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*Oct. 11.

IN RE REFERENCES BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Construction of statute—B.N.A. Act, ss. 91, 92, 101—"Supreme Court Act," R.S.C. (1906) c. 139, ss. 3, 60—References by Governor-General in Council—Opinions and advice—Jurisdiction of Parliament—Independence of judges—Judicial functions—Constitution of courts—Administration of the laws of Canada—Provincial legislative jurisdiction.

Per Fitzpatrick C.J. and Davies, Duff and Anglin JJ.—The provisions of section 60 of the "Supreme Court Act," R.S.C. (1906) ch. 139, are within the legislative jurisdiction of the Parliament of Canada.

Per Girouard and Idington JJ.—The provisions of that section assuming to authorize references by the Governor-General in Council to the judges of the Supreme Court of Canada for their opinions in respect to matters within provincial legislative jurisdiction are *ultra vires* of the Parliament of Canada; but, if the governments of the Dominion and of a province unite in the submission of the questions so referred the judges of the Supreme Court of Canada should entertain the reference.

Per Idington J.—The administration of justice in each province having been assigned exclusively to it the power of Parliament in regard to the same is limited to creating a court of appeal and courts for the administration of the laws of Canada.

Per Idington J.—Parliament has no power to authorize the interrogation of the Supreme Court of Canada except where the question submitted relates to some subject or matter respecting which it is competent for Parliament to legislate and respecting which it has legislated and competently constituted judicial authority in that court to administer or aid in administering the laws so enacted.

Per Idington J.—*Quære.* As to the constitutionality of adopting a system of interrogations of the judiciary even when the questions are confined to subjects of the kind thus indicated.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff and Anglin JJ.

MOTION on behalf of the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta, by way of protest against the Supreme Court of Canada, or the individual members thereof, entertaining or considering the questions, hereinafter referred to, submitted by the Governor-General in Council, and that the inscription on the roll for the hearing thereof be stricken from the list, and that the same be reported back to the Governor-General in Council as not being matters which can properly be considered by the court as a court, or by the individual members thereof under the constitution of the court as such, nor by the members thereof in the proper execution of their judicial duties.

The matters referred by His Excellency the Governor-General in Council by Orders in Council on 9th and 30th May, 1910, were as follows:

"1. What limitation exists under 'The British North America Act, 1867,' upon the power of the provincial legislatures to incorporate companies?

"What is the meaning of the expression 'with provincial objects' in section 92, article II., of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

"2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article II. of 'The British North America Act, 1867,' power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?

"Has a company incorporated by a provincial legis-

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lature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province ?

"3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

(*a*) within the incorporating province insuring property outside of the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province ?

"Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?

"Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?

"4. If in any or all of the above mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the 'Insurance Act,' 1910, 9 & 10 Edw. VII., chapter 32, section 3, sub-section 3 ?

"Is the said enactment, the 'Insurance Act,' 1910, chapter 32, section 23, sub-section 3, *intra vires* of the Parliament of Canada ?

"5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

"(*a*) the Dominion Parliament ?

"(*b*) the legislature of another province ?

"6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses ?

"For examples of such provincial legislation see Ontario, 63 Vict. ch. 24; New Brunswick Cons. Stats., 1903, ch. 18; British Columbia, 5 Edw. VII. ch. II.

"7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province ?

"Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province ?

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation ?"

The questions referred by order in council, on 29th June, 1910, were as follows:

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"1. Is it competent to the legislature of British Columbia to authorize the government of the province to grant by way of lease, license or otherwise the exclusive right to fish in any or what part or parts of the waters within the 'Railway Belt,'

"(*a*) as to such waters as are tidal, and

"(*b*) as to such waters as although not tidal are in fact navigable ?

"2. Is it competent to the legislature of British Columbia to authorize the government of that province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province ?

"3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province, or lying between the province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the government of the province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low water mark in the said waters or any of them ?"

Wallace Nesbitt K.C. for the motion. There is no jurisdiction conferred upon Your Lordships to consider and determine the questions now referred and the court and the members thereof should refrain from doing so. The jurisdiction of the Parliament of Canada to enact section 60 of the "Supreme Court Act" must be supported, if at all, under the terms of

section 101 of the "British North America Act," 1867. With this section must be read sub-section 14 of section 92 of the "British North America Act." The terms of section 60 do not fall within the terms of section 101 relating to the constitution, maintenance and organization of a "general court of appeal," nor within those relating to the establishment of "additional courts for the better administration of the laws of Canada." The term "administration of the laws" must refer to the enforcement of laws after adjudication between parties, or upon proper application by the application of legal remedies. Section 60 provides for a proceeding of an entirely different character.

The court is asked to arrive at a conclusion which is not to be enforced in any way and which is utterly ineffective in so far as it may throw light upon the views entertained by the members of the court upon the questions at the moment when they are referred.

This is not a matter of the administration of the law. In dealing with the questions referred, the court is not dealing with the laws of Canada. In two of the references the questions are as to the jurisdiction of the provincial legislatures and can have no relation to the administration of the laws of Canada. Section 101 in conferring jurisdiction to establish additional courts for the better administration of the laws expressly limits this power to the laws of Canada as opposed to the laws of the provinces:—and this limitation has been clearly understood and acted upon by Parliament on various occasions, as, for instance, in section 67 of the "Supreme Court Act," where the operation of that section is made dependent on the provincial legislature agreeing and providing that

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the Supreme Court of Canada should have the necessary jurisdiction. The same proviso is found in section 32 of the "Exchequer Court Act." Without such proviso Parliament would have clearly infringed upon the provincial jurisdiction conferred by sub-section 14 of section 92 of the "British North America Act." Reference may also be had to the general scope of the "Exchequer Court Act."

It would seem that section 60 has no relation to the administration of any law whether of Canada or of the provinces, but simply provides for taking opinions in an entirely advisory and ineffective manner, in an entirely non-judicial capacity, just as Parliament might have provided for taking opinions of any other body or person upon any question, legal or otherwise, upon which the opinion of such body or person was of interest to the Dominion of Canada. A consideration of some instances in which the matter has been brought before this court will shew that this has been the almost unanimous opinion of its members. Of the references under section 60, and sections it now replaces, made to the Supreme Court of Canada on various occasions, with but one exception the reference has been, in a sense, upon consent of both parties, no objection being raised to the expression of the opinions, and those opinions have been consequently expressed, as a general rule, without consideration of the power of Parliament to impose such a duty upon the court, or its members, or upon the desirability or non-desirability of acting upon the reference. *Re Provincial Fisheries*(1), *per* Taschereau J., at p. 539. In *Re "Lord's Day Act"*(2), objection was taken to the jur-

(1) 26 Can. S.C.R. 444. (2) 35 Can. S.C.R. 581.

isdiction by a private party merely as to answering questions in respect to hypothetical or supposed legislation. The majority of the court considered this objection well taken, but concluded that, as the court theretofore had answered similar questions, and as the Privy Council had answered questions of the same character, they should proceed to answer the questions in that case; see cases referred to by Idington J. and his remarks, at page 600, on the section now represented by section 60, which apply equally to the question now raised and explain and justify the course heretofore taken in answering questions under section 60. The special difficulty as to hypothetical questions has since been cured by an amendment to the section. In *Re Criminal Code*(1), the whole question was the subject of discussion; see *per* Girouard J. at page 436; *per* Davies J., at page 437; *per* Idington J., at page 441; *per* Duff J., at page 452; and *per* Anglin J., at page 454.

The answers requested are of an entirely advisory and non-judicial character, not by way of the exercise of functions of a court of appeal nor of a court for the administration of the laws of Canada, and, therefore, not within the terms of section 101 of the "British North America Act." Parliament has no jurisdiction to command or compel the giving of advice by members of the Supreme Court of Canada, who, when once duly appointed, are no longer in any sense under the orders of Parliament except in so far as it has jurisdiction to legislate for that court as a court.

The feeling that this court, although not viewing the section as legislation binding upon it, should, nevertheless, out of courtesy or deference to Parlia-

(1) 43 Can. S.C.R. 434.

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ment and to the Governor-General in Council, render answers, involves very serious consideration in a case where any party concerned raises objection. If the Government, although in certain circumstances entitled to obtain opinions, by obtaining those opinions are obtaining something not merely of use for their information or guidance, but which may be a source of embarrassment to the administration of justice in its proper channels, they are obtaining something to which they are not entitled. An opinion by the judges of the Supreme Court of Canada is entirely different from an opinion given by any other individuals, even if equally qualified, inasmuch as all provincial courts, while not, perhaps, legally bound to give effect to that opinion, would feel themselves bound by that opinion as though it were a judgment of the court, notwithstanding that the matter was not brought before the Supreme Court of Canada through the usual and proper channel, with the usual procedure devised to safeguard the interests of parties.

Newcombe K.C., Deputy-Minister of Justice, contra.—The answers requested are, by sub-section 6 of section 60, declared to be advisory only. This is within the jurisdiction of the Parliament of Canada; it forms part of the legislation enacted by the group of sections, in the "Supreme Court Act," included in sections 35 to 49, and is consistent with them. The same objections were taken, *arguendo*, by Mr. Blackstock K.C., in *Re "The Lord's Day Act"* (1), at pages 588-589, notwithstanding which the court proceeded to answer the questions there submitted, as it has done in numerous other cases referred under the same legislation. Notices of

(1) 35 Can. S.C.R. 581.

the present references have been duly given to the governments of all the provinces and several of them have signified their concurrence and the desire to have the questions answered.

Lafleur K.C., on behalf of the Provinces of Quebec and British Columbia, stated that these provinces had consented to the reference in regard to "Fisheries," and, also, on behalf of the "All-Canada Insurance Federation" that they were desirous of having the questions respecting the "Insurance Act" decided.

A. Geoffrion K.C., on behalf of the Province of Quebec, stated that the province desired to have the questions respecting the "Insurance Act" disposed of by the court.

THE CHIEF JUSTICE.—The question, and the only question, we have now to dispose of, is a preliminary objection which has been taken to our hearing and considering these references made to us by order in council, on the ground that notwithstanding anything contained in the "British North America Act, 1867," the Parliament of Canada cannot impose upon this court the duty of answering questions which, as those representing some of the provinces contend, do not apply to legislation actually passed by that Parliament, or to legislation which it is intended it should pass.

The questions relate to:

(*a*) The limitations placed by the "British North America Act, 1867," upon the power of provincial legislatures with respect to the incorporation of companies;

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(*b*) The competency of the legislature of British Columbia to grant by way of lease the exclusive right to fish in certain parts of the waters within the "Railway Belt" in that province;

(*c*) The validity of certain sections of the "Insurance Act," 1910.

The Province of British Columbia consents to the reference with respect to the granting of licenses to fish within the "Railway Belt."

Various questions involving, as those now submitted, the true construction of the "British North America Act" with respect to the exercise of the legislative power of Parliament and of the provinces respectively have been at different times submitted to this court by the executive and answered; in some instances, it is true, in recent years, under protest. The answers given to those questions have been on several occasions appealed to the Judicial Committee of the Privy Council and that body assumed it had jurisdiction to deal with them, although certainly in no respect under the legislative control of the Parliament of Canada. A list of those references will be found on page 267 of Mr. Cameron's "Supreme Court Practice."

Speaking for myself, I feel bound by the rule established for us by these precedents which date back to the very beginning of this court. They have established a rule of conduct which now has for me the force of law.

If the practice originated (as a learned legal writer says) in error, yet the error is now so common that it must have the force of law.

I entertain no doubt, however, that independently of all precedent it is our duty to consider the questions submitted. It is not necessary for us to say now

whether everything that is or may be involved in the consideration of each of the questions referred would or would not properly fall under our cognizance. If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings. Lord Watson, in the *Brewers Case*(1). In other words even in the absence of those special provisions in the "British North America Act" and the "Supreme Court Act," to which I will hereafter refer, I would still hold that the members of this court are the official advisers of the executive in the same way as the judges in England are the counsel or advisers of the King in matters of law, our constitution being "similar in principle to that of the United Kingdom." (Preamble of the "British North America Act.") The same Act, in the distribution of powers, declares

> that the executive government and authority of and over Canada continues to be and is vested in the Queen.

In England the practice of calling on the judges for their opinion as to existing law is well established. Evidence of its existence will be found as far back as history and tradition throws any light on British legal institutions(2). After quoting the section of the constitution of Massachusetts which provides for taking

(1) [1896] A.C. 348.

(2) *Beckman* v. *Mapelsden*, O. Bridg. 60, at p. 78.

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the opinion of the judges by the executive or legislative department, Chief Justice Gray says(1):

> This article, as reported in the convention that framed the constitution, limited the authority to the Governor and Council and the Senate, and was extended by the convention so as to include the House of Representatives; and, as may be inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial or their legislative capacity, had the right to demand the opinions of the twelve judges of England.

The case in which the Lords in their judicial capacity called for the opinion of the judges, is a very familiar one. I might mention *O'Connell's Case*(2), in which the decision of the Lords was against the opinion of the majority of the judges. A well-known precedent may be cited of *McNaghten's Case*(3). Here not only was there no litigated question before the Lords, but not even any pending legislative question. The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the central criminal court, but not in any way before them, a case developing interesting questions in the law relating to insanity, conceived that they would like to know a little more accurately what the law on those points was. They accordingly put a set of "abstract questions" to the judges — questions not arising out of any business before them, actual or contemplated. One of the judges protested against this proceeding and his objections bear a close resemblance to those urged in support of this preliminary objection, *e.g.*, that the questions put

(1) Op. of Justices, 126 Mass. 557, at p. 561.

(2) 11 Cl. & F. 155.

(3) 10 Cl. & F. 200.

do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms, that he had heard no argument;

and that he feared

that as the questions relate to matters of criminal law of great importance, the answers to them by the judges might embarrass the administration of justice when they are cited in trials.

The Lords took notice of this and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on "abstract questions of existing law."

For your Lordships (said Lord Campbell) may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is.

These words of Lord Campbell are absolutely applicable to this reference. In anticipation of possible legislation on the important subjects of insurance, incorporation of joint stock companies and control of fisheries, the executive of Canada desires to be advised as to the constitutional limitations upon its legislative power. In *McNaghten's Case* (1) Lord Brougham refers to the case of "Fox's Libel Act," when the judges answered questions about the existing law of libel. Lord Campbell cited an instance where the judges were called on to give their opinion upon the questions of law propounded to them respecting the "Clergy Reserves (Canada) Act." (2). One of the questions was whether the Legislative Assembly of United Canada had exceeded their lawful authority in legislating with respect to the sale of the clergy reserves. Lord Wynford said he did not doubt the

(1) 10 Cl. & F. 200.

(2) 7 & 8 Geo. IV., ch. 62.

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power of the House to call on the judges and to have their opinion as to existing law. He recalled the instance when he was Lord Chief Justice of the Court of Common Pleas that he communicated to the house the opinion of the judges with regard to the usury laws, and the house subsequently passed a law on the subject. The Lord Chancellor (Lord Lyndhurst) concurred "as to our right to have the opinions of the judges" on existing law. In a previous case the judges begged to be excused from giving an opinion, requested by the House of Lords, upon the question whether a pending bill was in conflict with previous acts relating to the Bank of England. The questions were argued by counsel on both sides; but the judges said that the inquiries were not

> confined to the strict construction of existing Acts of Parliament.

In re Westminster Bank(1).

This is not a case in which we are called on to express an opinion by anticipation on causes actually depending before the courts nor is it to be supposed for one moment that we will consider ourselves bound by the opinions given in answer to the questions submitted to us if the principles involved are brought before us in due course of law. As Lord Mansfield said in the *Sackville Case*(2),

> we shall be ready, without difficulty, to change our opinions, if we see cause, upon objections that may then be laid before us, though none have occurred to us at present which we think sufficient.

I am certainly of opinion that the practice of taking counsel, as it were, with the judges, to ascertain and elicit their opinions upon a specific question before it had been brought judicially before them is objec-

(1) 2 Cl. & F. 191. (2) 2 Eden 371.

tionable. And I entirely agree with what is said by Mr. Hargrave(1):

> However numerous and strong the precedents may be in favour of the King's extra-judicially consulting the judges on questions in which the Crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve lest the rigid impartiality so essential to their judicial capacity, should be violated. The anticipation of judicial opinions on causes actually depending should be particularly guarded against, and therefore a wise and upright judge will ever be cautious how he extra-judicially answers questions of such a tendency.

At the same time we must not forget that judges are officers of the Crown, and I adopt without any reserve the opinion expressed by Dorion C.J., a man of wide political and judicial experience, when, speaking for the full Court of Queen's Bench in Quebec, he said in *Bruneau et al.* v. *Massue*(2):

> The judges of the Superior Court as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or the local legislature. If these duties were either incompatible or too onerous to be properly performed, provided neither legislature had exceeded the limits of its legislative power, it would become the duty of the local and Dominion Governments to suggest a remedy by some practical solution of the difficulty, *but it does not devolve upon courts of justice to assume the authority of declaring unconstitutional a law on account of the real or supposed inconveniences which may result in carrying out its provisions.*

These words were subsequently quoted with approval by Chief Justice Sir W. Meredith in *Langlois* v. *Valin*(3), at page 16, and they are specially applicable in the present circumstance. This court was established by the Parliament of Canada

> as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada(4),

(1) Co. Litt. 110*a* (5).
(2) 23 L.C. Jur. 60.
(3) 5 Q.L.R. 1.
(4) Sec. 3, "Supreme Court Act."

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under the authority of section 101 of the "British North America Act." That section is as follows:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada.

And we are asked to answer certain questions submitted to us by the executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian constitution, the "British North America Act."

Dealing now with the constitutionality of those provisions of the "Supreme Court Act," under which this reference has been made. That Act was drafted and passed through Parliament when Hon. T. Fournier was Minister of Justice and was brought into force by a proclamation issued by Hon. Ed. Blake, his successor in office. The general legal presumption that a legislature does not intend to exceed its jurisdiction is strengthened in this case by the fact that constitutional lawyers of such eminence as Blake and Fournier are responsible for the legislation, the validity of which is now challenged.

I presume it will not be suggested that the Imperial Parliament could not constitutionally confer upon the Canadian Legislature the power to establish a court competent to deal with such references as we have now before us; and, if not, how could more apt words be found to express their intention to confer that power? Could better words be used to convey the widest discretion of legislation with respect to the all embracing subject "the better administration of the laws of Canada?" It cannot now be doubted either in

view of the decision of the Privy Council in *Valin* v. *Langlois*(1), that if the Parliament of Canada might have created a new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new jurisdiction to this court.

The distinction between creating a new court and conferring a new jurisdiction upon an existing court is but a verbal and non-substantial distinction.

If any doubt remains as to the legislative jurisdiction of Parliament in the premises, a reference to section 91 of the "British North America Act," which provides that the Parliament of Canada may from time to time make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces, should dispel that doubt.

Lord Halsbury, delivering the judgment of the Judicial Committee in *Riel* v. *The Queen*(2), at pages 678-9, said, interpreting the words "peace, order and good government":

The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence.

It has not been argued, and I do not think it could seriously be argued for a moment, that if Parliament possesses the power to make these references, that power has not been vested in the executive. Section

(1) 5 App. Cas. 115. (2) 10 App. Cas. 675.

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37 of the "Supreme Court Act," as originally enacted, read as follows:

The Governor in Council may refer to the Supreme Court for hearing or consideration, any matter which he thinks fit; and the court shall thereupon hear or consider the same and certify their opinion thereon to the Governor in Council; provided that any judge or judges of the court who differ from the opinion of the majority may, in like manner, certify his or their opinion or opinions to the Governor in Council.

In view of doubts expressed by members of this court at different times as to whether the intention of the legislature had been clearly expressed, changes have been made widening the scope of that section until we finally have section 60 of the "Supreme Court Act," which is in the following terms:

Important questions of law or fact touching

(*a*) the interpretation of the "British North America Acts," 1867 to 1886; or

(*b*) The constitutionality or interpretation of any Dominion or provincial legislation; or,

(*c*) The appellate jurisdiction as to educational matters, by the "British North America Act, 1867," or by any other Act or law vested in the Governor in Council; or,

(*d*) The powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

(*e*) Any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question; may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

2. When any such reference is made to the court it shall be the duty of the court to hear and consider it, and to answer each question so referred; and the court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

3. In case any such question relates to the constitutional validity

of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the Attorney-General of such province shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said court between parties.

It is to be observed that this section was enacted to remove all doubt as to the intention of Parliament, to get the opinion of the members of this court as to the validity of proposed legislation as well as of all existing legislation.

Section 37 of the "Supreme Court Act," as it was originally enacted, seems to have been taken from 3 & 4 Wm. IV. ch. 41, which reads as follows:

It shall be lawful for His Majesty to refer to the said Judicial Committee (the Judicial Committee of the Privy Council), for hearing and consideration and such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.

In re Schlumberger(1), at page 12, speaking of this section, the Right Honourable Dr. Lushington said, dealing with an objection to the jurisdiction of the Privy Council to hear and consider a petition referred to them by order in council:

(1) 9 Moo. P.C. 1.

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The only construction that can be placed upon the section above quoted is a construction which shall give to the words therein contained their complete meaning, without limitation whatsoever,

and further,

that the Judicial Committee were not entitled to put any limitation on these words in any matter referred to them by the Crown.

In addition to those above mentioned, constitutional cases of great importance to a colony have been referred by the Sovereign to the Judicial Committee, such as to the power of the legislature of Queensland in respect of money bills and the validity of Protestant marriages in Malta and upon their report have been decided by the Governor in Council. (See P. papers, 1894, No. 214, 1896, 7982.)

Objection was taken by some of the judges of this court to the hearing of the reference *Re Sunday Legislation*(1). At the argument on the appeal to the Privy Council, it appears from the report that Mr. Newcombe, in reply said:

Then, my Lords, Mr. Riddell has questioned the jurisdiction under the "Supreme Court Act" to make the reference. I do not know whether your Lordships desire me to reply to that.

To which Lord McNaghten said:

I think we know the terms of the Act. They are wide enough to embrace it.

The sections of the "Supreme Court Act" to which I think useful reference may be made are:

Section 3, which constitutes the Supreme Court as a general court of appeal and as an additional court for the better administration of the laws of Canada;

Sections 35 to 49 inclusive, defining the appellate jurisdiction of the Supreme Court;

(1) 35 Can. S.C.R. 581.

Sections 60 to 67 inclusive, which define the special jurisdiction of the Supreme Court, which includes not only references by the Governor in Council but also references by the Senate and House of Commons, habeas corpus and certiorari and cases removed by provincial courts.

In addition we have section 55 of the "Railway Act," R.S.C. [1906] ch. 37, which provides that the Railway Commissioners may refer questions for the opinion of the judges of the Supreme Court. This power has been freely exercised by the Commission and we have never to my knowledge refused to answer the questions submitted. Can it now be successfully argued that the Railway Commissioners have the power to make references to this court and that the Parliament, that created the Commission, has not got that power?

Section 55 of the "British North America Act" provides that a bill may be reserved for the signification of the Sovereign's pleasure. Before exercising this prerogative of rejection would it not be within the power of the Home Government to refer the question involved to the Judicial Committee under the fourth section of 3 & 4 Wm. IV. ch. 41, above quoted? If so, by analogy, may we not argue that the same principle would apply to the case of disallowance which may be exercised in connection with the power of supervision over provincial legislation entrusted to the Dominion Government, as provided for in section 60 of the "British North America Act"? If a provincial Act is reserved by a lieutenant-governor for the consideration of the Governor-General in Council, the opinion of the members of this court as to its constitutionality might well be taken for the guidance of His Excellency.

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If this may be done after an Act has been passed, why should it not be competent to seek such advice in advance of legislation?

For all these reasons I hold:

1. That the Governor in Council has the power under the constitution to make this reference;

2. That it is the duty of the members of this court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way embarrass the administration of justice.

GIROUARD J. (dissenting).—As to the motion to quash, I would prefer to wait for judgment till the matter is discussed on the merits. I am prepared, however, to say that the Governor-General in Council has jurisdiction to refer the constitutionality or interpretation of federal statutes or other federal matters to this court; but he cannot do so if the subject-matter of reference is merely provincial; and with regard to the latter I think the "Supreme Court Act," especially section 60 (para. (*b*)), is *ultra vires*. In a case like this, this court does not sit as a general court of appeal for Canada, but as an "additional court for the administration of the laws of Canada" within section 101 of the "British North America Act, 1867."

This additional court is a court of common law and equity in and for Canada and is merely advisory. Its decision binds no one. R.S.C., ch. 139, section 3.

The consent of the provinces is not sufficient to give us jurisdiction, unless they agree to the reference and constitute what may be called a submission to

the court which is always open to litigants even at common law; and in such a case the decision of this court should be binding as to the parties to it.

DAVIES J.—Questions with regard to the legislative powers of the Dominion Parliament and the provincial legislatures, and also as to the meaning and extent of certain enactments made by these bodies respectively, having been referred by the Governor in Council to this court pursuant to section 60 of the "Supreme Court Act" for hearing and reasoned answers our jurisdiction has been challenged on the ground that the section of the "Supreme Court Act" above referred to was either altogether or in part *ultra vires* of the Parliament of Canada.

The preamble to Canada's constitutional Act refers to the expressed desire of the provinces then confederated

> to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar *in principle* to that of the United Kingdom,

and the Act was passed to carry into effect that expressed desire.

In the division of legislative powers assigned to the Canadian Parliament and legislatures, Parliament is empowered generally to

> make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces,

and is given exclusive and paramount legislative authority over all matters coming within the 29 classes of subjects specifically enumerated.

The classes of subjects exclusively assigned by the

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92nd section to the legislatures of the provinces embrace

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.

In addition to this division of legislative power, section 101 provides for the establishment by Parliament "notwithstanding anything in this Act" of a general court of appeal for Canada and of any additional courts for the better administration of its laws.

The first step necessary to determine whether in authorizing questions to be put to this court on important constitutional and legal points by the Governor in Council, Parliament acted beyond its powers is to determine whether section 60 is in conflict with the powers exclusively assigned to the provincial legislatures. If it is not in such conflict then in my opinion the objection is entirely disposed of.

The "Federation Act" as was said by the Judicial Committee in *Bank of Toronto* v. *Lambe*(1), at page 588,

exhausts the whole range of legislative power and whatever is not thereby given to the provincial legislatures rests with the Parliament.

Sub-section 14 of section 92 of our constitutional Act is the one with which it is contended section 60 of the "Supreme Court Act" is in conflict. I quite fail to appreciate in what respect this can be held to be so.

The former assigns to the legislature the exclusive power to make laws for the administration of justice in the province.

The latter authorizes the Governor-General in

(1) 12 App. Cas. 575.

Council to submit important questions to this court relating to the powers of Parliament and the legislatures respectively, and to other subjects affecting the general administration of the laws of Canada.

The answers which the judges of this court are required to give to the questions asked are reasoned answers after having heard arguments from counsel representing the different conflicting interests. But these answers are simply to aid the Governor in Council in reaching conclusions for which they must be held entirely responsible. The answers do not bind the Governor in Council. He may act in accordance with them or not, as he pleases, giving them just such weight as he pleases. They are advisory only. They do not bind even this court as has been often said before if at any time it is called upon in its strictly judicial capacity to decide the very question asked. Being advisory only and not binding upon the body to whom they are given or upon the judges who give them they cannot be said to be in any way binding upon the judges of any of the provincial courts. For these reasons I am of the opinion that there is no necessary conflict between the two sections and that therefore the objection taken to the constitutional validity of section 60 fails.

But even if it was decided that such conflict did exist, it would by no means determine the invalidity of the clause attacked. The inquiry would then be removed one step further back and would require the proper construction of section 101 authorizing Parliament,

notwithstanding anything in the Act, to constitute a general court of appeal for Canada and also additional courts for the better administration of the laws of Canada.

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If that section and the legislation of Parliament under it are broad enough to confer on the Governor in Council the power to put these questions then that alone would dispose of the objection.

In my opinion the language of the section is quite broad and ample enough to confer the required and assumed power. The section says that, "notwithstanding anything in this Act" the Parliament of Canada may, etc., so that even if the powers conferred when exercised necessarily conflicted with any of the exclusive powers of the legislatures they would be constitutional. We all know that the laws of Canada are administered by the several departments of government, that these laws consist not only of the statutes passed by Parliament but of the rules and regulations authorized by these statutes to be made by the Governor in Council, the better to carry out the general object and purpose of the statutes. The administration of these statutes and regulations often and necessarily under our constitution involve the determination of most difficult and novel legal and constitutional questions. It would only seem right and proper that there should have been in the constitutional Act some means authorized by which the opinions of some independent tribunal might be obtained on such questions as related to the proper interpretation of the constitutional Act itself; the constitutionality or interpretation of Dominion or provincial legislation; or the exercise by the Governor-General in Council of any of the judicial or quasi-judicial functions he may under the constitutional Act be called upon to discharge, as well as other kindred questions.

In my judgment such an apparently desirable ob-

ject was accomplished by the language of the 101st section. The powers given to Parliament by that section whatever they may be construed to cover and include were certainly paramount powers, not limited by any powers of legislation assigned to the provincial Parliament. They are given expressly "notwithstanding anything" in the constitutional Act.

In my opinion they are broad and ample enough to cover the powers which Parliament has attempted in the 60th section to exercise. They authorize the establishment of a court for the better administration of the laws of Canada. Parliament has established this general appeal court as such a court. There cannot be any constitutional objection in my opinion to its doing so and with matters of policy we have no concern. The better administration of the laws of Canada may and doubtless frequently does necessarily involve a consideration and determination of the extent, meaning and constitutionality of provincial legislation and the advisory powers with which section 60 deals cover and are intended to cover both fields of legislation. In point of fact and law, these powers of legislation, Dominion and provincial, are so interlaced that one can hardly be considered apart from the other.

If I am right in my construction of this section 101 nothing more remains to be said on the question before us. It is said that this court is a general court of appeal for Canada, but I see no constitutional reason if we were that and that alone, why Parliament could not impose on it the duty of giving reasoned answers to such important questions as it might authorize the Governor-General in Council to ask.

But Parliament has made this court more than a

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mere general court of appeal. It has made it also a "court for the better administration of the laws of Canada," and, as I have already said, that, to my mind, removes any reasonable doubt upon the point in question.

The different references which have from time to time been made to this court have always been heard and answered without question as to the constitutionality of the section under which they were made. Many appeals of a most important character have gone to the Judicial Committee from the answers given by this court on these references, but in no case has any such objection as that now under consideration been taken. The section largely, indeed almost substantially, as it stands to-day was passed in 1891, based on a resolution introduced into the House of Commons by Mr. E. Blake, accepted by the late Sir John A. Macdonald, then leader of the government, and adopted unanimously by the House. These facts by no means conclude the question. At the same time they shew what the opinion of many of Canada's most distinguished jurists has been and it is hard to believe that such a point as that now raised, if well taken, could have escaped the observation of all the distinguished counsel who have argued the question on the many references made, and the jurists who constituted the board of the Judicial Committee and decided those of them which were appealed to that board.

If the power of Parliament now in controversy to pass section 60 is held to depend upon the general power to legislate for the peace, order and good government of Canada, then of course the question whether there was a conflict of jurisdiction between the Dominion and the provincial authorities would

have to be decided. It seems to me that the very broadest construction should be placed upon these words, "peace, order and good government." They certainly would, in relation to the objection now taken, be construed in the light of the words in the preamble that our constitution was to be similar in principle to that of the United Kingdom.

While the constitutions of the Dominion and the provinces are mainly written and defined, that of the United Kingdom is unwritten and is the growth of customs, precedents, practices and principles defined from time to time, sometimes by Acts of Parliament, and sometimes by judicial decisions, sometimes left undefined. When we find that it has been the undoubted right of the House of Lords, itself the highest court of appeal in the United Kingdom, as also a branch of the High Court of Parliament to summon the common law judges before their House to answer questions as to what the law of the Kingdom is on any given question, and when we further find that the Imperial Parliament has itself enacted laws declaring the right of the King in Council to call upon the Judicial Committee, itself a court of appeal, in certain matters, alike in England and from the Dominions of the Crown beyond the seas, we can fairly say that such right to obtain the opinions of the common law judges and of the Judicial Committee is a principle of the British constitution and in accordance with its spirit. When, therefore, we are called upon to determine what meaning should be given to the power assigned in our constitutional Act to Parliament to legislate for the peace, order and good government of Canada, we cannot hold that legislation requiring the judges of our Court of Appeal to answer questions submitted

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to them by the Governor in Council is not in accordance with the spirit or principle of our constitution and would not be within Parliament's powers.

My conclusions, therefore, are, first, that the legislation challenged by the motion now before us is constitutional under section 101 of our constitutional Act, and that if there is a doubt upon that point it comes clearly within the power of legislating for the peace, order and good government of Canada, because it is in accordance with British precedent and practice, and is not in conflict with any of the powers exclusively assigned to the legislatures of the provinces.

I say nothing whatever about the particular questions now before us awaiting argument. Whether they go further than they should must be determined later.

IDINGTON J. (dissenting).—The jurisdiction of this court to answer the questions submitted by these references has been challenged by the motion made.

I respectfully dissent from the conclusion arrived at by a majority of the court. I agree in regard to our jurisdiction to answer some of the questions submitted. But the decision as a whole implies not only that Parliament has, but also has exercised, the power of commanding this court, originally constituted and established a court of common law and equity, never supposed to have been constituted by virtue of any other power than section 101 of the "British North America Act," which enacts as follows,

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada,

to become an advisory adjunct of the Department of Justice and fill the place usually held by subaltern law officers of the Crown. As if to shew more clearly than ever this section 101 to be its sole foundation the constituting Act was amended by 6 Edw. VII. ch. 50, section 1, being substituted for the original declaration, and stands now as follows:

> 3. The court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada, is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

I desire at the outset to make clear that the references which have the sanction of the provincial government to their submission by the Dominion government are within the jurisdiction of this court.

Section 101 of the "British North America Act" does not so clearly as it might cover the ground of authority for the creation of a court of quasi-original jurisdiction to dispose of such constitutional controversies as said references imply between the Dominion and provinces. But said section 101 and sub-section 14, of section 92, of the "British North America Act," coupled together do lay such a foundation of authority and followed by section 67 of the "Supreme Court Act," and the correlative provincial legislation provided for therein, do seem to me sufficient to confer jurisdiction within the limits thus assigned.

However that may be, the jurisdiction of the court I think, was always wide enough to cover submissions made jointly by Dominion and province. And the province in some cases has so legislated as to render it necessary to inform the Attorney-General of the province of any constitutional question raised in any case, and enabled him to intervene.

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I see no objection to the practice that has arisen as the result of all this by which the Dominion and provinces have repeatedly come directly here, and stated and argued the point of legal controversy involved, and had the same decided and then sometimes appealed to the Privy Council.

I am not oblivious of the fact that the omission in the "British North America Act" to provide expressly for the expedients thus adopted, leaves them open to criticism, which is, however, answered, it seems to me, by the implied constitutional powers we must assume to be inherent in these constituent bodies mutually to protect and so far as possible delimit their respective spheres of jurisdiction in relation to each other or the subject-matters assigned to each to deal with.

This sane method thus adopted and long acted upon, I do not question; nor do I question section 60 of the "Supreme Court Act," in so far as in aid thereof. I cannot agree in the sweeping attacks upon it in argument here by way of asserting its entire invalidity.

I therefore hold so far as regards the reference in the Fisheries case, said to be made pursuant to an understanding between the Dominion and the Province of British Columbia, and thereby falling within said method, that it is within our jurisdiction.

It was objected in argument that our decision of that might in an indirect way affect other provinces.

Such must of necessity under our system of jurisprudence, resting upon precedent, be the result of any decision of any concrete case, where the precedent created thereby may bind in a like case between other parties not made parties to such preceding cases.

The like result would also follow if a point of con-

stitutional law happened to arise in an action between private litigants and be there decided.

I also am of opinion that section 101 enables Parliament to confer, if it see fit, on this court, jurisdiction to hear disputed cases involving or springing out of the application of the laws of Canada.

I do not think that the phrase "any additional courts" in said section implies that the additional courts must of necessity be a separate tribunal composed of different persons.

Indeed, the words "additional courts" are, I think, relative to the existing provincial courts, administering the laws of Canada as well as of the provinces.

This court as originally constituted was blended as it were with the Exchequer Court. Their respective functions were defined, but the same persons were judges of both courts.

Moreover, the power of Parliament to delegate its powers of trying election petitions to a provincial court, was duly maintained though it might have constituted under section 101, a court of its own for the purposes of such trials.

The question of separation of one or more juridical powers when being created, or of consolidation of two or more after their creation, when and so far as within the power of Parliament to constitute the judicial powers then in question, seems to me entirely matter of convenience and expediency, and does not touch the question of jurisdiction.

I am, therefore, prepared to hold that if and in so far as this court has been or may be duly given jurisdiction to administer any laws of Canada, and so far as the proceedings in question can be brought thereunder, we are bound to observe and discharge

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such judicial functions as implied therein. In the submission *In re Criminal Code*(1), made to us last term, though inclined to think the reference pushed the power and duty to the verge of the reasonable limits section 101 of the "British North America Act" would permit, I, with some doubt, agreed the questions might fall within the words of that section.

In disposing of that reference the majority of the court seemed impressed, as I was, with the futility of the proceeding, and intimated that their opinions bound no one. But as it was quite competent for Parliament to enact relative to criminal procedure whatever it pleased, no great harm could arise from answering any such questions.

The questions here submitted relative to the "Insurance Act" enacted by Parliament are of an entirely different character. It is not so admittedly within the power of Parliament. It is in truth the true meaning of the "British North America Act" that is involved. How can the solution of that be said to be administering the laws of Canada unless presented in a concrete case?

To say that our opinion may bind no one is, I respectfully submit, not a satisfactory disposition of the matter. For if Parliament has the power to insist upon an answer it must be because it would be competent for Parliament to enact, and that it might enact, retrospectively and prospectively that our answers, or rather the concurrent answer of the majority, is or is to become law, binding all concerned.

This brings us to the solution of the problem of whether or not Parliament can by any method impose

(1) 43 Can. S.C.R. 434.

upon this court the duty of answering or constitute by any method a judicial court that can properly be asked to answer, in an inquiry of this kind now submitted to us and in face of the submission being objected to by all the provinces concerned, and only spoken to by counsel for the Dominion and possibly our nominee.

Let us first assume this court has been constituted only by virtue of the authority of section 101 above quoted, and see if anything therein can justify such a position as asking or answering all these questions. Pass for the present those relative to the meaning of any statute enacted by Parliament. The observations I am about to make may well apply to those questions as well as to the others relative to the "British North America Act" and provincial statutes to which I will first direct particular attention. Some different considerations may arise relative to the questions touching the laws of Canada. But some of the considerations I am about to bring forward apply to all.

No one can pretend that answering these questions is an exercise of or falls within the appellate jurisdiction of this court. Every one will admit, however, that the questions of law involved therein may each and all involve the very issue of law to be presented at any moment by a private litigant or be raised by a province in private litigation or come within the range of a controversy which section 67 and provincial legislation have paved the way for, if not expressly provided for, being dealt with by mutual submission.

Why should any or all of such parties be prejudiced and embarrassed by a proceeding of this kind?

It is not of its expediency I am treating, for that does not directly concern this inquiry, but of its bearing upon the administration of justice.

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That whole subject, save as specifically provided, is by section 92, sub-section 14, expressly assigned to the provincial authorities. I say the whole, for when that administered in each province is so, there is nothing left unless in unorganized territory. And there is only one exception or method of reservation given by the "British North America Act," so far as provincial legislation and the judicial administration thereof is concerned and that is by way of appeal to this court. It is the method that (if permissible), I may say, appears in the Quebec resolutions at the meeting that led to the passing of the "British North America Act." And the power to create additional courts appears to have been resolved separately and expressed as relative to the Acts of Parliament.

All rights springing from or resting upon provincial legislation must be determined first by the local courts and if need be then by appeal therefrom. What right have we to attempt to overawe them by dicta of ours obtained from us by this method? What right and authority legislative or judicial exists to interfere with the administration of justice according to the methods and the mode assigned by this organic law designed to guard and enforce the rights, obligations and duties of all concerned?

The questions coming thus for adjudication may involve the very existence of the corporate powers of those concerned and of many others in a like plight. What right have we to jeopardize their stability by expressing any opinion on an *ex parte* application, or where no right exists to command an appearance, and, as we have found possible, upon a perfunctory exposition of the law upon which we are asked to pass ?

What would be thought of a judge who had ex-

pressed to a private litigant an opinion more or less deliberate upon the questions upon the solving of which the determination of that litigant's rights must turn, sitting afterwards upon his case, hearing and adjudging it?

The thing thus put would (I am glad to believe) be an absolute impossibility. No such man sits upon the bench in our country.

But analyze the situation we are now presented with, and wherein lies the difference?

The controversy on some of these cases submitted seems to be one between the Dominion and the provinces, or some of them. The very questions may involve the solution of the exact point in some case now on its way here in a due, orderly and ordinary way; why forestall the rights of these suitors?

Is there any difference in the last analysis between answering and advising the Dominion as a litigant as to its rights as against a province, and the case I have put of a private litigant? How can we when we have answered sit upon the appeal of a private litigant, either with a province intervening as under existing legislation is possible, or without, to decide the identical question upon which we have already given an *ex parte* opinion?

The constitution of this court was intended for the purpose of adjudicating by way of appeal or otherwise upon such questions as might be by it finally disposed of or authoritatively reviewed and finally disposed of by the Privy Council.

It was sought thereby to eliminate by such a system for the administration of justice a mass of appellate work which the growing demands then present and prospective required should be disposed of in this

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country and at the same time the way be kept open in the more important and far reaching judgments pronounced here and elsewhere for an appeal to an Imperial tribunal.

It never was intended by the creation of this court or the power given to create it to change the leading features of constitutional government expressly designed after the model of the British constitution as adopted and in use for a quarter of a century in a number of the provinces confederated by the "British North America Act," and thereby (subject to the features of the federal system) intended to be continued by the Dominion and inferentially also by each of the provinces, so far as circumstances would permit.

It is therefore necessary in order to understand the full compass of what we are asked to undertake and the full import of the challenge now made respecting the constitutional power of Parliament to impose upon us the duty of such an undertaking, that we should comprehend something of the constitutional limitations implied in the leading features of constitutional government to which I have adverted.

Is there any parallel in that constitutional government for such an interrogation of the judiciary as to the meaning of a mass of acts as these inquiries embrace ?

Is it any answer to say that an inquiry may be made of the Privy Council, historically and by statute duly constituted by a plenary parliament a consultative as well as a judicial body? Is it any answer to say that at rare intervals in modern times there have been submissions to the judges by virtue of a survival of a part of a practice having an historical record trace-

able to times when the separation of the legislative, executive and judicial functions were not supposed to be as necessary, indeed speaking generally so cardinal a principle of modern constitutional government as modern thought has held necessary?

Is it any answer to say that what might exist in an almost dormant condition in a state of society where the force of historic tradition and constitutional usages are a guarantee that cannot be supplied here, could be supposed proper to establish here and to have incorporated in such an Act as the British North America Act?

These considerations are submitted in answer to the suggestion that in some way I am unable to understand such vestiges or survivals existent in England might have been in the minds of men enacting expressly as section 101 does enact and may be implied therein as inherent in the power conferred to establish any additional courts.

But the language forbids the thought.

It is expressly confined to courts for administering the laws of Canada. What are the laws of Canada? Is it not obvious that they are the laws enacted by the Parliament of Canada? Is it not obvious that such a thing as administering the laws of the provinces is a thing beyond the literal meaning of the words, and in conflict with the exclusive power assigned to the provinces of constituting courts of justice for that very purpose.

How can it be supposed in the face of such an enactment and such a system as a whole that the Dominion could ever interfere?

Moreover, the expression "any law of Canada" when used in an Act of Parliament dealing with a sub-

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ject matter that might well have implied giving it the full remedial effect and measure of relief that seemed necessary and by its purview to incorporate the local laws therewith, this Court held itself bound by the phrase to limit the operation of that statute to an enactment of the Parliament of Canada.

I refer to the case of *Ryder* v. *The King* (1), where it was attempted to be maintained that by force of the said expression in sub-section (*d*) of section 16, of the Exchequer Court Act, giving relief against the crown in the case of workmen entitled to compensation it covered the right in a local law. It was held it could not be so extended.

When we thus eliminate from the operation of section 101 anything but that comprised in the laws of Canada, where is there any authority in Parliament to direct as it is claimed to have directed?

Many of those reasons and considerations already assigned relative to the inquiry so far as relative to questions respecting the British North America Act and provincial laws, are applicable to, and I think effectively cover inquiries relative to the laws of Canada.

It is said, however, Parliament can enact relative to subjects beyond those specifically assigned when it deems it necessary for the peace, order and good government of Canada.

In the first place I repeat the "British North America Act" has by section 101 impliedly exhausted the subject and covered everything of a judicial character possible to assign, when we have regard to section 92, sub-section 14. And thus as well by the application of

(1) 36 Can. S.C.R. 462.

the maxim *expressio unius est exclusio alterius* as that by the inherent character of the subject-matter, having regard to what has already been said, everything directly involved herein has been disposed of.

In the next place the power given by the "British North America Act" in section 91, relative to peace, order and good government, expressly excludes the classes of subjects assigned exclusively to the legislatures of the provinces. I am thus unable to find the power to direct claimed to have been conferred.

Let the interpretation of the law of Canada now before us in scction 60 of the "Supreme Court Act," be considered here.

I submit as to that, wide as some of its expressions are and possibly partially inoperative we must never, if we can help it, attribute to Parliament the purpose of intending to exceed or of even unintentionally exceeding its powers, and must give its enactments operation so far as not *ultra vires*.

The final paragraph declaring what is decided to be held a final judgment of the court binding on the parties for purposes of appeal implies that there must have been before the court parties concerned who can appeal. There can be no appeal unless parties of some kind are affected; no one can be heard to appeal who has not appeared.

Something it may be said so omitted we are to supply by nominating counsel.

I prefer, if possible, assuming Parliament never intended such a submission as those respecting powers over which it has no control, or power to meddle with, and where no one will appear or can be brought forward to appear. I prefer assuming the legislation presupposed that the provinces would appear in accord-

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ance with the practice I have already adverted to; either willingly or by force of public opinion; or at all events that the jurisdiction is to be restricted in other cases to the classes of appeals such as involved in the *Manitoba School Case* (1), or relative to the laws of Canada, wherein no question of a conflict with a province or its exclusive rights and powers could be at all involved or anything relative thereto.

Let us assume for the present that no appeal is taken from such expressions of our opinion. The nominating of counsel to appeal is unprovided for.

Let us assume each of these questions answered in such a way as to derogate from or deny the right of the provinces to legislate in a way they have long been accustomed to do, and thus cast doubt on the legal existence of a vast number of corporate bodies and the legality of contracts innumerable.

Are we to assume that our opinions no matter how much we may protest that they do not bind, will be treated as contemptible and of no effect? To do so would be to encourage a contempt for the highest court in the Dominion.

Let us assume that our opinions are treated with the respect due to such a court, and we may shake to its foundation the commercial seats of business and interests of the country.

We may be thus placed by asserting jurisdiction between contempt on the one hand and disorder on the other.

Or let us assume that an appeal is taken and the court above us has as heretofore refused to answer or to attempt to solve in that way mere speculative or

(1) 22 Can. S.C.R. 577.

theoretical issues.. Where are we left? Where can we and how can we remedy the evil plight into which we have plunged our court or the commercial interests we have involved; or perhaps both.

This court has consistently and most properly said that when there is a doubt of our jurisdiction we must refuse to act or to presume we have it.

I submit with respect that there is the gravest doubt of our jurisdiction.

As germane to what I have already said of the constitutional models and problems involved in the framing of the "British North America Act," and the inherent improbabilities of such a thing being attempted as the creation of our court with such powers, I might be permitted to refer to the history of such references in the United States. In my opinion on the *"Lord's Day" Case* (1), I referred thereto, and now make the further reference to Black on Constitutional Law, p. 84, where a further collection of authorities may be found.

These all indicate that short of an express authority engrafted as it must in all such cases be in the State Constitution, and adopted by a direct vote of the people, such a thing is non-existent in that country and in a most restricted form even in the few cases permitted.

We know we are much indebted to the experience of that country for the form of government we in Canada enjoy. I think we can, despite what may have been said to the contrary, in arriving at the true interpretation of our "British North America Act" (brought into being when civil war there had become an object lesson which bore fruit in the form of federation

(1) 35 Can. S.C.R. 581.

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adopted by that Act) especially on questions of this kind, receive most useful lessons both of instruction and warning from the experience of that country and from many of its master-minds that have dealt with the solving of such problems as are now presented to us.

When one has pondered over the constitutional problems they have been engaged with, the solution of and the long time it has taken to solve some such questions as propounded to us herein which we are expected to do within a few weeks, one must feel the wisdom of making haste slowly.

Our Constitution like that of the United States, consists largely of enumerated subject-matters and powers to be exercised exclusively in respect of same without any attempt at definition of how or how far by federal or provincial authority respectively.

I may be permitted in relation thereto to draw from one of the sources I have indicated an enunciation of principles that are worth considering.

That great judge, Chief Justice Marshall of the United States Supreme Court, whose long life-work was taken up in a great part with solving problems arising out of such conditions, in one of his judgments in speaking relatively to this feature which is common to our "British North America Act" and the Constitution of the United States, said:—

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

And speaking of the constitutional question then before him, he says:—

> In considering this question, then, we must never forget that it is a *constitution* we are expounding.

It has been said that it is quite competent for Parliament to impose upon this court any duty it sees fit, and the election case of *Valin* v. *Langlois* (1), (from which judgment leave to appeal was refused (2), is relied upon.

I am quite unable to see any analogy, in some of these submissions to that case.

That case would go a long way to maintain the proposition that any judicial duty within the competence of Parliament to create might be imposed upon us but falls far short of what is involved in some of these questions submitted.

Can Parliament constitute this court a tariff commission, a civil service commission, a conservation commission, a department for the management of any of the affairs of state, or an adjunct to any of the departments discharging such duties, or an advisory adjunct to the provincial courts?

It matters not to reply that these things are unlikely to be proposed.

It is a bare question of the power to impose any other than a judicial duty and that relative to the laws of Canada. When argument goes beyond that limit any one of these extreme questions is an apt answer to such a pretence.

I do not deny for one moment the competence of Parliament to constitute a Board for any one of these suggested purposes or to annex thereto an advisory

(1) 3 Can. S.C.R. 1. (2) 5 App. Cas. 115.

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committee for purposes of inquiry into and answering questions of law.

But I do say that no such or the like duties can be imposed upon this court. And I most respectfully submit (if we bear in mind not only that it is a constitution we are expounding but one as clear as any thing can be, not entirely written in express words, but to be inferred from the nature of things as understood by the highest authorities and the language of the "British North America Act" itself), that it clearly would not be any more competent for Parliament to do so than to constitute the Minister of Justice the supreme court.

The legislative, executive and judicial functions of government must be kept separate if we are to maintain the principles of government we enjoy, and which it was intended we should enjoy.

If we degrade this court by imposing upon it duties that cannot be held judicial but merely advisory and especially in the wholesale way submitted herein, we destroy a fundamental principle of our government.

I am speaking of jurisdiction. I am dealing with the power of Parliament relative to the constitution of a judicial tribunal.

The production of a thesis on such subjects as involved in some of the questions submitted, which can only be answered in some such form, might be a profitable mental exercise but seems beyond the scope and purview of anything permitted by the "British North America Act" as part of any judicial duty.

To any one who supposes all or any of these suggestions as to the duty we are asked to undertake as fanciful, let him turn to the hypothetical questions put, and some that are not so purely hypothetical, but

all intended to be disposed of on an *ex parte* argument decisive of the right of nine provinces to legislate on a variety of subjects. Let him turn to the cases giving rise to some few of the many contentions involved, and having read them and considered, again read these questions.

Is there not involved, in the very essence of what is attempted, the taking away of men's rights or liberties without due process of law?

Was the doing of that not the fundamental reason that led to the remonstrances that brought about the granting of the great charter that such things should not thenceforth be done?

It seems to me so and in the highest sense there can never be supposed to have been or to be any implication justifying such a thing as possible within the powers to be used for the peace, order and good government of Canada.

The Manitoba School Case (1), was relied upon.

That case and the legislation anticipating it of which section 60 is now the substitute in a more extended form was a disposition by this means of the discharge of a judicial duty or quasi appellate judicial duty, which was cast upon the Governor-General in Council by the "British North America Act."

Parliament was held to have a right to delegate the discharge of part of that duty to this court. It was and is an entirely different question from what arises here.

It has no relation to what arises herein. If the mere statement of the legal facts relative to each of these two classes of cases cannot be grasped so that

(1) 22 Can. S.C.R. 577.

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their distinction becomes thereby clear, it would, I fear be hopeless to make anything I have said understood.

In the one case we have a duty expressly cast by the "British North America Act" upon the authorities which have to deal with both the adjudication and the execution of the judgment, and these same authorities may well be implied to have inherently possessed the means of disposing of such an appeal to be resolved in some way. In the other there is not in the slightest way any express duty cast upon the Dominion to delimit the sphere of action of the provinces. And nothing in that regard is implied save by virtue of section 101. And there is nothing that can be reasonably implied therein of an extra-judicial nature. There is, therefore, nothing to rest upon as in the other case any shadow of excuse for claiming the like right or power relative to this court.

Again it is said that it need not be an *ex parte* argument for this court can designate some counsel to represent the provinces or any one concerned in spite of them and their resolve not to appear.

I mention it lest my repeated reference to the *ex parte* nature of the kind of proceeding taken should lead any one to suppose I had overlooked this.

If any one thinks that or the exercise of that supposed power can render the proceeding any other than *ex parte* in every essential, then I most respectfully submit he has failed to grasp the nature of the problems to be solved.

When the provinces have done their best and exercised the greatest care and study of the facts and the operation of the conditions to be understood if a right conclusion is to be reached one may well doubt if it is

possible to find continuously existent that depth of insight into the future to reach right conclusions. A direct specific power of supervision by means of the veto is assigned to the Dominion as the corrective of any presumption on the part of any provincial legislature to exceed its powers. Does not that direct power exclude the adoption of any indirect method such as the expedient now in question? A workable conclusion can never be reached save by the slow methods that from time to time have been exercised to solve other questions of law and liberty by a treatment of concrete cases as the occasions arise.

In referring to the history of the "British North America Act," the improbabilities that history suggests relative to its scope and purposes and the inconveniences and considerations of the possible consequences of any such mode of proceeding as now in question as proper to be had in view in arriving at the true interpretation of the powers it confers or fails to confer, I may be told this Act is a written instrument that must be construed by what it contains.

I agree it is so to a certain extent and I think I have demonstrated from what it contains the absolute negation of any such power of interference with the exercise of the powers of the provinces as claimed herein. But beyond that when and where the terms of the instrument may be found ambiguous we must, I submit, approach its interpretation somewhat after the fashion or in the like manner in which we approach any other written instrument of ambiguous import and have as its surrounding circumstances, regard to its origin, its general character and purposes and then these considerations I have adverted to may well be borne in mind.

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When we turn our attention to the omission to define in detail the enumerated powers as already referred to and the omission of much more I have not referred to, the careful student will find much need for a knowledge of history and especially of constitutional history to aid him in the interpretation of this instrument.

In conclusion I hold that if we have jurisdiction we are in duty bound to answer so far as our knowledge and understanding enable us to.

I hold further that if in our collective view it is held or if any of us in his individual view holds we have no jurisdiction to answer and Parliament no power to give that jurisdiction, we are and each of us is, in duty bound to say so, and abide by that position until the court above has on appeal decided otherwise.

DUFF J.—The objection taken *in limine* by the provincial governments is that the questions in so far as they expressly call for an expression of opinion respecting the extent of the legislative powers of the provinces are such as Parliament has no authority to require or authorize this court to answer. I think it cannot be disputed that Parliament might constitute a body (whether described as a court or not) empowered to exercise a purely consultative jurisdiction in respect of questions touching the limitations imposed upon the legislative powers of the Dominion or the provinces in respect of any given subject. This authority would seem to be a necessary adjunct to the legislative authority with which Parliament is invested — limited as it is (within the boundaries of Canada) by reference to the powers conferred upon the local legislatures. Subject

to some limited exceptions (with which we are not here concerned), full legislative authority within Canada is divided between Parliament and the provincial legislatures. All such authority as is not given to the legislatures is vested in Parliament. In most cases in which controversy arises respecting the limits of Dominion legislative authority the limits of provincial authority are to a greater or less extent involved. Very obviously, I should think, it must frequently be desirable if not absolutely essential that Parliament be in a position to inform itself as thoroughly as possible in advance of legislation upon any particular subject, not only how far its own powers extend in reference to that subject but what authority may be lawfully exercised by the provinces in relation to it. Parliament may desire in some cases to legislate to the full limit of its own powers. In other cases it may be desirable that as far as possible legislative action in given conditions should be left to the local legislatures. In all such cases the advantage of trustworthy legal advice respecting the constitutional authority of the Dominion and the provinces respectively must be evident. It seems, therefore, to be outside the range of dispute apart from any special provision that authority to take such steps must be regarded as involved in the grant of the legislative powers conferred upon Parliament. The substantial question presented by the appeal is whether there is anything in the character of this court as a "general court of appeal for Canada" established under section 101 of the "British North America Act" which is necessarily incompatible with the exercise of the functions that section 60 of the "Supreme Court Act" professes to require the court to perform. In other

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words, is there anything in section 101 which by necessary implication prohibits the exercise of such functions by a court of general appeal for Canada established under it?

I am not able to reach the conclusion that the constitution of a general court of appeal for Canada under this section would necessarily involve the exclusion of such a jurisdiction. The jurisdiction conferred by section 60 is consultative merely. The advice although expressed in the form of a judgment and given after argument, is not a judicial deliverance of this court as a court. It is consequently not binding on anybody—neither upon the government asking for advice nor upon interested parties, who take part in the discussion. The opinions expressed do not, in my judgment, constitute judicial precedents by which this court in the exercise of its jurisdiction under section 101 can be bound or by which any court whose judgments are appealable to this court can be bound.

I do not think that the connotation of the term "general court of appeal for Canada" involves any interdiction upon the exercise by that body of such extra-judicial functions. Under the constitution of the United Kingdom (and the first paragraph of the preamble of the "British North America Act" discloses the intention that the Constitution of Canada shall be similar in principle to that of the United Kingdom) the business of judicature is and has always been performed by bodies and persons invested with other powers, legislative, administrative or consultative. The highest court of appeal in the United Kingdom is a legislative body. Some of the powers of the High Court of Justice are really administrative powers formerly exercised by the Lord Chancellor in his ad-

ministrative capacity. Even habeas corpus seems to have been thought by an eminent judge (Lord Bramwell in *Cox* v. *Hakes*(1), at pages 525-6) not to be an act of judicature. The Lord Chancellor has been a member of the cabinet since cabinets existed, and has always exercised wide administrative powers. The common law judges have always been subject to be summoned by the peers to advise upon questions of law. The High Court of Justice in one instance at least (under section 29 of the "Local Government Act," 1888), exercises a purely advisory jurisdiction, *Ex parte County Council of Kent* (2). There is nothing then in the fact that this court is a court which according to traditional British notions is necessarily inconsistent with the exercise of such duties. Nor do I think there is anything in the circumstance that the court, as constituted under section 101, is a court of appeal. The "Supreme Court Act" confers or professes to confer upon the judges of this court jurisdiction in habeas corpus where the question involved relates to criminal proceedings under a statute of the Parliament of Canada; and I do not think the validity of this provision has ever been questioned. I have mentioned the Lord Chancellor, and the House of Lords; and even the High Court of Justice now exercises appellate jurisdiction. In none of these cases, as I have pointed out, has the exercise of legislative administrative or advisory functions been regarded as incompatible with the judicial character of the body exercising those functions.

The objection to some extent is also rested upon section 92, sub-section 14, of the Act. I quite agree

(1) 15 App. Cas. 506. (2) [1891] 1 Q.B. 725.

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that if section 60 on its true construction required this court to do any act directly affecting the action of the courts of any of the provinces in respect of such a question either by way of declaring a rule which those courts should be bound to follow or creating a judicial precedent binding upon them, or upon this court in its capacity as a court entertaining appeals from the provincial courts under section 101 or imposing on this court any duty incompatible with the due exercise of its jurisdiction in respect of such appeals—such for example as pronouncing, *ex parte,* at the behest of the executive upon a question raised, *inter partes,* in such an appeal — I quite agree, I say, that if that were the effect of section 60 then the validity of that section might be open to objection as Dominion legislation professing to deal with the subject of the administration of justice in the provinces after a manner not justified by the "British North America Act." But I do not think the submission (for advice) of questions relating to the legislative jurisdiction of the provinces or the giving of such advice necessarily constitute such an interference with the administration of justice.

I should, perhaps, add that I do not wish to be understood as expressing any opinion upon the propriety of the questions now before us. I confine myself to the precise point raised by Mr. Nesbitt.

ANGLIN J.—If the jurisdiction of the Parliament of Canada to enact it depended solely upon section 101 of the "British North America Act," I am not certain that section 60 of the "Supreme Court Act" would be *intra vires.* The duties which it imposes do not appertain to the work of "a general court of appeal for

Canada"; and the constitution of this court "as an additional court for the better administration of the laws of Canada" (Sup. Ct. Act, sec. 3), I incline to think, contemplates its having jurisdiction to interpret, apply, and carry out (administer) such laws rather than to act as the adviser of the executive, or of Parliament, or its component branches, upon questions of jurisdiction to enact prospective legislation (sec. 60 (*d*)). It may be that, having regard to the preamble of the "British North America Act," the power to create a court involves the right to impose upon it the duties prescribed by section 60 and that, *ex vi termini*, when constituted it is endowed with the powers necessary to enable it to discharge such duties. But such implied or inherent jurisdiction, whether legislative or judicial, is apt to prove, like public policy, "a very unruly horse." Its limits are vague and ill-defined. It may become a specious pretext to cloak an unwarranted assumption of power. I prefer to rest my opinion that section 60 of the "Supreme Court Act," is *intra vires* upon the provision of section 91 of the "British North America Act," empowering Parliament

> 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.

In section 92, which deals with the "exclusive powers of provincial legislatures," I find no subject enumerated with provincial jurisdiction over which anything in section 60 of the "Supreme Court Act" could be deemed an interference. It has been argued that the administration of justice in the provinces(1)

(1) Section 92, sub-section 14.

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would be affected by the exercise by this court of the jurisdiction which section 60 purports to confer. If Parliament had attempted to give to opinions of this court thus obtained the effect of judgments *inter partes*, there would be much force in this contention, because, assuming the validity of the legislation, provincial courts might then properly deem themselves bound to regard such opinions as binding upon them. But the express declaration that, except for purposes of appeal to His Majesty in Council, the opinion of the court on any reference under section 60 is "advisory only" (sub-section 6), denudes it of all the other notes of a judgment of this court sitting as "a general court of appeal for Canada," leaving this court itself and every other court throughout the Dominion—inferior as well as superior—free to disregard it. The views of members of this court upon the character and effect of their answers to questions referred to them under section 60 have been expressed in several cases: *Re Provincial Fisheries* (1) at page 539; *Re Sunday Labour Legislation* (2); *In re Criminal Code* (3). I therefore fail to perceive in the impugned legislation any interference with "the administration of justice in the provinces." On no other ground was it suggested that section 60 invaded the field of legislation exclusively assigned to the provinces.

The words of the "British North America Act," empowering Parliament to make laws for the peace, order and good government of Canada,

are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. *Riel* v. *The Queen* (4), at page 678.

(1) 26 Can. S.C.R. 444.
(2) 35 Can. S.C.R. 581.
(3) 43 Can. S.C.R. 434.
(4) 10 App. Cas. 675.

Lord Chancellor Halsbury, delivering the judgment of the Judicial Committee, further said that their Lordships were of the opinion that there is not the least colour for the contention

> that if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government that they would be entitled to regard any statute directed to those objects, which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

Parliament having the responsibility of legislating must be allowed to decide for itself what particular measures are calculated to promote peace, order and good government. If its legislation does not on the one hand trench upon the exclusive domain of provincial legislative jurisdiction and on the other does not overstep the restrictions necessarily flowing from the inherent condition of a dependency, or conflict with paramount Imperial legislation, no court may question its validity, because

> the "Federation Act" exhausts the whole range of legislative power, and whatever is not thereby given to provincial legislatures rests with the Parliament. *The Bank of Toronto* v. *Lambe*(1), at page 588;

and "when acting within the limits" of its jurisdiction our Parliament

> has and was intended to have plenary powers of legislation, as large and of the same nature as those of the (Imperial) Parliament itself. *The Queen* v. *Burah*(2), at page 904.

That Parliament could have provided for the creation of a body of law officers and have imposed upon it the duty of advising upon such questions (speaking generally) as are now propounded for our considera-

(1) 12 App. Cas. 575. (2) 3 App. Cas. 889.

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tion admits of no doubt. I know of nothing to prevent its requiring the discharge of such duties by lawyers who happen to be members of this court. The wisdom of such legislation as a matter of policy Parliament and not this court must determine.

I am, therefore, of opinion that we may not decline to entertain this reference on the ground that section 60 of the "Supreme Court Act" is *ultra vires* of Parliament.

I reserve consideration of whether and how far each of the several questions included in the present reference falls within the purview of section 60 and can be or should be answered, until we have had the advantage of argument and discussion upon them.