Privy Council Appeal No. 23 of 1952

The Attorney General for Ontario and others - - - *Appellants*

v.

Israel Winner (doing business under the name and style of Mackenzie Coach Lines) and others - - *Respondents*

AND

Israel Winner (doing business under the name and style of Mackenzie Coach Lines) and others - - *Appellants*

v.

S.M.T. (Eastern) Limited and others - - - - *Respondents*

Consolidated Appeals

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1954

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD PORTER]

The problem with which their Lordships are confronted in the present appeal is concerned with the conflicting jurisdiction of the Parliament of Canada on the one part and on the other part of the legislation and regulations of the Province of New Brunswick made under its local acts.

The parties immediately concerned were originally (1) as defendant one Winner who resides in the United States of America and was in the business (*inter alia*) of operating motor buses for the carriage of passengers and goods for hire or payment from Boston through the State of Maine and the province of New Brunswick to Glace Bay in the province of Nova Scotia and intermediately, and (2) as plaintiff the respondent S.M.T. Ltd. which holds licenses granted by the Motor Carrier Board of the province of New Brunswick to operate motor buses for hire or payment over certain highways which need not be further specified between St. Stephen and the City of St. John both in New Brunswick.

In substance the plaintiff's claim was for an injunction against the defendant restraining him from embussing and debussing (i.e. taking up or setting down) passengers within the province of New Brunswick and a declaration that he had no right to do so.

In his defence the defendant stated that he had in fact embussed and debussed passengers in the province and that he intended to continue doing so unless and until some Court of competent jurisdiction should declare that he was legally debarred therefrom.

Upon these contentions Hughes J. of the Chancery Division of the Supreme Court of New Brunswick gave no decision but propounded certain questions of law to be raised for the opinion of the Supreme Court of New Brunswick, Appellate Division. He further ordered that, for the purpose of this opinion, the facts relevant to the issues to be determined should be deemed to be those set out in his order.

Those essential to the matter now in question are as follows:—

1. The plaintiff is a company incorporated under and by virtue of the New Brunswick Companies' Act and is in the business (*inter alia*) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the Province of New Brunswick.

2. The plaintiff holds licences granted by the Motor Carrier Board of the Province 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.

3. The plaintiff by its public motor buses maintains a daily passenger service over the routes set out in paragraph (2) hereof.

5.—(*a*) On the 17th June, 1949, on the application of the defendant the Motor Carrier Board granted a licence to the defendant, permitting him to operate public motor buses from Boston in the State of Massachusetts through the Province of New Brunswick on Highways 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 1st August, 1949.

(*b*) At the time of making the said application, the defendant challenged the validity of 13 George VI Chapter 47 (1949), and the Motor Carrier Act, 1937, as affected thereby, as being *ultra vires* of the Legislature of the Province of New Brunswick.

(*c*) The Motor Carrier Board made no specific ruling on the defendant's challenge as set out in sub-paragraph (*b*), but acted under 13 George VI Chapter 47 (1949).

6. The defendant by his motor buses maintains a regular passenger service over the routes set out in paragraph 5 (*a*) hereof.

7. Since 1st August, 1949, the defendant has continually embussed and debussed passengers within the Province of New Brunswick and it is his intention to continue to do so unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

8. The defendant intends to carry passengers not only from points without the Province of New Brunswick to points within the said Province and vice versa, but also, in connection with and incidental to his operations as more particularly described in paragraph (9) hereof, to carry passengers from points within the said province to destinations also within the said province, unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

9.—(*a*) The business and undertaking of the defendant consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation 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.

(*b*) The said business and undertaking is conducted by the defendant over that portion of its route which lies between the said City of Boston and the Town of Calais, Maine, under a certificate granted by Interstate Commerce Commission (a Federal commission of the United States of America having jurisdiction *inter alia*, over inter-state transportation).

(*d*) The Motor Carrier Board of the Province of New Brunswick, on the 17th of June, 1949, on the application of the defendant as set forth in paragraph 5 hereof, purported to license the operation of the defendant, in the Province of New Brunswick, as follows:

"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 Highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Novia Scotia and return, but not to enbus or debus passengers in the said Province of New Brunswick after 1st August, 1949."

(*e*) The Board of Commissioners of Public Utilities for the Province of Nova Scotia has purported to approve the defendant's operations in the Province of Nova Scotia over the following routes:

"(*a*) New Brunswick Border to Glace Bay, via Route No. 4—Wentworth Valley and Truro.....302 miles;

(*b*) New Brunswick Border to Glace Bay, via Route No. 2—Parrsboro and Truro.....319 miles;

(*c*) New Brunswick Border to Glace Bay, via Route No. 6—Pugwash, Wallace, Pictou and New Glasgow.....292 miles;

(*d*) Truro to Halifax.....64 miles (3 miles of which is within the corporate limits of the Town of Truro and City of Halifax)."

(*f*) Subsequently the said Board of Commissioners of Public Utilities for the Province of Nova Scotia amended the certificate granted to the defendant as set out in sub-paragraph (*e*) hereof as follows:

"Operation of this route is permitted To Be Suspended from 12th January, 1949 until 1st May, 1949."

(*g*) The defendant in fact, operates as a public motor carrier between the City of Boston aforesaid, the Town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, a copy of which is hereunto annexed marked "A," between the 1st day of May and the 15th day of December in each year, the period of time covered by the certificates granted by the Interstate Commerce Commission.

(*j*) Incidentally to its operations as aforesaid, the defendant proposes to pick up, within the Province of New Brunswick, passengers and their baggage having a destination also within the Province of New Brunswick.

The questions for the opinion of the Supreme Court of New Brunswick were:—

(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 Carrier Board?

(2) Is 13 Geo. VI chapter 47 (1949) *intra vires* of the legislature of the Province of New Brunswick?

To these questions there was by agreement between the parties added what may be described as an enlargement of the first question but may perhaps be more conveniently dealt with (as it was dealt with in the Supreme Court of New Brunswick) as forming a third question viz.:—

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

In order to appreciate the basis upon which it was thought necessary to make these enquiries, it is essential to set out a number of the provisions of the relevant Acts but their Lordships have not thought themselves required to deal with the third question or to transcribe any portion of the Motor Vehicle Act of 1934 since admittedly no action has been taken under that Act and moreover as the Supreme Court of New Brunswick have pointed out the principles upon which any questions arising under that Act are to be determined involve considerations similar to those applicable to the case of the Motor Carrier Act. Nor have their Lordships considered it desirable to set out the whole of the latter Act. Essential sections have alone been transcribed. The bearing of other sections can best be dealt with where they affect the argument, and the amendments of the Motor Carrier Act which have been made from time to time can best be treated in the same way.

The Provisions which their Lordships feel constrained to set out are as follows:—

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

(*a*) "Board" means the Motor Carrier Board as hereinafter constituted.

(*b*) "Licence" means a licence granted to a motor carrier under this Act.

(*c*) "Licensed Motor Carrier" means a motor carrier to whom a licence has been granted by the Board under this Act.

(*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. [am 1939, c. 37, 1949, c. 47.]

(*h*) "Regulations" mean and include the rules and regulations and general orders made by the Board under this Act.

3.—(1) The members of the Board of Commissioners of Public Utilities are hereby constituted a Board for the purposes of this Act and shall be known as the Motor Carrier Board. The Chairman and Secretary of the said Board of Commissioners of Public Utilities shall be, respectively, the Chairman and Secretary of The Motor Carrier Board.

(2) In the absence of any member of the Board from a regularly constituted meeting thereof the Secretary shall sit and perform the duties of a member of the Board.

(3) Without limiting any powers, duties, authority or jurisdiction conferred or imposed by this Act, all powers, duties, authority and jurisdiction as are vested in the Board of Commissioners of Public Utilities for common carriers are hereby vested in the Board over motor carriers except as otherwise specifically provided in this Act.

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.

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.

9. If at any time conditions are such that in the opinion of the Chief Highway Engineer, a highway is being or would be damaged by the operation of any public motor bus or public motor truck, the Chief Highway Engineer may order an immediate discontinuance of operation on such highway until further order.

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

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, 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 and may from time to time repeal, alter and amend any such orders, rules and regulations. All general regulations shall be subject to the approval of the Governor in Council and on being approved shall be published in The Royal Gazette, am. 1940, c. 11."

The Act was originally passed in 1937 but certain amendments have been made in it since that date. Two alterations in section 4 may be referred to in as much as some reliance was placed upon them as assisting in the construction of the provisions of the Act. Originally the section ended "over specified routes *and* between specified points within the province".

The alteration from "and" to "or" in their Lordships' opinion is immaterial to any question which they have to decide. As to the omission of the words "within the province" they agree with the Supreme Court of Canada that, whatever may have been in the mind of the Provincial authorities in deleting them, those words must be implied inasmuch as the province can exercise no authority over another province or over a foreign country.

The vital question for their Lordships' determination is what restrictions are or can be placed by the Province of New Brunswick upon inter-state or international undertakings by reason of the provisions of the Motor Carriers Act, and whether the terms of the licence actually granted to Mr. Winner are authorised under that Act.

The powers entrusted to the Dominion and Province respectively are those set out in sections 91 and 92 of the British North America Act.

Well known as those provisions are their Lordships think that the matter is clarified by setting out the relevant provisions of section 92, omitting however subsection 16 inasmuch as that subsection in the present case adds nothing to the arguments which depend upon the wording of subsection 10.

"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:

(13) Property and civil rights in the Province."

It is now authoritatively recognised that the result of these provisions is to leave Local Works and undertakings within the jurisdiction of the Province but to give to the Dominion the same jurisdiction over the excepted matters specified in (*a*), (*b*) and (*c*) as they would have enjoyed if the exceptions were in terms inserted as one of the classses of subjects assigned to it under section 91: see *City of Montreal* v. *Montreal Street Rly.* [1912] A.C. 333 at p. 342.

The Supreme Court of the Province answered all three questions and at the expense of repetition but for the sake of clarity their Lordships again set out the questions inserting the answers given by that Court:—

"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."

From that decision an appeal was taken by Mr. Winner to the Supreme Court of Canada by leave of the Supreme Court of New Brunswick. Meanwhile the Attorney-General of New Brunswick gave notice of his intention to intervene and at a later time pursuant to Orders made by the Supreme Court of Canada the Attorney-Generals of Canada and of the Provinces of Ontario, Quebec, Nova Scotia, British Columbia, Alberta and Prince Edward Island, together with Canadian National Railway Company, Canadian Pacific Railway Company, Maccam Transport Company and Carwil Transport Limited intervened.

When the matter came to be considered by the Supreme Court of Canada, that Court pointed out that it was concerned not with a reference but with an action, that the Claim was in its origin made by one Motor Carrier against another Motor Carrier asking that he be prohibited by injunction from taking up and setting down passengers in the province of New Brunswick and that the questions asked involved the consideration of matters outside those involved in the decision of the dispute raised by the pleadings.

The Chief Justice indeed took the view that the only power of the province was to deal with the appellant under the Motor Vehicles Act since (1) by S. 22 the provisions of the Motor Carrier Act were to be deemed to be in addition to the provisions of the Motor Vehicles Act ; (2) the Motor Vehicles Act provided for the treatment of non-residents whereas the Motor Carrier Act did not ; (3) in the case of non-residents therefore the Motor Carrier Board has no authority to give or withhold or limit the terms of a licence ; (4) there was no evidence or contention that Mr. Winner had not complied with the provisions of the Motor Vehicles Act and (5) there was therefore no ground on which the Court could grant an injunction. The other members of the Court agreed with the Chief Justice that there was no reference and that the sole question for their determination was whether as between the two parties the one could obtain as against the other an injunction prohibiting him from picking up or setting down passengers within the province. In their view, however, the provisions of the Motor Carrier Act affected the position of a foreigner and the dispute between the parties was as to whether under those provisions or by the terms of their licence the Board had power to prohibit Mr. Winner from embussing or debussing passengers within the province of New Brunswick. They did not determine that the Board had no power to issue a licence to a non resident, and accordingly based their decision upon a consideration as to whether the Motor Carrier Act or the terms of the licence were authorised by the powers given to a province under the British North America Act.

Their Lordships are not prepared to hold that the Board lack authority to deal with residents in provinces or countries other than New Brunswick or to decide that the provisions of the Motor Carrier Act have no application to the case. Nor indeed was any such contention put before them. They therefore proceed to discuss the problem whether the Motor Carrier Act or the licence is *ultra vires* the jurisdiction of the province.

It was on this basis that the matter was dealt with by the Supreme Court of Canada and accordingly that Court did not answer the individual questions put to them but summed up their conclusions in the following order :—

> " And this Court, proceeding to render the judgment which should have been rendered by the said Supreme Court of New Brunswick, Appellate Division, did order and adjudge that the answer to such parts of the questions submitted as it is considered necessary to answer for the disposition of the issues properly raised in the pleadings is as follows :—
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> 1. It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from bringing passengers into the Province of New Brunswick from outside said province and permitting them to alight or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage ; but except as to passengers to whom stop-over privileges have been

> extended as aforesaid it is within the legislative powers of the Province of New Brunswick by the Statutes and Regulations in question, and within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from carrying passengers from place to place within the said Province incidentally to his other operations."

It will be observed that the Order in question adopts a compromise which does not appear to have been contended for by either side viz., whilst permitting the taking up or setting down of passengers engaged in an inter-provincial or inter-national journey, it prohibited the carrying of persons between two points where the journey was wholly within the province.

From that decision there was an appeal by special leave to their Lordships' Board by the Attorney-General of Ontario and others against that part of the judgment which permitted any kind of picking up or setting down within the province of New Brunswick whether in the course of a journey beginning outside the province and ending within it or in the course of a journey beginning within it and ending without the province. There was also a cross-appeal by Mr. Winner and others against the prohibition of purely intra-state traffic i.e. carriage from one point within the province to another point also within it.

Before their Lordships when dealing with the matter of the appeal it was urged (1) that Mr. Winner's business did not come within the exception contained in section 92 (10) (*a*) and (2) in any case the province as owner of or as being in control of its highways had jurisdiction over them not only to licence operations upon them but to regulate them in all respects. By virtue, it was said, of the powers of the province to control provincial highways and traffic, the Motor Carrier Board had power to grant or refuse a licence to Mr. Winner at their discretion. It was acknowledged that it had in fact granted him a licence but asserted that the condition attached to the licence was merely a condition upon which he became entitled to operate upon the highways of the province, not a regulation of his business or undertaking.

The first proposition involves a close and careful consideration of the terms and effect of section 92 (10) (*a*).

The argument was put in a number of ways. In the first place it was said that works and undertakings must be read conjunctively, that the subsection has no operation unless the undertaking is both a work and an undertaking—the former a physical thing and the latter its use.

There was it was maintained in the present instance no work and the existence of a work was an essential element in order to make the subsection applicable. The necessity for the existence of both elements might, it was said, be illustrated by considering the case of a railway where there was both a track and the carriage of goods and passengers over it, and in construing the words " works and undertaking " regard must be paid to the words associated with them in the subsection.

Their Lordships do not accept the argument that the combination of a work and an undertaking is essential if the subsection is to apply. Perhaps the simplest method of controverting it is to point out that the section begins by giving jurisdiction to the provinces over local works and undertakings. If then the argument were to prevail, the province would have no jurisdiction except in a case where the subject matter was both a work and an undertaking. If it were not both but only one or the other the province would have no authority to deal with it and at any rate under this section local works which were not also undertakings and local undertakings which were not works would not be subject to the jurisdiction of the province—a result which so far as their Lordships are aware has never yet been contemplated. Moreover in subsection 10 (*c*) the word " works " is found uncombined with the word " undertakings ", a circumstance which leads to the inference that the words are to be read disjunctively so that if

either works or undertakings connect the province with others or extend beyond its limits, the Dominion and the Dominion alone is empowered to deal with them.

The case of steamships is an even more potent example of the difficulty of reconciling the suggested construction with the wording of the section. Lines of steamships between the province and any British or foreign country can carry on their operations without the existence of any works. The only connecting link which they provide is by passing to and fro from the one to the other. Their Lordships must accordingly reject the suggestion that the existence of some material work is of the essence of the exception. As in ships so in buses it is enough that there is a connecting undertaking.

It is true and was contended that it is possible to postulate that section 92 (10) has a limited scope and deals only with matters which are both works and undertakings. Works alone and undertakings alone are in this aspect entrusted to the province under subsection (13) as being property and civil rights or under (16) as being matters of a merely local or private nature in the province. It was argued accordingly that jurisdiction over interconnecting works and undertakings is given to the Dominion under the general words inserted at the beginning and end of section 91 but not under section 92 (10). In terms however the language of sect. 92 (10) (*c*) embraces a wider subject matter and in their Lordships' view is not confined to so limited a construction. All local works and all local undertakings are included under the phraseology used and it is in their Lordships' opinion immaterial that *ex abundante cautela* they are again covered by subsection (13).

If the province is given authority over both local works and local undertakings it follows that the exceptional works and undertakings in subsection (10) (*a*) likewise comprise both matters.

Some illumination is, as their Lordships think, given by a consideration of the decision in the *Radio* case (*The Regulation and Control of Radio Communication in Canada* [1932] A.C.304) as expressed in the judgment of the Board at pp. 314 and 315. The question in issue was whether the control of Radio transmission was in whole or in part within the jurisdiction of the Dominion or of a province and it was held that the sole authority resided with the Dominion.

Undoubtedly the main contention in that case was that a convention had been entered into between Great Britain, Canada and other Dominions and Colonies on the one part and foreign countries on the other and that accordingly under the general powers conferred upon it by s. 91 of the British North America Act to make laws for the peace, order and good government of Canada the Parliament of Canada had under the Convention a power similar to that which it would have had under s. 132 if the Convention had been a treaty between the British Empire, as an Entity, and foreign countries.

This aspect of the decision is stressed by their Lordships' Board in the Labour Convention Case [1937] A.C. 326 at p. 351. But that case was concerned with the effect of s. 132 and except incidentally does not mention s. 92.

The Radio case (*supra*) on the other hand expressly applies the provisions of s. 92 (10). "Their Lordships" it is said "draw special attention to the provisions of head (10) of s. 92. Those provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91". After quoting the words of this subsection, the judgment continues "Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (*a*) within both the word 'telegraphs' and the general words 'undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province'".

Later the judgment proceeds to say "undertaking is not a physical thing but is an arrangement under which of course physical things are used".

In their Lordships' view these expressions are directly applicable to the present case. In the Radio case there was no connecting work only a connecting undertaking unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connection.

It is argued that the provinces are entrusted with local works and undertakings subject however to the exception that they must be "other than such as are in the following classes", and that on its true construction the section must mean "other than such *local* works and undertakings as are within those exceptions". The submission goes on to maintain that *ex concessis* Mr. Winner's work or undertaking is not local having no anchorage as it were within the province and for that reason is not within the exception. Their Lordships' Board does not so read the sub-section. In their opinion "other than such" merely means such works and such undertakings as are within the categories thereafter set out.

The argument can be tested by considering its effect upon one of the specific subjects mentioned e.g. railways. A railway is an exception to local works and undertakings because it is included in the words "other than such" etc. But if the appellants' argument is sound the section must mean local works and undertakings other than such local works and undertakings as are in the category of railways: and, as the exception only includes *local* works, it would take local railways out of the jurisdiction of the province, which it does not, and would not comprehend interconnecting railways, which have always been held to be included and the inclusion of which is obviously one of the objects of the subsection.

One further point was put forward upon this aspect of the case. It was suggested that, whatever view be taken of the matters which their Lordships have dealt with, yet Mr. Winner's activity never became an undertaking until he received a licence; until then it was but a project. he could not get to work before he had a licence. It is true, the argument went on, that he had obtained a licence but his licence only permitted him to run through New Brunswick without embarking or disembarking passengers. That was his undertaking and so far as New Brunswick was concerned, it could not be enlarged by a claim that it was an inter provincial or inter national undertaking.

Their Lordships are not prepared to accept the contention that an undertaking has no existence until it is carried into effect or is capable of being lawfully carried out. It may be an undertaking at any rate if the promoter has done everything which was necessary on his part to put it in motion, and has made all the essential arrangements. Indeed the argument that the undertaking did not come into existence until a licence was granted and the transporting actually began is in their Lordships' view inconsistent with the opinion expressed by the Board in *Toronto Corporation* v. *Bell Telephone Coy. of Canada* [1905] A.C. 52 where at p. 58 it is said:—

> "The view of Street J. apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss C.J.O., "the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found

in the case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883) 9 App. Cas. at p. 165, to which the learned Judges of Appeal refer."

In any case Mr. Winner had obtained a licence and has been exercising a business of transportation under it and has not limited his undertaking to the terms of his licence.

To succeed upon this point the appellants would have to say that this is a local work and undertaking because it makes use of the provincial roads, and that the only existing undertaking is one in which the respondent cannot take up or set down passengers in the provinces. In fact, however, another undertaking does exist viz.: that of through carriage and also of picking up and setting down passengers within the province and that undertaking existed from the initiation of Mr. Winner's activities and still exists since, whether rightfully or wrongfully, he has from the start embussed and debussed passengers within the province. That he does so is stated in the facts and whether the picking up and setting down of passengers is lawful or unlawful is the matter which their Lordships have to determine.

On this part of the case therefore the Board agrees with the majority of the Judges of the Supreme Court; and though it is true that the learned Chief Justice does not find it necessary to consider the point he at least has expressed no opinion against it.

The second contention put forward on behalf of the appellants was that whatever their exact legal position with regard to the roads, they admittedly make, maintain and control them; the roads are local works and undertakings constructed and maintained by the province; in that capacity it is entitled to regulate their use in any way it pleases and indeed to prohibit their use if it so wishes. The contention is an important one because if it is true, interprovincial undertakings connecting one province with another are within the jurisdiction of the Dominion, but can be totally sterilized by Acts and regulations of the province curtailing or preventing the use of its roads. It was alleged that the roads are property in the province—as indeed they are—that roads of one province are divided by an imaginary line from those of another province or another nation at the point of meeting: there is therefore no connecting work and, their roads being local, the province has absolute power over their uses i.e. both the method of use and whether they may or not be used at all.

Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.

It would not be desirable nor do their Lordships think it would be possible to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples but in the present case their Lordships are not faced with considerations of this kind nor are they concerned with the further question which was mooted before them viz. whether a province had it in its power to plough up its roads and so make interprovincial connections impossible. So isolationalist a policy is indeed unthinkable. The roads exist and in fact form a connection with other provinces and also, in this case, with another country. Since in their Lordships' opinion Mr. Winner is carrying on an undertaking connecting New Brunswick both with Nova Scotia and the State of Maine there exists an undertaking connecting province with province and extending beyond the limits of the province.

Prima facie at any rate such an undertaking is entrusted to the control of the Dominion and taken out of that of the province. No doubt if it were not for section 90 (10) (*a*) of the British North America Act the province, having jurisdiction over local works and undertakings and over property and civil rights within the province could have prohibited the use of or exercised complete autocratic control over its highways, but the subsection in question withdraws this absolute right where the undertaking is a connecting one. To this limitation some meaning must be

given and their Lordships cannot accept the view that the jurisdiction of the Dominion is impaired by the province's general right of control over its own roads. So to construe this subsection would in their Lordships' opinion destroy the efficacy of the exception.

The limitation of the jurisdiction of Dominion and province have been many times canvassed and litigated both in the Canadian Courts and in the Privy Council. Undoubtedly the province has wide powers of regulation. Many instances were adduced in the course of argument and their Lordships may refer to certain of those most relied upon.

In *Colonial Building & Investment Association* v. *Attorney-General of Quebec* 9 App. Cas. 157 the provincial mortmain laws were said to be contrary to the jurisdiction given to the Dominion in respect of Dominion Companies. The principles relied upon are set out at p. 166 in the following words:—

> "But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz. throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land."

Similar propositions were laid down in *Great West Saddlery Co. Ltd.* v. *The King* [1921] 2 A.C. 91 where the gist of the decision may be taken from the head note where it says:—

> "A Company incorporated by the Dominion under the Companies Act of Canada with power to trade in any province may consistently with sections 91 and 92 of the British North America Act be subject to provincial laws of general application such as laws imposing taxes, or relating to mortmain or requiring licences for certain purposes, or as to the form of contracts."

For the same reasons it was held in *Lymburn* v. *Mayland* [1932] A.C. 318 at p. 324 that a provision prohibiting the selling of the shares of Dominion Companies was not *ultra vires* provincial legislation inasmuch as it did not preclude them from selling their shares unless they were registered but merely subjected them to competent provisions applying to all persons trading in securities.

Both the latter cases however are careful to point out that legislation will be invalid if a dominion company is sterilised in all its functions and activities or its status and essential capacities are impaired in a substantial degree.

What provisions have the effect of sterilising all the functions and activities of a company or impair its status and capacities in an essential degree will of course depend on the circumstances of each case but in the present instance their Lordships cannot have any doubt but that the Act or the licence or both combined do have such an effect on Mr. Winner's undertaking in its task of connecting New Brunswick with both the United States of America and with the province of Nova Scotia.

Nor indeed, whatever may be said of the Act, is the licence a provision applying to all persons: It is a particular provision aimed at preventing Mr. Winner from competing with local transport companies in New Brunswick.

But, it is contended, there are two rights—that of the Dominion and that of the province—one giving power to the one body and the other to the other; and enabling Dominion or province to pass legislation dealing with its own topic: the province with its roads and the Dominion with connecting undertakings. So long as the Dominion has not, as it has not,

passed legislation dealing with the matter, the powers overlap and the province is entitled to enact its own provisions which unless and until the Dominion deals with the matter are valid and enforceable. This argument does not appear to have been presented to the Courts in Canada and their Lordships do not agree with it.

The province has indeed authority over its own roads but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking not the roads which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.

Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict interprovincial traffic. As their Lordships have indicated this does not in any way prevent what is in essence traffic regulation but the provisions contained in local statutes and regulations must be confined to such matters.

In the present case they are not so confined. They do not contain provisions as to the use of the highways—they are not even general regulations affecting all users of them. They deal with a particular undertaking in a particular way and prohibit Mr. Winner from using the highways except as a means of passage from another country to another state. It does not indeed follow that a regulation of universal application is necessarily unobjectionable—each case must depend upon its own facts, but such a regulation is less likely to offend against the limitation imposed on the jurisdiction of the province inasmuch as it will deal with all traffic and not with that connecting province and province. The question as their Lordships see it, and indeed as it was argued, raises the hackneyed consideration what is the pith and substance of the provision under consideration. Is it in substance traffic regulation or is it an interference with an undertaking connecting province and province? Their Lordships cannot doubt but that it was the latter. It obviously sought to limit activities of an undertaking connecting the State of Maine with New Brunswick and New Brunswick with Nova Scotia. It was not mere regulation of road traffic. It is true that the distinction between the jurisdiction of the dominion and that of a province may be a fine one as appears from a comparison of two cases both to be found in [1899] A.C. viz.: *Canadian Pacific Rly.* v. *Bonsecours* at p. 367 and *Madden* v. *Nelson and Fort Sheppard Railway* at p. 626. But except to call attention to the fact that each case must depend on an exact examination of its own facts those decisions are not directly relevant to any point which their Lordships have to decide.

In their Lordships' opinion the action of the province was an incursion into the field reserved by the British North America Act to the Dominion.

In coming to this conclusion their Lordships refrain from deciding whether the Act or the Regulations or both are beyond the powers of the province. It may be that the Act can be so read as to apply to provincial matters only. If this be so the licence given to Mr. Winner is an unauthorised limitation of his rights because it is for the Dominion alone to exercise either by Act or by Regulation control over connecting undertakings.

On the other hand it may be that the Act itself must be construed as interfering with undertakings connecting province with province or with another country.

In either case the province either through the Act itself or through the licence issued in pursuance of regulations made under the Act has exceeded its jurisdiction. The licence indeed may be good as a licence but the limitation imposed in it is *ultra vires and of no effect.*

There remains however the further question whether although the licence cannot be limited in the manner imposed by the Board Mr. Winner can nevertheless as the Supreme Court adjudged be prohibited from taking up and setting down purely provincial passengers i.e. those whose journey both begins and ends within the province.

So far as their Lordships are able to judge none of the parties and none of the interveners suggested such a compromise in any of the Courts in Canada.

Their Lordships might however accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises one within the province and the other of a connecting nature.

Their Lordships however cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

The Supreme Court however approached the question from a different angle. To them a distinction should be drawn between what was an essential and what an incidental portion of the enterprise. In their view the portion which could be shed without putting an end to it did not constitute an essential part of the undertaking and therefore could be dealt with by the province, leaving only the essential part for the Dominion's jurisdiction.

Their Lordships are of opinion that this method of approach results from a misapprehension of the true construction of section 92 (10) (*a*) of the British North America Act. The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

The view of the Supreme Court is succinctly put by Rand J. when he says:—

> "Assuming then that the international and interprovincial components of Winner's service are such an undertaking as head 10 envisages, the question is whether, by his own act, for the purposes of the statute, he can annex to it the local services. Under the theory advanced by Mr. Tennant, given an automobile, an individual can, by piecemeal accumulation, bring within paragraph 10 (*a*) a day-to-day fluctuating totality of operations of the class of those here in question. The result of being able to do so could undoubtedly introduce a destructive interference with the balanced and co-ordinated administration by the province of what is primarily a local matter; and the public interest would suffer accordingly. There is no necessary entirety to such an aggregate and I cannot think it a sound construction of the section to permit the attraction, by such mode, to Dominion jurisdiction of severable matter, that otherwise would belong to the province."

No doubt the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or other provinces but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as interprovincial and the other part as provincial.

The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.

The contention is clearly dealt with by the observations of the Board in the *Bell Telephone* case (*supra*), observations which in their Lordships' opinion have a direct application to the present case and are to be found at p. 59 in the following words:—

> "It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local

business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the appellants."

In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or Regulation.

Of course as has so often been pointed out whether upon the evidence adduced an activity can be adjudged to be local is a matter of law, but once it is decided that it can be local the question whether it is so is one of fact for the relevant tribunal to determine.

In the case under consideration no such question arises, the undertaking is one connecting the province with another and extending beyond the limits of the province and therefore comes within the provisions of section 92 (10) (*a*) and is solely within the jurisdiction of the Dominion.

One note of warning should however be sounded. Their Lordships express no opinion as to whether Mr. Winner could initiate a purely provincial bus service even though it was under the aegis of and managed by his present organisation.

No such question however arises or has been raised. As it is their Lordships will humbly advise Her Majesty that the appeal of the Attorneys General for Ontario Alberta and Prince Edward Island ought to be dismissed (2) that the appeal of Israel Winner Canadian National Railway Company and Canadian Pacific Railway Company ought to be allowed (3) that the order of the Supreme Court ought to be varied by substituting the following answer to such parts of the questions submitted as it considered it was necessary to answer for the disposal of the issues properly raised in the pleadings " 1. It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of The Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking, as described in paragraph 9 sub-paragraphs (*a*), (*g*), (*h*) and (*j*) of the facts set out in the Order of Hughes J. dated 17th January 1950, from bringing passengers into the Province of New Brunswick from outside the said Province and permitting them to alight, or from carrying passengers from any point in the Province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick " (4) that the order of the Supreme Court as to costs ought to stand save that it should be varied by giving Israel Winner the whole instead of two-thirds of his costs of the appeal to the Supreme Court. The costs incurred by Israel Winner in the consolidated appeals to this Board are to be paid by the Attorneys General for Ontario Alberta and Prince Edward Island.

(20225) Wt. 8269—26 150 10/54 D.L.

In the Privy Council

THE ATTORNEY GENERAL FOR ONTARIO
AND OTHERS

v.

ISRAEL WINNER (doing business under the name and style of Mackenzie Coach Lines)
AND OTHERS

AND

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AND OTHERS

v.

S.M.T. (EASTERN) LIMITED
AND OTHERS

Consolidated Appeals

DELIVERED BY LORD PORTER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2

1954