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REYNOLDS v. FOSTER.

Teetzel, J.

I can find no authority indicating that, in the absence of express provision, the law will imply the terms upon which the principal money of a mortgage, agreed to be given, shall be payable. In sec. 369 of Fry, 5th ed., a number of instances, upon authorities cited in the notes, are given, where it has been held that the contract was incomplete, such as when it was not stated from what time an increased rent was to commence; where the contract did not state, either directly or by reference, the length of the term to be granted; where a contract for a lease for lives neither named the lives nor decided by whom they were to be received; where there was a contract for a partnership which defined the term of years, but was silent as to the amount of capital, and the manner in which it was to be provided.

I think that the matter of when and how the principal money was to be payable was such a material part of the agreement that its omission rendered the agreement incomplete, and that it is impossible by implication to supply the omission; and that, therefore, neither judgment for specific performance nor for alternative damages can be awarded.

The action must be dismissed; but, the defendant having failed to support his charge of fraud, there will be no costs.

Action dismissed.

ATTORNEYS-GENERAL FOR THE PROVINCES of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta, v. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA and the Attorney-General for the Province of British Columbia.

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Judicial Committee of the Privy Council, Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Robson.
May 16, 1912.

1. CONSTITUTIONAL LAW—STATUTE AUTHORIZING REFERENCE OF QUESTIONS TO THE FEDERAL SUPREME COURT BY EXECUTIVE FOR OPINION—VALIDITY—BRITISH NORTH AMERICA ACT, 1867, SECS. 91, 92, 101 SUPREME COURT ACT, R.S.C. 1906, CH. 139, SEC. 60.

Section 60 of the Supreme Court Act, R.S.C. 1906, ch. 139, which empowers the Governor-in-Council to refer to the Supreme Court of Canada for their opinion questions either of law or of fact, is within the legislative jurisdiction of the Parliament of Canada.

[*Re References by the Governor-in-Council* (1910), 43 Can. S.C.R. 536, affirmed on appeal.]

Statement

THIS was an appeal from a judgment of the Supreme Court of Canada (Justices Girouard and Idington dissenting) of October 11, 1910.

Sir Robert Finlay, K.C., *Wallace Nesbitt,* K.C., (of the Canadian Bar), *A. Geoffrion,* K.C., (of the Canadian Bar), and *Geoffrey Lawrence,* for the appellants.

E. W. Newcombe, K.C. (Deputy-Minister of Justice for Canada), and *A. W. Atwater,* K.C., for the Dominion of Canada.

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The suit raised an important question—namely, whether the Governor-General of Canada has power under the Constitution of the Dominion to frame and refer to the Supreme Court for their opinion questions as to the Constitutional powers of the Provinces, the effect of Provincial statutes, and other matters of importance.

The Governor-General in Council, purporting to act under section 60 of the Supreme Court Act, 1906, referred to the Supreme Court certain questions as to the powers *inter se* of the Canadian Parliament and the Legislatures of the Provinces to incorporate companies, and as to the effect of such incorporation. The questions thus propounded were framed to obtain the opinion of the Supreme Court as to whether companies incorporated under Provincial statutes have power or capacity to do business outside the territorial limits of the incorporating Province. They affect the standing of a great number of companies incorporated by the Provinces since the Confederation in 1867, and now carrying on business in two or more Provinces, and they may also concern the legislative control over companies incorporated in the several colonies before their entry into Confederation. Although the questions are of such vital importance to the Provinces, they complain they were not consulted in the framing of them. Every previous reference under section 60 of the Supreme Court Act has been made with the consent of the Provinces concerned, but the question of jurisdiction has never before been directly raised or decided. At the same time the Governor-General in Council referred to the Supreme Court certain other questions as to the competency of the Provincial Legislature of British Columbia to authorize the Government of that Province to grant exclusive fishery rights in certain inland waters and parts of the sea, and as to the validity and effect of the Insurance Act, 1910, passed by the Parliament of Canada.

The Attorneys-General for seven of the Canadian Provinces protested against the jurisdiction of the Supreme Court to entertain any of those references, and applied that they should be struck out. They contended that the British North America Act did not authorize the Parliament of Canada to enact section 60 of the Supreme Court Act, which, they submitted, was therefore *ultra vires* and was a direct interference with the exclusive power bestowed on the Provincial Legislatures by the British North America Act. The Dominion, on the other hand, contended that no such conflict or difficulty arose.

The matter was argued before the Supreme Court which, by a majority of four Judges against two, decided that they had jurisdiction to entertain and answer the references submitted to them by the Governor-General in Council. From that opinion the present appeal was preferred.

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London, May 16, 1912. The LORD CHANCELLOR in delivering their Lordships' judgment said the real point raised in this

most important case was whether or not an Act of the Dominion Parliament authorizing questions either of law or fact to be put to the Supreme Court and requiring the Judges of that Court to answer them on the request of the Governor in Council was a valid enactment within the powers of that Parliament. Much care and learning had been devoted to the case, and their Lordships were under a deep debt to all the learned Judges who had delivered their opinions under this anxious controversy.

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. There could be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the other hand covered the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points had arisen, and might hereafter arise, upon these provisions of the Act which drew the dividing line between what belonged to the Dominion or to the Province respectively. An exhaustive enumeration being unattainable (so infinite were the subjects of possible legislation), general terms were necessarily used in describing what either was to have, and with the use of general terms came the risk of some confusion, whenever a case arose in which it could be said that the power claimed fell within the description of what the Dominion was to have, and also within the description of what the Province was to have. Such apparent overlapping was unavoidable, and the duty of a Court of Law was to decide in each particular case on which side of the line it fell in view of the whole statute.

In the present case, continued his Lordship, quite a different contention is advanced on behalf of the Provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of Provincial rights, but not because the power of asking such questions belongs exclusively to the Provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a Provincial Legislature within its own Province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

Broadly speaking, the argument on behalf of the Provinces proceeded upon the following lines. They said that the power

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to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court and, therefore, of grave prejudice to the rights of the Provinces and of individual citizens. Any question, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it with their reasons. Though no direct effect is to result from the answers so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal.

When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights. This view, which was most powerfully presented, has a twofold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned.

A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an

Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of his Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For, whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and, obviously, bestowed by the British North America Act. Indeed, it might ensue from the breach of almost any power.

It is then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the 101st section the Dominion is enabled to establish a Supreme Court of Appeal from the provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the Provincial Courts. But of any power to ask the Court for its opinion, there is no word in the Act. All depends upon whether such a power is repugnant to that Act.

The provinces by their counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the Provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body, according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is

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intended to be similar, as recited in the British North America Act, 1867. And they say that to place the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it or with the free access to an unbiassed tribunal of appeal to which litigants in the Provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for.

The argument on behalf of the provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*. In the course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, House of Lords, and His Majesty's Judges.

It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the fourth section of the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the fourth section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand, it must be remembered that the members of the Judicial Committee are all Privy Councillors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatized as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the Judges and to ask them such questions as it may think necessary for the decision of a particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords

possesses in its legislative capacity a right to ask the Judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some 50 years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a similar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

Very little assistance is afforded by the almost or altogether obsolete practice of his Majesty's Judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of his Majesty's Judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a Court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the Judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board. It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

The first step towards authorizing the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed, providing for the same thing with more detail, though not in wider terms, and it is the 1906 Act which gave rise to the present appeal. Between 1875 and to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance with these

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Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee, under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such appeals, as though they were appeals from the ordinary jurisdiction. In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals.

These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorneys-General, as shewing that the Acts now alleged to have been *ultra vires* were in fact acted upon, and so treated as valid, not only by the Court in Canada, but also on appeal in Whitehall. It was urged, on the other hand, for the Provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained, from what is due to the independence and character of Courts of Justice. It is clear, indeed, that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

Great weight ought also to be attached to another significant circumstance. Nearly all the Provinces have themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that section 101 of the British North America Act forbids this being done by the Dominion Parliament, this argument cannot apply to the Provincial Legislatures, because section 101 does not apply to the Provinces. Either then these Provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the Provincial Acts as well as that of the Dominion are *ultra vires* upon the general ground already dwelt upon—that a Court of Justice ceases in effect to be a Court of Justice when such a

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duty is laid upon it. Certainly it is remarkable that for 35 years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has now been tranquilly acted upon without question by the Legislatures of the Dominion and Provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada.

It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (*e.g.*, must Justices of the Peace and Judges be re-sworn after a demise of the Crown?), no one would ever have thought of saying it was *ultra vires*. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the Provinces or alleged to do so. But the answers are only advisory, and will have no more effect than the opinions of the Law Officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answers these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

Yet the argument that to put questions is *ultra vires* must be the same whether the power is rightly or wrongly used. If you say that it is *intra vires* to put some kinds of questions but *ultra vires* to put other kinds of questions, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to

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the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter. Their Lordships will therefore humbly advise his Majesty that this appeal ought to be dismissed.

Appeal dismissed.

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MERCANTILE TRUST CO. v. CANADA STEEL CO.

Ontario High Court. Trial before Riddell, J. April 4, 1912.

1. MASTER AND SERVANT (§ II B 3—139)—SERVANTS' ASSUMPTION OF RISK—WALKING UNDER DANGEROUS PLATFORM.

Where a servant was killed by a brick falling through an opening in a platform under which his work did not take him the master is not answerable therefor where the servant had been warned as to and knew the danger of going under the opening, and had been expressly directed to keep away therefrom.

2. MASTER AND SERVANT (§ II A—63)—DUTY OF MASTER—SAFETY OF PLATFORMS—IMPRACTICABILITY OF SAFETY APPLIANCES.

The fact that a certain appliance might have prevented the death of a servant will not render a master liable therefor where the jury found that its use would have been impracticable, and that its absence did not amount to a defect.

3. DEATH (§ IV—26)—CONTRIBUTORY NEGLIGENCE—WORKMAN—ASSUMPTION OF RISK.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom.

4. MASTER AND SERVANT (§ II C—185)—LIABILITY OF MASTER—WORKMAN'S DEATH CAUSED BY HIS INADVERTENCE.

In the absence of an express finding by the jury that a servant at the time he was killed was guilty of contributory negligence a master will not be liable therefor on the theory that his death was the result of a mere act of inadvertence upon the servant's part during the course of his employment.

[*Laliberte* v. *Kennedy* ((Ont.) not reported), and *Wilson* v. *Davis*, 10 O.W.R. 315, specially referred to.]

Statement

ACTION brought by the administrators of a deceased Italian labourer for damages for negligence resulting in his death.

The action was dismissed with costs.

A. M. Lewis, for the plaintiffs.

J. W. Nesbitt, K.C., for the defendants.

Riddell, J.

RIDDELL, J.:—The defendants were building a blast furnace—this consisted of a steel jacket, in the form of what may, with sufficient accuracy, be described as a vertical cylinder. This jacket was over 60 feet high, and was being lined with firebrick at the time of the accident. The lining was effected in this way. Beginning at the bottom with the firebrick, when the lining had