IN THE SUPREME COURT OF CANADA

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION.

BETWEEN :

ISRAEL WINNER, doing business under the name and style of MACKENZIE COACH LINES,

(DEFENDANT) APPELLANT,

AND

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

10 (PLAINTIFF) RESPONDENT.

Appellant's Factum.

PART I

STATEMENT OF FACTS

This Appeal arises out of an action instituted by S. M. T. (Eastern) Limited against the Appellant herein by Writ of Summons issued out of the Supreme Court of New Brunswick, Chancery Division on the 17th day of September, A.D. 1949 (Record p. 2), whereunder S. M. T. (Eastern) Limited, hereinafter called " the Respondent " claimed as follows :

" 1. An injunction restraining the defendant from picking up and letting
20 down passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia border.

2. For damages arising out of the defendant's enbussing and debussing passengers within the Province of New Brunswick since August 1st, 1949.

3. For an accounting to ascertain such damages.

4. Costs of this action.

5. Such further and other relief as to this Honourable Court may seem just."

On the 14th day of December, A.D. 1949, the Respondent gave Notice of Trial for the 20th day of December, A.D. 1949.

When the said action came up for trial as aforesaid, it was agreed by Counsel for the Appellant and Counsel for the Respondent that prior to the trial of the said action, Questions of Law should be referred to the Supreme Court of New Brunswick, Appellate Division, pursuant to O. 34 of The Rules of the Supreme Court of New Brunswick.

Order 34 reads in part as follows :

1. SPECIAL CASE

" 1. The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court or a Judge. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court or Judge and the parties shall be at liberty to refer to the whole contents of such documents, and the Court or Judge shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom, if proved at a trial.

2. If it appear to the Court or a Judge, that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a master or an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court either by special case or in such other manner as the Court or a Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

Accordingly Mr. Justice Peter J. Hughes, on the 17th day of January, A.D. 1950 (to which date the said action had been adjourned) made an Order appearing at p. 8 of the Record raising Questions of Law for the opinion of the Appellate Division on facts set out in the said Order, which facts constitute the facts involved in this Appeal and are not reiterated in this factum.

At the hearing before the Appellate Division, the Questions of Law above referred to were enlarged by Agreement of Counsel (Record p. 17).

Briefly summarized the Questions of Law raised for the opinion of the Appellate Division involved the validity of The Motor Carrier Act, 1937, (N.B.), as amended, insofar as it purported to affect an inter-provincial and international motor carrier undertaking carried on by the Appellant herein.

Copies of the said Act, consolidating Amendments enacted in 1939 (3 Geo. VI c. 37) have been filed with the Registrar.

Particular reference is made to an Amendment enacted in 1949, (13 Geo.) VI, c. 47 (N. B.) which Amendment reads as follows:

" 1. Clause (f) of Sub-section (1) of Section 2 of Chapter 43 of 1 Geo. VI, (1937) The Motor Carrier Act, 1937, as amended by Chapter 37 of 3 Geo. VI, (1939) is hereby further amended by striking out everything in the said clause after the word ' fares ' in the third line thereof.

2. Clause (g) of Sub-section (1) of Section 2 of the said Chapter, as amended by Chapter 37 of 3 Geo. VI (1939) is hereby further amended by striking out everything in the said clause after the word ' hire ' in the third line thereof.

3. Section 4 of the said Chapter, as amended by Chapter 37 of 3 Geo. VI (1939) is hereby further amended by striking out the word ' and ' in the fourth line thereof and substituting therefor the word ' or ', and by striking out the words ' within the province ' being the last three words of the said section."

The said Questions of Law also involved the validity of certain sections of The Motor Vehicle Act (24 Geo. V c. 20) as amended and of certain Regulations promulgated thereunder, insofar as such sections and Regulations purported to affect the Appellant's said undertaking.

The validity of the said sections and Regulations was raised for the opinion of the Appellate Division under the Agreement of Counsel above referred to which Agreement enlarged the Questions of Law raised by the Order made by Mr. Justice Hughes on January 17th, 1950 (Record p. 8) by raising for the opinion of the Appellate Division the additional question as to the validity, in respect of the Appellant's undertaking, of the Act last referred to and in particular of Sections 6 and 53 thereof and of Regulation 13 promulgated thereunder.

Copies of the said Act with the Regulations printed at the end thereof, have been filed with the Registrar.

The Motor Carrier Act of the Province of New Brunswick was first enacted in 1927, being c. 16 of the Acts of the Assembly of that year.

Such original legislation purported to cover inter-provincial and international motor carriage as well as purely intra-provincial motor carriage, without distinction and perhaps without realization that its apparent scope extended beyond regulation and control of intra-provincial motor carriage.

The original Act was included in R.S.N.B., 1927, as c. 27, amended to some extent but inter-provincial and international motor carriage remained within the apparent scope of the Act.

In 1937, the present Motor Carrier Act, 1937, was adopted in substitution for the original Act. As enacted in 1937, the said Act likewise purported to cover inter-provincial and international motor carriage as well as purely intra-provincial motor carriage.

In 1939 however (3 Geo. VI, c. 37), the 1937 Act was amended in such a way as to exclude from the definition of " public motor bus " and " public Motor truck," motor vehicles operating to or from points without the Province of New Brunswick.

As amended, Section 2 (f) read after the 1939 Amendment as follows :

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

While not particularly relevant to this Appeal, since the Appellant does not carry on a trucking business, it may nevertheless be noted that the 1939 Amendment similarly amended the definition of " public motor truck " to read as follows :

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

The effect of the 1939 Amendment was to exclude from the definition of public motor buses and public motor trucks, motor buses and motor trucks operating inter-provincially or internationally.

Section 11 of the said Act reads as follows :

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

Section 4 of the said Act as amended in 1939 read as follows :

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

It is therefore apparent that The Motor Carrier Act as it read in 1939, did not prohibit inter-provincial or international motor carrier undertakings.

Under the 1949 Amendment, as above quoted, however, the definitions of " public motor bus " and " public motor truck " were again altered to include inter-provincial and international motor carriage.

The 1949 Amendment is the principal reason for the present Appeal, the Appellant contending that it is ultra vires of the Legislature of the Province of New Brunswick, since it deals with a class of subject matter exclusively within the legislative power of Canada and not of the provinces.

One ground on which the Appellant bases his Appeal is that by virtue of Section 92 (10) (a) of the B. N. A. Act, undertakings connecting a province with any other or others of the Provinces of Canada or extending beyond the

limits of such province, are excepted from provincial legislative jurisdiction and entrusted to the legislative jurisdiction of Canada under Section 91 (29) of the B. N. A. Act and the opening and concluding words of Section 91 of the said Act.

It is also contended, as more fully appears in the Statement of Facts set out in the Order of Mr. Justice Peter J. Hughes, dated the 17th day of January, A.D. 1950 (Record p. 8) that the Appellant operates a Public Motor Bus Service between the City of Boston in the Commonwealth of Massachusetts and Halifax and Glace Bay in the Province of Nova Scotia, thus conducting an undertaking which is within the meaning of the enumerated legislative power of Canada relating to the Regulation of Trade and Commerce conferred by Section 91 (2) of the B. N. A. Act.

Under the terms of the Agreement of Counsel above referred to (Record p. 17) a similar contention has been raised in respect of The Motor Vehicle Act and Amendments thereto and in respect of Regulation 13 promulgated under the said Act, which Act and Regulation have substantially the same effect as The Motor Carrier Act insofar as inter-provincial and international motor carriage is concerned.

The Motor Carrier Act and in particular Section 11 thereof, contains a specific prohibition as to motor carriage within the territorial limits of the Province of New Brunswick.

The prohibition contained in Section 11 may, in the discretion of The Motor Carrier Board, be removed in whole or in part by license issued to any Motor Carrier applying therefor, under the provisions of Section 4 of the said Act, but unless The Motor Carrier Board grants a license under the said section, the prohibition contained in Section 11 is absolute.

The Motor Carrier Act therefore has the effect, since the 1949 Amendment above referred to, of prohibiting absolutely the carrying on of the business of motor carriage, unless such motor carriage should be licensed by The Motor Carrier Board.

The Motor Vehicle Act and Regulations promulgated thereunder has the same effect.

Section 92 of the B. N. A. Act reads in part as follows :

" 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say—

10. Local works and undertakings other than such as are of the following classes :—

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

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

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

Any reference to inter-provincial or international motor carriage contained in the foregoing Statement of Facts is intended primarily to be a reference to works and undertakings connecting a Province with any others of the Provinces of Canada or extending beyond the limits of such Province, within the meaning of Section 92 (10) (a) of the B. N. A. Act.

The Appellant's contention therefore, is that his undertaking is not within the legislative jurisdiction of the Province of New Brunswick, but on the contrary is within the exclusive legislative jurisdiction of Canada, primarily by reason of Section 91 (2), 91 (29) and 92 (10) (a) of the B. N. A. Act and further because his undertakings is not of a merely local or private nature in the Province of New Brunswick, such latter argument being postulated upon the fact that under the distribution of legislative powers as set out in the B. N. A. Act, no province has any legislative power in respect of matters which are not of a merely local or private nature.

The Appellant respectfully refers Your Lordships to the Pleadings which are printed in the Case at pages 1–8, such Pleadings having been read by Mr. Justice Peter J. Hughes at the time that he made his Order above referred to dated the 17th day of January, A.D. 1950 (Record p. 8).

PART II

ERROR

The Appellant submits that the Reasons for Judgment of the Appellate Division of the Supreme Court of New Brunswick (Record p. 19) and the Judgment of the said Appellate Division (Record p. 18) are erroneous in the following respects:

1. The learned Judges of the said Appellate Division erred in holding that the Appellant's undertaking was not local in the Province of New Brunswick.

2. The said learned Judges misconstrued Section 92 (10) (a) of the B.N.A. Act in holding that an undertaking must be " local " in order to bring it within the meaning of the exceptions contained in Section 92 (10) (a) of the B. N. A. Act.

3. In the alternative, the said learned Judges erred in holding that if the Appellant's undertaking should not be considered as local, therefore the Province of New Brunswick has legislative jurisdiction over such undertaking,

relevant authorities having established that no province has legislative jurisdiction in respect of classes of subjects which are not of a local or private nature.

4. That in particular Harrison J. erred in holding that the Appellant had no status to challenge the validity of the Case above referred to because he is a " foreign national " (Record p. 36).

5. That the said learned Judges of the Appellate Division likewise erred in not holding that Section 91 (2) of the B. N. A. Act, relating to the Regulation of Trade and Commerce, placed legislative jurisdiction as to the Appellant's inter-provincial and international operations within the exclusive legislative jurisdiction of Canada.

6. That the said learned Judges erred generally in finding that legislative jurisdiction as to the said operations of the Appellant were subject to control by provincial legislation.

PART III

ARGUMENT

As has been pointed out above, between the years 1939 and 1949, The Motor Carrier Act of this Province did not even purport to restrict the operation of inter-provincial or international motor carriage over its highways.

The 1949 Amendment to the said Act did purport to bring such inter-provincial and international motor carriage within the scope of the Act and, as appears in the Order made by Mr. Justice Hughes on January 17th, 1949, the Appellant applied to The Motor Carrier Board of the Province of New Brunswick (taking objection at the same time to the validity of the said Amendment) for a license permitting him to operate as theretofore in the Province of New Brunswick in the course of his normal operations, which involve motor carriage between Boston, Massachusetts and Glace Bay and Halifax, Nova Scotia. The Motor Carrier Board permitted him to run through the Province of New Brunswick but did not permit him to enbus or debus passengers within that Province — in other words, the permission extended only to the operation of buses between the point of entry, namely the United States Border at Calais, Maine and the point of leaving the Province at the Inter-provincial Border between New Brunswick and Nova Scotia, with closed doors (see facts as stated in said Order).

The Appellant questioned the efficacy of the Board's ruling on the ground that the 1949 Amendment was ultra vires of the Legislature of the Province of New Brunswick.

The principal grounds on which the Appellant challenged the validity of the 1949 Amendment were :

1. That the Appellant's undertaking was and is an undertaking connecting the Province of New Brunswick with the Province of Nova

Scotia and extending beyond the limits of the Province of New Brunswick into the State of Maine and other States of the United States of America as far as Boston, Massachusetts, thus falling within the scope of head 10 (1) (a) of Section 92 of the B. N. A. Act.

2. That regulation of the Appellant's undertaking falls within the meaning of Section 91 (2) of the B. N. A. Act relating to the Regulation of Trade and Commerce.

That the word " undertaking " as used in Section 92 (10) (1) (a) of the B. N. A. Act is wide enough to cover the Appellant's undertaking has been made clear by the Judicial Committee of the Privy Council in the *Radio Case* (1932) 2 D. L. R. 81, 86 ff., wherein Their Lordships said :

" ' Undertaking ' is not a physical thing but is an arrangement under which of course physical things are used. Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking ' connecting the Province with other provinces and extending beyond the limits of the Province.' "

It is consequently immaterial that the Appellant operates between provinces and states over highways, rather than over a line of rails or other similar medium.

It clearly is an arrangement in the course of which physical things are used, namely public motor buses and other incidental equipment, which arrangement is carried out over highways connecting the states and provinces involved.

Since the definition of " Public Motor Bus " as contained in The Motor Carrier Act, 1937, was amended in 1949, the undertaking of the Appellant has been absolutely prohibited within the Province of New Brunswick, by Section 11 of the said Act, except to such extent as The Motor Carrier Board in its discretion, should permit the Appellant to carry on his undertaking within the said Province, by license granted under Section 4 of the said Act, as amended in 1939 and in 1949.

As has been pointed out above the said Board has removed the prohibition imposed by Section 11 of the Act but to the extent only of permitting the Appellant to operate his Public Motor Buses through the Province of New Brunswick with closed doors.

At this point also the Appellant respectfully takes issue with a certain statement made by His Lordship Mr. Justice Harrison in the course of his Reasons for Judgment.

In Record p. 30, l. 15, His Lordship is reported as saying :

" The defendant, a citizen of the State of Maine, U.S.A., desires to operate a system of motor buses from Massachusetts, through Maine and

through New Brunswick, to Nova Scotia, and claims to make use of the New Brunswick highways and to compete with New Brunswick bus lines and other means of transportation by transporting passengers and goods to or from any point in New Brunswick from and to points outside the Province, and also by transporting passengers and goods between points wholly within the Province, *without being subject to New Brunswick laws regulating motor bus traffic within the Province and without payment of the license fees required from motor buses operating wholly within the Province.*"

With all due deference to His Lordship's remarks, italicized above, the Appellant has never taken objection to the payment of ordinary Provincial license fees required under the provisions of The Motor Vehicle Act, 1934, and Amendments thereto, nor to due observance of rules of the road nor to provisions regulating traffic generally on the highways of the Province of New Brunswick, as contained in the said The Motor Vehicle Act.

The Appellant recognizes the right of a province, by laws of general application, not discriminatory in nature, to regulate traffic on its highways and to impose taxation in respect of the use thereof, provided that such laws and taxation are not directed against inter-provincial or international motor carrier undertakings as such.

If, in the course of argument before the Appellate Division of the Supreme Court of New Brunswick, anything was said by Counsel for the Appellant herein leading Their Lordships to think that the Appellant claimed the right to evade provincial taxation in respect of his operations as a common carrier or to ignore rules of the road of general application, then the Appellant wishes at once to correct such impression and to assure Your Lordships and Their Lordships in the Court below that such impression was not intentional.

The Appellant's complaint is that The Motor Carrier Act, amended as at present, prohibits him absolutely from operating in the Province of New Brunswick except to such extent as a provincial Board permits him to operate. The Motor Vehicle Act (which has not been and will not be discussed at length) has the same effect.

Section 6 (1) of the last mentioned Act provides as follows :

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

Section 53 provides as follows :

" 53. No motor vehicle shall be used or operated upon a highway unless the owner shall have complied in all respects with the requirements

of this Act, nor where such highway has been closed to motor traffic under the provisions of the Highway Act."

Regulation 13 promulgated under the said Act provides as follows :

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

It is respectfully submitted that the same considerations as have been and will be developed herein in regard to The Motor Carrier Act apply to any section of or Regulation promulgated under The Motor Vehicle Act insofar as any such section or Regulation is directed against an undertaking such as that carried on by the Appellant.

No further detailed reference will be made to The Motor Vehicle Act. The Appellant, however, submits that the purpose or object of The Motor Carrier Act and of those sections of The Motor Vehicle Act which purport to confer upon the Minister of Public Works discretionary power to determine who shall conduct the business of a motor carrier within the Province of New Brunswick is not regulation and control of highways but is rather regulation and control (or in the case before Your Lordships — prohibition) of a particular class of business or undertaking.

The Motor Vehicle Act, 1934, is highway legislation in that (generally speaking) it prescribes rules for the control of traffic and use of the highways.

In addition, the Province of New Brunswick, as have most provinces, has a Highway Act being 9 Geo. VI (1945) relating generally to the administration of the highways of the Province of New Brunswick, such administration being placed under the control of the Minister of Public Works.

The two Acts last referred to are herein mentioned for the purpose of contrasting their purpose with the purpose of The Motor Carrier Act which, it is submitted, has no concern with the use of highways except to such extent as they may incidentally constitute the medium over which motor carriers conduct their undertakings. In other words, it is submitted that the primary if not the sole purpose of The Motor Carrier Act is to control the particular business or undertaking of being a motor carrier.

His Lordship Mr. Justice Harrison applied to the problem before him and before Your Lordships cases wherein it had been held that the regulation of highway traffic rested with the provinces and held that Acts relating to the regulation of traffic applied to undertakings such as that conducted by the Appellant.

His Lordship evidently felt that legislative power to regulate traffic

enabled provinces to regulate business undertakings such as that carried on by the Appellant (Record p. 34).

In an earlier case, namely, *S. M. T. (Eastern) Limited v. Ruch* (1939-40) 14 M. P. R. 206, 214, His Lordship had said :

> " It might also be said that The Motor Carrier Act is not an attempt to legislate regarding the highways of the province but merely in respect to a trade or business conducted over them by motor carriers."

The Appellant respectfully submits that the view expressed by His Lordship in the *Ruch Case* is correct and that His Lordship was in error in applying to the case presently on appeal before Your Lordships, authorities establishing that in general the regulation of highways is within the legislative jurisdiction of the Provinces.

As will be argued, infra, Canada has exclusive legislative jurisdiction in respect of the Appellant's motor carrier undertaking by reason of Section 91 (29) of the B. N. A. Act, and the exceptions contained in Section 92 (10) (a) of the said Act, as well as by reason of Section 91 (2) of the said Act.

It has been held by the Judicial Committee of the Privy Council in several cases, the latest of which is *Canadian Pacific Railway Co.* v. *A.-G. for B. C.* (1950) 66 T. L. R. 34 that " head 29 of Section 91 brings within the legislative authority of the Parliament of Canada any matter expressly excepted in the enumeration of classes of subjects in Section 92 ; and as paragraphs (a), (b) and (c) of head 10 of Section 92 are exceptions from that head, it follows that if the subject matter in question in the case referred to can be brought within the scope of any of these paragraphs it must come within the scope of Section 91." (66 T. L. R. at p. 40).

See also *Montreal* v. *Montreal Street Railway Company* (1912), 1 D. L. R. 681, 685 ; *The Radio Case* (1932) 2 D. L. R. 81, 85 ff.

It is clear from the cases last referred to that by reason of head 29 of Section 91 of the B. N. A. Act, the exceptions falling within the classes of subjects excepted out of the primary operation of head 10 of Section 92 not only fall within the exclusive jurisdiction of Canada but that they fall within such jurisdiction as enumerated powers of Canada and not merely under its general power as contained in the opening words of Section 91.

It is also familiar ground, that, inter alia, railway companies which connect provinces or which extend beyond the limits of one province are within the legislative jurisdiction of Canada by reason of the same Section 92 (10) (a) which is relied upon by the Appellant herein.

Furthermore, it is clear that the end result, insofar as legislative jurisdiction is concerned, is precisely the same no matter whether the subject matter in question has been brought within the legislative jurisdiction of Canada under sub-head (a), (b) or (c) of head 10 of Section 92.

The above remarks as to the applicability and effect of Section 92 (10) of the B. N. A. Act are preliminary to a reference to one of the cases relied upon by Mr. Justice Harrison regarding the applicability of provincial legislative power over highways.

The case referred to is *Beauport* v. *Quebec Railway, Light and Power Co.* (1945), 1 D. L. R. 145, wherein Canada had declared the Quebec Railway and Tramway Company (a predecessor of Quebec Railway, Light and Power Co.) to be a work for the general advantage of Canada, thus placing it within the exclusive legislative jurisdiction of Canada through the operation of Section 92 (10) (c) of the B. N. A. Act.

The Railway Company also operated an Autobus Service in the Province of Quebec and the question was raised as to whether or not the Board of Transport Commissioners or the Quebec Public Service Board was the proper authority to approve and fix the company's tariff of tolls in respect of such Autobus Service.

Quebec legislation purported to confer upon the Provincial Public Service Board, power to approve and fix such tariff of tolls. Dominion legislation (as it was held) was non-existent in that respect. It was held by this Honourable Court that by reason of Section 92 (10) (c) and the declaration made thereunder, the provincial legislation was ultra vires and further that since the Dominion had not legislated in the field the Board of Transport Commissioners had no power or authority to approve and fix a tariff of tolls in respect of the said Autobus Service.

In the course of his Reasons for Judgment, Rinfret, J. (now the Chief Justice of this Honourable Court) said at page 152 :

> " Undoubtedly it could not be contended that for certain purposes the autobus service is not amenable to the provincial laws, but, in my view, that must mean : *provincial laws of general application.* (Lukey and A.-G. for Sask. v. Ruthenian Farmers Elevator Co. (1924), 1 D. L. R. 706, S. C. R. 56 : John Deere Plow Co. v. Wharton, 18 D. L. R. 353 at pp. 360-1, (1915) A.C. 330 at p. 341).
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> The Province has the control of its highways (Provincial Secretary Of Prince Edward Island v. Egan (1941), 3 D. L. R. 305, S. C. R. 396, 76 Can. C.C. 227). It has to maintain them and to look after the safety and convenience of the public by *regulating and controlling the traffic* thereon. An instance of the exercise of that control by the Province might be the fact that the Railway Company held a permit from the Quebec Public Service Board ; but I do not think that the submission to provincial and municipal enactments can be extended to anything beyond the regulations of the character just mentioned and surely not, in my opinion, to the tariffs of rates and tolls of the company, which are made the subject of special laws and enactments under federal legislation and, in particular under the Railway Act of Canada. Otherwise there would be that dual control, already adverted to and rendering the proper working and operations of the company practically impossible."

This case affords a clear exposition of the extent to which a province may affect a class of subject contained in the exceptions to Section 92 (10) and therefore, by transposition, included among the enumerated powers of Canada.

Laws of general application may affect undertakings such as that carried on by the Appellant herein but otherwise provincial legislative power in respect of highways, whether under Section 92 (13), Section 92 (16) or any other enumerated head of Section 92, can, at the most, enable provinces to regulate generally the use of highways.

It is respectfully submitted that an undertaking, such as that carried on by the Appellant herein, cannot be denied the use of provincial highways by provincial legislation purporting to regulate and control the business of being a motor carrier — such is not " highway " legislation.

It is a familiar principle that so-called proprietary interests in land (even in highways) are subject to legislation competently enacted by a proper authority.

Reference re Water-Power, (1929) 2 D. L. R. 481, 484, 489-90.

Consequently the Appellant respectfully submits that, except in respect of laws of general application, he is not subject to provincial legislation under any power which the province may have relating to the control of highways.

It is difficult in the abstract to determine just what may comprise matters of general application.

The case of *John Deere Plow Co. v. Wharton* 1915 A. C. 330, 341 (referred to by the learned Chief Justice in the excerpt last quoted) established the proposition that even though a company incorporated under the laws of Canada could not be excluded by provincial licensing laws, nevertheless, it would be subject to laws of general application, such as mortmain laws. The case was followed in *Great West Saddlery Co. Ltd. v. The King* (1921) 2 A.C. 91.

In *A.-G. for Manitoba v. A.-G. for Canada* (1928), 98 L.J.P.C. 65, however, a case arose involving the validity of certain provincial Statutes prohibiting Dominion companies from selling their own shares within the provinces involved, without the consent of a Provincial Commission or Board.

The Statutes in question applied equally to all companies and, it might have been thought that they would be held to be laws of general application.

The Judicial Committee nevertheless held that the said Statutes interfered directly and substantially with the status and capacity conferred on Dominion companies under Dominion legislation, validly enacted by Canada and hence that the said Statutes were ultra vires of the provinces which had enacted them.

Viscount Sumner said on page 69 :

> " Neither is the legislation which is in question saved by the fact that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation, not upon its purpose."

In a later case, namely, *Lymburn v. Mayland*, (1932), 101 L.J.P.C. 89, the Judicial Committee had before it the Alberta Security Frauds Prevention Act, 1930, which Act was held to be intra vires of the Province of Alberta even in respect of Dominion companies but such Act did not wholly preclude Dominion companies from selling their shares unless they were registered but merely required Dominion companies wishing to sell their securities in the Province of Alberta to comply with various regulations which the Judicial Committee did not regard as so onerous as to constitute a prohibition or a serious impairment of the status and capacity conferred on Dominion companies under Dominion legislation.

The Motor Carrier Act, 1937, of the Province of New Brunswick does, since the 1949 Amendment, distinctly prohibit the carrying on of the Appellant's inter-provincial and international motor carrier undertaking except to such extent as the prohibition contained in Section 11 of the Act is removed by The Motor Carrier Board Act under the provisions of Section 4 of the Act.

The situation therefore is analogous to that existing in the *John Deere Plow Co.* case, the *Great West Saddlery* case and in *A.-G. for Manitoba v. A.-G. for Canada* and, assuming for the moment that the Appellant's undertaking falls within the class of subjects more particularly referred to in sub-head (a) of head (10) of Section 92 of the B. N. A. Act, it would seem to be clear that The Motor Carrier Act, 1937, as amended in 1949, is ultra vires of the Province insofar as it purports to cover inter-provincial and international motor carrier operations.

It has already been pointed out that the word " undertaking " as used in sub-head (a) is wide enough to comprehend the motor carrier operations carried on by the Appellant.

The absence of Dominion legislation in respect of inter-provincial and international motor carriage is immaterial if in fact Dominion legislation would be intra vires of the Dominion if enacted under an *enumerated* head of Section 91 of the B. N. A. Act.

Thus in *A.-G. for Alberta v. A.-G. for Canada*, 1943 A. C. 356, 369-71, it has been held :

> " It is well settled that in case of conflict between the enumerated heads of s. 91 and the heads of s. 92 the former must prevail. The words in s. 91, and particularly the emphatic sentence : ' 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 ' must be given their natural effect. The final words of the section inserted from abundant caution were these : ' 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.' It follows that legislation coming in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the provincial legislatures under s. 92. *In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given exclusive legislative authority as to 'all matters coming within the classes of subjects' enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound:* Attorney General for Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia. There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since 1894 it has been a settled proposition that, if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91, and is properly within one of the subjects enumerated in s. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation : *Attorney-General for Ontario v. Attorney-General for Canada.* It is this proposition which, from the nature of the case, too often leads to difficulty. Legislation since 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilization. It is sometimes difficult to determine whether a particular matter, the subject of a provincial Act, is in ' pith and substance ' within one of the enumerated heads of s. 91, or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of s. 91 and s. 92, and, finally, there may be a doubt whether the legislative field is or is not clear. It must not be forgotten that where the subject matter of any legislation is not within any of the enumerated heads either of s. 91 or of s. 92, the sole power rests with the Dominion under the preliminary words of s. 91, relative to ' laws for the peace, order, and good government of Canada '."

In *Beaufort v. Quebec Railway, Light and Power Co.*, (1945) 1 D. L. R. 145, it was likewise held per Rand, J. at p. 165 of the report :

" There is, then, federal jurisdiction in relation to these tolls, but federal legislation is lacking. It is not suggested that there was in force in the Province at the time of Confederation any law of carriers adequate or appropriate to fill the hiatus in that legislation. However inconvenient it may appear, therefore, it follows that the regulation of tolls for services in whole or in part by autobus is not within the powers of the Board of Transport ; and as the Provincial Transportation and Communication Board Act (1939 (Quebec), c. 16, now R.S.Q. 1941, c. 143) is inapplicable within the exclusive Dominion field, these tolls lie outside of any existing statutory control."

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See also *A.-G. for Canada v. A.-G. for Quebec*, (1946) 62, T.L.R. 657, supporting the same proposition. See also *Canada v. Ontario* (*Fisheries Case*) 1898 A.C. 700.

It remains to be determined whether or not in fact the Appellant's undertaking is an undertaking within the classes of subjects included in Section 92 (10) (a) of the B. N. A. Act.

Harrison, J. (Record p. 31) conceded that if the Appellant's undertaking did not fall within the exceptions contained in Section 92 (10) (a), then The Motor Carrier Act, 1937, as amended in 1949, was ultra vires of the Province of New Brunswick.

His Lordship said :

> " To my mind it must be conceded that if this undertaking comes within the provisions of sub-section (10) (a) of Section 92, then, under the decision in the *Beauport Case* the Defendant's (Appellant's) contention is correct and, insofar as the Acts in question affect the Defendant, they would be ultra vires."

In *Citizens Insurance Company v. Parsons*, (1881) 7 A.C. 96, the Judicial Committee laid down a method of approach useful in determining questions involving the distribution of legislative power effected by Sections 91 and 92 of the B. N. A. Act as follows (report p. 109) :

> " The first question to be decided is whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in Section 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 Section 91, and whether the power of the Provincial Legislature is or is not thereby overborne."

In *A.-G. for Alberta v. A.-G. for Canada*, 1939, A.C. 117, Lord Maugham said :

> " Some propositions may be stated that are not in dispute. Clearly it is necessary in dealing with such a question to consider the whole scheme for distribution of powers contained in the two sections. The ' classes of subjects ' enumerated, looked at singly, overlap in many respects. It is obvious, for example, that currency, paper money, patents, trade-marks and so forth are different kinds of property and therefore as a matter of verbal definition within section 92 (13) ; but this occasions no logical difficulty, for, as has been repeatedly observed, the concluding paragraph of section 91 declares that any matter coming within any of the classes of subjects enumerated in that section ' shall not be deemed to come within the class of matters of a local and private nature ' assigned exclusively to the provinces. As pointed out in the judgment of Duff C.J.

(concurred in by Davis J.) it is well established that if a given subject matter falls within any class of subjects enumerated in section 91, it cannot be treated as covered by any of those within section 92. (*Attorney-General for Ontario v. Attorney-General for Canada*, (1896) A.C. 348; *Great West Saddlery Co. v. The King* 1921, 2 A.C. 91 *at p.* 99).

" It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question fairly considered falls prima facie within section 91 rather than within section 92. The result of the comparison will not by itself be conclusive, but it will go some way to supply an answer to the problem which has to be solved.

" The next step in a case of difficulty will be to examine the effect of the legislation (*Union Colliery Co. of B. C., Ltd. v. Bryden* (1899) A.C. 580). For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly the Acts passed by the Provincial legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating or intended to operate or recently operating in the Province.

" A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of section 92 (2), ' direct taxation within the Province *in order to the raising of a revenue* for Provincial purposes ' is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other. (*Attorney-General for Ontario v. Reciprocal Insurers*, (1924) A.C. 328, *at p.* 342; *in re Insurance Act of Canada* (1932) A.C. 41). Here again matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the legislature, and generally speaking the speeches of individuals would have little evidential weight.'

" If these principles are borne in mind, it appears to their Lordships, as it appeared to the Supreme Court, that the specific question that arises in relation to the Bill No. 1 presents no serious difficulty. In the first place it is plain that the taxation is aimed simply at banks, including savings banks; and by section 91 ' banking ' and ' savings banks ' are within the exclusive legislative authority of the Dominion."

And also:

" In their opinion it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question."

In a later case, namely, *A.-G. for Alberta v. A.-G. for Canada*, (1947) 63 T. L. R. 479 at p. 481, the approach to the problem of distribution of legislative power under Sections 91 and 92 was further considered as follows :

" The question, therefore, is whether operations of this sort fall within the connotation of ' banking ' as that word is used in section 91 of the British North America Act. Their Lordships entertain no doubt that such operations are covered by the term ' banking ' in section 91. The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act. To take what may seem a frivolous analogy, if ' skating ' was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central Legislature. Other illustrations may be drawn from section 91 as it stands : take, for example, head 5, ' postal services '. In 1867 postal services in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of aeroplanes for carrying mail is, on that account, not within the phrase. The concept of banking certainly includes the granting of credit by banks ; ' a banker ' as Chief Justice Duff said in dealing with the *Alberta Legislation Reference* (1938) S.C.R. 100, at p. 116) ' has been defined as a dealer in credit.' *Whether the expansion of credit now effected by bankers' advances is regarded as wise or unwise, as just or unjust, as economically desirable or economically unjustifiable, does not, in the view of their Lordships, affect the point here at issue at all. If it is fairly included within the conception of ' banking ' it is a matter exclusively reserved for the Legislature of Canada.*

" In the well-known decision of the Privy Council in *Tennant v. Union Bank of Canada* (10 *The Times L.R.* 147, at p. 150 ; (1894) A.C. 31, at p. 46), Lord Watson laid it down that the head ' banking ' was an expression ' wide enough to embrace every transaction coming within the legitimate business of a banker.' He further said that, notwithstanding that ' property and civil rights ' was a topic allocated to provincial Legislatures under section 92, ' banking ' was one of the matters concerning which the exclusive legislative authority of the Parliament of Canada could not be operated without interfering with and modifying civil rights in the Province (at pp. 150 and 45 of the respective reports). This view of the width of the expression ' banking ' has been recently confirmed by another decision of this board, in *Attorney-General for Canada v. Attorney-General for Quebec* (62 *The Times L.R.* 657 ; (1947) A.C. 33). Undoubtedly the business of banking has developed and expanded greatly since Confederation, though it is by no means clear that even before 1867 banks in Canada were not practising to a more limited extent the kind of operation which it is the object of the Alberta Act now under consideration to prevent or restrict. It appears to their Lordships to be impossible to hold that it is beyond the business covered by the word ' banking ' to make

loans which involve an expansion of credit. *Legislation which aims at restricting or controlling this practice must be beyond the powers of a provincial Legislature.* It is true, of course, that in one aspect provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the ' pith and substance ' of the legislation is ' banking ' (the phrase ' pith and substance ' can be traced back to Lord Watson's judgment in *Union Colliery of British Columbia, Limited v. Bryden* (15 *The Times L.R.* 508 ; (1899) A.C. 580), this is the aspect that matters and part II is beyond the powers of the Alberta Legislature to enact."

It must therefore be determined :

1. Whether or not the legislation herein impugned can be supported under any enumerated head of Section 92 of the B.N.A. Act ; if not, no further question arises and the Act complained of, is ultra vires of the Province.

2. If the Act herein impugned prima facie falls within one of the enumerated heads of Section 92, then does it conflict with any enumerated head of Section 91, whether or not Canada has legislated in the field ? If there is such a conflict, then the Provincial Legislation is ultra vires insofar as it affects the Appellant.

As has been noted above, the effect of Section 92 (10) of the B.N.A. Act is to transfer to Section 91 of the said Act as enumerated powers, the classes of subjects included in the exceptions to Section 92 (10).

The primary purpose of Section 92 (10), apart from the exceptions contained therein, is to entrust to each province exclusive jurisdiction in respect of " *local* works and undertakings."

The exceptions contained in Section 92 (10) (a) obviously relate to works and undertakings which are not confined within the territorial limits of a province.

Their Lordships in the Appellate Division of the Supreme Court of New Brunswick nevertheless held that the word " local," being the first word in head 10 of Section 92 qualified all of the exceptions with the result that, as Their Lordships thought, that unless the undertaking involved in this Appeal should be " local " within the Province of New Brunswick, it could not fall within any of the classes of subjects enumerated in Section 92 (10) (a).

Thus Harrison, J., said in Record p. 31, l. 31 :

" Dealing with the first argument : sub-section (10) of Section 92 deals entirely with ' *local* works and undertakings.' The grammatical reading of sub-section (10) must imply the words ' local works and undertakings ' after the word ' such ' in the first line. Those words and undertakings which are excepted from the provincial jurisdiction are ' local works and undertakings ' which connect the province with any other or extend beyond the limits of the province.

' Local ' means local within the Province of New Brunswick, the province with which we are dealing. The Defendant has no office *or*

location of any kind in New Brunswick; and his timetable annexed to the Judge's Order, shows his only office to be at Lewiston, Maine. The Defendant's undertaking is local in the State of Maine; it is not local in New Brunswick."

It is respectfully submitted that this interpretation of Section 92 (10) is erroneous and that the word " local " does not apply to the exceptions other than those contained in Section 92 (10) (c), whereunder works " although wholly situate within the Province " may be placed under Dominion legislative jurisdiction if 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.

The mere fact that Section 92 (10) (c) deals with works " wholly situate within the Province " in itself indicates that Section 92 (10) sub-sections (a) and (b) deal with works and undertakings which are not wholly situate within the Province.

Such, in any event, is perfectly obvious from a reading of sub-sections (a) and (b).

While the grammatical reading of head 10 of Section 92 may, on the surface, lend some support to the view adopted by the learned Judges of the Appellate Division, it is respectfully submitted that the exceptions contained in sub-heads (a) and (b) cannot be regarded as referring to classes of subjects which are " local " within the meaning of the B.N.A. Act.

The important words in Section 92 (10) (a) are " works and undertakings."

In *Canadian Pacific Railway v. A.-G. for B. C.*, (1950) 66 T.L.R. 34, 40, Their Lordships of the Judicial Committee of the Privy Council said as to sub-section (a), referring to the four specified classes at the outset thereof:

> " The context shows that each of the four specified classes is intended to be a class of ' works and undertakings.' "

And further on page 41:

> " The latter part of the paragraph (sub-section (a)) makes it clear that the object of the paragraph is to deal with means of inter-provincial communication."

It is submitted that Their Lordships did not intend in the excerpt last quoted, to exclude international communication which was not involved in the case referred to.

Their Lordships in the Appellate Division of the Supreme Court of New Brunswick cited no authority for the proposition that an undertaking cannot be local unless it has an office or offices in the jurisdiction of the forum.

In fact, such an interpretation would be inconsistent with the decision in the *Radio Case* (1932) 2 D.L.R. 81, wherein the Judicial Committee held that the Parliament of Canada had legislative jurisdiction in respect of radio communication by reason of Section 92 (10) (a) of the B.N.A. Act.

The decision of the Judicial Committee was rendered on appeal from a reference from the Supreme Court of Canada which reference was worded as follows :

" 1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed ?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited ? "

The majority of the Supreme Court of Canada had answered the first question in the affirmative *without qualification as to whether or not the undertaking was local* in the jurisdiction of the forum.

The Judicial Committee upheld the majority view, likewise without qualification as to locus.

Since the case arose on a reference without regard to locality of the undertaking, it is respectfully submitted that it is an authority for the view that it is immaterial whether or not an undertaking is " local " within the jurisdiction of the forum for the purpose of determining whether or not it falls within the meaning of Section 92 (10) (a). Otherwise, the Judicial Committee should have qualified the answers given by the majority of the Supreme Court of Canada by adding conditions involving locus of the undertaking.

It should further be noted that the view taken by the Appellate Division of the Supreme Court of New Brunswick has inherent therein the danger of dual legislative control since an undertaking may be " local " in one province and not in others, in which case, the view of the Appellate Division would require Courts of any provinces wherein the undertaking might be " local," to hold that it was under federal legislative jurisdiction whereas Courts of provinces wherein it should not be " local " would be obliged to hold that the undertaking was within provincial jurisdiction.

This view results in an anomalous situation, since the classes of subjects which are entrusted to provincial legislative jurisdiction are of a " local or private nature."

Thus the concluding words of Section 91 read as follows :

" Any matter coming within any of the classes of subjects enumerated in this Section 91 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 has been held by the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for the Dominion*, 1896 A.C. 348, 359 (referring to the words last quoted) as follows :

" It appears to them that the language of the exception in Section 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of Section 92 as being, from a provincial point of view, *of a local or private nature.*"

See also *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 99-100.

It had formerly been suggested that the concluding words of Section 91 referred only to head 16 of Section 92.

It follows therefore that each enumerated head of Section 92 relates to a matter of a " *local or private nature* " or conversely, that if any Court should feel constrained to hold that any matter was not " local or private " from a provincial point of view, then automatically, such matter would not fall under any enumerated head of Section 92.

Cf. Citizens Insurance Company v. Parsons, ubi supra.

Consequently, if the learned Judges of the Appellate Division of the Supreme Court of New Brunswick were correct in finding that the Appellant's undertaking was not *local* in the Province of New Brunswick, then such province was and is without legislative jurisdiction, in respect of the Appellant's undertaking.

For reasons which will presently be advanced, the Appellant's undertaking is not of a " *private nature.*"

If, on the other hand, such undertaking is " local "within the Province of New Brunswick, then, on the view taken by the learned Judges of the Appellate Division, it falls within the meaning of Section 92 (10) (a) and hence is within federal legislative jurisdiction.

The Appellant prefers the view that no part of his undertaking is " local " within the meaning of the B.N.A. Act but rather that it is an integrated inter-provincial and international transportation system with principal office at Lewiston, Maine, and ticket offices in every State and Province in which the undertaking is conducted, namely, Massachusetts, New Hampshire, Maine, New Brunswick and Nova Scotia, ten of such ticket offices being located in ten separate Cities, Towns or Villages in the Province of New Brunswick (with all due deference to the remarks of Mr. Justice Harrison, supra, to the effect that the Appellant had no office in New Brunswick). (See Time Table, being exhibit to Order of Mr. Justice Hughes, dated January 17th, 1950—following Record p. 11.) Nevertheless, the Appellant does not on such latter account consider that his undertaking is "*local* " in New Brunswick to any greater extent than the Canadian Pacific Railway Company (with head office in Montreal, Que.) is " *local* " in New Brunswick, unless in a very limited sense—i.e. a business carried on in one province is " local " there, but if it is also carried on in several other jurisdictions, can it be said to be " local " in all of them, or does not a plurality of localities negative the idea that the business is " local " anywhere — is it not rather National (cf. C. P. R.), International (cf. Appellant) or Inter-provincial (cf. Appellant). The remarks of Mr. Justice Harrison regarding the *Radio Case* (Record p. 31) are difficult

to follow. His Lordship held that radio broadcasting in Canada was local in *all* of the Provinces. Does not the conclusion destroy itself ? What if His Lordship had said that such broadcasting by, let us say, a Montreal Broadcasting Station, with no offices or other connection outside the Province of Quebec, was " local " all over the world because a sufficiently powerful receiving set could receive its transmissions all over the world. The illustration may be fanciful, but would not the assumption that the station was " local " on a world wide scale, ipso facto, destroy itself ?

On a narrower scale, it is submitted that an undertaking, such as a Railway which runs through more than one Province (let us say through two Provinces) is not " *local or private.*"

Cf. *MacDonald v. Riordan* (1899) 30 S.C.R. 619.

Through Railways are under Federal legislative jurisdiction because of the same Section 92 (10) (a) upon which the Appellant relies, and has the power, inter alia, to affect Provincial Crown lands, including Highways (supra p. 13).

Parliament may, in cases falling within the exceptions to Section 92 (10), (c), legislate in respect of Provincial Railways, as had already been pointed out.

In addition to authorities cited, please see *A.-G. for Quebec v. Nipissing Central Railway*, 1926 A.C. 715 ; 95 L.J.P.C. 221.

And likewise Parliament, in such a case, can encroach upon Section 92 (13), relating to " Property and Civil Rights *in the Province.*" *Canadian Elec. Ass'n. v. C. N. R.* 1934 A.C. 551 ; 103 L.J.P.C. 127.

The Appellant does not (and probably the Railway Company does not) consider the undertaking of the C. P. R. to be " local " in New Brunswick (notwithstanding that it has offices in such Province) yet nothing could be more firmly settled than that a through Railway is under Federal legislative jurisdiction by reason of Sections 92 (10) (a), 91 (29) and the opening and closing words of Section 91.

Therefore, if the C. P. R. is not " local " in New Brunswick, the Appellate Division's interpretation of Section 91 (10) (a) implying the word " local " at various points in Section 92 (10), is erroneous.

Similar considerations apply to C. P. R. Telegraphs, C. N. R. Telegraphs, Telephone lines connecting the local telephone company with points beyond the territorial limits of the Province and, abandoning multiplication of examples, the Appellant submits that similar considerations apply to himself and his inter-provincial and international motor carrier undertaking.

In *Toronto v. C. P. R.* 1908 A.C. 54, The Railway Committee of the Privy Council of Canada had made an Order requiring the C. P. R. to take certain steps to protect the public at level crossings in the City of Toronto and vicinity, and further ordered that the cost be borne equally by the C. P. R. and the City. The C. P. R. complied with the Order and sued the City for its share of the cost. The City replied that sections of the Railway Act, under which the Order had been made were ultra vires of the Dominion.

The Privy Council said on p. 58 :

" There is no doubt the Railways connecting the Province with any other or others of the Provinces are expressly excepted from the jurisdiction of the Provinces and placed under the exclusive jurisdiction of the Parliament of the Dominion by . . . . the B. N. A. Act, 1867, Section 91, sub-section 29 and Section 92 Sub-section 10 (a)."

And further on p. 59 :

" The rights in the highways conferred on the municipalities by the sections of the Consolidated Municipal Act, 1903, 3 Edw. 7, c. 19 (Ontario), cited in the Appellant's Case, *do not, in their Lordships' opinion, help the Appellant's at all on the ultra vires point.*"

The excerpt last quoted invites a further examination of the character, purpose and effect of the 1949 amendment to The Motor Carrier Act, 1937, as visualized by Mr. Justice Harrison.

Subject to minor discrepancies (unimportant for the most part) Richards, C. J. and Hughes, J. agreed in substance with the Reasons for Judgment of Harrison, J. — hence the emphasis on the reasons given by Harrison, J. who wrote the most comprehensive Reasons for Judgment.

As has been pointed out Harrison, J. thought that the legislation impugned was " *Highway Legislation.*"

More specifically, His Lordship said (Record p. 33) :

" The Motor Carrier Act deals entirely with traffic within the province. for that reason it comes within sub-section (13) ' Property and Civil Rights ' and (16) ' Matters of a merely local or private nature ' of Section 92."

In his paraphrase of sub-sections (13) and (16) His Lordship omitted in each case, the concluding words of the sub-sections, which, as to both sub-sections, are : " *in the Province.*"

It has already been pointed out that *each* sub-head of Section 92 is conditioned by the requirement that the class of subject or class of matter involved must be of a " *local or private nature,*" otherwise the province in question has no legislative jurisdiction — (See the *Parsons Case* quoted supra and Record p. 21).

His Lordship does not seem to have ruled upon Section 92 (9) relating to :

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

This sub-section has no application unless the purpose or object of the province was " the raising of a revenue for Provincial, local or municipal purposes."

Lefroy—Constitutional Law of Canada p. 128.

As His Lordship has pointed out (Record pp. 35, 36) Provinces may require licences in respect of classes of subjects in respect of which they have jurisdiction *otherwise than under sub-section* 13, but that is a matter of regulation and adds nothing to sub-section 13 — nor would such licensing requirements be imposed under sub-section 13. They would be incidental to the enumerated head (other than 13) under which the Province in question had legislated.

Clearly, The Motor Carrier Act, 1937, was not enacted for the purpose of raising a revenue. Its licensing provisions exist solely as part of the machinery for controlling the business of being a motor carrier.

Richards, C. J., on the other hand held that " the Act " (presumably as amended in 1949) might be supported under heads (9), (10) and (13) of Section 92 of the B. N. A. Act. (Record p. 21). The learned Chief Justice did not rely on head 16 of Section 92.

In that particular regard it is respectfully submitted that His Lordship was correct since it has been held that head 16 of Section 92 of the B. N. A. Act does not include any of the classes of subjects which are included in the other fifteen heads of Section 92.

A.-G. for Ontario v. A.-G. for the Dominion, 1896 A.C. 348, 365.

If, therefore, His Lordship was correct in thinking that the Act in question was comprehended by any class of subject included in heads (9), (10) and (13), then His Lordship was also correct in not relying upon head (16) as did Harrison, J.

It is respectfully submitted, however, that His Lordship, the learned Chief Justice was in error in thinking that the Act in question fell within any enumerated head of Section 92, for reasons already discussed.

His Lordship said (Record p. 24) :

> " However, as set forth above, the legislation in question is entirely local in character. It relates to traffic within the Province. Only incidentally does it affect traffic passing through the Province."

It is respectfully submitted that His Lordship has taken too narrow a view in that regard.

A chain is as strong as its weakest link and the Province of New Brunswick is one of the links connecting the route followed by the Appellant between Boston, Massachusetts, and Glace Bay and Halifax, Nova Scotia.

It is true that The Motor Carrier Board has permitted the Appellant to travel through the Province of New Brunswick with closed doors, but it is perfectly clear that the breaking of a link in the Appellant's route in this manner must adversely affect his undertaking in every other jurisdiction through which he passes.

For example, a potential traveller from Boston, if the 1949 amendment is valid, could not travel from Boston, Mass., to Saint John, N. B. Examples of this nature could be multiplied showing the effect which the 1949amendment has on the Appellant's undertaking not only within the Province of New Brunswick but also wherever he conducts his undertaking.

Furthermore, treated in the abstract, The Motor Carrier Board might have and still might, refuse the Appellant any permission whatever to traverse the highways of the Province of New Brunswick.

In *A.-G. for Alberta v. A.-G. for Canada,* (1947) 63 T.L.R. 479 a Provincial Statute purported to authorize a Board to license banks in the Province.

The Judicial Committee said on page 480 :

> " There is nothing in the Act to suggest that the Board *must* license chartered banks operating within Alberta and it follows that the enactment purports to confer on the Board *the right to refuse such a license.*"

This excerpt can equally well be applied to Section 4 of The Motor Carrier Act, 1937, with the result that, considered in the abstract, The Motor Carrier Board could refuse the Appellant or any other inter-provincial or international motor carrier, permission to use the highways of the Province in any way.

Such, it is respectfully submitted, is entirely foreign to the intention of the B. N. A. Act.

Hughes, J. referred to the Reasons for Judgment of Harrison, J. and said (Record p. 37) :

> " I agree in all respects with the reasons which he has expressed with the exception of the penultimate paragraph upon which I express no opinion."

The said penultimate paragraph will be discussed infra.

Meanwhile, the Appellant respectfully submits that the word " private " as used in the concluding words of Section 91 of the B. N. A. Act and in head (16) of Section 92 of thesaid Act must be read as meaning " private in the Province."

The concluding words of Section 92 apply to all sixteen heads of Section 92, not all of which contain the words " in the Province." Most of the heads of Section 92 do however contain the words " in the Province " or some similar phrase and in particular head (16) does specifically contain the phrase " in the Province."

It must be clear beyond question that the Province could not legislate, even since the enactment of the Statute of Westminster (which does not confer extra territorial jurisdiction on the Province anyway) as to a private matter which was not local in some sense within the Province.

Consequently, if the Appellant's undertaking is not " local or private " in

the Province of New Brunswick, it is not covered by any enumerated head of Section 92 and whether or not it is covered by an enumerated head of Section 91 the Province has no legislative jurisdiction in respect of such undertaking, in which case, of course, jurisdiction would belong to the Dominion under its general power, if not covered by an enumerated power.

Conversely, if the Appellant's undertaking is local, legislative jurisdiction in regard thereto, would belong to the Dominion under Section 92 (10) (a) of the B. N. A. Act for reasons already developed.

It is therefore submitted for reasons given above that the exceptions contained in Section 92 (10) (a) do not require that the undertaking should be "*local*" within the Province of New Brunswick.

Notwithstanding the grammatical considerations which influenced the Appellate Division, it is submitted that the exceptions contained in Section 92 (10) (a) and (b) are intended to cover non-local works and undertakings.

In that connection, reference is made to *Reference* re *Water Power*, (1929), 2 D.L.R. 481, 493, wherein Duff, J. (as he then was) said :

> " Nevertheless, it has been said that the language of sections 91 and 92 ' and of various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this Board about the Australian Commonwealth Act (1900 (Imp.), c. 12) in a recent case (*A.-G. for the Commonwealth v. Colonial Sugar Refining Co.*, (1914) A.C. 237, at 254) that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side, shews that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision ' : *per* Haldane, L. C., in *John Deere Plow Co. v. Wharton*, 18 D.L.R., at pp. 357-8."

In addition to the view by the Appellate Division, which the Appellant respectfully submits is erroneous, it is further submitted that the Appellate Division has partially mis-stated the claim made by the Appellant in the following regard :

> His Lordship Mr. Justice Harrison stated, inter alia, that the Appellant claimed the right to transport passengers and goods between points wholly within the province (Case p. 27 l. 15).

The Appellant's claim in that regard appears in paragraph 2 (b) of his Statement of Defence, wherein the Appellant said that (Record p. 5) :

" (b) he intends to carry passengers not only from points without the Province of New Brunswick to points within the said Province and vice versa, but also, in connection with and incidentally to his international and inter-provincial operations, to carry passengers from points within the said Province to destinations also within the said Province, unless and until it shall have been declared by some Court of competent jurisdiction that such operations are prohibited by The Motor Carrier Act and amendments thereto, or by any other applicable statute of law."

The allegations contained in the Appellant's Statement of Defence were repeated in his Counterclaim (Record p. 6).

See also paragraph 8 of the Order of Mr. Justice Hughes, dated January 17th, 1950 (Record p. 9.)

From the above references it is clear that the Appellant's claim is not that he has an unqualified right to carry passengers from points within the province to destinations also within the province but that such claim extends only to carriage of such nature " in connection with and incidentally to his inter-provincial and international operations."

In that connection reference is made to *Toronto Corporation v. Bell Telephone Company of Canada,* 1905, A.C. 52, 59 wherein it was stated :

" First, it was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the Appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telgeraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."

This excerpt was quoted with approval in the *Radio Case,* (1932), 2 D.L.R. 81, 87.

See also *Luscar Collieries Limited v. N. S. McDonald,* (1928) 97 L.J.P.C. 21.

In that case, Luscar Collieries owned a short branch of railway in the Province of Alberta.

Another branch railway (called the Mountain Park Railway) had also been constructed in the same Province, which latter branch became a part of the C. N. R.

The branch owned by Luscar Collieries was operated by the C. N. R. under an agreement between Luscar Collieries and the C. N. R.

The question before the Judicial Committee of the Privy Council was whether or not the Luscar Collieries branch was a railway within the legislative jurisdiction of Canada and therefore subject to the provisions of the Railway Act.

Their Lordships made reference to Section 92 (10) (a) of the B. N. A. Act and said on page 25 :

" Their Lordships agree with the opinion of Duff, J., that the Mountain Park Railway and the Luscar branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway, and connecting the Province of Alberta with other provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a province that it does not connect that province with another. If it connects with a line which itself connects with one in another province, then it would be a link in the chain of connection, and would properly be said to connect the province in which it is situated with other provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of the opinion that it is in fact a railway connecting the Province of Alberta with others of the provinces, and therefore falls within section 92, sub-section 10 (a) of the Act of 1867. There is a continuous connection by railway between the point of the Luscar branch farthest from its junction with the Mountain Park branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway should cease to operate the Luscar branch, the question whether under such altered circumstances the railway ceases to be within section 92, sub-section 10 (a) may have to be determined, but that question does not now arise."

It is therefore submitted that if the Appellant's undertaking is primarily inter-provincial and international, then no province has any legislative jurisdiction (other than in respect of laws of general application, hereinbefore discussed) over what may prima facie be local operations, if in fact such operations are connected with and incidental to the operation of the Appellant's inter-provincial and international undertaking.

The principal importance of this submission, to the Appellant, involves the important question as to whether or not he has the right to carry passengers from points within the Province of New Brunswick to destinations also within the Province, in connection with his inter-provincial and international operations ; e.g. from Saint John, N. B. to Moncton, N. B.

It is further submitted that there is no room for an application of the so-called " double aspect " rule referred to by Mr. Justice Harrison in Case p. 31, quoting *Attorney-General for Canada v. Attorney-General for B. C.*, 1939, A.C. 111, 118.

In the course of his Reasons for Judgment, Mr. Justice Harrison however, quoted from *Attorney-General for Alberta v. Attorney-General for Canada*, 1943 A.C. 356, 370 (Record p. 35.) as follows :

> " It follows that legislation coming in pith and substance within one of the classes specially enumerated in section 91 is beyond the legislative competence of the provincial legislatures under section 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether the legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given exclusive legislative authority as to ' all matters coming within the classes of subjects 'enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound."

The excerpt quoted definitely negatives the view that until the Dominion has legislated in a field in respect of which it has exclusive legislative authority under an enumerated head of Section 91, provincial legislation in such field may be competent.

The case of *Attorney-General for Alberta v. Attorney-General for Canada* just referred to has been quoted at greater length in this factum, supra, p. 14.

From the excerpt quoted herein it appears that the " double aspect " rule applies only to cases in which matters which were only incidental or ancillary to the main object which was within the exclusive legislative powers of the Dominion Parliament and *then only of course, if the subject matter of the provincial legislation should be within one of the classes of subjects enumerated in Section* 92.

Mr. Justice Harrison held that the legislation impugned in this Appeal dealt primarily with motor vehicle traffic within the Province and was in pith and substance within provincial legislative jurisdiction as Highway Legislation ; that insofar as the Dominion was concerned, the legislation was ancillary and that the provincial legislation would prevail until the Parliament of Canada legislated in the field, presumably under legislative power which Parliament does have in respect of motor carriage, although His Lordship had earlier held that Section 92 (10) (a) did not confer such legislative jurisdiction on Parliament because of the implications which His Lordship thought were contained in the word " local."

It is respectfully submitted for reasons advanced above that the Acts herein impugned are not in pith and substance Highway Legislation but on the contrary are legislation in respect of a trade, business or undertaking, namely, the undertaking of being a motor carrier.

Consequently, it is submitted that the 1949 amendment to The Motor Carrier Act, 1937, falls directly within the meaning of Section 92 (10) (a) and is not of a nature merely ancillary or incidental thereto.

It is respectfully submitted that the object, purpose and effect of the 1949 amendment to The Motor Carrier Act, 1937, are all clearly indicative of an

intent on the part of the provincial legislature to bring inter-provincial and international motor carriage within the scope of The Motor Carrier Act, 1937, and further that the object, purpose and effect of The Motor Carrier Act itself is clearly to regulate the undertakings of motor carriers and to prohibit the carrying on of business by motor carriers not approved by The Motor Carrier Board — not to regulate highways.

The object or purpose of legislation has a bearing particularly upon the question as to whether or not it falls within one of the classes of subjects entrusted to the Provinces under an enumerated power of Section 92.

It is a familiar principle that neither province nor Dominion can, under the guise of legislating in respect of a class of subject entrusted to it, encroach upon a legislative field which in fact belongs to the other.

In designating The Motor Carrier Act as " highway " legislation it is respectfully submitted that this principle is being violated.

The history of The Motor Carrier Act was briefly reviewed at the outset of this factum. Between 1939 and 1949 The Motor Carrier Act did not even purport to cover inter-provincial or international motor carriage and the 1939 amendment which made this clear must obviously have been enacted with a view to excluding such carriage from the scope of the Act.

It must be equally clear that the 1949 amendment was enacted for no purpose other than to bring inter-provincial and international motor carriage within the scope of the Act.

If such was the purpose of the 1949 amendment it clearly is not highway legislation but is almost demonstrably legislation purporting to control the operation of a particular class of business. The fact that the business is conducted over highways is an incidental factor only.

If such was the purpose or effect, then even if no enumerated power contained in any of the heads of Section 91 covers the situation, nevertheless, no province has jurisdiction since the matter would not be local, private or provincial within the proper meaning of those words.

Since the undertaking is partly conducted in the Province of New Brunswick, however, it may be that it may properly be designated as " local," in which case it falls within the meaning of Section 92 (10) (a).

The " effect " of legislation has a bearing principally in connection with the question as to whether or not legislation, even though prima facie within an enumerated head of Section 92, nevertheless conflicts with an enumerated head of Section 91 and therefore is invalid by reason of the concluding words of Section 91.

It is when such a question arises, that the further question as to the validity of provincial laws of general application may arise.

In that connection reference is again made to *A.-G. for Manitoba v. A.-G. for Canada*, quoted supra at p. 13.

The further and somewhat novel question remains, namely, as to whether or not a certain paragraph in the Reasons for Judgment of Mr. Justice Harrison is sound.

The paragraph referred to is the penultimate paragraph which Hughes, J. referred to, which reads as follows :

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

It is respectfully submitted that the status of a foreign national to raise a constitutional issue is as extensive as that of a subject of His Majesty.

His Lordship cites no authority for the paragraph above quoted and the Appellant has been unable to discover any authority directly bearing upon the proposition advanced by His Lordship.

In *Dicey — Conflict of Laws*, (6 ed.) p. 161, it is stated :

> " The High Court (except for enemy aliens) is open to persons of every description. No one is, on account of his mere position or status, precluded from being plaintiff in an action, or from taking legal proceedings in the Court. Nor, again, is anyone, on account of his mere position or status, exempt from the liability to be made Defendant in an action (except for diplomats, and foreign sovereigns) . . . In this matter, a British subject and an alien, a natural person and a corporation . . . stand in exactly the same position."

In *Dr. Cheshire — Private International Law*, (3 ed) p. 130 it is stated :

> " The general rule is that all persons may invoke or may become subject to the jurisdiction of the English Courts, even though they are foreign by nationality or by domicile, and even though the cause of action has arisen abroad or is otherwise intimately connected with a foreign country."

In *Oppenheim — International Law*, (7 ed.) Vol. I, p. 620, it is stated :

> " Every state is by the Law of Nations compelled to grant aliens at least equality before the law with its citizens, as far as safety of person and property is concerned."

Furthermore, in *The Canadian Citizenship Act* (Statutes of Canada, 1946, c. 15, s. 29) it is provided that there shall be no discrimination in respect of property rights of any description between an alien and a Canadian citizen.

Constitutional questions in Canada, theoretically are nothing more than questions involving the interpretation of an Imperial Statute or Statutes.

Any other statute involving any litigation in Canadian Courts could be questioned by an alien. There appears to be no sound reason why the B.N.A. Act and amendments thereto should not equally be open to question by an alien if relevant to the questions in issue.

Generally on a question as to the extent to which a Province can, by laws of general application, affect undertakings such as that carried on by the Appellant, see *C. P. R.* v. *Notre Dame de Bonsecours Parish*, (1899) 68 L.J.P.C. 54.

In that case the headnote reads as follows :

" Although by Section 92, sub-section 10 of the British North America Act, 1867, railways which extend beyond the limits of a Province are subject exclusively as railways to the legislative authority of the Dominion, such railways do not cease to be part of the Provinces in which they are situated, nor are they in other respects exempted from the jurisdiction of Provincial Legislatures. Matters of purely local concern, having no relation to the structure of the railway, are within the local jurisdiction.

The Appellant company was required by the Respondents to clear out a certain ditch on the line within the parish, and the effect of the operation would not alter the structure of the ditch or the railway :— Held, that the order was within the competence of the parish to make".

Lord Watson said on page 56 :

" The British North America Act, whilst it gives the legislative control of the Appellant's railway, qua railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the Provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures. Accordingly the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company ; but it is, inter alia, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the Province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the ' railway legislation,' strictly so-called, applicable to these lines which were placed under its charge, should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the Appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should

be thoroughly cleaned out by the Appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation, competent to the Legislature of Quebec."

Reference is made generally to *C. P. R. v. A.-G. for B. C.*, (1950) 66 T.L.R. 34, being the latest authoritative case discussing the meaning and effect of Section 92 (10) (a).

Factually, the case is of no importance since it involved questions relating to the Empress Hotel, Victoria, B.C., which hotel was owned by the C. P. R.

It was held that the hotel was not a part of the railway undertaking and therefore, since it did not connect provinces or extend beyond the limits of a province it did not fall within the meaning of Section 92 (10) (a).

The discussion of the sub-section referred to however, is valuable.

TRADE AND COMMERCE CLAUSE

The Appellant also relied in the Court below and relies here, upon Section 91 (2) of the B. N. A. Act which reads as follows:

" 2. The regulation of Trade and Commerce."

A discussion of the opening and closing words of Section 91 is herein omitted since such words have been delimited in many of the cases which have already been cited and are, of course, familiar to Your Lordships.

The Appellant asks Your Lordships' permission to omit a detailed discussion of the Trade and Commerce Clause in view of an article written by His Lordship, Mr. Justice Vincent A. MacDonald, now of the Supreme Court of Nova Scotia and formerly Dean of Dalhousie Law School.

The article referred to will be found in 26 *Canadian Bar Review* at p. 21. Reference is made in particular to pages 36-40 and to the last paragraph commencing on page 41 and ending on page 42.

The Appellant respectfully requests Your Lordships' permission to refer to the authorities cited by Mr. Justice MacDonald in foot-notes to the pages just referred to.

It appears from the said article that while the Dominion cannot legislate in respect of particular trades carried on in single provinces, nevertheless, it has been firmly established that under the Trade and Commerce Clause, the Dominion can legislate " in relation to the regulation of (a) external and (b) inter-provincial trade."

Notwithstanding earlier authorities it has now also, as appears in the said article, been established that the Trade and Commerce Clause may be invoked in its own right and is not confined to a collateral role in assistance of legislation enacted by the Dominion under some other power.

His Lordship, Mr. Justice Harrison, it is respectfully submitted, was in error in quoting *Snider's* case (Record p. 33) and in adopting the now outmoded proposition that the Trade and Commerce Clause can only be invoked in aid of a power conferred independently of that Clause.

It is clear that the Trade and Commerce Clause is an enumerated power of the Dominion and hence under the concluding words of Section 91, that legislation enacted thereunder must prevail over legislation enacted under any enumerated head of Section 92, subject of course, to proper interpretation of the meaning of the Trade and Commerce Clause.

That the regulation of a transportation system can properly be called " regulation of Trade and Commerce " should be abundantly clear since the incidence of the railway strike which recently disrupted the economic life of Canada.

Anything which affects business, it is respectfully submitted, should be subject to regulation under the Trade and Commerce Clause, if it can otherwise be properly invoked.

The Appellant's undertaking primarily concerns the transportation of passengers and their baggage but carriage of passengers can affect business as well as carriage of freight. Should there be any question as to this contention let it be supposed that not only the Appellant's undertaking but all transportation systems connecting the Province of New Brunswick with the outside world should be discontinued.

Could it possibly be said that the economic life of New Brunswick would not thereby suffer ?

If the Province can forbid the carrying on of the Appellant's undertaking then it can also forbid the C. P. R. and other railways to operate in the Province.

This is reductio ad absurdum and it is respectfully submitted, should make it clear that prohibition or adverse regulation of the Appellant's undertaking affects Trade and Commerce and therefore under the authorities above cited, falls within the Trade and Commerce Clause and the Appellant's undertaking is not subject to provincial legislation.

His Lordship Mr. Justice Harrison (Record p. 36) observes that the legislation in question " would seem to be altogether beneficial."

The Appellant makes no comment as to the truth or falsity of this statement but wishes to add to his submissions as herein contained, the further submission that the wisdom or unwisdom of a statute is entirely irrelevant as to any enquiry as to whether it is intra vires or ultra vires.

A.-G. for Alberta v. A.-G. for Canada, (1947) 63 T.L.R. 479, 481.

SEVERABILITY

The Appellant does not contend that The Motor Carrier Act, 1937, or the provisions of The Motor Vehicle Act and Regulations made thereunder

are ultra vires as a whole but rather that they are ultra vires in respect of his undertaking as described above.

As to The Motor Carrier Act, 1937, the Appellant's particular complaint is in respect of the 1949 amendment purporting to bring within the scope of the Act inter-provincial and international motor carriage.

It is submitted that the Act could be held to be ultra vires in respect of such motor carriage while remaining intra vires as to purely inter-provincial motor carriage. The test of severability has been stated in numerous cases one of which is the case last referred to, namely, *A.-G. for Alberta v. A.-G. for Canada*, (1947) 63 T.L.R. 479, 481.

> " There remains the second question whether, when part II had been struck out from the Act as invalid what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is intra vires ' either in whole or in part,' but this does not mean that when part II is declared invalid what remains of the Act is to be examined bit by bit to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all. Chief Justice Harvey dealt with the second question very briefly and answered it by merely saying that part I is intra vires. Their Lordships, as just explained, think that, notwithstanding the form of the question put, the matter cannot be disposed of so summarily."

In numerous cases Acts have been held to be ultra vires as to certain undertakings but not as to others. Typical examples are the Great West Saddlery case and A.-G. for Manitoba v. A.-G. for Canada, referred to supra.

In all of the said cases, provincial legislation was held to be invalid insofar as it affected Dominion companies but not otherwise.

SUBMISSION

For the reasons advanced above the Appellant respectfully submits that the judgment rendered by the Appellate Division of the Supreme Court of New Brunswick should be reversed and that The Motor Carrier Act, 1937, (N. B.) as amended and the sections and Regulation of The Motor Vehicle Act, 1934, as amended, hereinbefore referred to, be held to be ultra vires of the Legislature of the Province of New Brunswick in respect of the Appellant's inter-provincial and international undertaking.

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