(8) Municipal institutions in the Province.

(9) Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes.

(10) Local works and undertakings other than such as are of the following classes :

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.

(b) Lines of steamships between the Province, and any British or foreign country.

(c) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

(11) The incorporation of companies with Provincial objects.

(12) The solemnization of marriage in the Province.

(13) Property and civil rights in the Province.

(14) The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

(15) The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

(16) Generally all matters of a merely local or private nature in the Province."

Factum of the Attorney General of Canada

PART I

STATEMENT OF FACTS

1. This is an appeal from a judgment (Record p. 18) of the Appeal Division of the Supreme Court of New Brunswick dated May 1, 1950, in respect of certain questions of law raised for the opinion of the Court of Appeal before trial by order made by Hughes J. on January 17, 1950. (Record p. 8). Leave to appeal to this Court was granted by the Supreme Court of New Brunswick by order dated May 8, 1950.

2. The order of reference provided that, for the purpose of the reference, the facts relevant to the issue, or issues, to be determined shall be deemed or taken to be those therein set out. (Record p. 8). This statement of facts shows, *inter alia*, that :

(1) the Respondent operates motor buses for the carriage of passengers and goods for hire over certain routes in the Province of New Brunswick pursuant to licences granted by The Motor Carrier Board of the Province of New Brunswick ;

(2) the Appellant, who resides in Lewiston, in the State of Maine, operates motor buses for the carriage of passengers and goods for hire between Boston in the Commonwealth of Massachusetts and the Town of Glace Bay in the Province of Nova Scotia, and between intermediate points, including points within the Province of New Brunswick ; and

(3) on June 17, 1949, the New Brunswick Motor Carrier Board purported to grant a licence to the Appellant permitting him to operate public motor buses from Boston through the Province of New Brunswick on certain routes to Halifax and Glace Bay in the Province of Nova Scotia and return " but not to enbus or debus passengers in the said Province of New Brunswick after August 1st, 1949."

3. By writ issued September 17, 1949, (Record p. 2) the Respondent brought its action against the Appellant for an injunction restraining him from picking up and letting down passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia border and, for other related relief.

4. The questions as finally submitted to the Supreme Court of New Brunswick and the answers given by that Court are as follows :

1. " Are the operations or proposed operations of the Defendant within the Province of New Brunswick or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act (1937) and amendments thereto, or orders made by the said Motor Carrier Board ? "

Answer : " Yes, prohibited, until the Defendant complies with the provisions of the Act."

2. " Is 13 George VI Chapter 47 (1949) intra vires of the legislature of the Province of New Brunswick ? "

Answer : " Yes, in respect of this Defendant." (Richards, C.J., and Hughes, J. answering simply " Yes.")

3. " Are the proposed operations prohibited or in any way affected by Regulation 13 of The Motor Vehicle Act, Chapter 20 of the Acts of 1934 and amendments, or under Sections 6 or 53 or any other sections of The Motor Vehicle Act ? "

Answer : " Yes, until the Defendant complies with the provisions of the Act, and the Regulations made thereunder."

5. By order of Taschereau J. dated September 15, 1950, the Attorney-General of Canada was granted leave to intervene in this appeal.

PART II

POINTS IN ISSUE

6. With reference to the first question, the Attorney-General of Canada submits that it should be answered in the negative because the Appellant's undertaking is within the exclusive jurisdiction of Parliament as being

(*a*) an undertaking connecting the Province with another Province and, therefore, a matter within s. 91 (29) of the British North America Act by virtue of the exceptions contained in s. 92 (10) (a) thereof ;

(*b*) an undertaking extending beyond the limits of the Province and, therefore, a matter within s. 91 (29) of the British North America Act by virtue of the exceptions contained in s. 92 (10) (a) thereof ;

(*c*) an undertaking that is not a " local " undertaking and, therefore, a matter within s. 91 (29) of the British North America Act by virtue of the exception in s. 92 (10) of all undertakings other than " local " undertakings ; and

(*d*) an undertaking other than a " local " undertaking and, therefore, a matter within s. 91 of the British North America Act because undertakings other than " local " are impliedly excluded from the matters to which the jurisdiction of the provincial legislatures extends by virtue of s. 92 of the British North America Act ;

and its operations cannot, therefore, be prohibited, in whole or in part, by provincial legislation.

7. Alternatively, with reference to the first question, the Attorney-General of Canada submits that it should be answered in the negative because the exclusive legislative authority to regulate international and interprovincial transactions is vested in Parliament by s. 91 (2) of the British North America Act.

8. With reference to the second question, the Attorney-General of Canada submits that the question should be answered in the affirmative but that it should be indicated that chapter 47 of the statutes of New Brunswick of 1949 cannot have had the effect of extending the operation of The Motor Carrier Act (1937) to the operation of an undertaking, such as that of the Appellant, within the exclusive jurisdiction of Parliament.

9. With reference to the third question, the Attorney-General of Canada submits that the question should be answered in the negative but that it should be indicated that the Appellant, in carrying on his undertaking in the Province of New Brunswick, must comply with all the valid provisions of the Motor Vehicle Act of that Province applicable to it.

10. The Attorney-General of Canada further submits that the Appellant is not precluded from questioning the validity of provincial legislation merely because he is a foreign national.

PART III

ARGUMENT

11. The relevant provisions of New Brunswick's Motor Carrier Act, chapter 43 of the statutes of 1937, would appear to be as follows :

" 2. (1) In this Act unless the context otherwise requires :—

* * *

(*f*) ' Public Motor Bus ' means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares from any point within the Province to a destination also within the Province.

(*g*) ' Public Motor Truck ' means a motor vehicle, with or without a trailer, carrying or used to carry goods or chattels for hire from any point within the Province to a destination also within the Province.

* * * "

" 4. The Board may grant to any person, firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the province."

* * *

" 5

(3) In determining whether or not a licence shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services.

(4) If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a licence be granted to the applicant in accordance with its finding upon proper security being furnished.

* * * "

" 11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a licence from the Board authorizing such operations and then only as specified in such licence and subject to this Act and the Regulations."

The 1949 statute, which is the subject matter of question number 2, provides for the following amendments to the above provisions :

(*a*) everything in s. 2 (1) (f) after the word " fares " is deleted ;

(*b*) everything in s. 2 (1) (g) after the word " hire " is deleted ; and

(*c*) s. 4 is amended by striking out the word " and " in the fourth line and by substituting the word " or " therefor and by striking out the words " within the province," being the last three words of the said section.

The provisions of the Motor Vehicle Act referred to in question 3 are as follows :

" 6. (1) Except as provided in Sections 14, 16, 20 and 23 of this Act, and except in the case of any motor vehicle used exclusively as an ambulance or by a fire department for protection against fires, every owner of a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in New Brunswick shall, before the same is so operated, apply to the Department for and obtain the registration thereof."

" 53. No motor vehicle shall be used or operated upon a highway unless the owner shall have complied in all respects with the requirements of this Act, nor where such highway has been closed to motor traffic under the provisions of the Highway Act."

The regulation referred to in question 3 does not appear in the case except as quoted by Harrison J. as follows :

Regulation 13 : " No person operating a motor vehicle as a public carrier between fixed termini outside the Province shall operate such motor vehicle on the highways of the Province unless the operator is in possession of a permit issued by the Department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable." (Record p. 30).

12. The provisions of the British North America Act which require consideration are :

" 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say,—

. . . .

2. The Regulation of Trade and Commerce.

. . . .

29. Such classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

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

. . . .

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes :—

(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with

any other or others of the Provinces, or extending beyond the limits of the Province :

(*b*) Lines of Steam Ships between the Province and any British or Foreign Country :

(*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

. . .

13. Property and Civil Rights in the Province.

. . .

16. Generally all Matters of a merely local or private Nature in the Province."

13. *The Appellant's transportation business is an " undertaking " within the meaning of that word as used in section 92 (10) of the British North America Act.* It is now settled that " ' Undertaking ' is not a physical thing, but is an arrangement under which of course physical things are used." (*In re Regulation and Control of Radio Communication in Canada* (1932) A.C. 304, per Viscount Dunedin at page 315) and, therefore, includes the operations of a motor transportation business. (*Quebec Railway Light and Power Co. v. Town of Beauport*, (1945) S.C.R. 16.)

14. *The Appellant's transportation undertaking connects the Province of New Brunswick with the Province of Nova Scotia and extends beyond the limits of the Province of New Brunswick and is, therefore, a " matter " within the exclusive legislative jurisdiction of Parliament by virtue of s. 91 (29) and s. 92 (10) (a) of the British North America Act.* It is clear that the Appellant's bus line joins points in New Brunswick to points in Nova Scotia and extends from New Brunswick into Nova Scotia on the one hand and into the United States of America on the other. The learned Judges below appear to have thought, however, that paragraph (a) of s. 92 (10) of the British North America Act applies only to works that are " local " in the particular Province. It is, however, established that paragraph (a) applies to transportation undertakings which are not local in a particular province. See *Attorney General for British Columbia v. Canadian Pacific Railway Company* (1906) A.C. 204, per Sir Arthur Wilson at p. 210 ; *Toronto v. Canadian Pacific Railway Company* (1908) A.C. 54, per Lord Collins at p. 58 ;

Luscar Collieries Limited v. McDonald (1927) A.C. 925, per Lord Warrington of Clyffe at pp. 932-3 ; and *Canadian Pacific Railway v. Attorney-General for British Columbia* (1950) A.C. 122 per Lord Reid at pp. 142-3. As the Appellant's undertaking is a " matter " falling within paragraph (a) of s. 92 (10) of the British North America Act, it is a matter within the exclusive jurisdiction of Parliament by virtue of s. 91 (29).

15. *The Appellant's undertaking is not a " local " undertaking and is, therefore, a matter within the exclusive jurisdiction of Parliament by virtue of s. 91 (29) and s. 92 (10) of the British North America Act.* Undertakings other than "local" undertakings are expressly excepted from s. 92 (10) and, therefore, an undertaking that is not a local undertaking in the province is a matter within the exclusive jurisdiction of Parliament by virtue of s. 91 (29).

16. *Alternatively, the Appellant's transportation undertaking is a matter " not coming within the classes of subjects . . . assigned exclusively to the legislatures of the provinces " and is, therefore, within the exclusive jurisdiction of Parliament by virtue of s. 91 of the British North America Act.* S. 92 (10) confers legislative jurisdiction on the legislatures of the provinces in relation to undertakings. It extends the provincial jurisdiction, however, only to " local " undertakings. Unless the various heads of s. 92 are read disjunctively, this limitation would be "nugatory" General classes of subjects to be found in other heads of s. 92, such as " civil rights in the province" and "matters of a merely local or private nature", must be regarded as "excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words." The power of legislating with reference to undertakings other than "local" undertakings must, therefore, "belong exclusively to the Dominion Parliament, for the matter is one ' not coming within the classes of subjects' ' assigned exclusively to the Legislatures of the Provinces,' within the meaning of the initial words of s. 91." Compare *John Deer Plow Company Limited v. Wharton* (1915) A.C. 330, per Viscount Haldane L.C. at pp. 339-40. It has never been disputed that Parliament has exclusive authority to make laws for through railways. See *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907) A.C. 65 per Lord Dunedin at p. 67. The position cannot be different as regards through bus lines.

17. *As the Appellant's undertaking* qua *undertaking is within the exclusive jurisdiction of Parliament, the Appellant cannot be prohibited by provincial legislation from carrying it on in whole or in part.* When the Parliament of Canada has exclusive authority to make laws in relation to a transportation undertaking, it has the exclusive right to regulate the management thereof and the powers of the person by whom it is operated. See *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours* (1899) A.C. 367, per Lord Watson at p. 372.

A province cannot by legislation affect the works of such an undertaking. See *Attorney-General of Alberta v. Attorney-General of Canada and the Canadian Pacific Railway Company* (1915) A.C. 363, per Lord Moulton at p. 368 and *Wilson v. Esquimalt & Nanaimo Railway Co.* (1922) 1 A.C. 202, per Duff J. at p. 207. Nor can it regulate the rates to be charged in the course of the operation of the undertaking. See *Quebec Railway Light & Power Co. v. Town of Beauport* (1945) S.C.R. 16. If the province cannot, by legislation, interfere with or regulate the undertaking, it cannot prohibit it. Compare *Attorney General of Alberta v. Attorney General of Canada* (1939) A.C. 117 ; *John Deere Plow Company Limited v. Wharton*, (1915) A.C. 330, and *Great West Saddlery Company Limited v. The King* (1921) 2 A.C. 91. If the Province cannot prohibit the whole of the undertaking it cannot prohibit part thereof. Compare *Toronto v. Bell Telephone Company of Canada* (1905) A.C. 52.

18. *Alternatively, the Motor Carrier Act of New Brunswick is, insofar as an interprovincial or international transportation company is concerned, a law in relation to trade and commerce and, therefore, not applicable to the operations of such companies.* The Province cannot regulate interprovincial or international transactions. See *Attorney-General for British Columbia* v. *Attorney General for Canada and others* (1937) A.C. 377, per Lord Atkin at p. 387 and *Shannon and others v. Lower Mainland Dairy Products Board* (1938) A.C. 708, per Lord Atkin at p. 718 and compare *Attorney General of Manitoba v. Manitoba Licence Holders' Association* (1902) A.C. 73, per Lord MacNaghten at pp. 79-80.

19. For the reasons set out in paragraphs 13 to 18, supra, it is submitted that the first question should be answered in the negative.

20. *The second question, as to the validity of c. 47 of the statutes of New Brunswick of 1949, should be answered in the affirmative.* The effect of this statute is to delete certain provisions in the New Brunswick Motor Carrier Act by which its operation was clearly limited to the Province of New Brunswick. The amendments do not, however, require the Act to be given any *ultra vires* construction and the amending statute is not, therefore, *ultra vires*. It cannot, however, be construed as having extended the operation of the Motor Carrier Act to undertakings within the exclusive jurisdiction of Parliament.

21. *The third question, as to whether the Motor Vehicle Act prohibits or affects the Appellant's operations, should be answered in the negative.* While Parliament has exclusive jurisdiction in relation to the Appellant's undertaking *qua* undertaking, the Appellant is not " in other respects " outside the jurisdiction of the provincial legislature (*Canadian Pacific Railway Company v. Corporation*

of the Parish of Notre Dame de Bonsecours (1899) A.C. 367, per Lord Watson at p. 372.) He must conform with provincial laws of general application controlling traffic on the highways for the safety and convenience of the public. See *Quebec Railway Light & Power Company v. Town of Beauport* (1945) S.C.R. 16 per Rinfret C.J. at p. 24, Kerwin J. at p. 33 and Rand J. at p. 39. The Motor Vehicle Act, however, does not, and cannot, prohibit in whole or in part the operation of an undertaking within the exclusive jurisdiction of Parliament and the third question should, therefore, be answered in the negative.

22. *The Appellant is not precluded from questioning the validity of provincial legislation merely because he is a foreign national.* Harrison J. held that—

> " Even if the Acts in question should be held *ultra vires* in respect of a Canadian national carrying on an undertaking local in Canada for transporting passengers and goods between provinces, it does not follow that the defendant can raise the same defence. As a foreign national it is enough that the Province has made certain laws regarding vehicular traffic within its boundaries. These laws the defendant is bound to comply with until they are superseded by Dominion legislation. In the meantime so far as foreign nationals are concerned they have no status to ask that such laws be declared *ultra vires*.". (Record p.36).

The province either has authority, by virtue of the British North America Act, to make a law or it has not. If a law is *ultra vires* the province, no law exists and there is nothing to apply to a foreign national any more than to a Canadian citizen. Once a foreign national becomes a party to an action in the Canadian Courts he has the same right to have his legal position determined as a Canadian citizen has.

W. R. JACKETT.

Factum on Behalf of the Attorney-General for Ontario.

The Attorney-General for Ontario adopts and relies on the factum of the Respondent.

C. R. MAGONE,

of Counsel for the Attorney-General for Ontario.

Factum of the Attorney General for the Province of Quebec

PART A

THE CASE

The present appeal is taken from an opinion on a question of law of the Supreme Court of New Brunswick, Appeal side, delivered on the 1st. May, 1950, and answering questions submitted in accordance with an order of the Honourable Peter J. Hughes, in an action before the Chancery Division.

The facts are not disputed and can be summarized as follows :—

The Plaintiff is a company incorporated under the New Brunswick Companies' Act. It holds licenses granted by the Motor Carrier Board of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the city of Saint John, New Brunswick, over Highway Route No. 1 and between the said city of Saint John and the Nova Scotia border over Highway Route No. 2 for the purpose of carrying passengers and goods for hire or compensation.

The defendant resides at Lewiston, in the state of Maine, one of the United States of America. He is in the business of operating motor buses for the carrying of passengers and goods for hire or compensation under the name and style of MacKenzie Coach Lines. He operates motor buses between the city of Boston in the Commonwealth of Massachusetts and the town of Glace Bay in the Province of Nova Scotia and between intermediate points. The defendant's business is conducted over the portion of the route which lies between the said city of Boston and the town of Calais, Maine, under a certificate granted by the Interstate Commerce Commission, (a Federal Commission of the United States of America having jurisdiction, inter alia, over interstate transportation) permitting the Defendant to carry passengers and their baggage as a motor carrier in the manner and over the routes mentioned in the said certificate.

On the 17th day of June, 1949, the Defendant made an application to the Motor Carrier Board of New Brunswick for a license permitting him to operate public motor buses through the Province of New Brunswick. At the same time, however, the Defendant challenged the validity of the Act 13 Geo. 6, chapter 47 (1949) and of the Motor Carrier Act (1937) as being ultra

vires of the legislature of the Province of New Brunswick. On the same day, to wit, the 17th day of June, the motor Carrier Board granted a license to the Defendant, in the following terms :—

> " Israel Winner doing business under the name and style of " MacKenzie Coach Lines ", at Lewiston in the State of Maine, is granted a license to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on Highway Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said province of New Brunswick after August 1st, 1949."

The Board however, made no specific ruling on the Defendant's challenge as to the constitutionality of the Acts above mentioned.

The Defendant availed himself of the authority granted to him to use the highways of the Province of New Brunswick but ignored the restrictions contained in the above order. He continually embussed and debussed passengers within the Province of New Brunswick and expressed his intention of so doing until stopped by legal process.

Proceedings were instituted by the Respondent for an injunction and for damages and after issues were joined, it was ordered by the Honourable Peter J. Hughes to submit for the opinion of the Supreme Court, Appellate Division, the following questions :—

> " 1. Are the operations or proposed operations of the defendant within the Province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937 and amendments thereto, or orders made by the said Motor Carrier Board ? "
>
> " 2. Is 13 George VI Chapter 47 (1949) intra vires of the legislature of the Province of New Brunswick ? "

Before the Supreme Court, Appeal Division, and pursuant to an agreement between Counsel, the question of law was enlarged to include the following :—

> " 3. Are the proposed operations prohibited or in any way affected by Regulation 13 of The Motor Vehicle

Act, Chapter 20 of the Acts of 1934 and amendments, or under Sections 6 or 53 or any other sections of The Motor Vehicle Act ? "

On the first day of May, 1950, all the questions were answered in the affirmative, (Record page 18) and leave to appeal to the Supreme Court of Canada was granted by the said Court on the 8th day of the same month.

The Attorney General for the Province of Quebec was allowed to intervene in this appeal about five months later, to wit, on the second day of October, 1950.

PART B

ARGUMENT

I

Sections of The Motor Vehicle Act and regulations thereunder which are referred to in the questions submitted to the Court read as follows :—

" 6. (1) Except as provided in Sections 14, 16, 20 and 23 of this Act, and except in the case of any motor vehicle used exclusively as an ambulance or by a fire department for protection against fires, every owner of a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in New Brunswick shall, before the same is so operated, apply to the Department for and obtain the registration thereof.

53. No motor vehicle shall be used or operated upon a highway unless the owner shall have complied in all respects with the requirements of this Act, nor where such highway has been closed to motor traffic under the provisions of the Highway Act.

Regulation 13 : " No person operating a motor vehicle as a public carrier between fixed termini outside the Province shall operate such motor vehicle on the highways of the Province unless the operator is in possession of a permit issued by the Department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable."

The Act 13 George VI, chapter 47 (1949) is an Act amending The Motor Carrier Act (1937) and the sections of The Motor Carrier Act (1937) as amended are the following :—

" 2. (1) (e) ' Motor Carrier ' means a person, firm or company that operates or causes to be operated in the province a public motor bus or a public motor truck.

(f) ' Public Motor Bus ' means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.

4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points.

5. (3) In determining whether or not a license shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services.

(4) If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a license be granted to the applicant in accordance with its finding upon proper security being furnished.

(5) No license shall be issued to a motor carrier unless there is filed with the Board—

(a) A liability insurance policy or bond satisfactory to the Board.

11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a license from the Board authorizing such operations and then only as specified in such license and subject to this Act and the Regulations.

12. (3) Upon the recommendation of the Board, the Governor in Council may order that the provisions of this Act shall not apply to a motor vehicle used, or being used, as a public motor bus or a public motor truck for a specified purpose not otherwise exempt from such provisions.

17. (1) The Board may from time to time make regulations fixing the schedules and service, rates, fares and charges of licensed motor carriers, prescribing forms, fixing the fees payable to the Province, requiring the filing of returns, reports and other data and generally make regulations concerning motor carriers and public motor buses and public motor trucks as the Board may deem necessary or expedient for carrying out the purposes of this Act and for the safety and convenience of the public. . ."

In pith and substance the legislation above quoted is legislation to regulate and control the use of public highways of the province and to govern highway traffic by motor carriers within the province with the object of ensuring safe transportation of goods and passengers and by limiting the number of licensed carriers to enable those obtaining licenses to provide efficient service; also to obtain by license fees, revenue for provincial, local or municipal purposes.

Under section 92 of the B.N.A. Act, provincial legislatures are competent exclusively to make laws in relation to :—

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other licenses in order to the raising of a revenue for Provincial, Local, or Municipal purposes.

13. Property and Civil Rights in the Province.

16. Generally all matters of a merely local or private nature in the Province.

At the coming into force of the B.N.A. Act, " military routes " were transferred to the Dominion; but all other routes remained the property of the province in which they were situate (108 and 109 B.N.A. Act and third schedule to the Act.) Since

that time, all public highways have continued to belong to the provinces or to the municipal corporations holding their powers by delegation from the Provinces. It has always been considered as one of the functions of the provinces and of the municipalities to build, improve, divert or close highways.

In the case of *Provincial Secretary of P.E.I. vs Egan* (1941) 3 D.L.R. at page 305, Chief Justice Duff at page 310, said :—

> " I do not find any difficulty in dealing with the present case. Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways and the operation of a system of licenses for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local Legislatures."

And at page 321, Justice Rinfret said :—

> " The provincial legislation in question in this case is, in pith and substance within the classes of subjects assigned to the provincial Legislatures ; it is licensing legislation confined to the territory of Prince Edward Island.
>
> The right of building highways and of operating them within a Province, whether under direct authority of the Government, or by means of independent companies or municipalities , is wholly within the purview of the Province *(O'Brien vs. Allen,* (1900) 30 S.C.R. 340), and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, both from the point of view of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous."

In the case of *Quebec Railway Light & Power Co. vs Town of Beauport* (1945) S.C.R. p. 16, Justice Rinfret said at page 24 :—

> " The province has the control of its highways (*Provincial Secretary of P.E.I. v. Egan* (1941) 3 D.L.R. 305 : 1941 S.C.R. 396). It has to maintain them and to look after

the safety and convenience of the public by regulating and controlling the traffic thereon."

And in the same case Justice Hudson at page 35 :—

"The right to license, regulate and control traffic on streets and highway within a province lies with the legislature of such province."

The strips of land over which public highways are built, being the property of the provinces or of their Creatures, the municipal corporations, and the right to use highways being a civil right, it follows that any legislation regulating or restricting the use of highways in a province, is legislation relating to property and civil rights.

And the right to regulate the use of public highways includes the right to curtail or abolish such use :—

"It has long been recognized in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount and cannot be interfered with even by the Crown itself but only by parliament or the legislature. . . There is no question but that the legislature of Ontario can by statute modify or abolish that right; but, if it is to be modified and the rights of the public curtailed or affected, the will of the legislature must be unequivocally expressed. *Ontario Hydro-Electric Power Comm. v. Gray* (1924) 55 O.L.R. 339 C.A. (at p. 344)."

Morecver, the impugned legislation is legislation relating to matters of a merely local or private nature in the province although it may incidentally have some effect outside the province. In *Shannon vs Lower Mainland Dairy Products Board* (A.C. 1938 page 708) it was said at page 720 :—

"The true nature and character of the Act, its pith and substance is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed 'in respect of trade' and is therefore not subject to attack on that ground.

The pith and substance of this Act is that it is an Act to regulate particular business entirely within the province and it is therefore intra vires of the province."

And at page 721 :—

"If regulation of trade within the province has to be held valid, the ordinary method of regulating trade, i.e.,

by a system of licenses, must also be admissible. A license itself merely involves a permission to trade, subject to compliance with specified conditions. . . But if licenses are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes."

II

But the Appellant contends that the legislation is ultra vires under clause 10A of section 92 of B.N.A. Act :—

" 10. Local Works and Undertakings other than such as are of the following classes :—

a. Lines of steam or other ships, railways, canals, telegraphs, and other work and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province ;

b. Lines of steam ships between the Province and any British or foreign country ;

c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

Generally local works and undertakings are within the exclusive competency of the province. Exceptionally local works and undertakings fall under the federal jurisdiction if they are such local works and undertakings as are of, amongst others, the classes of " other works and undertakings connecting the province with any other or others of the provinces . ." This exception, as all other exceptions must be strictly construed. It appears from the text that the only works and undertakings contemplated by the provision are works and undertakings locally situate in one province and connecting the province in which they are located with another province. In other words, the undertaking must have its situs in one of the provinces of Canada. This is an essential element. This construction of clause A of head 10 is further confirmed by the wording of clauses B and C of the same head. In the present case, the Defendant has no office, no place of business, no organization, no situs in the province. His office or place of business is at Lewiston, in the state

of Maine. His undertaking extends from the state of Maine into the Province of New Brunswick.

III

Can it be said that the Acts under dispute exceed the competency of the province of New Brunswick because they constitute legislation in relation to the "regulation of trade and commerce within the meaning of head 2 of section 91.

The legislation under dispute is in no sense an attempt to regulate Appellant's trade or business. The Appellant is carrying on the business of transporting passengers and their baggage for hire or gain. In order to carry out this business, Appellant has acquired the use of motor buses and obtained the services of drivers and other personnel. None of these matters are interfered with by the New Brunswick legislation.

But in order to carry on his business, the Appellant wishes to use the highways of the province of New Brunswick which were constructed by and are maintained by this province. And it is the use of said highways which is regulated by the Acts now being discussed. The Motor Carrier Act (1937) as well as the Motor Vehicle Act (1934) and regulation 13 made thereunder, are regulations of highway traffic, not of any trade or commerce. They are police regulations applicable generally to all those making use of the highways. The law is of a general application and the Appellant is placed in precisely the same position as any other member of the public in New Brunswick in so far as his right to use the highways of New Brunswick is concerned. If the Appellant's contention was maintained, the result would be that citizens of the United States of America or of an adjoining province to New Brunswick would be placed in a superior position to the public of New Brunswick. They would be subject to no regulations while the public of New Brunswick would be bound to submit to all the restrictions contained in the impugned legislation.

Furthermore, even if the legislation with which we are now dealing would be considered as a regulation of the Appellant's business, it would not be legislation relating to the regulation of trade and commerce within the meaning of head 2 of section 91.

It is now well settled that head 2 of section 91 does not confer upon the Dominion Parliament the power to regulate particular trades in the provinces or the contracts of a particular business or trade.

In the case of *Citizens Insurance Co. vs Parsons* (7, A.C. page 96) it was cited by Sir Montague Smith delivering the judgment of the Board at page 113 :—

> " Construing therefore the words ' regulation of trade and commerce ' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sec. 92."

In the *Natural Products Reference* (1936) S.C.R., p. 398, at p.410, Sir Lyman Duff, summarizing the subsequent pronouncements of the Judicial Committee on the same subject, made the following statement :—

> " It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense ; while, on the other hand, it does embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers."

The decision of the Supreme Court of Canada in the above reference was confirmed by the Judicial Committee, and Lord Atkin commenting upon the remarks of Sir Lyman Duff, said :—

> " The few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on

this point, and preclude further disputes." (1937-A.C. p. 326 at 353.)

In the *Insurance case* (1916) A.C. 588, Viscount Haldane, said at page 596 :—

" Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. . . No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded."

See also *King vs. Eastern Terminal Elevators* 1925 S.C.R. page 434 : *Board of Commerce* (1922)—1 A.C. p.191 at 201.

IV

It is contended on behalf of Appellant that a province has no right to legislate in such a manner as to preclude the use of a provincial highway to a business or undertaking coming under the jurisdiction of the Dominion Parliament. In support of this contention Appellant cited the following cases : *Toronto Corporation v. Bell Telephone Co. of Canada* (1905) A.C. p. 52 ; *Great West Saddlery Co. v. The King* (1921) 2, A.C. 91 ; *John Deere Plouw Co. v. Wharton* (1915) A.C. 330 and *Beauport v. Quebec Railway, Light & Power Co.* (1945 1 D.L.R. 145.)

All these cases lay down the principle that provincial legislatures cannot legislate in such a manner that a company created under federal authority " is sterilized in all its functions and activities " or that " its status and essential capacity are impaired in a substantial degree " (*Great West Saddlery v. The King and John Deere Plouw v. Wharton* above quoted. See also *A.G. for Manitoba vs A.G. for Canada*, 1929 A.C. page 260.)

The Appellant is not a company holding its power, status and capacity from the Dominion Parliament. Appellant is a

foreign citizen seeking to make use of the highways of New Brunswick in order to transport passengers and goods over them for hire or gain. Appellant's right to make use of these highways is a civil right bestowed on him as a member of the public in New Brunswick. And this right derives from the law of New Brunswick, not from the federal Parliament.

Moreover, companies created under federal authority are nevertheless subject to provincial legislation concerning the carrying on of their business within the province. As was said by the Privy Council in the case of *Lymburn v. Mayland* (1932) 2 D.L.R. p. 6 :—

> " A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and may find its special activities, completely paralyzed, as by legislation against drink traffic, or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the province as to the business of all persons to trade in securities."

And in the case of *A.G. for Manitoba v. A.G. for Canada*, the Judicial Committee after stating that provincial legislatures were incompetent to legislate so as to impair in a substantial degree the status and essential capacity of a federal company, further added that it was for the provinces to determine " the form or the formalities of the contracts, under which business is to be carried on within the province or of prescribing the restriction under which property within the province can be acquired." (1929 A.C. p. 260.)

Moreover, in the case of *Citizens Insurance v. Parsons* already quoted, it was said that a federal company authorized to deal in real estates throughout Canada could nevertheless be paralyzed if laws of mortmain were in existence in all the province.

For the above reasons, it is respectfully submitted that the present appeal should be dismissed with costs.

Ottawa, October 16th, 1950.

L. EMERY BEAULIEU, K.C.,
Attorney for Intervenant the
Attorney General of the Province of
Quebec.

Factum of the Attorney General of the Province of Nova Scotia

PART I

STATEMENT OF FACTS

The Attorney General of Nova Scotia adopts the Statement of Facts as set out in the factum for the Respondents at page 1 to page 7, line 21.

PART II

POINTS IN ISSUE AND SUBMISSIONS

The points in issue are whether or not the answers given by the Appeal Division of the Supreme Court of New Brunswick to the questions submitted to it are correct and, if not, how should the said questions be answered. 6

This involves a consideration of the constitutional validity of the Motor Carrier Act, 1937 (N. B.), and amendments thereto, or orders made by the Motor Carrier Board ; 13 George VI, Chapter 47 (1949) ; Sections 6 and 53 of the Motor Vehicle Act, Chapter 20 of the Acts of 1934 (N. B.), and of regulation 13 made under the provisions of the said Motor Vehicle Act ; and of acts done under the purported authority of the said Motor Carrier Act and Motor Vehicle Act and of regulation 13 thereof.

The position of the Attorney General of Nova Scotia is, and he submits

(1) that the Motor Carrier Act and the Motor Vehicle Act as such are constitutionally valid as being legislation in relation to matters falling within enumerated heads (2), (9), (13) and (16) of Section 92 of the British North America Act.

(2) that regulation 13 made under the provisions of the Motor Vehicle Act is not constitutionally valid as it is not a regulation made in relation to any matter enumerated in Section 92 of the British North America Act.

(3) and that the conditions imposed by the Motor Carrier Board are not valid inasmuch as they exceed the authority which the Motor Carrier Act does or can confer upon it.

The Attorney General of Nova Scotia further submits that the answers to the questions submitted to the Appeal Division of the Supreme Court of New Brunswick should be :

As to question 1. Yes, affected by the Motor Carrier Act and the orders of the Board, but the Act does not and cannot authorize the Board to make regulations respecting traffic originating at or destined to points outside the Province of New Brunswick.

As to question 2. Yes, but that amendment has not the effect of authorizing the Board to make orders in relation to traffic originating at or destined to points outside the Province of New Brunswick.

As to question 3. Yes, affected by the Motor Vehicle Act but that Act cannot apply to inter-provincial or international transportation of passengers or goods as such and inasmuch as regulation 13 purports to do so it is not constitutionally valid.

PART III

BRIEF OF ARGUMENT

1. It is submitted that the first step in examining the validity of legislation in Canada, whether Dominion or Provincial, is to determine what is the pith and substance of the legislation.

> *Union Colliery Co. of B. C. v. Bryden,*
> (1899) A. C. 580 at p. 587 ; 68 L. J. P. C.
> 118 at 120

What is the " true nature and character of the legislation " ?

> *Russell v. The Queen,* (1882) 7 A. C.
> 829 at pp. 839-840

2. Having determined these questions the method of inquiry may be followed which was adopted by the Privy Council in

> *Citizens Insurance Co. v. Parsons*
> (1881) 7 A. C. 96 at p. 109 ;
> 51 L. J. P. C. 11 at p. 17.

3. The Attorney General of Nova Scotia submits that the Motor Carrier Act (N. B.) and the Motor Vehicle Act (N. B.) and amendments thereto and the orders and regulations made thereunder in pith and substance relate to the following subject matters :

(1) Highways and highway traffic within New Brunswick. This includes laws of general application relating to the use of highways—regulating

the transportation by motor vehicles of goods and passengers within the Province so as to insure safe and efficient service ; obtaining by license fees a revenue to compensate the Province for the use of the roads.

(2) The transportation of passengers or goods between points wholly within the Province of New Brunswick including the approval by the Board of various routes, types of vehicles, and the limitation of the number of carriers permitted to so operate.

(3) The inter-provincial, international or trans-provincial transportation of passengers and goods as such, including the prohibition of a carrier from operations across the Province of New Brunswick between termini outside the Province, and the prohibition of the transportation of passengers or goods from points in New Brunswick to points outside New Brunswick and vice versa.

4. As to the first and second subject matters in paragraph 3 above, the Attorney General of Nova Scotia submits that these are proper subject matters for Provincial legislation under the enumerated headings (2), (9), (13) and (16) of Section 92 of the British North America Act.

P. E. I. v. Egan, (1941) 3 D. L. R. 305 ; 1941 S. C. R. 396.
O'Brien v. Allen, (1900) 30 S. C. R. 340.

In Re Insurance Act of Canada, (1932) A. C. 41 ;
101 L. J. P. C. 26.

Shannon v. Lower Mainland Dairy Products Board,
(1938) A. C. 708 ; 107 L. J. P. C. 115.

A. G. Manitoba v. Manitoba License Holders Association,
(1902) A. C. 73 ; 71 L. J. P. C. 28.

Cherry vs Rex, (1938) 1 D. L. R. 156.

Abitibi Power Company v. Montreal Trust Company,
(1943) A. C. 536 ; 112 L. J. P. C. 49 ; 2 A. E. R. 311

5 (a). As to the third subject matter mentioned in paragraph 3 above, the Attorney General of Nova Scotia submits that this subject matter does not come under any of the enumerated heads of Section 92 of the British North America Act, nor is jurisdiction with respect to it conferred upon the Provinces by any other section of the British North America Act, and, therefore, legislation on this subject matter by the Province is not constitutionally valid.

Russell v. Queen, supra.

Citizens Insurance Co. v. Parsons, supra.

Beauport v. Quebec Railway, Light & Power Company,
(1945) 1 D. L. R. 145 ; S. C. R. 16.

5 (b). However, the Attorney General of Nova Scotia further submits that insofar as the Motor Carrier Act and the Motor Vehicle Act of New Brunswick are valid legislation under the first and second subject matters in paragraph 3 above and they incidentally affect inter-provincial and international or trans-provincial carriers, they are valid in the absence of any Dominion legislation conflicting with them.

C. P. R. v. Notre Dame de Bonsecours, (1899) A. C. 367 ; 68 L. J. P. C. 54.

A. G. Ontario v. A. G. Canada, (1894) A. C. 189 ; 63 L. J. P. C. 59.

A. G. Canada v. A. G. B. C., (1930) A. C. 111, 99 L. J. P. C. 20.

Forbes v. A. G. Manitoba, (1937) A. C. 260 ; 106 L. J. P. C. 17.

A. G. Alberta v. A. G. Canada, (1943) A. C. 356 ; 112 L. J. P. C. 17 ; 1 A. E. R. 240.

In conclusion the Attorney General of Nova Scotia submits that the questions submitted to the Court should be answered as indicated in Part II of this Factum.

JOHN A. Y. MACDONALD,
L. HARRIS McDONALD
Of Counsel for the Attorney General of Nova Scotia.

Halifax, Nova Scotia,
September 13, 1950.

Factum of the Attorney General of New Brunswick, Intervenant in the Action

PART I

STATEMENT OF FACTS

This is an Appeal from an opinion of the New Brunswick Supreme Court, Appeal Division, delivered on May 1st, 1950, answering certain questions of law submitted for the opinion of the said Court upon an Order of the Honourable Peter J. Hughes in an action in the Chancery Division of the said Court between the Respondent and Appellant herein.

In the said action the Respondent claimed an injunction restraining the Appellant from enbusing and debusing passengers within the Province of New Brunswick in and from his motor buses operating through the Province from the United States to Nova Scotia and vice versa, together with other relief.

The facts, for the purposes of the opinion, were agreed upon by the parties to the action and are fully set forth in the said Order (Record p. 8).

The Attorney General of New Brunswick intervened in the action and was represented by counsel at the hearing before the New Brunswick Supreme Court, Appeal Division.

10 The questions of law submitted for the opinion of the Court are set forth in the said Order of the Honourable Peter J. Hughes and are as follows :

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of the Motor Carrier Act, 1937 and amendments thereto, or orders made by the said Motor Carrier Board ?

2. Is 13 George VI, Chapter 47 (1949) intra vires of the legislature of the Province of New Brunswick ?

During the hearing before the Supreme Court the questions of law were
20 enlarged by consent of the plaintiff and defendant (Case, page 25, lines 20-23) to include the following : 7

3. Are the proposed operations prohibited or in any way affected by Regulation 13 of The Motor Vehicle Act, Chapter 20 of the Acts of 1934 and amendments, or under section 6 or 53 or any other sections of The Motor Vehicle Act ?

The Court answered all questions in the affirmative and on the 8th day of May, 1950, leave to appeal to the Supreme Court of Canada was granted by the said Court.

PART II

30 ## POINTS IN ISSUE ON THE APPEAL

As the facts were agreed upon (Record p. 8) the questions arising resolve themselves into whether The Motor Carrier Act, 1937, and The Motor Vehicle Act, 1934, and Regulation 13 made thereunder, are a constitutional exercise of the powers of the legislature of New Brunswick.

PART III

ARGUMENT

It is submitted that the case before the Court presents a somewhat unique and a very important constitutional situation.

The Attorney General of New Brunswick has had the opportunity of perusing the Factum of the Respondent. He supports the arguments set forth therein with the following additions and alterations.

The Appellant operates a motor bus transportation service for passengers and their baggage from Boston, Massachusetts, in the United States of America through New Brunswick to Glace Bay in Nova Scotia and vice versa. He contends that as such his is a local work or undertaking connecting New Brunswick with Nova Scotia or extending beyond the limits of New Brunswick within the meaning of clause (a) of head 10 of section 92 of the British North America Act, 1867 ; that by reason thereof it is excepted from the legislative jurisdiction of the Legislature of New Brunswick and by virtue of head 29 of section 91 of The British North America Act, 1867 placed under the exclusive jurisdiction of the Parliament of Canada.

Head 10 of section 92 of the British North America Act, 1867 should therefore be given most careful consideration. In its context it reads as follows :

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

10. Local Works and Undertakings other than such as are of the following Classes :—

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province :

(b) Lines of Steam Ships between the Province and any British or Foreign Country :

(c) Such Works, as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

It is submitted that the effect of clause (a) is to remove from exclusive provincial legislative jurisdiction local works and undertakings that *in fact* connect the province with any other or others of the provinces or *in fact* extend beyond the limits of the province within the meaning of the said clause. Local works and undertakings as a *subject matter* is assigned to the exclusive jurisdiction of the provincial legislature. Local works and undertakings that *in fact* connect or extend as aforesaid, and thereby fall within the *classes of local works and undertakings* excepted, are alone removed from the exclusive legislative jurisdiction of the province. The subject of the exception is the local work or undertaking as such. This fact is borne out by clause (c) of the said head 10.

It is necessary then to determine whether the object of Appellant's claim is a local work or undertaking with the meaning of clause (a) of head 10 aforesaid.

It is submitted that the object of Appellant's claim is a business of transporting passengers and their baggage for hire or gain. To carry out this business Appellant has acquired the use of motor buses and the services of drivers and other personnel. He contends that his is a local work or undertaking and that, because he offers transportation services from the United States through New Brunswick to Nova Scotia and vice versa, his is a local work or undertaking connecting the province with another province or extending beyond the limits of the province.

If Appellant's business is a work or undertaking, it is difficult to see how it may be considered as a *local* work or undertaking. It appears to be clear that in the said clause (a) of head 10 of section 92 the word " local " applies to the work or undertaking itself. If Appellant's work or undertaking is local in New Brunswick it is not by virtue of the facts offered in support of his claim. He agrees (Record p. 9) that his business and undertaking consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the City of Boston, Massachusetts and Glace Bay, Nova Scotia, and between intermediate points. On the basis of these facts the, submission is made that it is, if anything, international as opposed to local in New Brunswick, and that Appellant's operations in New Brunswick form merely a portion or segment of what appears from the facts agreed upon to be an international undertaking.

If the business and undertaking of Appellant is not a " local " work or undertaking then it is submitted clause (a) of head 10 aforesaid does not apply and the Appellant's business and undertaking in New Brunswick, prima facie under the jurisdiction of the New Brunswick legislature as property and civil rights, is not transferred to the jurisdiction of the Parliament of Canada through that channel.

If, however, the Appellant's contention is correct and his transportation business is a local work or undertaking, and one such as to be excluded from exclusive provincial jurisdiction, it is submitted that the work or undertaking

thereby excluded consists of his business of carrying passengers for gain together with his motor buses and other equipment pertaining to his business.

But the Appellant wishes to use the highways of the province upon which to carry on his business of transporting passengers for gain and he says, in effect, that because his work or undertaking is excluded from provincial jurisdiction so also are the provincial highways for the reason that he wishes to use them in connection with his business.

The highways of the province were constructed by and are maintained by the province. Some are the property of the Crown in right of the province. All are under the exclusive jurisdiction of the Province. *Provincial Secretary Treasurer of Prince Edward Island v. Egan (1941) 3 D.L.R. 305.* If the highways may be considered as a work or undertaking, they are a work or undertaking separate and distinct from that of Appellant in no way belonging to him or under his control. They are not therefore transferred to the jurisdiction of the Parliament of Canada *as part and parcel* of his work or undertaking if his be so transferred.

If provincial highways are a local work or undertaking to effect the transfer of exclusive legislative jurisdiction over them from the province to the Parliament of Canada it must be shown that they are such a local work or undertaking as is contemplated within the exceptions enumerated in clause (a) of head 10 of section 92 of the British North America Act, 1867. It must be shown that because New Brunswick or any other province has connected its highways with those of another province it has thereby lost legislative jurisdiction over them with the practical result that provincial highways are now under the exclusive legislative jurisdiction of the Parliament of Canada.

That the Imperial Parliament had no such intention when it enacted the British North America Act 1867, is borne out by the fact that " roads " and " highways " are conspicuous by their absence from clause (a) of head 10 of section 92, enacted as it was at a time when transportation by road or highway was the dominant means of travel between the Provinces. It is also significant that neither in the said clause (a), nor elsewhere in the Act is mention made as to the clause being binding upon the Crown.

If highways may not be considered as a local work or undertaking but merely as a right to pass and repass, control over that right in New Brunswick remains it is submitted, with the New Brunswick legislature, a phase that will be considered more fully later in this factum.

In the New Brunswick Appeal Division Appellant based his claim to the use of the provincial highways and his primary attack on the constitutionality of the New Brunswick legislation in question upon a contention that the province has no right to legislate in such a manner as to preclude the use of a provincial

highway to an undertaking placed under the jurisdiction of the Parliament of Canada. In support of his contention he cited, among others, the following cases : *Toronto Corporation v. Bell Telephone Co. of Canada* (1905) 74 L. J. P. C. 22 ; *Great West Saddlery Co. v. The King* (1921) 2 A. C. 91 ; *John Deere Plow Co. v. Wharton (1915) A. C. 330* and *Beauport v. Quebec Railway, Light & Power Co.* (1945) 1 D. L. R. 145.

It is submitted that these authorities do not have application in the present case. Any right that Appellant may have or acquire to use the highways of New Brunswick is a common law right bestowed on him as a member of the public in New Brunswick. The right is granted him under the laws of New Brunswick.

In the cases cited above the rights or power concerned stemmed or flowed from the Parliament of Canada. It is submitted that the basis of these decisions rests on the doctrine or theory that a provincial legislature cannot defeat sterilize or impair to a substantial degree powers validly granted by the Parliament of Canada.

Rinfret, J. brings forward this point in Beauport v. Quebec Railway, Light & Power Co. (supra) at page 150 when he says :

" Most of what was said and decided by this Court in the Montcalm Land case, supra, equally applies in the premises. As was said by Mr. Justice Newcombe at p. 156 D. L. R., p. 289 C. R. C., p. 559 S. C. R. of the report of that case :

' One must look to what the respondent's claim involves ; *it is* nothing less than *provincial statutory compulsion of a Dominion railway corporation*, either to exercise powers which parliament has not conferred, or, in the exercise of its competent Dominion powers, to submit to provincial review and regulation, *followed* in either case *by the consequence that, for failure to comply* with the provincial order, *the company may forcibly be deprived of its property, powers, rights and management*, and ultimately subjected to an action for its dissolution ; and this notwithstanding what is undoubtedly true that neither the constitution and powers of the company nor its authorized undertaking, are subject to the legislative authority of the province. It is needless to say that these things cannot be done'."

Davis, J. brings forward the point at page 155 as follows :

" I think the principle is that stated in the John Deere Plow case, 18 D. L. R. 353 at p. 360 (1915) A. C. 330 at p. 341 :

' It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that *the status and powers of a Dominion company as such cannot be destroyed by provincial legislation*'."

Rand, J. at page 163 likewise brings forward the point when he says :

" Nor do I think there can be attributed to the last clause of that provision an effect which would nullify the operative part of the subsection (meaning the subsection enacted by the Parliament of Canada granting to the company power to operate auto buses). What was intended to be and was done (meaning by the Parliament of Canada) was the creation of *new powers* in the federal works as such, and not merely the addition of a corporate capacity. The contrary view involves the introduction of a dual control over the essential functions of such an undertaking."

In the present case no status or powers have been bestowed upon the Appellent by the Parliament of Canada. His rights and powers, if any, as a resident of the United States of America, to operate motor buses on the highways of New Brunswick are common law rights bestowed upon him under the law of New Brunswick as a member of the public when in New Brunswick. While the work or undertaking comprising his bus service may, if in existence, be under the jurisdiction of the Parliament of Canada, the Parliament of Canada has given the Appellant no right or power to operate his undertaking on the highways of New Brunswick or elsewhere in Canada. Even " a Dominion company constituted with powers to carry on a particular business . . . . . may find its special activities completely paralyzed as by legislation (meaning provincial legislation) against drink traffic or by laws as to holding land." *Lymburn et al. v. Mayland et al.* (1932) 2 D. L. R. page 6, at page 9.

It is submitted that the right of the Legislature of New Brunswick by statute to modify, curtail or abolish the common law right of the public to use its highways is clear. See *Ontario Hydro-Electric Power Commn. v. Gray (1924)* 55 O. L. R. 339 C. A. (at p. 344), wherein it was held :

" It has long been recognized in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount, and cannot be interfered with even by the Crown itself but only *by parliament or the legislature* . . . . . There is no question but that *the legislature* of Ontario *can by statute modify or abolish that right :* but, if it is to be modified and the rights of the public curtailed or affected, the will of the legislature must be unequivocally expressed."

By Chapter 43 of 1 George VI, 1937, The Motor Carrier Act, 1937, the Legislature of New Brunswick has clearly expressed curtailment of the public right to operate public motor buses on its highways. By section 11 it has provided as follows :

" 11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the province without holding a license from the board authorizing such operations and then only as specified in such license and subject to this Act and the Regulations."

This is a law of general application. It curtails the common law right of any member of the public in New Brunswick to operate a public motor bus in New Brunswick. The Appellant by his claims in substance says that it does not affect his right because his undertaking is under the jurisdiction of the Parliament of Canada, but the Parliament of Canada has given him no rights.

The practical result of his contention becomes apparent. Citizens of the United States of America or of an adjoining province to New Brunswick are placed in a superior position to the public in New Brunswick. They can operate at pleasure public motor buses on the highways of New Brunswick. Fly-by-night operators can operate public motor buses during peak seasons and remove them during slack seasons or on slack days with the result that the local operator, operating under license provided by provincial law and required to maintain a continuous service, may be forced out of business, thus depriving the people of the province of adequate and continuous public motor bus transportation service on their own highways which they constructed and maintain at their own expense.

It is submitted that the Appellant is in precisely the same position as any other member of the public in New Brunswick as respects his common law right to use the highways of New Brunswick under The Motor Carrier Act, 1937. It is further submitted that a contrary view in the final analysis results in a denial to the legislature of the province of the right to close a provincial highway solely because an individual in the United States wishes to operate a public motor bus upon it. The license granted to the respondent in the present case might well in fact have been granted to the Appellant pursuant to the legislative enactment referred to.

The arguments advanced herein apply also in support of The Motor Vehicle Act and Regulation 13 made thereunder. It is submitted that it is the prorogative right of the provincial legislature to control traffic on its highways and to abolish or abrogate the common law right of the public in respect of free passage on its highways.

It is submitted that the present case involves an absence or lack of power upon the part of the Appellant to operate his motor buses on the highways of New Brunswick unless accorded him under the laws of New Brunswick. The result is, of course, that in the complete absence of such a power his business of transporting passengers for gain on the highways of New Brunswick is impossible of performance and no work or undertaking will exist to be transferred to the jurisdiction of the Parliament of Canada under clause (a) of head 10 of section 92 of The British North America Act, 1867.

If the proposed work or undertaking does not exist because the Appellant does not possess motor buses, drivers or the common law right to operate on New Brunswick highways there is no work or undertaking to be transferred. The situation may be otherwise in the case of a Dominion company empowered to operate a highway transportation service by the Parliament of Canada.

There is, however, another and a very important aspect to the case to be considered, and it is this. While clause (a) of head 10 aforesaid has the effect of transferring to the jurisdiction of the Parliament of Canada local works and undertakings " connecting the Province with any other or others of the provinces", the only works or undertakings possible of transfer to the jurisdiction of the Parliament of Canada under the clause as " extending beyond the limits of the province " are those that extend into another province or other Canadian territory. It is submitted that clause (a) has no application in the case of a local work or undertaking extending from a foreign country into a Canadian province or vice versa.

It is submitted that this proposition is clearly borne out by the enactment of clause (b) of the said head 10. If clause (a) includes lines of steamships extending beyond the limits of New Brunswick to a British or foreign country, clause (b) would have no meaning or purpose. It is submitted that there must be attributed, if possible, to every portion of a legislative enactment some meaning or effect, and that the meaning or effect of the said clause (b) is to provide for a case not included in clause (a). Clause (a) must therefore be read in the light of clause (b). The clauses must be read together. The result, it is submitted, is to demonstrate that under clause (a) local works and undertakings that extend beyond the limits of the province into a foreign country or vice versa are not included in the exceptions defined by the clause. In the present case, then, nothing is to be gained to the Appellant under clause (a) aforesaid should he establish that his undertaking extends from the United States, a foreign country, into New Brunswick or vice versa. If his undertaking is not under provincial jurisdiction it cannot be by virtue of that fact. Only on the grounds that it connects New Brunswick with Nova Scotia, or extends beyond the limits of New Brunswick into Nova Scotia, or vice versa, can the said clause (a) be invoked in support of Appellant's contention.

It is submitted that there is a very clear reason for the form and effect of clauses (a) and (b) as above presented. The British North America Act, 1867, was drawn in the colonial days of this nation. Local works and undertakings extending beyond the limits of a province into a foreign country, or vice versa, were and are the subject of treaty or international arrangement. These works and undertakings were not, as such, assigned under the British North America Act, 1867, to the Parliament of Canada. It is submitted that they would at that time be the subject of treaty or international arrangement between the United Kingdom and the foreign country concerned.

Section 132 of The British North America Act, 1867, provides as follows :

> 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

Section 132 of The British North America Act, 1867 bestows on the Parliament and Government of Canada powers necessary to perform the obligations of Canada, or of any province, towards foreign countries arising out of treaties between the Empire and foreign countries. No power to enter into treaties was by the Act conferred upon Canada. During the years Canada's position in this regard has been the subject of evolutionary change and her treaty making powers are today generally recognized within the Empire and by the nations of the world.

The declaration of the Imperial Conference of 1926 has received general acceptance within and without the Empire. It will be recalled that it was therein stated that :

> " They (Great Britain and the Dominions) are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

But while Canada's treaty-making powers are now recognized her power to implement treaties is limited. Insofar as the subject matter of a treaty is under the jurisdiction of the Canadian Parliament, Canada can carry out the terms of the treaty. Insofar as the subject matter of a treaty is under the jurisdiction of the Provincial Legislatures, Canada, by her treaty making powers, is not thereby empowered to implement the treaty. This, it is submitted, is the result of the judgments of the Privy Council in the Canadian constitutional cases reported in 1937.

Returning to a consideration of clause (a) of the said head 10, that portion or segment of Appellant's undertaking in New Brunswick is under provincial jurisdiction. While Canada may enter into a treaty in respect of the international undertaking she has in fact not done so. Should Canada do so, however, any obligations made by her thereunder could not be implemented except by an exercise of the legislative powers of the legislature of New Brunswick. The change or development in Canada's treaty making powers has not in any way affected the scope or meaning of section 132 of The British North America Act, 1867.

It is further submitted that if a foreign operator cannot extend his undertaking into New Brunswick even by treaty or international arrangement, except by an exercise of the legislative powers of the legislature of New Brunswick, it necessarily follows that he cannot extend it into Nova Scotia through the device of representing it as an undertaking connecting New Brunswick with Nova Scotia or extending beyond New Brunswick into Nova Scotia, for he can have no work or undertaking in New Brunswick to extend into or connect with Nova Scotia. If such were not the case the constitutional rights of a province in this regard could be completely destroyed by any foreign operator through the simple device of thrusting his undertaking into a province from the

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United States through or by way of an adjoining province and representing his intrusion into the former province as the result of his having extended his undertaking from the adjoining province or as connecting the two provinces.

It may be that constitutional amendments are necessary or advisable in respect of the powers of implementing treaties involving matters under provincial jurisdiction. It is, however, submitted that the above presents the true constitutional situation with respect to local works and undertakings extending beyond the limits of a province into a foreign country or vice versa. The alternative presents a chaotic situation whereunder the provinces are subject to the uncontrolled intrusion of operators from a foreign country subject to no laws of the realm.

In conclusion it is respectfully submitted that The Motor Carrier Act, 1937, The Motor Vehicle Act, 1934 and Regulation 13 thereunder are intra vires of the Legislature of New Brunswick ; that the answers given to the said questions submitted to the learned judges of the New Brunswick Supreme Court, Appeal Division, are correct in law ; and that this appeal should be dismissed with costs in this court.

DATED this 6th day of September, 1950.

J. Edward Hughes
Of Counsel for the
Attorney General of New
Brunswick, Intervenant
in the Action.

Factum of Attorney General of British Columbia Intervenant in the Appeal

The Attorney General of the Province of British Columbia respectfully adopts the Statement of Facts and Argument contained in the Factum of the Attorney General of New Brunswick filed herein.

DATED this 29th day of September, 1950.

H. ALAN MACLEAN,
Of Counsel for the Attorney General of British Columbia.

Factum of the Attorney General of Prince Edward Island Intervenant in the Appeal

The Attorney General for Prince Edward Island adopts and relies on the Factum of The Attorney General for the Province of New Brunswick filed herein.

DATED this 14th day of October, A.D., 1950.

JAMES E. WELLS
Of Counsel for the Attorney General of Prince Edward Island.

Factum of Attorney General of Alberta Intervenant in the Appeal

The Attorney General of the Province of Alberta respectfully adopts the Statement of Facts and Argument contained in the Factum of the Attorney General of New Brunswick filed herein.

DATED this 22nd day of September, 1950.

J. C. OSBORNE,
Of Counsel for the Attorney General of Alberta.

Factum of Canadian National Railway Company and Canadian Pacific Railway Company

PART I.

1. This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick dated 1st May, 1950, answering three questions raised for the opinion of that Court. Two of the questions were raised by an Order of Hughes J. dated 17th January, 1950 (Record p. 8), the third by agreement of counsel during the course of argument before the Appeal Division (Record p. 17). The questions and answers are set out at page 15 of the Case.

2. By Order of the Supreme Court of Canada dated 13th November, 1950, Canadian National Railway Company and Canadian Pacific Railway Company (hereinafter for convenience referred to as " the railways ") have been granted leave to intervene in the appeal.

3. The railways are concerned in this appeal for many reasons.

Their operations, including their services and rates, are, with a few unimportant exceptions, uniformly regulated and controlled by the Railway Act (R.S.C. 1927, Chap. 170) and by the Board of Transport Commissioners for Canada. For example, they are required to give adequate and suitable accommodation for traffic (Sec. 312); they may not abandon a line of railway without the approval of the Board (Sec. 165A); and their rates are subject to disallowance by the Board if such rates are shown to be unreasonable or unjustly discriminatory (Sec. 325).

The railways are in active competition with the operators of motor vehicles carrying passengers and freight for hire. Such operators of motor vehicles are now subject to some extent to regulation under statutes passed by the Provincial Legislatures but are not now subject to any regulation or control by any act of the Parliament of Canada. Many of such operators of commercial motor vehicles are engaged in transport of passengers and freight as between Provinces and as between Canada and the United States. Attempts have been made by certain provinces to impose some measure of regulation and control over such operations but there has been no uniformity in such regulation or control either as to intra-provincial operations or as to interprovincial or international operations. For

example, in some provinces commercial motor vehicle operators carrying freight for hire are completely free from regulation and control except such regulation and control as is established for the safety of their operation upon the highways and to produce revenue for the provinces. On the other hand, some of the provinces have fairly extensive regulation and control of such operations. It is the view of the railways that commercial motor vehicle operations should be subject to effective regulation and control.

4. There would seem to be no material difference between interprovincial and international transportation by commercial motor vehicles and similar transportation by railways. Nor would there seem to be any material difference between intra-provincial transportation by commercial motor vehicles, where such transportation is incidental to and an integral part of interprovincial and international transportation operations, and similar intra-provincial transportation by Dominion railways.

5. The facts are set forth in the Order of Mr. Justice Hughes dated 17th January, 1950 (Record p. 8) and it would not appear necessary to repeat or summarize them here.

PART II.

6. The railways submit that the judgment below is erroneous in the following respects :

(1) In answering question 1 in the terms it did. That question should have been answered in the negative.

(2) In answering question 2 in the terms it did. If the amending Act of 1949 on its true interpretation makes The Motor Carrier Act applicable to undertakings which are within the legislative jurisdiction of the Parliament of Canada, that question should have been answered in the negative. If, on the other hand, that Act on its true interpretation does not make The Motor Carrier Act applicable to such undertakings, that question should have been answered in the affirmative.

(3) In answering question 3 in the terms it did. In so far as Regulation 13 and the sections of The Motor Vehicle Act prohibit the proposed operations, that question should have been answered in the negative. In so far as such

provisions merely affect but do not prohibit the proposed operations and are laws of general application within provincial jurisdiction, that question should have been answered in the affirmative.

PART III.

7. *Question I.*—

" Are the operations or proposed operations of the Defendant within the Province of New Brunswick or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act (1937) and amendments thereto, or orders made by the said Motor Carrier Board ? "

(Answered : " Yes, prohibited, until the Defendant complies with the provisions of the Act.")

8. The motor bus business of the Appellant is an " undertaking " within the meaning of section 92 (10) (a) of the British North America Act.

In re Regulation and Control of Radio Communication in Canada (1932) A.C. 304 at p. 315.

Quebec Railway Light and Power Co. v. Beauport (1945) S.C.R. 16 at p. 24.

Luscar Collieries v. McDonald (1927) A.C. 925 at pp. 932–3.
Canadian Pacific Railway Company v. Attorney-General for British Columbia (1950) A.C. 122 at pp. 142–3.

9. That undertaking connects the provinces of New Brunswick and Nova Scotia and extends beyond the limits of New Brunswick into the United States. It is, therefore, excepted from the " Local Works and Undertakings " assigned exclusively to the legislatures of the provinces and, by virtue of section 91 (29) of the British North America Act, is a matter within the exclusive jurisdiction of the Parliament of Canada.

10. If the undertaking of the Appellant is not a " local " work and undertaking so as to come within section 92 (10), it falls within the exclusive jurisdiction of the Parliament of Canada by virtue of

the general provisions of section 91, as being a matter not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces.

John Deere Plow Company Ltd. v. Wharton (1915) A.C. 330 at pp. 339–40.

11. Since the undertaking of the Appellant is within the exclusive jurisdiction of the Parliament of Canada, all matters relating to the physical interference with the Appellant's works and to the management of that undertaking are wholly withdrawn from provincial authority.

The provisions of The Motor Carrier Act empower the Motor Carrier Board to regulate and control matters relating to the physical interference with the works and to the management of all public motor bus undertakings operated in New Brunswick. In so far as those provisions purport to empower that Board to regulate and control the operations or proposed operations of the Appellant in New Brunswick they are ultra vires and are not operative or binding.

Canadian Pacific Railway Company v. Notre Dame de Bonsecours (1899) A.C. 367 at p. 372.

In re Alberta Railway Act (1913) 48 S.C.R. 9 per Duff J. at p. 38.

Great West Saddlery Co. v. The King (1921) 2 A.C. 91 at 124.

12. The transportation business or undertaking of the Appellant cannot be regarded as being composed of two separate businesses, one for the purpose of transporting passengers between New Brunswick and Nova Scotia and between those provinces and the United States, the other for the purpose of transporting passengers between points within New Brunswick. The undertaking of the Appellant is one single undertaking. No division can be made between the interprovincial and international activities of the Appellant and the local activities incidental thereto that are performed wholly within New Brunswick. The submissions in paragraphs 9 to 13 hereof apply equally to the incidental local activities of the Appellant.

Toronto v. Bell Telephone Co. of Canada (1905) A.C. 52.

13. For the above reasons the railways submit that question 1 should be answered in the negative.

14. *Question* 2.—

" Is 13 George VI Chapter 47 (1949) intra vires of the legislature of the Province of New Brunswick ? "

(Answered : " Yes, in respect of this Defendant." Richards, C.J. and Hughes, J. answering simply " Yes.")

15. The operation of The Motor Carrier Act immediately prior to the amending Act of 1949 referred to in this question, was by express words limited to transportation undertakings carried on wholly within New Brunswick. The amending Act provides for the deletion of the words which imposed this limitation on the operation of The Motor Carrier Act. The amending Act appears to be open to two possible interpretations.

16. One interpretation is that it extends the application of The Motor Carrier Act to interprovincial and international transportation undertakings. If that be the true interpretation, the amending Act is ultra vires of the legislature of the province and question 2 should be answered in the negative. For the reasons given in dealing with question 1 Parliament only can regulate and control an interprovincial and international transportation undertaking.

17. The other possible interpretation of the amending Act is that it does not extend the application of The Motor Carrier Act because it is to be presumed that the legislature did not intend to exceed its jurisdiction.

Macleod v. Attorney-General for New South Wales (1891) *A.C.* 455 at p. 457.

If this be the true interpretation, the amending Act is intra vires of the legislature of New Brunswick, but it has not the effect of making The Motor Carrier Act valid and operative in respect to the undertaking of the Appellant. In that view question 2 should be answered in the affirmative with an appropriate qualification.

18. *Question* 3.—

" Are the proposed operations prohibited or in any way affected by Regulation 13 of The Motor Vehicle Act, Chapter 20 of the Acts of 1934 and amendments, or under Section 6 or 53 or any other sections of The Motor Vehicle Act ? "

(Answered : " Yes, until the Defendant complies with the provisions of the Act, and the Regulations made thereunder.")

19. A transportation undertaking within the exclusive jurisdiction of Parliament may be subject to provincial laws of general application, such as laws imposing taxes and laws providing for safety of operation, but a provincial legislature cannot validly enact for the enforcement of such laws sanctions which if applied would sterilize the undertaking and destroy the means whereby the undertaking is carried on.

10 *John Deere Plow Company Ltd. v. Wharton* (1915) A.C. 330.
Great West Saddlery Company Ltd. v. The King (1921) 2 A.C.91.

Lymburn v. Mayland (1932) A.C. 318 at p. 324.
Attorney-General of Alberta v. *Attorney-General of Canada* (1939) A.C. 117.

20. The undertaking of the Appellant for reasons set out in dealing with question 1 is within the exclusive jurisdiction of Parliament. In so far as the Regulation and Sections referred to in this question make it a condition precedent to the operation of the
20 public motor busses of the Appellant that the Appellant secure a permit therefor or obtain registration thereof, that Regulation and those Sections would sterilize the undertaking of the Appellant and destroy the means whereby that undertaking is carried on in New Brunswick and are, therefore, ultra vires of the provincial legislature.

21. In so far, however, as the Regulation and Sections referred to in this question are laws of general application and impose taxes, provide for safety of operation or deal with other matters within provincial jurisdiction but do not prohibit the operation of the
30 motor busses of the Appellant, that Regulation and those Sections are intra vires of the legislature of the province.

22. It follows from the application of the above principles to Regulation 13 under The Motor Carrier Act that the conditions to be set forth in the permit issued by the Department must relate solely to matters within provincial jurisdiction and that the fee to be determined by the Minister must be for the purpose of raising revenues, not for the purpose of regulating or controlling the operation of the Appellant's undertaking.

Canadian Pacific Railway Co. v. Notre Dame de Bonsecours (1899) A.C. 367 at p. 372.

Quebec Railway Light & Power Co. v. Beauport (1945) S.C.R. 16.

23. In so far as Regulation 13 and the Sections of The Motor Vehicle Act prohibit the proposed operations of the Appellant, question 3 should be answered in the negative. In so far as such provisions merely affect but do not prohibit the proposed operations and are laws of general application within provincial jurisdiction, then question 3 should be answered in the affirmative.

C. F. H. CARSON,
Counsel for
Canadian National Railway Company and
Canadian Pacific Railway Company.

Factum on behalf of Maccam Transport Limited

1. Maccam Transport Limited is a body corporate with Head Office at the City of Moose Jaw, in the Province of Saskatchewan, and carries on the business of highway freight transporters in the Provinces of Alberta, Saskatchewan, Manitoba and Ontario.

2. Maccam Transport Limited is concerned in the appeal as an inter-provincial highway carrier of freight and was requested to make an application for leave to intervene by Canadian Automotive Transportation Association, the national organization of the Trucking Industry, which represents, through its provincial affiliates, over five thousand highway transport companies.

3. By Order of the Supreme Court of Canada dated the 17th day of January, 1951, Maccam Transport Limited was granted leave to intervene in this appeal.

4. Highway carriers of freight are subject to such regulations as each provincial legislature deems necessary to control the use of provincial highways. A motor vehicle, whether it be a commercial motor vehicle or a private passenger car, is subject to effective regulations as it passes from one province into another.

5. Compared to the total number of highway transport operators in Canada, only a small number are engaged in inter-provincial carriage of freight and are subject to the rules and regulations of each province over whose highways they pass.

10 6. Maccam Transport Limited respectfully adopts and relies upon the Statement of Facts and Argument contained in the factum of the Respondent.

DATED this 19th day of January, 1951.

F. R. HUME,
Of Counsel for Maccam Transport Limited.

Factum of Carwil Transport Limited Intervenant in the Appeal

Carwil Transport Limited respectfully adopts the Statement of Facts and Argument contained in the Factum of the Respondent filed herein.

20 DATED this 19th day of January, 1951.

CLIFFORD H. HOWARD
Counsel for Carwil Transport Limited, Intervenant.

In the Supreme Court of Canada

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK
APPELLATE DIVISION

BETWEEN

ISRAEL WINNER, doing business under the name and style of MacKenzie Coach Lines *Appellant (Defendant)*

AND

S. M. T. (EASTERN) LIMITED, a duly incorporated company *Respondent (Plaintiff)*

AND

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF NOVA SCOTIA
THE ATTORNEY GENERAL OF NEW BRUNSWICK
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
THE ATTORNEY GENERAL OF ALBERTA
CANADIAN NATIONAL RAILWAY COMPANY
CANADIAN PACIFIC RAILWAY COMPANY
MACCAM TRANSPORT LIMITED AND
CARWIL TRANSPORT LIMITED *Intervenants*

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1. **Appellants' Factum**
2. **Respondents' Factum**
3. **Attorney General of Canada's Factum**
4. **Attorney General of Ontario's Factum**
5. **Attorney General of Quebec's Factum**
6. **Attorney General of Nova Scotia's Factum**
7. **Attorney General of New Brunswick's Factum**
8. **Attorney General of British Columbia's Factum**
9. **Attorney General of Prince Edward Island's Factum**
10. **Attorney General of Alberta's Factum**
11. **Canadian National Railway Company and Canadian Pacific Railway Company's Factum**
12. **Maccam Transport Limited's Factum**
13. **Carwil Transport Limited's Factum**

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