. It merely illustrates this — that although your Lordships may think it makes a very poor Supreme Court, and that it is a bad constitution, and very unsatisfactory, still it is a Court and such a Court as Parliament has in its judgment seen fit to set up. If, for instance, it were required here that the Judges of the Supreme Court should be Members of the King's Privy Council for Canada, that would put them, I suppose, in the same position as to the Governor General that your Lordships are in with regard to the King, and advice might be sought independently of the Statute.

LORD SHAW: I cannot help feeling that all these illustrations, each and all of them, may be accompanied with most delicate constitutional principles. I have the feeling that, by way of illustration, points may be raised of great delicacy, and unless one is forced to consider them one would rather not.

THE LORD CHANCELLOR: It seems to me that the point against you comes ultimately to this — whether under this ~~[illegible]~~ law, the British North America Act, in speaking of Judicature and Courts and Judges, ~~it~~ takes with it a constitutional rule that the Judges shall not be consulted otherwise than openly. It seems to me that that is what it ultimately comes to.

MR NEWCOMBE: I think that is so, my Lord, but how can that

2 be involved, having regard to the history of the Courts and the action of the Legislature in this country? May I refer, before I close, to two other Statutes?

LORD SHAW: Before doing that, upon the point you were on, do I gather you agree that any answers given would be really of no account judicially?

MR NEWCOMBE: Yes, my Lord.

LORD SHAW: What I am interested to know from you, on behalf of the Attorney General for the Dominion, is if that were so why were all these provinces through their Attorneys General convened to this discussion if it was a matter that was to have no judicial effect in their provinces at all? You see on page 7 each of them by the Deputy Minister of Justice was convened, and my difficulty is, if it was to be as it were blank cartridge with regard to all these provinces, why set everybody in warlike array.

MR NEWCOMBE: Of course the rules require the Attorneys General to be notified.

LORD SHAW: Do they? That may be the answer.

MR NEWCOMBE: It certainly has always been the practice, but, notwithstanding that, it only goes to this, I submit, that the bringing in of the parties and the arguing and discussing of the question only leads to the better opportunity to form an opinion but not to the quality or the binding effect of the opinion.

LORD ATKINSON: It has no judicial effect but has it not a prejudicial effect?

MR NEWCOMBE: That may be.

LORD ATKINSON: As provinces, have not they a right to complain of the Court which is their Supreme Court being put to a task which may affect their interest, altogether foreign to the ordinary work of a Judge?

3 MR NEWCOMBE: They may complain, I submit, as Lord Herschell said, to those whom the Legislature has elected, but they have no right to complain to the Court because the Court is there. The same considerations might arise in this way -- the Supreme Court is made a Court also for the better administration of the lawsof Canada independently of matters of appeal altogether; questions come up, original or otherwise, independently of appeal, and the Judges come to opinions. Could the provinces have any constitutional objection to that? Then on the same lines I was going to refer to Chapter 104 of the Revised Statutes of 1906, which is the Public and Departmental Enquiries Act. This Statute authorises the Governor in Council, whenever he deems it expedient, to cause enquiry to be made into any matter connected with or concerning the good government of Canada or the public conduct of public business, to issue a Commission of enquiry, and the Commissioners have power to summon witnesses, take evidence and report, with their recommendations. That power is not infrequently used by appointing the Judges of the Supreme Court and Judges of the Exchequer Court as Commissioners.

THE LORD CHANCELLOR: Here I see they take power to examine witnesses on oath by Statute: you have to get power in England to examine witnesses on oath on any Royal Commission, and they appoint Judges on them.

MR NEWCOMBE: Yes. Quite recently the Judge of the Exchequer Court held a very prolonged enquiry into one of the Public Departments and reported with regard to official misconduct and various matters. Actions might well arise out of that, and they would come to the Courts for trial, and it might have been a very undesirable thing to apppint any Judge as a Commissioner; but I humbly submit he could not be

4 challenged as disqualified to hear the case. Suppose the learned Chief Justice maintained the view which he does, that independently of Statute the Governor has the right to summon his Judges to give opinions, and any one were summoned and gave his opinion, and a suitor came before him the next day with an appeal which involved the very point, is it possible he could object to the Chief Justice sitting on the argument because he had tendered this advice; and if he could not object, and if he is not disqualified, then the fact that he does it under the direction of Parliament does not any the more disqualify him.

The other Statute is the Judges Act, 1906, chapter 138, section 28 of the Revised Statutes of Canada. It provides for the removal of County Court Judges, and it says in Subsection 4 that the Governor in Council may, for the purpose of making enquiry into circumstances of misbehaviour, inability or incapacity of such Judge, issue a Commission to one or more of the Judges of the Supreme Court of Canada or any one or more of the Judges of the inferior Courts, and they may report for the information of the Crown. Nothing happens — there is no adjudication — it is merely for information; but the same prejudice might result.

Now, my Lords, I have nothing further to say except that there is a long line of decisions here, advisory only, still they have been thought to have been pronounced in the execution of the power under the Statute. The constitution of the country in many respects stands upon this, equally with the statutory words which they expound. New legislation has been passed: tremendous changes were made in the local and provincial legislation having regard to the decision of your Lordships in the Fisheries case,

and then, as another illustration, the Manitoba School case, of course, was attended with very great changes and results; and here the other day your Lordships entertained an appeal upon a question submitted on the construction of an agreement involving a very large amount of money. The whole question was considered and every question answered, reversing in all points the Judgment of the Supreme Court.

THE LORD CHANCELLOR: There is a string of cases.

MR NEWCOMBE: Yes, my Lord, and I submit that it would be a very serious thing if, at this stage in the development of the country and constitution, we should have it declared that all these proceedings have been taken in error.

MR ATWATER: My Lords, I do not know that I can add anything usefully to what my learned friend Mr Newcombe has said in connection with this subject, and I will not detain your Lordships longer than may be necessary, but as Mr Newcombe has concluded by remarking, the question which has been raised on this appeal for the first time is one of very great importance, not only to the Dominion, but to the Provinces. If your Lordships, as a body, have assumed ~~presume~~ that powers had not, and never were conferred upon the Provinces by the British North America Act at all events it is a custom which has been in force ever since practically this Act came into operation; it has been in force for 35 years without question or suggestion of question, and as my learned friend, Mr Newcombe, said, it has been the basis of your Lordships decisions, and the Supreme Courts' decisions on these very references, and it has been the basis to a very large extent of our Constitution, and what has grown out of these decisions. But referring to the question of the Manitoba School Case, decided by the Supreme Court, to the effect that the Government of Canada had nothing to do with questions of education in the Province of Manitoba, it came to your Lordships, and your Lordships decided, contrary to the decision of the Supreme Court, that the Dominion Government had power to legislate. Acting upon your Lordships decision upon that very reference, the Dominion of Canada took action, and legislated, with the result that the whole of the political features of the country, and the history of the country for the last 15 years has been changed. In all this line of cases, the assumption has been at all events, that the Governpr General in Council has the power to submit these questions to his Courts--to the only Courts he could refer them to--that is the Supreme Court of Canada. And a similar power of reference has been exercised, rightly,

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or wrongly, ever since Confederation by the different Lieutenant Governors of the Provinces. If the power did not exist in a Governor General in Council to refer to his Majesty's judges for Canada, the questions for decision, or for advice, then equally the power did not exist for any of the Lieutenant Governors to refer them. Yet they seem to have assumed that they had that power under the general powers contained in sub-section 14, section 92, which your Lordships have been so frequently referred to--that is that the Provinces have the right to pass laws regarding the administration of justice in the Province, including the constitution, maintenance, and organisation of provincial Courts. That is the only legislation which your Lordships will find in the British North America Act which could confer such a power on the Lieutenant Governors of the Provinces. Yet under the words "constitution of the Courts" I presume, or under the inherent right which the Lieutenant Governprs have considered they have, to refer questions to the Courts of the Provinces, they have constantly referred questions to these Courts, and that has been going on for a great number of years, as far as the Province of Quebec, withwhich I am most familiar, is concerned. In very recent years the Lieutenant Governor in Council has referred some of the most important questions as to his authority, and the authority of the Legislature of the Province, to the judges to legislate on, as to certain questions whether it was intra vires or not to do so, and the Court has assumed, and the Lieutenant Governor has acted accordingly. Recently a question came up which involved the rights of the Legislature of Quebec to pass an Act authorising an investigation into certain municipal affairs, and so on, and one question which was in issue was the administration of the affairs of the City of Montreal, and on the decision of the Court of

~~the Court of~~ Appeal that the Legislature had power, they took it, and an enquiry followed which had the most far-reaching results.

LORD ATKINSON: I do not think our attention was called to any cases in which this point had been raised and debated.

MR ATWATER: No, my Lord, I agree that the question never may have been challenged, or the power may have been challenged of the Government of the Dominion, or of the Legislatures to do so, but I very respectfully submit that some custom must prevail, particularly as any constitutional matters must be regarded as having the force of law, and if we are not bound by the strict limits of our charter, if I may call it so, or of our constitution, and of the British North America Act-- if we are fettered by that, and if we cannot find any authority in it on thepart of the Governor, or of any Lieutenant Governor, to refer matters to his Courts, of course the question must resolve itself, as my friend tries to make out, into a pure question of the interpretation of the Statute. But I think there is a broader principle, if I may submit it to your Lordships, than that. I respectfully submit that the constitution of Canada, is in fact, and was intended to be similar in principle, to that of the United Kingdom.

LORD ATKINSON: Similar to what it was in the year 1867, or similar to what it was in the time of the Tudors and the Stuarts?

MR ATWATER: I should hardly think it was the intention of the British Parliament in 1867 to subject us to a constitution so old as that. Would it have been impossible for a sovereign through the house of Lords, or by his constitutional advisers, to have referred a question to his judges? If it were a question of the advisers of His Majesty wishing the advice of his judges, would it not be still constitutional?--

would it not be under your system, constitutional to do so? I am not arguing, nor do I think it necessary for me to argue, the question of whether that would be advisable, or whether such a course might not have the effect, as my friend puts it so strongly, of influencing or prejudicing the opinions of any judge, if he subsequently was required to sit upon the matter in a case inter partes. But, my Lords, that is not the question as it seems to me. The question is whether that would be a constitutional thing to do or not. Now if it were a constitutional thing for the sovereign, or his advisers, or the House of Lords advising the sovereign, to ask for the opinion of His Majesty's judges, could they not do so?

THE LORD CHANCELLOR: I think the question has to be put a little differently-- whether it is an unconstitutional thing for Parliament to pass an Act enabling it to be done. Of course it may be that it has not been done of late years in England, and it has not, no doubt--I mean by the sovereign--but at the same time there is no case that I remember which has been called to our attention, which says that it cannot be done. There are previous cases in which it has been done, and I think 1760 or 1761 was the last occasion. If that is so, does the mere fact that the "Judicature" has been set up by the British North America Act, carry with it a negation of the right of Parliament to impose duties, other than judicial duties, on the judges. That seems to me to be the way in which the question will have to be answered.

MR ATWATER: If I may answer that my Lord, it seems to me, that, assuming that we have the principles of the British constitution, and that there would be an inherent right on the part of the Governor in Council, which would exist we will say in His Majesty--and suppose there is that same right

conferred on the Governor of Canada and his advisers, then it may come to be a question of what judges he might refer such questions to, and the question then would be whether the judges, the Statutory Court which was created under the British North America Act or their functions would be limited, so as to exclude the possibility of such a reference being made to them. Now in that respect I submit tthey are not precluded from considering such a question, because if your Lordships will refer to the language of section 101 of the British North America Act, it says that: "The Parliament of Canada may notwithstanding anything in this Act from time to time provide for the constitution, maintenance and organisation of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada". Now I submit that nothing could be more fundamental on the law of Canada, and the basic law of its constitution than the British North America Act itself, and this is the only Canadian Court which has jurisdiction to be created by the British North America Act. All the other Courts are provincial Courts. If the Governor in Council was to have the right to submit to any judges any questions of importance, or any constitutional questions on the interpretation of the Act, he clearly could not submit them to the provincial Courts; he must submit them only to his own Court--that is to the Canadian Court; and if your Lordships will look at the third section of the Supreme Court Act of Canada, it constitutes the Supreme Court not only an ~~Appeal~~ appellate Court, but it says, ~~that~~ "the Court of common law and equity in and for Canada now existing". This Act came into force in the year 1875. It says that the common law and equity Court now existing under the name of the Supreme Court of Canada "is hereby continued under that name as a general

Court of Appeal for Canada, and as an additional Court for the better administration of the laws of Canada, and shall continue to be a Court of Record." Now it is quite true that that Court has judicial functions, but my submission is that that does not exclude the judges of it from rendering advice to the Governor in Council. If there is an inherent right on the part of the sovereign in Canada, as represented by the Governor General, to consult his judges, to refer to his judges, this is the only Court he could come to. So that if my submission is correct, it comes to this--that it is immaterial whether section 60 of the Supreme Court Act were enacted or not--section 60 is merely an assumption by Parliament to impose a statutory duty on the Supreme Court. But even if that section were not in the Supreme Court Act, my submission would be that the Governor in Council could refer constitutional questions upon which he wished the advice of the judges, to the judges of the only Court in Canada to which he could refer such questions. He could not manifestly submit them to any provincial Court. They are all judges in a sense, and all act as His Majesty's judges, but he could not refer a question of grave constitutional importance for opinion to the judges of Saskatchewan or Quebec; he must refer, if he is going to have that right, to the judges of the only Canadian Court. Nor, my Lords, does that Court, and the imposition of these powers on such Court, or the exercise of such rights on the part of the Government, take away the judicial character of the Court. I think one of your Lordships remarked that the provinces were entitled to a Court of Appeal. That, I submit, rather goes further than the Act says. All that the Act says in section 101 is that the Parliament of Canada "may from time to time provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada".

It was optional with Parliament whether they did so or not. For eight years after the British North America Act came into force in 1867, the Parliament of Canada did not avail itself of that Act, and there were great doubts, and great discussion at the time whether such a Court might not seriously affect the interests of some of His Majesty's subjects.

LORD ROBSON: I suppose between 1867 and 1875, a Province, if they had any conflict as to the jurisdiction, would have only this body?

MR ATWATER: Yes.

LORD ROBSON: Then the Dominion of Canada placed in front of this Court the Supreme Court, which is to deal with all provincial questions.

MR ATWATER: No, not necessarily, my Lord.

LORD ROBSON: So far as they are in conflict with the dominion-- as between the Dominion and the Provinces, the Supreme Court is to decide, so that the Supreme Couft is to be in a sort of arbitral position, if I may use the word, between the Dominion and the Provinces. Under these circumstances, have not the Provinces a right to insist that the Court, once established, and placed between them and the King, shall preserve its functions unimpaired and exercise them, without any kind of prejudice towards the

77. Provinces?

GS1 MR ATWATER: I do not know whether I answer your Lordship's question by making this remark: there is no obligation on the part of a suitor in Canada, whether the matter be between the Dominion and one of the provinces or between a private individual and the Dominion, to go to the Court: he can come here. For instance, if a concrete question arose as to their jurisdiction as between the Dominion and one of the provinces of Canada, the matter would have to commence in the Court of one of the provinces, and from there it would travel to the Court of Appeal of that province. Then the losing party could appeal directly to your Lordships. In very many cases, your Lordships will remember, which have come under your Lordships' consideration there has been no reference or appeal made to the Supreme Court of Canada at all -- that Court has been ignored, and the parties have come here directly, so that there is no right conferred on the provinces to have such a Court established. That Supreme Court in regard to Canada cannot in any way be assimilated to the position of the Supreme Court in the United States. There there is a constitutional right on the part of the different States to have a Supreme Court, and it was one of the essential features of the Act by which the original States of the Union came together, when they agreed to part with a certain amount of their legislative powers each to a central authority, that they stipulated as part of the bond that an Appellate Court should be established, and that as part of the constitution was established, and it was in connection with the character of that Court that I submit Chief Justice Marshall was induced to give the ruling that he did -- that they had nothing but judicial functions. If that argument was applicable to the Supreme Court of Canada

2 I could quite understand your Lordships' proposition, that it would be to a certain extent depriving the provinces of the advantage of not having an Appellate Court which was provided for by the constitution; but it is not provided for by the constitution: all that the constitution says under this head, in giving these powers, is that it "may from time to time". It may enlarge from time to time; it may absolutely derogate if it was found to be necessary in its working, and, as I said, at the time the Supreme Court Act was enacted there were serious doubts and serious objections as to whether the effect of having such a Supreme Court for all Canada might not operate in injustice to the inhabitants and the subjects of the province of Quebec. Therefore one part of the Supreme Court Act provides that at least two of the Judges of the Supreme Court shall always be taken from the Bar of the province of Quebec in order to see that the rights of his Majesty's subjects in Quebec, which to a certain extent were guaranteed them by the Treaty of Cession, were protected by a proper representation from the Bar of that province on the Bench. There is nothing, therefore, in the British North America Act which is in any way a sacrament that between the provinces or as a bond to the provinces they must have an Appellate Supreme Court whose functions shall be exclusively confined to those of judicial functions only. It is created as a Court not only of appellate jurisdiction but as a Court for the better administration of the laws of Canada as well, and, I submit, for the very grave and serious questions which may come up from time to time for the consideration of his Excellency in Council. Your Lordships must remember that his Excellency, the Governor General of Canada in Council, has all the power quoad the provinces that his Majesty has

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quoad Canada. He has powers of veto with regard to provincial legislation under section 90 of the British North America Act, and your Lordships will find under this head, applicable to the original four provinces which constituted the Dominion: "The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, shall extend and apply to the Legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the Legislatures thereof, with the substitution of the Lieutenant Governor of the province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the province for Canada". Your Lordships will also find that under section 57 of the British North America Act a Bill may be reserved for the signification of the Queen's pleasure ~~is not~~ and may be disallowed. So that the power of veto of ~~a~~ provincial legislation rests on his Excellency in Council. The powers of the Crown are vested by the British North America Act quoad the rest of Canada in the Governor General.

Now, my Lords, I submit there may be questions of the very gravest and most serious importance upon which the Governor General may wish the advice of his Judges, and those questions he has the right, I respectfully submit, to refer to the Courts, and, as I said before, the only Court to which he can refer them is the Supreme Court of Canada. He cannot refer them to a provincial Court obviously. Therefore if a question comes up as to whether provincial legislation which is being passed is <u>ultra vires</u> of the province or not, or whether as to their own legislation

4 it is *intra vires* of Parliament to pass a certain measure, surely it is perfectly proper and wise in the administration of the laws of Canada, which is the administration of the British North America Act (and the question as to *intra vires* of an Act is surely a question of the fundamental basic constitutional Act of Canada) to test the question. It is a question surely which affects very nearly the proper administration of the laws of the country, and it is those questions which I submit the Governor General should have a right to put before his responsible Judges.

THE LORD CHANCELLOR: It really comes to this, that you say, assuming ~~the~~ administration alone meant judicial administration, that the consulting of the Judges on a matter of public importance, apart from the legal aspect, may not be necessarily *inter parties*.

MR ATWATER: I say it is not necessarily inter parties particularly on constitutional questions. The argument has been used very ably that it is a disadvantage to have a Judge expressing himself upon a question which may hereafter come before him judicially, and that it would create a prejudice in his mind and would disenable him from giving an impartial Judgment later on if an actual conflict arises. That may be so, but at the same time the Act distinctly says that their decisions are not to bind them, and their giving opinions of that nature would be very much less prejudicial, I submit, that if they were restrained altogether from expressing any opinion. In other words, it seems to be more ~~dis~~advantageous that questions of constitutional importance and so on should be settled in the abstract and at once by references of this sort than to wait until the concrete question arises. The mischief, if mischief there is to be, that would follow the putting

5 into force of an unconstitutional Act by a province and the allowing of interests to be formed under it, would be far greater than having a question decided once and for all by the highest Tribunal in Canada, who would say whether it was unconstitutional or not.

LORD SHAW: I see the force of that, but of course the constitutional point is a little broader than that — it is whether the executive is entitled to have the judiciary as its standing Council.

MR ATWATER: I think, my Lord, one must leave a certain amount to the discretion of the Governor and his advisers in the way of putting all questions. I hardly think it could be assumed that he would put before the Court all questions, as your Lordship puts it, and constitute them as standing Council.

LORD ROBSON: This, you know, Mr Atwater, is a tremendously strong case.

MR ATWATER: I admit that, my Lord.

LORD SHAW: ,I have tried to count the questions but I am afraid I have quite lost count of them.

MR ATWATER: I am not attempting to defend them at all, and I do not think I should trouble your Lordships by discussing the merits of these particular questions.

LORD ROBSON: If you are right, you know, these questions are not only admissible, but many more would be admissible of a worse character without any unreasonableness on the part of the Governor General or his advisers, but, simply regarding it as a constitutional right.

LORD ATKINSON: You must defend the Act, and the Act does not define constitutional questions, but it say's "any questions of law or fact" — and that is the Act you have to defend.

MR ATWATER: Yes, my Lord, but I am using the constitutional question argument in this way — if it is the right of the

6 Governor to put to his Judges questions at all, naturally those which he would put would probably be constitutional questions, but if you take away all authority from the Court ——

LORD ATKINSON: You do not defend this Act by proving an analogy to the British constitution, and that he has power to put some important questions of law. You must defend the Act by shewing that he has power to put any important question of law or fact, because those are the words of the Act.

MR ATWATER: My submission is that even under section 60, by which Parliament imposes a certain duty on the Supreme Court, it is part of its constitution. Your Lordships will notice that the wording of section 101, which provides for the constitution ~~by~~ of a general Court for Canada, is identical in language with subsection 14 of section 92, which provides for the establishment of provincial Courts. Subsection 14 says that the provinces have the right ~~to~~ of the administration of justice in the provinces, "including the constitution, maintenance, and organisation of provincial Courts, both of civil and of criminal jurisdiction", and then section 101 says that "the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada". There you have the same words, and taking it under the word "constitution" the Legislatures have assumed to cast this burden upon the provincial Courts.

LORD ATKINSON: I thought this was defended on the ground that they would have power to establish an additional Court for this thing, and if they had power to establish an

7 additional Court there is no objection to throwing the duty they would throw on this additional Court, if created, on to the Court of Appeal. That is certainly the argument in the Judgments, because it was said there they could throw it on an additional Court, and if they could throw it on an additional Court they could throw it on an existing Court.

MR ATWATER: That was the language of the Judgment of the ~~Lord~~ Chief Justice. He took that ground, if I might refer your Lordship to it ——

LORD ATKINSON: It is in my mind, but the thing that is pressing upon me is this — you might argue that the Governor General had power to consult the Judges on some points, but that will not hold: you must say he has power to consult the Statute them on any question which may be an important question of law or fact.

MR ATWATER: My submission, my Lord, is that even without section 60 the right would exist to refer questions to the Court. As to what those questions might be — whether they were constitutional questions or whether they were important questions — would be perhaps for the Court to decide.

LORD ATKINSON: Do you admit that the Court would have power to refuse to answer because they did not admit it to be an important question?

MR ATWATER: It is declared to be important if it is referred,

THE LORD CHANCELLOR: My difficulty is not in seeing that there is power to ask particular questions or power to make and authorise them to be asked, but my difficulty is to see where, consistently with the Statute, you leave to the Judges the right to say: "We do not decline the duty; we recognise the duty, but we think in this particular question on this particular point of fact or law it would be

inconsistent with the administration of justice to answer it." If you are to clog the power with a right of that kind on the part of the Judges one would understand it, but I do not see under the Statute that there is any loop-hole left to the Judges to refuse. I do not say that it is so, but it is not very apparent.

MR ATWATER: I must admit, my Lord, that the Statute so far as it goes -- section 60 and its subsections -- of the Supreme Court compels an answer — it imposes a duty on the Judges of answering any such questions: but would that be anything more than this; supposing Parliament assumed that right, would they be doing anything more than imposing something upon a Court of their own creation which would be part of their constitution?

THE LORD CHANCELLOR: What strikes me is that it is not so much in the construction, but it is laid down that this is a Parliament of plenary powers for the peace, order and good government, and no Court of Justice is to assume that they are going to act unreasonably or to say that their power is limited in law because of any apprehension that they may use it improperly. We are bound to assume as regards the Parliament of Canada the same thing as we should assume with regard to the Parliament of Great Britain, that it is going to do what is right and is not going to abuse any power in it. I am not expressing any final opinion at all but it seems to me that that is the real answer to the point.

MR ATWATER: Of course if the Parliament of Canada has the right to pass legislation imposing these duties on the Court, I submit that they have the right to require an answer as well.

THE LORD CHANCELLOR: The Statute undoubtedly does, because it uses the word "shall".

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MR ATWATER: Undoubtedly, and I think the Statute contemplates that the answer shall be not merely an answer saying they will not ~~construe~~ consider but an answer on the merits.

LORD ATKINSON: It seems to me the Governor would be the sole Judge of the question which should be put, and if he thinks it is important he will put it.

LORD MACNAGHTEN: And the Court has no power, it has to answer any questions submitted to ~~them.~~ it.

MR ATWATER: There is no doubt the intention of the Act was to declare that any question that the Governor in Council chose to submit to the Court was to be a question which they were bound to consider — that, I think, must be conceded.

LORD ROBSON: Practically any question?

MR ATWATER: Yes.

THE LORD CHANCELLOR: Then comes in the proposition that we are to assume that what the Governor of Canada will do is right, and if the question be such as in the opinion of the Court upon a reference ought not to be answered, we are not to assume that the Governor of Canada will insist upon their answering it.

MR ATWATER: Exactly. It seems to me that this language of ~~the~~ section 60, by which it declares that any question shall be an important question of fact, assumes a sort of definitive statement as to what are questions of law and fact to try as distinguished from what are questions of law and fact to leave open to the Court, and to leave it open in each case to state which it is.

LORD ATKINSON: I cannot get my mind away from this, that the question you have to attack here is that the Parliament of Canada had a right to pass this Act — ~~apart from the fact~~ whether in particular the Governor General might or

might not insist upon the Judges answering ~~any~~ a question which they might deem it inexpedient to answer, ~~That~~ is not really the question; the question is, had the Parliament power to pass an Act which enjoins upon them a duty to answer.

MR ATWATER: My submission with regard to that is that if it is part of the constitution of the Court — if it is both a Court of Appeal and an additional Court for the administration of justice ——

LORD ATKINSON: But does it not come back to the question whether this act is practically forbidden by section 101?

MR ATWATER: It might.

THE LORD CHANCELLOR: It really comes to that.

MR ATWATER: But, my Lord, it might also come to the question of whether these questions referred by the Governor might not be questions on matters connected with the peace, order and good Government of Canada and the proper administration of the laws of Canada. Taking a question which his Excellency in Council considers of sufficient importance to get the advice of his Judges upon, surely that is ~~might be~~ a matter very much connected with ~~which he would have~~ administration.

THE LORD CHANCELLOR: Really that is what it comes to, and that is a reason for saying it is not prohibited by section 101.

MR ATWATER: Quite so.

THE LORD CHANCELLOR: But the point is whether it is prohibited not by the Act but by the effect of section 101.

LORD ATKINSON: Of course I do not suggest, if the Governor General had these powers, he would abuse them.

MR ATWATER: I should hardly suppose they would be abused by any Governor, but I submit not only does this come within the powers conferred by section 101, but that it is

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practically contemplated by it — that Canada may establish any Court which in its opinion may be for the better administration of its laws, and that it may impose such duties upon it as part of its constitution as it might see fit, just as they gave to the local legislatures the powers to regulate the constitution of the local Courts or provincial Courts.

LORD ROBSON: Let me put the question in this way. Does it not come to this — whether in enacting section 101, which gave the Dominion Parliament power to create a Court of Appeal that might decide questions, the Imperial Parliament intended to give it not only a power to decide questions of law but to deal with purely provincial questions at the instance of the Governor General, which is a more extensive interference with subsection 14 section 92 than is contemplated, I think, by section 101. Parliament might very well say: "We will let the Dominion of Canada constitute a Court of Law a Court of Appeal, and to that extent we qualify the provincial autonomy". But has Parliament, in saying that, qualified provincial autonomy to the further extent of enabling the Governor General to put questions directly to the Court directly affecting the administration of the Dominion?

MR ATWATER: I would not say so, and besides that, if your Lordship will allow me to remark, not only an Imperial Parliament gave the right to Canada to constitute a Court of Appeal but it may be done away with — it is a permissive right. There is no constitutional right on the part of the province to establish a Court of Appeal, and besides that the Supreme Court or any Court of Appeal has appellate jurisdiction upon questions between parties as well as provinces. Then this Court is constituted, and Parliament has given the right not only to create a Court of Appeal but any additional Courts which may be required, and this Supreme Court is constituted not only a Court of Appeal but an additional Court, so that it has both functions.

LORD ROBSON: Does one function interfere with the other in such a way as to make an undue call or affect the rights of the provinces when they come to the provincial Courts for decision?

MR ATWATER: I submit that provincial autonomy would not be affected by it, because on these questions which might come up, asking that the Supreme Court might give a decision ~~of the~~ on a constitutional question between one of the provinces and the Dominion on a concrete case which the Province itself might raise, if anybody considered himself badly treated, or ignored by the Supreme Court entirely they could come directly to your Lordships' Committee for a decision. So that the Supreme Court is not a decisive and conclusive tribunal, which absolutely disposes, as a finality, of all the rights and questions which may come up between the Provinces and the Dominion. If Your Lordships will allow me to refer for a moment again to the case of Valin v Langlois, which has been so frequently referred to here, reported in 5 Appeal cases,-it deals with this question of an additional Court, or the functions of the Supreme Court as an additional Court. Your Lordships will remember that the Chief Justice in his judgment on page 18 referred to this case in these terms: "I presume it will not be suggested that the Imperial Parliament could not constitutionally ~~xxfxx~~ confer upon the Canadian Legislature the power to establish a Court competent to deal with such references as we have now before us; and, if not, how could more apt words be found to express their intention to confer that power? 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'". That is what I was calling your Lordships' attention to: "It cannot now be doubted either in view of the decision of the Privy Council in Valin v Langlois, (5 Appeal Cases, page 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

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exercise of this new jurisdiction to this Court. 'The distinction between creating a new Court, and conferring a new jurisdiction upon an existing Court, is but a verbal and non-substantial distinction'". I think your Lordships put the question as to whether that was a quotation from your Lordships' decision in the case of Valin v Langlois. Now I referred to the judgment in Valin v Langlois, and to the language of your Lordships at pages 120 and 121 of the Report. On page 120. Lord Selborne in giving judgment, says: "There is therefore nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial Courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces. But in addition to that, it appears that by the Act of 1873, which, even by those judges who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and so very different even in form, was done". Then on page 121 his Lordship says: "Therefore their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act, as to its principle, and those provisions of the former Act which all the judges of all the Courts in Canada, apparently without difficulty, held to be lawful and constitutional". So that, my Lords, I submit the Chief Justice was right when he said that there was an unsubstantial distinction between the creation of the new Court, and the imposing upon the old Court of new powers. If, therefore, instead of creating a New Court, which I think could be done, and I think must be conceded could be done, to determine such questions, they imposed on the Supreme Court, as they did in

the language of section 3 of the Supreme Court Act, the duties of a new Court, there is no substantial distinction to be taken in regard to it.

My Lords, I do not think there is anything more I can usefully submit to your Lordships, except as I ~~did~~ said before the importance and far reaching nature of your Lordships' decision in this case. As to the arguments upon this question which ~~I~~ are put to your Lordships, or put to the Courts rather, I again submit that your Lordships have nothing to do with them. You have nothing to do with the argument that these questions are creating alarm and apprehension, and trouble. I submit that ~~t~~that is not a consideration which should enter into your Lordships' judgment in the matter. I personally am not aware of any such disturbance having been created, and it seems to me that if there is doubt as to some of the powers of some of the Legislatures or of Parliament that is suggested by the questions put, it would be far better to have them decided at once, than to have them left as an open and constantly recurring matter. That was the course that was adopted in the questions which have come before your Lordships before. In the Manitoba school case, in the Fisheries Case, and in the Licensing case, there were these questions which involved the most important considerations as to the respective authority of the Legislatures. They have been decided, and they form really the basis of a great deal of our constitution.

SIR ROBERT FINLAY: The last observation which my learned friend made was that it was a great advantage to have questions which might arise decided at once, and decided with expedition. The opinions expressed are not binding, but they are such that the answers to them are such as to cause very grave embarrxassment, as I submit, to the proper business of the Court. Now Lord Shaw put to my

friend Mr Newcombe the question why it was that the Attorneys General of all the provinces were cited, and my friend Mr Newcombe replied that that was because the rules require it. But the question is only moved a stage further back. Why do the rules require it? It is because this case is only one illustration of the principle that pervades all these references--that matters are raised in which the central government, the Dominion Government and the provincial government are really opposing parties, or may be opposing parties, and therefore the rules most properly provide that that should be done which was done in the present case. The fact that the rules so provide really adds cogency to the argument that arises on the fact that the various provinces have been cited. It must have been left out of sight in dealing with this matter that this question arises only finally when the Governor General, really the Dominion Government, may be on the one side, and the provinces or some of them on the other side. I submit to your Lordships that the only mode of determining questions of that kind is by a test action in which the matter is raised in a concrete form and determined judicially. It cannot be decided in any other way. To allow the Dominion Government, which may be so to speak, one party to the dispute, to put a series of questions to the Supreme Court of Appeal of Canada, would really have a tendency to lower the confidence felt in that Court of Appeal, and in a vast number of cases it might deprive Canada of recourse to their own Supreme Court of Appeal. Time after time applications would be made for leave to come direct to your Lordships' Board on the ground that the judges of the Supreme Court of Canada had already expressed their opinion in answer to such questions, and therefore it would be mere useless expense to go to the Supreme Court of Canada.

I submit to your Lordships that that is a very grave consideration, and that if such a power exists it might be exercised at the pleasure of the Dominion Government--any questions may be put, and it might, and probably would result in depriving Canada of its own Court of Appeal as an available tribunal for entertaining appeals from the provincial Courts.

LORD MACNAGHTEN: If section 60 had been confined to A, B and C, would you have still said it would be unconstitutional?

SIR ROBERT FINLAY: I should, my Lord, and I should respectfully submit it is unconstitutional for this reason-- that each of the questions under A, under B, or under C may arise in an actual suit--in litigation. They affect the provinces of the Dominion Government, and of the provincial governments; and I put it to your Lordships that no power has been conferred upon the Dominion Government to send to the judges for their views upon any questions, including of course a questions that might arise under A, B and C.

LORD SHAW: I cannot charge my memory, but I rather think that in the development of the constitution of the United States, all the dicta of Chief Justice Marshall were pronounced with regard to limited cases--I think that is so.

SIR ROBERT FINLAY: Undoubtedly the Supreme Court of the United States has no power whatever to declare a Statute unconstitutional unless it arises in the course of litigation.

LORD SHAW: In reference to what my noble friend has put, question A seems to be at the first blush a very natural thing to ask--that in Canada, the central Government, so to speak, should ask ~~these~~ its judges what the constitution means. On the first blush that seems natural, but on the other hand you have across the border an example of that having

been dealt with in a very ample way.

SIR ROBERT FINLAY: Yes, my Lord, and my submission is that, legislating with a knowledge of what had taken place in the United States, it is perfectly impossible to suppose, that if anything of this kind had been intended by the framers of the constitution, they would not have expressed it. It is a power that would certainly have been expressed if it had been intended to confer it, and having regard to the practice in the United States, and in England, on the principles of which this constitution is stated to be framed, I submit to your Lordships that it cannot be possibly implied, and the only proper inference is that it was intentionally left out. My friend Mr Newcombe referred to the Revised Statutes of Canada, ~~page~~ chapter 104, providing for the issue of commissions, but that is a very different thing indeed, and I only mention it because I think my friend said that judges of the Supreme Court had been appointed on such commissions. My friend is of course more likely to be right than I am, but I have the assistance of my friend Mr Nesbitt, who tells me that a judge of the Exchequer Court has been appointed on such a commission, but the provinces have nothing to do with the Exchequer Court.

THE LORD CHANCELLOR: Surely that does not matter.

SIR ROBERT FINLAY: No, it does not.

THE LORD CHANCELLOR: Judges have been appointed on commissions here.

SIR ROBERT FINLAY: Yes, my Lord, Lord Justice Vaughan Williams sat as Chairman of the Commissions which dealt with the ~~Disestablishment~~ question of the Welsh Church. As a matter of fact I am told that they have abstained from appointing on such commissions, judges of the Supreme Court.

MR NEWCOMBE: If anything turns upon it, those commissions are on record, and I can get a certified copy.

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SIR ROBERT FINLAY: I am taking the statement from my friend Mr Newcombe, and if he has an opportunity of refreshing his memory he will do so, but My friend Mr Nesbett is of quite a different opinion, and of course my mind is a blank upon it.

LORD ATKINSON: The judges sit there as individuals no doubt, the same as judges appointed on Commissions in England.

SIR ROBERT FINLAY: Very well, my Lord, I will not say a word more on the point. Then my friend Mr Newcombe referred to the Revised Statutes of Canada, 1906, chapter 138, section 28. As soon as that section is looked at, it is seen that it relates to a totally different matter. It relates to enquiries into circumstances respecting the misbehaviour, inability or incapacity of a County Court judge, and empowers the issue of a commission to one or more judges of the Supreme Court or to any superior Court in any province, empowering them to make such enquiries. I dismiss that section as irrelevant. Then my friend referred to another section which is much more relevant--section 33, which provides "that no judge of the Supreme Court of Canada, shall either directly or indirectly act as director or manager of any corporation, company or firm, or engage in any occupation or business other than his judicial duties, but every such judge shall devote himself exclusively to such judicial duties". A judge would be much more harmlessly employed as a director of a bank, I submit, than in answering questions of this sort, which would certainly interfere with the proper discharge of his official duties.

My friends have pressed your Lordships very much, and from their point of view not improperly, with a long series of cases in which such references have taken place. Now I submit that that is not emtitled to any weight in this connection. If it were the case of spelling out an unwritten constitution, I agree a long series of ~~xxxxx~~ instances might be of great service, but here we have to

deal with a written constitution of very recent date--only in 1867--and I submit to your Lordships that it is quite impossible to say that a certain number of cases which we have had--there are not more than a dozen at the very outside--in which the parties desirous of having particular questions settled, have submitted to the jurisdiction, have invoked indeed the jurisdiction--I submit it is perfectly impossible to say that such a consideration can properly influence the Court now that the question is raised as to the correct construction of the written constitution.

LORD SHAW: The odd thing remains, and you will recognise the force of it, that this Board has not only done it at the request of the parties, but they have remitted to Canada what were the proper answers the Canadian judges should give; now it turns out that the whole of this was an unconstitutional procedure.

SIR ROBERT FINLAY: My Lord, is not the answer to that found in considering how the question presented itself in any one of these individual cases? A large number of parties have come over from Canada to argue these questions which they wanted answered at the time. They have presented themselves at the Bar of your Lordships' Board, ~~and~~ but none of ~~these~~ them raise the question of jurisdiction; indeed so far from raising it, they are all anxious that your Lordships should deal with the answers.

LORD SHAW: They have obtained from this Board, and from the Courts of Canada advice on which they both ~~wanted~~ consented to act.

SIR ROBERT FINLAY: Yes, and in fact that is illustrated by the attitude of British Columbia in the present litigation. British Columbia is a party, as Defendant, and their attitude is shewn by the letter which I read to your Lordships in opening this case, and it is that such references may be held with the consent of the provinces, but not without their

consent. That is the attitude assumed throughout in these cases where this question was not raised, but I say ~~they~~ that cannot give jurisdiction, and above all, it cannot by any possibility affect the construction of the statute now that the question is raised.

MR ATWATER: Will you pardon me for interrupting. Sir Robert states that in the questions which have come before your Lordships, and before the Supreme Court heretofore, there has been consent. There has perhaps in the case of the particular province raising the question, taking the Liquor Licensing Act for example, where there were questions involving the constitutionality of Acts passed by the Provincial Legislatures with regard to licensing. The reference in that case was consented to merely by the Province of Ontario, and the Attorney General of the Dominion, but the decision of your Lordships in that case, and of the Supreme Court, affected not only the Province of Ontario, but every one of the nine Provinces of the Dominion of Canada, none of the other eight being present, or consenting at all. So that I want to disabuse your Lordships minds of the idea that all the provinces were consenting parties to these references which have come before your Lordships heretofore--it was only one province in each case.

SIR ROBERT FINLAY: When I said consent, I meant consent by the parties who were before the Board, and desired to have the questions settled. But, my Lords, what my friend has just said intensifies very much indeed the objection to these references. He now says that where one province appeared, and a question was raised which affected not only that province in its relations to the Dominion, but also affected all the other provinces, the other provinces were not parties, and not being parties of course they did not consent; yet their interests would be affected as I

submit by this very irregular procedure, because although it has no authority, it is regarded by most people as having more weight than it has in point of law. And why is it that they have provided that the opinions shall be delivered as if they were judgments in a litigation? They are to be delivered in public as if the point arose for judgment in the course of an ordinary litigation, with the inevitable result which must have been contemplated, that the minds of people would be impressed with the fact that the judges were giving judgment.

LORD SHAW: And the dissenting judge is to give his reasons for dissenting.

SIR ROBERT FINLAY: Exactly. It is most carefully and elaborately provided, so that there shall be all the pomp and ceremony over judicial decision, when it is not a judicial decision at all, but a great many people will be impressed with the idea that it is.

LORD ATKINSON: There is a list, and they have power to appoint a particular person to represent any particular interest they may deem advisable.

SIR ROBERT FINLAY: Exactly. Reference has been made by my friend Mr Newcombe to one case arising in England, which he says is an instance of such advisory functions being thrown upon the High Court. That is the case of Exparte the County Council of Kent, v the Council of Dover, which is reported in Law Reports 1891, 1 Queen's Bench, page 725, but I venture to think, when that case is looked into, it will be found that it does not bear any such colour at all. The passages which my friend referred to are at pages 728 and 729. Now reading the sections under which these proceedings take place it will be seen at once how different that case was from the present case. The

10. section was section 29 of the Local Government Act, 1888

and as your Lordships are aware that Act entirely reconstituted the local government throughout England, and all sorts of questions might arise as to what functions, what powers and what liabilities devolved upon the different authorities created, particularly as regards the County Councils, and Joint Committees. Here is the section which provides for solving such difficulties. It is printed in a note at the bottom of page 726 of the Report: "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". That is not advisory at all as soon as one looks at what the question was.

MR NEWCOMBE: The Lord Chancellor said it was a consultative jurisdiction.

SIR ROBERT FINLAY: He used the words consultative jurisdiction, but I am going to shew in what sense he used them. They were to decide the question, and the whole point Lord Halsbury was dealing with was this--was the decision of the High Court final, or did an appeal lie to the Court of Appeal; and the opinion Lord Halsbury came to was that the High Court was selected to decide the question finally; that is to say that it was provided that their decision should govern the matter--that it was not sent to the

11. High Court as a branch of the judicature, but they were

picked out in order to decide this question without appeal. The judgment will shew what Lord Halsbury intended to decide. It begins at page 727: "The only thing with which we have to deal is whether in the form in which the question now arises before us there is an appeal to this Court. We are of opinion that there is not. An appeal must be given, and is not to be presumed. We do not of course mean that it must be given in so many words. If the thing appealed from becomes a judgment, or order, a decree or rule of the High Court, it would of course be appealable under section 19 of the Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used. Now the language of section 29 of the Local Government Act 1888, which we have to construe, provides that the matter (which we shall describe presently) is to be 'decided' by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject matter dealt with in the section, they certainly imply no right of appeal. In the case of Overseers of Walsall v London & North Western Railway Company, though the Court of Appeal was divided on the subject of whether an appeal existed in that case or not, no doubt was (nor, indeed, we think could be) expressed, that if the proceeding then in question had been purely of a consultative character, no appeal would lie; but for reasons partly depending upon the forms of the procedure, which involved a rule quashing an order of Sessions, the House of Lords ultimately held that an appeal did lie. Now, in this case (again postponing the consideration of the thing to be done under the section, and

12. confining ourselves for the moment to the mere words) there

is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is 'decision'. We think the Legislature must be taken to have been aware of the state of the law as pronounced by the House of Lords in 1878" (That is in the Walsall case) "and if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out 10 years before by the decision of the House of Lords in the case to which we have referred. But the Legislature has not done so. It has used a popular, and not a technical or legal word; and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal. 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".



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That, of course, does not mean advisory: it is that this point was referred to them for decision and for final decision. "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' 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 determination 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." For these reasons they were of opinion that there was no appeal.

My Lords, the case is one where as between the authorities they were to decide: it did not affect private rights, and a question might be raised if it were capable of being again raised in any competent procedure.

My Lords, there are other illustrations of the same thing. Your Lordships are aware that under the Arbitration Act an Arbitrator may state a case in the course of the proceedings for the opinion of the Court. Evidence is objected to, and the question may be of such magnitude that it is well to have an authoritative opinion expressed in the case, and accordingly there is power given by the Arbitration Act to state a case in this interlocutory way for the opinion of the Court.

The LORD CHANCELLOR:- That is a case of litigation between A. and B.

Sir ROBERT FINLAY:- Yes.

The LORD CHANCELLOR:- It has nothing to do with this.

Sir ROBERT FINLAY:- And it has been held there that no appeal lies from what is called the consultative judgment or consultative decision of the High Court.

I submit that so far from helping my friend's argument, as soon as the true bearings of that case are appreciated, it tends very strongly the other way.

Now attention was called by the Lord Chancellor to the very important question of how such references in England would be

regarded: are they or are they not alien to the British Constitution as it existed at the date of the British North America Act? I submit to your Lordships that they are absolutely alien. In England there never has at any time been anything like this. There have been cases under the Stuart Kings and under the Tudors where the Judges were consulted on behalf of the Crown: in fact, I remember seeing in a book on the duties of Law Officers that one of the privileges of a Law Officer was to confer with a Judge with regard to any case that was ~~going~~ coming on and to see how it should be handled. I certainly was never aware that such a privilege existed and I think any Judge would probably treat any Law Officer with scant courtesy who tried to exercise the supposed privilege.

LORD SHAW:- The Judges in those days were also Parliament men. "Don't tell me," said a great Judge, "how to interpret this Statute: I made it." The three functions, judiciary, legislative and executive were all mixed up.

Sir ROBERT FINLAY:- Yes. What I do say is this, the idea of such legislation as this by the Imperial Parliament is an absolutely impossible one.

THE LORD CHANCELLOR:- That is only because Parliament, you say, would not pass it?

Sir ROBERT FINLAY:- Yes, my Lord, because it would be unconstitutional.

THE LORD CHANCELLOR:- You mean it would be contrary to what is in the Constitution.

Sir ROBERT FINLAY:- Yes. To see how alien putting any such duties on Judges is according to modern ideas in this country, one has only to endeavour to realise what would be said if any Department brought in a Bill to enable them to send a series of questions such as are now before your Lordships in this case to the Judges to decide in reference to legislation which might be contemplated or questions of administration that might arise between that Department and private individuals. The thing would be intolerable.

The LORD CHANCELLOR:- No doubt, but after all, if it be the case, to say that the House of Commons or the House of Lords would not entertain a Bill or a proposal of that kind, is not really to settle the question.

Sir ROBERT FINLAY:- No, my Lord.

The LORD CHANCELLOR:- The question is as to whether in the British North America Act there is nothing which in terms says you may do this, or there is nothing which in terms says you may not do this. There is on the one hand the right to make laws for the peace, order, and good Government of Canada: on the other hand, there is the establishment of a Judicature. It seems to me, and it has for some time, that it really turns upon that, looking at section 101, whether you can say that the institution of a Court of Justice, meaning what it does according to the Constitution of Great Britain or of Canada imports the negation of the right to consult the Judges.

Sir ROBERT FINLAY:- I entirely agree, and that is the way I venture to present it to your Lordships. All I am at present saying, and I shall be very brief indeed upon this head, is that this Constitution states that it is to be according to the principles of the British Constitution, and it is so alien to the principles of the British Constitution, as it is now understood, that there should be any such use made of the Judges that, if it had been intended to confer such a power, you most certainly would have had it in express terms. I submit to your Lordships that, although the Imperial Parliament may do anything it likes, the introduction of a Bill of this kind would be regarded by all parties of all shades of opinion as an outrage.

Now your Lordship yesterday referred to Mr Justice Story's book in which there is a passage which throws some light upon the principles which should govern such questions. I found the reference to the 5th volume of the Life of Washington by Chief

Justice Marshall himself, Chief Justice of the United States. The references given in Story are wrong, at all events they are wrong according to the edition that I got from the Middle Temple Library.

THE LORD CHANCELLOR:- If you will give us the date of the edition, perhaps it may help us.

Sir ROBERT FINLAY:- It is the edition of 1807. I should think it must be the first edition. The two pages are 356 and 365. The question that had arisen there was as to the rights of the United States under their treaties with France. It was in 1793 at the time of the First Republic, and a British Merchantman had been captured and had been taken into a port in the United States, and there converted into a privateer, and was about to sail, and the question was whether that should be permitted.

THE LORD CHANCELLOR:- Captured by whom?

Sir ROBERT FINLAY:- By the French.

THE LORD CHANCELLOR:- Taken into an American port?

Sir ROBERT FINLAY:- Yes, my Lord. A series of questions was put to the Secretary of State, and at page 356 there occurs this passage: "In answer to this letter the Secretary stated the assurances which had on that day been given to him by Mons. Genet" (that is the representative ~~of~~ in the United States) "that the vessel would not sail before the President's decision respecting her should be made. In consequence of this information immediate coercive measures were suspended. In the Council, the next day it was determined to request the answers of the Judges of the Supreme Court of the United States to a series of questions comprehending all the subjects of difference which existed between the Executive and the Minister of France relative to the exposition of the Treaties between the two Countries and in the mean time to retain in port such privateers as had been equipped by any of the belligerent powers within the United States. This determination was immediately communicated to Mons. Genet; but, in contempt of it, the 'Little Democrat' proceeded on her cruize"

The "Little Democrat" was the name which was given to this converted vessel. Then at page 365 occurs this passage: "About this time, it is probable, that the difficulties felt by the Judges of the Supreme Court in expressing their sentiments on the points referred to them, were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, those gentlemen deemed it improper to enter the field of politics, by declaring their opinions on questions not growing out of the case before them. This communication being actually received, on the emergency being too pressing to admit of further delay, the consideration of a complete system of rules to be observed by the belligerents in the ports of the United States, was taken up pending the deliberations on the official conduct of Mons. Genet." Then the other reference in Story in the note is to Hayburn's case, reported in 2 Dallas' Reports of the Supreme Court at pages 409-10, and it is not so much the case I think that is referred to as the notes. There is an elaborate note which runs over two pages. I do not propose to read it all to your Lordships, but it relates to the reasons given by the Judges of the Circuit Courts for declining as some of them did absolutely to carry out an Act which threw upon the Judges as to settling claims by widows and orphans who were barred by some limitations that were established under previous legislation. I will only read a very few sentences just to show the note which was struck. The first is from the resolutions passed by the Circuit Court for New York District: "That by the Constitution of the United States the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachments on either. That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner." Then they go on to give reasons for thinking that these duties were not judicial. "As

therefore the business assigned to this Court by the Act is not judicial nor directed to be performed judicially, the Act can only be considered as appointing Commissioners for the purposes mentioned in it, by official, instead of personal, descriptions." And the Judges of this Court said that they felt at liberty to act on that view of the Act as appointing them Commissioners although it was by their official description as Judges of the Circuit Court. The Circuit Court for the District of Pennsylvania expressed themselves on the general principle in this way, after referring to the Constitution: "It is a principle important to freedom that in government the judicial should be distinct from and independent of the legislative department. To this important principle the people of the United States in forming their Constitution have manifested the highest regard. They have placed their judicial power not in Congress but in 'Courts.' They have ordained that the 'Judges of those Courts shall hold their offices during good behaviour' and that 'during their continuance in office their salaries shall not be diminished.'" I am not reading the whole of this. "Upon due consideration we have been unanimously of opinion that under this fact the Circuit Court held for the Pennsylvania District could not proceed, first because the business directed by this Act is not of a judicial nature" and so on.

THE LORD CHANCELLOR:- As I understand it, the practice in the United States is not to make these references.

Sir ROBERT FINLAY:- Yes.

THE LORD CHANCELLOR:- Based upon the theory that the judicature should be independent of the executive, and only judicial power.

Sir ROBERT FINLAY:- Exactly, my Lord. Then there is the opinion given by the Supreme Court of North Carolina. I am reading from the reprint of the Reports of the Supreme Court from what is called the Lawyer's Edition published at New York in 1901, edited by Dr Williams. The notes I presume are in the original report in Dallas: anyhow of course whatever authority they have proceeds

from ~~there~~ their being the opinions of these Judges.

Then your Lordships have been told that in some of the separate States of the United States the Constitution provides for such references to the Judges asking answers to questions.

The LORD CHANCELLOR:- Are not we getting rather far? This is the Constitution of the States of the Union.

Sir ROBERT FINLAY:- I did not propose to go into it. I was only going to cite the opinion delivered by Mr Justice Story on a proposal made to strike out this clause of the Constitution of one of the States and the reasons he gave for it.

The LORD CHANCELLOR:- To strike it out in Court?

Sir ROBERT FINLAY:- No, at a Convention. Your Lordship is aware that as a preliminary step towards changing the Constitution of the individual States a Convention is held, and Mr Justice Story at this Convention gave the reasons for thinking that such a power ought not to exist, but I will not read it: it states in different language and very emphatically what is implied in the extract from the Life of Washington that I have read and what has been stated in these passages cited in the note. The quotations I have given from the report of the Massachussets Convention of 1820 are set out in the 11th Volume of the new series of the American Law Review for 1890 at pages 391-2.

Then, my Lords, of course I mentioned that this question had been mooted in connection with the Australian Constitution, which does not contain any such power, any more than the South African does, and I am not going to read to your Lordships what has been said there. It is a very forcible ~~disposition~~ disquisition as to the evils which attend the insertion of such a power, which it is pointed out does not exist under the Constitution of Australia.

Now, my Lords, my friend Mr Newcombe made reference to two cases in the 9th and 12th Appeal Cases, Hodge v. The Queen and the Bank of Toronto v. Lambe, and as I understood my friend, the use he desired to make of these cases was to show that the power to send such questions to the Supreme Court must be in some legislative body in Canada. The short answer to that is that it is not in either, if it is inconsistent with any part of the Constitution. Sir Barnes Peacock delivered the Judgment, and all that there is in Hodge v. The Queen (the passage which my friend cited is at page 132 in the 9th Appeal Cases) is a very emphatic statement that the Parliament of Canada and the Provincial Assemblies are not acting as the delegates of the Imperial Parliament. They are acting as legislative assemblies supreme within the limits prescribed by the Constitution. That throws no light upon the question which is what the limits of the Constitution are. The Bank of Toronto v. Lambe was cited for the sake of one sentence on page 588: "And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament". That, of course, is so, but it is all that is given; it is all within the limits of the Constitution must be within one or the other of these two authorities.

Now a great deal has been said on the question whether the Judges could refuse to answer any questions which they thought

mischievous, and my friend Mr Newcombe for the purpose of rendering this Act more tolerable in its operation has, if I rightly understand him, said that he holds the view that the Judges might refuse to answer any questions which they thought were dangerous in their tendency or inconsistent with their judicial duties - I so understood my friend - inexpedient to answer. My friend puts that argument forward.

Mr NEWCOMBE: Stating the reasons, which, in themselves, would constitute an answer to the question within the meaning of the Act.

Sir Robert FINLAY: I do not think a statement that you decline giving any answer as it is inexpedient would constitute an answer within the meaning of an Act of Parliament or within the meaning of the word as used anywhere. It is a reason for not answering; it is not an answer. The terms of the Act are wholly inconsistent with my friend's view. The Act says: "and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question". It is not open for them to say it is not important. "When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court", and any dissentient Judge is to give his reasons. I submit to your Lordships that the Act is perfectly clear and that any attempt to lighten, to float, this Act, to get this Act over the bar by saying that it is subject to the right of the Judges to refuse to answer is totally unsustainable. The words will not bear it. The words are imperative, and to take my friend's view would amount to inserting a vital alteration in the terms of the section.

Then my friend said: Oh, but the Dominion Government may waive their rights; they will act reasonably; they will waive their rights. How can a possible waiver by the Dominion Government of their rights under this section affect the question of whether the section itself is constitutional or not?

Then I desire to add a very few words upon the point to which, as the Lord Chancellor has indicated, the whole thing comes back, the effect of section 101. Section 101 deals first with the Supreme Court as a Court of Appeal. I am not certain whether it has even been suggested that in answering such questions this Court would be acting as a Court of Appeal; I do not think it has. I say that it certainly/~~is~~ is not. A Court of Appeal means ~~entering~~ entertaining appeals from Judgments given by inferior Courts, and I say not merely that it is not acting as a Court of Appeal but that it is inconsistent with the functions of a Court of Appeal to be asked to commit itself beforehand upon such questions.

Then, my Lords, it was attempted to sustain these references by saying that it might fall under the second branch of the section, which gives power to create additional Courts for the administration of the law of Canada. Therefore, in the first place it must be a Court, to fall within that. Secondly, it must be for the administration of the law, and thirdly it must be for the administration of the law of Canada - not one of the three. It really reminds me of what was once said of the "Holy Roman Empire", that it was neither holy, nor Roman, nor an Empire. This is not a Court, it is not for the administration of any law, and it is not for the administration of the law of Canada.

My friend referred to a passage in the Judgment of Lord Justice Fry in the Law Reports 1892, 1 Q. B. at page 446.

The LORD CHANCELLOR: Surely it means a Court of Justice. There are all sorts of Courts.

Sir Robert FINLAY: Yes, but occurring in this passage it

means what is defined in Coke upon Littleton at page 58 "a place where justice is judicially ministered". That definition is perfectly right, and it is not vitiated by the absurd definition which Lord Coke goes on to give. He says curia comes from cura, quia in curiis publicis curas gerebrant. In substance it is all right, although the etymology is defective.

Then the expression "High Court of Parliament" was used. That is an expression which has come down from the days when the King administered justice in the aula Regia, which is all that there was of Parliament then. At present there are no judicial functions except in the House of Lords, and the House of Lords is one of the Courts and appears in any list of Courts in any legal treatise. The House of Commons is not a Court of Law. Lord Coke said that if anyone said that the House of Commons was not a Court of record he would that his tongue clave to the roof of his mouth. Whether it has the powers of a court of record - of course it has the power of committing for contempt and so on - it is not a Court in the ordinary sense. In the second place: "for the administration of the law". That, again, I think I have sufficiently argued to answer such questions. Thirdly, it must be the law of Canada. On that point, I submit that means the administration of the federal law, the Federal Statutes, and not of the Provincial law. May I say in this connection the case of Valin v. Langlois to which reference was made was the case of the creation of an additional court. It was a Court to try election petitions and it really has no analogy at all and no bearing on this point.

Then something was said, I think by Mr Atwater, as to the Provinces of Canada having passed Acts for such references for their Provincial Courts. Of course, there may be different considerations arising there, and I do not desire to plunge into an argument upon that question. I am not prepared to admit that the Provinces have the right to do it, because I say it is

inconsistent with the idea of a court, but you have not got in that case section 101, the pivot on which the whole of this controversy turns.

May I, in conclusion, merely say that this case is one of great importance having regard to the great interests involved. I submit it is also of vast importance as affecting the standing in public estimation of the Judges of the Supreme Court of Canada.

The LORD CHANCELLOR: We shall take time to consider.

Third Day.

In the Judicial Committee
of the Privy Council

Between 35/1912

The Attorney General
for the Province of Ontario
Appts

— and —

The Attorney General for
Canada

— and —

The Attorney General for
The Province of British
Columbia.

11th December 1911