1, 1947



# In the Privy Council.

No. 26 of 1940.

# ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled "An Act to amend the Supreme Court Act."

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO, THE ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE ATTORNEY-GENERAL OF NEW BRUNSWICK AND THE ATTORNEY-GENERAL OF NOVA SCOTIA *Appellants,*

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL OF MANITOBA AND THE ATTORNEY-GENERAL OF SASKATCHEWAN .. *Respondents.*

# RECORD OF PROCEEDINGS.

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PART I.—PLEADINGS &c.

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# In the Privy Council.

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# RECORD OF PROCEEDINGS.

PART I.

PLEADINGS.

*In the Supreme Court of Canada.*

**No. 1.**

No. 1. Order of Reference by His Excellency the Governor-General in Council, dated the 21st day of April, 1939. (P.C. 908).

**Order of Reference by His Excellency the Governor-General in Council dated the 21st day of April, 1939.**

(P.C. 908.)

At the Government House at Ottawa.

Friday, the 21st day of April, 1939.

Present:

10 His Excellency the Governor-General in Council.

*In the Supreme Court of Canada.*

No. 1. Order of Reference by His Excellency the Governor-General in Council, dated the 21st day of April, 1939 (P.C. 908). —*continued.*

Whereas there has been laid before His Excellency the Governor-General in Council a report from the Right Honourable the Minister of Justice, dated April 18th, 1939, representing that, at the fourth session of the Eighteenth Parliament of Canada, Bill 9, entitled " An Act to amend the Supreme Court Act," was introduced and received first reading in the House of Commons on January the 23rd, 1939 ; and

That, on April the 14th, the debate on the motion for second reading of this Bill, an authentic copy of which is hereto annexed, was adjourned in order that steps might be taken to obtain a judicial determination of the question of the legislative competence of the Parliament of Canada to enact the provisions of the said Bill in whole or in part ;

Now, therefore, His Excellency the Governor-General in Council, on the recommendation of the Minister of Justice and pursuant to the provisions of section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration :—

Is said Bill 9, entitled " An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ?

E. J. LEMAIRE,
Clerk of the Privy Council.

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## No. 2.

No. 2. Bill No. 9 of the 4th Session of the Eighteenth Parliament of Canada, entitled " An Act to amend the Supreme Court Act," January 23, 1939.

### Bill No. 9 of the 4th Session of the Eighteenth Parliament of Canada, entitled " An Act to Amend the Supreme Court Act," January 23, 1939.

4th Session, 18th Parliament, 3 George VI, 1939.

The House of Commons of Canada.

Bill 9.

An Act to amend the Supreme Court Act of Canada.

R.S., c. 35 1928, c. 9 ; 1929, c. 58 ; 1930, c. 44 ; 1937, c. 42.

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. Section fifty-four of the Supreme Court Act, chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor :—

Exclusive jurisdiction and judgment to be final.

" 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the Court shall, in all cases, be final and conclusive.

Abolition of appeals to His Majesty in Council.

"(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

Judicial Committee Acts, 1833 and 1844 repealed (3 and 4 W. IV, c. 41, and 8 V, c. 69)

"(3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

Pending appeals saved.

2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

Coming into force.

3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette.

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## No. 3.

No. 3.
Order of Supreme Court of Canada for Inscription of Reference and Directions dated the 1st day of May, 1939.

### Order of Supreme Court of Canada for Inscription of Reference and Directions, dated the 1st day of May, 1939.

In the Supreme Court of Canada.

Before :

The Right Honourable the Chief Justice.

Monday, the 1st day of May, A.D. 1939.

In the Matter of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada, entitled "An Act to Amend the Supreme Court Act."

Upon the application of the Attorney-General of Canada for directions as to the inscription for hearing of the Case relating to the question referred by His Excellency the Governor-General for hearing and consideration by the Supreme Court of Canada under the provisions of section 55 of the Supreme

*In the Supreme Court of Canada.*

No. 3. Order of Supreme Court of Canada for Inscription of Reference and Directions, dated the 1st day of May, 1939 —*continued.*

Court Act and upon hearing read the Order-in-Council dated the 21st April, A.D. 1939 (P.C. 908), setting forth the said question ; upon reading the Affidavit of Charles P. Plaxton filed herein ; and upon hearing what was alleged by counsel for the applicant and for the Attorneys-General of Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Alberta and Saskatchewan (no one appearing on behalf of the Attorney-General of Manitoba, although he was duly served with notice of such application).

It is ordered that the said Case be inscribed for hearing at the present Sittings of this Honourable Court on the 19th day of June, A.D. 1939, and filed on or before the 15th day of May, A.D. 1939, and that three copies thereof be thereupon delivered to the Ottawa Agents of the Attorneys-General of the several Provinces.

And it is further ordered that the Attorneys-General of the respective Provinces of Canada be notified of the hearing of the argument of the said Case by delivering to their respective Ottawa agents on or before the 15th day of May, A.D., 1939, a Notice of Hearing of the said reference and a copy of the said Order-in-Council, as well also as a copy of this Order.

And it is further ordered that the Attorney-General of Canada and the Attorneys-General of the respective Provinces of Canada be at liberty to file Factums of their respective arguments on or before the 12th day of June, A.D. 1939, and that they be at liberty to appear personally or by counsel upon the argument of the said reference.

And it is further ordered that notice of the said reference be given in the Canada Gazette on or before the 15th day of May, A.D. 1939.

And it is further ordered that the Attorney-General of Canada be at liberty to include in the Case such statutes, orders-in-council and other documentary material as he may consider to be relevant to the question referred to this Honourable Court for hearing and consideration as aforementioned, reserving, however, to the Attorneys-General of each of the Provinces aforementioned, the right to include as an appendix to his Factum such additional statutes, orders-in-council or documentary material as he may desire to submit with reference to the question referred as aforesaid, upon and subject to the condition that each such Attorney-General shall furnish to the Attorney-General of Canada and the Ottawa agents of each of the other Attorneys-General, parties to this reference, a list of any such additional statutes, orders-in-council or documentary material, on or before the 5th day of June, A.D. 1939.

(Sgd.) L. P. DUFF, C.J.

## No. 4.

*In the Supreme Court of Canada.*

No. 4. Notice of Hearing of Reference, dated the 8th day of May, 1939.

### Notice of Hearing of Reference, dated the 8th day of May, 1939.

In the Supreme Court of Canada.

In the Matter of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada, entitled " An Act to Amend the Supreme Court Act."

Take notice that the Reference herein has, by Order of the Right Honourable the Chief Justice of Canada dated the 1st day of May, A.D. 1939, been inscribed for hearing at the present Sittings of this Honourable Court on the 19th day of June, A.D. 1939, and you are hereby notified of the hearing of the said Reference pursuant to the terms of the said Order, copy of which is hereto annexed.

Dated at Ottawa, this 8th day of May, A.D. 1939.

W. STUART EDWARDS,
Solicitor for the Attorney-General of Canada.

To : The Ottawa agents for
The Attorney-General of Ontario,
The Attorney-General of Quebec,
The Attorney-General of Nova Scotia,
The Attorney-General of New Brunswick,
The Attorney-General of Manitoba,
The Attorney-General of British Columbia,
The Attorney-General of Prince Edward Island,
The Attorney-General of Alberta,
The Attorney-General of Saskatchewan.

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## No. 5.

No. 5. Factum of the Attorney-General of Canada.

### Factum of the Attorney-General of Canada.

PART I.

STATEMENT OF CASE.

1. By Order of His Excellency the Governor-General in Council, dated April 21st, 1939 (P.C. 908) (Record, p. 5), the following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the Supreme Court Act :

*In the Supreme Court of Canada.*

No. 5. Factum of the Attorney-General of Canada —*continued.*

" Is said Bill 9, entitled ' An Act to amend the Supreme Court Act,' or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ? "

2. As the proposed amendments of the Supreme Court Act embodied in said Bill 9 fall within narrow compass, it will be convenient to set out the full text of the operative provisions of the Bill as follows :—

" 1. Section fifty-four of the Supreme Court Act, chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor :—

" ' 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the Court shall, in all cases, be final and conclusive.

" ' (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

" ' (3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.'

" 2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

" 3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette."

3. The relevant provisions of the British North America Act, 1867, are the introductory clause of sec. 91, sec. 92 (14), and secs. 101 and 129, reading as follows :—

" 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; . . ."

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

* * * * * * *

" 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."

" 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."

" 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made ; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act."

4. The provisions of the British North America Act, 1867, were, in terms, made applicable only to the Provinces thereby united, namely, the Provinces of Canada, Nova Scotia and New Brunswick ; but the first mentioned of these Provinces, namely, the Province of Canada, was by that Act divided into two separate Provinces, namely, the Provinces of Ontario and Quebec, corresponding respectively with the former Provinces of Upper Canada and Lower Canada. The relevant provisions of the British North America Act, 1867, were, however, made applicable to the Provinces subsequently created or admitted into the Union, namely :—

(1) In the case of Manitoba (Rupert's Land and the Northwestern Territory having been admitted into and made part of the Dominion of Canada by Order of the Sovereign in Council dated June 23, 1870, with effect from July 15, 1870) by sec. 2 of the Manitoba Act, 1870 : (Record, p. 191).

(2) In the case of British Columbia by Article 10 of the terms of Union with that Province approved by Order of the Sovereign in Council dated May 16, 1871 : (Record, p. 195).

(3) In the case of Prince Edward Island, by the third last paragraph of the terms of Union approved by Order of the Sovereign in Council dated June 26, 1873 : (Record, p. 197).

(4) In the case of Alberta, by sec. 3 of the Alberta Act, 1905 : (Record, p. 198).

*In the Supreme Court of Canada.*

No. 5. Factum of the Attorney-General of Canada —*continued.*

(5) In the case of Saskatchewan, by sec. 3 of the Saskatchewan Act, 1905 : (Record, p. 199).

5. The Statute of Westminster, 1931, 22 Geo. V (Imperial) cap 4 (Record, p. 200) is applicable to Canada as well as to other Dominions. By this Statute certain legal restrictions on Dominion Sovereignty were removed. The relevant provisions of the said statute are sections 2, 3 and 7 reading as follows :—

" 2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

" (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

" 3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

" 7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

" (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces."

" (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

## Part II.

## SUBMISSION OF THE ATTORNEY-GENERAL FOR CANADA.

6. The Attorney-General for Canada will contend for the reasons hereinafter set forth that the provisions of said Bill 9 are, in their entirety, intra vires of the Parliament of Canada in virtue of :—

(*a*) Its residuary legislative power to make laws for the peace, order and good government of Canada conferred by the introductory words of sec. 91 of the British North America Act, 1867 ; or

(*b*) Alternatively its exclusive, paramount and plenary legislative authority under sec. 101 of the said Act,

and that the question referred to this Honourable Court should, accordingly, be answered, without qualification, in the affirmative.

## PART III.

## ARGUMENT.

7. Object and effect of Bill 9: By sec. 35 of the Supreme Court Act, R.S.C. 1927, cap. 35, it is provided:—

> "The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada."

By subsec. 1 of sec. 54 of the said Act as proposed to be amended by Bill 9, it is provided:—

> "The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada. . . ."

The cardinal object of the Bill is revealed in this subsection. Whereas the Supreme Court in its character as a general court of Appeal for Canada, as now constituted, exercises appellate, civil and criminal jurisdiction within and throughout Canada, it is the object and intent of Bill 9 that the Court shall have hold and exercise not merely such appellate jurisdiction, but "exclusive, ultimate" appellate civil and criminal jurisdiction within and for Canada, and that its judgments shall in all cases be final and conclusive. To the attainment of this cardinal purpose of the Bill, the remaining provisions thereof are ancillary.

Subsection 2 of sec. 54, as proposed to be amended, is in much the same form as, though more sweeping in its terms than, subsec. 4 of sec. 1024 of the Criminal Code, which was the subject of the decision of the Judicial Committee in *British Coal Corporation* v. *The King* [1935] A.C. 500. Stated shortly, its intended effect is to annul any right of His Majesty in Council to entertain appeals from any court now or hereafter established within Canada.

To the same end, subsec. 3 of sec. 54, as proposed to be amended, repeals the Judicial Committee Acts of 1833 and 1844, and all orders, rules or regulations made thereunder in so far as the same are part of the law of Canada.

The remaining provisions of the Bill are of subsidiary importance.

8. By way of approach to the argument of the constitutional question raised by this reference, it will be convenient to outline briefly:—

(1) The nature of the appellate jurisdiction exercised by His Majesty in Council, and

(2) The existing classes of appeals from Canadian Courts to His Majesty in Council.

9. Nature of appellate jurisdiction of His Majesty in Council. Prior to 1833, the right of the Sovereign in Council to entertain, by way of special leave, appeals from any court in His Majesty's Dominions beyond the seas, was a settled part of the royal prerogative: "a residuum of the royal prerogative of the Sovereign as the fountain of justice"; *British Coal Corporation* v. *The King* [1935] A.C. 500, 511. As was said by the Judicial Committee in *Regina* v. *Bertrand* (1867) L.R. 1 P.C. 520, 530:—

> ". . . in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or

*In the Supreme Court of Canada.*

No. 5. Factum of the Attorney-General of Canada —*continued.*

statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

This appellate jurisdiction was usually exercised in a Committee of the whole Privy Council which, having heard the allegations and proofs, made their report to His Majesty in Council by whom a judgment was finally given: 1 Bl. Com. pp. 231, 232; Preamble of the Judicial Committee Act, 1833; Bentwich, Privy Council Practice, 3rd ed., 1937, pp. 2, 3.

In 1833 there was passed an Act of the Imperial Parliament, 3-4 William IV, cap. 41, entitled "An Act for the better administration of justice in His Majesty's Privy Council," later given the short title of "The Judicial Committee Act, 1833" (Record, p. 203). This Act created a statutory body called "The Judicial Committee of the Privy Council," and is the basis of the present constitution and procedure of this tribunal. It recites, inter alia, that "from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council"; and proceeds to provide for the more effectual hearing and reporting of appeals to His Majesty in Council and on other matters, and for giving powers and jurisdiction to His Majesty in Council. The Act goes on to provide for the formation of a Committee of His Majesty's Privy Council to be styled "The Judicial Committee of the Privy Council"; and enacts that "all appeals, or complaints in the nature of appeals whatever, which, either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council" from the order of any court or judge, should thereafter be referred by His Majesty to, and heard by the Judicial Committee as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open court.

A later Act, the Judicial Committee Act, 1844, 7-8 Vict. cap 69 (Record, p. 206), after reciting that "the Judicial Committee, acting under the authority of the said Acts (the Act of 1833 and an amending Act), hath been found to answer well the purpose for which it was so established by Parliament; but it is found necessary to improve its proceedings in some respects for the better despatch of business, and expedient also to extend its jurisdiction and powers," enacts in sec. 1 that it shall be competent to Her Majesty, by general or special Order in Council, "to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal within such colony or possession." This followed a recital that by the laws in force in certain of Her Majesty's colonies and possessions abroad, no appeals could be brought to Her Majesty in Council save only from courts of error or of appeal, and that it was expedient to provide that Her Majesty in Council should be authorised to admit such appeals.

By these Acts, and by various later Imperial Acts, the constitution and jurisdiction of the Privy Council have been altered and extended and are by them and by orders made under their authority completely regulated. These statutes are reviewed in Bentwich's Privy Council Practice, 3rd Ed., 1937, pp. 1-9.

The Judicial Committee Acts are in force not merely in the United Kingdom, but throughout the Empire, subject, of course, to such inconsistent provisions affecting appeals to His Majesty in Council as are contained in the constitutions of some of the Dominions or in other British statutes. For instance, the power of His Majesty in Council to direct courts of the Dominions to carry into effect the orders, decisions or sentences issued or pronounced by him on the report of the Judicial Committee and the legal efficacy of such directions in the Dominions clearly depend upon the provisions of those Acts ; see *e.g.* sec. 21 of the Act of 1833 ; sec. 9 of the Act of 1843 ; secs. 1, 9 and 11 of the Act of 1844.

10. Existing Classes of Appeals from Canadian Courts to His Majesty in Council.—In discussing appeals to His Majesty in Council, it is of some importance to bear in mind the distinction between the different classes of appeals from judgments of the courts in Canada which are available. They are :—

I. Appeal by special royal grant, in the case of each of the Provinces of Canada, except Ontario and Quebec.

In virtue of Imperial Orders in Council (Record, p. 211), passed under the authority of the Judicial Committee Acts, commonly referred to as the King's Orders an appeal lies, speaking generally, from any final judgment of the Supreme Court of each Province (*a*) as of right where the matter in dispute on the appeal amounts in value to a specified sum or upwards or (*b*) at the discretion of the court from any judgment of the court whether final or interlocutory, if in its opinion the question involved is one fit and proper for appeal.

II. Appeals allowed by Provincial statutes in the case of Ontario and Quebec.

By the Constitutional Act of 1791 (Record, p. 217), under which the old Province of Quebec was divided into two new provinces called Upper and Lower Canada respectively, provision was made by sec. 34 for the establishment of a court of civil jurisdiction within each of the said provinces respectively, for hearing and determining appeals within the same " in the like cases, and in the like manner and form, and subject to such appeal therefrom, as such appeals might, before the passing of this Act, have been heard and determined by the Governor and Council of the Province of Quebec ; but subject, nevertheless, to such further or other provisions as may be made in this behalf by any Act of the Legislative Council and Assembly of either of the said provinces respectively assented to by His Majesty, his heirs or successors."

In professed exercise of the power so conferred, the Legislature of each province enacted a statute—Lower Canada, 34 Geo. III, cap. 6 (Record,

p. 219); and Upper Canada, 34 Geo. III, cap. 2 (Record, p. 221)—providing for appeals in certain classes of cases to His Majesty in Council.

These statutory provisions (assuming them to have been validly enacted), continued in force by sec. 46 of the Act of Union, 1840 (3-4 Vict., cap. 35) (Record, p. 222), were, subject to certain intermediate modifications, continued in force by sec. 129 of the British North America Act, 1867, " subject, nevertheless (except with respect to such as are enacted by or as exist under the Acts of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

The existing statutory provisions relating to Privy Council appeals in force in these Provinces respectively, are to be found, for Ontario, in the Privy Council Appeals Act, R.S.O. 1937, cap. 98 (Record, p. 229), and for Quebec, in Article 68 of the Quebec Civil Code of Procedure (Record, p. 231).

III. Appeals by special leave of His Majesty in Council.

An appeal lies to the King in Council by special leave obtained from the King in Council on application to the Judicial Committee from the judgment of any court of any of the British Dominions, unless His Majesty has parted with authority to grant such leave.

11. Appeals from the Supreme Court of Canada.—The British North America Act, 1867, by sec. 101, authorised the creation of a general Court of Appeal for Canada. In 1875, by 38 Vict., cap. 11 (Canada), the Supreme Court of Canada was established with " an appellate, civil and criminal jurisdiction within and throughout the Dominion of Canada." Section 47 of the said Act (now sec. 54 of the Supreme Court Act, R.S.C., 1927, cap. 35) enacted that the judgments of the Supreme Court of Canada should, in all cases, be final, and that no further appeal should be brought to " any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."

This Act was assented to by the Governor-General and a copy thereof was transmitted by him to the Secretary of State for the Colonies in accordance with sec. 56 of the British North America Act. Following considerable correspondence and discussion between the Honourable Edward Blake, then Minister of Justice, and the Earl of Carnarvon, Colonial Secretary, the Act was not disallowed ; but in a secret despatch, dated August 29, 1876, from the Colonial Secretary to the Governor-General, it was stated that in view of the fact that the Act did not purport to take away any right of appeal to Her Majesty in Council from the judgment of any provincial court with respect to which a right of appeal then existed, sec. 47 would be inoperative, except in the unlikely event of a new court of appeal being established by the Parliament of the United Kingdom for the hearing of Colonial appeals, seeing that the said section saved Her Majesty's royal prerogative to review judgments of the Supreme Court of Canada. In conformity with this view, in *Johnston* v. *St. Andrew's Church, Montreal* [1887] 3 A.C. 159, 162, the Judicial

Committee held that Her Majesty's prerogative to allow an appeal, if so advised, was left entirely untouched and preserved by said sec. 47.

There is thus no appeal as of right from the Supreme Court of Canada to His Majesty in Council ; but the royal prerogative being preserved, or in effect the statutory jurisdiction of the Judicial Committee of the Privy Council, there is at present an appeal from that court to His Majesty in Council by (but only by) special leave of the Judicial Committee.

12. In substance, then, the right of a litigant to bring an appeal from the judgment of a Canadian Court to His Majesty in Council must be derived from one or other of the following :—

(*a*) Imperial legislation, and in particular the Judicial Committee Acts of 1833 and 1844, and in the case of each Province, other than Ontario and Quebec, the relevant King's Order, or

(*b*) In the case of the Provinces of Ontario and Quebec, the legislation (if valid) which is in force in those Provinces relating to appeals to His Majesty in Council, passed under the assumed authority of sec. 34 of the Constitutional Act of 1791, or

(*c*) The King's prerogative right to entertain any such appeal, unless such prerogative has been superseded and displaced by the statutory jurisdiction of the Judicial Committee of the Privy Council under the Judicial Committee Acts of 1833 and 1844.

It follows, therefore, that legislation by the Dominion Parliament designed (as Bill 9 is) to constitute the Supreme Court of Canada the " exclusive, ultimate " appellate court " within and for Canada " to the exclusion of any jurisdiction vested in the King in Council or in the Judicial Committee of the Privy Council can be justified as competent legislation only if that Parliament has been given power to repeal or at any rate to render inoperative the legislation referred to in (*a*) and (*b*) above, and possibly also, as regards (*c*) above, to annul the King's prerogative.

13. Regulation of appeals to King in Council, a prime element in Canadian Sovereignty.

In *British Coal Corporation* v. *The King* (1935) A.C. 500, 520, 521, Lord Sankey, L.C., who delivered the judgment of the Board, after stating that :—

> " Among the powers which go to constitute self-government there are necessarily included powers to constitute the Law Courts and to regulate their procedure and to appoint their judges. . . . A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the case may be."

proceeded to consider the question whether the special or prerogative appeal to the King in Council should be treated " as being something quite special

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and as being a matter standing, as it were, on a pedestal by itself," or " as simply one element in the general system of appeals in the Dominion."

On this point Lord Sankey concluded that :—

> " Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice."

The grounds upon which Lord Sankey justified this conclusion were stated as follows :—

> " The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court : if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian Courts. . . . But it is said that this class of appeal is a matter external to Canada ; emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so, the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada."

The point thus concluded by this decision is that all appeals from Canadian Courts to His Majesty in Council, including the so-called special or prerogative appeals, are " essentially matters of Canadian concern," and their regulation and control, in consequence, " a prime element in Canadian sovereignty as appertaining to matters of justice " : that is to say, of the very essence of the powers of self-government conferred by the British North America Act, 1867.

This was no more than a logical application of the principles which had been repeatedly laid down by the Judicial Committee concerning the nature and scope of the powers of self-government conferred by the British North America Act, 1867. These principles are :—

> (1) " The powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. . . . For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

*Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A.C. 571, 581 and 584 ; quoted with approval in *British Coal Corporation* v. *The King*, *supra* at p. 517.

(2) The powers so conferred endowed the Dominion Parliament and the Provincial Legislatures, within their respective spheres, with " authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow " : *Hodge* v. *The Queen*, 9 A.C. 117, 132 ; *In re Initiative and Referendum Act* [1919] A.C. 935, 942 ; *Croft* v. *Dunphy* [1933] A.C. 156, 163-4.

(3) The power of the Dominion Parliament to make laws for the peace, order and good government of Canada or in relation to any of the enumerated subjects of s. 91 " is apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to " : *Riel* v. *The Queen*, 10 A.C. 675, 678 ; *Croft* v. *Dunphy*, *supra*, 164. Hence, " in interpreting a constitution or organic statute such as the British North America Act, that construction most beneficial to the widest amplitude of its powers must be adopted " ; *The British Coal Corporation* v. *The King*, *supra*, 518, and " once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act," there exists " no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State " : *Croft* v. *Dunphy*, *supra*, 163.

It follows, then, that the only question presented for decision by the present reference is whether the power to constitute the Supreme Court of Canada the " exclusive ultimate " appellate court " within and for Canada," and to prohibit all appeals to His Majesty in Council in the fashion intended by the provisions of Bill 9, is within the legislative competence of the Dominion Parliament or of the Provincial Legislatures.

14. Prior to the Statute of Westminster, 1931 (Record, p. 200), the power of the Dominion Parliament, or indeed of any legislative organ in Canada, to legislate with regard to appeals to His Majesty in Council was fettered :—

(*a*) (so far as the appeals were by statutory right) by the Colonial Laws Validity Act, 1865, which rendered a Colonial law repugnant to the provisions of an Act of Parliament of the United Kingdom extending to the Colony either by express words or by necessary intendment void and inoperative to the extent of such repugnancy, and

(*b*) by s. 129 of the British North America Act, 1867, which excepted from repeal or alteration by the Dominion Parliament or the Provincial Legislatures, pre-confederation Imperial Statutes extending to Canada, and

(*c*) whether the appeals depended upon statutory right or upon the prerogative right alone) by the doctrine of the territorial limitation of the powers of Colonial Legislatures.

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In *Nadan* v. *The King* [1926] A.C. 482, the Judicial Committee (opinion by Lord Cave) held that sec. 1025 of the Criminal Code was ineffective to annul the right of His Majesty in Council to grant special leave to appeal in a criminal case upon two grounds :—

> First, that however widely the powers of the Dominion Parliament under sec. 91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada, and in particular in relation to " the criminal law . . . including the procedure in criminal matters," were construed, " they are confined to action to be taken in the Dominion," and
>
> Secondly, that said sec. 1025 was repugnant to the Judicial Committee Acts, and was, therefore, void and inoperative by virtue of the Colonial Laws Validity Act, 1865.

The judgment in *Nadan's* case [1926] A.C. 482, was interpreted by the Board in the *British Coal Corporation* case [1935] A.C. 500, as having proceeded upon these grounds :—

> (1) " That sec. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865 ;
>
> (2) " That it could only be effective if construed as having extra-territorial operation, whereas according to the law as it was in 1926 the Dominion Statute could not have extra-territorial operation."

By the Statute of Westminster, 1931 (Record, p. 200), the first of these two restrictions, that imposed by the Colonial Laws Validity Act, 1865, was removed both as regards the Dominion Parliament and the Provincial Legislatures ; sec. 2 and sec. 7 (2) (Record, p. 201, ll. 3-14 ; p. 201, ll. 39-41) ; but the second of these restrictions, that relating to the lack of capacity to make a law having extra-territorial operation, was removed in respect of the Dominion Parliament only : sec. 3 (Record, p. 201, ll. 15-17). The other restriction mentioned above, namely, that imposed by sec. 129 of the British North America Act, 1867, was held by the Judicial Committee in the *British Coal Corporation* case, *supra*, p. 520, to have also been removed by sec. 2 (2) of the Statute of Westminster, 1931. The latter branch of sec. 2 (2) of that Statute empowers the Dominion Parliament to repeal any Imperial Act or any order, rule or regulation made thereunder " in so far as the same is part of the law of the Dominion." This power is by sec. 7 (2) of the same Statute, extended " to laws made by any of the Provinces of Canada and to the powers of the Legislatures thereof," and by sec. 7 (3) can be exercised by the Dominion Parliament and the Provincial Legislatures only in relation to matters within the competence of these bodies respectively.

In so far as appeals to His Majesty in Council may depend upon the prerogative right alone, that right must exist by virtue of the common law of England ; and under the first branch of sec. 2 (2) of the Statute of Westminster, 1931, the Dominion Parliament may, by an enactment within its legislative competence, displace the operation of such common law.

In so far as such appeals depend upon statutory right, the right exists

in virtue of the Judicial Committee Acts, 1833 and 1844; and under the second branch of said sec. 2 (2), the Dominion Parliament may repeal such Acts " in so far as the same are part of the law of the Dominion." It is submitted that this expression embraces any Imperial Act which expressly, or by necessary intendment, extends to Canada or any part of it.

That the common law of England upon which the prerogative right referred to must depend, and the Judicial Committee Acts, are in force in and throughout Canada is beyond question. The decision in *Nadan's* case, *supra*, clearly proceeded upon the view that these Acts are Acts " extending to the Colony " within the meaning of sec. 2 of the Colonial Laws Validity Act, 1865, just as the more recent decision of the Board in the *British Coal Corporation* case, *supra*, no less clearly proceeded upon the view that the common law of England upon which the prerogative depends, and the said Acts, were " part of the law of the Dominion," and had, therefore, been effectively displaced as regards appeals in criminal matters to His Majesty in Council by the enactment of the Dominion Parliament there under consideration. The said Acts are, indeed, of general operation in and throughout Canada applying as they do to appeals from any court in Canada ; and none the less so, because appeals as of right from the courts of each province, other than Ontario and Quebec, are regulated by a special King's Order for each province made under authority of the Judicial Committee Act of 1844. It remains, therefore, to consider whether the provisions of Bill 9 fall within the legislative competence of the Dominion Parliament.

15. Bill 9 is not within the legislative competence of Provinces :

The rule of construction to be applied to secs. 91 and 92 of the British North America Act, 1867, for the purpose of ascertaining whether the provisions of this Bill fall within the legislative competence of the Dominion Parliament is well settled : *Citizens Insurance Co.* v. *Parsons* [1881] 7 A.C. 96, 109 ; *Russell* v. *The Queen* [1882] 7 A.C. 829, 836 ; *Dobie* v. *Temporalities Board* [1882] 7 A.C. 136, 149 ; *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396, 406.

In the case first above cited the governing principle is stated by Sir Montague Smith, who delivered the judgment of the Board, as follows :—

> " The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in sec. 92, and assigned exclusively to the legislatures of the Provinces ; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature prima facie falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and whether the power of the provincial legislature is or is not thereby overborne."

Have the Provinces then any legislative power to regulate or prohibit appeals from provincial courts to His Majesty in Council ? If not, then

*cadit quaestio*,—the provisions of Bill 9 must fall within the legislative competence of the Dominion Parliament, because the powers distributed by the British North America Act between the Dominion on the one hand and the Provinces on the other " cover the whole area of self-government within the whole area of Canada " and " it would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada " : *Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A.C. 571, 583, 584 ; or, as the Board stated in *Bank of Toronto* v. *Lambe* [1887] 12 A.C. 575, 587, " the Federation Act exhausts the whole range of legislative power, and whatever is not thereby given to Provincial Legislatures rests with the Parliament."

The only relevant head of provincial legislative jurisdiction is sec. 92 (14), " The administration of justice in the Province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." It will be observed there are three branches of this enumerated head. First, there are the main and controlling words, " The administration of justice in the Province." Is the giving or withholding of appeals from provincial courts to His Majesty in Council in civil matters within the scope of those words ? It is submitted it is not. The power is, in terms, subject to a territorial limitation. It is restricted to the administration of justice " in the Province." Appeals of the kind referred to may relate to administration of justice in respect of or for the Province ; they do not relate to the administration of justice " in the Province." Secondly, " The administration of justice in the Province " is expressed by sec. 92 (14) to include two other matters, namely :

(*a*) the constitution, maintenance and organisation of provincial courts both of civil and of criminal jurisdiction, and

(*b*) procedure in civil matters in those courts.

As to these two branches of the enumerated head, all that need be said is that neither His Majesty in Council nor the Judicial Committee of the Privy Council is a provincial court.

In *Nadan* v. *The King* [1926] A.C. 482, the residuary legislative authority of the Dominion Parliament to make laws for the peace, order and good government of Canada, and in particular its exclusive legislative authority in relation to " The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," although not in terms restricted territorially as in the case of sec. 92 (14), were held to be " confined to action to be taken in the Dominion." Upon this ground, among others, a Dominion enactment professing to prohibit appeals to His Majesty in Council in criminal matters was held to be ineffective to annul the prerogative right of the King in Council to grant special leave to appeal. In other words, such appeals were treated, in effect, as not relating to administration of criminal justice even in Canada, but rather as an extra-territorial administration of criminal justice for or in respect of Canada. Still less, then, can appeals from Canadian courts to His Majesty in Council in civil matters be considered as relating to " The administration of justice in

the Province " in view of the express territorial limitation contained in the description of that enumerated subject-matter.

There is another decisive reason, on the decisions, why the giving or withholding of appeals to His Majesty in Council in civil matters cannot be held to fall within the scope of sec. 92 (14) or any other enumerated head of that section.

The judgment in *Nadan's case, supra*, as interpreted by the Board in the *British Coal Corporation case* [1935] A.C. 500, was based on two grounds only :—

" (1) That sec. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865 ;

" (2) That it could only be effective if construed as having extra-territorial operation, whereas according to the law as it was in 1926 the Dominion Statute could not have extra-territorial operation."

By the Statute of Westminster, 1931, the first of these two restrictions, that imposed by the Colonial Laws Validity Act, 1865, was removed both as regards the Dominion Parliament and the Provincial Legislatures ; but the second of these restrictions, that relating to lack of capacity to make a law having extra-territorial operation, was removed in respect of the Dominion Parliament only. The Provincial Legislatures continue, as before, to have no legislative capacity to make any law having extra-territorial operation. Therefore, as extra-territoriability of operation is essential to the legal efficacy of any law designed to abrogate the right of His Majesty in Council to grant leave to appeal in civil cases from any provincial court (as the decisions in *Nadan's case* and in the more recent *British Coal Corporation case* hold), the subject-matter of such a law clearly falls outside of, and transcends, provincial legislative authority, and falls (as it must fall : *Bank of Toronto* v. *Lambe*, 12 A.C. 575, 587 ; *Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A.C. 571, 581, quoted with approval in *British Coal Corporation* v. *The King, supra*, at 517) exclusively within the legislative powers of the only Canadian legislative body competent to make a law having extra-territorial operation, namely, the Parliament of Canada.

16. Alternatively, Bill 9 is within the scope of powers of the Dominion Parliament under s. 101 of the British North America Act :

It is submitted, in the alternative, that the provisions of Bill 9 are within the exclusive legislative competence of the Parliament of Canada in virtue of its exclusive and paramount power under sec. 101 of the British North America Act to establish a general court of Appeal for Canada. Said sec. 101 provides as follows :—

" 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

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In virtue of the power so conferred, the Parliament of Canada by cap. 11 of the Statutes of 1875, established " a Court of Common Law and Equity in and over the Dominion of Canada " called " The Supreme Court of Canada " (sec. 1) ; and provided that " the Supreme Court shall have, hold and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada " (sec. 15). The decisions relating to the interpretation of said sec. 101 afford authority for the following propositions :

I. The legislative power conferred by sec. 101 may be exercised " notwithstanding anything in this Act "—

" which," applying the language of the Judicial Committee in *Tennant* v. *Union Bank* [1894] A.C. 31, 45, in regard to the corresponding *non obstante* clause in sec. 91, " plainly indicates that the legislation of that Parliament so long as it strictly relates to these matters, is to be of paramount authority "; and to the extent the provincial judicial system is repugnant to the legislation of the Parliament of Canada within the scope of sec. 101, provincial arrangements must give way.

*In re References by the Governor-General in Council* (1910) 43 S.C.R. 536, Davies J., at pp. 562, 563, said :—

> " 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.
>
> * * * * * * *
>
> 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."

II. Provincial legislation cannot take away or impair the jurisdiction conferred upon the Supreme Court by the Supreme Court Act.

In *Crown Grain Co.* v. *Day* [1908] A.C. 504, the Judicial Committee held that the Manitoba Mechanics and Wage-earners Lien Act, R.S.M. cap. 110, sec. 36, which enacted that in suits relating to liens the judgment of the Manitoba Court of King's Bench should be final and that no appeals should lie therefrom, was ultra vires, as the Provincial Act could not circumscribe the appellate jurisdiction granted to the Supreme Court by the Dominion Parliament under authority of sec. 101 of the British North America Act to hear appeals " from any final judgment of the highest court of final resort now or hereafter established in any Province of Canada." Lord Robertson, delivering the judgment of the Board, said at p. 507 :—

> " It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies ; if the powers thus overlap, the enactment of the Dominion Parliament

must prevail. This has already been laid down in *Dobie* v. *Temporalities Board*, 7 A.C. 136, and *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* [1907] A.C. 65."

In *Consolidated Distilleries Ltd.* v. *Consolidated Exporters Corp. Ltd.* (1930) S.C.R. 531, Newcombe J., after quoting the foregoing passage, said at pp. 537, 538 :—

" From this it may be inferred that the Parliament of Canada, in the execution of its powers under s. 101, has ancillary legislative authority of the same character as it possesses under the enumerations of s. 91. But the case is capable of being stated even more strongly, seeing that the powers of Parliament under s. 101 are expressly declared to be exercisable, ' notwithstanding anything in this Act ' ; so that not only may the Parliament, within the scope of what is comprised in the constitution, maintenance and organisation of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada effectively exercise powers of the ancillary variety, like those which are exemplified in such cases as *Tennant* v. *The Union Bank of Canada* [1894] A.C. 31, and *The Royal Bank of Canada* v. *Larue* [1928] A.C. 187. . . ."

In *Danjou* v. *Marquis* (1879) 3 S.C.R. 251, Fournier J., at p. 264, said :—

" Le droit du parlement fédéral de rendre ces causes appelables, nonobstant toute législation au contraire existant alors dans les provinces, n'étant pas douteux, il me semble que cette disposition devrait recevoir son plein et entier effet."

Henry J., at p. 269 :—

" By the provision of the British North America Act, 1867, sec. 101, ' The Parliament of Canada is given authority,' from time to time, ' to provide for the constitution, maintenance and organisation of a general Court of Appeal for Canada.' The right to ' provide for the constitution ' of the Court without any terms of limitation, must, in my opinion, confer upon the Parliament of Canada the exclusive power of providing for appeals to this court, from the highest to the lowest courts in the Dominion ; but, of course, in such a way as not to interfere with the procedure in the several Provinces, which is given for regulation to the Local Legislatures. No Act of the Parliament of Canada can affect the powers of the Local Legislatures in regard to appeals from one Court to another in any Province, but, when not so affecting such appeals, the Parliament of Canada, I hold, had, and has, the right to decide what cases shall come to this Court from the judgment or decision of any other Court."

*City of Halifax* v. *McLaughlin Carriage Co.* 39 S.C.R. 174. Fitzpatrick C.J. (Duff J, concurring), at p. 183 :—

" The Legislature of Nova Scotia, with respect to this court, has no power to limit the right of appeal any more than it can confer jurisdiction."

Davies J., at p. 187 :—

" Our jurisdiction to hear appeals depends, of course, upon the

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'Supreme Court Act' and its amendments, and no legislation of the provincial legislatures could impair that jurisdiction."

III. It is quite competent for the Dominion Parliament to allow and appeal to the Supreme Court of Canada from judgments of provincial courts, even though such judgments be not final nor such courts, courts of final resort.

*L'Association St. Jean-Baptiste de Montreal* v. *Brault* (1901) 31 S.C.R. 172. In this case the court upheld the constitutional validity of the Dominion Act, 54-55 Vict. cap. 25, which authorised appeals from the Superior Court sitting in review in the Province of Quebec. Taschereau J., delivering the judgment on behalf of himself and Gwynne, Sedgewick and King JJ., said at p. 174 :—

"This is an appeal from the Court of Review. The respondent moves to quash it on the ground that the enactment of the Dominion Parliament passed in 1891, giving the right to appeal from that court is unconstitutional and ultra vires. This motion cannot prevail.

* * * * * * *

"Section 101 of the British North America Act, 1867, enacts that notwithstanding the exclusive jurisdiction given to the provincial Legislatures over civil rights, the Parliament of Canada has the power to provide for the constitution, maintenance and organisation of a general court of appeal for Canada, without restricting the power, as it does for additional courts of first instance, to the administration of laws of Canada.

"The respondent would contend that all the appeals heard in this from all over the Dominion, since its creation in 1875, in cases not governed by the federal laws, were determined without jurisdiction. For, if parliament had not the power to authorise an appeal in such cases from the Court of Review, in Quebec, it had not the power to authorise it from the courts of final jurisdiction in the other provinces. Then we have often held that the provincial legislatures have not power to restrict in any way the jurisdiction of this court or to add to it. The Quebec Legislature had not the power to authorise an appeal to this court from the Court of Review, or from any of its courts. That being so, it follows that the Dominion Parliament must have that power."

It is to be observed that this judgment points out that the power to constitute a general Court of Appeal for Canada under sec. 101 is not restricted by the concluding words of the section, " for the better administration of the laws of Canada."

On application to the Judicial Committee (composed of the Right Honourable Sir Barnes Peacock, the Right Honourable Sir Robert Collier, the Right Honourable Sir Richard Couch and the Right Honourable Sir Arthur Hobhouse) for special leave to appeal in *MacLaren* v. *Caldwell* (1882) 8 S.C.R. 435, Mr. Bethune argued that the authority of the Parliament of Canada under s. 101 to establish a General Court of Appeal for Canada was limited by the concluding words of that section, " for the better administration of the laws

of Canada," that is, the laws passed by the Parliament of Canada, and that the Supreme Court of Canada had no authority to entertain any appeal with regard to the construction of any provincial law. The notes of the discussion on this submission are reported in 3 C.L.T. 343-346. Sir Barnes Peacock, who pronounced the decision, although granting leave to appeal upon other points involved said (3 C.L.T. at p. 346) :—

> " There is one other point to which their Lordships wish to allude, that is, the objection which has been made to the jurisdiction of the Dominion Parliament to pass the law with reference to the Supreme Court of Canada, and also the power of the Supreme Court of Canada to entertain such an appeal as this, which involves a question of the construction of the Acts of the Provincial Parliament. Their Lordships do not think there is any ground for allowing that question to be raised on the hearing of the appeal."

IV. *Provincial Legislatures have no power to grant an appeal to the Supreme Court of Canada.*

*Union Colliery Co.* v. *Attorney-General for British Columbia* (1897) 17 C.L.T. 391 :—

> " By the Act of the British Columbia Legislature, 54 V, c. 5, the Lieutenant-Governor in Council may refer to the Supreme Court of the Province, or to a Divisional Court thereof, or to the full Court, any matter which he thinks fit so to refer, the opinion of the Court to be deemed a judgment of the Court, and an appeal to lie therefrom as in the case of a judgment in an action."

The Supreme Court of Canada held, on a motion to quash, that no appeal lies to the Supreme Court of Canada from the opinion of the British Columbia Court on such a reference. If it was the intention of the Act to create such an appeal, it was beyond the powers of the Legislature of the Province and the appeal was quashed.

*L'Association St. Jean-Baptiste de Montreal* v. *Brault* (1901) 31 S.C.R. 172 : Taschereau J., at p. 174 :—

> " Then we have often held that the provincial legislatures have not power to restrict in any way the jurisdiction of this court, or to add to it. The Quebec Legislature had not the power to authorise an appeal to this court from the Court of Review, or from any of its courts."

17. The power vested in the Parliament of Canada by sec. 101 of the British North America Act is a power, in terms, made exercisable " notwithstanding anything in this Act " as well as " from time to time," to provide for " the constitution, maintenance and organisation of a general Court of Appeal for Canada."

In approaching the construction of this branch of sec. 101, the following considerations deduced from the decisions are relevant and important :—

> First, sec. 101 is one of a fasciculus of sections (96 to 101) contained in Part VII of the British North America Act under the heading

" Judicature "—relating to the system of judicature, including the powers and responsibilities of the Dominion Government and Parliament in regard thereto, authorised to be established by that Act.

" . . . save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice : but by the Act these powers are vested in the Dominion Legislature, and thus *pro tanto* the prerogative is merged in the statutory powers " : *British Coal Corporation* v. *The King* [1935] A.C. 500, 520.

Secondly, it must be taken as now settled that the special or prerogative appeals from Canadian Courts to the King in Council are " essentially matters of Canadian concern " and their regulations and control, in consequence, " a prime element in Canadian sovereignty as appertaining to matters of Justice " : *British Coal Corporation* v. *The King*, *supra*, 521.

Thirdly, in interpreting an organic statute such as the British North America Act, " that construction most beneficial to the widest amplitude of its powers must be adopted " : *British Coal Corporation* v. *The King*, *supra*, 518.

Fourthly, the provisions of the British North America Act are to be construed as investing the Dominion Parliament, in cases within its jurisdiction, with the power to regulate or prohibit appeals to the King in Council : *British Coal Corporation* v. *The King*, *supra*, 519-520.

It is, accordingly, submitted that the legislative authority vested in the Dominion Parliament by sec. 101 is subject to no limitation extraneous to, and not imported by, the language of that section itself. The legislation authorised by that section is legislation providing for " the constitution, maintenance and organisation of a general Court of Appeal for Canada." The power conferred is, in relation to those matters, exclusive, paramount and plenary.

What, then, is the scope of the power ? The words used clearly authorise legislation establishing a general Court of Appeal for Canada and providing for the appointment and the payment of the judges and officers thereof. The court contemplated is " a general court of appeal for Canada," not a court of limited appellate jurisdiction. The power to constitute the court necessarily implies, as an essential incident, the power to define from time to time, in such manner as Parliament in its wisdom may determine, the appellate jurisdiction of the court. Of the corresponding words, " the constitution, maintenance and organisation " in sec. 92 (14) of the British North America Act relating to provincial courts, Strong J. (Gwynne and Patterson JJ., concurring) in *In re County Court of British Columbia* (1892) 21 S.C.R. 446, 453, said :—

" . . . the constitution, maintenance and organisation of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects."

If this be true of the provincial legislative power under sec. 92 (14) where the words referred to are, in effect, qualified and curtailed by the express mention

in the context of " procedure in civil matters in those courts," *i.e.*, the provincial, it must, *a fortiori*, be also true of the exclusive, paramount and plenary legislative power conferred upon the Parliament of Canada by the corresponding words of sec. 101 where they stand unqualified.

The power to define the appellate jurisdiction of the court, being in point of law unrestricted, necessarily involves the power to determine what shall be the effect of the judgments given by the court : that is to say, to attribute, if Parliament so pleases, absolute finality to the judgments rendered by the court. A court which has power to give judgments subject to a right of appeal to some other court has not the same jurisdiction as a court which has jurisdiction to give an ultimate or final judgment in the same case. In other words, the existence of a right of appeal from the judgment of a court is a limitation affecting its jurisdiction. As Lord Westbury, L.C., said in *Attorney-General* v. *Sillem* (1864) 10 H.L.C. 704, 720, 721 :—

> " . . . the creation of a new right of appeal . . . is, in effect, a limitation of the jurisdiction of one court and an extension of the jurisdiction of another."

Hence if it be conceded (as it must be) that it was within the competence of the Dominion Parliament under sec. 101 to establish the Supreme Court of Canada, and to give it appellate jurisdiction over the decisions of any provincial court, then there appears to be no limitation suggested by the words of that section which would preclude the Dominion Parliament from vesting in that court " exclusive " and " ultimate " appellate jurisdiction in respect of appeals from the highest to the lowest courts in Canada, and from making the judgments of that court absolutely final and conclusive, to the exclusion of any appellate jurisdiction or authority, statutory or prerogative, vested in His Majesty in Council. There appears to be no sound ground for any suggestion that legislation by Parliament directed to that purpose would not be legislation relating to " the constitution, maintenance and organisation " of the Supreme Court of Canada in its character as " a general Court of Appeal for Canada " to the same extent as the legislation now contained in the Supreme Court Act.

Alternatively, it is submitted, that if such legislation be not legislation substantively embraced by the words " constitution, maintenance and organisation of a general court of appeal for Canada," it is at any rate legislation " truly ancillary " (*Grand Trunk Railway of Canada* v. *Attorney-General for Canada* [1907] A.C. 65, 68), or " reasonably necessary " (*Toronto Corporation* v. *Canadian Pacific Railway* [1908] A.C. 54, 58), or " necessarily incidental " (*City of Montreal* v. *Montreal Street Railway* [1912] A.C. 333, 343), to the exercise of the power conferred by those words : *Crown Grain Co.* v. *Day* [1908] A.C. 504, 507 ; *Consolidated Distilleries Ltd.* v. *Consolidated Exporters Corporation Ltd.* 1930 S.C.R. 531, 537, 538.

It is not without significance, as affording some confirmation of the foregoing construction of sec. 101 of the British North America Act, that when the Supreme and Exchequer Court Act, chap. 11 of the Statutes of Canada, 1875, was originally passed, sec. 47 thereof (sec. 54 of the present Act) provided that the judgment of the Supreme Court should, in all cases, be final

*In the Supreme Court of Canada.*

No. 5. Factum of the Attorney-General of Canada —*continued.*

and conclusive, prohibited any appeal therefrom to any court of appeal established by the Imperial Parliament for the hearing of appeals or petitions to Her Majesty in Council, but " saving any right by which Her Majesty may be graciously pleased to exercise her Royal Prerogative."

The constitutional authority of the Parliament of Canada to enact this section, and under possible altered circumstances to exclude the prerogative appeal to His Majesty in Council from judgments of the Supreme Court of Canada, was the subject of acute discussion in correspondence which passed in 1875-1876 between the Honourable Edward Blake, then Minister of Justice, and Lord Carnarvon, Secretary of State for the Colonies, with reference to the proposed disallowance of the Supreme and Exchequer Court Act. In the course of this correspondence, Mr. Blake made it very clear that he recognised no limitation upon the legislative power of the Dominion Parliament " to abolish any prerogative of the Crown affecting the Canadian people within the range of subjects on which that Parliament is authorised to legislate," and he submitted that in case the Canadian Parliament should pass an Act making the decisions of the Supreme Court absolutely final, that Act should be left to its operation.

The Imperial authorities finally decided, as has been stated in para. 11 of this factum above, to leave the Act to its operation. The point of significance is that sec. 47 assumed the existence of legislative authority on the part of the Parliament of Canada to affect the Royal prerogative, the latter being safeguarded by the device of an express saving clause.

18. The special statutory provisions relating to appeals as of right to His Majesty in Council from judgments of the provincial courts in Ontario and Quebec, and the history of their origin have been referred to in para. 10 of this factum above. Originally enacted by the legislatures of the provinces of Upper and Lower Canada in the professed exercise of authority conferred by the Constitutional Act of 1791, they were (so far as validly enacted) continued in force in the Province of Canada by section 46 of the Act of Union, 1840, and are still, subject to certain intermediate modifications, in force under the authority of section 129 of the British North America Act, 1867.

In effect, these statutes provide that in certain classes of cases an appeal shall lie to the Privy Council. If it is suggested that this provincial legislation is binding on His Majesty in Council, it is submitted that that suggestion is not tenable. The text of sec. 92 (14) of the British North America Act and the judgment of the Privy Council in *Nadan* v. *The King* [1926] A.C. 418, establish conclusively, it is submitted, that previous to the Statute of Westminster, 1931, neither the Canadian Parliament nor any Canadian Legislature could adopt laws in any way binding upon His Majesty in Council regarding his jurisdiction, and the Statute of Westminster, 1931, as previously pointed out, has cured that defect with regard to the Dominion Parliament only. On the other hand, it is fully appreciated that it would be difficult to contend that this legislation is absolutely void. This view, however, may be suggested: that legislation of this character adopted by a province is effective to the extent that it is binding on the provincial tribunal. It, in effect, orders the provincial tribunal, in the classes of cases respecting which

it provides for the appeal, to receive the security on such appeal, and to transmit to the Registrar of the Privy Council a certified transcript of the record. There is no reason to doubt the validity of the legislation up to that point. It is certainly legislation respecting the administration of justice, and it deals with matters in the province. It is true that what is done in the province is ancillary to the administration of justice outside the province before His Majesty in Council, but that is no objection, any more than it is an objection to the provincial statutes which provide that provincial courts may enforce attendance and answering of questions by witnesses on a commission issued by a foreign court. Such legislation is "Administration of justice in the province," though it is ancillary to administration of justice outside. The Privy Council might have ignored this legislation and insisted on an application for leave to appeal being made in each case before it, or His Majesty in Council might have, notwithstanding this legislation, passed Orders in Council, as he did for the other provinces, and these Orders in Council might have been inconsistent with the statutes, in which case undoubtedly such Orders would have prevailed. The Privy Council has chosen to treat this legislation, valid up to a point, as being equivalent to Orders of His Majesty in Council.

AIMÉ GEOFFRION.
C. P. PLAXTON.
W. R. JACKETT.

*In the Supreme Court of Canada.*

No. 5. Factum of the Attorney-General of Canada —*continued.*

# APPENDIX.

## REVISED STATUTES OF ONTARIO, 1937.

### Chapter 98.

### THE PRIVY COUNCIL APPEALS ACT.

When appeal may be made.

1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council. R.S.O., 1927, c. 86, s. 1.

Security.

2. No such appeal shall be allowed until the appellant has given security in $2,000, to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed. R.S.O., 1927, c. 86, s. 2.

Stay of execution.

3. Subject to rules of court, upon the perfecting of such security, execution shall be stayed in the original cause except in the following cases,—

Exceptions: where assignment or delivery of document or personal property directed.

Delivery into custody or security.

(*a*) if the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into court or placed in the custody of such officer or receiver as that court or judge of it appoints, or until security has been given to the satisfaction of the Supreme Court or a judge thereof, and in such sum as may be directed, that the appellant will obey the order of the Privy Council;

Where execution of instrument directed.

(*b*) if the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited with the proper officer to abide the judgment of the Privy Council;

Where sale of real property, etc., directed.

(*c*) if the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been entered into to the satisfaction of the Supreme Court, or a judge thereof, and in such sum as such court or judge directs, that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and if the judgment is confirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession of it, and also in case the judgment is for

Security and not to commit waste.

the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

Where payment of money directed.

(*d*) if the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Supreme Court, or a judge thereof, that if the judgment or any part of it is affirmed the appellant will pay the amount thereby directed to be paid or the part of it as to which the judgment may be affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on the appeal. R.S.O., 1927, c. 86, s. 3.

Security to pay debt.

Forms, etc., of security. Rev. Stat., c. 263.

4. Subject to the provisions of The Guarantee Companies Securities Act, the security shall be by the bond of two sufficient sureties, each of whom shall make affidavits or justification. R.S.O., 1927, c. 86, s. 4.

Amount of security where judgment directs payment of money.

5. Where security is to be given for payment of money, directed by the judgment or order appealed from to be paid, either as a debt or for damages or costs, the bond shall be in double the amount by the judgment or order directed to be paid; but where security is to be given in a sum in excess of $2,000, the Supreme Court or a judge thereof may allow it to be given by a larger number of sureties, apportioning the amount among them as may be deemed proper, and where the amount directed to be paid exceeds $10,000 may allow the security to be given for such amount less than double the amount directed to be paid as may be deemed proper. R.S.O., 1927, c. 86, s. 5.

Where judgment directs sale, etc.

6. Where the judgment appealed from directs the sale or delivery of possession of real property or chattels real, the bond shall be in double the yearly value of the property. R.S.O., 1927, c. 86, s. 6.

Filing of bond.

7. The bond, with an affidavit of the due execution of it, and the affidavits of justification, shall be filed in the office in which the action or matter was commenced, and shall be deemed to be perfected and allowed, unless within fourteen days after being served with notice of the filing the respondent moves for its disallowance; but the appellant may, after the filing, make a special application before the expiration of such fourteen days to stay execution. R.S.O., 1927, c. 86, s. 7.

Payment into court in lieu of bond.

8. Instead of giving a bond the appellant may, without order, pay into court a sum equal to half the penalty of the bond in cases within section 3 or section 6, or equal to the amount by the judgment or order directed to be paid in cases within section 5, and the money when so paid in shall stand as security in lieu of a bond, but either party may apply to the court or a judge to increase or diminish the amount to be paid into court. R.S.O., 1927, c. 86, s. 8.

Fiat for stay.

9. When the security has been perfected and allowed, a judge of the Supreme Court may issue his fiat to the sheriff to whom any

execution upon the judgment has been issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not; but if the grounds of appeal appear to be frivolous, the Supreme Court or a judge thereof may order execution to issue or to be proceeded with. R.S.O., 1927, c. 86, s. 9.

Unless appeal frivolous.

Approval of security.

10. A judge of the Supreme Court shall have authority to approve of and allow the security to be given by a party who intends to appeal to His Majesty in His Privy Council, whether the application for such allowance be made during the sittings of the Court, or at any other time. R.S.O., 1927, c. 86, s. 10.

Exception in appeals under Rev. Stat., c. 130.

11. The preceding sections shall not apply to an appeal to His Majesty in His Privy Council from a judgment of any court on a reference under The Constitutional Questions Act, R.S.O., 1927, c. 86, s. 11.

Exceptions.

12. The provisions of this Act, other than section 1, shall not apply to any appeal heretofore or hereafter taken by His Majesty in right of the Province of Ontario, or by any Minister of the Crown for the Province of Ontario, or by The Hydro-Electric Power Commission of Ontario, and any such appeal shall be admitted and thereupon execution shall be stayed in the original cause without the giving of any security. 1937, c. 62, s.2.

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## THE CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC.

### Chapter LXII.

### Appeals to His Majesty.

1249. The execution of a judgment from which an appeal is taken to His Majesty in His Privy Council cannot be prevented or stayed unless the party aggrieved gives good and sufficient sureties, within the delay fixed by the court which rendered the judgment, or by one of the judges of such court, that he will effectually prosecute the appeal, satisfy the condemnation, and pay such costs and damages as may be awarded by His Majesty, in the event of the judgment being confirmed.

The security must be received before the clerk of the court which rendered the judgment.

The sureties justify their solvency upon the real estate which is described in the bailbond.

One surety suffices, if he is the owner of real estate, which he describes, equal in value to the amount of the security over and above all charges and hypothecs.

The clerk who receives such security may order, either on demand or otherwise, the production of the registrar's certificate, the valuation rolls, and any other documents for the purposes of the security, and is bound to

put such questions as he deems advisable to the sureties. Such questions and the answers thereto may be taken down in writing.

The appellant may, however, exempt himself from furnishing such security by depositing an amount equal to that required for the security, either in money, in bonds of the Dominion or of this Province, or in municipal debentures; and such moneys, bonds or debentures are deposited either in the office of the court which rendered the judgment, or with the sheriff, as the clerk may direct.

(C.C.P., 1179, am. C.P., 68, 559, 1214, 1215. C.C. 1938, 1968. 7 Geo. V, c. 56, s. 1.)

1250. The appellant may also consent to the judgment being executed, and in such case may give security for the costs in appeal only, under the same conditions as under Article 1214. (C.C.P., 1180.)

1251. The execution of any judgment appealed from cannot be prevented or stayed after six months from the day on which the appeal was allowed, unless the appellant files in the office of the clerk of the court which rendered the judgment a certificate, signed by the clerk of His Majesty's Privy Council, or any other competent officer, stating that the appeal has been lodged within such delay, and that proceedings have been had therein.

(C.C.P., 1181, am.)

1252. The clerk of the court which rendered the judgment must register any exemplification of a decree of His Majesty in His Privy Council as soon as it is presented to him for that purpose, without requiring any order to that effect from the court which rendered the judgment, and must send back the record in the case to the court below, together with a copy of the exemplification which has been registered as above-mentioned.

(C.C.P., 1182, am. C.P., 1247.)

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## No. 6.

No. 6. Factum of the Attorney-General of Ontario.

## Factum of the Attorney-General of Ontario.

INDEX.

*In the Supreme Court of Canada.*

No. 6. Factum of the Attorney-General of Ontario. —*continued.*

## PART I.

## STATEMENT OF CASE.

1. By an Order of His Excellency the Governor-General in Council, dated the 21st day of April, 1939 (P.C. 908), the following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to Section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35 :—

> Is said Bill No. 9 entitled " An Act to Amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ?

2. The text of the said Bill is contained in the case filed by the Attorney-General of Canada, at page 10.

3. By the said Bill it is provided that—

(*a*) The Supreme Court of Canada shall have, hold and exercise ultimate appellate civil and criminal jurisdiction within and for Canada ;

(*b*) The judgment of the said Court shall in all cases be final and conclusive ;

(*c*) The Royal prerogative permitting appeals to His Majesty in Council shall not be exercised in any case brought from any court now or hereafter established within Canada ;

(*d*) No appeal shall lie to His Majesty in Council by virtue of any Act of the Parliament of the United Kingdom from any court now or hereafter established within Canada ;

(*e*) No Appeal shall lie to His Majesty in Council by virtue of any Act of the Parliament of Canada from any court now or hereafter established within Canada ;

(*f*) No appeal shall lie to His Majesty in Council by virtue of any Act of the Legislature of any Province from any court now or hereafter established within Canada ;

(*g*) The Acts of the Parliament of the United Kingdom of Great Britain and Ireland, viz., the Judicial Committee Act (3 and 4 William IV), 1833, Chapter 41, and the Judicial Committee Act, 1844 (8 Victoria), Chapter 69, and all orders, rules or regulations made under the said Acts insofar as they are part of the law of Canada, are repealed.

## PART II.

## SUBMISSIONS OF THE ATTORNEY-GENERAL FOR ONTARIO.

3. The Attorney-General for Ontario will contend, for the reasons hereinafter set forth, that the said Bill No. 9 of the 4th Session of the 18th Parliament of Canada, entitled " An Act to Amend the Supreme Court Act," is ultra vires of the Parliament of Canada insofar as it attempts—

(*a*) To make the judgment of the Supreme Court of Canada final and conclusive in any matter coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces under the

British North America Act, Section 92 ; or in any case in which the constitutional validity of any Act of the Parliament of Canada or of the Provincial Legislature is in question.

(*b*) To limit the exercise of the Royal Prerogative (if any) admitting appeals to His Majesty in Council from the Supreme Court of Canada in any such matters.

(*c*) To limit the exercise of the Royal Prerogative (if any) admitting appeals to His Majesty in Council from any provincial court in any such matters.

(*d*) To limit appeals to His Majesty in Council pursuant to any Act of the Parliament of the United Kingdom of Great Britain and Ireland in any such matters.

(*e*) To repeal in effect provincial legislation permitting appeals to His Majesty in Council in any such matters.

(*f*) To limit appeals pursuant to any Act of a Provincial Legislature to His Majesty in Council in any such matters.

(*g*) To repeal the Acts of the Parliament of the United Kingdom of Great Britain and Ireland, namely The Judicial Committee Act, 1833 (3 and 4 William IV), Chapter 41, and The Judicial Committee Act, 1844 (8 Victoria), Chapter 69, permitting appeals to His Majesty in Council, in any such matters.

## Part III.

## ARGUMENT ON THE LAW.

5. The Provincial Legislatures have exclusive power to make laws in relation to matters coming within the following classes of subjects :—

The British North America Act, Section 92 :

(1) The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

(13) Property and civil rights in the Province.

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

and therefore the provisions of the said Bill Number 9 insofar as they trench upon those subjects are ultra vires.

*The Board of Commerce Act*, 1919, *and The Combines and Fair Prices Act*, 1919 [1922], 1 A.C. 191.

Viscount Haldane at page 198 and 199 :—

" It is one thing to construe the words ' the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its

*In the Supreme Court of Canada.*

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very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which requires a title to so interfere as basis of their application. For analogous reasons their Lordships think that Section 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces, exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter."

6. The legislative powers of the Provinces in relation to matters coming within the classes of subjects enumerated in Section 92 of the British North America Act are in no way subordinate to those of the Parliament of Canada, but within those limits are supreme.

*Hodge* v. *The Queen* [1883], 9 A.C. 107, at page 132 :—

" When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

7. By the Confederation Act the rights of the Provinces were preserved.

*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892], A.C. 437.

Lord Watson, at page 441 :—

" Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into

one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of provincial government. But, insofar as regards those matters which, by Section 92, are specially reserved for Provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

8. There has been no redistribution of legislative powers since Confederation. The Statute of Westminster, 1931, has not had that effect, but on the contrary, by that statute the division of legislative powers between the Provinces and the Dominion has been specifically retained.

Address of the Parliament of Canada to His Majesty. (Appendix, page 66.)
Summary of Proceedings, Imperial Conference, 1926. (Appendix, page 63.)
Summary of Proceedings, Imperial Conference, 1930. (Appendix, page 65.)
Statute of Westminster, 1931, Section 7 :—

" 7 (1) Nothing in this Act shall be deemed to apply to the repeal amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

" (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

" (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

*Attorney-General for Canada* v. *Attorney-General for Ontario* [1937], A.C. 326.

Lord Atkin, at page 351 :—

" For the purposes of Sections 91 and 92, that is, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her

separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments, need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

" It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that, as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in Section 92, legislation to support the new functions is in the competence of the Provincial Legislatures only."

At page 354 :—

" But the legislative powers remained distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

9. By the British North America Act, Section 129, the laws in force in the Province at Confederation were continued, subject to being repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces in accordance with the distribution of legislative powers under Sections 91 and 92. The right to appeal to His Majesty in Council was one of these laws and therefore within the limits of Section 92 the provincial legislatures alone have jurisdiction to deal with this subject.

The Constitutional Act, 1791 (Record, p. 217) :—

" An Act to establish a Superior Court of Civil and Criminal jurisdiction and to regulate the Court of Appeal." (Record, page 221.)

The Act of Union, 1840 (Record, page 222) :—

" An Act respecting the Court of Error and Appeal." (Record, page 227.)

The Judicial Committee Act, 1833 (Record, page 203).

The Judicial Committee Act, 1844 (Record, page 206).

*Martineau* v. *Montreal City* [1932], A.C. 113.

10. The right to legislate with respect to appeals to His Majesty in Council in civil cases is within the exclusive jurisdiction of the Provincial Legislatures.

*McBride* v. *Ontario Jockey Club* (1925), 58 O.L.R. 267.

Middleton J.A. (in Chambers), at page 268 :—

" Following immediately upon the Proclamation of 1763, which itself has been recognised as having the force of law, and the Constitutional Act of 1791, the Parliament of Canada passed the Act of 1794, 34 George III, Chapter 2, which, by Section 36, enacted that the judgment of the Court of Appeal then established should be final, in all cases where the matter in controversy does not exceed the sum or value of £500 sterling, but in cases exceeding that amount, as well as in certain other cases not now material to be mentioned, an appeal should lie to His Majesty in his Privy Council upon proper security being given by the appellant to prosecute the appeal and to pay the costs of the appeal if it should be unsuccessful.

" This Section, modified in detail from time to time but substantially unchanged, has remained upon our statute book ever since, and is now found in the Privy Council Appeals Act, R.S.O. 1914, Chapter 54, Section 2 :

> ' Where the matter in controversy in any case exceeds the sum or value of $4,000.00 . . . an appeal shall lie to His Majesty in his Privy Council ; and except as aforesaid, no appeal shall lie to His Majesty in his Privy Council.'

" Ever since the original enactment, the right of appeal, in cases falling within its terms, to the Judicial Committee, has stood unchallenged, and no leave to appeal from the Judicial Committee or from the court below, has been regarded as necessary. In all cases where there is not an appeal as of right under the terms of the statute, the courts of this Province have no jurisdiction to grant leave ; and although the statute is absolute in prohibiting a right of appeal in cases, that do not fall within it, it is now established that this does not deprive His Majesty of the Prerogative right to grant leave to appeal in any case in which he sees fit to exercise the Prerogative right."

*Beauharnois Light, Heat and Power Co.* v. *The Hydro Electric Power Commission* (1937), O.R. 847.

*In the Supreme Court of Canada.*

No. 6. Factum of the Attorney-General of Ontario —*continued.*

Middleton, J.A., at page 853 :—

" Here the jurisdiction to regulate the practice of appeals to the Privy Council is unquestionably within the jurisdiction of the Province and no such enquiry can be entered upon."

Henderson, J.A., at page 854 :—

" I have no doubt of the jurisdiction of the Legislature to amend its Act governing appeals to the Privy Council by dispensing with the necessity for security as is done by this Section, etc."

*Re Boulton, et al, and The Toronto Terminals Railway Co. Ltd.* (1933), O.R. 816.

Mulock, C.J.O., at page 819 :—

" I agree with my brother Middleton that for the reasons expressed by him this appeal should be allowed, and, therefore, confine my observations to the argument of the contestant that the award having been made under the provisions of a Statute of the Parliament of Canada, an appeal to the Privy Council from the order of this Court does not lie.

" The claimant under the arbitration proceedings, acquired a civil right (the right to compensation for the land expropriated) against the contestant. When a civil right comes into existence, no matter what be its source, it is subject to the exclusive jurisdiction of Provincial legislation (B.N.A. Act, Section 92) and, therefore, it was not competent for the Parliament of Canada, even if by the Railway Act it purported to do so, to control or interfere with its enforcement. The Privy Council Appeals Act, R.S.O. 1927, Chapter 86, enacts that

> ' Where the matter in controversy in any case exceeds the sum or value of $4,000.00 . . . an appeal shall lie to His Majesty in his Privy Council.'

" The matter in controversy here exceeding that sum, the claimant (on giving the security for costs required by Section 2 of The Privy Council Appeals Act) is entitled to appeal and, therefore, the order appealed from should be set aside and this appeal allowed with costs."

11. By Section 101 of the British North America Act, the Parliament of Canada has power to provide for the " constitution, maintenance and organisation " of a general Court of Appeal for Canada, and this has been held to include the power to provide for appeals to that Court in matters coming within the classes of subjects enumerated in Section 92.

*The City of Halifax* v. *McLaughlin Carriage Company* (1907), 39 S.C.R. 174.

*L'Association St. Jean Baptiste de Montreal* v. *Henri Alexandre A. Brault* (1901), 31 S.C.R. 172.

*Crown Grain Company* v. *Day* [1908], A.C. 504.

But this does not include the power to limit appeals from that Court to His Majesty in Council in matters coming within the classes of subjects enumerated in Section 92. While the words " constitution, maintenance and organisation " may permit the Parliament of Canada to legislate as to what appeals

shall be heard by the Supreme Court of Canada, they do not permit the Parliament of Canada to limit appeals from that Court to His Majesty in Council. It is submitted that this is not a matter of " constitution, organisation or maintenance " of the court so established, but comes within the exclusive power of the Provincial Legislatures to legislate with respect to " property and civil rights in the Provinces," and " the administration of justice in the Provinces, including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts." It will be noted that the words " constitution, maintenance and organisation " appearing in Section 101 are also found in Section 92 (14) dealing with provincial courts but in the latter subsection the additional words " and including procedure in civil matters in those Courts" appear.

*Consolidated Distilleries, Ltd.* v. *Consolidated Exporters Corp. Ltd.* (1930), S.C.R. 531.

This was an appeal to the Exchequer Court, in which a third party notice was filed and Audette, J., set aside the third party notice. The defendant appealed.

Anglin, C.J.C. (delivering the majority judgment), at page 535 :—

" While there can be no doubt that the powers of Parliament under Section 101 are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a Court competent to deal with matters purely of civil right as between subject and subject. While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it. The matter is purely one of exclusive provincial jurisdiction, concerning, as it does, a civil right in some one of the Provinces."

*In re Nagy* (1925), 46 C.C.C. 333 (C.A. Sask.).

Per Turgeon, J.A., at page 333 :—

" Power to create a Court of criminal jurisdiction is one thing—a thing that may be done by the Province under the authority of Clause 14 of Section 92 of the B.N.A. Act—but the power to determine whether or not an appeal shall lie to such Court in a proceeding arising out of the Criminal Code of Canada, is another thing—a matter of criminal procedure exclusively reserved to the jurisdiction of Parliament by Clause 27 of Section 91 of the Act."

Bentwich Privy Council Practice (3 Ed.), p. 30 :—

" The Dominion Parliament could not, however, abolish a right of appeal from the Supreme Courts of the Canadian Provinces in civil matters. The regulation of civil appeals is a matter for the Provincial

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Legislature, and it would be for the Legislature in each province to take action."

*British Coal Corporation* v. *The King* [1935], A.C. 500.

Viscount Sankey, at page 523 :—

" Their Lordships have in this judgment been dealing only with the legal position in Canada in regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases."

12. In any case the Parliament of Canada cannot, by legislating repugnantly to provincial legislation, in effect repeal Provincial Statutes validly passed under the provisions of Section 92 of the British North America Act providing for appeals to His Majesty in Council from the decisions of provincial courts. The Parliament of Canada has no jurisdiction to pass statutes providing for appeals in matters coming within Section 92, from provincial courts, and cannot, therefore, repeal such statutes either by repugnancy or otherwise.

*Attorney-General for Ontario* v. *The Attorney-General for the Dominion* [1896], A.C. 348. (Distillers and Brewers case.)

Lord Watson, at page 366 :—

" It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada insofar as these are within its competency, must over-ride Provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by Section 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion ; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the Provincial Legislature, but must be submitted to the judicial tribunals of the country."

Keith, The Dominion as Sovereign State (1938), page 84 :—

" The Statute of Westminster, 1931, by abolishing the supremacy of Imperial legislation, opened the way to Dominion action. Hence Canada abolished in 1933 the appeal in criminal causes, and the Irish Free State that in any case. Both measures have been pronounced valid by the Privy Council. As regards civil causes abolition to be really effective in Canada would require coincident action by the Provinces and the Federation, which is improbable, but the right to abolish exists, and the appeal certainly is no longer a bar on the sovereignty of the Dominion."

*Attorney-General of Ontario* v. *Hamilton Street Railway* [1903], A.C. 524.

13. The Parliament of Canada cannot claim the right to legislate with respect to appeals to His Majesty in Council in matters coming within any of

the classes of subjects in Section 92 of the British North America Act, upon the ground that in order effectively to abolish appeals to His Majesty in Council it would require extra-territorial legislation and that the Provinces have not this power. The right given by the Statute of Westminster, 1931, Section 2 and in Section 7 (2) to the legislatures of the Provinces is a full and plenary right. The Royal prerogative (if any) permitting appeals to His Majesty in Council is law in force in Canada, and under the provisions of Subsection 2 of Section 2 of the Statute of Westminster, which by Section 7 (2) is extended to the power of the Legislatures of the Provinces, it is provided :—

> " No law . . . made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England. . . ."

Therefore the power given in the Statute of Westminster to the provincial legislatures includes the power to interfere with the Royal prerogative.

When power is given to legislate, it must be construed as a power to do so effectively.

*Croft* v. *Dunphy* [1933], A.C. 156. (This case arose before the Statute of Westminster.)

Lord MacMillan, at page 163 :—

> "But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion Legislature has full power to enact Customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.
>
> " In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in Section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state."

At page 165 :—

> " When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power."

14. The Royal prerogative exercised by way of special leave to appeal to His Majesty in Council is merged in the Judicial Committee Act, 1833, and the Judicial Committee Act, 1844, and there is now no Royal prerogative

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to admit appeals to His Majesty in Council apart from these Statutes. The Royal prerogative has been defined as being " the residue of arbitrary power left in the hands of the Crown by Parliament " (Dicey, p. 61), and it is submitted that there is no residuary power remaining.

*Nadan* v. *The King* [1926], A.C. 482, at page 491 :—

" The right of the exercise of the Royal prerogative extends (apart from legislation) to judgments in criminal as well as in civil cases. It has been recognised and regulated in a series of statutes, of which it is sufficient to mention two, viz., the Judicial Committee Acts of 1833 and 1844."

*Toronto Railway Company* v. *The City of Toronto* [1920], A.C. 426.

Viscount Finlay, at page 434 :—

" At the opening of the case Mr. Geary made a preliminary objection to the jurisdiction, decision on which was reserved until the case should have been heard. Mr. Geary contended that it was not competent to grant special leave to appeal to His Majesty in Council direct from the Railway Board. Their Lordships, after full consideration, have arrived at the conclusion that the Railway Board is not exempt from the prerogative of the Crown to grant special leave to appeal. The Railway Board is not a mere administrative body. It is a Court of record, and it may be of some importance that in some special cases its decisions on points of law should be taken on special leave direct to His Majesty in Council. The prerogative of granting special leave to appeal is, prima facie, applicable to all Courts in His Majesty's Dominions, and their Lordships cannot see any ground which would warrant them in holding that the Railway Board is exempt from the general rule."

*Moore* v. *A.-G. for Irish Free State* [1935] A.C. at page 499.

" Mr. Green has finally contended that the amendment is invalid because it affects the prerogative of the King in a matter outside the Dominion and outside the competence of the Oireachtas (Free State Parliament). It might be possible to state many objections to this contention, but it is enough here to say that whatever might be the position of the King's prerogative if it were left as matter of the Common Law, it is here in this particular respect and in this particular enactment made matter of parliamentary legislation, so that the prerogative is pro tanto merged in the statute, and the statute gives powers of amending and altering the statutory prerogative."

*De Keyser's Royal Hotel, Limited* v. *The King* (1919), 2 Ch. 197.

Swinfen Eady, M.R., at page 216 :—

" It is therefore necessary to consider what powers are by law vested in the Sovereign, and exercised by the Executive Government, over the lands and houses of subjects required for the defence and security of the realm.

" Those powers which the Executive exercises without parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute

for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative ? Indeed, it was expressly admitted by the Solicitor-General (Sir Ernest Pollock), and in my opinion rightly admitted, that where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute."

Warrington, L.J., at page 232 :—

"... where an Act of the Crown is authorised by statute any pre-existing prerogative right to do the same act is merged in the statutory authority, and the act in question must be deemed to have been done by virtue of the latter."

Duke, L.J., at page 245 :—

"The rights of the Crown are not taken to be abated by statute unless the intention of the Legislature is to that effect clear and unmistakable upon the face of the statute."

*Attorney-General* v. *De Keyser's Royal Hotel, Limited* [1920], A.C. 508.

Lord Dunedin, at page 526 :—

"None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of Rolls is unanswerable. He says : 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on the prerogative ? '

"The prerogative is defined by a learned constitutional writer as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be affected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed."

*British Coal Corporation* v. *The King* [1935], A.C. 500.

Lord Sankey, at page 512 :—

"It was this appellate jurisdiction (along with other jurisdictions such as in admiralty or ecclesiastical causes) which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council."

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*Moore* v. *The Attorney-General for the Irish Free State* [1935], A. C. 484. Viscount Sankey, at page 499 :—

"Appeals to His Majesty in Council in matters coming within Section 92 of the British North America Act can therefore be limited only by a Provincial statute making the Imperial Statutes of 1833 and 1834 inapplicable to appeals from the Province."

Statute of Westminster, 1931, Section 2 and Section 7 (2). (Record, p. 201.)

15. If any part of the Royal prerogative permitting appeals to His Majesty in Council has been left intact it only applies to criminal cases. The Imperial Statutes of 1833 and 1834 did not contemplate appeals in criminal cases.

*Chung Chuck* v. *The King* [1930], A.C. 244 :—

" The accused was charged with offences under the Produce Marketing Act of B.C. On appeal to the British Columbia Court of Appeal that Court granted leave to appeal to the Privy Council.

" The order-in-council in England allowing appeals from the British Columbia Court (of January 23rd, 1911) allowed an appeal from ' any final judgment, decree, order or sentence of the said Supreme Court of British Columbia.' Their Lordships held that this was a criminal proceeding."

Lord Sankey, L.C., at page 255 :—

" Their Lordships think when Mr. Wood made his first submission with regard to the word ' sentence ' he rather relied upon the fact that the word ' sentence ' was a word which was appropriate to some procedure in criminal law, but when he replied he did not put his case quite as high as that, nor indeed could he have done so. Although the word ' sentence ' no doubt in the minds of some people is peculiarly appropriate to criminal cases and is chiefly heard in criminal trials, there is a great difference between a verdict and a sentence, and it would be very strange if leave to appeal was to be given only against a sentence and not against a conviction. As has been pointed out in the course of the argument, ' sentence ' is a well-known word in common law, and their Lordships do not think the word ' sentence ' (applied) so as to give the right to give leave to appeal in a criminal case."

At page 256 :—

" Finally, if one looks through the order-in-council itself one sees there a great number of provisions for the purpose of dealing with cases where leave to appeal is given which are entirely appropriate in civil matters and not only not appropriate in criminal matters but criminal matters do not appear to be provided for if they are included within the word ' decision.' "

At page 257 :—

" In those circumstances their Lordships have arrived at the conclusion that the appellants have not made out either of their points.

They have not made out Point (1), that this is not a criminal matter. Their Lordships think it is a criminal matter. They have not made out Point (2), that the order-in-council of January 23rd, 1911, gave a right to the Court of Appeal to give leave to appeal in criminal matters. In the result the preliminary objection succeeds, not indeed upon the point which is in the petition of the learned Attorney-General for British Columbia, supported by the learned Attorney-General for Canada, but upon the point that Mr. Wood has not satisfied their Lordships that it is a civil matter, or that there was a right in the Court of Appeal of British Columbia to give leave to appeal in a criminal case."

16. If the Royal prerogative permitting appeals to His Majesty in Council is not merged in the statute, the Provincial Legislatures have exclusive legislative authority to limit the Royal prerogative in matters within the British North America Act, Section 92.

Statute of Westminster, 1931, Section 2 and Section 7 (2) (Record, p. 201).

*Attorney-General for Canada* v. *The Attorney-General for Ontario* [1898], A.C. 247. (Queen's Counsel case.)

Lord Watson, at page 252 :—

" The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments ; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the Bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be affected by the direct personal act of the Sovereign. Even in the case of titles of honour, it does not appear to be doubtful that the Sovereign may, with the assistance of an Act of the Legislature, exercise the prerogative in a manner which would but for its provisions be unconstitutional."

At page 254 :—

" By the combined effect of these enactments (referring to Head 4 and 14 of Section 92 of the B.N.A. Act) it is entirely within the discretion of the Provincial Legislature to determine by what officers the Crown, or in other words the Executive Government of the Province, shall be represented in its Courts of law or elsewhere, and to define by Act of Parliament the duties whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The revised Statute of 1877, insofar as it relates to the appointment of Queen's Counsel, is, in the opinion of their Lordships, within the limits of that legislative authority ; and, that being so, there appears to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant-Governor, will constitute an

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encroachment upon the prerogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Soveriegn may have been delegated."

17. The history of the decided cases prior to the enactment of The Colonial Laws Validity Act in 1865 indicates that the Legislatures of the Colonies had jurisdiction to legislate affecting the Royal prerogative to admit appeals to His Majesty in Council.

*Cuvillier* v. *Aylwin* (1832), II Knapp 72, E.R. 406, at 77.

Coltman (K.C.), for the Petitioner—(inter alia) :— 10

" One of these fundamental principles has always been understood to be, the right of all who are injured by the determination of the Courts in His Majesty's colonies, to appeal to him in his Council for redress. It is true, that in the instructions to the governors of plantations there is a limit put upon their power to allow appeals in causes where the amount in dispute is under a certain value ; but in all those instructions there is an express reservation of the power of the King himself, in Council, to admit appeals upon any terms, and for any value. As far as regards the Province of Lower Canada, there are no words in the English statute of the 31st Geo. the 3d (c. 31) which take away from the subject the right 20 of appeal to which he is entitled by the common law of England. The words of the Provincial statute of the 34th Geo. the 3d (34 Geo. iii, c. 6) are certainly more extensive ; but in that also there are express provisos, that nothing therein contained should derogate from the rights of the Crown, either to constitute other Courts of Justice, or from any other right or prerogative of the Crown whatsoever. It would, indeed, be beyond the power of a Provincial Legislature to take away the rights of His Majesty to receive appeals, even if such were their intention ; and if such a construction were to be put upon this Provincial Act, it would be inconsistent with the 31st Geo. the 3rd (c. 31), which has been always 30 regarded as the constitutional charter of the Canadas."

At 78 :—

" Master of the Rolls.—It is not necessary to hear counsel on the other side. The King has no power to deprive the subject of any of his rights ; but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights. This petition must therefore be dismissed."

This case was decided in 1832 prior to the enactment of The Judicial Committee Act, 1833. 40

*The Queen* v. *Eduljee Byramjee* (1846), 5 Mo. P.C., 276.

The Right Hon. Dr. Lushington, at page 295 :—

" In that case (*Cuvillier* v. *Aylwin*) the judgment was given in but few words. The counsel for the respondent was not heard, but it was observed, ' It is not necessary to hear counsel on the other side. The

King has no power to deprive the subject of any of his rights, but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects in any of the countries under his Dominion of any of his rights. This petition must thereupon be dismissed.'

" It was, therefore, held, that though there was a reservation of the right of the Crown, yet as the Act in Canada was made in pursuance of an Act of Parliament of Great Britain, the powers contained in that Act did take away the prerogative of the Crown. So we apprehend this charter in India, being granted in pursuance of an Act of Parliament here, if by the true construction of the charter the prerogative of the Crown is in any way limited, it must be said to be limited, not by the Act of the Crown itself, but by the Act of the Crown acting under the authority of Parliament."

The case of *In re Louis Marois* (1862) 15 Moo. P.C. 189, is not inconsistent with the above decisions (see extract of judgment in *re Louis Marois* contained in judgment of *Cushing* v. *Dupuy*, at page 53 Factum) the effect of which is that the Colonial Legislation preserved the prerogative right of appeal to Her Majesty in Council. This decision is not an authority for the principle that a Colonial Legislature has no power to abolish appeal to His Majesty in Council.

After the passing of The Colonial Laws Validity Act (1865), the authority of a Colonial Legislature to limit the Royal prerogative admitting appeals to His Majesty in Council was discussed in the following cases :—

*Regina* v. *Bertrand* (1867), L.R. 1 P.C. 520.

Sir John T. Coleridge, at page 529 :—

" Upon this statement it was contended, first, on behalf of the respondent that their Lordships ought not to entertain the appeal ; but they do not accede to this. Upon principle, and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

*Johnson* v. *Minister and Trustees of St. Andrew's Church* [1877], 3 A.C. 159.

The Lord Chancellor, at page 162 :—

" The first question is, is there in this case a power, notwithstanding the Canadian Act, to allow, if Her Majesty should be so advised, such an appeal. Now I will read the Section of the Canadian Act. It is the 47th Section (now Section 54) ' . . . That Section consists of three parts ; the second or intermediate part of the Section contains the negative words, " no appeal shall be brought," ' etc. Those words their Lord-

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ships may leave out of consideration, because they refer to what may be called the hypothetical establishment of a Court by the Parliament of Great Britain and Ireland, by which Court appeals from the colonies are supposed to be ordered to be heard; and inasmuch as no Court of that kind has been established, that part of the Section may be omitted from our consideration. I will read it, therefore, as if the Section ran thus, 'The judgment of the Supreme Court shall in all cases be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative.'

"Now their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this Section. Therefore their Lordships would have no hesitation, in a proper case, in advising Her Majesty to allow an appeal upon a judgment of this Court."

*Cushing* v. *Dupuy* [1880], 5 A.C. 409.

Sir Montague E. Smith, at page 416 :—

"Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Article 1178 of the Code of Civil Procedure. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the Province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative."

* * * * * * *

"The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the Royal prerogative, since the 28th Section of the Insolvency Act does not profess to touch it; and they think, upon the principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* v. *Aylwin* (2 Knapps' P.C. 72), which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

"The question in *Cuvillier* v. *Aylwin* arose upon the Lower Canada Colonial Act (34 George III, Chapter 6), which enacted that the judgment of the Court of Appeal should be final in all cases under the value of £500, and an application for special leave to appeal in a case under that value was refused by a committee of the Privy Council. The

remarks attributed to the Master of the Rolls, in his judgment rejecting the petition, are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

" *In re Louis Marois* (15 Moore's Privy Council, 189) upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier* v. *Aylwin* the very point was decided against the petitioners, said : ' If the question is to be concluded by that decision, this petition must be at once dismissed ; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd Section of the Act on the prerogative of the Crown.'

* * * * * * *

" Another case, lately before this Committee, requires consideration, *Theberge* v. *Landry*, 3. A.C. 159. It was an application for special leave to appeal against the judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by Section 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative Right in the Crown to review the judgment of the Superior Court upon an Election Petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction, delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed ; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown : ' Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by ex-

press words ; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative.' It was not suggested that an appeal would not have lain to the Queen in Council under the Insolvency Act of 1875 ; and it was not until two years afterwards that the amending Act of 1877, which is said to have taken it away, was passed.

" The learned counsel for the appellant drew attention to the Act of the Parliament of Canada, 31 Victoria, Chapter 1, which enacts Rules of Interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

" Subsection 33 of Section 7 of that Act is as follows : ' No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs, or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.'

" The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

" Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an Act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it."

*Renouf* v. *Attorney-General for Jersey* [1936], A.C. 445.

An appeal from the Royal Courts of the Island of Jersey.

Lord Maugham, at page 463 :—

" By a Commission issued by the Queen herself in 1590 to Tertullian Pyne, doctor of laws, and Robert Napper, authority was given to these Commissioners amongst other things ' to establish and confirme suche good orders and constitucions as by you with the advise and consent of the Captaine Bailiff and jurates and States of the saide Isle shall bee thought profitable and necessarie for the common wealthe of the said Isle and agreeable to the auncient lawes and customes thereof.' Among the ordinances made and said to have been established by the said Pyne and Napper in the year 1591 in relation to the Isle of Jersey was Ordinance No. 4, relating to appeals. It begins with a recital in these terms : ' And forasmuch as My Lords of Her Majesty's Privy Council are greatly importuned from time (to time) about many causes in which no definitive sentence has been given which is contrary to the ancient privileges of this Island and contrary to the express orders thereupon laid down and approved by the said Lords. And also about many appeal causes (which have been) well judged and wrongly appealed in. And about many sentences given in criminal causes or others in which no appeal lies or ought to be suffered—a thing which redounds to the great trouble of many good subjects of Her Majesty in this Isle.'

At page 464 :—

" For redress thereof it was ordered that ' whosoever shall make any request to my Lords of the Council in such causes, wherein definitive sentence has not previously been given or in any cause above specified which ought to be ordered and adjudged by the Bailiff and jurats, shall forfeit to Her Majesty her heirs and successors ten pounds sterling.' The Ordinance clearly refers (amongst other matters) to an Order in Council of May 13, 1572, limiting appeals in civil cases to causes or matters over a certain value, and prohibiting appeals in any cause or matter, great or small, before a definitive sentence or other judgment having the force and effect of a definitive sentence. It is a reasonable conclusion that all the appeals mentioned in the recital are appeals as of right, and that the clause has no reference to an appeal by special leave. Here again, however, there is a saving clause in wide terms which extends to all ' rights, titles and royalties and pre-eminences whatsoever which Her Majesty has had or can and might or ought to have in this Isle notwithstanding those orders, laws, and constitutions hereinbefore recited or anything herein contained which might be contrary thereto.' The necessary conclusion is that the discretion of the Crown to give special leave to appeal was not taken away."

At page 468 :—

" On consideration of all the various matters to which their Lordships have been referred the conclusion must be that there is no Order in Council, charter, or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters."

In the case of *Nadan* v. *The King* [1926], A.C. 482, the question of the authority of a Colonial Legislature to abolish appeals to His Majesty in Council came squarely before the Privy Council for the first time since *Cuvillier* v. *Aylwin* (infra, p. 22) and this case was not followed.

It is submitted that the *rationes decidendi* of *Nadan* v. *The King* and *Richelieu and Ontario Navigation Co.* v. *Owners of SS. Cape Breton* are the same.

*Richelieu and Ontario Navigation Co.* v. *Owners of SS. Cape Breton* [1907], A.C. 112.

An appeal from the Supreme Court of Canada without special leave to the Privy Council.

Sir Gorell Barnes, at page 115 :—

" Their Lordships are of opinion that the express provisions of the said 6th Section of the Act of 1890 (The Colonial Courts of Admiralty Act of 1890, 53 and 54 Victoria, Chapter 27, Imperial) conferred the right of appeal to His Majesty in Council from a judgment or decree of the Supreme Court of Canada pronounced in an appeal to that Court from the judgment or decree of the Colonial Court of Admiralty for

Canada constituted under the Acts aforesaid given or made in the exercise of the jurisdiction conferred upon it by the said Act of 1890. Their Lordships therefore permitted the appeal to proceed upon the merits, and the case was accordingly heard."

Consequently before the enactment of The Colonial Laws Validity Act, 1865, a Colonial Legislature had power to regulate appeals to His Majesty in Council and the exercise of the prerogative right of appeal.

The law officers for the Crown in England were of the opinion that the prerogative could be affected by Colonial legislation and so approval to the Supreme Court of Canada Act, 1875, which made the decision of the Supreme Court of Canada final and binding, was withheld until words preserving the Royal prerogative were inserted.

Todd's Parliamentary Government in the Colony, 2nd Ed., page 184 :—

" Upon the introduction into the Canadian Parliament in 1875 of a Bill to create a Supreme Court for the Dominion, it was the expressed intention of ministers to have prohibited any further appeals to Her Majesty's Privy Council. They were notified, however, that the Bill could not be sanctioned unless it preserved to the Crown its rights to hear the appeals of all British subjects who might desire to appeal in the ultimate resort to the Queen in Council. Accordingly, a saving clause to that effect was inserted in the Bill, and it received the Royal Assent."

18. The power to legislate extra-territorially is not required in order to affect the Royal prerogative permitting appeals to His Majesty in Council.

*Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892], A.C. 437.

Lord Watson, at page 441 :—

" The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the Legislature of Canada ; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain."

The Crown is one and indivisible throughout the Empire, hence there is only one Royal prerogative.

*Theodore* v. *Duncan* [1919], A.C. 696.

An appeal from Australia regarding the Meat Supply for Imperial Uses Act of 1914 (Queensland).

Viscount Haldane, at page 706 :—

" The Crown is one and indivisible throughout the Empire, and it acts in self-governing states on the initiative and advice of its own ministers in these states."

The case of *Rex* v. *Nadan* has been explained in *British Coal Co.* v. *The King* [1935], A.C. 500.

The argument of the Attorney-General for England, page 508, was as follows :—

" *Nadan* v. *The King* was decided on two grounds :

" (1) Repugnancy of the Canadian Act to Imperial Acts ;

" (2) Its incompetence by reason of its extra-territorial effect.

" On the second ground the wrong view was taken in treating special leave to appeal as not being an action in the Dominion. Only geographically is the Privy Council a Court of Great Britain."

Viscount Sankey (L.C.), at page 521 :—

" The appeal, if special leave is granted, is from a decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court : if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian Sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada ; emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee of the Court of Law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, Tribunal."

At page 523 :—

" Their Lordships have in this judgment been dealing only with the legal position in Canada in regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases."

*Hull* v. *McKenna* (1926), I.R. 402 P.C. :—

" The Judicial Committee sit in the capacity of judges ; their report is acted on by the Sovereign in full Privy Council, so that proceedings before the Committee are in substance strictly judicial. The Judicial Committee is not an English body in any exclusive sense ; it is not a body with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa or in South Africa, or in Australia, or in India, as in London, etc., and it is only for convenience and because the members of the

*In the Supreme Court of Canada.*

No. 6. Factum of the Attorney-General of Ontario —*continued.*

Privy Council are conveniently in London that the Judicial Committee do sit there."

Halsbury Laws of England, 2nd Ed., Vol. 8, page 552, para. 1220 :—

" The Judicial Committee of the Privy Council is an Imperial Body representing the Empire and is no more English than is, for instance, Indian, Canadian, or South African. Strictly speaking, the Committee has no location. The Sovereign is everywhere throughout the Empire in the contemplation of the law, and it is only for convenience that the Committee sits in London."

*Moore* v. *The Attorney-General for the Irish Free State* [1935], A.C. 484. Viscount Sankey, at page 499 :—

" Mr. Green has finally contended that the amendment is invalid because it affects the prerogative of the King in a matter outside the Dominion and outside the competence of the Oireachtas (Free State Parliament). It might be possible to state many objections to this contention, but it is enough here to say that whatever might be the position of the King's prerogative if it were left as matter of the Common Law, it is here in this particular respect and in this particular enactment made matter of parliamentary legislation, so that the prerogative is pro tanto merged in the statute, and the statute gives powers of amending and altering the statutory prerogative."

19. If in order to affect the Royal prerogative admitting appeals to His Majesty in Council it is necessary to legislate extra-territorially, the Provincial Legislatures have that power for that purpose.

Statute of Westminster, 1931, Section 2 and Section 7 (2) (Record, p. 201).

*Croft* v. *Dunphy* [1933], A.C. 156, see Factum, page 45.

20. The Parliament of Canada has no power to attempt to make uniform procedure in civil matters in the provinces without providing for the coming into force of such a law by Provincial legislation.

British North America Act, Section 94 (Appendix, p. 60).

Reference *re Natural Products Marketing Act*, 1936, S.C.R. 398, at p. 415.

21. Canada is a federation and, therefore, different from an unitary state. Its legislative powers are divided between the Parliament of Canada and the Legislatures of the Provinces. Any growth, therefore, which Canada enjoys must find a corresponding growth in each of the Provinces and in the Legislatures thereof.

*Henrietta Muir Edwards* v. *The Attorney-General for Canada* [1930], A.C. 124.

Lord Sankey, at page 136 :—

" The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada. ' Like all written constitutions it has been subject to development through usage and convention ': Canadian Constitutional Studies, Sir Robert Borden, 1922, page 55.

" Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act

by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."

Thus if the Parliament of Canada enjoys equality of status in matters coming within the classes of subjects enumerated in Section 91, with the Imperial Parliament, the Provincial Legislatures enjoy the same equality of status when legislating within the provisions of Section 92 of the British North America Act.

Summary of Proceedings, Imperial Conference, 1926 (Appendix, p. 63).
Statute of Westminster, 1931, preamble (Record, p. 66).

22. Since the bill in question deals with some matters assigned exclusively to the Provincial Legislatures under Section 92 of the British North America Act it cannot come under the power respecting peace, order and good government of Canada as provided by Section 91 unless there is an emergency amounting to national peril.

Reference *re Natural Products Marketing Act*, 1936, S.C.R. 398.
*Toronto Electric Commissioners* v. *Snider* [1925], A.C. 396.
Viscount Haldane, at page 412 :—

" It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen*, 7 A.C. 829, as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in Section 91. Unless this is so, if the subject matter falls within any of the enumerated heads in Section 92, such legislation belongs exclusively to provincial competency. No doubt there may be cases arising out of some extraordinary peril to national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive provincial competency. Such cases may be dealt with under the words at the commencement of Section 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment of *Fort Frances Pulp and Power Company* v. *Manitoba Free Press* (1923), A.C. 695, are highly exceptional."

For the above reasons and the argument which may be advanced at the hearing of the reference the Attorney-General for Ontario submits that the answer to the question referred must be that the said Bill No. 9 so far exceeds the legislative power of the Parliament of Canada that it must in its entirety be declared ultra vires.

GORDON D. CONANT,
Attorney-General for Ontario.
WILLIAM B. COMMON,
CLIFFORD R. MAGONE,
of Counsel for the
Attorney-General for Ontario.

# APPENDIX.

## BRITISH NORTH AMERICA ACT.

### Section 94.

### UNIFORMITY OF LAWS IN ONTARIO, NOVA SCOTIA AND NEW BRUNSWICK.

Legislation for uniformity of laws in the three Provinces as to property and civil rights and uniformity of procedure in Courts.

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

## THE SUPREME COURT OF CANADA ACT.

### R.S.C.—Chapter 35.

### APPELLATE JURISDICTION.

Jurisdiction throughout Canada.

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. 1920, c. 32, s. 2.

Appeals from Court of last resort.

36. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the highest Court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty) where such judgment is,

Exceptions.

Requisites.

(*a*) a final judgment; or

(*b*) a judgment granting a motion for a non-suit or directing a new trial. 1920, c. 32, s. 2; 1925, c. 27, s. 2.

Appeals from other than court of last resort.

37. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie directly to the Supreme Court from any final judgment of a provincial court, whether of appellate or original jurisdiction, other than the highest court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section thirty-six.

In all cases.

(*a*) in any case by leave of the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted: Provided that except in cases in which such highest court of final resort has concurrent jurisdiction with the court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest court of last resort and which has not been heretofore appealable to the Supreme Court; and

Where over $2,000 involved.

(*b*) where the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars without leave but by consent in writing of the parties or their solicitors verified by affidavit and filed with the Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court to be appealed from;

Ordinarily appeal only from court of last resort.

but otherwise, subject to section forty-four, no appeal shall lie to the Supreme Court other than from the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted, whether the judgment or decision in such proceeding was or was not a proper subject of appeal to such highest court of final resort. 1920, c. 32, s. 2.

No appeal from discretionary orders.

38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec. 1920, c. 32, s.2.

Restrictions.

39. Except as otherwise provided by sections thirty-seven and forty-four, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless

Value over $2,000.

(*a*) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or

Special leave.

(*b*) special leave to appeal is obtained as hereinafter provided. 1920, c. 32, s. 2.

Value proved by affidavit.

40. Where the right to appeal or to apply for special leave to appeal is dependent on the amount or value of the matter in controversy such amount or value may be proved by affidavit, and it shall not include interest subsequent to the date on which the judgment to be appealed from was pronounced or any costs. 1920, c. 32, s. 2.

Leave of provincial court of last resort.

41. Special leave to appeal may be granted in any case within section thirty-six by the highest court of final resort having jurisdiction in the province in which the judicial proceeding was originally instituted: Provided that in any case whatever where the matter in controversy on the appeal will involve.

Proviso.

Validity of statute.

(*a*) the validity of an Act of the Parliament of Canada or of the legislature of any province of Canada or of an Ordinance

or Act of the council or legislative body of any territory of Canada ; or

Revenue.

(*b*) any fee of office, duty, rent or revenue, or any sum of money payable to His Majesty ; or

Future rights.

(*c*) the taking of any annual rent, customary or other fee, or, other matters by which rights in future of the parties may be affected ; or

Title to land

(*d*) the title to real estate or some interest therein ; or

Patents.

(*e*) the validity of a patent ; and

Where over $1,000 involved.

(*f*) in cases which originated in a court of which the judges are appointed by the Governor-General and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars ;

Leave of the Supreme Court.

Additional time.

if a special leave to appeal has been refused by the highest court of final resort in the province the Supreme Court may nevertheless grant such leave during the period fixed by section sixty-four or within thirty days thereafter, or within such further extended period as the Court or a judge may upon cause shown in the particular case, either before or after the expiry of the said thirty days, fix or allow. 1920, c. 32, s. 2 ; 1925, c. 27, s. 3.

Mandamus and Habeas Corpus.

42. Nothing in the three sections last preceding shall affect appeals in cases of mandamus and habeas corpus. 1920, c. 32, s. 2.

Appeal from final court of appeal on subject referred by Lieut.-Gov. in C.

43. An appeal shall lie to the Supreme Court from an opinion pronounced by the highest court of final resort in any province on any matter referred to it for hearing and consideration by the Lieutenant-Governor in Council of such province whenever it has been by the statutes of the said province declared that such opinion is to be deemed a judgment of the said highest court of final resort and that an appeal shall lie therefrom as from a judgment in an action. 1922, c. 48, s. 1.

Appeals under other Acts.

44. Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction. 1920, c. 32, s. 2.

## Judgment Final and Conclusive.

Judgment to be final.

54. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. R.S., c. 139, s. 59.

Saving H.M.'s prerogative.

# IMPERIAL CONFERENCE—1926.

## Summary of Proceedings.

(Cmd. 2768)

Page 14 :

### II.—Status of Great Britain and the Dominions.

The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution ; while, considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full developments—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy ; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however, accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference ; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to status, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this Report will show how we have endeavoured not only to state political theory, but to apply it to our common needs.

# IMPERIAL CONFERENCE—1930.

## Summary of Proceedings.

(Cmd. 3717)

Page 17 :

### (A) Report of the Conference of 1929 on the Operation of Dominion Legislation.

The Imperial Conference examined the various questions arising with regard to the Report of the Conference on the Operation of Dominion Legislation and in particular took into consideration the difficulties which were explained by the Prime Minister of Canada regarding the representations which had been received by him from the Canadian Provinces in relation to that Report.

A special question arose in respect to the application to Canada of the sections of the Statute proposed to be passed by the Parliament at Westminster (which it was thought might conveniently be called the Statute of Westminster), relating to the Colonial Laws Validity Act and other matters. On the one hand it appeared that approval had been given to the Report of the Conference on the Operation of Dominion Legislation by resolution of the House of Commons of Canada, and accordingly, that the Canadian representatives felt themselves bound not to take any action which might properly be construed as a departure from the spirit of that resolution. On the other hand, it appeared that representations had been received from certain of the Provinces of Canada subsequent to the passing of the resolution protesting against action on the Report until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action.

Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present their views. In the second place, it was necessary to provide for the extension of the sections of the proposed Statute to Canada or for the exclusion of Canada from their operation after the Provinces had been consulted. To this end it seemed desirable to place on record the view that the sections of the Statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act.

*In the Supreme Court of Canada.*

No. 6. Factum of the Attorney-General of Ontario —*continued.*

(Statutes of Canada 1931 p.v.)

## STATUTE OF WESTMINSTER.

### ADDRESS OF THE PARLIAMENT OF CANADA TO HIS MAJESTY.

(Adopted by the House of Commons on 30th June, 1931, and by the Senate on 6th July, 1931.)

Whereas the Delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences held at Westminster in the years of Our Lord One Thousand Nine Hundred and Twenty-six and One Thousand Nine Hundred and Thirty, did make certain declarations and resolutions, which are set forth in the Reports of the said Conferences ;

And Whereas, pursuant to certain recommendations set forth in the Report of the Imperial Conference, held at Westminster in the year of Our Lord One Thousand Nine Hundred and Twenty-six, as modified by Agreement made between His Majesty's Governments, a Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation was held at Westminster, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and certain declarations, resolutions and recommendations were made, as set forth in the Report of that Conference ;

And Whereas the delegates of His Majesty's Governments at the Imperial Conference, held at Westminster in the year of Our Lord One Thousand Nine Hundred and Thirty, passed certain resolutions set forth in the Report of that Conference, which reads as follows :—

" (i) The Conference approves the Report of the Conference on the Operation of Dominion Legislation (which is to be regarded as forming part of the Report of the present Conference), subject to the conclusions embodied in this Section.

" (ii) The Conference recommends :—

" (*a*) That the Statute proposed to be passed by the Parliament at Westminster should contain the provisions set out in the Schedule annexed.

" (*b*) That the 1st December, 1931, should be the date as from which the proposed Statute should become operative.

" (*c*) That with a view to the realisation of this arrangement, Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom, if possible by 1st July, 1931, and, in any case, not later than the 1st August, 1931, with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the schedule annexed.

" (*d*) That the Statute should contain such further provisions as to its application to any particular Dominion as are requested by that Dominion."

And Whereas the said Report of the Imperial Conference, held at Westminster in the year of Our Lord One Thousand Nine Hundred and Thirty, also sets forth in a schedule certain clauses and recitals to be included in a statute which, it was proposed, should be enacted by the Parliament of the United Kingdom, and which, it was thought, might conveniently be called the Statute of Westminster ;

And Whereas consideration has been given by the proper authorities in Canada as to whether and to what extent the principles embodied in the proposed Act of the Parliament of the United Kingdom should be applied to Provincial legislation ; and, at a Dominion-Provincial Conference, held at Ottawa on the seventh and eighth days of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-one, a clause was approved by the Delegates of His Majesty's Government in Canada and of the Governments of all of the Provinces of Canada, for insertion in the proposed Act for the purpose of providing that the provisions of the proposed Act relating to the Colonial Laws Validity Act should extend to Laws made by the Provinces of Canada and to the powers of the Legislatures of the Provinces ; and also for the purpose of providing that nothing in the proposed Act should be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder ; and also for the purpose of providing that the powers conferred by the proposed Act on the Parliament of Canada and upon the Legislatures of the Provinces should be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

Be it therefore resolved that a humble Address be presented to His Majesty the King, in the following words :—

To the King's Most Excellent Majesty :

Most Gracious Sovereign :

We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada, in Parliament assembled, humbly approach Your Majesty praying that You may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom, pursuant to certain declarations and resolutions made by the Delegates of Your Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences held at Westminster in the years of Our Lord One Thousand Nine Hundred and Twenty-six and One Thousand Nine Hundred and Thirty, and pursuant to certain other resolutions made by the Delegates of Your Majesty's Government in Canada and of the Governments of all of the Provinces of Canada, at a Dominion-Provincial Conference held at Ottawa on the seventh and eighth days of April in the year of Our Lord One Thousand Nine Hundred and Thirty-one, the said Act to contain the following recitals and clauses, or recitals and clauses to the following effect :—

*In the Supreme Court of Canada.*

No. 6. Factum of the Attorney-General of Ontario —*continued.*

STATUTE OF WESTMINSTER.

And whereas it is meet and proper to set out by way of preamble to this Act, that inasmuch as the Crown is the symbol of the free association of the Members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the Members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion.

It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested and consented to, the enactment thereof.

Without prejudice to the generality of the foregoing provisions of this Act sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

Without prejudice to the generality of the foregoing provisions of this Act section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for

regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

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(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The powers conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

(3) The provisions of Section — of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the Legislatures of such Provinces.

(A number to be inserted corresponding to the section number of the second clause set forth in this Schedule, Imperial Conference, 1930, Summary of Proceedings, page 65.)

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Notwithstanding anything in the Interpretation Act, 1889, the expression " Colony " shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

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All of which we humbly pray Your Majesty may take into Your favourable and gracious consideration.

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## No. 7.



### Factum of the Attorney-General of Nova Scotia.

In this Reference the Attorney-General of Nova Scotia adopts and relies on the Factum filed herein by the Honourable the Attorney-General for Ontario.

J. H. MACQUARRIE,
Attorney-General of Nova Scotia.

T. D. MACDONALD,
of Counsel for the
Attorney-General for Nova Scotia.

Halifax.

*In the Supreme Court of Canada.*

No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

# APPENDICES TO THE FACTUM ON BEHALF OF THE PROVINCE OF NOVA SCOTIA.

## INDEX.



## APPENDIX A.

### COMMISSION TO GOVERNOR CORNWALLIS, May 6, 1749.

See Houston: Constitutional Documents of Canada, p. 9.

Extract from Selections from the Public Documents of the Province of Nova Scotia, published under a Resolution of the House of Assembly passed March 15, 1865, and edited by Thomas B. Akins, D.C.L.

His Majesty's Commission to His Excellency Governor Cornwallis.

George the Second, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, &c. To our Trusty and well beloved, the Honourable Edward Cornwallis, Esquire, Greeting. Whereas we did by our Letters Patent under our Great Seal of Great Britain bearing date at Westminster the Eleventh day of September in the second year of Our Reign constitute and appoint Richard Philipp's, Esquire, Our Captain General and Governor in Chief, in, and over Our Province of Nova Scotia or Acadie, in America, with all the rights, members and appurtenances whatsoever thereunto belonging, for and during our Will and pleasure; as by the said recited Letters patent relation being thereunto had may more fully and at large appear.

Now Know you that we revoked and Determined and by these presents do Revoke and Determine the said recited Letters Patent, and every clause, article and thing therein contained; and Further Know you that we reposing special trust and confidence in the prudence, courage and Loyalty of you the said Edward Cornwallis of our especial Grace certain knowledge and meer motion have thought fit to constitute and appoint you the said Edward Cornwallis to be our Captain General & Governor in Chief in and over our

province of Nova Scotia or Acadie in America, with all the rights, members and appurtenances whatsoever thereunto belonging, and we do hereby require and command you to do and execute all things in due manner that shall belong unto your said Command and the Trust We have reposed in you according to the several powers and authorities granted or appointed you by this present Commission and the instructions herewith given you or by such further powers, Instructions and authorities as shall at any time hereafter, be granted or appointed you under our signet & sign manual or by our order in our privy Council & according to such Reasonable Laws and Statutes as hereafter shall be made or agreed upon by you with the advice and consent of Our Council and the Assembly of our said province under Your Government hereafter to be appointed in such manner & form as is hereafter expressed.

And for the better administration of Justice and the management of the Publick affairs of our said province, We hereby give and grant unto you the said Edward Cornwallis full power and authority to Chuse nominate & appoint such fitting and discreet persons as you shall either find there or carry along with you not exceeding the number of Twelve, to be of our Council in our said Province. As also to nominate and appoint by Warrant under your hand and seal all such other officers and ministers as you shall Judge proper and necessary for our service and the good of the people whom we shall settle in our said Province until our further will and pleasure shall be known.

And our will and pleasure is that you the said Edward Cornwallis (after the publication of these our Letters Patent) do take the Oaths appointed to be taken by an Act passed in the first year of his late Majesty's our Royal father's Reign, Entitled an Act for the further security of His Majesty's Person and Government and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors. As also that you make and subscribe the Declaration mentioned in an Act of Parliament made in the Twenty-fifth year of the Reign of King Charles the Second entitled an Act for preventing dangers which may happen from Popish Recusants. And likewise that you take the usual Oath for the due execution of the office and trust of Our Captain General and Governor in Chief of our said Province for the due and impartial Administration of Justice; and further that you take the oath required to be taken by Governors of Plantations to do their utmost that the several Laws relating to Trade and the Plantations be observed. All which said Oaths and Declaration Our Council in our said Province or any five of the members thereof have hereby full power and authority and are required to tender and administer unto you and in your absence to our Lieutenant Governor, if there be any upon the place, all which being duly performed you shall administer unto each of the members of Our said Council as also to our Lieutenant Governor, if there be any upon the place, the said Oaths mentioned in the said Act Entitled an Act for the further security of His Majesty's Person and Government and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants and

*In the Supreme Court of Canada.*

No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors; as also to cause them to make and subscribe the aforementioned declaration and to administer to them the Oath for the due execution of their places and Trusts.

And we do hereby give & grant unto you full power and Authority to suspend any of the members of our said Council to be appointed by you as aforesaid from sitting voting and assisting therein if you shall find just cause for so doing.

And if it shall at any time happen that by the Death departure out of our said province, suspension of any of our said Councillors or otherwise there shall be a vacancy in our said Council (any five whereof we do hereby appoint to be a Quorum) our will and pleasure is that you signify the same unto us by the first opportunity that we may under our signet & sign manual constitute and appoint others in their stead.

But that our affairs at that distance may not suffer for want of a due number of Councillors, if ever it shall happen that there shall be less than nine of them residing in our said Province We hereby give and grant unto you the said Edward Cornwallis full power and authority to Chuse as many persons out of the principal freeholders Inhabitants thereof as will make up the full number of our said Council to be nine and no more; which persons so chosen and appointed by you shall be to all intents and purposes Councilors in our said Province until either, they shall be confirmed by us or that by the Nomination of others by us under our sign manual or signet our said Council shall have nine or more persons in its.

And We do hereby give and grant unto you full power & authority with the advice and consent of our said Council from time to time as need shall require to summon and call General Assemblys of the Freeholders and Planters within your Government according to the usage of the rest of our Colonies & plantations in America.

And our will and pleasure is that the persons thereupon duly elected by the major part of the Freeholders of the Respective Counties and places & so returned shall before their setting take the Oaths mentioned in the said Act entitled an Act for the further security of his Majesty's Person and government and the succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors, as also make and subscribe the aforementioned Declaration (which Oaths & Declaration you shall commissionate fit persons under our seal of Nova Scotia to Tender and administer unto them), and until the same shall be so taken and subscribed no person shall be capable of sitting tho' elected, and we do hereby declare that the persons so elected and qualified shall be called and deemed the General Assembly of that our Province of Nova Scotia.

And that you the said Edward Cornwallis with the advice and consent of our said Council and Assembly or the Major part of them respectively shall have full power and authority to make, constitute and ordain Laws, Statutes & Ordinances for the Publick peace, welfare & good government of our said province and of the people and inhabitants thereof and such

others as shall resort thereto & for the benefit of us our heirs & successors, which said Laws, Statutes and Ordinances are not to be repugnant but as near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britain.

Provyded that all such Laws, Statutes & Ordinances of what nature or duration so ever be within three months or sooner after the making thereof transmitted to us under Our Seal of Nova Scotia for our approbation or Disallowance thereof as also Duplicates by the next conveyance.

And in case any or all of the said Laws, Statutes & Ordinances not before confirmed by us shall at any time be disallowed and not approved & so signyfied by us our Heirs or Successors under our or their sign manual & signet or by order of our or their privy Council unto you the said Edward Cornwallis or to the Commander in Chief of our said Province for the time being then such and so many of the said Laws, Statutes and Ordinances as shall be so disallowed & not approved shall from thenceforth cease, determine & become utterly void & of none effect any thing to the contrary thereof notwithstanding.

And to the end that nothing may be passed or done by our said Council or Assembly to the prejudice of us our Heirs & Successors We Will & ordain that you the said Edward Cornwallis shall have and enjoy a Negative Voice in the making and passing of all Laws, Statutes & Ordinances as aforesaid.

And you shall & may likewise from time to time as you shall Judge it necessary adjourn, Prorogue & Dissolve all General Assemblies as aforesaid.

And our further will and pleasure is that you shall and may keep & use the Publick Seal of our Province of Nova Scotia for Sealing all things whatsoever that Pass the Great Seal of Our said Province under your Government.

And We do further give and grant unto you the said Edward Cornwallis full power and authority from time to time ; at any time hereafter by yourself or by any other to be authorised by you in that behalf to administer and give the Oaths mentioned in the aforesaid Act to all and every such person or persons as you shall think fit who shall at any time or times pass into our said Province or shall be residing or abiding there.

" And we do by these presents give and grant unto you the said Edward Cornwallis full power and authority with advice and consent of our said Council to erect constitute and establish such & so many Courts of Judicature & publick Justice within our said Province and Dominion as you and they shall think fit and necessary for the hearing & determining all causes as well Criminal as Civil according to Law and Equity and for awarding of Execution thereupon with all reasonable and necessary powers, Authorities fees & Privileges belonging thereunto as also to appoint & Commissionate fit persons in the several parts of your Government to administer the oaths mentioned in the aforesaid Act Entitled an Act for the further security of His Majesty's Person & Government & the Succession of the Crown in the Heirs of the late Princess Sophia being Protestants and for Extinguishing the hopes of the Pretended Prince of Wales and his open and secret abettors ; As also to tender & Administer the aforesaid Declaration unto such persons belonging to the said Courts as shall be obliged to take the same."

And We do hereby authorize and Impower you to constitute & appoint Judges & in cases requisite Commissioners of Oyer & Terminer, Justices of the Peace and other necessary officers & ministers in our said Province for the better administration of Justice and putting the Laws in execution and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in Judicial Causes.

And We do hereby give and Grant unto you full power & Authority where you shall see cause or shall Judge any offender or offenders in Criminal matters or for any fines or forfeitures due unto us, fit objects of our mercy to pardon all such offenders and to remitt all such Offences Fines & Forfeitures, Treason & willfull murder only excepted ; in which cases you shall likewise have power upon extraordinary occasions to Grant Reprieves to the offenders untill & to the intent our Royal Pleasure may be known therein.

We do by these presents Authorise and empower you to collate any Person or Persons to any Churches, Chapels or other Ecclesiastical Benefices within our said Province as often as any of them shall happen to be void.

And We do hereby give & grant unto you the said Edward Cornwallis by yourself or by your Captains & Commanders by you to be authorised full power and authority to Levy, arm, muster, command & employ all persons whatsoever residing within our said Province and as occasion shall serve to march from one place to another or to embark them for the resisting & withstanding of all Enemies, Pirates & Rebels both at Land & Sea, and to Transport such Forces to any of our plantations in America if necessity shall require for the Defence of the same against the Invasion or attempts of any of our Enemies, and such Enemies, Pirates & Rebels if there shall be occasion to pursue and prosecute in or out of the Limits of our said Province & plantations or any of them & (if it shall so please God) to vanquish, apprehend & take them & being taken, according to Law to put to death or keep & preserve them alive at your discretion & to execute Martial Law in time of Invasion or other Times when by Law it may be executed & to do & execute all & every other thing or things which to our Captain Generals & Governor in Chief Doeth or ought of right to belong.

And we do hereby give & grant unto you full power and authority by & with the advice and consent of our said Council of Nova Scotia, to Erect, Raise & Build in our said Province such & so many Forts & Platforms, Castles, Citys, Boroughs, Towns & Fortifications as you by the advice aforesaid shall Judge necessary, and the same or any of them to fortify and furnish with ordnance, ammunition & all sorts of arms fit and necessary for the security and defence of Our said Province and by the advice aforesaid the same again or any of them to demolish or dismantle as may be most convenient.

And for as much as divers mutinies & disorders may happen by persons shipped and employed at sea during the time of War and to the end that such as shall be shipped & employed at sea during the time of War, may be better governed & ordered. We hereby give and grant unto you the said Edward Cornwallis full power and authority to constitute & appoint Captains, Lieutenants, Masters of Ships & other Commanders & Officers, and to grant to

such Captains, Lieutenants, Masters of Ships & other Commanders & Officers Commissions in time of War to execute the Law martial according to the directions of such Laws as are now in force or shall hereafter be passed in Great Britain for that purpose and to use such proceedings, authorities, punishments and executions upon any offender or offenders who shall be mutinous, seditious, disorderly or any way unruly either at sea or during the time of their abode or residence in any of the Ports, Harbours or Bays of our said Province as the cause shall be found to require according to the martial Law and the said directions during the time of War as aforesaid.

Provyded that nothing herein contained shall be construed to the enabling you or any by your authority to hold Plea or have any Jurisdiction of any offence, cause, matter or thing committed or done upon the high sea or within any of the Havens, Rivers or Creeks of our said Province under your Government by any Captain, Commander, Lieutenant, master, officer, seaman, soldier or person whatsoever, who shall be in our actual service & pay in or on board any of our Ships of War or other Vessels, acting by immediate Commission or Warrant from our Commissioners for executing the office of our High Admiral of Great Britain for the time being, under the Seal of Our Admiralty, but that such Captain, Commander, Lieutenant, master, officers, seaman, soldier, or other person so offending shall be left to be proceeded against & tryed as their offences shall require either by Commission under our great Seal of Great Britain as the Statute of the 28th of Henry the eighth directs or by Commission from our said Commissioners for executing the office of our High Admiral or from our High Admiral of Great Britain for the time being, according to the aforementioned Act for the establishing Articles & orders for the Regulating and better Government of His Majesty's Navies, Ships of War & Forces by sea and not otherwise.

Provyded nevertheless that all disorders & misdemeanors, committed on shore by any Captain, Commander, Lieutenant, master, officer, seaman, soldier or other person whatsoever belonging to any of our ships of War or other Vessels acting by Immediate Commission or Warrant from our said Commissioners for executing the office of High Admiral or from our High Admiral of Great Britain for the time being under the Seal of Our Admiralty, may be tried & punished according to the Laws of the Place where any such disorders, offences and misdemeanors shall be committed on shore, notwithstanding such offender be in our actual service & borne in our pay, on board any such our ships of war or other vessels acting by immediate Commission or warrant from our said Commissioners for executing the office of High Admiral or our High Admiral of Great Britain for the time being as aforesaid so as he shall not receive any protection for the avoiding of Justice for such offences committed on shore from any pretence of his being employed in our service at Sea.

And our further will and pleasure is that all publick money raised or which shall be raised by any Act hereafter to be made within our said province be issued out by Warrant from you by & with the advice and consent of the Council & disposed of by you for the support of the Government and not otherwise.

*In the Supreme Court of Canada.*

No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

And we do likewise give & grant unto you full power and authority by & with the advice and consent of our said Council to settle and agree with the Inhabitants of our Province for such Lands, Tenements & heriditaments as now are or hereafter shall be in our power to dispose of and them to grant to any Person or Persons upon such terms and under such moderate Quit Rents services and acknowledgements to be thereupon reserved unto us as you by & with the advice aforesaid shall think fit. Which said grants are to pass & be sealed by our seal of Nova Scotia and being entered upon Record by such officer or officers as shall be appointed thereunto, shall be good & effectual in Law against us our heirs & successors.

And We do hereby give you the said Edward Cornwallis full power to order and appoint Fairs, Marts & Markets as also such & so many Ports, Harbours, Bays, Havens and other places for convenience & security of shipping & for the better Loading & unloading of Goods & merchandises as by you with the advice & consent of the said Council shall be thought fit & necessary.

And We do hereby require & Command all officers & ministers Civil & Military and all other Inhabitants of our said Province, to be obedient, aiding and assisting unto you the said Edward Cornwallis in the Execution of this our Commission and of the powers & authorities herein contained, and in case of your death or absence out of Our said province to be obedient, aiding & assisting unto such person as shall be appointed by us to be our Lieutenant Governor or Commander in Chief of our said Province; To whom we do therefore by these presents give & grant all & Singular the powers & authority's herein granted, to be by him executed & enjoyed during our pleasure or untill your arrival within our said province.

And if upon your Death or absence out of our said province there be no person upon the Place commissionated or appointed by us to be our Lieutenant Governor or Commander in Chief of the said Province, Our Will & Pleasure is that the Eldest Councilor, who shall be at the Time of your death or absence residing within our said Province shall take upon him the administration of the Government and execute our said Commission & Instructions and the several powers and authorities therein contained in the same manner & to all intent and purposes as either our Governor or Commander in Chief should or ought to do in case of your absence until your return or in all cases until our further pleasure be known herein.

And we do hereby declare ordain & appoint that you the said Edward Cornwallis shall & may hold, execute & enjoy the office & place of our Captain General & Governor in Chief in & over our said Province of Nova Scotia, with all its rights, members & appurtenances whatsoever together with all & singular the Powers & authorities hereby granted unto you for & during our will & pleasure.

In Witness whereof we have caused these our Letters to be made patent. Witness ourself at Westminster the Sixth day of May in the Twenty-second year of Our Reign.

By Writ of Privy Seal.

[L. S.] (Signed) YORKE & YORKE.

## Appendix B.

## EXTRACTS FROM INSTRUCTIONS TO GOVERNOR CORNWALLIS, April 29, 1749.

(Public Records Office, Ottawa, C.O. 218; 3 pp. 60 et seq.)

66th. And Whereas for the Peace, Happiness and security of all Our Subjects within Our said Province, and for the more speedy and easy Execution of Justice and Determination of all Controversies and Differences, it is necessary that Courts of Judicature and Publick Justice should be erected, and also judges or assistant Justices of the Peace, Sheriffs and other Officers should be appointed according to the Power and Direction of Our Commission and these Our Instructions; It is therefore Our Will and Pleasure, that One Principal Court of Judicature should be and is hereby established to be held twice a year or often as you shall judge expedient by the Name of the General Court, and to have Jurisdiction of all Causes Real and Personal at Common Law above the Value of five Pounds, to act as a Court of Chancery but not without Appeal to Us when the Matter in Question shall exceed £300 Sterling, as also to try all Criminals Cases that may come before them; which said Court It is Our further Will and Pleasure should consist of Our Governor or Commander in Chief and Our Council of Our said Province for the time being, any five whereof to be a Quorum.

67th. And it is Our further Will and Pleasure, and you are hereby Authorized and required to constitute and appoint such and so many Inferior Courts of Judicature and Justice within the several Districts of Our said Province as you by and with the Advice and Consent of Our said Council shall judge most proper, as also Judges, Justices of the Peace, Sheriffs and other Offices and Ministers of Justice, taking care that you do administer or cause to be administered to all and every such Person or Persons as you shall so appoint such Oath or Oaths as are usually given for the due Execution of Offices and Places and the Impartial Administration of Justice, and in the Choice and nomination of the said Judges, Justices, Sheriffs and other Officers you are always to take Care that they be Men of good Life and well affected to Our Government and of good Estates and Abilities and not necessitous Persons.

68th. And you are to transmit to Us by One of Our Principal Secretaries of State and to Our Commissioners for Trade and Plantations with all convenient speed a particular Account of all Establishments of Jurisdiction Courts, Officers, and Officers, Powers, Authorities, Fees and Priviledges granted and settled within Our said Province, as likewise an Account of all publick Charges relating to the said Courts and of such Funds as are settled and appropriated to discharge the same, together with exact and Authentick Copies of all proceedings in such Causes where Appeals shall be made to Us in Our Privy Council.

71st. And Whereas frequent Complaints have been made of great Delays and undue proceedings in the Courts of Justice in several of Our

Plantations, whereby many of Our Subjects have very much suffered, and it being of the Greatest Importance to Our Service and to the Welfare of Our Plantations, that Justice be everywhere speedily and duly administered, and that all Disorders, Delays and other undue Practices in the Administration thereof be effectually prevented. We do particularly require you to take especial Care that in all Courts, where you are authorized to preside ; Justice be impartially administered, and that in all other Courts established within Our said Province all Judges and other Persons therein concerned do likewise perform their several Duties without Delay or Partiality.

72d. You are to take Care that no Court of Judicature be adjourned but upon good Grounds, as also that no Orders of any Court of Judicature be entred or allowed which shall not be first read and approved of by the Magistrates in open Court, which Rule You are in like manner to see observed with relation to the Proceedings of Our Council of Nova Scotia, and that all Orders there made be first read and approved in Council before they are entred upon the Council Books.

85th. Whereas Appeals ought to be made in Cases of Error from the respective Courts in Our said Province unto You and the Council there in General Court, and in Your Absence from Our said Province to Our Lieutenant Governor or to the Commander in Chief for the time being and the said Council in Civil Causes if either Party shall not rest satisfied with the Judgement of You or the Commander in Chief for the time being and Council as aforesaid, Our Will and Pleasure is that they may then appeal unto Us in Our Privy Council ; Provided the Sum or Value so appealed of unto Us do exceed three hundred Pounds Sterling as aforesaid, and that such Appeal be made within fourteen Days after Sentence, and good Security be given by the Appellant that he will effectually prosecute the same and answer the Condemnation, as also pay such Cost and Damages as shall be awarded by Us in Case the Sentence of You or the Commander in Chief for the time being and Council be affirmed ; And it is Our further Will and Pleasure, that in all Cases whereby Your Instructions you are to admit Appeals to Us in Our Privy Council—Execution be suspended until the final Determination of such Appeal, unless good and sufficient Security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgements or Decree, in Case upon the Determination of such Appeal such Judgement or Decree should be reversed and Restitution awarded to the Appellant.

## Appendix C.

## EXTRACTS FROM INSTRUCTIONS TO GOVERNOR HOPSON, May 7th, 1752.

(Quoted in Volume 19, Canadian Law Times, at page 65 et seq.)

" And Whereas for the Peace, Happiness and Security of all His Majesty's Subjects within the said Province, and for the more speedy and easy execu-

tion of Justice and Determination of all controversies and differences, it is necessary that Courts of Judicature and publick Justice should be erected, and also a Judge, or Assistant Justice of the Peace, Sheriffs and other officers should be appointed according to the Powers and Directions of His Majesty's Commission and these Instructions; It is therefore His Majesty's Will and Pleasure, that one principal Court of Judicature should be held twice a year or oftener as you shall judge expedient by the Name of the General Court, and to have Jurisdiction of all causes Real and Personal at common law above the value of five pounds, to act as a Court of Chancery, but not without appeal to His Majesty when the matter in Question shall exceed three hundred Pound Sterling, as also to try all criminal cases that may come before the said General Court, which said Court, It is further His Will and Pleasure should consist of the Governor or Commander-in-Chief and the Council of the said Province for the time being, any five whereof to be a quorum."

"Whereas Appeals ought to be made in cases of error from the respective Courts in the said Province unto you and the Council there in General Court and in your absence from the said Province to the Lieutenant-Governor or to the Commander-in-Chief for the time being, and the said Council in civil causes, if either party shall not rest satisfied with the Judgment of you or the Commander-in-Chief for the time being and Council as aforesaid, His Majesty's Will and Pleasure is that they may then appeal unto His Majesty in His Privy Council; Provided the Sum or Value so appealed for unto His Majesty do exceed three hundred Pounds sterling, and that such Appeal be made within fourteen days after Sentence and good security be given by the Appellant that he will effectually prosecute the same and answer the condemnation, as also pay such Cost and Damages as shall be awarded by His Majesty in case the sentence of you or the Commander-in-Chief for the time being and Council be affirmed; And it is His Majesty's further Will and Pleasure that in all cases where by your instructions you are to admit Appeals to His Majesty in His Privy Council, execution be suspended until the final determination of such Appeal, unless good and sufficient Security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree in case upon the Determination of such Appeal such Judgment or Decree should be reversed and Restitution awarded to the Appellant."

## Appendix D.

## ADDITIONAL INSTRUCTIONS TO GOVERNOR HOPSON, 1753.

(See Volume 19, Canadian Law Times, page 71.)

George R.

Additional Instruction to our Trusty and Well-beloved Peregrine Thomas Hopson, Esquire, our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia or Acadie in America, or to the Commander-in-Chief of our said province for the time being. Given at Our Court at St.

*In the Supreme Court of Canada.*

No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

James's the 18th day of December, 1753, in the Twenty-seventh year of Our Reign.

Whereas it hath been represented unto us, that the Method prescribed by the Instructions heretofore given by Us to the Governors of Our Colonies and Plantations in America, relative to appeals from the Courts there in Cases of Error, has, by subsequent Regulations which have been from time to time made by Us in Our Privy Council relative to such Appeals, become defective and improper, For Remedy thereof for the future, It is Our Royal Will and Pleasure that you or the Commander-in-Chief of Our Province of Nova Scotia for the time being do permit and allow appeals from any of the Courts of Common Law in Our said Province unto you or the Commander-in-Chief and the Council of Our said Province ; and you are for that purpose to issue a Writ in the manner which has been usually accustomed, returnable before yourself and the Council of Our said Province who are to proceed to hear and determine such Appeal, wherein such of Our said Court as shall be at that time Judges of the Court from whence such Appeal shall be so made to you our Captain-General or to the Commander-in-Chief for the time being and to Our said Council as aforesaid, shall not be admitted to vote upon the said Appeal ; but they may be nevertheless be present at the hearing thereof, to give the reasons of the Judgment given by them in the Causes wherein such Appeals shall be made, Provided, nevertheless, that in all such Appeals the sum or value appealed for do exceed the sum of three hundred pounds sterling, and that security be first duly given by the Appellant to answer such Charges as shall be awarded, in case the first sentence is affirmed. And if either party shall not rest satisfied with the judgment of you or the Commander-in-Chief for the time being and of Our Council as aforesaid, Our Will and Pleasure is that such Party may then appeal unto Us in Our Privy Council. Provided the sum or value so appealed for unto Us do exceed five hundred pounds sterling, and that such Appeal be made within fourteen days after Sentence, and good security given by the Appellant that he will effectually prosecute the same and answer the condemnation, and also pay such Costs and Damages as shall be awarded by Us in case the sentence of you or the Commander-in-Chief for the time being and of Our Council be affirmed ; Provided, nevertheless, that where the matter in question relates to the taking or demanding of Duty payable to us or to any Fee or Office, or annual Rent, or other such like matter or thing where the rights in future may be bound, in all such cases you are to admit an Appeal to Us in Our Privy Council, altho' the immediate sum or value appealed for be of less value. And it is our further Will and Pleasure that in all Cases where by your Instructions you are to admit Appeals to Us in Our Privy Council, execution be suspended until the final Determination of such Appeals, unless good and sufficient security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree, in case, upon the Determination of such Appeal, such Decree or Judgment should be reversed and Restitution awarded to the Appellant.

## APPENDIX E.

## NOTATION *RE* JUDICIAL COMMITTEE ACTS OF 1833 AND 1844.

The Appeals to the Privy Council from the Province of Nova Scotia continued to be regulated under the Instructions issued to various Governors in substantially the same form as those issued to Governor Hopson until the time of the passing of the Judicial Committee Acts, and thereafter until the year 1861, in which year the Commission and Instructions issued to Viscount Monck (referred to in Appendix G) omitted express reference to such appeals. The position with regard to appeals from 1861 until 1863, when the Order in Council set forth in Appendix H was passed, is not entirely clear. Apparently, however, during this period no cases arose in which the matter of appeal to the Privy Council was raised.

The relevant text of the Judicial Committee Act, 1833, 3 & 4 William IV, Chapter 41 (Imperial) is to be found in the printed Record at page 203 et seq).

The relevant portion of the text of the Judicial Committee Act, 1844, 7 & 8 Victoria, Chapter 69 (Imperial), is set forth in the printed Record at page 206 et seq.

## APPENDIX F.

## EXTRACTS FROM INSTRUCTIONS TO SIR EDMUND WALTER HEAD, SEPTEMBER 20TH, 1854.

(See Book 352, Public Records of Nova Scotia.)

(Nova Scotia Public Archives.)

The Instructions read in part as follows :

" Instructions to Our trusty and Well-beloved Sir Edmund Walter Head, Baronet, Our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia or in his absence to our Lieutenant Governor or the Officer administering the Government of Our said Province for the time being.

Given at Our Court at Balmoral this Twentieth day of September, 1854, in the eighteenth year of Our Reign."

" Twenty-first. Our will and pleasure is that you do, in all civil causes, on application being made to you for that purpose, permit and allow appeals from any of the Courts of Common Law, or other Courts in Our said Province, in the manner and form which have been usually accustomed ; Provided nevertheless, that in all such appeals the sum or value appealed for do exceed the sum of Three hundred pounds sterling, and that security be first duly given by the Appellant to answer such charges as shall be awarded in case the first sentence be affirmed, and if either party shall not rest satisfied with the judgment of you and Our Executive Council, Our will and pleasure is that the Appellant may then appeal unto Us, in Our Privy Council provided the sum or value so appealed for unto Us do exceed Five hundred pounds

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No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

sterling and that such appeal shall be made within fourteen days after sentence and good security be given by the Appellant that he will effectually prosecute the same and answer the condemnation, and also pay such costs and damages as shall be awarded by Us in case the sentence of you and the said Executive Council shall be affirmed : Provided nevertheless when the matter in question relates to the taking or demanding any duty payable to Us, or to any fee of office or other such like matter or thing where our rights in future may be bound, in all such cases you are to admit an appeal to Us in Our Privy Council, although the immediate sum or value appealed for be of a less amount or value ; and it is Our further will and pleasure, that in all cases where, by your instructions, you are to admit appeals to Us in Our Privy Council, execution be suspended until Our final determination of such Appeal, unless good and sufficient security be given by the Appellee to make ample restitution of all that the Appellant shall have lost by means of such decree or judgment in case, upon the determination of such Appeal, such decree or judgment should be reversed and restitution awarded to the appellant."

" Twenty-second. You are also to admit appeals unto Us in Our Privy Council in all cases of fines imposed for misdemeanours, provided the fines so imposed amount to or exceed the sum of one hundred pounds sterling, the Appellant giving good security that he will effectually prosecute the same and answer the condemnation if the sentence by which such fine was imposed be confirmed."

" Twenty-eighth. It being of the greatest importance to Our service and to the welfare of Our plantations that justice be everywhere speedily and duly administered, and that all disorders, delays and other undue practices in the administration thereof be effectually prevented We do particularly require you to take especial care, that in all Courts where you are authorised to preside, justice be impartially administered and that in all other Courts established within Our said Province all Judges and other persons therein concerned do likewise perform their several duties without delay or partiality."

## Appendix G.

## NOTATION REGARDING COMMISSION AND INSTRUCTIONS TO VISCOUNT MONCK, 1861.

(See Book 352, Public Records of Nova Scotia.)

(Nova Scotia Public Archives.)

The Commission and Instructions issued to Viscount Monck as Captain-General and Governor-in-Chief in and over the Province of Nova Scotia contain no specific reference to the matter of Appeals to the Privy Council. The Commission contains the following paragraphs :—

" II. And we do hereby authorise, empower and command you in due manner, to do and execute all things that shall belong to your said command and the trust we have reposed in you according to the several

powers, provisions, and directions granted or appointed you by this our commission, and the instructions herewith given to you, or by such further powers, instructions and authorities, as shall at any time hereafter be granted or appointed you in respect to the said Province, under our sign-manual and signet, or by our order in Our Privy Council, or by us through one of our Principal Secretaries of State, and according to such reasonable laws and statutes as are now in force, or shall hereafter be made and agreed upon by you with the advice and consent of the Legislative Council and Assembly of our said Province."

" VIII. And we do hereby authorise and empower you to constitute and appoint Judges and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers in our said Province, for the better administration of justice, and putting the laws into execution."

## Appendix H.

## IMPERIAL ORDER IN COUNCIL, 1863, *RE* APPEALS TO THE PRIVY COUNCIL FROM THE PROVINCE OF NOVA SCOTIA.

(The text of the Order-in-Council may be found in MacPherson : The Practice of the Judicial Committee, 2nd ed., 1873, Appendix, p. 111.)

At the Court of Windsor,
The 20th day of March, 1863.

Present :
The Queen's Most Excellent Majesty in Council.

Whereas by an Act passed in the session of Parliament, holden in the seventh and eighth years of Her Majesty's Reign, entitled " An Act for amending an Act passed in the fourth year of the Reign of His late Majesty, intituled ' An Act for the better administration of justice in His Majesty's Privy Council, and to extend its jurisdiction and powers,' " it was amongst other things provided that it should be competent for Her Majesty, by an order or orders, to be from time to time for that purpose made, with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony, or possession abroad, although such Court shall not be a Court of errors or a Court of appeal within such colony or possession ; and it shall also be competent to Her Majesty by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon : provided always, that it shall be competent to Her Majesty in Council to revoke, alter, and amend any such order or orders as aforesaid, as to Her Majesty in Council shall seem meet :

*In the Supreme Court of Canada.*

No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

And whereas it is expedient that provision should be made in pursuance of the said recited enactment, to enable parties to appeal in civil causes from the decisions of the Supreme Court of the Province of Nova Scotia to Her Majesty in Council, the same not being a Court of error or of appeal;

It is hereby ordered by the Queen's Most Excellent Majesty, by and with the advice of Her Privy Council, that any person or persons may appeal to Her Majesty, her heirs and successors, in her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of the Province of Nova Scotia, as a court of civil judicature, or as a court of revenue or of escheat, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned; that is to say: in case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling, or in case such judgment, decree, order, or sentence shall involve directly or indirectly, any claim, demand, or question to or respecting property in any civil right, amounting to, or of the value of three hundred pounds sterling or in case the matter in question relates to the taking or demanding any duty payable to Her Majesty, her heirs and successors, or to any fee of office, or other such like matter or thing, whereby the rights of Her Majesty, her heirs or successors, may be bound; the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may, within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Court by motion for leave to appeal therefrom to Her Majesty, her heirs and successors, in her or their Privy Council, or if the said Court be not sitting, then by petition to either of the Judges of the said Court. And in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said Court or such Judge as aforesaid shall, and is hereby empowered either to direct that the judgment, decree, order, or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended pending the said appeal, as to the said Court or such Judge as aforesaid may appear to be most consistent with real and substantial justice. And in case the said Court or such Judge as aforesaid shall direct such judgment, decree, order, or sentence to be carried into execution, the person or persons in whose favour the same shall be given, shall, before the execution thereof, enter into good and sufficient security, to be approved by the said Court or such Judge as aforesaid, for the due performance of such judgment or order as Her Majesty, her heirs and successors, shall think fit to make upon such appeal. And that in all cases, security shall also be given by the party or parties appellant in a bond or mortgage, or personal recognisance, not exceeding the value of five hundred pounds sterling for the prosecution of the appeal and for the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council to the party or parties respondent; and that such security as aforesaid for the prosecution of the appeal, and for the payment of all such costs as may be awarded, be completed within twenty-eight days from the date of the motion or petition for leave to appeal:

and the party or parties appellant shall then, and not otherwise, be at liberty to prefer and prosecute his, her, or their appeal to Her Majesty, her heirs and successors, in her or their Privy Council in such manner and under such rules as are or may be observed in appeals made to Her Majesty from His Majesty's Colonies and plantations abroad.

And it is further ordered, that it shall be lawful for the said Court, at its discretion, on the motion, or if the said Court be not sitting, then for either of the Judges of the said Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said Court, to grant permission to such party to appeal against the same to Her Majesty, her heirs and successors, in her or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Provided also, that if in any action, suit, or other proceeding, it shall so happen that no final judgment, decree, order, or sentence can be duly given in consequence of a disagreement of opinion between the Judges of the said Court, then in such case, the final judgment, decree, order, or sentence may be entered, pro forma, on the petition of any of the parties to the action, suit, or other proceeding, according to the opinion of the Chief Justice, or in his absence, of the senior Puisne Judge of the said Court. Provided, that such judgment, decree, order, or sentence shall be deemed a judgment, decree, order or sentence of the Court for the purpose of an appeal against the same, but not for any other purpose.

Provided always, and it is hereby ordered, that nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, her heirs and successors, upon the humble petition of any person or persons aggrieved by any judgment or determination of either of the said Courts, at any time to admit his, her, or their appeal therefrom, upon such terms and upon such securities, limitations, restrictions, and regulations as Her Majesty, or her heirs or successors, shall think fit, and to reverse, correct, or vary such judgment or determination as to Her Majesty, her heirs or successors, shall seem meet.

And it is further ordered, that in all cases of appeal made from any judgment, order, sentence, or decree of the said Court to Her Majesty, her heirs or successors, in her or their Privy Council, such Court shall certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and order, had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said Court ; and that the said Court shall also certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against.

And it is further directed and ordained that the said Court shall, in all cases of appeal to Her Majesty, her heirs and successors, conform to and execute, or cause to be executed, such judgments and orders as Her Majesty,

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No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

her heirs or successors, in her or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal order, or other order or rule of the said Court, should or might have been executed.

## Appendix I.

## IMPERIAL ORDER IN COUNCIL, 1911, *RE* APPEALS TO THE PRIVY COUNCIL FROM THE PROVINCE OF NOVA SCOTIA.

At The Court at Buckingham Palace,

The 5th day of July, 1911.

Present :

The King's Most Excellent Majesty.

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| Lord President. | Sir John Rhys. |
| Lord Chamberlain. | Sir Rufus Isaacs. |
| Lord Kinnear. | Mr. M'Kinnon Wood. |
| Mr. Secretary Churchill. | Mr. T. J. MacNamara. |
| Mr. Secretary Harcourt. | Mr. J. H. Witley. |
| Sir Joseph Ward. | Mr. Charles Fenwick. |
| Sir Charles Fitzpatrick. | Mr. J. W. Wilson. |
| Sir George Murray. | Mr. A. Bonar Law. |
| Sir Edward Morris. | Mr. W. Hayes Fisher. |
| Sir T. Vezey Strong. | Mr. Laurence Hardy. |
| Sir William Anson. | Mr. F. E. Smith. |
| Sir Frederick Pollock. | Mr. F. Huth Jackson. |

Whereas by an Act passed in a Session of Parliament holden in the seventh and eighth years of Her late Majesty Queen Victoria's reign, intituled, " An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled ' An Act for the better administration of Justice in His Majesty's Privy Council ' ; and to extend its jurisdiction and powers," it was amongst other things provided, that it should be competent to Her Majesty, by any Order or Orders, to be from time to time for that purpose made, with the advice of Her Privy Council, to provide for the admission of any Appeal or Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Error or a Court of Appeal within such Colony or Possession ; and it would also be competent to Her Majesty, by any such Order or Orders as aforesaid, to make all such provisions as to Her Majesty in Council should seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon ; Provided always that it should be competent to Her Majesty in Council to revoke, alter, and amend any such Order or Orders as aforesaid, as to Her Majesty in Council should seem meet :

And Whereas by an Order in Council dated the 20th day of March, 1863, provision was made in pursuance of the said Act to enable parties to appeal from the decisions of the Supreme Court of the Province of Nova Scotia to Her Majesty in Council:

And Whereas it is expedient, with a view to equalising, as far as may be, the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council of the 20th day of March, 1863, should be revoked and that new provision should be made for regulating Appeals from the said Supreme Court to His Majesty in Council:

It is Hereby Ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council of the 20th day of March, 1863, be and the same is hereby revoked, and that the Rules herein set out shall regulate all Appeals to His Majesty in Council from the said Province of Nova Scotia.

1. In these Rules, unless the context otherwise requires:—

"Appeal" means Appeal to His Majesty in Council;

"His Majesty" includes His Majesty's heirs and successors;

"Judgment" includes decree, order, sentence or decision;

"Court" means either the Full Court or a single Judge of the Supreme Court of Nova Scotia according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from;

"Month" means calendar month;

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) as of right from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the

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—*continued.*

final judgment may be entered pro forma on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. Where the judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just. And in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the

documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, the Record, as finally printed (whether in Nova Scotia or in England) shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Nova Scotia or in England.

11. Where the Record is printed in Nova Scotia the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court.

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13. Where part of the Record is printed in Nova Scotia and part is to be printed in England, Rules 11 and 12 shall, as far as practicable apply to such parts as are printed in Nova Scotia and such as are to be printed in England respectively.

14. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

15. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of the opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated, the Court may direct the Appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an applica-

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No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

tion in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice or sufficient notice of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as in the opinion of the Court the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty's in Council.

20. Where an Appellant, having obtained final leave to appeal, desires, prior to the despatch of the Record to England, to withdraw his Appeal, the Court may, upon an application in that behalf made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a Certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a Certificate, the Appeal shall be deemed as from the date of such Certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the date of the order granting final leave to appeal and the despatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the appeal

the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered on the Record in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the Appeal may be printed either in Nova Scotia or in England and shall, in either event, be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his Appeal in person.

25. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in Nova Scotia, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on an Appeal from a judgment of the Court in like manner as any original judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

ALMERIC FITZROY.

## SCHEDULE.

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and $8\frac{1}{2}$ inches in width.

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No. 7. Factum of the Attorney-General of Nova Scotia —*continued.*

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

NOTE.—Appeals to His Majesty in Council from the Province of Nova Scotia are at present regulated by the Order in Council set forth as Appendix I above.

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No. 8. Factum of the Attorney-General of New Brunswick.

## No. 8.

## Factum of the Attorney-General of New Brunswick.

Bill No. 9 proposes in effect to prohibit appeals from any Court in Canada, whether Federal or Provincial, to the Judicial Committee of the Privy Council.

By Imperial Order in Council of date of 27th day of November, 1852, published at pages 497 and 498 of 9 N.B.R. in connection with the case *Brookfield* v. *Saint Andrews & Quebec Railway Company*, page 496, and made part of this case as appendix to the factum of the Attorney-General of New Brunswick, the provisions of the Judicial Committee Act, 1833 and 1844 (4 Wm. IV, Cap. 41 and 7th and 8th Vict., Cap. 69) were made applicable to New Brunswick, and appeals had been taken direct from the Supreme Court of New Brunswick to the Judicial Committee of the Privy Council or rather to the reigning Sovereign, both before Confederation and afterwards until the coming into force of the Supreme Court of Canada Act (now Cap. 35, Revised Statutes, Canada, 1927). Since then appeals to the Judicial Committee may be taken per saltum without first appealing to the Supreme Court of Canada, and a number of appeals have been so taken.

The effect of the proposed Bill No. 9 is (A) that if a case were appealed from the Supreme Court of New Brunswick to the Supreme Court of Canada the decision of the latter Court would be final and that an appeal to the Judicial Committee of the Privy Council would not lie, and (B) that an appeal could not be taken direct from the Supreme Court of New Brunswick to the Judicial Committee or rather to His Majesty.

Allowing " A " to stand for the present, but taking up " B "—

By Clause 14 of Section 92 of the British North America Act, 1867, " The Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil matters in those Courts," and the question to be first considered is to what extent, can the Legislature of New Brunswick make final the decisions of its Supreme Court.

Now the Dominion acting under section 101 of the B.N.A. Act has constituted the Supreme Court of Canada " to be a General Court of Appeal for Canada," that is not only for the Dominion as an entity, but for the various Provinces of the Dominion.

Certain of the Provinces had sought to restrict appeals from the Supreme Court of the Province to this Supreme Court. From such an Act passed by the Province of Manitoba an appeal was carried to the Judicial Committee, viz., *Crown Grain Co. Ltd.* v. *Day* [1908], A.C. 504, and the Manitoba Act was declared ultra vires, but not because it was beyond the scope of clause 14 of section 92 of the B.N.A. Act, nor because it was extra-territorial, but because that if Provinces were to be allowed to make the judgments of their Provincial Courts " final and conclusive " the result would be the virtual defeat of the main purposes of this Court of Appeal. And in other cases taken to such Court of Appeal against similar legislation by other Provinces, decision was the same by such Supreme Court of Canada as was afterwards decided by the Privy Council in the *Crown Grain Co. case :* see *Clarkson* v. *Ryan* (1890), 17 Can. S.C.R. 251 ; *Halifax* v. *McLaughlin Carriage Co.* (1907), 39 Can. S.C.R. 174. Also see *Cushing* v. *Dupuy*, 5 A.C. 409, where on a provision making the judgment of a Canadian Court final as against an appeal to the Judicial Committee there was no question as to such provision being extra-territorial ; and in this connection it might be noted that the Supreme Court of Canada Act (C. 35 Rev. Stat. Can. 1927) has a section (sec. 54) making the judgments of the Court final and conclusive, and that no appeal shall be taken to His Majesty in Council except by virtue of the Royal Prerogative.

And in similar manner the Province of New Brunswick may enact that a decision of its Supreme Court shall be final and conclusive as against any appeal to the Judicial Committee. This, however, would not prohibit the exercise of the prerogative right of His Majesty to grant leave for such appeal ; but that right could not be granted by the New Brunswick Court.

Now as has been said by the Judicial Committee, the whole area of legislative power conferred by the B.N.A. Act is covered by the powers given to the Parliament of Canada and to the Legislatures of the various Provinces, such powers being fully set out in sections 91 and 92 of the Act, except some special power given by some special section, as the power to the Dominion by section 101 to constitute a Court of Appeal, etc. By section 92 are set forth certain matters to be dealt with exclusively by the Provinces and by section 91 certain matters exclusively by the Dominion and to cover any residuum, it is set forth in that section that the Dominion may " 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." This provision has been dealt with in various cases before the Judicial Committee, and the opinion of the Committee seems to be well expressed and clearly enunciated in *Attorney-General of Canada* v. *Attorney-General of Alberta* [1916] 1 A.C. 588, where at page 595 it is said " there is only one case outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a Province, and that is where the subject matter lies outside all of the subject matters enumeratively entrusted to the Province under section 92."

It is true that later in *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396, it is said at page 412 : " No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as

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the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency," but one can hardly contend that the right of appeal to the Judicial Committee is an " extraordinary peril to the national life," and it is submitted that this quotation from *Toronto Electric Commrs.* v. *Snider* emphasises, rather than detracts from, the finding in *Attorney-General of Canada* v. *Attorney-General of Alberta*, quoted above, as a general rule.

It is therefore submitted that the proposed new section 54 to the Supreme Court of Canada Act as set out in this Bill No. 9, in so far as it purports to prohibit the Legislature of New Brunswick from passing legislation to the effect that a decision of the Appeal Division of the Supreme Court of New Brunswick shall be final and conclusive, is ultra vires of the Parliament of Canada.

But it is further contended that the Legislature of New Brunswick may, notwithstanding the Royal Prerogative, prohibit appeals, in civil cases, from the decision of its Supreme Court to the Judicial Committee or His Majesty as fully as it was decided in *British Coal Corporation* v. *The King* [1935] A.C. 500, the Parliament of Canada prohibited criminal appeals by section 1025 of the Criminal Code as enacted by section 17 of 23 and 24 Geo. V, c. 53.

The decision in the *British Coal Corporation case* depended upon section 2 of the Statute of Westminster and upon subsection (3) of section 7 and possibly upon section 3 of such Statute. But by subsection (2) of section 7 of the Statute the provisions of section 2 are extended to the Provinces of Canada. Therefore, section 2 would, as relating to the Provinces of Canada, read as follows :—

> 2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Legislature of any Province of Canada.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Legislature of any Province of Canada shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislatures of the Provinces shall include the powers to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of any such Province.

But before dealing with this section 2, as it reads when relating to the Provinces of Canada, attention is directed to subsection (3) of section 7 which enacts that the powers conferred by the Statute shall be restricted " to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively " ; and it is taken that the words " matters within the competence " mean the classes of matters set forth, as far as the Provinces were concerned, in section 92 of the B.N.A. Act and does not refer, for example, to the competence of a Province to pass extra-territorial legislation, as that does not appear to be a matter of competence within the meaning of this subsection (3) such as it

could be enumerated with the matters given exclusively to the Provinces by section 92 of the B.N.A. Act; but, as being a matter in connection with an appeal from the decisions of the Supreme Court of New Brunswick, it is something appurtenant to the powers given the Province under clause 14 of such section 92.

Now taking up subsection (2) of section 2 of the Statute of Westminster as it would read as above set out when applied to the Provinces of Canada— The right of appeal direct from a judgment of the Appeal Division of the Supreme Court of New Brunswick to the Judicial Committee, or rather to His Majesty is part of the law of the Province, and by this subsection (2) of section 2, power is given not only to make laws but " to repeal or amend any such Act, order, rule or regulation," and this includes not only the Judicial Committee Acts of 1833 and 1844 but also all orders in regard to the Royal Prerogative; and this power is given to the Provinces to the same extent as to the Dominion. It might be claimed that a Province has not the power to make laws under this subsection having extra-territorial operation, because section 3 of the Statute applies only to the Dominion; but this section 3 was necessary to give to the Dominion full power to make laws having extra-territorial operation in relation to the matters set forth in section 91 of the B.N.A. Act over and above legislation that might be passed under subsection (2) of section 2 of the Statute.

But full power is given the Provinces by this subsection (2) to repeal certain Acts, orders, &c., within their competence, and how can it be said such power is given if such an essential as the right to make laws having extra-territorial operation was left out? For the Province not to have this power would be to largely nullify subsection (2) of section 7 as applied to Provinces, and it is claimed that it is necessarily implied, or to use the words of Lord Sankey when declaring in the *British Coal Corporation case* [1935] A.C. 500, at 519, an implied power under section 91 of the B.N.A. Act, " It does not indeed do so by express terms, but it does so by necessary intendment."

Therefore, if the Province of New Brunswick can, notwithstanding the Royal Prerogative, repeal the Judicial Committee Acts of 1833 and 1844 as far as they relate to New Brunswick, then certainly, under the rule enunciated in *Attorney-General of Canada* v. *Attorney-General of Alberta*, hereinbefore set out, the Dominion cannot do so.

And having in mind this *Attorney-General of Canada* v. *Attorney-General of Alberta* rule and what has been said by the Judicial Committee about the whole power of legislation given under the B.N.A. Act being fully covered by the power of legislation given to the Dominion and to the Provinces, it is contended that this does not extend to power given under the Statute of Westminster; and the Dominion, although it might legislate under a power given under the Statute of Westminster in regard to any of the items enumerated under section 91, as being within the exclusive jurisdiction of the Dominion could not legislate under such power under the " peace, order and good government " clause of section 91.

Now taking up the proposed Bill No. 9, the substance of the Bill is the repeal of section 54 of " The Supreme Court Act " and the substitution of a new section 54 therefor.

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The Supreme Court of Canada was constituted in 1875 (Cap. 11) under a special power given to the Dominion by section 101 of the B.N.A. Act, which gave power to the Dominion to constitute " a general Court of Appeal for Canada." Could the Dominion have constituted such a Court, under the " peace, order and good government " clause of section 91 of the B.N.A. Act ? It is claimed not. Such a Court might have been established under Royal Instruction to the Governor General under the Royal Prerogative of the Sovereign, but as it is the Court is established under section 101 of the B.N.A. Act. Its constitution, maintenance and organisation as a " General Court of Appeal for Canada " is under and must be within the power given by such section 101, and it is claimed that it is no part of the power given to the Dominion by this section to prohibit or take away from the Province of New Brunswick the right which it had at the time of the coming into force of the B.N.A. Act and still has, of appeals from decisions in civil cases of its Supreme Court to the Judicial Committee of the Privy Council.

Now all that has been previously set out in this factum has been so set out without any consideration of section 129 of the B.N.A. Act or subsection (1) of section 7 of the Statute of Westminster. But a consideration of these enactments places before the Court the matter of this reference from a viewpoint entirely different from the preceding parts of this factum.

Subsection (1) of section 7 of the Statute of Westminster enacts that " nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930, or any order, rule or regulation made thereunder." That is the Statute of Westminster in no way affects the B.N.A. Act, nor does it give any power to the Dominion or any Province of Canada to do so, or to make any repeal, amendment or alteration in regard to it. The British North America Acts 1867 to 1930 stand inviolate, and there can be no repeal, amendment or alteration thereof except by an Imperial Statute.

Now section 129 of the B.N.A. Act 1867 enacts that " except as otherwise provided by this Act all laws in force in . . . New Brunswick at the Union . . . shall continue in New Brunswick . . . as if the Union had not been made." This, however, is subject to a proviso set out in the latter part of the section, that the first part of the section is " subject nevertheless to be repealed, abolished or altered by the Parliament of Canada or by the Legislatures of the respective Provinces according to the authority of the Parliament or of that Legislature under this Act." But this proviso is subject to an exception, namely :—" Except with respect to such " (that is, laws in force at the time of the Union) " as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland." That is as stated at page 147, by Lord Watson in *Dobie* v. *Temporalities Board* [1882] 7 A.C. 136 (being an appeal from Quebec) that this section 129 of the B.N.A. Act, inter alia, enacts that except as therein provided all laws in force in Canada at the time of the Union thereby effected shall continue in Ontario and Quebec as if the Union had not been made ; but that enactment is qualified by the provision that all such laws with the exception of those enacted by the Parliaments of Great Britain or of

the United Kingdom of Great Britain and Ireland shall be subject " to be repealed, abolished or altered " &c.

Now at the time of the Union, upon the coming into force of the B.N.A. Act, 1867, the right of appeal from the decisions of the Supreme Court of New Brunswick to the Privy Council, was part of the law of New Brunswick by virtue of the Judicial Committee Acts of 1833 and 1844 and the Imperial Order-in-Council of date of the 27th day of November, 1852, printed as Appendix No. 1 to this factum, and such Acts and Order-in-Council were at the time of the Union, a part of the law of New Brunswick as far as they related to New Brunswick and appeals from the decisions of its Supreme Court.

Such Imperial Order-in-Council of the 27th of November, 1852, remained in force until it was superseded by Imperial Order-in-Council of date of the 7th day of November, 1910, printed as Appendix No. 2 to this factum. And under such Judicial Committee Acts of 1833 and 1844, and such Imperial Order-in-Council the right of appeal from the decisions in civil cases of the Appeal Division of the Supreme Court of New Brunswick to the Judicial Committee or His Majesty, together with such Acts and amendments thereto as far as they relate to such Appeals and also such Imperial Order-in-Council is now part of the law of the Province of New Brunswick.

This right of appeal and provisions in relation thereto being part of the law of the Province of New Brunswick at the time of the Union enacted by or existing under Acts of the Parliament of Great Britain and Ireland, it therefore follows that it cannot under the provisions of section 129 of the B.N.A. Act and the specific enactment of subsection (1) of section 7 of the Statute of Westminster, be repealed, amended or altered by the Dominion and therefore Bill No. 9 so far as it purports to repeal, alter or amend such law of the Province of New Brunswick, is ultra vires.

But if the Dominion cannot prohibit appeals from the Appeal Division of the Supreme Court of New Brunswick per saltum to the Judicial Committee of the Privy Council or to His Majesty in Council, it is claimed that it would be intolerable that it should prohibit appeals of New Brunswick cases from the Supreme Court of Canada. For it would appear that if there could be no appeal from the Supreme Court of Canada by special leave or otherwise that such Supreme Court would not be bound by the Privy Council decisions, so it might happen that the Supreme Court of New Brunswick relying on a Judicial Committee decision, would give a decision which on appeal to the Supreme Court of Canada would be reversed.

And it is claimed that as the Supreme Court of Canada is a creation under section 101 of the B.N.A. Act and depends on that section for its existence the legislation proposed by Bill No. 9 is, as hereinbefore set forth, ultra vires of the Parliament of Canada.

It is submitted that the Parliament of Canada has not the legislative competence to enact Bill No. 9.

J. B. DICKSON,
Deputy Attorney-General.

*In the Supreme Court of Canada.*

No. 8.
Factum of the Attorney-General of New Brunswick —*continued.*

## APPENDICES TO FACTUM OF PROVINCE OF NEW BRUNSWICK.



### No. 1.

Imperial Order-in-Council *re* Appeals to the Privy Council from New Brunswick, dated November 27th, 1852.

At the Court of Windsor.

The 27th day of November 1852.

Present :

The Queen's Most Excellent Majesty in Council.

Whereas by an Act passed in the session of Parliament, holden in the seventh and eighth years of Her Majesty's Reign, entitled " An Act for amending an Act passed in the fourth year of the Reign of His late Majesty, intituled ' An Act for the better administration of justice in His Majesty's Privy Council, and to extend its jurisdiction and powers,' " it was amongst other things provided that it should be competent for Her Majesty, by an order or orders, to be from time to time for that purpose made, with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or possession abroad, although such Court shall not be a Court of errors or a Court of appeal within such colony or possession ; and it shall also be competent to Her Majesty by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon ; provided always, that it shall be competent to Her Majesty in Council to revoke, alter, and amend any such order or orders as aforesaid, as to Her Majesty in Council shall seem meet :

And whereas it is expedient that provision should be made in pursuance of the said recited enactment, to enable parties to appeal in civil causes from the decisions of the Supreme Court of the Province of New Brunswick to Her Majesty in Council, the same not being a Court of error or of appeal :

It is hereby ordered by the Queen's Most Excellent Majesty, by and with the advice of Her Privy Council, that any person or persons may appeal to Her Majesty, her heirs and successors, in her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of the Province of New Brunswick, as a court of civil judicature, or as a court of

revenue or of escheat, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned; that is to say: in case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling, or in case such judgment, decree, order, or sentence shall involve directly or indirectly, any claim, demand, or question to or respecting property in any civil right, amounting to, or of the value of three hundred pounds sterling or in case the matter in question relates to the taking or demanding any duty payable to Her Majesty, her heirs and successors, or to any fee of office, or other such like matter or thing, whereby the rights of Her Majesty, her heirs or successors, may be bound; the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may, within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Court by motion for leave to appeal therefrom to Her Majesty, her heirs and successors, in her or their Privy Council, or if the said Court be not sitting, then by petition to either of the Judges of the said Court. And in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said Court or such Judge as aforesaid shall, and is hereby empowered either to direct that the judgment, decree, order, or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended pending the said appeal, as to the said Court or such Judge as aforesaid may appear to be most consistent with real and substantial justice. And in case the said Court or such Judge as aforesaid shall direct such judgment, decree, order, or sentence to be carried into execution, the person or persons in whose favour the same shall be given, shall, before the execution thereof, enter into good and sufficient security, to be approved by the said Court or such Judge as aforesaid, for the due performance of such judgment or order as Her Majesty, her heirs and successors, shall think fit to make upon such appeal. And that in all cases, security shall also be given by the party or parties appellant in a bond or mortgage, or personal recognisance, not exceeding the value of five hundred pounds sterling, for the prosecution of the appeal and for the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council to the party or parties respondent: and that such security as aforesaid for the prosecution of the appeal, and for the payment of all such costs as may be awarded, be completed within twenty-eight days from the date of the motion or petition for leave to appeal: and the party or parties appellant shall then, and not otherwise, be at liberty to prefer and prosecute his, her, or their appeal to Her Majesty, her heirs and successors, in her or their Privy Council, in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's Colonies and plantations abroad.

And it is further ordered, that it shall be lawful for the said Court, at its discretion, on the motion, or if the said Court be not sitting, then for either of the Judges of the said Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment,

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decree, order, or sentence of the said Court, to grant permission to such party to appeal against the same to Her Majesty, her heirs and successors, in her or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

Provided also, that if in any action, suit, or other proceeding, it shall so happen that no final judgment, decree, order, or sentence can be duly given in consequence of a disagreement of opinion between the Judges of the said Court, then in such case, the final judgment, decree, order, or sentence may be entered, pro forma, on the petition of any of the parties to the action, suit, or other proceeding, according to the opinion of the Chief Justice, or in his absence, of the senior Puisne Judge of the said Court. Provided, that such judgment, decree, order, or sentence shall be deemed a judgment, decree, order or sentence of the Court for the purpose of an appeal against the same, but not for any other purpose.

Provided always, and it is hereby ordered, that nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, her heirs and successors, upon the humble petition of any person or persons aggrieved by any judgment or determination of either of the said Courts, at any time to admit his, her, or their appeal therefrom, upon such terms and upon such securities, limitations, restrictions, and regulations as Her Majesty, or her heirs or successors, shall think fit, and to reverse, correct, or vary such judgment or determination as to Her Majesty, her heirs or successors, shall seem meet.

And it is further ordered, that in all cases of appeal made from any judgment, order, sentence, or decree of the said Court to Her Majesty, her heirs or successors, in her or their Privy Council, such Court shall certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said Court ; and that the said Court shall also certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against.

And it is further directed and ordained that the said Court shall, in all cases of appeal to Her Majesty, her heirs and successors, conform to and execute, or cause to be executed, such judgments and orders as Her Majesty, her heirs or successors, in her or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal order, or other order or rule of the said Court, should or might have been executed.

No. 2.

Imperial Order-in-Council *re* Appeals to the Privy Council from New Brunswick, dated November 7th, 1910.

At the Court at St. James's.

The 7th day of November, 1910.

Present :

The King's Most Excellent Majesty.

Lord President. Mr. Secretary Harcourt.
Lord Privy Seal. Sir George Buchanan.
Earl Beauchamp.

Whereas, by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled " The Judicial Committee Act, 1844 "), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon :

And whereas, by an Order in Council of the 27th day of November, 1852, provision was made for regulating Appeals from the Supreme Court of the Province of New Brunswick to Her Majesty in Council :

And whereas, it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council of the 27th day of November, 1852, should be revoked and that new provisions should be made for regulating Appeals from the said Supreme Court to His Majesty in Council :

It is Hereby Ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council of the 27th day of November, 1852, be and the same is hereby revoked and that the Rules herein set out shall regulate all Appeals to His Majesty in Council from the said Province of New Brunswick.

RULES.

1. In these Rules, unless the context otherwise requires : " Appeal " means Appeal to His Majesty in Council ; " His Majesty " includes His Majesty's heirs and successors ; " Judgment " includes decree, order, sentence, or decision ; " Court " means either the Full Court or a single Judge of the Supreme Court of New Brunswick according as the matter in question is one

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which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge; "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal; "Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from; "Month" means calendar month; Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) As of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £300 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value £300 sterling or upwards; and

(*b*) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, it, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceedings no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered pro forma on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Application to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) Upon condition of the Appellant, within a period to be fixed by the Court but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) Upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to

England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. Where the judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether in Canada or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Canada or in England.

11. Where the Record is printed in Canada, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof, and by affixing thereto the seal, if any, of the Court.

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13. Where part of the Record is printed in Canada and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to

*In the Supreme Court of Canada.*

No. 8. Factum of the Attorney-General of New Brunswick —*continued.*

such parts as are printed in Canada and such as are to be printed in England respectively.

14. The reasons given by the Judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

15. Where there are two or more applicants for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated, the Court may direct the Appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal, withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave of appeal, the Court may, on an application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice, or sufficient notice, of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as in the opinion of the Court, the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

20. Where an Appellant having obtained final leave to appeal, desires, prior to the despatch of the Record to England, to withdraw his Appeal, the Court may, upon an application in that behalf, made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring

the despatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a certificate, the Appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the order granting final leave to appeal and the despatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court shall, upon an application in that behalf, made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the Appeal may be printed either in Canada or in England, and shall, in either event, be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his appeal in person.

25. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. Reference by page and line to the relevant portions of the Record as printed, shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in New Brunswick, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court.

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Factum of the Attorney-General of New Brunswick
—*continued.*

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on any Appeal from a judgment of the Court in like manner as any original judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

ALMERIC FITZROY.

SCHEDULE.

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

## No. 3.

New Brunswick Order-in-Council dated August 17th, 1910, approving of proposed Imperial Order-in-Council *re* Appeals to the Privy Council.

August 10th, 1910.

The Executive Council having had under consideration the new Rules governing Appeals from the Supreme Court to His Majesty in Council, a copy of which is hereto attached marked (A), and the Report of the Honourable the Attorney-General that in his opinion the adoption of the said Rules of Appeal is in the public interest as tending to uniformity of practice in the matter of Appeals to His Majesty in Council, it is Recommended that the same be approved, and that His Honour the Lieutenant-Governor be moved to forward a copy of this Minute with a copy of the said Rules attached, to the Honourable the Secretary of State for Canada, for transmission by His Excellency the Governor-General to the Secretary of State for the Colonies, with the request on behalf of the Province of New Brunswick that an Imperial Order-in-Council authorising the said Rules may be made.

His Honour the Lieutenant-Governor concurring in the aforegoing report and recommendation,

It is accordingly so Ordered.

## No. 9.



### Factum of the Attorney-General of Manitoba.

In this Reference the Attorney-General of Manitoba adopts and relies on the factum filed herein by the Honourable the Attorney-General of Canada.

W. J. MAJOR,
Attorney-General of Manitoba.

Winnipeg, June 5th, 1939.

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## No. 10.



### Factum of the Attorney-General of British Columbia.



PART I.

STATEMENT OF CASE.

1. The subject of the Reference herein is Bill No. 9, entitled " An Act to amend the Supreme Court Act," introduced and read the first time in the House of Commons on January 23rd, 1939, reading as follows :—

" Bill 9.

" An Act to amend the Supreme Court Act of Canada.

" His Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows :—

" 1. Section fifty-four of the Supreme Court Act, chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor :—

" ' 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the Court shall, in all cases, be final and conclusive.

" ' (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of

any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

" ' (3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.'

" 2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

" 3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette."

2. The question submitted to the Court upon this Reference is as follows :—

Is said Bill 9, entitled " An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ?

## Part II.

## SUBMISSION OF THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

That the Bill is ultra vires in so far as it purports to abolish appeals to His Majesty in Council in civil matters.

## Part III.

## ARGUMENT.

The question submitted for determination of the Court involves the consideration of two matters.

1. The abolition of appeals direct from the Court of Appeal for British Columbia to the Privy Council, and

2. The abolition of appeals from the Supreme Court of Canada to the Privy Council.

The argument will be based upon the premise that the question of appeal in civil matters only is involved as it has been decided that criminal appeals to the Privy Council from any Court in Canada have been abolished.

*British Coal Corporation* v. *The King*, 1935, A.C.500.

In addition it has been decided that no appeal lies as of right from British Columbia in criminal matters.

*Chung Chuck* v. *The King*, 1930, A.C. 244.

As to the first branch of the argument :—

1. The abolition of appeals from the Court of Appeal for British Columbia to the Privy Council the Attorney-General for British Columbia will contend :—

(*a*) That the right of appeal from Provincial Courts direct to the Privy Council existed in British Columbia in early colonial days prior to confederation ; and

(*b*) was confirmed by the " British North America Act " and was one of the subjects assigned exclusively to the legislative jurisdiction of the Province under that Act ; and

(*c*) that it is in the same position to-day notwithstanding the provisions of the Statute of Westminster, 1931, and that the Dominion Parliament has no jurisdiction to legislate with regard to it.

As to (*a*) dealing with the appeal to the Privy Council in Crown Colony days before confederation, in early times an appeal lay to the King in Council by virtue of the royal prerogative from any Court of Justice in His Majesty's overseas possessions or dependencies.

" And whereas, from the decisions of various Courts of Judicature in the East Indies, and in the plantations, and colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council "—recital to 3 and 4 Will. IV, c. 41, commonly known as the Judicial Committee Act of 1833 (Record, p. 203, ll. 33-36).

This right was made statutory by the Act last mentioned and the Judicial Committee was established. In 1844 a later Act was passed known as the Judicial Committee Act of 1844 (Record, p. 206), enabling appeals to be taken to Her Majesty in Council from any colonial Court of Justice, although such court was not a Court of Errors or Court of Appeal, and enabling Her Majesty in Council to make rules and regulations governing the procedure in all appeals to the Judicial Committee.

" In effect therefore Her Majesty in Council was thus empowered to override a colonial law limiting or excluding appeals to Her Majesty in Council from any colonial court."

*British Coal Corporation* v. *The King* (*supra*), at p. 511.

The Act of 1844 is, it is submitted, still in force in British Columbia and together with the rules and regulations made under it dealing with procedure hereinafter referred to governs the right of appeal from British Columbia to-day.

Moreover, it will be seen from the following statutory provisions that from the earliest days of colonial settlement in British Columbia an appeal lay to Her Majesty in Council from local Courts by local law and this right of appeal has been preserved by subsequent legislation down to the present day.

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No. 10. Factum of the Attorney-General of British Columbia —*continued.*

On 4th April, 1856, an Imperial Order in Council was passed under the authority of an Act passed at the Session of Parliament held in the twelfth and thirteenth years of the reign of Her late Majesty Queen Victoria constituting the Supreme Court of Civil Justice of the Colony of Vancouver's Island as a Court of Record, and providing for appeals from this Court to Her Majesty in Council in civil causes. (Appendix Sched. A.)

In 1858 the Colony of British Columbia (excluding Vancouver Island) was established by Imperial Act of Parliament (21-22 Vict. c. 99) and a Proclamation was issued by Governor Douglas bringing this Act into effect in the territory now known as British Columbia (except Vancouver Island) on 19th November, 1858. Section V of the said Act provides for appeals to Her Majesty in Council from judgments in civil suits in the new Colony (Appendix Sched. B.)

A further Proclamation was issued by Governor Douglas on 19th November, 1858, declaring that the Civil and Criminal Laws of England as they existed on that date were in force in British Columbia except in so far as they were, from local circumstances, inapplicable. (Appendix Sched. C.)

On 19th November, 1866, the Colony of Vancouver Island was united to the Colony of British Columbia under the name of British Columbia by proclamation made pursuant to 29 & 30 Vict. c. 66 (Imp.), under which the laws in force in the separate colonies were retained until otherwise provided by lawful authority and the powers of Her Majesty in Council were left unaffected by anything in the Act. (Appendix Sched. D.)

Following the union the Proclamation of 19th November, 1858, declaring English law to be in force in British Columbia was revoked and enacted in statutory form by "The English Law Ordinance, 1867," being c. 70 of the Laws of British Columbia (Revised) 1871. (Appendix Sched. E.)

In 1871 the Colony of British Columbia entered confederation and the statute last named was re-enacted as cap. 103 of the Consolidated Statutes of British Columbia, 1877, and is now found as cap. 88 of the Revised Statutes of British Columbia, 1936. (Appendix Sched. F.)

On 12th July, 1887, Imperial Order-in-Council was passed pursuant to the Judicial Committee Act of 1844 providing for appeals from the Supreme Court of British Columbia to the Privy Council and regulating the procedure thereon.

On 23rd January, 1911, Imperial Order in Council was passed revoking the Order in Council of 12th July, 1887, and providing for appeals to the Privy Council from the Court of Appeal for British Columbia and regulating the procedure thereon, the Court of Appeal having been constituted in 1908. Rules 2 and 28 of this Order in Council read as follows :—

> "2. Subject to the provisions of these Rules, an Appeal shall lie—
>
> "(*a*) As of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards ; and

" (*b*) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

" 28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

Rule 2 gives a statutory right of appeal known as an appeal by right of grant or an appeal as of right. Rule 28 deals with the Appeal by special leave of the Privy Council by virtue of the royal prerogative.

" Where a grant exists the subject is said to possess an appeal as of right to the Sovereign in Council. Where no such grant has been made and the Sovereign has not parted with the prerogative, the subject, notwithstanding, possesses the general right to petition the Crown to exercise its prerogative by entertaining or permitting an appeal."—Bentwich, " The Practice of the Privy Council in Judicial Matters." 3rd Ed. 1937, p. 103-4.

It will be seen therefore that in civil matters in addition to the appeal as of right to the Privy Council from the Court of Appeal of the Province, derived from the above-named Statutes, Ordinances, Proclamations, and Orders in Council, there lies an appeal by virtue of the royal prerogative which has not been parted with in this Province.

" For it must be remembered, that if a reconsideration, by way of appeal be reserved to the Crown, the right of applying for it must be reserved also."

*Reg.* v. *Eduljee Byramjee*, 1846, 5 Moo. 276, p. 290.

As to (*b*), the confirmation of this right of appeal by the " British North America Act " and its assignment to the legislative jurisdiction of the Province, under section 92 (14) of this Act the Province is given exclusive legislative authority over the administration of justice in the Province, and, apart from criminal law and procedure, the appointment of judges and the establishment of penitentiaries, the Province has exclusive legislative authority over the whole field of the administration of justice in the Province.

In *Regina* v. *Bush*, 15 Ont. R. 389, Mr. Justice Street, after referring to sections 91 (27), 96, 97, and 101 of the " British North America Act," says (p. 404) : " Everything coming within the ordinary meaning of the expression ' the administration of justice ' not covered by the sections which I have referred to, therefore remains in my opinion to be dealt with by the Provincial Legislatures in pursuance of the powers conferred upon them by paragraph 14 of sec. 92." This opinion was cited with approval by Duff, C.J.C., in the " *Reference Concerning the Authority of Judges, &c.*" 1938, S.C.R. 398, at p. 406.

By section 129 of the " British North America Act " it was provided that except as otherwise provided by the Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all existing Courts of civil and criminal jurisdiction, should continue in force as if the Union had not

been made; subject, however, to the amendment or repeal of these laws by competent authority.

On 16th May, 1871, an Order in Council (Imp.) was passed pursuant to section 146 of the "British North America Act," admitting British Columbia into confederation and declaring it to be a Province of Canada under certain terms and conditions known as the Terms of Union, one of which (s. 10) provided (Record, p. 195, ll. 4-11) that the provisions of "British North America Act, 1867," should apply to British Columbia in the same way and to the like extent as they applied to the other Provinces of Canada and as if the Colony of British Columbia had been one of the Provinces originally united by the Act.

The appeal from Provincial Courts direct to the Privy Council in civil matters having been the law of the Colony of British Columbia prior to and up to the time of Union with Canada, it therefore became by virtue of s. 129 of the "British North America Act" and s. 10 of the Terms of Union the law of the province after the Union.

*G. Martineau & Sons Ltd.* v. *City of Montreal*, 1932, A.C. 113.

In addition, by the assignment of the administration of justice to the Province by section 92 (14) (with the exceptions noted above), the right of appeal to the Privy Council as part of the administration of justice falls within the exclusive legislative authority of the Province. "A most essential part of the administration of justice consists of the system of appeals"—*British Coal Corporation* v. *The King* (*supra*), p. 526.

The powers of the Provincial Legislature within its own sphere of authority are as plenary and as ample as the powers of the Dominion Parliament within its sphere of authority and within these limits are supreme.

*Hodge* v. *The Queen*, 9 A.C. 117, at 132.

As to (*c*)—the effect of the Statute of Westminster, 1931. This Statute does not change the situation as far as enlarging the legislative jurisdiction of the Dominion at the expense of the Province is concerned. It merely gives the Dominion power to repeal or alter the provisions of an Imperial Statute in its application to Canada within the legislative field of the Dominion, and gives a similar power to the Province within its legislative field. The relevant sections are 2 and 7 (Record, p. 201). By subsection (1) of section 7 it is provided that nothing in the Statute shall be deemed to apply to the repeal amendment or alteration of the "British North America Acts" 1867 to 1930. By subsection (2) it is provided that the provisions of section 2 shall extend to laws of the Province and to the powers of the Provincial Legislature. The effect of this subsection is to substitute the words "Legislature of a Province" for the words "Parliament of a Dominion" and "Province" for "Dominion" where they occur in section 2. It does not give the Dominion power to legislate within the field assigned exclusively to the Province, for by subsection (3) of section 7 it is expressly provided that the powers conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

It might be argued that since by section 3 of the Statute the Dominion Parliament is given power to make laws having extra-territorial operation and section 7 does not extend this power to the Province, the Dominion can thereby make laws having extra-territorial effect overriding the provisions of an Imperial Act such as the Judicial Committee Act of 1844 in its relation to appeals direct from the Province, but it is submitted that this contention is unsound. The whole statute must be read together and once it is established that the appeal direct from the Provincial Court to the Privy Council is a matter coming within Provincial jurisdiction, subsections (1) and (3) of section 7 govern the matter and prevent any encroachment by the Dominion upon Provincial jurisdiction.

" It is well known that section 7 (Stat. of Westminster) was inserted " at the request of Canada and for reasons which are well known." *British Coal Corporation* v. *The King* (*supra*), at p. 520, and at p. 521 : " It is not doubted that, with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is, of the Dominion or the Provinces as the case may be."

The " reasons " referred to in the first above-quoted passage were no doubt the demands of the Provinces to retain the existing framework of Confederation, and the prerogative appeal referred to in the second passage together with the appeal as of right has been effectively abolished in criminal matters by the Dominion by section 1024 (4) of the Criminal Code in pursuance of its legislative authority in that behalf derived from the " British North America Act " and the Statute of Westminster. (Appendix Sched. G.) The appeal in civil matters, however, both the prerogative appeal and so far as British Columbia is concerned the appeal as of right, is within the legislative field occupied exclusively by the Province under the division of powers in our federal system.

As to the second branch of the argument, regarding the right to abolish appeals from the Supreme Court of Canada in civil matters, reference is made to section 54 of the " Supreme Court Act," R.S.C. 1927, chap. 35, sec. 54, reading as follows :—

> " 54. The judgment of the Court, shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment, or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative."

This purports to prevent the appeal as of right, but reserves the prerogative appeal in civil matters.

This prerogative appeal is in the same position as the prerogative appeal from the Province. It falls within the administration of justice, assigned exclusively to the Province (with the exceptions noted above), and any

*In the Supreme Court of Canada.*

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attempt of the Dominion to interfere with it, would, it is submitted, be ultra vires.

ADMIRALTY.

As to appeals in Admiralty matters it is submitted for the consideration of the Court that the Dominion, having by virtue of the Statute of Westminster 1931 (Record, p. 200) repealed the "Colonial Courts of Admiralty Act, 1890," in so far as it applied to Canada (with the exception of the provisions relating to appeals to His Majesty in Council) by "The Admiralty Act, 1934" (Record, p. 216), it thereby lost its jurisdiction in Admiralty, and is not now competent to repeal the provisions of the Act of 1890 relating to appeals to His Majesty in Council. The jurisdiction of the Dominion is confined to the four corners of the British North America Acts and there is nothing in those Acts giving the Dominion jurisdiction to legislate regarding Admiralty matters. Prior to repeal of the Act of 1890 the Dominion derived its jurisdiction in Admiralty from that Act and once that Act was repealed, the jurisdiction ceased to exist.

All of which is respectfully submitted.

E. PEPLER,
Of Counsel for the Province of
British Columbia.

Victoria, B.C., June 1st, 1939.

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## APPENDIX—SCHEDULE A.

12 & 13 Victoriæ. A.D. 1849.

Cap. XLVIII.

An Act to provide for the Administration of Justice in Vancouver's Island.

(28th July, 1849.)

Whereas an Act was passed in the Forty-third Year of King George the Third, intituled An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces: And whereas by an Act passed in the Second Year of King George the Fourth, intituled An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction, within certain Parts of North America, it was enacted, that from and after the passing of that Act the Courts of Judicature then existing or which might be thereafter established in the Province of Upper Canada should have the same Civil Jurisdiction, Power and Authority, as well in the Cognisance of Suits as in the issuing Process, mesne and final, and in all other respects whatsoever, within the Indian Territories and other Parts of America not within the Limits of either of the Provinces of Lower or Upper Canada or of any Civil Government of the United States, as the said Courts had or were invested with within the Limits of the said Provinces of Lower or Upper Canada respectively. . . .

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Proclamation of this Act in Vancouver's Island the said Act of the Forty-third Year of King George the Third, and the said recited Provisions of the Second Year of King George the Fourth, and the Provisions contained in such Act for giving Force, Authority, and Effect within the said Indian Territories and other Parts of America to the Process and Acts of the said Courts of Upper Canada, shall cease to have Force in and to be applicable to Vancouver's Island aforesaid; and it shall be lawful for Her Majesty from Time to Time (and as well before as after such Proclamation) to make Provision for the Administration of Justice in the said Island, and for that Purpose to constitute such Court or Courts of Record and other Courts, with such Jurisdiction in Matters Civil and Criminal and such equitable and ecclesiastical Jurisdiction, subject to such Limitations and Restrictions, and to appoint and remove, or provide for the Appointment and Removal of such Judges, Justices, and such ministerial and other Officers, for the Administration and Execution of Justice in the said Island, as Her Majesty shall think fit and direct.

III. Provided always, and be it enacted, That all Judgments given in any Civil Suit in the said Island shall be subject to Appeal to Her Majesty in Council, in the Manner and subject to the Regulations in and subject to which Appeals are now brought from the Civil Courts of Canada, and to such further or other Regulations as Her Majesty with the Advice of Her Privy Council shall from Time to Time appoint.

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At the Court of Buckingham Palace.

The Fourth day of April, 1856.

Present—The Queen's Most Excellent Majesty, His Royal Highness Prince Albert, Lord Privy Seal, Viscount Palmerston, Duke of Wellington, Sir George Grey, Bart., Lord Chamberlain, Mr. Vernon Smith, Marquis of Lansdowne, Sir Charles Wood, Bart., Marquis of Abercorn, Mr. Baines, Lord Steward.

Whereas by an Act passed in the Session of Parliament, held in the 12th and 13th years of Her Majesty's reign, entitled: "An Act to provide for the administration of Justice in Vancouver's Island," it is amongst other things provided that it shall be lawful for Her Majesty, from time to time to make provision for the administration of Justice in the said Island and for that purpose to constitute such Court or Courts of Record, and other Courts, with such Jurisdiction in matters Civil and Criminal, and such Equitable and Ecclesiastical Jurisdiction, subject to such limitations and restrictions, and to appoint and remove, or provide for the appointment and removal of such Judges, Justices, and such ministerial and other Officers

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for the administration and execution of Justice in the said Island as Her Majesty may think fit and direct.

And Whereas it is expedient that provision should be made for the administration of Justice in Civil cases in the said Island.

It is therefore ordered, by the Queen's Most Excellent Majesty, by and with the advice of Her Privy Council, that there shall be within Her said Island, a Court which shall be called the Supreme Court of Civil Justice of the Colony of Vancouver's Island.

And the said Supreme Court is hereby constituted to be a Court of Record.

And it is hereby further ordered that the said Supreme Court shall be holden before a Chief Justice, and that the said Chief Justice shall be called and known by the name and style of "the Chief Justice of the Colony of Vancouver's Island," and shall from time to time be nominated and appointed to such his office by Her Majesty, Her Heirs and Successors by Letters Patent, under the Public Seal of the said Colony, to be issued in pursuance of any Warrants or Warrant to be from time to time for that purpose granted by Her Majesty, Her Heirs and Successors, under Her or Their sign manual. . . .

And Her Majesty doth hereby further ordain, direct, and appoint that the said Supreme Court shall have cognisance of all pleas, and jurisdiction in all Civil cases arising within the said Colony, with jurisdiction over Her subjects, and all other persons whomsoever, residing and being within the said Colony, and shall have all such Equitable jurisdiction, and all such powers for enforcing and giving effect to the same as the High Court of Chancery hath in England. . . .

And Her Majesty doth further give and grant to the said Supreme Court full power, authority and jurisdiction to apply, judge and determine upon and according to the laws now or hereafter in force within Her Majesty's said Colony. . . .

And whereas, it is by the same act of Parliament provided that all judgments given in any civil suit in the said Island, shall be subject to appeal to Her Majesty in Council, in the manner and subject to the regulations in and subject to which appeals are now brought from the Civil Courts of Canada, and to such further or other regulations as Her Majesty with the advice of Her Privy Council, shall from time to time appoint.

And whereas, it is expedient that provision should be made in pursuance of the said recited enactment to regulate appeals in civil causes from the decisions of the said Supreme Court of Civil Justice in Vancouver's Island to Her Majesty in Council: It is hereby further ordered, that any person or persons may appeal to Her Majesty, Her Heirs and Successors in Her or Their Privy Council, from any Final Judgment, Decree, Order or Sentence of the said Supreme Court, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned (that is to say), in case any such Judgment, Decree, Order or Sentence shall

be given or pronounced for or in respect of any sum or matter at issue above the amount of value of £300 sterling, or in case such Judgment, Decree, Order or Sentence shall involve directly or indirectly, any claim, demand, or question to or respecting property in any civil right amounting to, or of the value of £300 sterling, the person or persons feeling aggrieved by any such judgment, decree, order or sentence, may within twenty-one days next after the same shall have been pronounced, made or given, apply to the said Court by Petition for leave to appeal therefrom to Her Majesty, Her Heirs and Successors, in Her or Their Privy Council. . . .

And it is further ordered, that it shall be lawful for the said Supreme Court, at its discretion, on the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said Court, to grant permission to such party to appeal against the same to Her Majesty, Her Heirs and Successors, in Her or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Provided always, and it is hereby ordered that nothing herein contained doth or shall extend, or be construed to extend, to take away or abridge the undoubted right and authority of Her Majesty, Her Heirs and Successors, upon the humble petition of any person or persons aggrieved by any Judgment or determination of the said Court, at any time, to admit his, her, or their appeal therefrom, upon such terms, and upon such securities, limitations, restrictions, and regulations, as Her Majesty, or Her Heirs or Successors shall think fit, and to reverse, correct, or vary such judgment, or determination, as to Her Majesty, Her Heirs or Successors, shall seem meet.

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## APPENDIX.—SCHEDULE B.

British Columbia.

V. R.

Proclamation.

By His Excellency, James Douglas, Governor and Commander-in-Chief of Her Majesty's Colony of British Columbia and its Dependencies.

Whereas, by an Act of Parliament made and passed in the session of Parliament held in the 21st and 22nd years of the Reign of Her Majesty Queen Victoria, Chapter XCIX, intituled "An Act to Provide for the Government of British Columbia," the limits of the said Colony were defined, and Her Majesty was authorised to invest the Governor thereof with such powers as in the said Act of Parliament are mentioned ;

And whereas by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, Her Majesty has been pleased to appoint James Douglas to be Governor of British Columbia ; And the said Governor is required by the said Commission, amongst other things, formally to proclaim the said Act within the said Colony of British Columbia.

*In the Supreme Court of Canada.*

No. 10.
Factum of the Attorney-General of British Columbia
—*continued.*

Therefore I, James Douglas, Governor of the said Colony, now proclaim and publish the said Act for the information and guidance of Her Majesty's subjects, and others whom it may concern, as follows :—

Anno Vicesimo Primo et Vicesimo Secundo.

Victoriæ Reginæ.

Cap. XCIX.

An Act to provide for the Government of British Columbia.

(2d August, 1858.)

Whereas, divers of Her Majesty's Subjects and others have by the Licence and Consent of Her Majesty, resorted to and settled on certain wild and unoccupied Territories on the North-West Coast of North America, commonly known by the Designation of New Caledonia, and from and after the passing of this Act to be named British Columbia, and the Islands adjacent, for Mining and other purposes ; and it is desirable to make some temporary Provision for the Civil Government of such Territories, until permanent Settlements shall be thereupon established, and the Number of Colonies increased : Be it therefore enacted by the Queen's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the Authority of the same as follows :—

I. British Columbia shall, for the purposes of this Act, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Frontier of the United States of America, to the East by the main Chain of the Rocky Mountains, to the North by Simpson's River, and the Finlay Branch of the Peace River, and to the West by the Pacific Ocean, and shall include Queen Charlotte's Island, and all other Islands adjacent to the said Territories, except as hereinafter excepted.

II. It shall be lawful for Her Majesty, by any Order or Orders to be by Her from Time to Time made, with the Advice of Her Privy Council, to make, ordain, and establish, and (subject to such Conditions or Restrictions as to Her shall seem meet) to authorise and empower such Officer as She may from Time to Time appoint as Governor of British Columbia, to make Provision for the Administration of Justice therein, and generally to make, ordain, and establish all such Laws, Institutions, and Ordinances as may be necessary for the Peace, Order, and good Government of Her Majesty's Subjects and others therein ; provided that all such Orders in Council, and all Laws and Ordinances so to be made as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and Enactment thereof respectively.

V. Provided always, That all Judgments given in any Civil Suit in British Columbia shall be subject to Appeal to Her Majesty in Council, in the Manner and Subject to the Regulations in and subject to which Appeals are now brought from the Civil Courts of Canada, and to such further or other Regulations as Her Majesty, with the Advice of Her Privy Council, shall from Time to Time appoint.

VI. No part of the Colony of Vancouver's Island, as at present established, shall be comprised within British Columbia for the Purpose of this Act; but it shall be lawful for Her Majesty, Her Heirs and Successors, on receiving at any Time during the Continuance of this Act a joint Address from the Two Houses of the Legislature of Vancouver's Island, praying for the Incorporation of that Island with British Columbia, by Order to be made as aforesaid, with the Advice of Her Privy Council, to annex the said Island to British Columbia, subject to such Conditions and Regulations as to Her Majesty shall seem expedient; and thereupon and from the Date of the Publication of such Order in the said Island, or such other Date as may be fixed in such Order, the Provisions of this Act shall be held to apply to Vancouver's Island. . . .

And I do further proclaim and publish that the said recited Act shall take effect within the said Colony of British Columbia from the date hereof.

Issued under the Public Seal of the said Colony, at Fort Langley, this nineteenth day of November, 1858, in the Twenty-second year of Her Majesty's Reign, by me,

JAMES DOUGLAS,
Governor. (L.S.)

God Save the Queen.

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## APPENDIX.—SCHEDULE C.

V. R.

### Proclamation.

By His Excellency, James Douglas, Governor and Commander-in-Chief of Her Majesty's Colony of British Columbia and its Dependencies.

Proclamation, having the Force of Law to declare that English Law is in force in British Columbia.

Whereas, by an Act of Parliament passed in the Session held in the 21st and 22nd years of Her Majesty Queen Victoria, it was enacted that the territories therein described should be comprised within the Colony thereby created of British Columbia; and it was further enacted that on the proclamation of the said Act in British Columbia, certain Acts which were passed in the 43rd year of his late Majesty King George the Third, and in the 2nd year of his late Majesty King George the Fourth, and by which the law of Upper Canada was extended to certain parts of America therein mentioned, should cease to have force in the said Colony of British Columbia, or to be applicable thereto:

And whereas such proclamation of the said first mentioned Act has been duly made on this 19th day of November instant:

And whereas by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, Her Majesty was pleased to appoint James Douglas to be Governor of British Columbia, and to authorise the said James Douglas by proclamation issued under the Public Seal of the said Colony,

*In the Supreme Court of Canada.*

No. 10. Factum of the Attorney-General of British Columbia — *continued.*

to make Laws, Institutions and Ordinances for the peace, order and good government thereof:

It is therefore hereby enacted and proclaimed by the Governor of British Columbia that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony, till such times as they shall be altered by Her said Majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper Authorities against all persons infringing and in favour of all persons claiming protection of the same Laws.

Issued under the Public Seal of the said Colony, at Fort Langley, this nineteenth day of November, 1858, in the Twenty-second year of Her Majesty's Reign, by me,

JAMES DOUGLAS,
Governor. (L.S.)

God Save the Queen.

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## APPENDIX.—SCHEDULE D.

29 & 30 Victoriæ. A.D. 1866.

Cap. LXVII.

An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia.

(6th August, 1866.)

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this Present Parliament assembled, and by the Authority of the same, as follows:

1. This Act may be cited as The British Columbia Act, 1866.

2. In this Act the Term "Governor" means any Officer for the Time being lawfully administering the Government.

3. From and immediately after the Proclamation of this Act by the Governor of British Columbia, the Colony of Vancouver Island shall be and the same is hereby united with the Colony of British Columbia, and thenceforth those Two Colonies shall form and be One Colony, with the Name of British Columbia (which Union is in this Act referred to as the Union).

5. After and notwithstanding the Union the Laws in force in the separate Colonies of British Columbia and Vancouver Island respectively at the Time of the Union taking effect shall, until it is otherwise provided by lawful Authority, remain in force as if this Act had not been passed or proclaimed; . . .

6. Nothing in this Act shall take away or restrict the Authority of the Governor of British Columbia, with the Advice and Consent of the Legis-

lative Council thereof, to make Laws for the Peace, Order and good Government of British Columbia either before or after the Union ; nor shall anything in this Act interfere with the Exercise of any Power that would have been exerciseable by Her Majesty in Council if this Act had not been passed.

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## APPENDIX.—SCHEDULE E.

30 Vict. A.D. 1867.

### No. 70.

An Ordinance to assimilate the general application of English law.

(6th March, 1867.)

Whereas it is expedient to assimilate the Law establishing the date of the application of English Law to all parts of the Colony of British Columbia :

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows :—

1. " The Proclamation having the force of Law to declare that English Law is in force in British Columbia," of the 19th day of November, 1858, is hereby repealed. Provided, however, that such repeal shall not affect any rights acquired, or liabilities incurred or existing before such repeal ; but such rights and liabilities, civil and criminal, and all remedies and punishments thereunder shall still, notwithstanding such repeal, be capable of enforcement and imposition, as if this Ordinance had not been passed, but not further or otherwise.

2. From and after the passing of this Ordinance, the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia. Provided, however, that in applying this Ordinance to that part of the Colony previous to the Union known as British Columbia, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held to be modified and altered by all past Legislation (of the said Colony of British Columbia before the Union, and of the Colony of British Columbia since the Union) affecting the said Colony of British Columbia as it existed before the Union.

Provided also, that in applying this Ordinance to that part of the Colony heretofore known as the Colony of Vancouver Island and its Dependencies, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held to be modified and altered by all past Legislation of the said Colony of Vancouver Island, and of the whole Colony of British Columbia since the Union, affecting the former Colony of Vancouver Island and its Dependencies.

3. The Short Title of this Ordinance is " The English Law Ordinance, 1867."

*In the Supreme Court of Canada.*

No. 10. Factum of the Attorney-General of British Columbia —*continued.*

## APPENDIX.—SCHEDULE F.

Revised Statutes of British Columbia, 1936.

Chapter 88.

An Act respecting the General Application of English Law.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows :—

1. This Act may be cited as the " English Law Act." R.S. 1924, c. 80, s. 1.

2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of the Province ; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof. R.S. 1924, c. 80, s.2.

## APPENDIX.—SCHEDULE G.

Section 1024 (4)—Criminal Code of Canada.

(4) Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

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No. 11. Factum of the Attorney-General of Saskatchewan.

## No. 11.

## Factum of the Attorney-General of Saskatchewan.

In this Reference the Attorney-General of Saskatchewan adopts and relies on the factum filed herein by the Honourable the Attorney-General of Canada.

T. C. DAVIS,
Attorney-General of Saskatchewan.

## No. 12.

## Formal Judgment.

In the Supreme Court Canada.

Friday, the nineteenth day of January, A.D. 1940.

Present :

The Right Honourable The Chief Justice of Canada ;
The Honourable Mr. Justice Rinfret ;
The Honourable Mr. Justice Crocket ;
The Honourable Mr. Justice Davis ;
The Honourable Mr. Justice Kerwin ;
The Honourable Mr. Justice Hudson.

In the Matter of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled " An Act to amend the Supreme Court Act."

Whereas by Order of His Excellency the Governor General in Council, bearing date the twenty-first day of April, in the year of our Lord, one thousand nine hundred and thirty-nine (P.C. 908), the important question of law hereinafter set out was referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, Revised Statutes of Canada, 1927, chapter 35 :—

" Is said Bill 9, entitled ' An Act to amend the Supreme Court Act,' or any of the provisions thereof and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ? "

And whereas the said question came before this Court for hearing and consideration on the nineteenth, twentieth and twenty-first days of June, in the year of our Lord one thousand nine hundred and thirty-nine, in the presence of Mr. A. Geoffrion, K.C., and Mr. C. P. Plaxton, K.C., and Mr. W. R. Jackett, of counsel for the Attorney-General of Canada ; the Hon. Gordon D. Conant, K.C., Mr. W. B. Common, K.C., and Mr. C. R. Magone, K.C., of counsel for the Attorney-General of the Province of Ontario ; the Hon. J. H. MacQuarrie, K.C., and Mr. T. D. MacDonald, of counsel for the Attorney-General of the Province of Nova Scotia ; Mr. J. B. Dickson, of counsel for the Attorney-General of the Province of New Brunswick; Mr. P. H. Chrysler, of counsel for the Attorney-General of the Province of Manitoba ; Mr. S. F. M. Wotherspoon, of counsel for the Attorney-General of the Province of Prince Edward Island (holding a watching brief) ; Mr. Eric Pepler, of counsel for the Attorney-General of the Province of British Columbia ; and after due notice to the Attorneys-General for the Provinces of Quebec, Alberta and Saskatchewan ;

Whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration, and the same having come on this day for determination ;

## No. 12.

## Formal Judgment.

In the Supreme Court Canada.

Friday, the nineteenth day of January, A.D. 1940.

Present :

The Right Honourable The Chief Justice of Canada ;
The Honourable Mr. Justice Rinfret ;
The Honourable Mr. Justice Crocket ;
The Honourable Mr. Justice Davis ;
The Honourable Mr. Justice Kerwin ;
The Honourable Mr. Justice Hudson.

In the Matter of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled " An Act to amend the Supreme Court Act."

Whereas by Order of His Excellency the Governor General in Council, bearing date the twenty-first day of April, in the year of our Lord, one thousand nine hundred and thirty-nine (P.C. 908), the important question of law hereinafter set out was referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, Revised Statutes of Canada, 1927, chapter 35 :—

" Is said Bill 9, entitled ' An Act to amend the Supreme Court Act,' or any of the provisions thereof and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada ? "

And whereas the said question came before this Court for hearing and consideration on the nineteenth, twentieth and twenty-first days of June, in the year of our Lord one thousand nine hundred and thirty-nine, in the presence of Mr. A. Geoffrion, K.C., and Mr. C. P. Plaxton, K.C., and Mr. W. R. Jackett, of counsel for the Attorney-General of Canada ; the Hon. Gordon D. Conant, K.C., Mr. W. B. Common, K.C., and Mr. C. R. Magone, K.C., of counsel for the Attorney-General of the Province of Ontario ; the Hon. J. H. MacQuarrie, K.C., and Mr. T. D. MacDonald, of counsel for the Attorney-General of the Province of Nova Scotia ; Mr. J. B. Dickson, of counsel for the Attorney-General of the Province of New Brunswick; Mr. P. H. Chrysler, of counsel for the Attorney-General of the Province of Manitoba ; Mr. S. F. M. Wotherspoon, of counsel for the Attorney-General of the Province of Prince Edward Island (holding a watching brief) ; Mr. Eric Pepler, of counsel for the Attorney-General of the Province of British Columbia ; and after due notice to the Attorneys-General for the Provinces of Quebec, Alberta and Saskatchewan ;

Whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration, and the same having come on this day for determination ;

*In the Supreme Court of Canada.*

No. 12. Formal Judgment, 19th January, 1940 —*continued.*

This Court Hereby Certifies to His Excellency the Governor-General in Council, for his information, pursuant to subsection 2 of section 55 of the Supreme Court Act, that the opinions in respect of the question referred to the Court are as follows :—

By the Court: The Parliament of Canada is competent to enact the Bill referred in its entirety.

By Mr. Justice Crocket: The Bill referred is wholly ultra vires of the Parliament of Canada.

By Mr. Justice Davis: The Bill referred if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceedings commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

and that the reasons for such answers are to be found hereunto annexed, written and certified by the individual members of the Court.

(Sgd.) J. F. SMELLIE,
Registrar.

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No. 13. Reasons for Judgment. (A) Sir Lyman P. Duff C.J.

## No. 13.

## Reasons for Judgment.

(A) THE CHIEF JUSTICE :

For convenience of discussion, it is advisable to consider separately the prerogative appeal and the appeal by right of grant, or more shortly, the appeal as of right.

And first, of the prerogative appeal. The jurisdiction of His Majesty in Council in respect of the appeal which " lies " from the decisions of " various courts of judicature " in " the East Indies, the Colonies and plantations and other dominions abroad " was affirmed and regulated by the Parliament in the Privy Council Acts of 1833 and 1844. By the former of these Acts, the Judicial Committee of His Majesty's Privy Council was established, a statutory body, to whom (it was enacted)

" all appeals or complaints in the nature of appeals whatever, which " either by virtue of this Act, or of any law, statute or custom may be " brought before His Majesty in Council,"

from the order of any Court or Judge should thereafter be referred by His Majesty. It was enacted further that the Judicial Committee should hear such appeals and make a report or recommendation to His Majesty in Council for his decision thereon.

" It is clear," says the judgment of the Judicial Committee in *British Coal Corporation* v. *The King* [1935] A.C. at p. 510,

" that the Committee is regarded in the Act as a judicial body or Court,
" though all it can do is to report or recommend to His Majesty in Council,
" by whom alone the Order in Council which is made to give effect to
" the report of the Committee is made.

" But according to constitutional convention it is unknown and
" unthinkable that His Majesty in Council should not give effect to the
" report of the Judicial Committee, who are thus in truth an appellate
" Court of Law, to which by the statute of 1833 all appeals within their
" purview are referred."

The Bill referred to us purports to enact that the Supreme Court of Canada shall have, hold and exercise exclusive, ultimate, appellate jurisdiction, civil and criminal, in and for Canada ; and, for the purpose of giving effect to this enactment, it is in substance provided that the jurisdiction of His Majesty in Council and of the Judicial Committee to hear appeals from Canadian Courts is abrogated.

The consideration of the questions raised involves an examination of the authority of the Parliament of Canada under section 101 of the British North America Act as well as its authority under its general powers to make laws for the peace, order and good government of Canada.

The authority last mentioned, to make laws for the peace, order and good government of Canada is, by the express provisions of the Confederation Act of 1867, affected by only two limitations : first, it does not extend to matters assigned exclusively to the legislatures of the Provinces, a limitation which still persists notwithstanding the enactments of the Statute of Westminster ; and, second, by section 129, it did not authorise the repeal, abolition or alteration of any law in force in the federated provinces or of any legal commission, power or authority existing therein, enacted by or existing under any Act of the Imperial Parliament, a limitation now, since the enactment of the Statute of Westminster, no longer in force.

Section 101 is expressed in absolute terms and by it,

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

Whether the second of the above mentioned limitations formerly affected the authority of Parliament under section 101 is of little, if any, importance since the Statute of Westminster. I shall advert to the point later.

I turn first to the general powers of Parliament respecting peace, order and good government. It is, I think, not wholly irrelevant to notice the nature of the sovereignty which the Parliament of Canada has been conceived to possess (within, at all events, the territorial limits of Canada) and has actually exercised since the earliest times of Confederation. Under the

*In the Supreme Court of Canada.*

No. 13. Reasons for Judgment. (A) Sir Lyman P. Duff C.J. —*continued.*

authority of section 146 of the British North America Act, the territories comprised within Rupert's Land and the North-Western Territories (to the north and west of the federated provinces) were (June, 1870) admitted into the Union. Already, in May, 1870, the Parliament of Canada had (acting under its general law making authority) provided for the establishment (to take effect upon the admission of those territories) of the Province of Manitoba, for a constitution for the province including an executive authority exercisable in that province by a Lieutenant-Governor, parliamentary institutions with legislative authority respecting (inter alia) the administration of justice, taxation, municipal institutions, property and civil rights virtually identical with the authority granted to the original provinces under section 92. For more than thirty years thereafter, the territory west of Manitoba, extending to the Rocky Mountains, now within the Provinces of Alberta and Saskatchewan, was governed under statutes of the Parliament of Canada which provided for executive authority vested in a Lieutenant-Governor, a legislative assembly with large legislative powers, for taxation, for the administration of justice and for courts of judicature. In 1905, by other statutes of Canada, the Provinces of Alberta and Saskatchewan were established with constitutions similar to that of Manitoba.

True, it is, that, by the British North America Act of 1871, it was recited that doubts had been expressed as to the authority of Parliament to enact the Manitoba Act; but by the Act of 1871 the Manitoba Act was declared to have been validly enacted and the power to erect Provinces and provide constitutions for them was explicitly vested in Parliament together with unqualified authority to legislate for the peace, order and good government of the territories not included in any Province.

It would, indeed, be singular if the enactments of a legislature, charged with such responsibilities, responsibilities of the very highest political nature, should be interpreted and applied in a narrow and technical spirit or in a spirit of jealous apprehension as to the possible consequences of a large and liberal interpretation of them.

The question whether the Bill falls within the ambit of the Powers of Parliament under the authority to make laws for the peace, order and good government of Canada must be answered in the affirmative unless the subject matter of the Bill is in whole or in part, in the word of section 91, a matter "coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." The main contention against the validity of the Bill on this branch of the argument is founded on clause 14 of section 92, which is in these words:

> "92. In each Province the Legislature may exclusively make laws "in relation to matters coming within the classes of subjects next here- "inafter enumerated; that is to say,—
>
> > "(14) The administration of justice in the Province including "the constitution, maintenance, and organisation of provincial "courts, both of civil and of criminal jurisdiction, and including "procedure in civil matters in those courts."

So far as concerns this contention, the subject matter of this Bill in its substance is found in sections 2 and 3 which profess to abrogate the jurisdiction of His Majesty in respect of appeals from the courts of Canada and the statutory jurisdiction of the Judicial Committee to hear and report upon such appeals under the statutes of 1833 and 1844. I repeat, I am at the moment addressing my attention only to the prerogative appeal.

The members of His Majesty's Privy Council, as everybody knows, are nominated by the King on the advice of the Prime Minister of the United Kingdom (Anson, Vol. II, Part I, p. 153). The Judicial Committee is, as was observed in the judgment mentioned above (*British Coal Corporation* v. *The King* [1935] A.C., at pp. 510 and 511), a statutory appellate Court established and exercising jurisdiction as a court of justice under statutes of the Parliament of the United Kingdom.

The Court (the Judicial Committee) exists and exercises its jurisdiction under authority derived from the Parliament of the United Kingdom and its members are Privy Councillors who are nominated by statute in virtue of holding, or having held, specified high judicial offices in England or Scotland or are appointed by order in Council pursuant to statutory authority. The constitution and organisation of the Court in every respect is exclusively subject to the Parliament of the United Kingdom.

The constitution of the Judicial Committee is not, I think, without importance in its bearing upon the point I am now to consider: whether, namely, the subject matter of the Bill referred to us in whole or in part falls within the category of matters defined by clause 14 of section 92.

First of all, it is obvious that the Judicial Committee is not a provincial court within the sense of that clause, it being self evident that the phrase denotes courts which, as to their jurisdiction are primarily subjects of provincial legislation and whose process in civil matters, save in certain exceptional cases which will be adverted to, does not run beyond the limits of the province. No legislature in Canada has, of course, anything to say about the constitution of the Judicial Committee or about its organisation. Provision for all such matters is, as I have said, made by the legislature of the United Kingdom and orders in Council pursuant to authority derived therefrom.

The argument is, however, put in this way. Decisions of the provincial courts are subject to be reversed or varied, it is said, under prevailing law, by the decisions of the Judicial Committee and the orders of His Majesty in Council; and this appellate jurisdiction includes the subsidiary power to make such orders and give such directions as the appellate tribunal may consider just and convenient for the purpose of giving effect to such decisions: and the court appealed from may be required by its own process and its own officers to carry out such orders.

It is contended that legislation which abrogates this jurisdiction so to intervene in and ordain the course of proceedings in provincial courts is legislation in relation to the jurisdiction of such courts.

I cannot agree with this view for two reasons. First, while it would, perhaps, not be an abuse of language to say that this jurisdiction of His

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No. 13. Reasons for Judgment. (A) Sir Lyman P. Duff C.J. —*continued.*

Majesty in Council, by which he is enabled, for the purpose of giving effect to adjudications in prerogative appeals, to make orders requiring the court appealed from to carry out such adjudications is a jurisdiction which affects the jurisdiction of the Court from which the appeal lies, it is, nevertheless, quite another thing to say that this jurisdiction or power of His Majesty's is a matter within the definition of clause 14 so that legislation to abrogate that jurisdiction is legislation " in relation to " Provincial Courts within the meaning of clause 14. I am unable to convince myself that such legislation would in its " pith and substance " be legislation " in relation to " the " constitution, maintenance and organisation of provincial courts " or " procedure in those courts in civil matters." Its true subject matter would be the appellate jurisdiction of the Judicial Committee.

My second reason really involves a consideration of the alternative argument based upon clause 14. The general subject of clause 14 is " the administration of justice *in* the province." It is argued that the scope of these words must not be restricted by reason of the specific designation of provincial courts and matters connected therewith, as included in the general subject, and it is said interposition in proceedings in provincial courts in the manner just alluded to constitutes an intervention in the administration of justice and that the orders in council by which this is effected are truly acts done in " the administration of justice in the province " ; and that legislation abrogating the jurisdiction from which they emanate is consequently legislation " in relation to " that subject.

Something must be said at this point as to the essence of the prerogative appeal which the Bill before us purports to abrogate. The judgment of the Judicial Committee in *Nadan* v. *The King* (as interpreted in *British Coal Corporation* v. *The King*) requires us to hold that any legislation intended to abrogate the prerogative appeal must, if it is to be effective, be " extra-territorial in its operation " ; that the legislative powers vested in the Parliament of Canada under the enumerated clauses of section 91 did not, before the Statute of Westminster, enable that legislature to annul this prerogative right of the King in Council to grant leave to appeal because, however widely such powers are construed, they are confined to " action taken in Canada " ; and it would, indeed, appear that the central governing act in the appeal to the Judicial Committee is the decision. If there is authority in the Court as an appellate court to pronounce an effective decision, it is because such is the law that governs, not the appellate tribunal alone, but the inhabitants of Canada and the courts in Canada which carry out the decision. To say that the authority to adjudicate exists without the authority to make the adjudication effective in Canada would seem to be a self-contradictory statement ; and you cannot get rid of this authority unless you are endowed, it was held in *Nadan* v. *The King*, with extra-territorial powers which the Parliament of Canada did not in 1926 possess.

To return to section 92 (14). The legislative powers of the provinces are strictly confined in their ambit by the territorial limits of the provinces. The matters to which that authority extends are matters which are local in the provincial sense. This principle was stated in two passages in the

judgment in the *Local Option case* [1896] A.C. 348 delivered by Lord Watson speaking for a very powerful Board at pp. 359 and 365, respectively. I quote them :

" . . . the concluding part of s. 91 enacts that

" any matter coming within any of the classes of subjects enumerated " in this section shall not be deemed to come within the class of " matters of a local or private nature comprised in the enumeration " of the classes of subjects by this Act assigned exclusively to the " legislatures of the provinces."

" It was observed by this Board in *Citizens' Insurance Co. of Canada* " v. *Parsons* (7 A.C. 108) that the paragraph just quoted ' applies in its " grammatical construction only to No. 16 of s. 92.' The observation " was not material to the question arising in that case, and it does not " appear to their Lordships to be strictly accurate. It appears to them " that the language of the exception in s. 91 was meant to include and " correctly describes all the matters enumerated in the sixteen heads of " s. 92, as being, from a provincial point of view, of a local or private " nature."

* * * * * * *

" It is not necessary for the purposes of the present appeal to deter- " mine whether provincial legislation for the suppression of the liquor " traffic, confined to matters which are provincial or local within the " meaning of Nos. 13 and 16, is authorised by the one or by the other of " these heads. It cannot, in their Lordships' opinion, be logically held " to fall within both of them. In s. 92 No. 16 appears to them to have " the same office which the general enactment with respect to matters " concerning the peace, order, and good government of Canada, so far " as supplementary of the enumerated subjects, fulfils in s. 91. It " assigns to the provincial legislature all matters in a provincial sense " local or private which have been omitted from the preceding enumera- " tion, and, although its terms are wide enough to cover, they were " obviously not meant to include, provincial legislation in relation to the " classes of subjects already enumerated."

The Legislation of the provinces under all the heads of section 92 is, by law, confined to matters which are local " in the provincial sense." In the *Royal Bank of Canada* v. *Rex* [1913] A.C. 298 a statute of Alberta was held, in conformity with this principle, to be invalid and beyond the powers of the Legislature

" Inasmuch as what was sought to be enacted was neither confined to " property and civil rights within the province nor directed solely to " matters of merely local or private nature within it."

The subject matter in question was beyond the powers of the province as the Judicial Committee held, because the legislation dealt with an interest of some of the parties in a deposit in the Bank of Montreal carried on its books at Edmonton which was in the nature of an equitable debt having a

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constructive situs at the Head Office of the Bank which was outside the province. The principle has been applied also in *Provincial Treasurer* v. *Kerr* [1933] A.C. 710, in *Bonanza Creek* v. *The King* [1916] 1 A.C. 566 and in other cases ; and, indeed, in all the clauses of section 92, with the exception of clause 3, the territorial restriction is expressed or implied.

Construing clause 14 in light of the general principle stated as above by the Judicial Committee in the *Local Option case* [1896] A.C. 348, I am unable to accede to the proposition that the jurisdiction of the Judicial Committee and of His Majesty in Council in respect of prerogative appeals from a province belongs to the field described by the words " administration of justice in the province " as a local matter in the sense of that principle. Indeed, I think we are bound by the judgment of the Judicial Committee in *Nadan* v. *The King* (supra) as interpreted by the *British Coal Corporation* v. *The King* (supra), to hold that legislation intended to prevent the exercise of the prerogative in relation to the judgments of Canadian Courts is not legislation in relation to a local matter in that sense.

An argument was based upon clause 13 of section 92 " property and civil rights." With great respect to those who take a different view, I am unable to agree that clause 13 is pertinent. The subject matter of administration of justice including jurisdiction of provincial courts is specifically dealt with in clause 14 and, if the particular matter with which we are now concerned does not fall within the ambit of clause 14, then I think it must be taken to be excluded from the general clause 13 as well as the residuary clause 16. That is a principle which has been acted upon more than once in the construction of the clauses of section 92 as well as those of section 91. In the case of section 92 it was applied in determining the scope and effect of clause 11, " the incorporation of companies with provincial objects." This clause was the subject of a great deal of controversy until its effect was finally settled by the judgment of the Privy Council in *Bonanza* v. *The King* [1916] 1 A.C. 566 ; a controversy which would have been quite pointless, if, for the purpose of ascertaining the powers of the provinces in relation to the incorporation of companies, you could properly resort to clause 13. The Dominion authority in respect of the incorporation of companies under its powers in relation to peace, order and good government rests upon the limitation imposed upon the provincial power by the language of section 11. If the provinces were entitled to invoke the general authority of clause 13 in order to fill up the gap created by the limiting words of clause 11, the reasoning upon which the Dominion authority rests under the residuary powers under section 91 would be deprived of its foundation ; and, indeed, as Lord Haldane says in *John Deere Plow Co.* v. *Wharton* [1915] A.C. 339 if that were a legitimate procedure " the limitation in clause 11 would be nugatory."

Nor is the contention advanced by calling in aid the residuary clause (No. 16). That clause, as the Judicial Committee says in the passages already quoted, serves the purpose of supplementing the preceding enumerated clauses and includes " matters of a merely local or private nature within the province " not included in the preceding clauses. These words as the judgment declares are " wide enough to cover " all matters embraced within the preceding clauses,

all of which, it also declares, are correctly described by the words of section 91 as " matters of a local or private nature comprised in the enumeration of subjects by this Act assigned exclusively to the legislatures of the provinces." Whatever ancillary powers the provinces may possess in virtue of section 92 (16) they can only be ancillary to the local matters comprised in the preceding clauses as therein defined and they can only be exercised in relation to " matters of a merely local or private nature within the province."

As regards clause 1 of section 92, which is also relied upon, the exception " the office of Lieutenant-Governor " points to the subject matter and the scope of the clause. The term " provincial constitution " is employed as the heading of Title V. That title deals with the Executive Government of the Provinces, with constitution of their legislative institutions and very largely with appointments to Legislative Councils and elections to Legislative Assemblies. The heading of title V may be contrasted with that of Title VI " Distribution of Legislative Powers." There is nothing in the enactments of the earlier title supporting the contention that clause 1 of section 92 can be read as enlarging the authority of the legislature under the other clauses of that section, or as freeing the legislature from the restrictions imposed by those clauses.

I now come to section 101. That section has two branches, one which deals with a general court of appeal for Canada, while the other relates to the establishment of additional courts for the better administration of the laws of Canada. The phrase " laws of Canada " here embraces any law " in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion " (*Consolidated Distilleries* v. *The King* [1933] A.C. at p. 522).

It may be added that it has been held to give authority to Parliament in relation to the jurisdiction of provincial courts ; and to impose on the courts judicial duties in respect of matters within the exclusive competence of Parliament : insolvency (*Cushing* v. *Dupuy*, 5 A.C. 409) ; in election petitions (*Valin* v. *Langlois*, 5 A.C., at pp. 119 and 120).

Furthermore, the general jurisdiction of Parliament in relation to peace, order and good government has been exercised in imposing duties on provincial courts in relation to appeals from the courts of territories not within the limits of the provinces. Examples are : the appeal to the Court of Queen's Bench for Manitoba from the court of the North-West Territories (*Reil* v. *Rex*, 10 A.C. 675) ; and the appeal from the courts of the Yukon to the Supreme Court of British Columbia (*McDonald* v. *Belcher* [1904] A.C. 429).

As respects the general court of appeal, the authority is " notwithstanding anything in this Act, from time to time " to make provision " for the constitution, maintenance, and organisation of a general court of appeal for Canada." And the question for determination is whether this enactment imports an ambit of legislative authority that embraces the power to endow the court constituted under it with " ultimate and exclusive " jurisdiction in respect of appeals from provincial courts.

Prima facie, the authority is to make legislative provision for a court which shall have general authority as a court of appeal for Canada ; and to

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provide for the constitution and organisation of that court. This necessarily involves the power to subject every court of judicature or of public justice to the appellate jurisdiction of the court so to be constituted.

The section, until it is acted upon by Parliament, subtracts nothing from the legislative authority of the provinces. It subtracts nothing from any judicial authority exercisable in the Dominion. But when the Court is constituted and its jurisdiction and powers are defined by Dominion legislation, such legislation takes effect according to its scope and purport notwithstanding anything in the Confederation Act or anything done under that Act. Therefore, it is within the ambit of the legislative authority conferred by this section to define the cases in which, and the conditions under which, the appellate jurisdiction may be invoked, the powers of the court in respect of the judgments and orders it may pronounce, to provide for making such judgments and orders effective, and for that purpose to require the court appealed from to give effect to such judgments and orders according to their tenor.

In other words, it is competent to Parliament to give jurisdiction to entertain an appeal in any and every case in which it thinks fit to do so, and also to confer the correlative right of appeal in such cases and in any and every case to require the court appealed from to carry out any judgment pronounced upon the appeal. This, it appears to me, is involved, without qualification, in the very words of the section.

Are you then to imply a constitutional exception imperatively exempting from the operation of legislation under the section judgments or decisions from which, by the existing law, appeal may be taken or may have been taken to the Judicial Committee ?

It is of the first importance, I think, to notice that in ascertaining what powers are derived from the section, you are to give effect to its language " notwithstanding anything in this Act."

I think, since the Statute of Westminster, I cannot, without disregarding the reports of the Imperial Conferences recited therein, imply such a qualification. On the contrary, the governing object of section 101 being to invest the Parliament of Canada with legislative authority to endow a court of appeal for Canada with general appellate jurisdiction over all courts in Canada, and all persons concerned in proceedings in those courts, and with power to give complete effect to the judgments of that court,—such being the general object of the enactment, all subsidiary powers must, especially in view of the phrase just mentioned, be implied to enable Parliament to legislate effectively for that object.

Three considerations seem to me to be decisive :

(*a*) Since this legislative authority may be executed in Canada " notwithstanding anything in this Act," you cannot imply any restriction of power because of anything in section 92. Assuming even that section 92 gives some authority to the legislatures in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under section 101. Whatever is granted by the words of the section, read and applied as prima facie intended to endow Parliament with power to effect high political objects con-

cerning the self government of the Dominion (section 3 of the B.N.A. Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada ;

(*b*) Since, in virtue of the words of section 101, Parliament may legislate for objects within the ambit of section 101 regardless of any powers the provinces may possess to affect appeals to the Judicial Committee, it follows that the general power of Parliament to make provision for the peace, order and good government of Canada in relation to such objects is in no way limited by the exception of " local matters " assigned exclusively by the introductory words of section 91 to the legislatures of the provinces ; and, consequently, no existing judicial authority competent to affect the course of judicature in Canada can be an obstacle precluding the Parliament of Canada from making its legislation relating to these objects effective ;

(*c*) Having regard to the reports of the Imperial Conferences recited in the Statute of Westminster, to the provisions of that statute, and to the terms of section 101, you cannot properly read anything in the Statute of Westminster or in the B.N.A. Act as precluding Parliament, for the purpose of effecting its objects within the ambit of that section from excluding from Canada the exercise of jurisdiction by a tribunal constituted, organised and exercising jurisdiction under the exclusive authority of another member of the British Commonwealth of Nations.

The exercise of such jurisdiction for Canada by a tribunal exclusively subject to the legislation of another member of the Commonwealth is not a subject which can properly be described (as subject matter of legislative authority) as a matter merely local or private within a province. And again, the power to make laws for the peace, order and good government of Canada in relation to matters within section 101 being without restriction, the power of Parliament in such matter is, as I have said, more than once, paramount. In truth, the point seems to be governed by the decision in the *Aeronautics Reference* [1932] A.C. 54 as well as by the decision in the *Radio Reference* [1932] A.C. 304. The primacy of Parliament under section 101 is just as absolute as under the enumerated clauses of section 91.

As to appeals from the Supreme Court of Canada, or from any additional courts established under section 101, it ought, perhaps, to be noticed that since the Provinces can have no jurisdiction respecting them, they obviously fall within the ambit of the general power in relation to peace, order and good government.

Second, I come to the appeal as of right, so called.

Before this topic is discussed, it is advisable, I think, to refer to the contention that His Majesty's prerogative in relation to appeals was merged in the statutory powers of the Judicial Committee under the Judicial Committee Acts of 1833 and 1844. I should have thought it more accurate to say that this legislation affirmed and regulated the exercise of His Majesty's prerogative power in relation to appeals. The appeal is still an appeal to His Majesty in Council though in point of substance (*British Coal Corporation's*

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*case* [1935] A.C. at p. 510) the appellate jurisdiction is now exercised by the statutory court of the Judicial Committee, and I should have thought it resulted from the terms of section 92 of the British North America Act and the judgments in *Nadan* v. *The King* and in the *British Coal Corporation* v. *The King* that before the enactment of the Statute of Westminster neither the Parliament of Canada, nor the legislature of a province, could subtract from or add to His Majesty's prerogative as exercised by the Judicial Committee or, to put it another way, to the jurisdiction of the Judicial Committee.

We have to consider the legislation of Ontario and Quebec touching this subject, the appeal as of right, the orders in council affecting the other provinces, except British Columbia, and the rather special position of British Columbia.

As to Ontario and Quebec, the statutory provisions with which we are concerned were first enacted by the Provinces of Upper and Lower Canada in professed exercise of authority conferred by the Constitutional Act of 1791 ; they were continued in force in the Province of Canada by section 46 of the Act of Union of 1840 and are still in force under the authority of section 129 of the British North America Act.

To begin with Ontario and Quebec. The legislation in force was considered by the Judicial Committee in the year 1880 in *Cushing* v. *Dupuy* (5 A.C. 409). The appeal was from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing the judgment of a judge of the Superior Court in certain proceedings in insolvency instituted under an Act of the Parliament of Canada entitled " An Act respecting Insolvency " (38 Vict., c. 16). An application to the Court of Queen's Bench for leave to appeal to His Majesty in Council was refused on the ground that under the Insolvency Act its judgment was final. Article 1178 of the Code of Civil Procedure of 1867 in so far as relevant is in these words :

> " 1178. An appeal lies to Her Majesty in the Privy Council from " final judgments rendered in appeal or error by the Court of Queen's " Bench :—
>
> " 1. In all cases where the matter in dispute relates to any fee " of office, duty, rents, revenue, or any sum of money payable to " her Majesty ;
>
> " 2. In cases concerning titles to lands or tenements, annual " rents and other matters by which the rights in future of parties " may be affected ;
>
> " 3. In all other cases wherein the matter in dispute exceeds " the sum or value of five hundred pounds sterling."

The corresponding Ontario enactment is to the same effect except as to the pecuniary limit and as to another point to which reference will be made.

The effect of the Insolvency Act in declaring the judgment of the Court of Queen's Bench to be final in insolvency proceedings was held to preclude any appeal under article 1178 if valid ; and it was also held that legislation precluding such appeal could be validly enacted in respect of insolvency proceedings by the Parliament of Canada under the authority of section

91 (21) relating to Bankruptcy and Insolvency unless it infringed the Queen's prerogative.

It was held that such an enactment would not " infringe the prerogative " for the reason that " since it only provides that the appeal to Her Majesty " given by the Code framed under the authority of the Provincial Legislature " as part of the civil procedure of the Province shall not be applicable in the " new proceedings in insolvency which the Dominion Act creates, such a pro- " vision in no way trenches on the Royal prerogative."

The judgment is important, first, since it characterises the article of the Code as a provision enacted under the authority of the Provincial Legislature " as part of the civil procedure of the province." Second, that the legislature of the Dominion, in legislating upon a subject within its powers, could remove proceedings under that legislation from the operation of this provision and that in doing so it was in no way trenching on the Royal prerogative.

It ought also to be added as of equal importance that, the Judicial Committee having held the Court of Queen's Bench to be right in refusing to admit the appeal, it follows in point of law that there was no appeal from a judgment of the Court of Queen's Bench which the Parliament of Canada could not declare inadmissible in insolvency proceedings without infringing Her Majesty's prerogative.

Now, it is quite plain that, neither in 1867 nor in 1875 (it is conclusively settled by *Nadan* v. *The King*, as interpreted by the *British Coal Corporation's case*) neither the legislature of a province nor the Parliament of Canada could enact laws binding upon His Majesty respecting his appellate jurisdiction. We must, consequently, hold that this provincial legislation does not, and cannot, be legislation upon the subject of His Majesty's jurisdiction.

It is legislation in relation to procedure in the provincial courts giving directions to such courts as to proceedings that may be taken in them in respect of appeals to His Majesty.

The same considerations apply to Ontario.

If the Royal Proclamation of 1763 had the effect of creating jurisdiction then we are bound to hold under the authorities mentioned that no legislature in Canada had, prior to the Statute of Westminster, authority to abrogate that jurisdiction and the powers of the provinces have not, as explained above, been since enlarged because such jurisdiction is not a local matter within section 92.

The same considerations apply to British Columbia in so far as regards the statute of 1858. The Order in Council of 1856 must, I think, be taken to have been passed under the authority of the Judicial Committee Act of 1844 ; and the orders in Council of that character I am now to consider.

The provinces, other than Ontario and Quebec, are governed in respect of the appeal as of right by orders in council under the statute of 1844. These orders in council merely regulate the exercise of the jurisdiction of the Judicial Committee ; but, for the reasons given, no province can be competent to abrogate them in so far as the jurisdiction of the Judicial Committee would be thereby impaired ; and it is only with this jurisdiction that we are concerned, because jurisdiction is the subject matter of this Bill. In truth, it

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would appear that the orders in council and the legislation of Ontario and Quebec assume the existence of the jurisdiction of the Judicial Committee. The Bill before us professes to take away that jurisdiction. The power of Parliament even under the introductory clause of section 91 in respect of that subject does not infringe any authority of the provinces in relation to procedure in the provincial courts which postulates the existence of the jurisdiction.

The statute of Ontario professes to declare that, except in the cases specified, no appeal shall lie to His Majesty in his Privy Council. If the subject matter of this enactment really is the jurisdiction of the Judicial Committee then it is invalid. Probably, it ought to be read as a declaration that the rights given under the statute, whatever they may be, apply only in the cases specified.

To sum up with regard to the appeal as of right. In respect of that appeal, in so far as we are concerned with His Majesty's prerogative or the jurisdiction of the Judicial Committee, what I have said applies to the appeal as of right as well as to the prerogative appeal; and, I repeat, we are concerned here only with legislation abrogating the prerogative as regards Canada and with legislation abrogating the jurisdiction of the Judicial Committee as regards Canada. If such legislation is not within the ambit of the powers given to the provinces, or is within the ambit of the powers of the Dominion in respect of objects contemplated by section 101, then the Bill is valid.

I have proceeded thus far without any reference to the judgment of their Lordships of the Judicial Committee in the *British Coal Corporation* v. *The King* [1935] A.C. at pp. 520 and 523. I cannot satisfy myself whether or not their Lordships intended to express a final view that the appeal as of right is, from the provincial point of view, a local matter assigned to the provinces for legislative action by section 92. As far as I can see, that particular point did not arise for decision or for examination in that case.

We have been obliged to say in some cases, and have said with the approval of the Judicial Committee, that observations forming no part of the *ratio decidendi* in judgments of the Judicial Committee do not necessarily acquit us of the responsibility of deciding for ourselves on the point dealt with *Dominion of Canada* v. *Province of Ontario* [1910] A.C. 637. For my own part, if I were satisfied their Lordships had really intended to express an opinion upon the point now before us I should regard that as conclusive for the purposes of this reference; but I am not satisfied they did, and I am inclined to think they did not. In these circumstances it is my duty to form an opinion upon the point. I should add that their Lordships expressed no opinion as to the effect of section 101 and, apparently, did not consider it.

I return now to a point as to the effect of section 129 of the British North America Act already alluded to. Their Lordships in the *British Coal Corporation's case* say (at page 520) that before the Statute of Westminster the Dominion Legislature was subject, in legislating under section 91, to the limitations imposed not only by the Colonial Laws Validity Act, but also by section 129 of the British North America Act. I do not know that the point is now of any practical importance, but if it has not been finally decided, I venture to suggest, as regards section 101, that " notwithstanding anything

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in this Act " includes within its purview every part of section 129 as well as all the other sections of the Act.

My opinion, therefore, is :

First, that since, by the Statute of Westminster, the obstacles have been removed which prevented the Parliament of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of section 101 to enact the Bill in question.

Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government.

The answer to the interrogatory addressed to us by His Excellency in Council is that the Bill mentioned in the question is intra vires of the Parliament of Canada in its entirety.

(B) Rinfret J. :

(B) Rinfret J.

The question referred to this Court is as follows :

" Is said Bill 9, entitled ' An Act to amend the Supreme Court Act,' " or any of the provisions thereof, and in what particular or particulars, " or to what extent, intra vires of the Parliament of Canada ? "

The object and intent of Bill 9 is to amend the Supreme Court Act so that the Supreme Court shall have, hold and exercise " exclusive, ultimate " appellate civil and criminal jurisdiction within and for Canada, and that its judgments shall in all cases be final and conclusive.

My opinion is that the question should be answered in the affirmative, as to all the provisions of the Bill ; and I base that opinion upon the following reasons :

It has been repeatedly laid down by the Judicial Committee adjudicating upon the powers conferred by the British North America Act, that " the " powers distributed between the Dominion on the one hand and the Pro- " vinces on the other hand cover the whole area of self-government within " the whole area of Canada " and " whatever belongs to self-government in " Canada belongs either to the Dominion or to the Provinces, within the limits " of the British North America Act " (*Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A.C. 571, 581 and 584.)

Since the adoption of the Statute of Westminster, 1931, and the judgment of the Privy Council in *British Coal Corporation* v. *The King* [1935] A.C. 500, 521, it must be taken as now settled that appeals from Canadian Courts to the King in Council are " essentially matters of Canadian concern, and the

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" regulation and control of such appeals would thus seem to be a prime element " in Canadian sovereignty as appertaining to matters of justice."

It follows, therefore, that the real question presented for decision is whether the power to constitute the Supreme Court of Canada the " exclusive, ultimate " appellate court and to prohibit all appeals to His Majesty in Council is within the legislative competence of the Dominion Parliament or of the Provincial Legislatures.

The rule of construction followed in such cases is to decide, first, whether the Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the Legislatures of the Provinces. (*Citizens' Insurance Company* v. *Parsons* [1881] 7 A.C. 96, 109.) If it does not, then it must fall within the legislative competence of the Dominion Parliament, for " the Federation Act exhausts the whole range of legislative power, and " whatever is not thereby given to Provincial Legislatures rests with the " Parliament." (*Bank of Toronto* v. *Lambe* [1887] 12 A.C. 575, 587.)

The only head of provincial legislative jurisdiction which we have to consider is head (14) of section 92 :

> " The administration of justice in the Province, including the con-
> " stitution, maintenance, and organisation of provincial courts, both of
> " civil and of criminal jurisdiction, and including procedure in civil
> " matters in those courts."

If the matter of appeals to the Privy Council be within the legislative competence of the Provinces, it must fall under this head, for the several compartments of section 92 cannot overlap and it must be obvious that head (14) excludes the others.

The controlling words in head (14) are " The administration of justice in the Province." The words are not : in respect of or for the Province ; they restrict the power to the administration of justice " in the Province." These words cannot include matters of appeal from Canadian Courts to the Privy Council in London. (*Royal Bank* v. *The King* [1913] A.C. 283 ; *Brassard* v. *Smith* [1925] A.C. 371 ; and *Attorney-General of Alberta* v. *Kerr* [1933] A.C.710.)

As for the balance of head (14) concerning the constitution, maintenance and organisation of provincial courts, both of civil and of criminal jurisdiction and the procedure in civil matters in those courts, it need only be said that obviously it cannot have any reference whatever to His Majesty in Council or to the Judicial Committee of the Privy Council.

In recent years we have had the advantage of two pronouncements of the Judicial Committee on the question of the power to abolish appeals to the Privy Council and it seems to me that they are decisive of the point which is now submitted to this Court.

In *Nadan* v. *The King* [1926] A.C. page 482, there was an application for special leave to appeal from a provincial court from two convictions, one under a Provincial Liquor Act and the other under the Dominion Liquor Act. The point was raised that there was no jurisdiction to give leave having regard to section 1025 of the Criminal Code of Canada. It was held that section 1025 was ineffective to annul the right of His Majesty to grant special leave to appeal in a criminal case upon two grounds, first, that the powers of

the Dominion Parliament are confined to action to be taken in the Dominion and, second, that the section was repugnant to the Judicial Committee Acts and, therefore, inoperative by virtue of the Colonial Laws Validity Act, 1865.

The judgment in *Nadan's case* was interpreted by the Board in the *British Coal Corporation case* [1935] A.C. 500, as being based upon two grounds : the repugnancy of section 1025 to the Privy Council Acts and, therefore, to the Colonial Laws Validity Act and that it could only be effective if construed as having extra-territorial operation, whereas according to the law as it was in 1926 the Dominion Statute could not have extra-territorial operation. The effect of those two decisions is clearly that the matter of the appeal to the Privy Council was then considered outside the territory of Canada and could only be effectively dealt with by Canadian legislation if that legislation could have extra-territorial operation, which it had not at the time. By the Statute of Westminster the restriction imposed by the Colonial Laws Validity Act has been removed both as regards the Dominion Parliament and the Provincial Legislatures. The Dominion Parliament was further given full power to make laws having extra-territorial operation ; but such power was not given to the Provincial Legislatures. The following consequences seem to be the result from the two decisions of the Privy Council above referred to and from the subsequent enactment of the Statute of Westminster :—

The question of appeals to the Privy Council was considered by the Judicial Committee as a matter of extra-territorial operation.

It was decided that previous to the Statute of Westminster the Dominion Parliament could not effectively deal with the whole question of the appeals to the Privy Council because it had not then the power to make laws having extra-territorial operation.

It is only because such power was given to the Dominion Parliament by the Statute of Westminster that the *British Coal Corporation case* was subsequently decided upholding the Dominion's jurisdiction.

We must conclude that *a fortiori* the Provincial Legislatures could not effectively legislate with regard to the abolition of appeals to the Privy Council as the law stood before the Statute of Westminster ; and, as they continue as before to have no legislative capacity to make any law having extra-territorial operation, they have no power to deal with the matter of appeals to the Privy Council.

The result would be that this matter not being within the legislative competence of the Provinces it must fall necessarily within the competence of the Dominion Parliament.

This result is further supported in my view by section 101 of the British North America Act.

Under that section " the Parliament of Canada may notwithstanding " anything in this Act from time to time provide for the constitution, main- " tenance and organisation of a general Court of Appeal for Canada, etc."

The legislative authority conferred on the Dominion by that section is exclusive, paramount and plenary. It cannot be taken away or impaired by provincial legislation (*Crown Grain Co.* v. *Day* [1908] A.C. 504). Its

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jurisdiction extends as well to the laws passed by the Parliament of Canada as to any provincial law. It is " a general Court of Appeal for Canada " and the Dominion Parliament may exclusively determine the appellate jurisdiction of the Court.

One of the principal functions of a general Court of Appeal should be to settle jurisprudence and that object fails completely if it is not the final and ultimate Court of Appeal. There appears to be no sound ground for the suggestion that legislation by Parliament directed to that purpose would not be legislation relating to the constitution, maintenance and organisation of the Supreme Court of Canada in its character as a general Court of Appeal for Canada.

An attempt was made at the argument to make a distinction as regards admiralty law, but I think the legislative competence of the Dominion Parliament on that subject would naturally fall under the power to deal with navigation and shipping and the further power given by section 101 as to the " establishment of any additional courts for the better administration of the laws of Canada." For those reasons, I have come to the conclusion that Bill 9 in toto is intra vires of the Parliament of Canada.

(C) Crocket J.

(C) CROCKET J. :

Although this Bill, as it comes to us on this reference, simply entitled " An Act to amend the Supreme Court Act of Canada " purports to amend " The Supreme Court of Canada Act," c. 35 of the Revised Statutes of Canada, 1927, only by repealing s. 54 of that Act and substituting for it a new section of three comparatively short subsections, the most cursory examination of the proposed substitution shows that it goes far beyond the mere elimination from the existing section of its express recognition of the royal prerogative to grant leave to appeal from the judgments of this court. Its real purpose is to give this court " exclusive ultimate appellate civil and criminal jurisdiction within and for Canada," as it is expressed in s.s. 1. To accomplish this purpose the Bill itself recognises that the mere abrogation of the existing prerogative in relation to the judgments of this court will not suffice, and that it requires to make an end also of the long established prerogative of the reigning Sovereign to grant special leave to appeal to His Majesty's Privy Council from any judgment pronounced by any of His courts of justice in any of the Provinces of the Dominion, and to annul as well the provisions of any and every statute or law now in force in any Province under which appeals may be taken directly as of right to the Judicial Committee of the Privy Council in certain cases from the judgments of provincial courts. (The Code of Civil Procedure of Quebec, as amended by 8 Edward VII, c. 75, and 8 George V, c. 78, expressly provides for any appeal to His Majesty in His Privy Council from final judgments of the Court of King's Bench in all cases where the amount or value of the thing demanded exceeds $12,000, as well as in all cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected. The Privy Council Appeals Act, Revised Statutes of Ontario, 1937, provides also that an appeal shall lie to His Majesty in His Privy Council where the matter

in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual fee or rent, customary or other duty or fee or any like demand of a general and public nature affecting future rights, of what value or amount so ever the same may be, while in all the other Provinces of Canada Imperial Orders in Council, made under the provisions of the Judicial Committee Act, 1833, 3 & 4 William IV, c. 41, and the Judicial Committee Act, 1844, c. 69, of the Imperial Statutes, 7 & 8 Vict., which provide for direct appeals from the judgments of the Supreme and other Courts of the several Provinces to the Judicial Committee without any special leave of the Imperial Privy Council, undoubtedly are now operative in the other seven Provinces and have the same force and effect as if their provisions had been expressly enacted by their respective Legislatures.) Hence the far-reaching, all-embracing proposal of s.s. 2 :—

" (2) Notwithstanding any royal prerogative or anything contained " in any Act of the Parliament of the United Kingdom (this manifestly " would cover the B.N.A. Act itself) or any Act of the Parliament of " Canada or any Act of the legislature of any province of Canada or any " other statute or law, no appeal shall lie or be brought from any court " now or hereafter established within Canada to any court of appeal, " tribunal or authority by which, in the United Kingdom, appeals or " petitions to His Majesty in Council may be ordered to be heard."

And that of s.s. 3, actually declaring that :—

" (3) The Judicial Committee Act, 1833, chapter forty-one of the " statutes of the United Kingdom of Great Britain and Ireland, 1833, " and The Judicial Committee Act, 1844, chapter sixty-nine of the " statutes of the United Kingdom of Great Britain and Ireland, 1844, " and all orders, rules or regulations made under the said Acts *are hereby* " *repealed in so far as the same are part of the law of Canada.*"

The undoubted effect of the enactment of such a measure by the Parliament of Canada would be an open defiance by that body of the authority of any of the Provincial Legislatures of Canada to legislate in respect either of appeals as of right directly to the Judicial Committee of the Privy Council from the judgments of provincial courts now or hereafter established within Canada, or in respect of the royal prerogative to grant leave to appeal thereto independently of the provisions of any statute or law duly enacted by the Legislature of any Province or duly established by Order in Council under the provisions of the Imperial Judicial Committee Acts of 1833 and 1844. It would amount to an attempt on the part of the Parliament of Canada to arrogate to itself the complete control of the administration of justice in all the Provinces of the Dominion insofar as the finality of judgments in civil as well as in criminal cases is concerned and the right of the subject or anybody submitting to the jurisdiction of a provincial court to petition His Majesty for leave to appeal to him for redress through His Judicial Committee, and thus to strike at the constitutional integrity of all the Provinces of Canada as self-governing entities under the British Crown.

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If any warrant exists for the presentation to the Parliament of Canada of such a drastic Bill it must be found either in the Statute of Westminster, 1931, 22 George V, ch. 4, or in the British North America Acts, 1867 to 1930.

Section 4 of the first mentioned Imperial Statute, enacting that the Parliament of a Dominion has full power to make laws having extra-territorial operation, has been much stressed as a justification for the presentation of the Bill in question. It is contended that its enactment would have extra-territorial operation inasmuch as it would prohibit the hearing of appeals by His Majesty's Judicial Committee of the Privy Council, which sits in the United Kingdom beyond the territorial limits of Canada.

The answer to this contention, I think, is that insofar as the direct right of appeal to the Judicial Committee of the Privy Council provided by the Statutes of Quebec and Ontario and by orders in council in the other Provinces of the Dominion is concerned, the principal, and indeed the only effective, operation of the now proposed enactment would be the virtual repeal of these provincial statutes and orders in council, which manifestly could have effect only in Canada. This would be true also of the proposed abrogation of the royal prerogative in relation to the granting not only of appeals from the judgments of any provincial court in Canada, but also in relation to the granting by royal prerogative of appeals from judgments of the Supreme Court of Canada. So far as the exercise by the Sovereign of the royal prerogative is concerned, it cannot in any sense be said to be localised either in the place where the Sovereign resides nor in the place where his judicial committee sits, as was so clearly pointed out by Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council in *Hull* v. *McKenna*, I.R. (1926), at p. 404: "The Judicial Committee of the Privy Council," said Lord Haldane:

> " is not an English body in any exclusive sense. It is no more an English
> " body than it is an Indian body, or a Canadian body, or a South African
> " body, or for the future, an Irish Free State body. There sit among
> " our numbers Privy Councillors who may be learned Judges of Canada
> "—there was one sitting with us last week—or from India, or we may have
> " the Chief Justice, and very often have had them from the other Domin-
> " ions, Australia and South Africa. I mention that for the purpose of
> " bringing out the fact that the Judicial Committee of the Privy Council
> " is not a body, strictly speaking, with any location. The Sovereign is
> " everywhere throughout the Empire in the contemplation of the law.
> " He may as well sit in Dublin, or at Ottawa, or in South Africa, or in
> " Australia, or in India as he may sit here, and it is only for convenience,
> " and because we have a Court, and because the members of the Privy
> " Council are conveniently here that we do sit here; but the Privy
> " Councillors from the Dominions may be summoned to sit with us, and
> " then we sit as an Imperial Court which represents the Empire, and not
> " any particular part of it."

In *British Coal Corporation* v. *The King* [1935] A.C., Lord Sankey in delivering the judgment of the Judicial Committee said at p. 521:

"It may now be considered whether there is since the statute "(authorising appeals as of right to the Privy Council) any sufficient "reason why this matter of the special or prerogative appeal to the "King in Council should be treated, as being something quite "special and as being a matter standing, as it were, on a pedestal by "itself. Ought it not to be treated as simply one element in the general "system of appeals in the Dominion? The appeal, if special leave is "granted, is from the decision of a Canadian Court, and is to secure a "reversal or alteration of an order of a Canadian Court: if it is successful, "its effect will be that the order of the Canadian Court will be reformed "accordingly. Rights in Canada and law in Canada will thus be affected. "The appellant and respondent in any such appeal must be either "Canadian citizens or persons who have submitted to the jurisdiction "of the Canadian Courts. Such appeals seem to be essentially matters "of Canadian concern, and the regulation and control of such appeals "would thus seem to be a prime element in Canadian sovereignty as "appertaining to matters of justice. But it is said that this class of "appeal is a matter external to Canada: emphasis is laid particularly "on the fact that the Privy Council sits in London, and that in form the "appeal by special leave is not to the Judicial Committee as a Court of "law, but to the King in Council exercising a prerogative right outside "and apart from any statute. As already explained, this latter pro-"position is true only in form, not in substance. But even so the "reception and the hearing of the appeal in London is only one "step in a composite procedure which starts from the Canadian "Court and which concludes and reaches its consummation in the "Canadian Court. What takes place outside Canada is only ancillary "to practical results which become effective in Canada. And the appeal "to the King in Council is an appeal to an Imperial, not a merely "British, tribunal."

The last mentioned case, which was on an application for leave to appeal from a criminal conviction, decided that the extent of the legislative competence conferred on the Canadian Parliament in regard to appeals to the King in Council in criminal matters must now be ascertained from its constituent Act, the British North America Act, and that s. 91 of that Act, read with the rest of the Act by necessary intendment invested the Parliament with power to regulate or prohibit appeals to the King in Council *in criminal matters*. In the course of his judgment, Viscount Sankey said at p. 520:

"A most essential part of the administration of justice consists of "the system of appeals. It is not doubted that with the single excep-"tion of what is called the prerogative appeal, that is, the appeal by "special leave given in the Privy Council in London, matters of appeal "from Canadian Courts are within the legislative control of Canada, "that is, of the Dominion or the Provinces, as the case may be."

So that, while the decision in *British Coal Corporation* v. *The King* may be taken to have settled the question of the right of the Dominion Parliament

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(by reason of its exclusive legislative jurisdiction in relation to Criminal Law, including procedure in criminal cases) to prohibit appeals to the King in Council in criminal matters, that decision does not extend to appeals, either as of right or by the exercise of the royal prerogative in relation to classes of subjects, which the British North America Act has assigned exclusively to the Legislatures of the Provinces.

Apart, however, from these considerations and pronouncements it seems to me that it is only necessary to examine ss. 2 of s. 2 of the Statute of Westminster in connection with and in the light of ss. 2 of s. 7 of that Statute to see that s. 3 of the Statute respecting the power of the Parliament of the Dominion to make laws having extra-territorial operation could not reasonably be held to apply to such a matter as the royal prerogative to grant leave to appeal to the Judicial Committee of the Privy Council. Ss. 2 of s. 7 provides that ss. 2 of s. 2 shall extend to laws made by any of the Provinces of Canada and to the powers of the Legislatures of such Provinces. The provisions, therefore, of ss. 2 of s. 2 of the Statute of Westminster enacting that no law and no provision of any law made after the commencement of that Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and that the powers of the Parliament of the Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, insofar as the same is part of the law of the Dominion applies in the same way to laws made by any of the Provinces of Canada and to the powers of the Legislatures of those Provinces as it does to laws made by the Parliament of Canada and to the powers of that Parliament. The power, therefore, to repeal or amend any Act of the Parliament of the United Kingdom or any order, rule or regulation made thereunder, whether such repeal or amendment be made by the Parliament of Canada in relation to matters within its legislative jurisdiction or by the Legislature of any Province in relation to matters within its legislative jurisdiction is expressly limited by the words " insofar as the same is part of the law of the Dominion," i.e., Canada and its several component Provinces.

If the extra-territorial argument is not fully met by what I have already said, it is in my opinion effectually disposed of by reference to ss. 1 and 3 of s. 7 of the Statute of Westminster. The argument on behalf of the Dominion in this regard rests entirely upon the fact that ss. 2 of s. 7, which extends the provisions of ss. 2 of s. 2 to the Legislatures of the Provinces, makes no specific mention of s. 3 relating to the power of the Parliament of the Dominion to make laws having extra-territorial operation. It is claimed that this omission shows conclusively that it was the intention of the Imperial statute to confer some new power upon the Parliament of a Dominion as distinguished from the Legislatures of the Provinces. Ss. 3 of s. 7, however, explicitly enacts that

> " the powers conferred by this Act (including of course that conferred by
> " s. 3) upon the Parliament of Canada or upon the Legislatures of the
> " Provinces shall be restricted to the enactment of laws in relation to

" matters within the competence of the Parliament of Canada or of any " of the Legislatures of the Provinces respectively,"

so that by the operation of this ss. 3 of s. 7 alone s. 3 could not well be held to confer upon the Parliament of Canada any power to make laws in relation to matters, which were not already within its competence at the time of the passing of this Imperial statute. This accords entirely with the principle laid down by Lord MacMillan in delivering the judgment of the Judicial Committee in *Croft* v. *Dunphy* [1933] A.C. at p. 163, in holding that the Parliament of Canada was competent to provide by ss. 151 and 207 of the Customs Act (R.S. Canada 1927, ch. 42 as amended in 1928) that any vessel registered in Canada hovering within twelve miles of Canada having on board dutiable goods, the vessel and her cargo were to be seized and forfeited. Lord MacMillan there said :

" But while the Imperial Parliament may be conceded to possess " such powers of legislation under international law and usage, the " respondent contends that the Parliament of Canada has no such powers. " It is not contested that under the British North America Act the " Dominion legislature has full power to enact customs laws for Canada, " but it is maintained that it is debarred from introducing into such " legislation any provisions designed to operate beyond its shores or " at any rate beyond a marine league from the coast.

" In their Lordships' opinion the Parliament of Canada is not under " any such disability. Once it is found that a particular topic of legis- " lation is among those upon which the Dominion Parliament may com- " petently legislate as being for the peace, order and good government of " Canada or as being one of the specific subjects enumerated in s. 91 of " the British North America Act, their Lordships see no reason to restrict " the permitted scope of such legislation by any other consideration than " is applicable to the legislation of a fully Sovereign State."

Although the Statute of Westminster was then in force and their Lordships' attention was drawn to s. 3, which it was suggested had retrospective effect, their Lordships held in the view which they had taken of that case it was not necessary to say anything on that point beyond observing that the question of the validity of extra-territorial legislation by the Dominion could not at least arise in the future. The decision, however, as I have already intimated, is clearly in line with the express provisions of ss. 3 of s. 7 of the Statute of Westminster, which so explicitly restricts the Parliament of Canada in making laws having extra-territorial operation to matters within its competence. This obviously can only refer to matters within the competence of the Parliament of Canada under the provisions of the British North America Acts, 1867 to 1930, in the light of the provisions of ss. 1 of that section enacting that

" Nothing in this Act shall be deemed to apply to the repeal, amendment " or alteration of the British North America Acts, 1867 to 1930, or any " order, rule or regulation made thereunder."

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Far, then, from conferring any new legislative powers upon the Parliament of Canada in derogation of the legislative powers of its several provinces, the Statute of Westminster plainly preserves the British North America Acts, 1867-1930, intact and, moreover, explicitly restricts the legislative powers of both the Dominion Parliament and the Provincial Legislatures to their respective legislative fields, as prescribed by those Acts.

If I am right in this view it follows that if any authority exists for the enactment of the far-reaching Bill by the Parliament of Canada it must be sought within the four corners of the British North America Act itself.

Now, there are but two sections of that Act which are or possibly can be relied upon to support it or any part of it, viz., ss. 91 and 101.

Dealing first with s. 91, this is the well-known section, which prescribes the general authority of the Parliament of Canada 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. In addition to this general authority, and subject to the express limitation mentioned, it declares that

> " for greater certainty, but not so as to restrict the generality of the " foregoing terms of this section . . . (notwithstanding anything in this " Act) the exclusive legislative authority of the Parliament of Canada " extends to all matters coming within the classes of subjects next " hereinafter enumerated."

Then follows the enumeration of 29 specific classes of subjects.

If the subject matter of this Bill does fall within any of the classes of subjects assigned exclusively to the Legislatures of the Provinces, it seems perfectly clear that the residuary power conferred on the Parliament of Canada by the introductory words of s. 91 to make laws for the peace, order and good government of Canada does not authorise its enactment by that body. Our first duty, therefore, is to determine whether the Bill does or does not relate to matters falling within any of the 16 classes of subjects enumerated in s. 92 as the exclusive legislative prerogative of the Provinces. These 16 classes of subjects include :—

> " 1. The amendment from time to time, notwithstanding anything " in this Act, of the constitution of the Province, except as regards the " office of Lieutenant-Governor.
>
> " 13. Property and civil rights in the province.
>
> " 14. The Administration of Justice in the Province, including the " constitution, maintenance and organisation of Provincial Courts, both " of civil and of criminal jurisdiction, and including procedure in civil " matters in those courts."

That the proposed enactment directly and vitally concerns the administration of justice in all the Provinces of Canada is self-evident. Its avowed purpose is to constitute this court a court " of exclusive ultimate appellate civil and criminal jurisdiction within and for Canada," and to that end, " notwithstanding any Royal prerogative or anything contained in any Act " of the United Kingdom . . . or any Act of the Legislature of any Province

" of Canada " to prohibit all appeals " from any court now or hereafter established within Canada " to the Judicial Committee of His Majesty's Privy Council. How then could it possibly be said that the Bill does not essentially relate to the administration of justice in every Province of the Dominion, or that it is not designed to nullify or render inoperative the laws of all the nine Provinces of Canada, under which appeals now lie directly to that body from provincial courts—both appeals as of right in specified cases, as well as appeals in all other cases in which His Majesty may be advised to grant special leave to appeal thereto ?

Counsel for the Attorney-General of Canada, however, argued that the meaning of the expression " The administration of Justice," as used in enumeration 14, is not only limited territorially by the words " in the Province," but also by the words " including the constitution, maintenance and organ- " isation of Provincial Courts both of civil and of criminal jurisdiction, and " including procedure in civil matters in those courts."

It was never intended, of course, that the laws which s. 92 exclusively empowered the legislature " in each Province " to make in relation to matters coming within the classes of subjects therein enumerated should have any application beyond the limits of the Province in which they are enacted. That fact, however, in no way adds to the residuary power of the Dominion Parliament under the introductory words of s. 91 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," that is to say, to the Legislatures of all the Provinces of Canada alike. Obviously no single Legislature could make laws in relation to the administration of justice in any other than its own Province, but the Legislatures of all the nine Provinces of Canada are indisputably authorised by s. 92 (14) to exclusively make laws in relation to the administration of justice in their several Provinces. The question is, not whether any single Province could legislate in relation to the administration of justice in any other Province, but whether the Dominion Parliament under s. 91 is authorised to make laws in relation to the administration of justice in all the Provinces of Canada alike merely because the Legislature of each Province necessarily can make laws in relation to the administration of justice only in and for its own Province. The answer to such a question, I think, must be No.

As to the argument that the quoted words immediately following narrow and limit the meaning of the general words " The Administration of Justice in the Province," Street, J., in his judgment in *Regina* v. *Bush*, 15 O.R. at p. 403, sitting with Armour, C.J. and Falconbridge, J., in the Ontario Divisional Court in 1888, effectually, I think, disposed of this precise point when he said :

> " But these words (including the constitution . . . of provincial " courts) do not, as I read the clause, in any way limit the scope of the " general words preceding them, by which the whole matter of the ad- " ministration of justice is included. The fundamental weakness of the " defendant's argument appears to be his assumption that the word " ' including ' in this para. 14 is to be read as if it were ' videlicet ' or as

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> " if the words ' The Administration of Justice ' were to be treated, for " the purpose of this discussion, as being entitled to no weight."

His Lordship in the course of this judgment said that para. 14 of s. 92 appeared to him to be sufficient to

> " confer upon the Provincial Legislatures the right to regulate and " provide for the whole machinery connected with the administration of " justice in the Provinces, including the appointment of all the judges " and officers requisite for the proper administration of justice in its " widest sense."

and pointed out that the general, governing words of that paragraph were subject to no other limitation than that to be found in para. 27 of s. 91 (" The " Criminal Law, except the constitution of courts of criminal jurisdiction, " but including procedure in criminal matters ") and that contained in Part VII under the title " Judicature " (ss. 96 to 101 inclusive) relating to the appointment of judges of Superior, District and County Courts and the payment of their salaries and to the authority of Parliament to provide for the constitution, maintenance and organisation of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada. " Everything coming within the " ordinary meaning of the expression ' the administration of justice,' not " covered by (these) sections," he said,

> " remains, in my opinion, to be dealt with by the Provincial Legislatures " in pursuance of the powers conferred upon them by para. 14 of s. 92 " . . . It is clearly the intention of the Act that the Provincial Legis- " latures shall be responsible for the administration of justice within their " respective Provinces, excepting insofar as the duty was cast upon the " Dominion Parliament. The only duty cast upon the Dominion Parlia- " ment in the matter is contained in the clauses to which I have referred."

My Lord the Chief Justice in delivering the unanimous judgment of this court in 1938 in the matter of the Reference concerning the authority of judges and junior and acting judges, etc., to perform the functions vested in them respectively by the Ontario Children's Protection Act and other Acts of the Ontario Legislature expressly approved the judgment of Street, J. in this case and quoted two of the passages I have ventured now to reproduce. Relating as it does so essentially to the Administration of Justice, as that expression is ordinarily understood, in all the Provinces of Canada alike, it is, as I have already indicated, impossible to say that the main purpose and the real subject matter of the proposed enactment now before us does not fall within the classes of subjects, which the British North America Act has assigned exclusively to the Legislatures of the Provinces. For that reason the residuary power of the Dominion Parliament cannot properly be invoked in its support.

This being so, the question remains, as regards s. 91, whether, notwithstanding the fact that the proposed denial of the Royal prerogative to grant direct appeals from all courts in and throughout Canada to the Judicial Committee of His Majesty's Privy Council as well as the proposed abolition

of all direct appeals as of right, for which the laws of all the Provinces now provide, prima facie fall within enumerated head 14 of s. 92, do not also fall within any one of the 29 specific classes of subjects enumerated in s. 91, in which event the power of the Provincial Legislatures would be overborne according to the principle laid down by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* [1881] 7 A.C. 96 at p. 109 ; *Dobie* v. *Temporalities Board* [1881-2] 7 A.C. 136 at p. 149 ; and *Russell* v. *The Queen* [1882] 7 A.C. 829 at p. 836.

In expounding the principle of the pre-eminence of Dominion legislation in cases of conflict between the enumerated heads of ss. 91 and 92, as declared by the *non obstante* clause in the second branch of the former section, Sir Montague Smith in the *Parsons case* pointed out that it was obvious that in some cases where apparent conflict exists it could not have been intended " that the powers exclusively assigned to the Provincial Legislature should be absorbed in those powers given to the Dominion Parliament " . . . " It could not," he said,

> " have been the intention that such a conflict should exist ; and in order " to prevent such a result, the two sections must be read together, and " the language of one interpreted, and, where necessary, modified, by " that of the other. In this way it may in most cases be found possible " to arrive at a reasonable and practical construction of the language of " the sections so as to reconcile the respective powers they contain and " give effect to all of them."

Does then the real subject matter of this Bill fall within any of the classes of subjects specifically enumerated in s. 91 ?

The only one of the 29 enumerated heads of this section having any possible relevancy on this subject is that which has already been mentioned, (27), The Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters. Reading the two sections together and setting 91 (27) against 92 (14), there can be no doubt that the intention was that the exclusive power of the Legislatures to make laws in relation to the " Administration of Justice " should be subject to the exclusive power of the Dominion Parliament to make laws in relation to the Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters, and that with that single exception, so far as s. 91 is concerned, it conferred upon the Dominion no express legislative power in relation to the administration of justice in the Provinces.

While it is true that the decision of the Privy Council in *British Coal Corporation* v. *The King* settled the question that s. 91 invests the Dominion Parliament with the power to regulate or prohibit appeals to the King in Council in criminal matters, that decision, as previously pointed out, manifestly proceeded on the ground that the Criminal Law, including procedure in criminal matters, was specifically placed within its jurisdiction by enumerated head 27. Lord Sankey was careful to say that Their Lordships were in that judgment " dealing only with the legal position in Canada in regard to this type of appeal in criminal matters " and that it was " neither necessary

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nor desirable to touch on the position as regards civil cases." The Parliament of Canada has already by s. 17 of c. 53, 23-24 Geo. V (1933) provided that

> " Notwithstanding any royal prerogative, or anything contained in " the Interpretation Act or in the Supreme Court Act, no appeal shall " be brought in any criminal case from any judgment or order of any " court in Canada to any court of appeal or authority by which in the " United Kingdom appeals or petitions to His Majesty in Council may " be heard."

Indeed, that was the particular enactment, the constitutional validity of which was challenged in the *British Coal Corporation case*, and definitely held by that judgment to be within its legislative competence for the reason above indicated. This fact would seem to make it clear that the presently proposed enactment is directly aimed at the regulation and control of appeals to the Judicial Committee of the Privy Council in all civil cases throughout Canada, regardless of the provisions of any and all existing provincial laws. I have endeavoured to show that this is quite beyond the legislative power vested in the Parliament of Canada by s. 91 of the B.N.A. Act.

This brings me to the more difficult question as to whether justification can be found in s. 101 for the proposal of this Bill to completely do away with all appeals from Canada to the Judicial Committee of His Majesty's Privy Council and to give this court " exclusive, ultimate, appellate and civil and criminal jurisdiction within and for Canada." That this section enacting that the Parliament of Canada may, notwithstanding anything in this Act, provide for the constitution, maintenance and organisation of a General Court of Appeal for Canada, constitutes a further exception to the exclusive power of the Provincial Legislatures to make laws in relation to the Administration of Justice has already appeared. It is not questioned that the unrestricted power to constitute and organise a court necessarily implies power to define its jurisdiction and provide for the regulation of its procedure, nor, of course, that the exercise of such a power directly concerns the administration of justice. The difficulty arises from the fact that while s. 92 vests the exclusive legislative power in relation to the general subject of the administration of justice as well as in relation to civil rights in the Provincial Legislatures, s. 101, notwithstanding that fact, specifically invests the Dominion Parliament with power to constitute and organise a General Court of Appeal for Canada, and that we are again confronted with two apparently conflicting enactments, which must be read together and so interpreted as to give, as far as possible, reasonable and practical effect to each. This, as I take it, is the meaning of Sir Montague Smith's pronouncement above quoted in my discussion of the apparent conflict between ss. 91 and 92 regarding Procedure in Criminal Matters and Administration of Justice in the Provinces, and in my opinion it is quite as applicable to the question now under review, for, as he said, it could not have been intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those powers given to the Dominion Parliament.

It is clear enough that s. 101 must be read as conferring upon the Dominion Parliament whatever legislative authority is necessary to the constitution

and organisation of General Court of Appeal for Canada, no matter to what extent the exercise of such authority may infringe upon the exclusive legislative rights of the Provincial Legislatures as defined in s. 92. Indeed, this court and the Judicial Committee of the Privy Council have both decided, as regards this conflict of legislative authority that the Provincial Legislatures have no authority to limit the right of appeal to this court or in any way impair the jurisdiction conferred upon it by the Supreme Court Act. See *Clarkson* v. *Ryan* 17 S.C.R. (1890) 251 ; *City of Halifax* v. *McLaughlin Carriage Co.* 39 S.C.R. (1907) 174 and *Crown Grain Co. Ltd.* v. *Day* [1908] A.C. 504. An examination of these cases shows that the decisions all proceeded on the ground that, if the Provinces could so legislate, they could take away the jurisdiction of this court entirely and thus virtually defeat the object of its constitution and organisation. No such consideration arises here.

The question with which we are immediately concerned is, not the power to prescribe what type or class of case may be appealed from Provincial courts to this court, but the power, not only to abrogate the Royal prerogative, in respect of the judgments of this court on such appeals, but to abrogate it also in respect of the judgments of all provincial courts, and to abolish as well all per saltum appeals, which now lie to the Judicial Committee of His Majesty's Privy Council under provincial laws, the validity of which has never before been brought into question. Unless such power is necessarily incidental to the constitution, maintenance and organisation of a General Court of Appeal for Canada, I cannot, for my part, see how it can be justified by the terms of s. 101 or any of the cases relied upon by counsel for the Attorney-General of Canada. To hold otherwise would, in my most respectful opinion, be to practically ignore s. 92 (14) as well as s. 92 (13) and virtually transfer to the Dominion Parliament the regulation and control of these two classes of subjects—the most general and important of all the 16 classes of subjects which the B.N.A. Act has marked out as the exclusive legislative jurisdiction of the Provinces—by the simple expedient of amending the Supreme Court of Canada Act and thus placing the final disposition of all litigation in Canada, no matter how important the constitutional and property and civil rights involved may be, in the hands of a court established and exclusively controlled by Dominion legislation, without the long cherished right of recourse to the Crown for the redress of any grievance, which may be suffered by any litigant in connection therewith. Could it fairly be said in reading s. 101 together with s. 92 with a view to give, as far as possible reasonable and practical effect to each, that the Parliament of Canada would be justified by s. 101 in arrogating to itself, as necessarily incidental to the constitution, maintenance and organisation of this court, the power to regulate and control the Administration of Justice, as well as Property and Civil Rights in all the Provinces to such an extent as is proposed in this Bill ?

In discussing the introductory words of s. 91 in delivering the judgment of the Privy Council in the *Board of Commerce case* [1922] 1 A.C. at p. 197, Viscount Haldane said :

> " No doubt the initial words of s. 91 of the British North America
> " Act confer on the Parliament of Canada power to deal with subjects

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" which concern the Dominion generally, provided that they are not " withheld from the powers of that Parliament to legislate, by any of the " express heads in s. 92, untrammelled by the enumeration of special " heads in s. 91. It may well be that the subjects of undue combination " and hoarding are matters in which the Dominion has a great practical " interest. In special circumstances, such as those of a great war, " such an interest might conceivably become of such paramount and " overriding importance as to amount to what lies outside the heads in " s. 92, and is not covered by them. The decision in *Russell* v. *The* " *Queen* [1882] 7 A.C. 829, appears to recognise this as constitutionally " possible, even in time of peace ; but it is quite another matter to say " that under normal circumstances general Canadian policy can justify " interference, on such a scale as the statutes in controversy involve, " with the property and civil rights of the inhabitants of the Provinces. " It is to the legislatures of the Provinces that the regulation and re- " striction of their civil rights have in general been exclusively confided, " and as to these the Provincial Legislatures possess quasi-sovereign " authority. It can, therefore, be only under necessity in highly ex- " ceptional circumstances, such as cannot be assumed to exist in the " present case, that the liberty of the inhabitants of the Provinces may " be restricted by the Parliament of Canada, and that the Dominion can " intervene in the interests of Canada as a whole in questions such as " the present one."

And further, in discussing the question as to whether the Dominion legislation there under consideration fell under s. 91 (27) (The Criminal Law) His Lordship used this language at pp. 198 and 199 :

" It is one thing to construe the words ' the criminal law, except the " constitution of courts of criminal jurisdiction, but including the pro- " cedure in criminal matters,' as enabling the Dominion Parliament to " exercise exclusive legislative power where the subject matter is one which " by its very nature belongs to the domain of criminal jurisprudence, " A general law, to take an example, making incest a crime, belongs to " this class. It is quite another thing, first to attempt to interfere with " a class of subject committed exclusively to the Provincial Legislature, " and then to justify this by enacting ancillary provisions, designated as " new phases of Dominion criminal law which require a title to so inter- " fere as basis of their application. For analogous reasons their Lord- " ships think that s. 101 of the British North America Act, which enables " the Parliament of Canada, notwithstanding anything in the Act, to " provide for the establishment of any additional Courts for the better " administration of the laws of Canada, cannot be read as enabling that " Parliament to trench on Provincial rights, such as the powers over " property and civil rights in the Provinces exclusively conferred on their " Legislatures. Full significance can be attached to the words in question " without reading them as implying such capacity on the part of the " Dominion Parliament. It is essential in such cases that the new " judicial establishment should be a means to some end competent to " the latter."

*The King* v. *Consolidated Distilleries Limited*, S.C.R. (1930) 531, was an appeal from the judgment of Audette, J., of the Exchequer Court, granting a motion made by the defendant appellant as third party to set aside the third party notice on the ground that the issue raised by the third party notice between the original defendant and it was one over which that court had no jurisdiction. This court, Anglin, C.J., and Rinfret, Lamont and Cannon, JJ., Newcombe, J., dissenting, dismissed the appeal on the ground that the matter in controversy between the original defendant and the third party was purely one of exclusive provincial jurisdiction concerning a civil right in one of the Provinces. Anglin, C.J., in delivering the judgment of himself and his three brethren, said :

> " While there can be no doubt that the powers of Parliament under " s. 101 are of an overriding character, when the matter dealt with is " within the legislative jurisdiction of the Parliament of Canada, it " seems equally clear that they do not enable it to set up a court com- " petent to deal with matters purely of civil right as between subject " and subject. While the law, under which the defendant in the present " instance seeks to impose a liability on the third party to indemnify " it by virtue of a contract between them, is a law of Canada in the " sense that it is in force in Canada, it is not a law of Canada in the " sense that it would be competent for the Parliament of Canada to " enact, modify or amend it. The matter is purely one of exclusive " provincial jurisdiction, concerning, as it does, a civil right in some one " of the provinces (s. 92 (13)). "

The really decisive question on this branch of the argument regarding the conflict between the legislative power vested in the Dominion Parliament by s. 101 and that exclusively vested in the Provincial Legislatures by s. 92, as I have already said, is, whether the subject matter of this proposed enactment is comprised in the language of s. 101, as necessarily incidental to the exercise of the power thereby confided to the Dominion Parliament. Reading the section in connection with and in the light of s. 92, as it must be, it is in my opinion our clear duty to so construe it as to interfere as little as possible with the general scheme of the British North America Act regarding the distribution of legislative powers between the Dominion and the Provinces, and thus, while fully safeguarding the overriding legislative powers of the Dominion, insofar as they are explicitly declared, to prevent any undue or unnecessary encroachment upon what s. 92 has so unequivocally declared to be the exclusive legislative powers of the Provinces. This, I take it, to be the true guiding principle when a court is confronted with the duty of endeavouring to arrive at a reasonable and practical solution of a problem of this kind, as deducible from the pronouncement I have above reproduced and many other cases of similar import, which might have been quoted, dealing with apparently conflicting provisions of the British North America Act.

It is contended that the words " to provide for the constitution, maintenance and organisation of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada " necessarily imply power to declare that the judgments of

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these courts shall be absolutely final and conclusive, and, if the Dominion Parliament in its wisdom chooses to say so, unappealable to His Majesty's Privy Council, even by the exercise of the Royal prerogative. Power to constitute a court, it is said, covers power to define its jurisdiction, and this in turn power, not only to prescribe what cases it may hear and determine, but power to declare the consequences and effects of its judgments. If this be true of the power vested in the Dominion Parliament by s. 101 to provide for " the constitution, maintenance and organisation " of the courts therein indicated, must it not also be true of the exclusive power vested in the Provincial Legislatures by s. 92 to make laws in relation to " the constitution, maintenance and organisation " of Provincial courts, whether of civil or of criminal jurisdiction ? Surely it cannot be said that these words have one meaning when applied to any court or courts, which the Dominion Parliament may create, and another meaning when applied to Provincial courts. And I cannot for my part see that there is anything in the context, in which they are used in s. 101, which carries any larger implication than that arising from the context in which they are used in s. 92. Indeed, the contrary would seem to me to be the case. For, in s. 92 they are clearly used to indicate a specific sub-head or subdivision of the larger and more comprehensive class of subjects, viz., the administration of Justice in the Provinces.

The argument that either the general subject of The Administration of Justice in the Province or the constitution, maintenance and organisation of Provincial courts, both of civil and of criminal jurisdiction, is restricted by the additional words " and including procedure in civil matters in those courts " has already been dealt with in discussing the opposing submissions concerning ss. 91 and 92. I may add, however, in relation to the particular point now under consideration as to the conflict between ss. 92 and 101 that the obvious and the only reason, as it seems to me, for the alleged qualification of the general subject of " The Administration of Justice in the Province " by the words which immediately follow in enumeration 14 was to make it conform with s. 91 (27) regarding the general subject of " The Criminal Law." The latter excepts from " The Criminal Law," as a general subject for the exclusive jurisdiction of the Dominion Parliament, " the *constitution* of courts of *criminal* jurisdiction," but includes " *the procedure in criminal matters*," while s. 92 (14) specifically includes the *constitution*, maintenance and organisation of provincial courts, both of civil and of *criminal* jurisdiction, and *procedure in civil matters* in those courts. The clear intention, so far as ss. 91 and 92 are concerned, was to vest exclusive legislative authority in the Provinces over the whole subject of the Administration of Justice therein, subject only to the overriding legislative jurisdiction of the Dominion in relation to the Criminal Law and all matters necessarily incidental thereto (except the constitution of courts of criminal jurisdiction), and to such other encroachments on this general provincial legislative power over the Administration of Justice as might become necessary in order that the Dominion Parliament might legislate effectively in relation to any other one of the 28 other specific subjects assigned to it by s. 91. If I may supplement what I have before suggested as to the basic ground of the decision in the *British*

*Coal Corporation case*, it is obvious that this decision could not have been founded on any implication arising from the Dominion's power to constitute courts of criminal jurisdiction, which latter power is expressly excepted from that in relation to Criminal Law and exclusively vested in the Provinces. Its whole tenor, to my mind, is that it is the specific assignment to the Parliament of Canada by s. 91 (27) of the exclusive legislative jurisdiction in relation to such a general subject as that of " The Criminal Law," in the terms therein stated, which actually or by necessary intendment carries the power to prohibit appeals from provincial courts to His Majesty's Privy Council in criminal matters. Certainly that decision in no way supports the argument that power to constitute any court necessarily implies control of the right of appeal from its adjudications. On the contrary, it seems to me to flatly negative it for the reason just stated, viz., that the control of appeals from provincial courts of criminal jurisdiction in criminal matters is necessarily involved in the Dominion Parliament's exclusive legislative jurisdiction in relation to the general subject of The Criminal Law, notwithstanding that the constitution of courts of criminal jurisdiction is expressly excepted in s. 91 (27) from that general subject. If that be the case, as regards criminal matters, how can it consistently be claimed that the assignment by s. 92 (14) to the Provincial Legislatures of the exclusive legislative jurisdiction in relation to such a general subject as " The Administration of Justice," subject only to the limitations before mentioned, does not invest the Provincial Legislatures with the power to allow or prohibit, as they choose, appeals from the judgments of provincial courts in civil matters ? Only, it seems to me, on one intelligible ground, viz., that, though s. 92 (14) indisputably comprises it, s. 101 takes it away and vests it entirely in the Dominion Parliament. But can the language of s. 101 itself, when read in conjunction with that of ss. 91 and 92, properly be so interpreted ? In my opinion it cannot. The power thereby granted to the Parliament of Canada " notwithstanding anything in this Act," so far as the establishment of a General Court of Appeal for Canada is concerned, is, not only a special power relating to a single court, but is definitely limited to legislation providing for " the constitution, maintenance and organisation " of such a court. While it can readily be understood that this language in association with the non obstante clause must be construed as necessarily entitling the Dominion Parliament to cut into the exclusive legislative jurisdiction of the Provinces over the general subject of the Administration of Justice therein to such an extent as may be necessary to enable this court to fully function as a General Court of Appeal for Canada, and thus to regulate to that extent appeals to this court from provincial courts, that to my mind is the farthest limit to which the words " constitution, maintenance and organisation of a General Court of Appeal for Canada " can reasonably be extended. The section itself says nothing about the finality of the judgments of the court authorised to be constituted or about its " exclusive, ultimate appellate jurisdiction," and certainly contains no suggestion of any power to divest the Crown of its prerogative to grant leave to appeal to the Judicial Committee of the Privy Council, either in respect of its own judgments, or in respect of the judgments of provincial

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courts, nor of any power to repeal or annul any of the laws relating to courts of civil and criminal jurisdiction existing in Canada, Nova Scotia or New Brunswick at the time of the Union, which s. 129 expressly continued in the four original Provinces, as if the Union had not been made, until they should be repealed, abolished or altered either by the Parliament of Canada or by the Legislatures of the respective Provinces, according to the authority of Parliament, or of the Legislatures under that Act. To say that all these things are necessarily implied by the power to constitute such a court itself is to my mind quite inadmissible unless some reason can be found, either in the general scheme of the Act concerning the distribution of legislative authority between the Dominion and the Provinces or in some particular provision thereof, clearly demonstrating that the grant of this special power was so intended. Singularly enough, notwithstanding the argument already dealt with that none of the matters covered by this Bill fall under s. 92 (14) and that consequently they fall under the general residuary power conferred upon the Parliament of Canada by the introductory words of s. 91, s. 92 (14) is now invoked, shorn of its principal subject, for the purpose of attributing the provincial legislative power concerning the whole subject of appeals from the judgments of provincial courts to the words " constitution, maintenance and organisation " of such courts, and thus by enlarging their scope, enlarging that of s. 101. Assuming this to be true of the provincial legislative power under s. 92 (14), where, as the factum in support of the now proposed enactment puts it, the quoted words are in effect qualified and curtailed by the express mention in the context of " procedure in civil matters in those courts," it is urged that " it must *a fortiori* be true of the exclusive, paramount and " plenary legislative power conferred upon the Parliament of Canada by the " corresponding words of s. 101, where they stand unqualified."

This argument simply brings us back to the construction of s. 92 (14), and obviously is founded upon the bald assumption that the only operative part of enumeration 14 is that which immediately follows the principal subject of the Administration of Justice, viz., " the constitution maintenance and organisation of provincial courts both of criminal and civil jurisdiction." Such an assumption has already been shown to be entirely insupportable as manifestly involving the complete absorption of the principal general subject by a lesser, subordinate one, which is only mentioned for the purpose of meeting the exception provided for in s. 91 (27) to the Dominion's exclusive legislative jurisdiction in relation to the general subject of the Criminal Law. That the specification of the lesser subject in no way qualifies or curtails the general subject of the Administration of Justice any more than the specification of procedure in civil matters in those courts qualifies or curtails the subordinate, lesser subject of the constitution, maintenance and organisation of provincial courts seems to me with all respect, to be too clear to require demonstration. The legislative power of the Provinces in relation to the appealability or non-appealability of the judgments of their own courts is derivable in my opinion from the principal general subject of the Administration of Justice, which unmistakably would have comprised that power, had the subordinate subject of the constitution, maintenance and organisation of

provincial courts not been introduced into enumeration 14 for the reason above indicated, not with the words " that is to say," but with the word " including."

The highly ingenious attempt to extend the scope of the power to constitute a court by separating the words " constitution, maintenance and organisation of provincial courts " from their context in s. 92 (14) and thus practically deleting from that section the introductory and really governing words of enumeration 14 must, therefore, fail.

If it had been the intention of the Imperial Parliament, in constituting the Dominion and the Provinces as self-governing units thereof in 1867 and assigning to them their respective legislative rights, to annex to the special power conferred upon the Dominion to constitute this court such sweeping authority as that now insisted upon, is it to be supposed that it would be in the unequivocal language of s. 92 have purported to invest the Provinces with the exclusive power " to make laws in relation to " all the classes of subjects therein enumerated, and then proceed to divest them of all effective control of such a vital subject as the Administration of Justice by merely conferring upon the Dominion Parliament a special power to create a General Court of Appeal for Canada in such language as that used in s. 101, viz., " to provide " for the constitution, maintenance and organisation of a General Court of " Appeal for Canada " ?

While s. 101 undoubtedly clashes to some extent with s. 92 (14), I find it quite impossible to spell out of its language an intention to confer on the Dominion Parliament authority to encroach on the general subject of the Administration of Justice in the Provinces any farther than is reasonably and necessarily incidental to the constitution, maintenance and organisation of a General Court of Appeal for Canada or any other Federal court, which it may from time to time desire to set up for the better administration of its own laws. It surely never could have been intended by the enactment of s. 101 to empower the Dominion Parliament to extinguish the exclusive legislative rights of the Provinces to the extent contemplated by this Bill the enactment of which, if validated upon such grounds as those which have been advanced on this hearing, would practically reduce the important and general subject of the Administration of Justice, as the exclusive legislative prerogative of the Provinces, to the bare matter of procedure in civil matters in provincial courts, and invest the Dominion Parliament with the actual control of the whole litigation of the country, insofar as its final disposition is concerned, without any recourse to the Crown, and this regardless of whether the matters in controversy in such litigation relate to Property and Civil Rights in the Provinces, to the Constitution of the Provinces themselves, to Taxation for Provincial Purposes or any other of the sixteen classes of subjects exclusively assigned to the legislative competence of the Provinces, subject only to the exceptions already indicated.

For these reasons I am of opinion with all possible respect that what is described in the factum of counsel representing the Attorney-General of Canada as " the cardinal object " of this Bill, viz, the total and indiscriminate prohibition of appeals from all courts now or hereafter established within

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Canada to the Judicial Committee of His Majesty's Privy Council as a necessary means to accomplish the end of constituting this court a court of exclusive, ultimate, appellate, civil and criminal jurisdiction, without any recourse to the Crown, is not embraced within the legislative power confided to the Parliament of Canada, either expressly or by necessary implication, by the terms either of s. 91 or those of s. 101 of the British North America Act, and that Bill No. 9 should therefore be declared to be wholly ultra vires of the Parliament of Canada as seeking in the form of an amendment of the Supreme Court Act to extend the prohibition, which that Parliament has already applied against appeals in criminal cases by s. 17 of ch. 53, 23-24 Geo. V in amendment of the Criminal Code, and in the exercise of its exclusive legislative jurisdiction in relation to Criminal Law, to appeals in all civil cases from this and all other courts throughout the Dominion, regardless of whether such civil cases concern matters, which fall within the legislative powers granted it by s. 91 or not.

The Bill being one, the avowed object of which must fail unless every one of its provisions is intra vires of the Parliament of Canada, to which it has been presented for enactment, and it being impossible for the reason just stated to sever the valid from the invalid parts thereof beyond the general lines I have endeavoured in these reasons to make clear without completely recasting its material provisions, I most respectfully am of opinion that for these reasons, and in accordance with rule laid down in *Attorney-General for Ontario* v. *Reciprocal Insurers* [1924] A.C. at p. 346, and re-affirmed in *Attorney-General for Manitoba* v. *Attorney-General for Canada* [1925] A.C. at p. 568, the Bill must be pronounced ultra vires of the Parliament of Canada in its entirety.

My answer, therefore, to the question referred is that the Bill is wholly ultra vires of the Parliament of Canada.

(D) Davis J. (D) DAVIS J. :

In the submission by the Governor-General in Council for the opinion of this Court as to the competence of the Dominion Parliament to enact Bill No. 9, in whole or in part, the real question and it is a question of the greatest constitutional importance in Canada, is whether or not in civil cases the Dominion Parliament has the power to abolish the right of appeal to the Judicial Committee of the Privy Council from any of the courts in Canada (i.e., courts whether created by the Dominion or by the provinces) and to abolish the prerogative in such cases to grant special leave to appeal from any such courts.

The question of the power of the Dominion Parliament in criminal cases to abolish appeals was raised and determined by the Judicial Committee in the *British Coal Corporation case* [1935] A.C. 500. That decision sustained the constitutional validity of an amendment made by the Dominion Parliament to the Criminal Code in 1933 (23-24 Geo. V, ch. 53, sec. 17) which reads as follows :

" Notwithstanding any royal prerogative, or anything contained in
" the Interpretation Act or in the Supreme Court Act, no appeal shall be

" brought in any criminal case from any judgment or order of any court " in Canada to any court of appeal or authority by which in the United " Kingdom appeals or petitions to His Majesty in Council may be " heard."

While it is always material in considering constitutional powers to ascertain the origin and development of the constitution and to examine the decisions of the courts on its interpretation, it would be inutile for me to attempt to traverse again the difficult territory which their Lordships in the Privy Council have so fully explored in their judgments in the *Nadan case* [1926] A.C. 482, in the *Irish Free State case* [1935] A.C. 484, or in the *British Coal Corporation case.* It is sufficient to say that these cases were examined and discussed at length during the argument and have been very carefully considered. The judgments are fully reported and any attempt to summarise them might only mislead. But I would venture to make the observation that it is plain from those decisions that—

(1) before the passing of the Statute of Westminster 1931 it was not competent to the Dominion to pass an Act repugnant to an Imperial Act,

(2) the effect of the Statute of Westminster was to remove the fetters which lay upon the Dominion by reason of the Colonial Laws Validity Act and by sec. 129 of the British North America Act and also by the principle or rule that the Dominion's powers were limited by the doctrine forbidding extra-territorial legislation, and

(3) whatever might be the position of the King's prerogative if it were left as matter of the common law, it may by appropriate action be made matter of Parliamentary legislation so that the prerogative is pro tanto merged in the statute.

We cannot escape from the conclusion that in the *British Coal Corporation case* once the former limitations which had restrained legislative action by the Dominion were recognised as now removed by the Statute of Westminster, the judgment rests upon the fact that criminal law is one of the enumerated heads of sec. 91 of the British North America Act which section sets forth specific subject-matters of legislation which lie exclusively within the competence of the Dominion Parliament. It is to be observed that the validated legislation prohibited an appeal in any criminal case " from any judgment or order of any court in Canada." That being the decision, and binding upon us, the same result necessarily follows in respect of any such Dominion legislation in relation to matters properly within any of the other specific subjects enumerated in said sec. 91 or within the general power of the Dominion Parliament to make laws for the peace, order and good government of Canada. As was said by Lord Macmillan in the Privy Council in *Croft* v. *Dunphy* [1933] A.C. p. 156, at p. 163 :

" Once it is found that a particular topic of legislation is among those " upon which the Dominion Parliament may competently legislate as " being for the peace, order and good government of Canada or as being " one of the specific subjects enumerated in sec. 91 of the British North

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" America Act, their Lordships see no reason to restrict the permitted " scope of such legislation by any other consideration than is applicable " to the legislation of a fully Sovereign State."

We were invited to say that head 14 of sec. 92, " The administration of " justice in the province, including the constitution, maintenance and organ- " isation of provincial courts, both of civil and of criminal jurisdiction, and " including procedure in civil matters in those courts," controls the solution of the problem. The proposed abolition of appeals to the Privy Council is not however legislation in relation to the administration of justice " in the province." Nor can head 13 of sec. 92 " Property and civil rights in the province," be regarded as controlling the Dominion power in relation to matters within the exclusive legislative authority of the Parliament of Canada.

As to appeals in admiralty. The whole subject of admiralty jurisdiction has stood upon a special footing of its own. Whatever may have been the limitations on the Dominion power (prior to the Statute of Westminster) under the Colonial Courts of Admiralty Act 1890, see the *Woron case* [1927] A.C. 906, there never was any doubt that admiralty was not a provincial matter. As early as 1879 this Court held in *The Picton*, 4 S.C.R. 648, that the Dominion legislation 40 Vic. (1877), chap. 21, creating a " Court of Maritime Jurisdiction in the Province of Ontario " was intra vires the Dominion Parliament. In 1934, the Dominion Parliament by the Admiralty Act, 1934 (24-25 Geo. V, chap 31) repealed the " Colonial Courts of Admiralty Act 1890 " in so far as the latter Act was part of the law of Canada, with the exception of the provisions relating to appeals to His Majesty in Council. Legislation abolishing appeals or the prerogative to grant special leave in relation to admiralty matters in Canadian courts stands in the same position as do those subjects specifically enumerated in sec. 91.

Apart then from the power of the Dominion Parliament to abolish any right of appeal to the Privy Council and to abolish the prerogative to grant special leave to appeal in civil cases coming within any of the above mentioned classes, there remains the question whether there is any such right in relation to the specific subject-matters enumerated in sec. 92 of the British North America Act—subject-matters over which the provincial legislatures are given exclusive legislative authority. It is fundamental in the Canadian Constitution and has always been recognised as fundamental that the authority of the legislatures of the provinces is

> " as plenary and as ample within the limits prescribed by sec. 92 as the " Imperial Parliament in the plenitude of its power possessed and could " bestow,"

as was said as early as 1883 in *Hodge* v. *The Queen*, 9 App. cas. 117, 132, the principle has been recognised over and over again and particularly, for our present purposes in the *British Coal Corporation case* [1935] A.C., at p. 518.

The Statute of Westminster does not make it competent to the Dominion to legislate in relation to classes of subjects which before the statute were outside its competence (such, for example, as " Property and civil rights in the province," head 13, and " All matters of a merely local or private nature

in the province," head 16, of sec. 92). The assigned limits of subject and area under the *British North America Act*, as between the Dominion and the provinces, are not disturbed. The true character and position of the provincial legislatures remain and ought to be given full recognition.

Sec. 101 of the *British North America Act*, which enables the Dominion Parliament to provide for the constitution, maintenance and organisation of " a general court of appeal for Canada," cannot in my opinion be so interpreted as to extend power to the Parliament of Canada to make the jurisdiction of such court exclusive and final in relation to subject-matters which are within the sole legislative authority of the provincial legislatures.

There may be some difficulty at times in working out a division of legislative authority in appeals in civil cases but that is inherent in the practical working out of any federal system with a division of legislative powers between the central and the local legislating bodies.

It is inadvisable and indeed unnecessary to consider what powers may be possessed in the relevant regard by the legislatures of the Provinces; it is sufficient for the purpose of the question submitted to the Court to determine only the powers of the Dominion Parliament itself.

I would answer the question submitted by saying that the Bill if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

(E) KERWIN J.: (E) Kerwin J.

By Bill No. 9, introduced and read a first time in the House of Commons in the fourth session of the eighteenth Parliament of Canada, it was proposed to repeal section 54 of the Supreme Court Act, R.S.C. 1927, chapter 35, and substitute a new section therefor. This Court was established under the power conferred by the following section (101) of the British North America Act 1867 (hereafter referred to as the Act):—

> " The Parliament of Canada may, notwithstanding anything in this " Act, from Time to Time, provide for the Constitution, Maintenance and " Organisation of a General Court of Appeal for Canada, and for the " Establishment of any additional Courts for the better Administration of " the Laws of Canada."

The present Supreme Court Act continues this Court as a general court of appeal for Canada, and section 54 provides:—

> " The judgment of the Court shall, in all cases, be final and conclusive, " and no appeal shall be brought from any judgment or order of the " Court to any court of appeal established by the Parliament of Great " Britain and Ireland, by which appeals or petitions to His Majesty in

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" Council may be ordered to be heard, saving any right which His Majesty " may be graciously pleased to exercise by virtue of his royal prerogative."

The primary object of the Bill is set forth in the first subsection of the proposed new section 54 :—

" (1) The Supreme Court shall have, hold and exercise exclusive " ultimate appellate civil and criminal jurisdiction within and for Canada ; " and the judgment of the Court shall, in all cases, be final and con- " clusive."

It is undoubted that the effect of this and the other provisions of the new section would be to confer upon this Court not only appellate jurisdiction but exclusive and ultimate appellate civil and criminal jurisdiction within and for Canada, and to abolish any right of His Majesty in Council to entertain appeals from any Court within Canada now or hereafter established whether by Dominion or Provincial authority.

In *British Coal Corporation* v. *The King* [1935] A.C. 500, the Judicial Committee of the Privy Council determined that Parliament had effectively and validly abolished appeals in criminal cases to His Majesty in Council from any judgment or order of any court in Canada, by enacting in 1933, after the coming in force of the Statute of Westminster 1931 the following, as subsection 4 of section 1025 of the Criminal Code :—

" 4. Notwithstanding any royal prerogative or anything contained " in the Interpretation Act or in the Supreme Court Act, no appeal shall " be brought in any criminal case from any judgment or order of any " Court in Canada to any Court of Appeal or authority by which in the " United Kingdom appeals or petitions to His Majesty in Council may " be heard."

In substance, the question now submitted by the Governor-General in Council for our opinion, is whether a similar power exists as regards civil cases.

It will be convenient to investigate at the outset the position of appeals from Dominion Courts, that is, the Supreme Court of Canada and those additional Courts for the better administration of the laws of Canada, which Parliament may constitute. This inquiry resolves itself into two heads, (*a*) the prerogative right of the Sovereign in Council to grant special leave to appeal from judgments of Dominion Courts and (*b*) the power, if any, to appeal therefrom as of right. As applicable to both heads, it is of importance to recollect that in *Crown Grain Company Limited* v. *Day* [1908] A.C. 504, it was determined that a provincial legislature could not circumscribe the appellate jurisdiction of this Court by attempting to make the judgment of a Provincial Court final in cases where the Supreme Court Act permitted an appeal ; and that, notwithstanding the subject matter of the litigation was within the domain of provincial legislation.

Firstly then as to the prerogative right of the Sovereign in Council to grant special leave to appeal. While appeals in civil cases, either de jure or by grace, were not in question and were, therefore, not considered in the *British Coal Corporation case*, their Lordships did state the present position of the prerogative right in general. They explained that in early days " it

" was to the King that any subject who had failed to get justice in the King's " Court brought his petition for redress." So far as English Courts were concerned, this practice was altered whereby such petitions were brought to the King in Parliament or to the King in his Chancery, but from the Courts of the Plantations or Colonies, the petition went to the King in Council. This jurisdiction or prerogative right was settled and regulated by the Imperial Parliament in the Privy Council Acts of 1833 and 1844 and as a result, as their Lordships pointed out (page 512) :—

" Although in form the appeal was still to the King in Council, it " was so in form only and became in truth an appeal to the Judicial " Committee, which as such exercised as a Court of Law in reality, though " not in name, the residual prerogative of the King in Council. No " doubt it was the order of the King in Council which gave effect to their " reports, but that order was in no sense other than in form either the " King's personal order or the order of the general body of the Privy " Council."

That is, the Sovereign, by and with the consent of the Lords Spiritual and Temporal, and Commons in Parliament Assembled, through the instrumentality of Imperial Statutes transferred the prerogative right to the Judicial Committee of the Privy Council. It therefore follows that in these matters the Sovereign has no personal discretion whatever and that under constitutional usage His Majesty in Council may not decline to give effect to the Judicial Committee's recommendations.

Prior to the passing of the Statute of Westminster 1931, the proper body to abolish the right, as settled and fixed by the Judicial Committee Acts referred to, to grant leave to appeal in a civil case from a decision of a Dominion Court would have been the Imperial Parliament, but in my opinion that statute affords a complete answer to the first branch of the pending inquiry. The statute followed upon a series of declarations and resolutions set forth in the reports of the Imperial Conferences of 1926 and 1930 and according to one of the recitals of the statute, its enactment was deemed necessary " for " the ratifying, confirming and establishing of certain of the said declarations " and resolutions of the said Conferences that a law be made and enacted in " due form by authority of the Parliament of the United Kingdom."

In truth the statute embodies in legislative form the established constitutional position of the members of the British Commonwealth of Nations with respect to several matters. For present purposes, only sections 2 and 3 need be referred to :—

" 2. (1) The Colonial Laws Validity Act, 1865, shall not apply to " any law made after the commencement of this Act by the Parliament of " a Dominion.

" (2) No law and no provision of any law made after the commence- " ment of this Act by the Parliament of a Dominion shall be void or " inoperative on the ground that it is repugnant to the law of England, " or to the provisions of any existing or future Act of Parliament of the " United Kingdom, or to any order, rule or regulation made under any

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" such Act, and the powers of the Parliament of a Dominion shall include " the power to repeal or amend any such Act, order, rule or regulation " in so far as the same is part of the law of the Dominion.

" 3. It is hereby declared and enacted that the Parliament of a " Dominion has full power to make laws having extra-territorial opera- " tion."

By the Colonial Laws Validity Act, 1865, it was declared that the law of any colony should be void to the extent that it was repugnant to any Act of the Imperial Parliament extending to the colony or any order or regulation made under such Act, but by subsection 1 of section 2 of the Statute of Westminster, the Colonial Laws Validity Act is not to apply to any law passed after the commencement of the statute by the Parliament of the Dominion. The meaning of subsection 2 is beyond question. In view of several expressions of opinion by the highest authorities, it is perhaps unnecessary to call in aid the provisions of section 3 but certainly the combined effect of sections 2 and 3 is to remove the fetters that previously prevented Parliament from abolishing the right of the Judicial Committee to grant leave to appeal from a judgment of a Dominion Court. In view of the plain wording of section 101 of the Act, the provinces enjoyed no such powers, and the reasoning and conclusion in the *British Coal Corporation case* that that Act invests Parliament with the power by necessary intendment, applies equally to civil as to criminal cases.

With reference to the second branch of the inquiry, my opinion is that Parliament has the power to prohibit appeals as of right from any Dominion Court. In view of the grant and growth of self government in the Dominion, and subject to the special position of appeals in Admiralty to be mentioned later, this power existed and was recognised even before the Statute of Westminster. As stated in the *British Coal Corporation case* (page 520): " It is " not doubted that with the single exception of what is called the prerogative " appeal, that is, the appeal by special leave given in the Privy Council in " London, matters of appeal from Canadian Courts are within the legislative " control of Canada, that is of the Dominion or the Provinces as the case " may be." For the same reason that has been adverted to when considering the right to grant leave to appeal, the provinces have no power to prevent Parliament abolishing appeals as of right from Dominion Courts and the necessary authority therefore resides in Parliament.

Appeals in Admiralty require a more detailed investigation. The Exchequer Court of Canada, organised under the provisions of section 101 of the Act, was by a Canadian statute declared to be a Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890. By subsection 1 of section 6 of this last mentioned statute: " The appeal from a judgment of any Court " in a British possession in the exercise of the jurisdiction conferred by this " Act, either where there is, as of right, no local appeal or after a decision on " local appeal, lies to Her Majesty the Queen in Council "; and by section 15 the expression " local appeal " means " an appeal to any Court inferior to Her Majesty in Council." In *Richelieu and Ontario Navigation Company* v. *Owners of S.S.* " *Cape Breton* " [1907] A.C. 112, it was decided that by virtue of the Colonial Courts of Admiralty Act, 1890, an appeal as of right could be

brought from a decision of this Court varying, on appeal, a judgment of a Local Judge in Admiralty. Following the enactment of the Statute of Westminster, 1931, and particularly in view not only of sections 2 and 3 but also 5 and 6 of that statute, Parliament passed The Admiralty Act, 1934, chapter 31, establishing an Admiralty jurisdiction in the Exchequer Court. Sections 34 and 35 thereof provide :—

" 34. Notwithstanding anything in this Act contained, the pro-
" visions of any law now in force in Canada providing for an appeal to
" His Majesty the King in Council in Admiralty matters shall continue
" to be in force and shall be deemed not to have been repealed.

" 35. Saving the effect of the immediately preceding section, the
" Colonial Courts of Admiralty Act, 1890, chapter twenty-seven of the
" Acts of the United Kingdom for the year 1890, is repealed in so far as
" the said Act is part of the law of Canada."

So that, as Dominion legislation stands, a suitor may still appeal as of right from a decision of this Court rendered upon appeal from the Exchequer Court on its Admiralty side. By Bill No. 9 this appeal would be abolished.

The ingenious contention is that as Parliament by The Admiralty Act, 1934, had repealed the Colonial Courts of Admiralty Act, 1890, (with the exception noted), it thereby lost its jurisdiction in Admiralty, which, it is argued, was derived solely from the repealed Act. But that overlooks the fact that Parliament has jurisdiction under head 10 of section 91 of the Act over the subject matter of " Navigation and Shipping " and that it could, therefore, invest the Exchequer Court with jurisdiction over actions and suits in relation to that subject matter (*Consolidated Distilleries Limited* v. *The King* [1933] A.C. 508, at page 522). The limitations upon the exercise of its powers under head 10 of section 91 and the peace, order and good government clause imposed by the Colonial Laws Validity Act 1865 and the Colonial Courts of Admiralty Act 1890 having been removed by the Statute of Westminster, Parliament is now clothed with the same ample authority to abolish appeals as of right in Admiralty cases as it possesses with respect to appeals in civil cases generally from Dominion Courts.

Attention must now be directed to the problem as to whether Parliament has the requisite authority to abolish appeals as of right, or to abrogate the right of His Majesty in Council to grant leave to appeal, from decisions of Provincial Courts. Section 129 of the Act reads :—

" 129. Except as otherwise provided by this Act, all laws in force in
" Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of
" Civil and Criminal Jurisdiction, and all legal Commissions, Powers and
" authorities, and all Officers, Judicial, Administrative, and Ministerial,
" existing therein at the Union, shall continue in Ontario, Quebec, Nova
" Scotia, and New Brunswick respectively, as if the Union had not been
" made ; subject nevertheless (except with respect to such as are enacted
" by or exist under Acts of the Parliament of Great Britain or of the
" Parliament of the United Kingdom of Great Britain and Ireland), to
" be repealed, abolished, or altered by the Parliament of Canada, or by

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" the Legislature of the respective Province, according to the Authority " of the Parliament or of that Legislature under this Act."

All laws in force on July 1st, 1867, in the four named provinces were by this section continued therein subject to the exception and proviso. By appropriate legislation or Imperial order in council the section was made to apply to each of the other provinces as of the date of its entry into the Union. It would therefore appear convenient to ascertain what laws touching appeals were in force in the nine provinces on the relevant dates :

Ontario and Quebec.

The Constitutional Act, 1791, divided the old Province of Quebec into Upper and Lower Canada. Section 34 provided :—

" XXXIV. And whereas by an Ordinance passed in the Province " of Quebec, the Governor and Council of the said Province were con- " stituted a Court of Civil Jurisdiction, for hearing and determining " Appeals in certain Cases therein specified, be it further enacted by the " Authority aforesaid That the Governor, or Lieutenant-Governor, or " Person administering the Government of each of the said Provinces " respectively, together with such executive Council as shall be appointed " by His Majesty for the Affairs of such Province shall be a Court of Civil " Jurisdiction within each of the said Provinces respectively for hearing " and determining Appeals within the same, in the like Cases, and in the " like Manner and Form, and subject to such Appeal therefrom, as such " Appeals might before the passing of this Act have been heard and " determined by the Governor and Council of the Province of Quebec ; " but subject nevertheless to such further or other Provisions as may be " made in this behalf, by Any act of the Legislative Council and Assembly " of either of the said Provinces respectively assented to by His Majesty, " His Heirs or Successors."

The important part of this section for our present purpose is the proviso at the end. The power thereby conferred was exercised in Upper Canada by chapter 2 of the Statutes of 1794, and in Lower Canada by chapter 6 of the statutes of the same year.

By virtue of section 46 of the Act of Union, 1840 (Imperial), these enactments were continued in force subject to being varied by legislation of the Provinces of Canada. Such legislation was duly passed so that when the Act was passed in 1867 there were in force chapter 13 of the Statutes of 1859 providing for appeals as of right in Upper Canada, and chapter 77 of the Statutes of 1861, and section 1178 of the Code of Civil Procedure 1867, providing for appeals as of right in Lower Canada. In each province the right of appeal was limited to certain cases.

Nova Scotia.

Except possibly for the period 1861 to 1863, either the commissions or instructions issued to the Governors of the Province of Nova Scotia, from time to time, contained regulations providing for an appeal to the Sovereign in Council. By an Imperial order in council of 1863 authority was conferred

upon the Supreme Court of the Province to grant leave to appeal in certain cases, but the right of Her Majesty to admit an appeal in any case, upon special petition, was expressly reserved. At the time of Union, therefore, there existed in Nova Scotia under an Imperial order in council, the right, by leave of the Provincial Supreme Court, to appeal de jure in certain cases, and the right of the Sovereign in Council in any case to give leave to appeal as of grace.

New Brunswick.

Appeals from the Supreme Court of New Brunswick were provided for and regulated by an Imperial order in council dated November 27th, 1852. In all relevant respects it corresponded to the order in council of 1863 relating to Nova Scotia.

Manitoba.

On June 3rd, 1870, under the relevant provisions of the Act, an order in council admitted Rupert's Land and the Northwestern Territory into the Union. In anticipation of this step the Dominion Parliament had already passed The Manitoba Act in the same year, carving out of the newly admitted lands the Province of Manitoba. Any doubt as to the power of Parliament so to do was removed by the British North America Act of 1871. No order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories.

British Columbia.

An Imperial Statute of 1839, chapter 48, authorised Her Majesty from time to time to make provision for the administration of justice in Vancouver's Island, and for that purpose to constitute such Court or Courts of Record and other Courts as she should think fit. Section 3 enacted :—

> " III. Provided always, and be it enacted, That all Judgments given " in any Civil Suit in the said Island shall be subject to Appeal to Her " Majesty in Council, in the Manner and subject to the Regulations in " and subject to which Appeals are now brought from the Civil Courts " of Canada, and to such further or other Regulations as Her Majesty " with the Advice of Her Privy Council shall from Time to Time appoint."

Pursuant to this Act, an Imperial order in council of April 4, 1856, established a Supreme Court of Civil Justice of the Colony of Vancouver's Island, provided for an appeal to Her Majesty in Council in certain cases and preserved Her Majesty's prerogative right to grant leave to appeal in any case.

In 1858 the Colony of British Columbia (excluding Vancouver Island) was established by 21-22 Victoria, chapter 99 (Imperial), section 5 whereof, relating to appeals to Her Majesty in Council, corresponds to section 3 of the Act providing for the administration of justice in Vancouver's Island.

On November 19th, 1866, the Colony of Vancouver Island was united to the Colony of British Columbia under the name of " British Columbia " by a proclamation issued pursuant to 29-30 Victoria, chapter 66 (Imperial). This statute enacted that the laws in force in the separate colonies should be

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retained until otherwise provided by lawful authority, and the powers of Her Majesty in Council were left unaffected by anything in the statute.

Pursuant to an Imperial order in council, the Colony of British Columbia entered Confederation as of July 20th, 1871, at which date appeals from British Columbia Courts would appear to be subject to the same terms and regulations as applied to appeals from Ontario and Quebec.

Prince Edward Island.

In Prince Edward Island a system of courts was established under the authority of the instructions issued to the Governors of the Province, which instructions also provided for an appeal to Her Majesty in Council in certain circumstances.

No order in council was issued regulating these appeals down to July 1st, 1873, as of which date the Province joined Confederation. Since only laws that were in force at that time were continued, the Common Law Procedure Act, 1873, passed by the General Assembly of the Province on June 14th, 1873, would appear to have no relevancy as by its terms it was not to come into operation until January 1st, 1874. In any event, it is understood that the Judges of the Provincial Supreme Court did not exercise the powers conferred upon them by section 158 of the 1873 Act to make rules and regulations " directing the mode of procedure, either pro hac vice, or generally, " as may be required, and as may not be inconsistent with the Royal instruc- " tions and the rules and mode of procedure of the Judicial Committee of the " Privy Council."

Alberta and Saskatchewan.

The British North America Act of 1871 conferred upon Parliament the power to establish new provinces in any territories forming part of the Dominion, and accordingly, by Dominion Acts of 1905, the Provinces of Alberta and Saskatchewan were constituted as of September 1st of that year. It has been mentioned previously, when speaking of Manitoba, that no order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories (out of which these two provinces were formed).

These being the laws with respect to appeals to His Majesty in Council, in force in the several provinces as of the date of their entry into the Union, it may be stated that subsequent thereto appeals were regulated by Imperial orders in council passed with respect to British Columbia in 1887, Manitoba in 1892, and finally with respect to each province except Ontario and Quebec in 1910 and 1911, " with a view of equalising as far as may be " the conditions under which Her Majesty's subjects in the British Dominions " beyond the Seas shall have a right of appeal to Her Majesty in Council."

It is now necessary to revert to the provisions of section 129 of the Act. By virtue of that part of the section which appears in brackets, all such laws, that were enacted by or existed under Imperial Acts, could not be repealed, abolished or altered either by Parliament or by the Provincial Legislatures; if they were not of that description, they might be repealed, abolished or altered by the proper legislative body " according to the authority of the Parliament or of that Legislature under this Act." Primarily, it is contended

that these laws fall in the second division and that the Provincial Legislatures have the required authority under the Act ; in the alternative it is contended that, if they fall within the first division, the effect of sections 2 and 7 of the Statute of Westminster is to invest the legislatures with the necessary power.

The alternative argument may first be noticed. Section 2 of the Statute of Westminster has already been referred to ; section 7 is as follows :—

" 7.—(1) Nothing in this Act shall be deemed to apply to the repeal, " amendment or alteration of the British North America Acts, 1867 to " 1930, or any order, rule or regulation made thereunder.

" (2) The provisions of section two of this Act shall extend to laws " made by any of the Provinces of Canada and to the powers of the " legislatures of such Provinces.

" (3) The powers conferred by this Act upon the Parliament of " Canada or upon the legislatures of the Provinces shall be restricted to " the enactment of laws in relation to matters within the competence " of the Parliament of Canada or of any of the legislatures of the Pro- " vinces respectively."

The effect of subsection 2 of section 7 is that the Colonial Laws Validity Act, 1865, will not apply to any law made after the commencement of the statute by the legislature of a province, and that no law so made will be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under such Act, and the powers of a Provincial Legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the province. Subsection 2 must, of course, be read in conjunction with the other subsections and in my opinion the proper construction of section 7, upon a consideration of all its provisions, requires that a province or the Dominion be restricted to the powers of legislation conferred upon the Legislature or Parliament, as the case may be, by the Act. The Statute of Westminster does not enlarge the classes of subjects within which fall those matters in relation to which Parliament or a legislature may make laws. If, but for the Colonial Laws Validity Act, 1865, or any other Imperial Act applying to the Dominion, a Provincial Legislature would have been empowered by the Act to legislate upon a given matter, the restrictions imposed by those statutes are removed by the Statute of Westminster, but no alteration is made in the division of subjects between the two authorities. It must also be borne in mind that while by section 3 of the Statute of Westminster the doctrine prohibiting extra-territorial legislation ceased to apply to Parliament, that section, unlike section 2, was not made applicable to the Provincial Legislatures.

The summaries of the laws in force in each of the provinces at the relevant dates demonstrate that, except in the cases of Ontario and Quebec, and possibly British Columbia, they existed by virtue of the Judicial Committee Acts of 1833 and 1844 or Imperial orders in council passed in pursuance

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thereof. They, therefore, fall within that part of section 129 that appears in brackets, and for the reasons given immediately above may not be repealed, abolished or altered by the Provincial Legislatures unless these bodies already possess the necessary power under the Act.

This brings us to a consideration of the first contention. It is said generally on behalf of all those provinces that deny the jurisdiction of Parliament to enact the provisions of Bill 9, that their legislatures have the necessary authority under one of three heads of section 92 of the Act :—

" 1. The Amendment from Time to Time, notwithstanding anything " in this Act, of the Constitution of the Province, except as regards the " Office of Lieutenant-Governor.

" 13. Property and Civil Rights in the Province.

" 14. The Administration of Justice in the Province, including the " Constitution, Maintenance, and Organisation of Provincial Courts, both " of Civil and of Criminal Jurisdiction, and including Procedure in Civil " Matters in those Courts."

Taking these in reverse order, it will be noticed that by the very terms of head 14, the administration of justice is confined to the provinces, the Courts which the Provincial Legislatures are authorised to constitute, maintain and organise are Provincial Courts, and the procedure in civil matters is confined to procedure in those, i.e., Provincial Courts. At page 520 of the judgment in the *British Coal Corporation case* appears a statement, already set out, which together with the preceding sentence is relied upon by the provinces. It seems advisable to reproduce the entire passage : " A most essential part " of the administration of justice consists of the system of appeals. It is " not doubted that with the single exception of what is called the prerogative " appeal, that is, the appeal by special leave given in the Privy Council in " London, matters of appeal from Canadian Courts are within the legislative " control of Canada that is of the Dominion or of the provinces as the case " may be."

One argument based upon this passage is that the reference to the provinces would have been unnecessary if their Lordships had not felt that authority to deal with appeals here under review was in the provincial domain. But their Lordships pointed out at the end of the judgment that they had been dealing only with the legal position in Canada in regard to appeals in criminal matters and that it was neither necessary nor desirable to touch on the position as regards civil cases. There must always be kept in mind the particular thing with which a judgment is dealing. The difficulty of discovering language applicable only to particular circumstances is shown by the fact that if one's attention is confined to the sentence in the *British Coal* judgment preceding the passage quoted above, it would appear as if it were categorically stated that the power to constitute law courts and regulate their procedure was by the Act vested only in the Dominion Legislature ; whereas it is well-known, and the succeeding part of the judgment indicates, that certain powers with reference to the law courts are vested in the provinces.

The second argument, founded upon the first sentence in this passage, is that the phrase in head 14 of section 92, " administration of justice," con-

ferred the power upon the Legislatures to establish and regulate a system of appeals. Now it has been made clear in the *Crown Grain case* that the administration of justice, confined as it is to the provinces, is certainly not sufficient to permit the legislatures to deal with appeals from the Provincial Courts to the Supreme Court of Canada, and the proper conclusion appears to be that His Majesty in Council or the Judicial Committee cannot in any sense of the term be deemed " Provincial Courts " and that the legislatures are still territorially restricted.

As to head 13, while the right to launch an appeal to His Majesty in Council may be said to be a right in the province since a litigant in the Provincial Courts is either a resident of the province or has attorned to the jurisdiction, the effective part of the proceeding is the hearing and determination of the appeal ; and as to these, it cannot be said that they are rights in the province. It follows, I think, from the decision in *Brassard* v. *Smith* [1925] A.C. 371, that unless all the elements of the right exists in the province, head 13 can have no application.

In truth, if the provinces have not power under head 14, it is difficult to see how head 13 can have any application. As Viscount Haldane stated in *John Deere Plow Company, Limited,* v. *Wharton* [1915] A.C. 330 at page 340 : " The expression ' civil rights in the Province ' is a very wide one, extending, " if interpreted literally, to much of the field of the other heads of s. 92 and " also to much of the field of s. 91. But the expression cannot be so inter- " preted and it must be regarded as excluding cases expressly dealt with " elsewhere in the two sections, notwithstanding the generality of the words." With reference to the subject matter of the appeal in that case, His Lordship had already pointed out that unless heads 11 and 13 were read disjunctively the limitation in the former, " the incorporation of companies with provincial objects," would be nugatory. Similarly in the present instance, the limitation " in the province " in head 14 would have no application if the power under head 13 to enable an appeal to be launched carried with it the power to permit or abolish its hearing and determination.

As to head 1 of section 92, it must first be observed that the salient word " Constitution " is found in many parts of the Act. It appears in the first recital, " A Constitution similar in Principle to that of the United Kingdom "; in section 22 " In relation to the Constitution of the Senate " ; in the heading of Part V " Provincial Constitutions " ; in section 64 (which is included in Part V) " The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick " ; in section 88 (also included in Part V) " The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick " ; in head 27 of section 91 " except the Constitution of Courts of Criminal Jurisdiction " ; then in head 1 of section 92 ; and in section 101. This is not meant to be an exhaustive list but it is sufficient to indicate that the word is used in different senses throughout the Act. In head 1 of section 92, it must, I think, refer, as to the executive power, to such things as the appointment of Lieutenant-Governors and Provincial Administrators, and as to the legislative power, to such things as the Legis-

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latures for the provinces; all of these matters being dealt with by sections appearing under Part V. It can have no reference to such a particular subject as is identified by head 14.

If a province does not possess that authority, it has been made clear by a number of decisions of the Judicial Committee, some of which are referred to in the *British Coal Corporation case*, that such power must necessarily reside in the Dominion. It will be remembered that Bill 9 proposes to amend the Dominion statute respecting the Supreme Court of Canada. Under the opening clause of section 91, Parliament may make laws for the peace, order and good government of Canada, and by section 101 " The Parliament of " Canada may, notwithstanding anything in this Act, from time to time, " provide for the constitution, maintenance and organisation of a General " Court of Appeal for Canada." In my opinion the power thereby conferred includes the power to make the decisions of such appellate court exclusive and ultimate. The reasons set forth in *Nadan's case*, as explained in the *British Coal Corporation case*, as to why Parliament could not, prior to the Statute of Westminster, abolish appeals as of grace in criminal cases, apply with equal force to explain the inability of Parliament during that period to compel a litigant desirous of appealing from the judgment of a Provincial Court to apply to the Supreme Court of Canada, if his suit fell within the jurisdiction of that Court, and otherwise to abide by the decision against him. These restrictions have been removed by the Statute of Westminster and therefore, so far as all the provinces except Ontario and Quebec and possibly British Columbia are concerned, Parliament may validly enact the provisions of Bill 9.

It is now necessary to refer to an additional argument presented on behalf of Ontario, which is to this effect. By assenting to the Constitutional Act of 1791 His Majesty must be taken not only to have abandoned the prerogative right to regulate appeals as of right from Upper Canada to the Sovereign in Council but to have transferred it to the Legislative Council and Assembly of that province; that such transferred prerogative was so regulated by statute, which was continued in force by the Act of Union, 1840; that it was regulated by the Parliament of Canada by legislation, applying to Upper Canada, which existed at the time of Confederation and which was continued in force by section 129 of the Act; that thereafter Ontario continued to regulate appeals as of right and effectively abolish them, except under the conditions set forth in its legislation. So much may be conceded. The remainder of the argument that Ontario has also acquired the power to abolish the right of His Majesty in Council to grant special leave to appeal is, under the authorities, not so obvious.

Granting, however, the entire premises and conclusion of this contention, it will be recollected that the power deemed to reside in Parliament to make the decisions of the Supreme Court of Canada exclusive and ultimate may be exercised " notwithstanding anything contained in this Act." This non obstante clause places the Dominion power on the same footing as those conferred by the specially enumerated heads of section 91. As to these, their Lordships pointed out in *Proprietary Articles Trade Association* v.

*Attorney-General for Canada* (Combines Investigation Act Case) [1931] A.C. 310, at pages 326-327 :—

" If then the legislation in question is authorised under one or other " of the heads specifically enumerated in s. 91, it is not to the purpose " to say that it affects property and civil rights in the Provinces. Most " of the specific subjects in s. 91 do affect property and civil rights but " so far as the legislation of Parliament in pith and substance is operating " within the enumerated powers there is constitutional authority to " interfere with property and civil rights. The same principle would " apply to s. 92, head 14, the administration of justice in the Province."

In *Crown Grain Company Limited* v. *Day* [1908] A.C. 504, at page 506, it is stated : " It is inconceivable that a Court of Appeal could be established " without its jurisdiction being at the same time defined." The pith and substance of the proposed Bill is the jurisdiction of that General Court of Appeal, so that even if Ontario had authority the two powers overlap and " the enactment of the Dominion Parliament must prevail." *Crown Grain Company Limited* v. *Day* [1908] A.C. 504, at page 507 ; *Attorney-General of Canada* v. *Attorney-General of British Columbia* (Fish Canneries Case) [1930] A.C. 111, at page 118 ; In *Re Silver Bros.* [1932] A.C. 514, at page 521.

Stress was placed upon a passage in the judgment of Viscount Haldane in *The Board of Commerce case* [1922] 1 A.C. 191, at page 199. The paragraph in which these words appear is as follows (the particular passage being *italicised*) :—

" For analogous reasons the words of head 27 of s. 91 do not assist " the argument for the Dominion. It is one thing to construe the words " ' the criminal law, except the constitution of courts of criminal juris- " diction, but including the procedure in criminal matters,' as enabling " the Dominion Parliament to exercise exclusive legislative power where " the subject matter is one which by its very nature belongs to the domain " of criminal jurisprudence. A general law, to take an example, making " incest a crime, belongs to this class. It is quite another thing, first " to attempt to interfere with a class of subject committed exclusively " to the Provincial Legislature, and then to justify this by enacting " ancillary provisions, designated as new phases of Dominion criminal " law which require a title to so interfere as basis of their application. " *For analogous reasons their Lordships think that s.* 101 *of the British* " *North America Act, which enables the Parliament of Canada, notwith-* " *standing anything in the Act, to provide for the establishment of any* " *additional Courts for the better administration of the laws of Canada,* " *cannot be read as enabling that Parliament to trench on Provincial* " *rights, such as the powers over property and civil rights in the Pro-* " *vinces exclusively conferred on their Legislatures.* Full significance " can be attached to the words in question without reading them as " implying such capacity on the part of the Dominion Parliament. It " is essential in such cases that the new judicial establishment should be " a means to some end competent to the latter."

*In the Supreme Court of Canada.*

No. 13. Reasons for Judgment. (E) Kerwin, J. —*continued.*

It is quite evident that Viscount Haldane was there applying a well-known principle to the legislation in question by pointing out that Parliament could not, under the guise of establishing a Provincial Court for the better administration of the laws of Canada, really legislate upon matters of provincial concern. That principle has no application in the present case where Bill 9 deals with the jurisdiction of the Supreme Court of Canada, a subject matter within its exclusive power.

In all relevant respects Quebec is in the same position as Ontario. On behalf of British Columbia, it was urged that in view of section 3 of The Vancouver's Island Act of 1839 and section 5 of The Colony of British Columbia Act of 1858, the situation of that province, under section 129 of the Act, was identical with that of Ontario. It is not necessary to determine whether that be so or not, but certainly British Columbia stands in no higher position.

The views expressed with reference to the other six provinces add force to the opinion as to Ontario, Quebec and British Columbia. Without the use of express words, it could surely not have been intended that in a matter of this kind three provinces should be able to exercise a power denied to the others. From time to time all Provincial Courts are engaged in the duty of construing and enforcing Acts of Parliament and as to these particularly it is not to be expected that in some provinces an appeal could be taken only to this Court, while in others an alternative right to appeal or ask for leave to appeal, to His Majesty in Council would still exist. If that were so, the Court could not properly be described as " a General Court of Appeal for Canada."

For these reasons I would answer the question submitted to us " Yes, in its entirety."

(F) Hudson J.

(F) HUDSON J.:

His Excellency the Governor-General in Council has submitted to this Court for its opinion a question in the following language :—

> " Is said Bill No. 9, entitled ' An Act to amend the Supreme Court " Act ' or any of the provisions thereof, and in what particular or par- " ticulars or to what extent, intra vires of the Parliament of Canada ? "

Bill No. 9 referred to proposes, first, to give the Supreme Court of Canada exclusive, ultimate, appellate, civil and criminal jurisdiction within and for Canada ; secondly, to abolish appeals to the Privy Council, and thirdly, to repeal the Judicial Committee Act of 1833 and the Judicial Committee Act of 1844, of the statutes of the United Kingdom of Great Britain and Ireland, and all orders, rules or regulations made thereunder in so far as they affect Canada.

The validity of the Bill was supported by the Dominion and the Provinces of Manitoba and Saskatchewan, and opposed by Ontario, Nova Scotia, New Brunswick, British Columbia and Alberta. Neither Quebec nor Prince Edward Island took any part.

In the division of legislative power between the Dominion and the Provinces consequent upon Confederation, there was allotted to the Provinces by the British North America Act, section 92 (14) :—

" *Exclusive Powers of Provincial Legislatures.*

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

* * * * * * *

" (14) The Administration of Justice in the Province, including " the Constitution, Maintenance, and Organisation of Provincial " Courts, both of Civil and of Criminal Jurisdiction, and including " Procedure in Civil Matters in those Courts."

Under the authority of this provision, the Provinces have defined the constitutions of their several courts and provided for their maintenance and organisation.

But to enable these courts to function, the judges who interpret and apply the law must be appointed by the Dominion who must pay their salaries and under whose authority alone they can be removed : sections 96, 99 and 100 ; *Toronto Corporation* v. *York* [1938] A.C.415.

The laws administered in the Provincial courts are the laws applicable to the causes coming before them, whether these laws be within the legislative competence of the Province or of the Dominion.

The Dominion may impose additional duties on the judges and utilise the machinery of these courts to enforce Dominion laws of a special character, such as Dominion election petitions and bankruptcy : see *Langlois* v. *Valin*, 5 A.C. 115, and *Cushing* v. *Dupuy*, 5 A.C. 409.

From final decisions of these Provincial courts an appeal lies to the Supreme Court of Canada, which was established under the authority of section 101 of the British North America Act :—

" 101. The Parliament of Canada may, notwithstanding anything " in this Act, from Time to Time, provide for the Constitution, Main- " tenance, and Organisation of a General Court of Appeal for Canada, " and for the Establishment of any additional Courts for the better " Administration of the Laws of Canada."

A province cannot take away or impair the jurisdiction conferred on the Supreme Court by the Dominion Act in respect of matters otherwise purely Provincial : *Crown Grain* v. *Day* [1908] A.C. 504, 507. Nor has a Provincial Legislature any power to grant an appeal to the Supreme Court : *Union Colliery* v. *Attorney-General for British Columbia* (1897) 17 Can. Law Times, 391.

The Bill under consideration, if it became law, would make this Court the exclusive, final tribunal in all Canadian cases.

An appeal may also be brought from the Provincial courts to the Judicial Committee of the Privy Council in all except criminal cases. There are two

*In the Supreme Court of Canada.*

No. 13. Reasons for Judgment. (F) Hudson J. —*continued.*

classes of such appeals. First, what are called " prerogative appeals " by which the Judicial Committee may, if they see fit, grant leave to any litigant to appeal thereto from any decision of any court, either Dominion or Provincial. The second class is where provision has been made for what are called appeals as of right. In the Provinces of Ontario and Quebec, this has been done by legislation purporting to authorise appeals to the Judicial Committee subject to defined conditions, and in the other Provinces there are somewhat similar provisions made by orders-in-council.

The Bill under consideration would abolish appeals of both classes.

In criminal matters there is no longer any right of appeal to the Judicial Committee from any court, either Dominion or Provincial. In 1933 an amendment was made to the Criminal Code of Canada, section 17 of the Statutes of 23 and 24 Geo. V, as follows :—

> " Subsection 4 of section 10 of the said Act (the Criminal Code) is " repealed and is hereby re-enacted as follows :—
>
> > " Notwithstanding any royal prerogative or anything contained " in the Interpretation Act or in the Supreme Court Act, no appeal " shall be brought in any criminal case from any judgment or order " of any court in Canada to any court of appeal or authority in which " in the United Kingdom appeals or petitions to His Majesty may " be heard."

The validity of this provision was upheld in the case of *British Coal Corporation* v. *The King* [1935] A.C. at page 500. Therefore, future appeals in all criminal matters are effectually barred. In giving the judgment of the Committee, the Lord Chancellor, Lord Sankey, stated :—

> " It is here neither necessary nor desirable to touch on the position " as regard civil cases."

But the reasons for arriving at this judgment lead inevitably to the conclusion that the Canadian Parliament has a right to abolish any right to appeal to the Judicial Committee in any matter falling within the legislative jurisdiction of the Dominion Parliament, including an appeal from the decision of the Supreme Court of Canada in any matter whatsoever.

There remains for consideration the matter of appeals from the decisions of Provincial Courts where the law involved is within the exclusive legislative jurisdiction of the Provinces.

Prior to 1833, the right of the Sovereign in Council to entertain, by way of special leave, appeals from any court in His Majesty's Dominions beyond the seas, was a settled part of the royal prerogative : " a residuum of the royal prerogative of the Sovereign as the fountain of justice " : *British Coal Corporation* v. *The King*, supra, page 511. This appellate jurisdiction was usually exercised in a Committee of the whole Privy Council which, having heard the allegations and proofs, made their report to His Majesty in Council, by whom a judgment was finally given.

In 1833 there was passed an Act of the Imperial Parliament, 3-4 William IV, Chap. 41, entitled " An Act for the better administration of justice in His Majesty's Privy Council," later given the short title of " The Judicial

Committee Act, 1833." This Act created a statutory body called " The Judicial Committee of the Privy Council," and is the basis of the present constitution and procedure of this tribunal. It recites, inter alia, that " from " the decisions of various courts of judicature in the East Indies and in the " Plantations, Colonies and other Dominions of His Majesty abroad, an appeal " lies to His Majesty in Council " ; and proceeds to provide for the more effectual hearing and reporting of appeals to His Majesty in Council and on other matters, and for giving powers and jurisdiction to His Majesty in Council. The Act goes on to provide for the formation of a Committee of His Majesty's Privy Council to be styled " The Judicial Committee of the Privy Council " ; and enacts that " all appeals, or complaints in the nature of appeals whatever " which, either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council " from the order of any court or judge, should thereafter be referred by His Majesty to, and heard by the Judicial Committee as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open court.

It would appear, therefore, that this Act and the Supplementary Act of 1844 did not change the character of the jurisdiction but merely provided a more efficient method of exercising it. Reference here might be made to a statement of Lord Watson in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* [1897] A.C., page 199. At page 208 he said :—

> " By a clause in the statutes of 1890 and 1891 (Statutes of Ontario " and Canada), it is enacted that when the arbitrators proceed on their " view of a disputed question of law, ' the award shall set forth the same " ' at the instance of either party, and the award shall be subject to " ' appeal so far as it relates to such decision to the Supreme Court, and " ' thence to the Privy Council of England, in case their Lordships are " ' pleased to entertain the appeal.' The concluding part of that enact- " ment ignores the constitutional rule that an appeal lies to Her Majesty, " and not to this Board ; and that no such jurisdiction can be conferred " upon their Lordships, who are merely the advisers of the Queen, by " any legislation either of the Dominion or of the Provinces of Canada."

On the granting of self-government, many of the royal prerogatives passed to the Provinces and, at Confederation, these and some others were distributed among the Dominion and the Provinces largely in accordance with the distribution of legislative power.

There remained, however, some prerogatives which did not pass either to the Dominion or to the Provinces. They have sometimes been referred to as " Imperial prerogatives." During the past few decades with the broadening of Dominion status these Imperial prerogatives, in so far as they affected Canadian affairs, passed progressively under Dominion control. To illustrate by recent events, His Majesty now makes a declaration of war so far as it affects Canada on the advice of his Canadian Ministers. Again, by the Statute of Westminster, any alteration made in the succession to the Throne was made subject to the approval of the Dominion. When a change became

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No. 13. Reasons for Judgment. (F) Hudson J. —*continued.*

necessary, this was done, first, with the approval of the Canadian Ministers and afterwards confirmed by the Parliament of Canada.

The prerogative of appeal is the only one affecting Canadian affairs which continues to be exercised without the active participation of the Dominion. There were two initial legal obstacles in the way of Dominion legislation abrogating this particular prerogative. The first was that by reason of the operation of the Colonial Laws Validity Act such legislation by Canada would be repugnant to the Judicial Committee Acts of 1833 and 1844, and void for that reason. The second was that it would be in the nature of extra-territorial legislation and for that reason beyond the power of Parliament: see *Nadan* v. *The King* [1926] A.C. 482. However, these obstacles were removed by the Statute of Westminster: see *British Coal Corporation case*, supra.

Now it is contended on behalf of a majority of the Provinces that whatever remains of this prerogative is something in which they have rights and, for that reason, cannot be taken away by the Canadian Parliament.

The rights of the Provinces must be found within the four corners of the British North America Act. Before dealing with the particular sections of this Act, there are some general observations which merit consideration.

Prior to Confederation, each of the original Provinces was in the nature of unitary states. They had general power to make laws for the peace, order and good government within the Province. There was no restriction on the establishment of courts and the appointment of judges. They were in fact subject to no limitations except those imposed by the Imperial Parliament, or retained in the way of royal prerogatives. Upon Confederation, however, such powers of the Provinces were greatly restricted. In addition to the distribution of legislative power, some of the Imperial prerogatives were transferred to the Dominion and many of those formerly enjoyed by the Provinces were also transferred to the Dominion.

The Governor in Council now appoints and can dismiss the Lieutenant-Governors of the Provinces. The Dominion pays their salaries. The Governor-General in Council now has power to disallow Provincial statutes. This could not be done by His Majesty in Council (other than his Council in Canada). As has been said before, the Governor-General in Council now appoints the judges of the Provincial courts as well as those of the Dominion, and the Dominion pays the salaries of all. Perhaps the most important is that the reserve power to legislate for peace, order and good government was allotted to the Dominion Parliament and specific powers alone went to the Provinces.

There is no mention whatever in the British North America Act of appeals to the Judicial Committee or in fact to any other tribunal, except only the provision in section 101 for the establishment of a general court of appeal for Canada, the *British Coal Corporation case*, supra, establishes that the right to control appeals to the Judicial Committee must now be a matter coming within the jurisdiction either of the Canadian Parliament or the Provincial Legislatures.

As has been stated, the reserve power to legislate for peace, order and good government is vested in the Canadian Parliament and, therefore, unless

something can be found in the provisions of the Act which confer this power on the Provinces, the Dominion must have that power. As was stated by Sir Montague Smith in the case of *Citizens Insurance Company* v. *Parsons* [1881] 7 A.C. page 96, at page 109 :—

" The first question to be decided is, whether the Act impeached in " the present appeals falls within any of the classes of subjects enumerated " in sect. 92, and assigned exclusively to the legislatures of the provinces; " for if it does not, it can be of no validity, and no other question would " then arise. It is only when an Act of the provincial legislature prima " facie falls within one of these classes of subjects that the further ques- " tions arise, viz., whether, notwithstanding this is so, the subject of " the Act does not also fall within one of the enumerated classes of sub- " jects in sect. 91, and whether the power of the provincial legislature is " or is not thereby overborne."

Section 92 enumerates the subjects assigned exclusively to the Provinces. Of these the only relevant head of Provincial legislative jurisdiction would appear to be section 92 (14).

" 14. The Administration of Justice in the Province, including the " Constitution, Maintenance, and Organisation of Provincial Courts, both " of Civil and of Criminal Jurisdiction, and including Procedure in Civil " Matters in those Courts."

The first and controlling phrase is " the administration of Justice in the province." These words in their natural sense would mean the enforcement of justice according to law in the Province. They would imply authority to provide machinery necessary for that purpose. They would not imply making law. They might or might not imply the creation of courts for the interpretation and application of law. But the following words make clear the extent and limitation of any such implication, that is, " including the constitution, " maintenance and organisation of Provincial courts, both of civil and of " criminal jurisdiction, and the procedure in civil matters in those courts." It is obvious that the Provincial courts must be courts functioning within the Province and whose jurisdiction is limited by territorial boundaries of the Province.

Now the administration of justice means the enforcement of all justice according to law, civil or criminal, Dominion or Provincial, and the judges of the courts who are to interpret and apply the law for the purposes of such administration in the Provinces are to interpret and apply both Dominion and Provincial laws, and this in fact is what is done. The courts are for all parties commonly the subjects of both jurisdictions. While a province constitutes these courts and supplies the machinery for and does enforce the law, the function of judicature is entrusted to judges appointed and paid by Canada and not by the Provinces. The Dominion may also impose additional duties on the judges and utilise the machinery of those courts to enforce Dominion laws of a special character, such as Dominion Election Petitions and Bankruptcy.

Although called provincial courts they are in truth created by joint action, by and for the benefit of both jurisdictions.

*In the Supreme Court of Canada.*

No. 13. Reasons for Judgment. (F) Hudson J. —*continued.*

The Composition of these courts and the character of the business entrusted to them rebut any implication there might be that a province had a right to control appeals therefrom to any external tribunal.

Then there is the objection of extra-territoriality found fatal to the attempted repeal in question in the *Nadan* case, *supra.* Although this objection was removed by section 3 of the Statute of Westminster so far as it affected the Dominion, it still subsists in the case of the provinces. I am of the opinion that this section does not give the provinces the power for which they contend.

It was also contended on behalf of the Provinces that subsections 1 and 13 of section 92 might supply jurisdiction. But I am unable to see that either of these confers any such power. In any event, heading 14 is the compartment dealing with the subject matter and for this reason would exclude application on the others.

Another argument advanced on behalf of the Provinces was based on section 129 of the British North America Act as follows:

> " 129. Except as otherwise provided by this Act, all Laws in force
> " in Canada, Nova Scotia, or New Brunswick at the Union, and all
> " Courts of Civil and Criminal Jurisdiction, and all legal Commissions,
> " Powers and Authorities, and all Officers, Judicial, Administrative, and
> " Ministerial, existing therein at the Union, shall continue in Ontario,
> " Quebec, Nova Scotia, and New Brunswick respectively, as if the Union
> " had not been made; subject nevertheless (except with respect to such
> " as are enacted by or exist under Acts of the Parliament of Great Britain
> " or of the Parliament of the United Kingdom of Great Britain and
> " Ireland), to be repealed, abolished, or altered by the Parliament of
> " Canada, or by the Legislature of the respective Province, according to
> " the Authority of the Parliament or of that Legislature under this Act."

The obvious purpose of this section was to provide for continuity of law and administration until the new Parliament and new Legislatures were organised, assembled and able to function. I think it was clearly not the intention to alter the distribution of powers made by sections 91 and 92. The introductory words " Except as otherwise provided by this Act " make this perfectly plain.

If my view is correct that none of the headings in section 92 confer on the Provincial Legislatures, expressly or impliedly, power to abolish the right of appeal, then the reserve powers of the Dominion would come automatically into operation, and it is, therefore, " otherwise provided " in the Act that the Dominion should have any rights which the Provinces theretofore may have had in the matter.

A very able and interesting argument was presented to us on behalf of Ontario and by counsel for several of the other Provinces, based in the case of Ontario on the Constitutional Act of 1791, and in several of the other Provinces on subsequent orders-in-council; but holding the views that I do it is not necessary to discuss the points raised by them. I would just make one observation here. It must never be overlooked that with the passing of this Act there was a new orientation of powers, prerogative as well as legislative.

For complete accuracy it should be stated that references herein to

Provincial Courts do not apply to those inferior jurisdictions under consideration in a Reference before this Court the judgment in which is reported (1938) S.C.R. 398.

There remains to be considered the extent of the power conferred upon the Dominion by section 101. This provides :—

" 101. The Parliament of Canada may, notwithstanding anything in " this Act, from Time to Time, provide for the Constitution, Maintenance " and Organisation of a General Court of Appeal for Canada, and for the " Establishment of any additional Courts for the better administration " of the Laws of Canada."

The extent of the power thus conferred came before the Judicial Committee for consideration in the case of *Crown Grain* v. *Day* [1908] A.C. 504. The circumstances in this case were that the Manitoba Legislature had passed a Mechanics' and Wage Earners' Lien Act applying to the suit under appeal. This statute enacted that in suits relating to liens the judgment of the Manitoba Court of King's Bench should be final and that there should be no appeal therefrom. It was held that a Provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act. Lord Robertson, in giving the opinion of the Board, said at page 507 :—

" The appellants maintain that the implied condition of the power " of the Dominion Parliament to set up a Court of Appeal was that the " Court so set up should be liable to have its jurisdiction circumscribed " by provincial legislation dealing with those subject-matters of litigation " which, like that of contracts, are committed to the provincial Legisla- " tures. The argument necessarily goes so far as to justify the wholesale " exclusion of appeals in suits relating to matters within the region of " provincial legislation. As this region covers the larger part of the " common subjects of litigation, the result would be the virtual defeat " of the main purposes of the Court of Appeal.

" It is to be observed that the subject in conflict belongs primarily " to the subject-matter committed to the Dominion Parliament, namely, " the establishment of the Court of Appeal for Canada. But, further, " let it be assumed that the subject-matter is open to both legislative " bodies ; if the powers thus overlap, the enactment of the Dominion " Parliament must prevail. This has already been laid down in *Dobie* " v. *Temporalities Board*, 7 A.C. 136, and *Grand Trunk Ry. Co. of Canada* " v. *Attorney-General of Canada* [1907] A.C. 65."

Section 101 is included in a group of sections forming a distinct division of the Act under the heading " 7. Judicature " wherein provision is made for the appointment, payment, retirement and removal of judges and concludes with the provision for a general court of appeal. It would seem to me that reading the sections of this division together with other sections of the Act, that there is envisaged the ultimate establishment of a complete system of judicature within Canada with a final, general court of appeal of a last resort in Canada, and that this should be established when and with whatever jurisdiction Parliament might from time to time decide.

As has already been observed, there is no provision in the Act relating to appeals beyond Canada but, undoubtedly, when the Act was passed in 1867

*In the Supreme Court of Canada.*

No. 13. Reasons for Judgment. (F) Hudson J. —*continued.*

the prerogative right to appeal by special leave existed. But that did not necessarily mean that litigants who wished to appeal might not first be obliged to come to the Supreme Court of Canada. The words " a general court of appeal for Canada " surely imply only one court of appeal and it would appear to be anomalous that there should be concurrently a right of appeal to two different courts. This situation could not be effectively corrected until the passing of the Statute of Westminster, not because of any provisions in the British North America Act but because of external constitutional limitations. These having been removed, I can see no reason why the Dominion should not exercise the full powers given by this section, either expressly or impliedly and make the decisions of the Supreme Court of Canada final and conclusive and without appeal.

A special argument was raised in regard to Admiralty appeals, but I think this argument is shortly and definitely answered by the fact that " navigation and shipping " is a subject which is expressly allotted to the Dominion under section 91 of the Act, and the reasoning by which the conclusion was arrived at in the *British Coal Corporation case*, supra, that Canada had the power to make the decision of the Supreme Court final in regard to criminal matters, applies equally in regard to Admiralty cases.

For these reasons, I would answer the question submitted in the affirmative and say that a Bill in substantially the form of Bill No. 9 would be intra vires of the Parliament of Canada.

*In the Privy Council.*

No. 14. Order-in-Council granting special leave to appeal to His Majesty in Council. 30th April, 1940.

## No. 14.

## Order-in-Council granting special leave to appeal to His Majesty in Council.

At the Court at Buckingham Palace.

The 30th day of April, 1940.

Present :

The King's Most Excellent Majesty.

* * * * * * *

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 25th day of April 1940 in the words following, viz. :—

" Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of Ontario the Attorney-General of New Brunswick the Attorney-General of British Columbia and the Attorney-General of Nova Scotia in the matter of an Appeal from the Supreme Court of Canada in the matter of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled ' An Act to amend the Supreme Court Act ' between the Petitioners-Appellants and the Attorney-General of Canada the Attorney-General of Manitoba and the Attorney-General of Saskatchewan Respondents setting forth (amongst other matters) that the Petitioners desire special leave to appeal from a Judgment of the Supreme Court dated the 19th January 1940 whereby the Court certified to the Governor-

General in Council for his information the opinions of the Court on a question concerning the power of the Parliament of Canada to prohibit Appeals from any Court in Canada to Your Majesty in Council; that the question was referred to the Court by the Governor-General in Council on the 21st April 1939 pursuant to Section 55 of the Supreme Court Act Revised Statutes of Canada 1927 chapter 35 and was in the following terms :—'Is said Bill 9 entitled "An Act to amend the Supreme Court Act" or any of the provisions thereof, and in what particular or particulars, or to what extent *intra vires* of the Parliament of Canada ?' : that by Order of the Right Honourable the Chief Justice of Canada notice of the hearing of the argument was given to the Attorney-General of every Province and at the hearing the Attorneys-General of Canada Ontario British Columbia Nova Scotia New Brunswick and Manitoba were represented by Counsel who took part in the argument: that on the 19th January 1940 the Supreme Court certified that the opinions in respect of the question referred to the Court were as follows :—By the Court: The Parliament of Canada is competent to enact the Bill referred in its entirety; By Mr. Justice Crocket: The Bill referred is wholly *ultra vires* of the Parliament of Canada; By Mr. Justice Davis: The Bill referred if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any Province in respect of any action or other civil proceedings commenced in any of the Provincial Courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such Province: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court dated the 19th January 1940 or for such further Order as to Your Majesty in Council may appear fit:

"The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 19th day of January 1940.

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

*In the Supreme Court of Canada.*

No. 15. The British North America Act, 1867, ss. 91, 92, 101, 129 and 146.

PART II.

## STATUTES AND ORDERS IN COUNCIL.

### A.—CANADIAN CONSTITUTIONAL LEGISLATION.

### No. 15.

### The British North America Act, 1867, 30 Vict. Ch. 3 (Imperial).

* * * * * *

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

*Powers of the Parliament.*

Legislative Authority of Parliament of Canada.

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

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalisation and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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

*Exclusive Powers of Provincial Legislatures.*

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

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

*In the Supreme Court of Canada.*

No. 15.
The British North America Act, 1867, ss. 91, 92, 101, 129 and 146
*—continued.*

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes :—
    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province ;
    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country ;

    Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnisation of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

* * * * * *

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Continuance of existing Laws, Courts, Officers, etc.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue

in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament of that Legislature under this Act.

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XI. ADMISSION OF OTHER COLONIES.

Power to admit Newfoundland etc., into the Union.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

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## No. 16.



### Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, dated June 23, 1870.

At the Court at Windsor, the 23rd day of June, 1870.

Present:

The Queen's Most Excellent Majesty.
Lord President.
Lord Privy Seal.
Lord Chamberlain.
Mr. Gladstone.

Whereas by the British North America Act, 1867, it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the

*In the Supreme Court of Canada.*

No. 16. Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, dated June 23, 1870 —*continued.*

Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:

And whereas by an Address from the Houses of the Parliament of Canada, of which Address a copy is contained in the Schedule to this Order annexed marked A, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with the Dominion of Canada, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government upon the terms and conditions therein stated:

And whereas by the Rupert's Land Act, 1868, it was (amongst other things) enacted that it should be competent for the Governor and Company of Adventurers of England trading into Hudson's Bay (hereinafter called the Company) to surrender to Her Majesty, and for Her Majesty, by any Instrument under Her Sign Manual and Signet to accept a surrender of all or any of the lands, territories, rights, privileges, liberties, franchises, powers, and authorities whatsoever, granted or purported to be granted by certain Letters Patent therein recited to the said Company within Rupert's Land, upon such terms and conditions as should be agreed upon by and between Her Majesty and the said Company; provided, however, that such surrender should not be accepted by Her Majesty until the terms and conditions upon which Rupert's Land should be admitted into the said Dominion of Canada should have been approved of by Her Majesty and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada, in pursuance of the 146th Section of the British North America Act, 1867.

And it was by the same Act further enacted that it should be competent to Her Majesty, by Order or Orders in Council, on Addresses from the Houses of the Parliament of Canada, to declare that Rupert's Land should, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada;

And whereas a second Address from both the Houses of the Parliament of Canada has been received by Her Majesty praying that Her Majesty will be pleased, under the provisions of the hereinbefore recited Acts, to unite Rupert's Land on the terms and conditions expressed in certain Resolutions therein referred to and approved of by Her Majesty, of which said Resolutions and Address copies are contained in the Schedule to this Order annexed, marked B, and also to unite the North-Western Territory with the Dominion of Canada, as prayed for by and on the terms and conditions contained in the hereinbefore first recited Address, and also approved of by Her Majesty:

And whereas a draft surrender has been submitted to the Governor-General of Canada containing stipulations to the following effect, viz.:—

* * * * * * *

And whereas the said draft was on the fifth day of July, one thousand eight hundred and sixty-nine, approved by the said Governor-General in accordance with a Report from the Committee of the Queen's Privy Council for Canada; but it was not expedient that the said stipulations, not being contained in the aforesaid second Address, should be included in the surrender by the said Company to Her Majesty of their rights aforesaid or in this Order in Council.

And whereas the said Company did by deed under the seal of the said Company, and bearing date the nineteenth day of November, one thousand eight hundred and sixty-nine, of which deed a copy is contained in the Schedule to this Order annexed, marked C, surrender to Her Majesty all the rights of government, and other rights, privileges, liberties, franchises, powers and authorities granted, or purported to be granted to the said Company by the said Letters Patent herein and hereinbefore referred to, and also all similar rights which may have been exercised or assumed by the said Company in any parts of British North America not forming part of Rupert's Land, or of Canada or of British Columbia, and all the lands and territories (except and subject as in the terms and conditions therein mentioned) granted or purported to be granted to the said Company by the said Letters Patent:

And whereas such surrender has been duly accepted by Her Majesty, by an instrument under her Sign Manual and Signet, bearing date at Windsor the twenty-second day of June, one thousand eight hundred and seventy:

It is hereby Ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that, without prejudice to any obligations arising from the aforesaid approved Report, Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid:—

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And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.

*In the Supreme Court of Canada.*

No. 17.
The Manitoba Act, 1870.
33 Vict. cap. 3 (Canada), ss. 1 and 2.

## No. 17.

## The Manitoba Act, 1870, 33 Victoria, Chapter 3 (Canada).

An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba.

[Assented to 12th May, 1870.]

Preamble.

Whereas it is probable that Her Majesty The Queen may, pursuant to the British North America Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Parliament of Canada:

And whereas it is expedient to prepare for the transfer of the said Territories to the Government of Canada at the time appointed by the Queen for such admission:

And whereas it is expedient also to provide for the organisation of part of the said Territories as a Province, and for the establishment of a Government therefor, and to make provision for the Civil Government of the remaining part of the said Territories, not included within the limits of the Province:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Province to be formed out of N.W. territory when united to Canada.

1. On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honourable Privy Council, under the authority of the 146th Section of the British North America Act, 1867, shall, by Order in Council in that behalf, admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows: that is to say, commencing at the point where the meridian of ninety-six degrees west longitude from Greenwich intersects the parallel of forty-nine degrees north latitude—thence due west along the said parallel of forty-nine degrees north latitude (which forms a portion of the boundary line between the United States of America and the said North-Western Territory) to the meridian of ninety-nine degrees of west longitude,—thence due north along the said meridian of ninety-nine degrees west longitude, to the intersection of the same with the parallel of fifty degrees and thirty minutes north latitude,—thence due east along the said parallel of fifty degrees and thirty minutes north latitude to its intersection with the before-mentioned meridian of ninety-six degrees west longitude,—thence due south along the said meridian of ninety-six degrees west longitude to the place of beginning.

Its name and boundaries.

(Boundaries extended; 44 Victoria, chapter 14.)

Certain provisions of B.N.A. Act, 1867, to apply to Manitoba.

2. On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or, by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

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## No. 18.



## The British North America Act, 1871, 34 & 35 Vict., Ch. 28 (Imperial).

An Act respecting the establishment of Provinces in the Dominion of Canada.

[29th June, 1871.]

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited for all purposes as The British North America Act, 1871.

Parliament of Canada may establish new Provinces and provide for the constitution, etc., thereof.

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

Alteration of limits of Provinces.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion,

*In the Supreme Court of Canada.*

No. 18. The British North America Act, 1871. 34 and 35 Vict. cap. 28 (Imperial) —*continued.*

increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

Parliament of Canada may legislate for any territory not included in a Province.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

Confirmation of Acts of Parliament of Canada 32 and 33 Vict. (Canadian) cap. 3, 33 Vict. (Canadian) cap. 3.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively,—" An Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada " ; and " An Act to amend and continue the Act thirty-two " and thirty-three Victoria, chapter three, and to establish and " provide for the government of ' the Province of Manitoba,' " shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

Limitation of powers of Parliament of Canada to legislate for an established Province.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

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No. 19. Order of Her Majesty in Council admitting British Columbia into the Union, dated May 16, 1871.

## No. 19.

## Order of Her Majesty in Council admitting British Columbia into the Union, dated May 16, 1871.

At the Court of Windsor, the 16th day of May, 1871.

Present :

The Queen's Most Excellent Majesty.
His Royal Highness Prince Arthur.

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| Lord Privy Seal. | Lord Chamberlain. |
| Earl Cowper. | Mr. Secretary Cardwell. |
| Earl of Kimberley. | Mr. Ayrton. |

Whereas by the British North America Act, 1867, provision was made for the Union of the Provinces of Canada, Nova Scotia and New Brunswick into

the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of British Columbia, to admit that Colony into the said Union, on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; and it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council of British Columbia respectively, of which Addresses copies are contained in the Schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit British Columbia into the Dominion of Canada, on the terms and conditions set forth in the said Addresses.

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament, that from and after the twentieth day of July, one thousand eight hundred and seventy-one, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore recited Addresses. And, in accordance with the terms of the said Addresses relating to the Electoral Districts in British Columbia, for which the first election of members to serve in the House of Commons of the said Dominion shall take place, it is hereby further ordered and declared that such electoral districts shall be as follows :—

" New Westminster District " and the " Coast District," as defined in a public notice issued from the Lands and Works Office in the said Colony, on the 15th day of December, one thousand eight hundred and sixty-nine, by the desire of the Governor and purporting to be in accordance with the provisions of the thirty-ninth clause of the " Mineral Ordinance, 1869," shall constitute one district, to be designated " New Westminster District " and return one Member.

" Cariboo District " and " Lillooet District," as specified in the said public notice, shall constitute one district, to be designated " Cariboo District," and return one Member.

" Yale District " and " Kootenay District," as specified in the said public notice, shall constitute one District, to be designated " Yale District," and return one Member.

Those portions of Vancouver Island, known as " Victoria District," " Esquimalt District," and " Metchosin District," as defined in the official maps of those districts which are in the Land Office, Victoria, and are designated respectively, " Victoria District Official Map,

*In the Supreme Court of Canada.*

No. 19. Order of Her Majesty in Council admitting British Columbia into the Union, dated May 16, 1871 —*continued.*

1858," " Esquimalt District Official Map, 1858," and " Metchosin District Official Map, A.D. 1858," shall constitute one District, to be designated " Victoria District," and return two Members.

All the remainder of Vancouver Island, and all such islands adjacent thereto as were formerly dependencies of the late Colony of Vancouver Island shall constitute one District, to be designated " Vancouver Island District," and return one Member.

And the Right Honourable Earl of Kimberley, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions therein accordingly.

ARTHUR HELPS.

SCHEDULE.

*Address of the Senate of Canada.*

To the Queen's Most Excellent Majesty.

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the Senate of Canada in Parliament assembled, humbly approach your Majesty for the purpose of representing :—

That by a despatch from the Governor of British Columbia, dated 23rd January, 1871, with other papers laid before this House, by message from His Excellency the Governor-General, of the 27th February last, this House learns that the Legislative Council of that colony, in council assembled, adopted, in January last, an Address representing to Your Majesty that British Columbia was prepared to enter into Union with the Dominion of Canada, upon the terms and conditions mentioned in the said Address, which is as follows :—

To the Queen's Most Excellent Majesty.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Members of the Legislative Council of British Columbia, in council assembled, humbly approach Your Majesty for the purpose of representing :—

That during the last session of the late Legislative Council, the subject of the admission of the Colony of British Columbia into the Union or Dominion of Canada was taken into consideration, and a resolution on the subject was agreed to, embodying the terms upon which it was proposed that this colony should enter the Union ;

That after the close of the session, Delegates were sent by the Government of this Colony to Canada to confer with the Government of the Dominion with respect to the admission of British Columbia into the Union upon the terms proposed ;

That after considerable discussion by the Delegates with the Members of the Government of the Dominion of Canada, the terms and conditions hereinafter specified were adopted by a Committee of the Privy Council of Canada, and were by them reported to the Governor-General for his approval;

No. 19. Order of Her Majesty in Council admitting British Columbia into the Union, dated May 16, 1871 —*continued.*

That such terms were communicated to the Government of this Colony by the Governor-General of Canada, in a despatch dated July 7th, 1870, and are as follows :—

* * * * * * *

10. The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act.

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## No. 20.

No. 20. Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated June 26, 1873.

### Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated June 26, 1873.

At the Court at Windsor, the 26th day of June, 1873.

Present :

The Queen's Most Excellent Majesty.

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| Lord President. | Earl of Kimberley. |
| Earl Granville. | Lord Chamberlain. |

Mr. Gladstone.

Whereas by the British North America Act, 1867, provision was made for the Union of the Provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of Prince Edward Island, to admit that Colony into the said Union on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act ; and it was further enacted that the provisions of any Order in Council in that behalf, should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

*In the Supreme Court of Canada.*

No. 20. Order of Her Majesty in Council admitting Prince Edward Island into the Union dated June 26, 1873 —*continued.*

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council and House of Assembly of Prince Edward Island respectively, of which Addresses, copies are contained in the Schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit Prince Edward Island into the Dominion of Canada, on the terms and conditions set forth in the said Addresses.

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty, by the said Act of Parliament, that from and after the first day of July, one thousand eight hundred and seventy-three, the said Colony of Prince Edward Island shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore recited Addresses.

And in accordance with the terms of the said Addresses relating to the Electoral Districts for which, the time within which, and the laws and provisions under which the first election of members to serve in the House of Commons of Canada, for such Electoral Districts shall be held, it is hereby further ordered and declared that " Prince County " shall constitute one district, to be designated "Prince County District," and return two members; that " Queen's County " shall constitute one district, to be designated " Queen's County District," and return two members ; that " King's County " shall constitute one district, to be designated " King's County District," and return two members ; that the election of members to serve in the House of Commons of Canada, for such Electoral Districts shall be held within three calendar months from the day of the admission of the said Island into the Union or Dominion of Canada ; that all laws which at the date of this Order in Council relating to the qualification of any person to be elected or sit or vote as a member of the House of Assembly of the said Island, and relating to the qualifications or disqualifications of voters, and to the oaths to be taken by voters, and to Returning Officers and Poll Clerks, and their powers and duties, and relating to Polling Divisions within the said Island, and relating to the proceedings at elections, and to the period during which such elections may be continued, and relating to the trial of controverted elections, and the proceedings incidental thereto, and relating to the vacating of seats of the members, and to the execution of new writs, in case of any seat being vacated otherwise than by a dissolution, and to all other matters connected with or incidental to elections of members to serve in the House of Assembly of the said Island, shall apply to elections of members to serve in the House of Commons for the Electoral Districts situate in the said Island of Prince Edward.

And the Right Honourable Earl of Kimberley, one of Her Majesty's Principal Secretaries of State is to give the necessary directions herein accordingly.

ARTHUR HELPS.

No. 20. Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated June 26, 1873 —*continued.*

SCHEDULE.

To the Queen's Most Excellent Majesty.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the Dominion of Canada in Parliament assembled, humbly approach Your Majesty for the purpose of representing :—

That during the present Session of Parliament we have taken into consideration the subject of the admission of the Colony of Prince Edward Island into the Union or Dominion of Canada, and have resolved that it is expedient that such admission should be effected at as early a date as may be found practicable under the one hundred and forty-sixth section of the British North America Act, 1867, on the conditions hereinafter set forth, which have been agreed upon with the Delegates from the said Colony, that is to say :—

* * * * * * *

That the provisions in the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be especially applicable to, and only to affect one, and not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act.

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(Signed) JAMES COCKBURN,
Speaker.

House of Commons,
20th May, 1873.

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## No. 21.

No. 21. The Alberta Act, 4 and 5 Ed. VII (1905) cap. 3 (Canada). ss. 1, 2 and 3.

### The Alberta Act, 4 & 5 Ed. VII (1905), Ch. 3 (Canada).

An Act to establish and provide for the Government of the Province of Alberta.

[Assented to 20th July, 1905.]

Preamble.

Whereas in and by the British North America Act, 1871, being chapter 28 of the Acts of the Parliament of the United Kingdom passed in the session thereof held in the 34th and 35th years of the reign of Her late Majesty Queen Victoria, it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and

*In the Supreme Court of Canada.*

No. 21.
The Alberta Act, 4 and 5 Ed. VII (1905) cap. 3 (Canada). ss. 1, 2 and 3 —*continued.*

may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament of Canada ;

And whereas it is expedient to establish as a province the territory hereinafter described, and to make provision for the government thereof and the representation thereof in the Parliament of Canada : Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

Short title.

1. This Act may be cited as the Alberta Act.

Province of Alberta formed ; its boundaries.

2. The territory comprised within the following boundaries, that is to say :—commencing at the intersection of the international boundary dividing Canada from the United States of America by the fourth meridian in the system of Dominion lands surveys ; thence westerly along the said international boundary to the eastern boundary of the province of British Columbia ; thence northerly along the said eastern boundary of the province of British Columbia to the north-east corner of the said province ; thence easterly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the system of Dominion lands surveys as the same may be hereafter defined in accordance with the said system ; thence southerly along the said fourth meridian to the point of commencement,—is hereby established as a province of the Dominion of Canada to be called and known as the province of Alberta.

B.N.A. Acts, 1867 to 1886, to apply.

3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

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No. 22.
The Saskatchewan Act, 4 and 5 Ed. VII (1905), cap. 42 (Canada). ss. 1, 2 and 3.

## No. 22.

## The Saskatchewan Act, 4 & 5 Ed. VII (1905), Ch. 42 (Canada).

An Act to establish and provide for the Government of the Province of Saskatchewan.

[Assented to 20th July, 1905.]

Preamble.

Whereas in and by the British North America Act, 1871, being chapter 28 of the Acts of the Parliament of the United Kingdom

passed in the session thereof held in the 34th and 35th years of the reign of her late Majesty Queen Victoria, it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament of Canada ;

And whereas it is expedient to establish as a province the territory hereinafter described, and to make provisions for the government thereof and the representation thereof in the Parliament of Canada : Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

Short title.

1. This Act may be cited as the Saskatchewan Act.

Province of Saskatchewan formed ; its boundaries.

2. The territory comprised within the following boundaries, that is to say,—commencing at the intersection of the international boundary dividing Canada from the United States of America by the west boundary of the province of Manitoba, thence northerly along the said west boundary of the province of Manitoba to the north-west corner of the said province of Manitoba ; thence continuing northerly along the centre of the road allowance between the twenty-ninth and thirtieth ranges west of the principal meridian in the system of Dominion lands surveys, as the said road allowance may hereafter be defined in accordance with the said system, to the second meridian in the said system of Dominion lands surveys, as the same may hereafter be defined in accordance with the said system ; thence northerly along the said second meridian to the sixtieth degree of north latitude ; thence westerly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the said system of Dominion lands surveys, as the same may be hereafter defined in accordance with the said system ; thence southerly along the said fourth meridian to the said international boundary dividing Canada from the United States of America ; thence easterly along the said international boundary to the point of commencement,—is hereby established as a province of the Dominion of Canada, to be called and known as the province of Saskatchewan.

B.N.A. Acts, 1867 to 1886, to apply.

3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

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*In the Supreme Court of Canada.*

No. 23.
The Statute of Westminster, 1931, 22 Geo. V, cap. 4 (Imperial).

## No. 23.

## The Statute of Westminster, 1931, 22 Geo. V, Ch. 4 (Imperial).

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December, 1931.]

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences :

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion :

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom :

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained :

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Meaning of "Dominion" in this Act.

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the

Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Validity of laws made by Parliament of a Dominion. 28 & 29 Vict., c. 63.

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Power of Parliament of Dominion to legislate extra-territorially.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Parliament of United Kingdom not to legislate for Dominion except by consent.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Powers of Dominion Parliaments in relation to merchant shipping. 57 & 58 Vict., c. 60.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

Powers of Dominion Parliaments in relation to Courts of Admiralty. 53 & 54 Vict., c. 27.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

Saving for British North America Acts and application of the Act to Canada.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

*In the Supreme Court of Canada.*

No. 23. The Statute of Westminster, 1931, 22 Geo. V, cap. 4 (Imperial) —*continued.*

Saving for Constitution Acts of Australia and New Zealand.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Saving with respect to States of Australia.

9. (1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia, in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted.

10. (1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

Meaning of "Colony" in future Acts. 52 & 53 Vict., c. 63.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

Short title.

12. This Act may be cited as the Statute of Westminster, 1931.

## No. 24.



### Judicial Committee Act, 1833, 3 & 4 Wm. IV, Ch. 41 (Imperial).

An Act for the better Administration of Justice in His Majesty's Privy Council.

[14 August, 1833.]

2 & 3 W. 4, c. 92.

" Whereas by virtue of an Act passed in a Session of Parliament " of the Second and Third Years of the Reign of His present Majesty, " intituled *An Act for transferring the Powers of the High Court of* " *Delegates, both in Ecclesiastical and Maritime Causes, to His Majesty* " *in Council*, it was enacted that from and after the First Day of " *February* one thousand eight hundred and thirty-three it should " be lawful for every Person who might theretofore, by virtue either

25 Hen. 8, ch. 19.

" of an Act passed in the Twenty-fifth Year of the Reign of King " *Henry* the Eighth, intituled *The Submission of the Clergy and*

8 Eliz., c. 5.

" *Restrain of Appeals*, or of an Act passed in the Eighth Year of " the Reign of Queen *Elizabeth*, intituled *For the avoiding of tedious* " *Suits in Civil and Marine Causes*, have appealed or made suit to " His Majesty in His High Court of Chancery to appeal or make " suit to the King's Majesty, His Heirs or Successors, in Council, " within such Time, in such Manner, and subject to such Rules, " Orders, and Regulations for the due and more convenient Proceed- " ing as should seem meet and necessary, and upon such Security, " if any, as His Majesty, His Heirs and Successors, should from Time " to Time by Order in Council direct: And whereas by Letters " Patent under the Great Seal of *Great Britain*, certain Persons, " Members of His Majesty's Privy Council, together with others, " being Judges and Barons of His Majesty's Courts of Record at " *Westminster*, have been from Time to Time appointed to be His " Majesty's Commissioners for receiving, hearing, and determining " Appeals from His Majesty's Courts of Admiralty in Causes of " Prize: And whereas, from the Decisions of various Courts of " Judicature in the *East Indies*, and in the Plantations, Colonies, " and other Dominions of His Majesty Abroad, an Appeal lies to " His Majesty in Council; And whereas Matters of Appeal or " Petition to His Majesty in Council have usually been heard before

Certain persons to form a Committee to be styled " The Judicial Committee of the Privy Council."

" a Committee of the whole of His Majesty's Privy Council, who have " made a Report to His Majesty in Council, whereupon the final " Judgment or Determination hath been given by His Majesty: " And whereas it is expedient to make certain Provisions for the " more effectual hearing and reporting on Appeals to His Majesty " in Council and on other Matters, and to give such Powers and " Jurisdiction to His Majesty in Council as hereinafter mentioned." Be it therefore enacted by the King's Most Excellent Majesty by

*In the Supreme Court of Canada.*

No. 24.
Judicial Committee Act, 1833, 3 and 4 Wm. IV, cap. 41 (Imperial). ss. I. III. IV, XXI & XXVIII. —*continued.*

and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the President for the Time being of His Majesty's Privy Council, the Lord High Chancellor of *Great Britain* for the Time being, and such of the Members of His Majesty's Privy Council as shall from Time to Time hold any of the Offices following, that is to say, the Office of Lord Keeper or First Lord Commissioner of the Great Seal of *Great Britain*, Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice Chancellor of *England*, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of *Canterbury*, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all Persons, Members of His Majesty's Privy Council who shall have been President thereof or held the Office of Lord Chancellor of *Great Britain*, or shall have held any of the other Offices hereinbefore mentioned, shall form a Committee of His Majesty's said Privy Council, and shall be styled "The Judicial Committee of the Privy Council": Provided nevertheless, that it shall be lawful for His Majesty from Time to Time, as and when He shall think fit, by His Sign Manual, to appoint any Two other Persons, being Privy Councillors, to be Members of the said Committee.

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III

All appeals from sentence of any judge, &c., to be referred by His Majesty to the Committee to report thereon.

And be it further enacted, That all Appeals or Complaints in the Nature of Appeals whatever, which, either by virtue of this Act, or of any Law, Statute, or Custom, may be brought before His Majesty or His Majesty in Council from or in respect of the Determination, Sentence, Rule, or Order of any Court, Judge, or Judicial Officer, and all such Appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and that such Appeals, Causes, and Matters shall be heard by the said Judicial Committee, and a Report or Recommendation thereon shall be made to His Majesty in Council for His Decision thereon as heretofore, in the same Manner and Form as has been heretofore the Custom with respect to Matters referred by His Majesty to the whole of His Privy Council or a Committee thereof (the Nature of such Report or Recommendation being always stated in open Court).

IV

His Majesty may refer any other matters to Committee.

And be it further enacted, That it shall be lawful for His Majesty to refer to the said Judicial Committee for Hearing or Consideration any 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.

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XXI

Decrees for courts abroad to be carried into effect as the King in Council shall direct.

And be it further enacted, That the Order or Decree of His Majesty in Council on any Appeal from the Order, Sentence, or Decree of any Court of Justice in the *East Indies*, or of any Colony, Plantation, or other His Majesty's Dominions Abroad, shall be carried into effect in such Manner, and subject to such Limitations and Conditions, as His Majesty in Council shall, on the Recommendation of the said Judicial Committee direct; and it shall be lawful for His Majesty in Council, on such Recommendation, by Order, to direct that such Court of Justice shall carry the same into effect accordingly, and thereupon such Court of Justice shall have the same Powers of carrying into effect and enforcing such Order or Decree as are possessed by or are hereby given to His Majesty in Council: Provided always, that nothing in this Act contained shall impeach or abridge the Powers, Jurisdiction, or Authority of His Majesty's Privy Council as heretofore exercised by such Council, or in anywise alter the Constitution or Duties of the said Privy Council, except so far as the same are expressly altered by this Act, and for the Purposes aforesaid.

Act not to abridge powers of Privy Council.

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XXVIII

Power of enforcing Decrees.

And be it enacted, That the said Judicial Committee shall have and enjoy in all respects such and the same Power of punishing Contempts and of compelling Appearances, and that His Majesty in Council shall have and enjoy in all respects such and the same Powers of enforcing Judgments, Decrees, and Orders, as are now exercised by the High Court of Chancery or the Court of King's Bench (and both *in personam* and *in rem*, or as are given to any Court Ecclesiastical by an Act of Parliament passed in a Session of Parliament of the Second and Third Years of the Reign of His present Majesty, intituled *An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of* England *and* Ireland; and that all such Powers as are given to Courts Ecclesiastical, if of punishing Contempts or of compelling Appearances, shall be exercised by the said Judicial Committee, and if of enforcing Decrees and Orders shall be exercised by His Majesty in Council, in such and the same Manner as the Powers in and by such Act of Parliament given, and shall be of as much Force and Effect as if the same had been thereby expressly given to the said Committee or to His Majesty in Council.

2 & 3 W. 4, c. 93.

*In the Supreme Court of Canada.*

No. 25. Judicial Committee Act, 1844, 7 & 8 Vict., cap 69 (Imperial). ss. I, IX and XI.

## No. 25.

## Judicial Committee Act, 1844, 7 & 8 Vict., Ch. 69 (Imperial).

An Act for amending an Act passed in the Fourth Year of the Reign of His late Majesty, intituled *An Act for the better Administration of Justice in His Majesty's Privy Council ;* and to extend its Jurisdiction and Powers.

[6th August 1844.]

" Whereas the Act passed in the Fourth Year of the Reign of " His late Majesty, intituled *An Act for the better Administration of* " *Justice in His Majesty's Privy Council*, hath been found beneficial to the due Administration of Justice : And whereas another Act, " passed in the Sixth Year of the said Reign, intituled *An Act to* " *amend the Law touching Letters Patent for Inventions*, hath been " also found advantageous to Inventors and to the Public : And " whereas the Judicial Committee acting under the Authority of the " said Acts hath been found to answer well the Purposes for which it " was so established by Parliament, but it is found necessary to " improve its Proceedings in some respects, for the better Despatch " of Business, and expedient also to extend its Jurisdiction and " Powers : And whereas by the Laws now in force in certain of Her " Majesty's Colonies and Possessions abroad no Appeals can be " brought to Her Majesty in Council for the Reversal of the Judg- " ments, Sentences, Decrees, and Orders of any Courts of Justice " within such Colonies, save only of the Courts of Error or Courts " of Appeal within the same, and it is expedient that Her Majesty " in Council should be authorized to provide for the Admission of " Appeals from other Courts of Justice within such Colonies or " Possessions : " Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That it shall be competent to Her Majesty, by any Order or Orders to be from Time to Time for that Purpose made with the Advice of Her Privy Council, to provide for the Admission of any Appeal or Appeals to Her Majesty in Council from any Judgments, Sentences, Decrees, or Orders of any Court of Justice within any *British* Colony or Possession abroad, although such Court shall not be a Court of Errors or a Court of Appeal within such Colony or possession ; and it shall also be competent to Her Majesty, by any such Order or Orders as aforesaid, to make all such Provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such Appeals, and for carrying into effect any such Decisions or Sentences as Her Majesty in Council shall pronounce thereon : Provided always, that it shall be competent to Her Majesty in Council to revoke, alter, and amend any such Order or Orders as aforesaid, as to Her Majesty

3 & 4 W. 4, c. 41. 5 & 6 W. 4, c. 83. Her Majesty by Order in Council may provide for the Admission of an Appeal from any Colony although there shall not be a Court of Error or of Appeal in such Colony ; and may revoke such Orders.

Orders may be either general or special. General Orders to be published Not to affect present Powers for regulating Appeals from the Colonies. Judicial Committee may proceed to hearing of Appeals without special Order of Reference.

in Council shall seem meet: Provided also, that any such Order as aforesaid may be either general and extending to all Appeals to be brought from any such Court of Justice as aforesaid, or special and extending only to any Appeal to be brought in any particular Case: Provided also, that every such general Order in Council as aforesaid shall be published in the *London Gazette* within One Calendar Month next after the making thereof: Provided also, that nothing herein contained shall be construed to extend to take away or diminish any Power now by Law vested in Her Majesty for regulating Appeals to Her Majesty in Council from the Judgments, Sentences, Decrees, or Orders of any Courts of Justice within any of Her Majesty's Colonies or Possessions abroad.

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IX. And be it enacted, That in case any Petition of Appeal whatever shall be presented, addressed to Her Majesty in Council, and such Petition shall be duly lodged with the Clerk of the Privy Council, it shall be lawful for the said Judicial Committee to proceed in hearing and reporting upon such Appeal, without any special Order in Council referring the same to them, provided that Her Majesty in Council shall have, by an Order in Council in the Month of *November*, directed that all Appeals shall be referred to the said Judicial Committee on which Petitions may be presented to Her Majesty in Council during the Twelve Months next after the making of such Order; and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like Manner as if each such Appeal had been referred to the said Judicial Committee by a special Order of Her Majesty in Council: Provided always that it shall be lawful for Her Majesty in Council at any Time to rescind any general Order so made; and in case of such Order being so rescinded all Petitions of Appeal shall in the first instance be preferred to Her Majesty in Council, and shall not be proceeded with by the said Judicial Committee without a special Order of Reference.

Proviso.

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Judicial Committee may make Rules to be binding upon such Courts requiring Judges' Notes of Evidence, &c.

XI. And be it enacted, That it shall and may be lawful for the said Judicial Committee to make any general Rule or Regulation, to be binding upon all Courts in the Colonies and other Foreign Settlements of the Crown, requiring the Judges' Notes of Evidence taken before such Court on any Cause appealed, and of the Reasons given by the Judges of such Court, or by any of them, for or against the Judgment pronounced by such Court; which Notes of Evidence and Reasons shall by such Court be transmitted to the Clerk of the Privy Council within One Calendar Month next after the Leave given by such Court to prosecute any Appeal to Her Majesty in Council; and such Order of the said Committee shall be binding upon all Judges of such Courts in the Colonies or Foreign Settlements of the Crown.

*In the Supreme Court of Canada.*

No. 26.
Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., cap. 27 (Imperial). ss. 1 to 6.

## No. 26.

## Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., Ch. 27 (Imperial).

An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

[25th July, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Short title.

1. This Act may be cited as the Colonial Courts of Admiralty Act, 1890.

Colonial Courts of Admiralty.

2. (1) Every court of law in a British possession which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Goveror is the sole judicial authority, the expression " court of law " for the purposes of this section includes such Governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression " Colonial Court of Admiralty " were therein substituted for " Vice-Admiralty Court " or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof, and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows :—

(*a*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in

England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and

27 & 28 Vict., c. 25. 36 & 37 Vict., c. 88.

(*b*) A Colonial Court of Admiralty shall have under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorised, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and

(*c*) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment; and

(*d*) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea, or under any Act providing for the discipline of Her Majesty's Navy, than may be from time to time conferred on such court by Order in Council.

(4) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exerciseable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

Power of Colonial legislature as to Admiralty jurisdiction.

3. The legislature of a British possession may by any Colonial law—

(*a*) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(*b*) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

Reservation of Colonial law for Her Majesty's assent.

4. Every Colonial law which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or

*In the Supreme Court of Canada.*

No. 26. Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., cap. 27 (Imperial). ss. 1 to 6 —*continued.*

contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

**Local Admiralty appeal.**

5. Subject to rules of court under this Act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognisance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

**Admiralty appeal to the Queen in Council.**

6. (1) The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act either where there is as of right no local appeal or after a decision on local appeal lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(*a*) from any judgment not having the effect of a definite judgment unless the court appealed from has given leave for such appeal, nor

(*b*) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such court to Her Majesty in Council, or as are for the time being possessed by the High Court in England or by the court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the

No. 26.
Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., cap. 27 (Imperial). ss. 1 to 6.
—*continued.*

powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

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## No. 27.

No. 27.
Imperial Order in Council regulating Appeals to the Privy Council from Alberta, dated January 10th 1910.

### Imperial Order in Council regulating Appeals to the Privy Council from Alberta, dated January 10, 1910.

At the Court at Buckingham Palace.

The 10th day of January, 1910.

Present :

The King's Most Excellent Majesty.

Lord President. Lord Chamberlain.
Lord Privy Seal. Lord Pentland.
Sir Walter Hely-Hutchinson.

Whereas by an Act passed in a session of Parliament held in the seventh and eighth years of Her late Majesty's reign (shortly entitled " The Judicial Committee Act, 1844 "), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British colony or possession abroad although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon :

And whereas by an Act of the Province of Alberta in the Dominion of Canada passed in the seventh year of His Majesty's reign and being Chapter 3 entitled " An Act respecting the Supreme Court," a Superior Court of Civil and Criminal Jurisdiction was constituted and established in and for the said Province of Alberta called the Supreme Court of Alberta.

And whereas it is expedient with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such Appeals that provision should be made for Appeals from the said Supreme Court to His Majesty in Council :

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the said Province of Alberta.

*In the Supreme Court of Canada.*

No. 27. Imperial Order in Council regulating Appeals to the Privy Council from Alberta, dated January 10th 1910 —*continued.*

1. In these Rules, unless the context otherwise requires :—

" Appeal " means Appeal to His Majesty in Council ;

" His Majesty " includes His Majesty's Heirs and Successors ;

" Judgment " includes decree, order, sentence, or decision ;

" Court " means either the Full Court or a single Judge of the Supreme Court of Alberta according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge ;

" Record " means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;

" Registrar " means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;

" Month " means calendar month.

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie :—

(*a*) as of right, from any final Judgment of the Court where the matter in dispute on the Appeal amounts to or is of the value of one thousand pounds sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of one thousand pounds sterling or upwards ; and

(*b*) at the discretion of the Court from any other Judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final Judgment can be duly given in consequence of a difference of opinion between the Judges, the final Judgment may be entered *pro forma* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice, or in his absence, of the senior puisne Judge of the Court, but such Judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance :—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding five

hundred pounds, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. Where the Judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said Judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just. And in case the Court shall direct the said Judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and generally to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record as finally printed (whether in Canada or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Canada or in England.

11. Where the Record is printed in Canada the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council forty copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling every eighth page thereof, and by affixing thereto the seal of the Court.

*In the Supreme Court of Canada.*

No. 27. Imperial Order in Council regulating Appeals to the Privy Council from Alberta, dated January 10th 1910 —*continued.*

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the Case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13. Where part of the Record is printed in Canada and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to such parts as are printed in Canada, and such as are to be printed in England respectively.

14. The reasons given by the Judge, or any of the Judges, for or against any Judgment pronounced in the course of the proceedings out of which the Appeal arises shall by such Judge or Judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

15. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated, the Court may direct the Appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as in the opinion of the Court the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice, or sufficient notice, of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal or may give such other directions in the matter as in the opinion of the Court the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

20. Where an Appellant, having obtained final leave to appeal, desires, prior to the dispatch of the Record to England, to withdraw his Appeal, the

Court may, upon an application in that behalf made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the dispatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such certificate, the Appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the order granting final leave to appeal and the dispatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its dispatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the Appeal may be printed either in Canada or in England, and shall in either event be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his Appeal in Person.

25. The Case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of

*In the Supreme Court of Canada.*

No. 27. Imperial Order in Council regulating Appeals to the Privy Council from Alberta, dated January 10th 1910 —*continued.*

the Appeal, shall, either of his own motion or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in (Alberta) such costs shall be taxed by the proper officer of the Court in accordance with the Rules for the time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on an Appeal from a Judgment of the Court in like manner as any original Judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any Judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

ALMERIC FITZROY.

SCHEDULE.

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto (i.e., 54 ems in length and 42 in width).

II. The size of the paper shall be such that the sheet, when folded and trimmed, will be 11 inches in height and $8\frac{1}{2}$ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

NOTE: Similar Orders in Council were passed with respect to British Columbia (January 23, 1911), Manitoba (November 28, 1910), New Brunswick (November 7, 1910), Nova Scotia (July 5, 1911), Prince Edward Island (October 13, 1910), and Saskatchewan (October 13, 1910). (Cameron's The Canadian Constitution and the Judicial Committee, Vol. I, p. 151 *et seq.*)

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No. 28. The Admiralty Act, Statutes of Canada, 1934 cap. 31, ss. 1, 34 and 35.

## No. 28.

## The Admiralty Act, Statutes of Canada 1934, Ch. 31.

His Majesty by and with the advice and consent of the Senate and House of Commons of Canada enacts as follows:—

Short title.

1. This Act may be cited as *The Admiralty Act*, 1934.

* * * * * *

Appeal to His Majesty in Council preserved.

34. Notwithstanding anything in this Act contained, the provisions of any law now in force in Canada providing for an appeal to His Majesty the King in Council in Admiralty matters shall continue to be in force and shall be deemed not to have been repealed.

REPEAL.

Colonial Courts of Admiralty Act, 1890.

35. Saving the effect of the immediately preceding section, the *Colonial Courts of Admiralty Act*, 1890, chapter twenty-seven of the Acts of the United Kingdom for the year 1890, is repealed in so far as the said Act is part of the law of Canada.

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C.—LEGISLATION IN UPPER AND LOWER CANADA AND IN ONTARIO AND QUEBEC RELATING TO PRIVY COUNCIL APPEALS.

No. 29. The Constitutional Act of 1791, 31 Geo. III, cap. 31. (Imperial). ss. I, II and XXXIV.

## No. 29.

## The Constitutional Act of 1791, 31 Geo. III, Ch. 31 (Imperial).

An Act to repeal certain parts of an Act, passed in the fourteenth year of his Majesty's Reign, entitled, An Act for making more effectual provision for the government of the province of Quebec, in North America; and to make further provision for the government of the said province.

Preamble. 14 Geo. III, cap. 83, recited.

Whereas an Act was passed in the Fourteenth Year of the Reign of His Present Majesty, entitled, An Act for making more effectual Provision for the Government of the Province of Quebec in North America: And whereas the said Act is in many Respects inapplicable to the present Condition and Circumstances of the said Province: And whereas it is expedient and necessary that further Provision should now be made for the good Government and Prosperity thereof: May it therefore please Your most Excellent Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That so much of the said Act as in any Manner relates to the Appointment of a Council for the Affairs of the said Province of Quebec, or to the Power given by the said Act to the said Council, or to the major Part of them, to make Ordinances for the Peace, Welfare, and good Government of the said Province, with the Consent of His Majesty's Governor, Lieutenant-Governor or Commander in Chief for the Time being, shall be, and the same is hereby repealed.

So much of recited Act as relates to the appointment of a Council for Quebec or its Powers repealed.

*In the Supreme Court of Canada.*

No. 29.
The Constitutional Act of 1791, 31 Geo. III, cap. 31. (Imperial) ss. I, II and XXXIV —*continued.*

Within each of the intended Provinces a Legislative Council and Assembly to be constituted, by whose Advice His Majesty may make Laws for the Government of the Province.

II. And whereas His Majesty has been pleased to signify, by His Message to both Houses of Parliament, His Royal Intention to divide His Province of Quebec into Two separate Provinces, to be called The Province of Upper Canada, and The Province of Lower Canada ; be it enacted by the Authority aforesaid, That there shall be within each of the said Provinces respectively a Legislative Council, and an Assembly, to be severally composed and constituted in the Manner hereinafter described ; and that in each of the said Provinces respectively His Majesty, His Heirs or Successors, shall have Power, during the Continuance of this Act, by and with the Advice and Consent of the Legislative Council and Assembly of such Provinces respectively to make Laws for the Peace, Welfare, and good Government thereof, such Laws not being repugnant to this Act ; and that all such Laws, being passed by the Legislative Council and Assembly of either of the said Provinces respectively and assented to by His Majesty, His Heirs or Successors, or assented to in His Majesty's Name, by such Person as His Majesty, His Heirs or Successors, shall from Time to Time appoint to be the Governor, or Lieutenant-Governor, of such Province, or by such Person as His Majesty, His Heirs or Successors, shall from Time to Time appoint to administer the Government within the same, shall be and the same are hereby declared to be, by virtue of and under the Authority of this Act, valid and binding to all Intents and Purposes whatever, within the Province in which the same shall have been so passed.

* * * * * *

Establishment of a Court of Civil Jurisdiction in each Province.

XXXIV. And whereas by an Ordinance passed in the Province of Quebec, the Governor and Council of the said Province were constituted a Court of Civil Jurisdiction, for hearing and determining Appeals in certain Cases therein specified, be it further enacted by the Authority aforesaid That the Governor, or Lieutenant-Governor, or Person administering the Government of each of the said Provinces respectively, together with such executive Council as shall be appointed by His Majesty for the Affairs of such Province shall be a Court of Civil Jurisdiction within each of the said Provinces respectively for hearing and determining Appeals within the same, in the like Cases, and in the like Manner and Form, and subject to such Appeal therefrom, as such Appeals might before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec ; but subject nevertheless to such further or other Provisions as may be made in this Behalf, by Any act of the Legislative Council and Assembly of either of the said Provinces respectively assented to by His Majesty, His Heirs or Successors.

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## No. 30.

*In the Supreme Court of Canada.*

No. 30. The Judicature Act, Lower Canada, 34 Geo. III (1794) cap. 6, ss. I, XXIII, XXX and XLIII.

## The Judicature Act, Lower Canada, 34 Geo. III (1794), Ch. 6.

An Act for the division of the Province of Lower Canada, for amending the Judicature thereof, and for repealing certain Laws therein mentioned.

Most Gracious Sovereign,

Preamble.

We, your Majesty's most dutiful and loyal subjects, the Legislative Council and Representatives of your People of the Province of Lower Canada, having taken into our most serious consideration the message communicated to us last Session by his Excellency the Lieutenant-Governor, then your Majesty's Commander in Chief of this Province, recommending a plan, for altering and amending the Judicature thereof, and for establishing a due and uniform administration of justice therein, and having maturely deliberated upon the means, recommended in the said message, for securing to your People in this Province the important objects of your Majesty's paternal care, we do with profound gratitude for the same, most humbly beseech your Majesty, that it may be enacted: and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Lower Canada constituted and assembled by virtue of and under the authority of an Act of the Parliament of Great Britain, passed in the thirty-first year of his Majesty's reign, intituled: "*An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign,*" *intituled* "*An Act for making more effectual provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province*":

Provincial courts of appeal constituted.

XXIII. And be it further enacted by the authority aforesaid, that the Governor, Lieutenant-Governor or Person administering the Government, the members of the Executive Council of this Province, the Chief Justice thereof, and the Chief Justice to be appointed for the court of King's Bench at Montreal, or any five of them (the Judges of the court of the district wherein the judgment appealed from was given, excepted) shall be constituted and are hereby erected and constituted, a superior court of civil jurisdiction or provincial court of appeals, and shall take cognisance of, hear, try and determine all causes, matters and things appealed from all civil jurisdictions and courts, wherein an appeal by law is allowed: provided always that no member of the court of appeals, shall be considered disqualified from sitting on appeals, from the district of Three Rivers, excepting the Judges who may have given the judgment appealed from.

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Appeals in certain cases to His Majesty in Council

XXX. And be it further enacted by the authority aforesaid that the judgment of the said court of appeals of this Province, shall

*In the Supreme Court of Canada.*

No. 30. The Judicature Act, Lower Canada, 34 Geo. III (1794) cap. 6, ss. I, XXIII, XXX and XLIII —*continued.*

be final in all cases where the matter in dispute shall not exceed the sum or value of five hundred pounds sterling ; but in cases exceeding that sum or value, as well as in all cases where the matter in question shall relate to any fee of office, duty, rent, revenue, or any sum or sums of money payable to His Majesty, titles to lands or tenements, annual rents or such like matters or things where the rights in future may be bound, an appeal shall lie to His Majesty in his Privy Council, though the immediate sum or value appealed for, be less than five hundred pounds sterling, provided security be first duly given by the appellant, that he will effectually prosecute his appeal, and answer the condemnation, and also, pay such costs and damages as shall be awarded by His Majesty in his Privy Council, in case the judgment of the said court of appeals of this Province be affirmed, or provided that the appellant agrees and declares in writing at the Clerk's office of the court appealed from, that he does not object to the judgment given against him, being carried into effect according to law, on which condition he shall give sureties for the costs of the appeal, only, in case the appeal is dismissed, and on condition also that the appellee shall not be obliged to render and return to the appellant, more than the net proceeds of the execution, with legal interest on the sum recovered, or the restitution of the real property ; and of the net value of the produce and revenues of the real property, whereof the appellee has been put in possession, by virtue of the execution, to take place from the day he recovered the sum or possessed the real property until perfect restitution is made, but without any damage against the appellee, by reason of such execution, in case that the judgment be reversed any law, custom, or usage, to the contrary notwithstanding.

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Reservation of the rights and prerogatives of the Crown.

XLIII. Provided always, and it is declared and enacted by the authority aforesaid, that nothing herein contained shall be construed in any manner to derogate from the rights of the Crown, to erect, constitute and appoint courts of civil or criminal jurisdiction within this Province, and to appoint, from time to time, the Judges and Officers thereof, as his Majesty, his Heirs or Successors shall think necessary or proper for the circumstances of this Province, or to derogate from any other right or prerogative of the Crown whatsoever.

## No. 31.

*In the Supreme Court of Canada.*

No. 31. An Act to establish a Superior Court of Civil and Criminal jurisdiction and to regulate the Court of Appeal—The Statutes of Upper Canada 34 Geo. III (1794) cap. 2, ss. I, XXXIII and XXXVI.

## An Act to Establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal—The Statutes of Upper Canada, 34 Geo. III (1794), Ch. 2.

Preamble.

For the general and regular administration of justice throughout this province, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the province of *Upper Canada*, constituted and assembled by virtue of and under the authority of an Act passed in the parliament of *Great Britain*, intituled " An Act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled ' An Act for making more effectual provision for the government of the province of *Quebec*, in *North America*, and to make further provision for the government of the said province,' " and by the authority of the same. That there be constituted and established, and there is hereby constituted and established, a court of law, to be called and known by the name and style of his Majesty's court of king's bench, for the province of *Upper Canada*, which shall be a court of record of original jurisdiction, and shall possess all such powers and authorities as by the law of *England* are incident to a superior court of civil and criminal jurisdiction, and may and shall hold plea in all and all manner of actions, causes, or suits, as well criminal as civil, real, personal, and mixed, arising, happening, or being, within the said province, and may and shall proceed in such actions, causes or suits, by such process and course as shall tend with justice and despatch to determine the same, and may and shall hear and determine all issues of law, and shall also hear, and by and with an inquest of good and lawful men, determine all issues of fact that may be joined in any such action, cause or suit as aforesaid, and judgment thereon give, and execution thereof award, in as full and ample a manner as can or may be done in his Majesty's courts of king's bench, common bench, or in matters which regard the King's revenue by the court of exchequer in *England*. And that his Majesty's chief justice of this province, together with two puisne justices, shall preside in the said court, which court shall be holden in a place certain, that is, in the city, town, or place where the governor or lieutenant governor shall usually reside ; and until such place be fixed, the said court shall be holden at the last place of meeting of the legislative council and assembly.

A court of king's bench established.

Jurisdiction and powers thereof.

Persons who shall preside therein, and place where the same shall be holden.

* * * * * *

Court of appeals.

XXXIII. *And be it further enacted*, That the governor, lieutenant governor, or person administering the government of this province, or the chief justice of the province, together with any two or more members of the executive council of the province, shall compose a

*In the Supreme Court of Canada.*

court of appeal, for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them.

* * * * * *

No. 31. An Act to establish a Superior Court of Civil and Criminal jurisdiction and to regulate the Court of Appeal— The Statutes of Upper Canada, 34 Geo. III (1794) cap. 2, ss. I, XXXIII and XXXVI —*continued.*

Cases of appeal to His Majesty in Council.

XXXVI. *And be it further enacted by the authority aforesaid,* That the judgment of the said court of appeal shall be final, in all cases where the matter in controversy shall not exceed the sum or value of five hundred pounds sterling, but in cases exceeding that amount, as well as in all cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty, or fee, or any other such like demand of a general and public nature, affecting future rights, of what value or amount soever the same may be, an appeal may lie to his Majesty, in his privy council, upon proper security being given by the appellant that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded by his Majesty, in his privy council in case the judgment of the said court of governor and executive council, or court of appeals shall be affirmed, and upon the perfecting of such security, execution of the said judgment shall be stayed, until the final determination of such appeal to the King in council.

Security to be given.

Provision for removing the court of King's Bench to another place of holding the same.

*Provided always, and be it further enacted,* That in time of actual war, and when there may be reason to suspect an invasion of the province from the King's enemies, it shall and may be lawful for the governor, lieutenant-governor, or person administering the government, by and with the advice and consent of the executive council, to issue his proclamation to remove the place of holding the said court, and to appoint and make known such other place, within the limits of the province, as shall be deemed most safe and convenient for holding the same.

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## No. 32.

### The Act of Union, 1840, 3 & 4 Vict., Ch. 35 (Imperial).

No. 32. The Act of Union, 1840, 3 & 4 Vict., cap. 35 (Imperial), ss. I to III, XL, XLIV, XLVI and XLVII.

An Act to re-unite the Provinces of *Upper* and *Lower Canada*, and for the Government of *Canada*.

[23rd July, 1840.]

" Whereas it is necessary that Provision be made for the good " Government of the Provinces of *Upper Canada* and *Lower Canada*, " in such Manner as may secure the Rights and Liberties and pro- " mote the Interests of all Classes of Her Majesty's Subjects within " the same: And whereas to this end it is expedient that the said " Provinces be re-united and form One Province for the Purposes " of Executive Government and Legislation ": Be it therefore

Declaration of Union.

enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the Authority of the same, That it shall be lawful for Her Majesty, with the Advice of Her Privy Council, to declare, or to authorise the Governor-General of the said Two Provinces of *Upper* and *Lower Canada* to declare, by Proclamation, that the said Provinces, upon, from, and after a certain Day in such Proclamation to be appointed, which Day shall be within Fifteen Calendar Months next after the passing of this Act, shall form and be One Province, under the Name of the Province of *Canada*, and thenceforth the said Provinces shall constitute and be One Province, under the Name aforesaid, upon, from, and after the Day so appointed as aforesaid.

Repeal of Acts 31 G.3, c. 31.

II. And be it enacted, That so much of an Act passed in the Session of Parliament held in the Thirty-first Year of the Reign of King *George* the Third, intituled *An Act to repeal certain Parts of an Act passed in the Fourteenth Year of His Majesty's Reign, intituled "An Act for making more effectual Provision for the Government of the Province of* Quebec *in* North America," *and to make further Provision for the Government of the said Province*, as provides for constituting and composing a Legislative Council and Assembly within each of the said Provinces respectively, and for the making of Laws; and also the whole of an Act passed in the Session of Parliament held in the First and Second Years of the Reign of Her present Majesty, intituled *An Act to make temporary Provision for the Government of* Lower Canada; and also the whole of an Act passed in the Session of Parliament held in the Second and Third Years of the Reign of Her present Majesty, intituled *An Act to amend an Act of the last Session of Parliament, for making temporary Provision for the Government of* Lower Canada; and also the whole of an Act passed in the Session of Parliament held in the First and Second Years of the Reign of His late Majesty King *William* the Fourth, intituled *An Act to amend an Act of the Fourteenth Year of His Majesty King* George *the Third, for establishing a Fund towards defraying the Charges of the Administration of Justice and the Support of Civil Government in the Province of* Quebec *in* America, shall continue and remain in force until the Day on which it shall be declared, by Proclamation as aforesaid, that the said Two Provinces shall constitute and be One Province as aforesaid, and shall be repealed on, from, and after such Day: Provided always, that the Repeal of the said several Acts of Parliament and Parts of Acts of Parliament shall not be held to revive or give any Force or Effect to any Enactment which has by the said Acts, or any of them been repealed or determined.

1 & 2 Vict., c. 9.

2 & 3 Vict., c. 53.

1 & 2 W. 4, c. 23.

14 G. 3, c. 88.

III. And be it enacted, That from and after the Re-union of the said Two Provinces there shall be within the Province of *Canada*

*In the Supreme Court of Canada.*

No. 32. The Act of Union, 1840, 3 & 4 Vict., cap. 35 (Imperial), ss. I to III, XL, XLIV, XLVI and XLVII —*continued.*

Composition and Powers of Legislature.

One Legislative Council and One Assembly, to be severally constituted and composed in the Manner hereinafter prescribed, which shall be called "The Legislative Council and Assembly of *Canada*"; and that, within the Province of *Canada*, Her Majesty shall have Power, by and with the Advice and Consent of the said Legislative Council and Assembly, to make Laws for the Peace, Welfare, and good Government of the Province of *Canada*, such Laws not being repugnant to this Act, or to such Parts of the said Act passed in the Thirty-first Year of the Reign of His said late Majesty as are not hereby repealed, or to any Act of Parliament made or to be made, and not hereby repealed, which does or shall by express Enactment or by necessary Intendment, extend to the Provinces of *Upper* and *Lower Canada*, or to either of them or to the Province of *Canada*; and that all such Laws being passed by the said Legislative Council and Assembly, and assented to by Her Majesty, or assented to in Her Majesty's name by the Governor of the Province of *Canada*, shall be valid and binding to all Intents and Purposes within the Province of *Canada*.

Authority of the Governor.

XL. Provided always, and be it enacted, That nothing herein contained shall be construed to limit or restrain the Exercise of Her Majesty's Prerogative in authorising, and that notwithstanding this Act, and any other Act or Acts passed in the Parliament of *Great Britain*, or in the Parliament of the United Kingdom of *Great Britain* and *Ireland*, or of the Legislature of the Province of *Quebec*, or of the Provinces of *Upper* or *Lower Canada* respectively, it shall be lawful for Her Majesty to authorise the Lieutenant-Governor of the Province of *Canada* to exercise and execute, within such Parts of the said Province as Her Majesty shall think fit, notwithstanding the Presence of the Governor within the Province, such of the Powers, Functions, and Authority, as well judicial as other, which before and at the Time of passing of this Act were and are vested in the Governor, Lieutenant-Governor or Person administering the Government of the Provinces of *Upper Canada* and *Lower Canada* respectively, or of either of them and which from and after the said Re-union of the said Two Provinces shall become vested in the Governor of the Province of *Canada*, and to authorise the Governor of the Province of *Canada* to assign, depute, substitute, and appoint any Person or Persons, jointly or severally, to be his Deputy or Deputies within any Part or Parts of the Province of *Canada*, and in that Capacity to exercise, perform, and execute during the Pleasure of the said Governor such of the Powers, Functions, and Authorities, as well judicial as other, as before and at the Time of the passing of this Act were and are vested in the Governor, Lieutenant-Governor, or person administering the Government of the Provinces of *Upper* and *Lower Canada* respectively, and which from and after the Union of the said Provinces shall become vested in the Governor of the Province of *Canada*, as the Governor of the Province of *Canada* shall

deem to be necessary or expedient: Provided always, that by the Appointment of a Deputy or Deputies as aforesaid the Power and Authority of the Governor of the Province of *Canada* shall not be abridged, altered, or in any way affected otherwise than as Her Majesty shall think proper to direct.

Courts of Appeal, Probate, Queen's Bench and Chancery in Upper Canada; and Court of Appeal in Lower Canada.

XLIV. "And whereas by the Laws now in force in the said "Province of *Upper Canada* the Governor, Lieutenant-Governor, or "Person administering the Government of the said Province, or "the Chief Justice of the said Province, together with any Two or "more of the Members of the Executive Council of the said Province, "constitute and are a Court of Appeal for hearing and determining "all Appeals from such Judgments or Sentences as may lawfully "be brought before them: And whereas by an Act of the Legisla- "ture of the said Province of *Upper Canada*, passed in the Thirty- "third Year of the Reign of His late Majesty King *George* the Third, "intituled *An Act to establish a Court of Probate in the said Province,* "*and also a Surrogate Court in every District thereof*, there was and is "established a Court of Probate in the said Province, in which Act "it was enacted that the Governor, Lieutenant-Governor, or Person "administering the Government of the said last-mentioned Province "should preside, and that he should have the Powers and Authorities "in the said Act specified: And whereas by an Act of the Legisla- "ture of the said Province of *Upper Canada*, passed in the Second "Year of the Reign of His late Majesty King *William* the Fourth, "intituled *An Act respecting the Time and Place of Sitting of the* "*Court of King's Bench*, it was among other things enacted, that His "Majesty's Court of King's Bench in that Province should be holden "in a Place certain; that is, in the City, Town, or Place which should "be for the Time being the Seat of the Civil Government of the said "Province or within One Mile therefrom: And whereas by an Act "of the Legislature of the said Province of *Upper Canada*, passed in "the Seventh Year of the Reign of His late Majesty King *William* "the Fourth, intituled *An Act to establish a Court of Chancery in* "*this Province*, it was enacted that there should be constituted and "established a Court of Chancery, to be called and known by the "Name and Style of 'The Court of Chancery for the Province of "*Upper Canada*,' of which Court the Governor, Lieutenant-Governor, "or Person administering the Government of the said Province "should be Chancellor; and which Court, it was also enacted should "be holden at the Seat of Government in the said Province, or in "such other Place as should be appointed by Proclamation of the "Governor, Lieutenant-Governor, or Person administering the "Government of the said Province: And whereas by an Act of the "Legislature of the Province of *Lower Canada*, passed in the Thirty- "fourth Year of the Reign of His late Majesty King *George* the "Third, intituled *An Act for the Division of the Province of* Lower "Canada, *for amending the Judicature thereof, and for repealing certain*

(Laws of Upper Canada, 33 G. 3, sess. 2, c. 8.)

(Laws of Upper Canada, 2 W. 4, c. 8.)

(Laws of Upper Canada, 7 W. 4, c. 2.)

(Laws of Lower Canada, 34 G. 3.)

*In the Supreme Court of Canada.*

No. 32. The Act of Union, 1840, 3 & 4 Vict., cap. 35 (Imperial), ss. 1 to III, XL, XLIV, XLVI and XLVII —*continued.*

" *Laws therein mentioned*, it was enacted, that the Governor, Lieu-
" tenant-Governor, or the Person administering the Government,
" the Members of the Executive Council of the said Province, the
" Chief Justice thereof, and the Chief Justice to be appointed for
" the Court of King's Bench at *Montreal*, or any Five of them, the
" Judges of the Court of the District wherein the Judgment appealed
" from was given excepted, should constitute a Superior Court of
" Civil Jurisdiction, or Provincial Court of Appeals, and should
" take cognisance of, hear, try, and determine all Causes, Matters,
" and Things appealed from all Civil Jurisdictions and Courts wherein
" an Appeal is by Law allowed " ; be it enacted, That until otherwise provided by an Act of the Legislature of the Province of *Canada*, all judicial and ministerial Authority which before and at the Time of passing this Act was vested in or might be exercised by the Governor, Lieutenant-Governor, or Person administering the Government of the said Province of *Upper Canada*, or the Members of any Number of the Members of the Executive Council of the same Province, or was vested in or might be exercised by the Governor, Lieutenant-Governor or the Person administering the Government of the Province of *Lower Canada*, and the Members of the Executive Council of that Province, shall be vested in and may be exercised by the Governor, Lieutenant-Governor, or Person administering the Government of the Province of *Canada*, and in the Members or the like Number of the Members of the Executive Council of the Province of *Canada* respectively ; and that until otherwise provided by Act or Acts of the Legislature of the Province of *Canada*, the said Court of King's Bench, now called the Court of Queen's Bench of Upper *Canada*, shall from and after the Union of the Provinces of *Upper* and *Lower Canada* be holden at the City of *Toronto*, or within One Mile from the Municipal Boundary of the said City of *Toronto* : Provided always, that, until otherwise provided by Act or Acts of the Legislature of the Province of *Canada*, it shall be lawful for the Governor of the Province of *Canada*, by and with the Advice and Consent of the Executive Council of the same Province, by his Proclamation to fix and appoint such other Place as he may think fit within that Part of the last-mentioned Province which now constitutes the Province of *Upper Canada* for the holding of the said Court of Queen's Bench.

* * * * * *

and Effect in those Parts of the Province of Canada which now constitute the said Legislature of the Province of Canada.

Existing Laws saved.

XLVI. And be it enacted, That all Laws, Statutes, and Ordinances, which at the Time of the Union of the Provinces of *Upper Canada* and *Lower Canada* shall be in force within the said Provinces or either of them, or any Part of the said Provinces respectively, shall remain and continue to be of the same Force, Authority, and Effect in those Parts of the Province of *Canada* which constitute the

No. 32. The Act of Union, 1840, 3 & 4 Vict., cap. 35 (Imperial), ss. I to III, XL, XLIV, XLVI and XLVII —*continued.*

said Provinces respectively as if this Act had not been made, and as if the said Two Provinces had not been united as aforesaid, except in so far as the same are repealed or varied by this Act, or in so far as the same shall or may hereafter, by virtue and under the Authority of this Act, be repealed or varied by any Act or Acts of the Legislature of the Province of *Canada*.

Courts of justice, Commissions, officers, etc.

XLVII. And be it enacted, That all the Courts of Civil and Criminal Jurisdiction within the Provinces of *Upper* and *Lower Canada* at the Time of the Union of the said Provinces, and all legal Commissions, Powers, and Authorities, and all Officers, judicial, administrative, or ministerial, within the said Provinces respectively, except in so far as the same may be abolished, altered, or varied by or may be inconsistent with the Provisions of this Act, or shall be abolished, altered, or varied by any Act or Acts of the Legislature of the Province of *Canada*, shall continue to subsist within those Parts of the Province of *Canada* which now constitute the said Two Provinces respectively, in the same Form and with the same Effect as if this Act had not been made, and as if the said Two Provinces had not been re-united as aforesaid.

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## No. 33.

No. 33. An Act respecting the Court of Error and Appeal, Consolidated Statutes of Upper Canada, 1859, cap. 13, ss. 57 and 58.

### An Act respecting the Court of Error and Appeal, Consolidated Statutes of Upper Canada, 1859, Ch. 13.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :—

* * * * * *

Appeals to Her Majesty, in Her Privy Council.

Appeal final in matters not exceeding $4,000.

57. The judgment of the Court of Error and Appeal shall be final where the matter in controversy does not exceed the sum or value of four thousand dollars. 12 V. c. 63, s. 46.

When Appeal may be to the Queen in Privy Council.

58. In a case exceeding that amount, as well as in a case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an Appeal shall lie to Her Majesty in Her Privy Council. 12 V. c. 63, s. 46.

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*In the Supreme Court of Canada.*

No. 34.
An Act respecting the Court of Queen's Bench, Consolidated Statutes of Lower Canada, 1861, cap. 77 s. 52.

## No. 34.

## An Act respecting the Court of Queen's Bench, Consolidated Statutes of Lower Canada, 1861, Ch. 77.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :—

* * * * * *

Of Appeals to Her Majesty in Her Privy Council.

In what cases an appeal lies from the judgment of the Court of Q.B. to Her Majesty in Her Privy Council.

52. The judgment of the Court of Queen's Bench shall be final in all cases where the matter in dispute does not exceed the sum or value of five hundred pounds sterling ; but in cases exceeding that sum or value, as well as in all cases where the matter in question relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things, where the rights in future might be bound, an appeal shall lie to Her Majesty in Her Privy Council, in that part of the United Kingdom of Great Britain and Ireland called England, though the immediate sum or value appealed for be less than five hundred pounds sterling, provided security be first duly given by the appellant, that he will effectually prosecute his appeal, and answer the condemnation, and also pay the costs and damages to be awarded by Her Majesty, in Her Privy Council, in case the judgment of the said court is affirmed,—or provided that the appellant agrees and declares in writing, at the clerk's office of the court appealed from, that he does not object to the judgment given against him being carried into effect according to law, on which condition he shall give sureties for the costs of appeal only, in case the appeal is dismissed, and on condition also, that the appellee shall not be obliged to render and return to the appellant more than the net proceeds of the execution, with legal interest on the sum recovered, or the restitution of the real property, and of the net value of the produce and revenues of the real property whereof the respondent has been put in possession, by virtue of the execution, to be computed from the day he recovered the sum or possessed the real property until perfect restitution is made, but without any damage against the respondent, by reason of such execution, in case the judgment is reversed. 34 G. 3, c. 6, s. 30, and 12 V. c. 37, s. 19.

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## No. 35.



### Code of Civil Procedure of Lower Canada, 1867.

Chapter Fourth.

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On Appeals to Her Majesty.

1178. An appeal lies to her Majesty in the Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench :—

1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to her Majesty.

2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected ;

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling. C.S.L.C., c. 77, s. 52.

See 37 Vict., c. 6, s. 2 (Que.), under art. 494.

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## No. 36.



### The British North America Act, 1867, 30 Vict., Ch. 3 (Imperial).

Section 129. Vide supra, p. 186.

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## No. 37.



### The Privy Council Appeals Act, Revised Statutes of Ontario, 1937, Ch. 98.

When appeal may be made.

1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be an appeal shall lie to His Majesty in His Privy Council, and except as aforesaid, no appeal shall lie to His Majesty in His Privy Council. R.S.O. 1927, c. 86, s. 1.

* * * * * *

Exception in appeals under Rev. Stat., c. 130.

11. The preceeding sections shall not apply to an appeal to His Majesty in His Privy Council from a judgment of any court on a reference under *The Constitutional Questions Act*, R.S.O. 1927, c. 86, s. 11.

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*In the Supreme Court of Canada.*

No. 38.

The Constitutional Questions Act, Revised Statutes of Ontario, 1937, cap. 130.

## No. 38.

## The Constitutional Questions Act, Revised Statutes of Ontario, 1937, Ch. 130.

Reference to Court authorised.

1. The Lieutenant-Governor in Council may refer to the Court of Appeal or to a judge of the Supreme Court for hearing and consideration any matter which he thinks fit, and the Court shall thereupon hear and consider the same. R.S.O. 1927, c. 117, s. 1.

Appeal to Privy Council. Rev. Stat., c. 98.

8. An appeal to His Majesty in His Privy Council from a judgment of any court on a reference under this Act shall not be subject to the restrictions contained in The Privy Council Appeals Act. R.S.O. 1927, c. 117, s. 8.

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No. 39.

Court of King's Bench Reference Act of Quebec, R.S.Q. 1925, cap. 7, as amended by the Statutes of Quebec, 1928, cap. 13 ss. 1, 7, 8 and 9.

## No. 39.

## Court of King's Bench Reference Act of Quebec, Revised Statutes of Quebec, 1925, Ch. 7, as amended by the Statutes of Quebec, 1928, Ch. 13.

1. This Act may be cited as the Court of King's Bench Reference Act.

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7. An appeal shall lie from the opinion or view of the Court of King's Bench (Appeal Side), expressed in virtue of the preceding sections :—

(*a*) To the Supreme Court of Canada, in conformity with section 43 of the Supreme Court Act (Revised Statutes of Canada, 1927, chapter 35) ; or

Appeals.

(*b*) To His Majesty in His Privy Council.

Idem.

8. An appeal shall likewise lie to His Majesty in His Privy Council from the judgment rendered by the Supreme Court on an appeal authorised under sub-paragraph (*a*) of the preceding section 7, subject to an application for leave to appeal being made to His Majesty in His said Privy Council.

Opinion of Court of K.B. final.

9. The opinion of the Court of King's Bench, upon any such reference, although advisory only, shall, for all purposes of appeal to the Supreme Court of Canada, or to His Majesty in His Privy Council, be treated as a final judgment of the said court between the parties.

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## No. 40.

## The Code of Civil Procedure of Quebec as amended by 8 Ed. VII, Ch. 75, and 8 Geo. V, Ch. 78.

### Section IX.

### His Majesty in His Privy Council.

68. An Appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench :—

1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty ;

2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected ;

3. In every other case where the amount or value of the thing demanded exceeds twelve thousand dollars.

# In the Privy Council.

No. 26 of 1940.

## ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

IN THE MATTER of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled "An Act to amend the Supreme Court Act."

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO, THE ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE ATTORNEY-GENERAL OF NEW BRUNSWICK AND THE ATTORNEY-GENERAL OF NOVA SCOTIA ... ... ... ... ... *Appellants,*

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL OF MANITOBA AND THE ATTORNEY-GENERAL OF SASKATCHEWAN ... ... ... *Respondents.*

# RECORD OF PROCEEDINGS.

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