

GC 16.

8, 1954

In the Privy Council.

No. 23 of 1952.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

UNIVERSITY OF LONDON
W.C.1.

24 FEB 1955

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE ATTORNEY-GENERAL FOR ONTARIO,
THE ATTORNEY-GENERAL FOR ALBERTA
and THE ATTORNEY-GENERAL FOR
PRINCE EDWARD ISLAND (Intervenants) .

Appellants

AND

10 ISRAEL WINNER, doing business under the name
and style of MACKENZIE COACH LINES (Defendant)

Respondent

37732

AND

THE ATTORNEY-GENERAL FOR NEW
BRUNSWICK ex rel. S.M.T. (EASTERN) LTD.,
a duly incorporated Company (Plaintiff) . . .

Respondent

AND

20 THE ATTORNEY-GENERAL OF CANADA, THE
ATTORNEY-GENERAL FOR QUEBEC, THE
ATTORNEY-GENERAL FOR NOVA SCOTIA,
THE ATTORNEY-GENERAL FOR NEW
BRUNSWICK, THE ATTORNEY-GENERAL
FOR BRITISH COLUMBIA, CANADIAN
NATIONAL RAILWAY COMPANY,
CANADIAN PACIFIC RAILWAY COMPANY,
MACCAM TRANSPORT COMPANY and
CARWIL TRANSPORT LIMITED
(Intervenants)

Respondents

AND BETWEEN

30 ISRAEL WINNER (doing business under the name
and style of MACKENZIE COACH LINES) (Defendant)
and CANADIAN NATIONAL RAILWAY
COMPANY and CANADIAN PACIFIC
RAILWAY COMPANY (Intervenants) . . .

Appellants

AND

40 S.M.T. (EASTERN) LIMITED (Plaintiff) and the
ATTORNEYS-GENERAL OF CANADA,
ONTARIO, QUEBEC, NOVA SCOTIA, NEW
BRUNSWICK, BRITISH COLUMBIA, PRINCE
EDWARD ISLAND and ALBERTA, MACCAM
TRANSPORT LIMITED and CARWIL
TRANSPORT LIMITED (Intervenants) . . .

Respondents.

(Consolidated Appeals)

Case for the Respondents

THE ATTORNEY-GENERAL FOR NEW BRUNSWICK EX REL. S.M.T. (EASTERN)
LIMITED AND THE ATTORNEY-GENERAL FOR NEW BRUNSWICK, INTERVENANT

pp. 41-43.

1. These are appeals and cross-appeals by special leave from the judgment of the Supreme Court of Canada, dated October 22nd, 1951, allowing an appeal from a unanimous judgment of the Supreme Court of New Brunswick, Appeal Division.

pp. 18-19.

2. The judgment from which the appeals are taken, reversed the judgment of the New Brunswick Court and gave an answer to such part of questions raised in the New Brunswick Court, as it considered necessary.

p. 42, l. 39-p. 43,
l. 1.

3. It declared to the effect that it was not within the legislative power of the Province of New Brunswick to enact legislation by, or under which the Defendant, Winner (the Appellant in the Supreme Court of Canada, and operator of a certain bus service) might be prohibited from using such service to bring passengers into the Province of New Brunswick from beyond its borders and permitting them to alight therein, or picking up passengers within the Province and conveying them to a point beyond its borders, or from carrying passengers along the road traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges had been extended, as incidental to their contracts of carriage. 10

p. 43, ll. 1-8.

4. It further declared that except as to passengers to whom stop-over privileges were extended as aforesaid, it was within the legislative power of the Province to enact legislation under which the said Winner might be prohibited from carrying passengers from place to place within the Province as incidental to his other operations. 20

pp. 2-3.

5. By writ of summons dated September 17, 1949, the Respondent S.M.T. (Eastern) Limited brought an action against Israel Winner, doing business under the name, style and firm of MacKenzie Coach Lines, claiming an injunction to restrain him from picking up and letting down passengers within New Brunswick in his public motor buses running between St. Stephen, New Brunswick and the Nova Scotia border, for damages and other relief. 30

pp. 3-4.
pp. 5-6.
p. 7.

6. Pleadings were delivered—the Statement of Claim on October 18, 1949, Statement of Defence and Counter-claim on December 1, 1949, Reply and Defence to Counter-claim on December 8, 1949, and the case came on for hearing before Mr. Justice Hughes in December, 1949.

7. It was then agreed that, prior to the trial on questions of fact, certain questions of law should be stated, under the provisions of Order 34 of the Rules of the Supreme Court of New Brunswick, in the form of a special case for the opinion of the Court and such special case referred to the Court of Appeal for decision.

pp. 8-11.

8. The special case after stating certain facts, raised the following 40 questions for the opinion of the Court :—

p. 11, ll. 22-26.

(1) Are the operations or proposed operations of the Defendant within the Province of New Brunswick, or any part or parts thereof

as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937 and amendments thereto, or orders made by the said Motor Carrier Board ?

(2) Is 13 George VI, Chapter 47 (1949) *intra vires* of the legislature of the Province of New Brunswick ? p. 11, ll. 27-28.

9. When the matter came on for hearing before the Appeal Court (on which Mr. Justice Hughes sat as a member) the following question was added and the Order of Mr. Justice Hughes enlarged accordingly :— p. 17.

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

10. The Attorney-General of New Brunswick intervened in this action and was represented by Counsel on the hearing before the New Brunswick Appeal Court. p. 17.

11. The New Brunswick Appeal Court consisting of three Judges answered all questions asked in the affirmative. pp. 18-19.

12. Richards, C.J., held that The Motor Carrier Act was *intra vires* as being legislation coming within the following items of Section 92 of the British North America Act :— p. 21, ll. 36-41.

(9) Shop, etc., and other licenses in order to the raising of a revenue for provincial, local or Municipal purposes.

(10) Local works and undertaking, not being within any of the exceptions (a) (b) or (c).

(13) Property and civil rights.

(16) A matter of purely local or private nature.

13. Harrison, J., held that the legislation was *intra vires* as being legislation dealing only with traffic within the Province and coming under some one or more of items of Section 92.

30 (13) Property and civil rights in the Province. p. 33, ll. 2-3 & 33-37.

(16) Matters of a merely local or private nature ;

That it was not an undertaking within head 10 ; p. 32, ll. 32-33.

That in " pith and substance " the legislation dealt primarily with motor vehicle traffic within the Province and affected traffic passing through it incidentally ; that there was no Dominion Legislation respecting such traffic and until there was some enacted, the Provincial Legislation was effective regarding vehicles engaged in such traffic. p. 35, ll. 30-32.
p. 35, ll. 34-37.

40 He further held that it was not open to the Defendant, an alien, and resident of the United States of America, to challenge the validity of a Provincial Statute. p. 36, ll. 24-33.

p. 37, ll. 21-26.

14. Hughes, J., expressed his agreement with the judgment of Harrison, J., except with respect to the right of an alien to challenge the validity of provincial legislation. On this point he expressed no opinion.

p. 38.

15. Special leave to appeal from the judgment of that Court to the Supreme Court of Canada was granted the Defendant, Winner, on May 8th, 1950.

16. When the appeal came on for hearing before it, the Supreme Court of Canada raised the question as to whether the Plaintiff, S.M.T. (Eastern) Limited, as a private individual had a right to sue, and suggested the action should have been brought by the Attorney-General *ex relatione* 10 such Plaintiff.

17. This action had apparently been brought in reliance upon the authority of a decision of the New Brunswick Court of Appeal, *New Brunswick Power Co. v. Motor Transit Ltd.* 12 M.P.R. 152; (1937) 4 D.L.R. 376.

18. Without any decision upon such question (which was not one of the questions raised in or submitted in the Stated Case) it was arranged that the Attorney-General of New Brunswick *ex rel.* S.M.T. (Eastern) Limited should be added as Plaintiff in the action. He was so added by Order of Mr. Justice Harrison one of the Judges of the Supreme Court 20 of New Brunswick dated February 7th, 1951, which provided that the addition of such Plaintiff should take effect as from the date of the institution of the action.

19. While the appeal was pending before the Supreme Court of Canada, the Attorney-General of Canada, the Attorney-General for Ontario, the Attorney-General for Quebec, the Attorney-General for Nova Scotia, the Attorney-General for British Columbia, the Attorney-General for Prince Edward Island, the Attorney-General for Alberta, the Canadian National Railway, the Canadian Pacific Railway, the Maccam Transport Limited and the Carwil Transport Limited were added as 30 intervenants in the Supreme Court of Canada and were represented by Counsel at the hearing.

20. The major factums on that appeal were filed by the Appellant, Israel Winner, the Respondent S.M.T. (Eastern) Limited (filed before the Attorney-General *ex rel.* S.M.T. (Eastern) Limited was added as a Plaintiff), the Attorney-General of Canada, the Attorney-General for Quebec, the Attorney-General for Nova Scotia, the Attorney-General of New Brunswick as intervenants and the two railway companies, intervenants.

The appeal was heard by the full court of nine judges, each of whom 40 delivered a written opinion.

p. 48.

p. 54, l. 34-p. 55,
l. 12.

21. Chief Justice Rinfret of the Supreme Court of Canada did not consider it necessary to discuss the constitutionality of The Motor Carrier Act, or The Motor Vehicle Act of New Brunswick. He held that on the

interpretation of the Statutes and regulations made thereunder, the Defendant, Winner, was entitled to carry on his transportation business in the manner in which he sought to carry on, and that the *Order* of the Motor Carrier Board was not authorised by such Legislation, or Regulations, insofar as it purported to impose restrictions upon his operations.

22. Kerwin, J., held that legislative jurisdiction respecting highways generally, fell within head 13 of Section 92 as respecting "property and civil rights." p. 57, ll. 13-16.

10 He further held that the right of passage and user might be interfered with in *some* respects by Provincial Legislation; also that no claim was made to differentiate between residents of New Brunswick and residents of other Provinces and aliens. Proceeding, he held that the business or organization of Winner constituted an "undertaking" within the meaning of Section 92 (10) and says:— p. 57, ll. 19-20.
p. 57, ll. 22-24.
p. 58, ll. 29-34.

20 "However, it is sufficient to state that in my opinion the "interprovincial and international undertaking of the Appellant falls clearly within Section 92 (10) (a) of the British North America Act but that the carriage of passengers or goods between points (a) and (b) in New Brunswick is not necessarily incidental to the Appellant's undertaking connecting New Brunswick with any other, or others of the provinces or extending beyond the limits of the province, except as to such carriage in connection with stop-over privileges extended as an incident of the contract of through carriage." p. 58, l. 46-p. 59, l. 6.

23. Taschereau, J., suggests, but did not clearly hold that the control of the roads and highways and the regulation of traffic thereon, is within the legislative jurisdiction of the Province. He further held that the Appellant's operations constituted an undertaking within head 10 of Section 92 and therefore the Provincial legislation was not effective with respect to extra-provincial operation although effective with respect to local traffic. p. 62, ll. 30-34.
p. 61, ll. 15-16.
p. 61, ll. 32-34.

30

24. Rand, J., developed and stated a theory which appears to be novel. In substance he held that the use of the highways was a right incidental to the status of citizenship and presumably also incidental to the status of a friendly alien. He further held that a Province could not legislate to prevent a Canadian citizen from entering upon the highways within its limits and using them, and that the privilege of operating on the highways by Winner constituted the equivalent of a right of way which he was entitled to exercise. p. 66, ll. 3-35.

40 He also held that bus operations constituted an "undertaking" under head 10 and says:— p. 69, ll. 8-11.

"It follows that the province, in the absence of any consideration relating to highway administration or other sufficient exclusive provincial matter, was without power, having admitted these buses to the highways, to prevent them from setting down or taking up either international or interprovincial traffic. On the other hand, it could forbid the taking up or setting down of passengers travelling solely between points in the province." p. 67, ll. 12-18.

25. Kellock, J., held that the control of the use of provincial highways was *not* a matter of civil rights within the Province and thus subject to Provincial jurisdiction ; that there was nothing in Section 92 authorizing a Province to deny entry to its highways by persons at its borders ; and the right of user of highways was not a matter of legislative jurisdiction under head 13 as being a " civil right " within such head ; that the right to use the highway was a right vested in each subject, who is entitled to use it throughout the whole country.

He further held that Winner's bus operation constituted an " undertaking " within Section 92 (10) (a) which could not be prevented by Provincial legislation. He dealt with the matter of Intra-Provincial traffic and held that this could be separate from Extra-Provincial traffic, that it was local in character and subject to Provincial control and prohibition.

26. Estey, J., held that the Province possessed complete legislative jurisdiction over the highway, but that the Winner Organization and equipment constituted an " undertaking " within 10 (a) and once the Appellant was within the Province he had the right to pass anywhere upon the roads within the Province, upon complying with competently enacted provincial legislation. He also held that it was the *scope* of the operations of an undertaking that determined the legislative jurisdiction, that with respect to Extra-Provincial traffic, highways must be available to him without restriction, although with respect to Intra-Provincial traffic he was subject to the control of Provincial legislation and prohibition of Provincial legislation.

27. Locke, J., in substance held that the Appellant's operations were a work and undertaking. That it was within head 10 (a), insofar as the Extra-Provincial business was concerned, and with respect to such business only Parliament could impose restrictions, but, not within such head insofar as Intra-Provincial business was concerned, and with respect to the latter, the business was subject to Provincial Legislation.

28. Cartwright, J., did not state a particular conclusion of his own, he stated—

" I agree with my brother Rand that the relevant statutory provisions if valid, are broad enough to empower the Board to restrict the license as it did, and the answer to the question must therefore turn on whether it was within the powers of the legislature of New Brunswick to so provide. In the assumed circumstances of this case, set out above, I am in agreement with those members of the Court who hold that the New Brunswick statutes and regulations in question and the licence issued by the Motor Carrier Board, referred to above, are legally *ineffective* to prevent the Appellant by his undertaking from bringing passengers into the Province of New Brunswick from the United States of America or from another Province of Canada and permitting such passengers to alight in New Brunswick, or from picking up passengers in New Brunswick to be carried out of the province or from transporting between points in the province

“passengers to whom stop-over privileges have been extended as
 “an incident of a contract of through carriage; because in so far
 “as they purport so to do they are *ultra vires* of the legislature of
 “New Brunswick.”

29. Fauteux, J., held that the operation of Winner's bus line was an undertaking within head 10 (a). p. 87, ll. 31-35.

That the fact that the highway over which the buses travelled was *not* part of his undertaking was not material. p. 87, ll. 36-40.

10 In conclusion he held that in the measure in which it was Intra-Provincial, the bus service of the Appellant was within Section 92 (10) (a), but that his local operation remained within provincial control. That there was a difference in “pith and substance” between the Motor Carrier Act and the Motor Vehicle Act, the first relating to the public service of transportation, the latter to the operation of motor vehicles; that the material principle laid down in the case of *Prince Edward Island v. Egan* [1941] S.C.R. 396 (that the provinces have control of their highways) remains unaffected; that the fact that the Appellant was an alien was immaterial. p. 88, ll. 30-34.
p. 89, ll. 9-10.
p. 89, ll. 13-19.
p. 89, l. 17.
p. 89, ll. 21-22.

30. The Attorney-General of New Brunswick supports the appeal by the Attorneys-General for Ontario, Alberta and Prince Edward Island, 20 Intervenant. He opposes the appeal by Israel Winner, Defendant and the Canadian National Railway Company and the Canadian Pacific Railway Company, Intervenant.

31. He submits that the New Brunswick Statutes, the validity of which is challenged in this action, i.e. “The Motor Carrier Act” and “The Motor Vehicle Act” and regulations and orders made thereunder, are—

(1) wholly *intra vires*, and

30 (2) (A) are effective in New Brunswick with respect to all the public transportation business and operations of the said Defendant, both intra-provincial and inter-provincial, and (B) in the alternative, if his submission (A) is not upheld, are effective in New Brunswick with respect to his intra-provincial business and operations, as held in the judgment of the Supreme Court of Canada.

32. The majority of the Judges of the Supreme Court of Canada appear to have accepted the proposition that in general, each Province has legislative jurisdiction over the subject-matter of its roads and the use thereof, as the same came under heading (13), Property and Civil Rights. Mr. Justice Kellock indicates that he does not agree and states that he is of the opinion that the matter of control of the use of the roads is within the competence of the Federal Parliament. p. 71, l. 29—p. 72,
l. 6.

40 33. The majority of such Judges also appear to have overlooked the association of “The Motor Carrier Act” with “The Motor Vehicle Act” and “The Highway Act,” and proceeded to determine its validity independently of any association by it with such Statutes.

p. 65, l. 4—p. 66,
l. 38.

34. Certain of such Judges, and in particular, Mr. Justice Rand, also held that there are certain subject-matters (or at least a subject-matter) not expressly mentioned in the British North America Act which by their inherent nature are beyond the legislative competence of the Province.

35. It is submitted—

(A) The *validity* of the Provincial Statute in question is dependent upon enactment “in relation to” a subject-matter which is, or is included within, one or more of the subject-matters specified in the headings in Section 91.

(B) If it is so enacted, it is valid. However, even if valid its *effect* with respect to the Defendant, Winner’s operations, is dependent upon whether such operations *also* were or came within one or more of the subject-matters specified in the headings in Section 91, or deemed to be included in Section 91 as being specified exemptions to a heading in Section 92. If they did so come, then the effect of the Statute upon the Defendant’s operations, would be further dependent upon whether or not the Dominion Parliament had enacted legislation in relation to such subject-matter which was inconsistent with, and which over-rode the Provincial Statute. 10

36. The difference of opinion already expressed on these points 20 makes it apparent that they are not free from doubt and difficulty. None of the headings in Section 92 *expressly* specify or enumerate or include “roads” or “highways,” or use of, or traffic on same, neither do any of the headings in Section 91 *expressly* specify or enumerate or include them.

37. The Court must determine whether or not it should be included within one or more of the headings in Section 91 or Section 92. It is submitted that the subject of roads and their user by both persons and vehicles falls within one or more of the headings of Section 92, particularly within headings 9, 10, 13 and 16.

38. It is submitted that in order that it may properly construe a 30 document and ascertain its meanings—

(A) the Court is entitled to know the surrounding circumstances and the conditions at the time when the document came into existence, so as to place itself as near as possible in the position of the parties concerned. Halsbury’s Laws of England, 2nd ed., Vol. X, page 270, and cases cited.

(B) also, where matters remain in doubt, it is permissible for the Court to examine the evidence of acts *done under it*, as a guide to the intention of the parties. Halsbury’s Laws of England, Vol. X, page 274, Section 373, and cases cited. 40

Both submissions (A) and (B) are discussed and accepted by the Judicial Committee in *Watchman v. Attorney-General of East Africa Protectorate* L.R. [1919] A.C. 533—see at pp. 538–9–40.

39. On the assumption that it is not clear and free from doubt that the use of the roads and in particular such use for the purposes of public transportation is within some heading of Section 92, the following matters will be briefly discussed :—

(1) The origin and nature of New Brunswick legislation with respect to roads and their use and in particular public land transportation thereon, enacted prior to 1867.

10 (2) The circumstances preceding, leading up to, and which brought about the enactment of the British North America Act in 1867.

(3) The disposition by that Act of the ownership in the facilities for public land transportation then owned by the Province.

(4) The nature and development of the general legislation enacted by the Dominion Parliament after Confederation in relation to roads and public transportation.

(5) The nature and development of the legislation enacted by the Province of New Brunswick after Confederation in relation to roads, their use and public transportation generally.

ORIGIN AND NATURE OF NEW BRUNSWICK LEGISLATION PRIOR TO 1867.

20 40. Prior to its being constituted a Province, what is now New Brunswick, was a portion of the Province of Nova Scotia and the laws in force respecting roads and their use, were those which had been enacted by Nova Scotia.

41. Its own legislation with respect to the regulation and control of public transportation, at least with respect to such transportation of goods, was first enacted at the first session of its Legislature (1786). By Chapter XLVI of 26 George III the Legislature confirmed to the City of Saint John all the rights and privileges granted to it by its Charter of Incorporation dated 26th June 1785.

30 42. Among the Grants made to the City by that Charter and so confirmed was—

(A) authority to make all such laws, statutes, rights, ordinances, and constitutions which to them, or the greater part of them shall seem to be good, useful or necessary for the good rule and government of the body corporate aforesaid; and of all officers, ministers, artificers, citizens, inhabitants and residents of the said City within the limits thereof;

40 (B) the office of Cartage, Carriage and Portage of all goods, wares and merchandise and other things to be carted or carried in or through the said City, or any part thereof, or up and down and along the shores of the said harbour.

43. At that time, and for many years thereafter, railroads were unknown, roads were the only means of land transportation and legislation respecting roads and bridges, their use and traffic, etc., was enacted from time to time. The New Brunswick Public Statutes were in part consolidated, and in part reprinted, and many "private statutes" were also reprinted, in 1854 and it is convenient to refer to that printing.

44. At that time (1854) roads had been divided into two classes—“Great Roads” and “Highways,” R.S.N.B. (1854), Vol. 1, Title IX “of Roads,” Chapter 65 “of Great Roads” and Chapter 66 “of Highways.” These Statutes gave authority to lay out roads, to alter their location and to close them. All roads were constructed and maintained in part by the expenditure of public money and in part by the labour of the inhabitants of the particular area in which they were situate.

By Section 16 of Chapter 66, all male inhabitants being 18 years of age and upwards (with certain specified exceptions) were required to do such work on the roads for such time, either in person or by substitute as the surveyor should direct, with the provision that no person should be liable to perform more than 60 days’ labour in any one year. This was commonly known as “Statute Labour.” 10

45. Most of the legislation respecting the control and regulation of the roads and traffic, is found under title VIII heading “of the local government of counties, town and parishes.” Chapter 64 heading “of rules and regulations.” By it the Sessions of the Peace were given power to make regulations for—

“Second—For the licensing and regulation of ferries, and fixing the rates and fares therefor, and for conveying passengers to and from steam boats, on their passage along the rivers.” 20

“Fifth—For the regulation of carriages for hire, cartage and truckage, and the lading and unlading of vessels.”

“Twentieth—For preventing disorderly riding and driving on the public roads and bridges.”

46. The City of Fredericton was incorporated by Statute in 1848. The Statutes relating to it were consolidated and enacted as Chapter 15 of 14 Victoria (1851) (Reprinted in the “Local Statutes of New Brunswick 1854” at page 222).

By Section 53 the City Council was given power to make by-laws for many purposes including— 30

11th. To regulate carters, wagoners, and cartmen; the price to be paid to them for hauling loads in the said City, and the quantity to comprise a load.

33rd. To prevent immoderate driving or riding within the City.

35th. To regulate and license owners of livery stables, or other owners of horses or carriages letting out the same for hire or profit, and also porters, butchers and hucksters.

47. The foregoing Statutes, with possibly some amendments, or Statutes to like effect, were in force in 1867. 40

MILITARY ROADS.

48. In 1845 legislation had been enacted with respect to a “Military Road” from Halifax through New Brunswick to Quebec, Chapter XLVII, 8 Victoria. Apparently no action was taken under this Statute, or otherwise to establish any Military Roads in New Brunswick, and in the revision of 1854 it was listed as obsolete, Vol. 2 Public Statutes of N.B. 1854, p. 419.

RAILROADS.

49. In 1867 the only railroad in New Brunswick owned by the Province was the European and North American Railroad, Legislation with respect to which is in Vol. 2, Public Statutes N.B. (1854), starting at page 221.

CIRCUMSTANCES PRECEDING ETC., THE ENACTMENT OF THE BRITISH NORTH AMERICA ACT.

50. Prior to the enactment of the Statute, conferences were held between representatives of the various Provinces with a view to bringing
10 about some form of union.

The first was held at Charlottetown, P.E.I., with a view to the union of Provinces on the Atlantic Seaboard. It was not proceeded with because of the introduction of the larger scheme.

The second was held at Quebec, as a result of which and under date of 10th October 1864 certain resolutions were adopted as a basis of a proposed Confederation.

The third was held between duly authorised representatives of the then Province of Canada, Nova Scotia and New Brunswick, and under date of 4th December 1866 certain resolutions were adopted as the basis
20 for the confederation of such Provinces.

The British North America Act was in essence, the putting into legal form and providing the legal machinery required to give full effect to the Confederation agreement between the three Provinces of Canada, Nova Scotia and New Brunswick as settled by the London resolutions. It is in the nature of a private statute enacted to give legal effect to agreement of private parties. These parties were at that time unable by their own act to give legal effect to what they had agreed upon.

51. The matter of roads and transportation must have been one of the subjects discussed by the Provincial representatives.

30 52. The resolutions of the Quebec conference so far as material may be shortly stated.

Number 29 assigned to the General Parliament the power to make laws respecting—

2. The regulation of Trade and Commerce.
8. Lines of Steam or other Ships, Railways, Canals and other works, connecting any two or more of the Provinces together, or extending beyond the limits of any Province.
9. Lines of Steamships between the Federal Provinces and other Countries.
- 40 10. Telegraphic communication and the incorporation of Telegraph Companies.

11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorising them to be for the general advantage.
13. Militia, Military and Naval Service and Defence.
18. Ferries between any Province and a Foreign Country or between any two provinces.

Number 43 assigned to the Local Legislatures the power to make laws respecting—

1. Direct taxation and the imposition of Duties on the export of Timber, Logs, Masts, Spars, Deals and Sawn Lumber, and of 10 Coals and other Minerals.
12. Shop, Saloon, Taverns, Auctioneer and other Licenses.
13. Local Works.
15. Property and civil rights, excepting those portions thereof assigned to the General Parliament.
18. And generally all matters of private or local nature, not assigned to the General Parliament.

Number 55 assigned to the General Government certain public work and property of each Province, including—

6. Railway and railway stocks, mortgages, and other debts due 20 by railway companies.
7. Military Roads.

53. The London Resolutions were similar and in some instances identical.

Number 28 assigned to the General Parliament the power to make laws respecting—

2. The regulation of trade and commerce.
6. Lines of steam or other ships, railways canals and other works connecting any two or more of the Provinces together, or extending beyond the limits of any Province. 30
7. Lines of steamships between the Confederated Provinces and other countries.
8. Telegraphic communication and the incorporation of telegraph companies.
9. All such works as shall, although lying wholly within any province, be specially declared by the Acts authorising them to be for the general advantage.
11. Militia, Military and naval service and defence.
16. Ferries between any Province and a foreign country or between any two Provinces. 40

Number 41 assigned to the Local Legislatures the power to make laws respecting—

- 2. Direct taxation, and in the case of New Brunswick of levying timber dues by the mode and to the extent now established by law, provided such timber be not the produce of the other Provinces.
- 12. Shop, saloon, tavern, auctioneer and other licenses for local revenue.
- 13. Local Works.
- 10 15. Property and civil rights (including the solemnisation of marriage) excepting portions thereof assigned to the General Parliament.
- 18. And generally all matters of a private or local nature not assigned to the General Parliament.

Number 54, Public Works and Property of each Province to be assigned to the Central Government included—

- 6. Railways and railway stocks, mortgages, and other debts due by railway companies.
- 7. Military Roads.
- 20 54. The British North America Act in so far as the above-mentioned headings are concerned, enacted in substance the wording of the resolutions, although there is a difference in arrangement and some difference in phraseology.

One noticeable difference in arrangement is the inclusion of the substance of headings 6, 7, 8 and 9 of No. 28 of the London Resolutions, as exceptions to heading 13 of No. 41.

One change in phraseology was the addition of the expression “ and undertakings ” to heading 13 of No. 41.

30 Heading 13 with this addition and the exceptions, was enacted as heading 10, of Section 92.

Another change in phraseology was with respect to heading 15 of resolution 41, the substance of which was enacted as headings 12 and 13.

DISPOSITION OF OWNERSHIP OF PROVINCIAL ASSETS HELD WITH REFERENCE TO ROADS AND TRANSPORTATION.

55. Section 108 of the Statute provides that the public works and property of each Province enumerated in the third schedule, should be property of Canada. Included in such enumeration are—

- 6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
- 40 7. Military Roads.

Section 113 provides that the assets enumerated in the Fourth Schedule which then belonged to the Province of Canada, should be the property of Ontario and Quebec conjointly. Included in such enumeration are Montreal Turnpike Trust, and Quebec Turnpike Trust.

56. In 1867, public transportation, other than by water, was by roads and railroads. In the case of railroads, the motive power was mechanical; in the case of roads, it was animal.

LEGISLATION BY DOMINION IN RELATION TO ROADS.

57. Counsel for the Attorney-General of New Brunswick has been unable to find any legislation by Parliament in relation generally, to roads 10 in the Provinces, and the regulation and control of traffic on the highways.

58. The first Dominion Legislation respecting railways was Chapter 68 of 31 Victoria entitled "The Railway Act," October 1868.

The Dominion has enacted legislation in relation to railroad and railroad transportation ever since. It *inter alia*, set up Boards and gave them power to deal with many aspects of railroad and railroad traffic. It has in more recent years enacted legislation in relation to other kinds of public transportation, such as air plane transportation which was unknown in 1867, and has given Boards jurisdiction to deal with certain 20 aspects of these various forms of transportation. It has not, however, so far as research can determine, enacted any legislation with respect to roads or transportation or business on roads in general, and in particular has not enacted any such legislation with respect to motor bus public transportation. There is of course Dominion Legislation which has some effect upon or with respect to roads and traffic thereon, such as provisions of The Railway Act, respecting railway crossings by highways and of The Criminal Code respecting certain offences.

59. After the Provinces of Manitoba, Alberta and Saskatchewan were severally admitted as Provinces of Canada, the Dominion Parliament transferred to the Crown in the right of each such Province, the title to 30 the roads and road allowances within their respective geographical limits which until then the Crown in the right of the Dominion had owned.

Dominion Statute, *re* Manitoba, 39 Victoria, Chapter 20.

Revised Statutes of Canada (1886), vol. 1, Chapter 49.

Revised Statutes of Canada (1906), Chapter 99, Part II.

Re Alberta and Saskatchewan Dominion Statute, 6 Edward VII, Chapter 45.

Revised Statutes of Canada (1906), Chapter 100.

60. The Dominion Parliament has also enacted legislation authorising The Governor in Council to make money grants to the Provinces to aid each of them in paying for the construction of certain highways within its bounds, e.g., The Canada Highway Act, Chapter 54, 9-10 George V, Trans-Canada Highway Act 1949, 2nd Session, Chapter 40, now Chapter 269, Revised Statutes of Canada (1952).

The above Acts provided for grants of money to each Province to be expended in connection with certain of its highways of certain standards of construction. They did not contain any provision providing for, or
10 vesting in the Dominion, any control over the use of any highways so constructed, or of the traffic thereon.

NATURE AND DEVELOPMENT OF PROVINCIAL LEGISLATION IN
RELATION TO ROADS AND TRANSPORTATION SINCE 1867.

61. The exact language of much of the legislation referred to under this heading, is not material. It is only its general nature and effect which is or may be material. Therefore, in most instances the actual wording is not quoted.

62. Ever since 1867 the Province of New Brunswick has consistently enacted legislation in relation to roads, and the regulation and control
20 of the use of same. In that time many changes in it have taken place, most of which do not appear to be material.

63. The authority to make by-laws respecting Counties, Towns and Parishes, which in 1854 was vested in the Sessions of the Peace, was in 1877 by Chapter 99, C.S.N.B. 1877 vested in the County Council.

The wording of items 11, 14 and 29 of Section 96 of said Chapter 99 is substantially the same as that of items 2, 5 and 20 of Chapter 64, R.S.N.B. 1854 quoted in paragraph 45 hereof, with some additions. This authority to make such by-laws has been continued and enlarged and in 1949 was to be found in the Municipalities Act, Chapter 178 R.S.N.B. 1927.

30 64. The Cities of Saint John and Fredericton at all times have had legislative authority to enact by-laws controlling or regulating streets and traffic thereon, etc., to no lesser extent that such authority existed in 1867.

65. The general "Highway Acts" enacted from time to time also contained express regulations or restrictions with respect to vehicles and traffic on the roads through the Province generally.

66. 1895. The Peddlers' Act was first enacted as Chapter 39 of 58 Victoria. It prohibited any person within any county from peddling or hawking or carrying from place to place for the purpose of peddling or hawking any goods, wares or merchandise, unless he held a licence.
40 Such licence could only be granted if the applicant had resided within the county or adjoining county for at least twelve months.

The substance of this Statute has been re-enacted from time to time in various consolidations. As in force in 1949 it was Chapter 194, R.S.N.B. (1927).

67. 1903. The Public Statutes of New Brunswick were consolidated in 1903. It was about this time that motor vehicles first made their appearance on its highways. Chapter 184, C.S.N.B. (1903) in substance re-enacted Chapter 67, C.S.N.B. (1877) (respecting Great Roads). Chapter 185, C.S.N.B. (1903) in substance re-enacted the then former Highway Act (59 Victoria Chapter 21).

In the Index to the Consolidation, both these Statutes were merely listed by name, there being subscribed the following note to each: "This Act is not further indexed as the Commissioners understand it is proposed to supersede it by legislation during the sessions of 1904." 10

68. 1904. The next year (1904) a new Highway Act, 4 Edward VII, Chapter 6 was enacted and Chapters 184 and 185, C.S.N.B. 1903, were repealed. Section 3 abolished the distinction between Great Roads and other roads. It contained certain restrictive and prohibiting provisions applicable to the use of all roads. This Highway Act does not refer specifically to the use of motor vehicles on highways.

69. 1905. 5 Edward VII, Chapter 6, was re-enacted. This was entitled: "An Act in relation to the Registration and Identification of Motor Vehicles and the use of the public highways by such vehicles." Subject to certain exceptions— 20

Sec. 2 ss. 1 required every motor vehicle to be registered.

ss. 8 prohibited the use or operation of any motor vehicle upon a *public highway* unless it was so registered.

Sec. 3 ss. 1 prohibited the operation of a motor vehicle on a *public highway*, except at a restricted speed, etc., the maximum of which was fixed at one mile in four minutes.

Sec. 5 ss. 1 provided that every person desiring to operate a motor vehicle, as mechanic, employee, or for hire, must register his name and address and pay a registration fee.

ss. 5 provided that no person should operate a motor vehicle upon a *public highway* unless he had complied with the provisions of the section. 30

70. 1913. The Highway Act 1913, 3 George V, Chapter 15, contains more extensive provisions with respect to roads and the control of traffic on the same.

Section 62.—"The provisions of this Act generally shall apply to "all cities, towns or parishes, or parts thereof, but only in so far as the "same are consistent with any special or local laws concerning highways "in force in any such city, town, parish or part thereof."

71. 1915. 5 George V, Chapter 43, entitled "Motor Vehicle Law 1915." This was a more detailed and elaborate Statute than that of 1905. Section 3 (1) subject to some exceptions—fire apparatus, etc., required every motor vehicle to be registered and imposed a registration fee to be paid. 40

Subsection (8) provided no motor vehicle should be used or operated upon a *public highway* unless the owner should have complied with the provisions of the Section.

Subsection (9) exempted motor vehicles owned by non-residents from the requirement that motor vehicles should be registered provided that such motor vehicle had been registered in the State or Province of their residence. Such non-residents were exempt from local registration for a period of only twenty-one days in any one year.

Section 4 imposed restrictions on speed.

10 Section 5 dealt with the rule of the road (pass to the left), brakes, signalling apparatus (horn, etc.) and lights.

Section 6 provided for licensing of chauffeurs to operate and payment of license fees, etc.

Section 10 prohibited the use or operation of a motor vehicle upon *public highways* unless, in addition to the registration fee, the owner should have paid other additional fees, which in most instances were based on rated engine power.

20 Section 11 provided that no motor vehicle should be operated on *public highways* except by the registered owner or, licensed chauffeur, and in no event by any person under the age of 18 years.

Section 12 (1). "The Lieutenant Governor-in-Council may from time to time make regulations respecting the use of motor vehicles known as "Jitney Buses" and providing for the qualification of drivers and for the giving of bonds or other security by the proprietors or operators of such vehicles for the payment of damages to persons or property which may be caused by their operation. Such regulations may impose penalties not exceeding one hundred dollars for any offence to be recovered upon summary conviction."

30 "(2) each City, town or municipality within which such vehicles are operated, shall have power to make regulations as to routes, rates of fare and details of service, and to enforce such regulations by the imposition of penalties not exceeding fifty dollars, to be fixed by by-laws and recovered upon summary conviction."

72. 1918. 8 George V, Chapter 8, The Highway Act of 1918. This was a much more elaborate Highway Act and introduced some new feature of highway control. It continued the old prohibitions, restrictions and controls and by Section 78 enacted to the following effect :—

40 (1) That no *vehicle* carrying a load weighing more than 3,000 pounds and no portable mill on wheels, should be hauled or propelled along the roads in the Province between the 15th day of March and the 15th day of May in any year without a written permit, which the proper authority might refuse to issue, if in his opinion, the passage of such a vehicle would materially injure the roads, etc.

(2) That no *motor vehicle* should be allowed on any of the roads in the Province in the Spring of the year while the frost was coming

out of the ground, without the permission of the local authority first obtained. There were such exceptions as medical practitioners, clergymen, ambulances, etc.

73. 1921. 11 George V, Chapter 28. An amendment to the Highway Act of 1918. Section 3 authorised the Lieutenant Governor-in-Council to make such regulations as were deemed necessary, regarding the use of the highways of the Province.

74. 1921. 11 George V, Chapter 30. This amended the Highway Act of 1915. Section 2 in effect enacted—

(1) that no motor truck or motor vehicle used exclusively for commercial purposes with a carrying capacity of more than three tons should be operated or used on the roads of the Province, unless the owner should have first obtained a special permit or licence and paid a special fee for same ;

(2) that no motor truck or motor vehicle of a carrying capacity of more than five tons should be operated or used on the highways of the Province ;

(3) that motor trucks or motor vehicles used exclusively for commercial purposes owned by a non-resident of the Province should not be operated or used on the highways of the Province, without a special permit.

75. 1925. 15 George V, Chapter 16, amended Section 78 of the Highway Act of 1918 by, *inter alia*, enacting that subject to the exceptions of medical practitioners, etc., no motor vehicle should be allowed on any of the highways of the Province between the 15th day of March and the 20th day of May, without the permission of the Provincial Road Engineer or unless permission for the use of the highways had been given by the Minister of Public Works.

76. In 1926 a new Consolidation of New Brunswick Statutes was in course of preparation. A new Highway Act and a new Motor Vehicle Act were enacted.

77. The Highway Act, 1926. 16 George V, Chapter 3. This Statute continued and somewhat enlarged the provisions of the older statutes in relation to the temporary and permanent closing of roads, the general control of traffic, the prohibition of the use of the roads by all vehicles in excess of a certain weight, etc., between the 15th day of March and the 20th day of May and the prohibition of the use of the roads by *all motor vehicles* (other than of medical practitioners, etc.) between such periods, without certain permits, etc.

78. The Motor Vehicle Law, 1926. 16 George V, Chapter 4. This Statute (Section 3) continued the requirements that every motor vehicle should be registered and that no motor vehicle should be operated *on the public highway* unless so registered ; but Section 3 (10) excepted from local registration, motor vehicles of residents of Canada or the United

States who had complied with the registration laws of their residence ; such persons were permitted to operate motor vehicles in New Brunswick, without local registration for not more than 90 days in any one year, but by Section 3 (11) it was enacted that the provisions of subsection (10) should not apply to motor vehicles used for commercial purposes and that all such motor vehicles must be registered and licensed in New Brunswick before being operated in such Province.

By Section 5 it continued the provisions respecting the law of the road, lights, brakes, horn, etc.

- 10 By Section 6 it provided for licensing operators, and, by section 6 (7) every person operating a motor vehicle for the business of transporting passengers or freight for hire was required to take out a driving licence.

By Section 7 (5) it prohibited intoxicated persons from driving a motor vehicle and provided for the suspension and possible ultimate cancellation of the driving licence of a person convicted of driving while intoxicated.

By Section 11 it prohibited the operation of a motor vehicle upon a public highway outside of the cities and towns, where the gross weight exceeded 12,000 pounds.

- 20 It enacted that vehicles of certain weights should not be so operated unless they had pneumatic tyres of a specified minimum diameter.

By Section 15 it prohibited the operation of a motor vehicle on the highway by certain specified persons and absolutely prohibited the operation by any person under the age of 16 years.

By Section 16 it continued the general jurisdiction of the Lieutenant Governor-in-Council to make regulations respecting the use of motor vehicles known as "Auto Buses" and "Taxis"; it also continued the jurisdiction of cities, towns, etc., to enact regulations as to routes, rates of fares, details of service, etc., within their respective jurisdictions.

- 30 79. 1927. The first Motor Carrier Act was enacted, 17 George V, Chapter 16, entitled "Motor Carrier Act."

Section 20 enacted : "The provisions of this Act shall be construed " and held to be in addition to the provisions of ' The Motor Vehicle Law, " ' 1926 ' and ' The Highway Act, 1926 '."

Section 21 repealed certain provisions of the Motor Vehicle Law, 1926 respecting the regulation of Auto Buses and Taxis on the highway without the limits of cities, etc.

- 40 Section 4 enacted : "The board is hereby vested with power and " authority to specify the route or routes over which any motor carrier may " operate and to fix or approve the maximum or minimum and maximum " and minimum rates, fares and charges on routes over which any motor " carrier proposes running ; to regulate and supervise the schedules, " service and method of operating same ; to require the filing of returns, " reports and other data ; and to supervise and regulate motor carriers " in all matters affecting the relationship between such carriers and the " travelling public. The Board shall have the power and authority to

“ prescribe rules and regulations for safety as it may deem necessary.
 “ All laws relating to the powers, duties authority and jurisdiction of the
 “ Board over common carriers are hereby made applicable to all such motor
 “ carriers, except as herein otherwise specifically provided. All routes
 “ over which motor carriers propose to operate shall be subject to the
 “ approval of the Minister.”

Section 5 enacted : “ Except as hereinafter provided, it shall be
 “ unlawful and in violation of this Act, for any person, firm, corporation,
 “ lessee, trustee, or receiver, personally or by agent or employee, to operate
 “ any motor vehicle upon any public highway in the Province, for the 10
 “ transportation of persons or property for compensation, without holding
 “ a certificate, issued by the Board, allowing such motor vehicle to be so
 “ operated for compensation.”

Section 7 provided that no motor carrier authorised under the Act to
 operate within the Province, should abandon or discontinue any service
 established under the provisions of the Act, without an Order of the Board
 made after hearing, etc., except by direction of the Chief Highway Engineer
 who by Section 8 was given authority to order a discontinuance of the
 operation of a service, when, in his opinion, the highway was or would be
 damaged by such operation. 20

80. All the provisions of this Act are general. It includes no pro-
 visions expressly relating to extra provincial operations by Motor Carriers
 as such.

81. In 1927 the new consolidation of New Brunswick Statutes was
 completed and such consolidation enacted as Revised Statutes of New
 Brunswick 1927.

82. Under Title VII, “ Highways and Motor Vehicles ” :—

Chapter 25 R.S.N.B. 1927 replaced the Highway Act 1926
 (16 George V Chapter 3).

Chapter 26, R.S.N.B., 1927 replaced The Motor Vehicle Act 30
 1926 (16 George V, Chapter 4).

Chapter 27, R.S.N.B. 1927 replaced The Motor Carrier Act of
 1927 (17 George V, Chapter 16).

Such Chapters 25, 26 and 27, R.S.N.B. 1927 were in general content
 similar to the Statutes which they replaced.

The last section (21) of the Act of 1927 (a repealing section) was omitted
 in Chapter 27, R.S.N.B. 1927. The final section of the Revision being (20)
 —“ The provisions of this Chapter shall be deemed to be in addition to the
 “ provisions of The Motor Vehicle Act, and The Highway Act 1927, c. 16,
 “ s. 20 am.” 40

83. From 1927 to 1949, the substance of these three statutes had
 been continued and retained by other statutes. Those in force in 1949
 being

The Highway Act, 1945, Chapter 16 of 9 George VI, The
 Motor Vehicle Act, 1934, Chapter 20 of 24 George V, and The
 Motor Carrier Act, 1937, Chapter 43 of 1 George VI.

All three having been amended in detail after their respective enactment.

Together they constitute the totality of the *general* Provincial legislation then in force in relation to its roads, their maintenance and the control and regulation of their use, including use by motor vehicles.

84. In addition to this general legislation, there was also then in force some legislation enacted prior to 1867, and also some enacted after 1867 in relation to roads, their maintenance, control and regulation of their use in certain areas such as some cities, towns, etc.

VALIDITY OF LEGISLATION.

85. It is submitted that the general nature and effect of all this
10 legislation should be taken into consideration in deciding whether any provisions of, and orders made under, the Motor Carrier Act, and any provisions of, and regulation made under, The Motor Vehicle Act, are
20 *intra vires*, or are *ultra vires*.

86. In *Attorney General for Alberta v. The Attorney General for Canada et al*, L.R. 1939 A.C. 117, Plaxton's Constitutional Cases p. 394, the Judicial Committee did not limit its consideration to the wording of the particular Bill, the validity of which was in question. It held it was entitled to consider and did consider the Legislative history of the Province
20 and other Bills in association with which the particular Bill in question has been enacted as, indicative of its true nature and intent. The Statutes enacted since 1867 constitute acts done under the British North America Act and on that ground are a proper matter for consideration.

SUMMARY OF PROVINCIAL LEGISLATION.

87. At its first session in 1786 the Provincial Legislature enacted a general Highway Act, Chapter XXXII of 26 George III. The text of this Statute and some of the subsequent Highway Acts were not available to Counsel, but the first New Brunswick Statute so available (Chapter 2 of
30 5 William IV) contained provisions authorizing the opening, alteration, and closing of roads, and a provision (Sec. 30) prohibiting the use of horses, sleds, etc., on the roads, unless bells were fastened to the sleds or horses' harness.

88. Control of the use of roads for certain purposes, e.g., cartage, carriage and portage of goods thereon was in the case of the City of Saint John also dealt with by the New Brunswick Legislature as far back as 1786 (Case paras. 41-42).

89. In the case of the City of Fredericton the legislature authorized the regulation of carters, waggoners, cartmen, the size of their loads and their charges; also the regulation and licensing of owners of livery stables, etc., *porters*, butchers and *hucksters* (Case para. 46).

40 90. Many years prior to 1867, a Provincial Statute authorized the Sessions of the Peace to fix rates for conveying passengers to and from steamboats and to regulate carriage for hire, cartage and truckage in various local areas (Case para. 45). After 1867 the authority of the Sessions of the Peace to fix rates, regulate carriage, cartage and truckage was transferred to the County Council where it still remains (Case para. 63).

91. Prior to and in 1867 and for many years thereafter, transportation on the roads was solely by animal power, even the Street Cars on rails were operated by such power.

92. There has always been in force some general Provincial legislation respecting its roads and (at least since 1835) it has contained some provisions regulating the use of its roads. For many years such general regulating provisions were few in number. Most regulation was by local authority.

93. Since mechanical power came into use as a means of transportation, and particularly since it came into use as a means of public road transportation for reward, the number, power, weight and speed of the vehicles has been greatly increased. 10

94. As roads transportation facilities changed, the legislation with respect to such transportation was also changed so as to be appropriate to the changed conditions. Regulating provisions also became much more numerous and restrictive. The Legislature incorporated many of them into a Statute, and delegated to some central officer or body authority to enact other general regulations of general application throughout the Province.

95. While it became necessary (or at least advisable) for the general welfare of the local public, to more closely regulate, and in some circumstances to prohibit, the operation of such vehicles, and legislation has been enacted for that purpose, the general nature of such legislation and the subject matter " in relation to " which it was enacted, has not been changed. 20

96. If by the British North America Act the Province is given jurisdiction to legislate to regulate the use of the roads by vehicles drawn by animal power and the carriage of passengers and goods thereon by such vehicles, to prescribe the conditions under which they were to operate, and to establish the fares to be charged, etc., it has jurisdiction to so legislate with respect to the like use by vehicles operated by mechanical power. 30

97. The questions submitted to the New Brunswick Appeal Court were exceedingly broad. The basis of the Defendant's challenge to the validity of the New Brunswick Statutes is the provisions therein which prohibit the operations upon its public roads of motor vehicles and in particular such vehicles engaged in carrying persons or goods for reward, unless they have been granted Provincial license.

98. The New Brunswick Statutes contain numerous provisions, by, or under which the use of the roads by motor vehicles generally, or of a particular kind, or for a particular purpose are, or may be prohibited, either absolutely, or unless certain specified conditions are complied with. They also contain numerous provisions by or under which a private individual is prohibited from operating any motor vehicle upon its roads either absolutely, or unless certain specified conditions are complied with. 40

99. The Judgment of the Supreme Court of Canada held that the Defendant's Bus operations constituted an " undertaking " within the

meaning of that expression within Sec. 92 (10) (a) and that the Province had no power to enact legislation which was effective to prevent the Defendant from using his undertaking to carry on any extra-provincial operations.

100. It was also intimated by some Judges, and definitely stated by Mr. Justice Rand that there were certain subject matters not expressly mentioned in the British North America Act which because of their inherent nature, were not within the legislative jurisdiction of the Province, that in particular each citizen of Canada and each friendly alien had an inherent right to use any and all the roads in Canada, and that no Province was competent to enact legislation by or under which any such person could be prohibited, from making use of its roads, as he saw fit.

p. 65, l. 4.
p. 66, l. 38.
p. 71, l. 31.
p. 77, l. 19.

101. The Attorney General of New Brunswick in his capacity as Intervenant and also as Plaintiff, *ex relatione* S.M.T. (Eastern) Limited, accepts and relies upon the submissions made on his behalf in his Factum before the Supreme Court of Canada (No. 7). He also accepts and relies upon the submissions made on behalf of the Plaintiff S.M.T. (Eastern) Limited (the Respondent) before such Court (No. 2).

He further relies upon the reasoning contained in such Factum and the authorities cited therein.

INHERENT RIGHT TO USE OF ROADS.

102. The conception of an inherent right of every person to the use of all its roads, which is beyond Provincial legislative control (which was discussed by Judges of the Supreme Court of Canada) is not discussed in the Factums filed in that Court. Such conception is not in accordance with the express wording of the British North America Act, and is not fundamentally sound.

103. In Great Britain Parliament is supreme. It may prohibit the use of any road to all persons (close it). It may prohibit or restrict its use by any designated class of vehicles, etc. It may prohibit or restrict its use for any specified purpose, etc.

104. The same principle is applicable in Canada. However the *totality* of legislative jurisdiction which in Great Britain is vested in one body (Parliament) is in Canada divided and apportioned. One portion of such jurisdiction is given to the Dominion Parliament and another portion is given to the Provincial Legislatures. There is no subject matter with respect to which legislative jurisdiction is withheld by the Act and reserved to the Imperial Parliament.

Hodge v. The Queen, L.R. 9 A.C., p. 117, 1 Cameron, p. 333.

105. If there ever were such restrictions they were removed by the Statute of Westminster (1931) and did not exist when the New Brunswick Statutes in question were enacted.

If the opinion expressed in the Supreme Court of Canada is sound then once a Province has established and constituted a road, it has no jurisdiction to alter or close it, and it is powerless to prevent the destruction of its roads by the excess size, weight and speed of vehicles which any person may seek to operate upon them.

106. If a Province does not possess legislative jurisdiction to prohibit the use of one of its roads to all persons (close it), then the Dominion must have such jurisdiction. If a Province does not possess the legislative power to regulate and control the size, weight and speed of vehicles using its roads, then the Dominion must have such power. 10

107. The prohibitive or regulatory provisions in the New Brunswick Statutes (except where roads are wholly closed) are directed to the use of its roads for some purpose or in a manner which is contrary to public welfare.

108. No person may operate a motor vehicle on public roads, etc., unless he is licensed. No license may be issued to him unless he is deemed capable of properly operating such vehicle. No license is allowed to be issued to a very young person (he is deemed wholly incapable). No person who fails to qualify on examination is granted a license. A person who has qualified and has been granted a license may have his license cancelled and be deprived of his right to receive another if he is guilty of certain 20 offences—drunken driving, etc.

109. Subject to certain exceptions, the Statute prohibits the operation of any motor vehicle on the roads, unless it, the vehicle, be licensed. It further prohibits the use of motor vehicles for certain purposes unless a license for such purpose is issued.

110. It is submitted that a right to use a public road wholly within a Province by any person, resident or alien, is a civil right within such Province. That such right in the case at Bar is not a right in relation to one of the enumerated heads of Section 91, with respect to which the Dominion Parliament is given exclusive legislative jurisdiction, neither 30 does it, under the circumstances of this case, come under any other section (e.g., 132) which gives the Dominion certain legislative jurisdiction.

DEFENDANT'S BUS OPERATIONS AN UNDERTAKING.

111. The word "undertaking" is one which has several meanings. It is often spoken of as an obligation imposed by a contract—such does not appear to be its meaning in either the heading (10), or exception (a).

It has already been stated by this Board in the "Radio" case, *In re Regulation and Control of Radio Communication in Canada*, L.R. (1932), A.C. 304; *Plaxton*, p. 134, that an "undertaking" within the heading (10) was not a physical thing, but an arrangement under which physical things 40 were used (A.C., p. 315).

112. It is, however, submitted that not all arrangements in which physical things are used, constitute "undertakings" within its meaning as used in Sec. 92 (10).

In particular, it is submitted that for the purpose of the attachment of legislative jurisdiction, an extra-Provincial transportation undertaking cannot be *created* by the inclusion as one of its necessary component parts, of a work or tangible thing, or the use of a work or tangible thing, which is neither owned by, nor subject to a proprietary right of the claimant in any event, when such use is illegal.

113. Mr. Justice Rand states :—

“ The *privilege* of operating on the highway *now enjoyed* by p. 66, 11. 35-37.
 “ Winner so far constitutes therefore the equivalent of a *right of*
 10 “ *way.*”

There may be two answers to this statement :—

(A) Any right which a person has to use a road, as a member of the public, is not the equivalent of a private right of way owned by him.

(B) A person whose business operations within a Province would otherwise be subject to certain of its laws of general application cannot create an “ undertaking ” by which such operations are removed from such subjection, by making an illegal (prohibited) use of a provincial road.

20 On principle, a person cannot place his business beyond the effect of laws, otherwise applicable, by committing an illegal act.

ANSWER (A).

114. The right to use public roads, either for personal passage or passage by vehicles, or for business purposes, is not a proprietary or private right, vested in each individual and used by him in his personal capacity. It is a public right, pertaining to the public generally. Each individual is entitled to exercise it only as *one* of the public. It is not correct to describe it as being a right of way, the property of each user.

30 115. If a person is wrongfully prevented from exercising a right of passage, to which he is entitled only as a member of the public, he cannot maintain an individual action against the wrongdoer, merely because he has been prevented from exercising such right. In the absence of special damage, such action must be brought by the Attorney General. The party wronged may, however, recover any substantial damage that he has suffered, different in quality from that suffered by the other members of the public generally, or obtain an injunction to prevent the continuation of such damage. Halsburys Laws of England, 2nd Ed., Vol. 16, page 364, para. 487.

ANSWER (B).

40 116. It is submitted that such an underlying principle exists, although it may perhaps be differently stated. If such a principle does not exist, it logically follows that every person residing in the United States can by acting in violation of Provincial laws and without the authority of Dominion Law, create an extra-Provincial undertaking. All he would be

required to do is become the owner of or lessee, etc., of one or more vehicles (e.g., motor buses, motor trucks, motor cars, horse-waggon, push-carts or wheelbarrows) and publicly announce his intention to operate such vehicles for the purpose of carrying passengers or goods between a point just beyond a Provincial border, to a point within it, and perhaps commence such operation. Once he has done so, then (although there be in force a Provincial Statute prohibiting the use of such vehicles on its roads or bridges, either absolutely or subject to conditions of license, etc., which have not been complied with) this foreigner has removed his vehicles which he is using and his business operations with them, out of the 10 legislative jurisdiction of the Province in which substantially the whole of his operations may be conducted.

Not being subject to such jurisdiction he may use vehicles of kinds other persons are prohibited from using ; he can use roads at times when other persons cannot use them ; he can refuse to provide such service as is reasonably required throughout the year for the public good and use his vehicles so as to take the " cream " of the business, and supply no service at all during the poor seasons, etc.

117. A person may probably lawfully create a transportation " undertaking " within the expression (A) of heading (10), by lawfully 20 constructing a private road extending from a point in Maine to a point in New Brunswick and providing a public transportation service on that road.

118. It is submitted that unless the operator of motor vehicles—be they Buses, Trucks, Carriages, or Sleds, has the equivalent of a proprietary interest in or over the ground upon which his transportation vehicles or business operations are carried on, they do not constitute an " undertaking " within the meaning of that expression as used in heading (10) Section 91.

119. It is proposed to discuss the following cases :— 30

Citizens Insurance Co. v. Parsons, L.R. 7, A.C. 96, I Cameron 267.

Hodge v. The Queen, L.R. 9 A.C. 117, I Cameron 333.

Colonial Bldg. Investment Assoc. v. Attorney General of Quebec, L.R. 9 A.C. 157, I Cameron 349.

Bank of Toronto v. Lambe, L.R. 12 A.C. 579, I Cameron 378.

Attorney-General of Ontario v. Attorney-General for Canada, L.R. [1894] A.C. 189, I Cameron 481.

Attorney-General of Ontario v. Attorney-General for Canada, L.R. [1896] A.C. 348, I Cameron 481. 40

Canadian Pacific Ry. Co. v. Corp. of Parish of Notre Dame de Bonsecours, L.R. [1899] A.C. 367, I Cameron 558.

Attorney-General of Manitoba v. Manitoba License Holders Association, L.R. [1902] A.C. 73, I Cameron 574.

Toronto v. Bell Telephone Co. of Canada, L.R. [1905] A.C. 52, I Cameron 617.

Toronto Corporation v. Canadian Pacific Railway Co., L.R. [1908] A.C. 54, I Cameron 653.

City of Montreal v. Montreal Street Railway, L.R. [1912] A.C. 333, I Cameron 711.

John Deere Plow Company v. Wharton, L.R. [1915] A.C. 330, I Cameron 806.

10 *Attorney-General for Canada v. Attorney-General for Alberta*, L.R. [1916] 1 A.C. 588, II Cameron 63.

Watchman v. Attorney-General of East Africa Protectorate, L.R. [1919] A.C. 533.

Rex v. Nat. Bell Liquors, Ltd., L.R. [1922] 2 A.C. 128, II Cameron 272.

McCull v. Canadian Pacific Ry. Co., L.R. [1923] A.C. 127.

Attorney-General for Ontario v. Reciprocal Insurers et al, L.R. [1924] A.C. 328, II Cameron 334.

Re Regulation and Control of Radio Communications, L.R. [1932] A.C. 304, II Cameron 137.

20 *Lymburn v. Mayland*, L.R. [1932] A.C. 318, Plaxton 145.

Forbes v. Attorney-General of Manitoba, L.R. [1937] A.C. 260, Plaxton 259.

Attorney-General for Canada v. Attorney-General for Ontario, L.R. [1937] A.C. 326, Plaxton 278.

Attorney-General for Canada v. Attorney-General for Ontario, L.R. [1937] A.C. 335, Plaxton 305.

Attorney-General for Ontario v. Attorney-General for Canada, L.R. [1937] A.C. 405, Plaxton 352.

30 *Attorney-General for British Columbia v. Attorney-General for Canada*, L.R. [1937] A.C. 377, Plaxton 327.

Shannon v. Lower Mainland Dairy Products, L.R. [1938] A.C. 708, Plaxton 379.

Attorney-General for Alberta v. Attorney-General for Canada, L.R. [1939] A.C. 117.

Ladore v. Bennett, L.R. [1939] A.C. 468.

Provincial Secretary of Prince Edward Island v. Egan (1941), S.C.R. 396.

Attorney-General for Alberta v. Attorney-General for Canada, L.R. [1943] A.C. 356.

40 *Abitibi Pulp & Paper Co. v. Montreal Trust Co.*, L.R. [1943] A.C. 537.

Quebec Light & Power Co. v. Beauport (1945), S.C.R. 16.

Attorney-General for Saskatchewan v. Attorney-General for Canada, L.R. [1949] A.C. 110.

Canadian Pacific Railway Co. v. Attorney-General for British Columbia, L.R. [1950] A.C. 122.

Halsbury's Laws of England, 2nd Ed., Vol. X, p. 274, para. 373 ; Vol. XVI, p. 364, para. 487.

pp. 18-19.

120. It is submitted that the judgment appealed from is erroneous, that the appeal by the Attorney-General of Ontario and Others should be allowed and the questions answered or the rights of the parties declared, 10 substantially as held by the Appeal Court of New Brunswick, and the appeal by the Defendant Winner and Others dismissed, for the following amongst other

REASONS

- (1) THAT the relevant statutes constitute legislation which in pith and substance are enacted "in relation to"—
 - (a) "Local Works and Undertakings," Sec. 92 (10) and not "in relation to" any of the exceptions to heading (10), or
 - (b) "Property and Civil Rights within the Province," 20 Sec. 92 (13), or
 - (c) "A matter of a merely local nature within the Province," Sec. 92 (16), or
 - (d) "Other Licenses," etc., Sec. 92 (9).
- (2) THAT the Defendant's buses and bus operations do not constitute a work or an undertaking connecting the Province with any other or others extending beyond the limits of the Province, within the meaning of Sec. 92 (10) (a).
- (3) THAT if the Defendant's buses and bus operations do 30 constitute such an undertaking, the legislation in question is not enacted in relation to works or undertakings within heading Sec. 92 (10) (a), it merely affects them; Provincial legislation is not rendered *ultra vires* because it has some effect upon a subject matter over which the Dominion has legislative jurisdiction.
- (4) THAT if the Defendant's buses or bus operations constitute an "undertaking" (Sec. 92 (10) (a)), and is therefore, a subject, in relation to which the Dominion has legislative jurisdiction, the Dominion has never 40 exercised such jurisdiction. It has not enacted any legislation in relation to bus operations generally, or in relation to this particular operation. The field is clear so that the Provincial statutes have full effect according to their tenor.

JOHN F. H. TEED.

In the Privy Council.

ON APPEAL

From the Supreme Court of Canada.

BETWEEN

THE ATTORNEY-GENERAL FOR ONTARIO, THE ATTORNEY-GENERAL FOR ALBERTA and THE ATTORNEY-GENERAL FOR PRINCE EDWARD ISLAND (Intervenants) *Appellants*

AND

ISRAEL WINNER, doing business under the name and style of MACKENZIE COACH LINES (Defendant) *Respondent*

AND

THE ATTORNEY-GENERAL FOR NEW BRUNSWICK ex rel. S.M.T. (EASTERN) LTD., a duly incorporated Company (Plaintiff) *Respondent*

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL FOR QUEBEC, THE ATTORNEY-GENERAL FOR NOVA SCOTIA, THE ATTORNEY-GENERAL FOR NEW BRUNSWICK, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA, CANADIAN NATIONAL RAILWAY COMPANY, CANADIAN PACIFIC RAILWAY COMPANY, MACCAM TRANSPORT COMPANY and CARWIL TRANSPORT LIMITED (Intervenants) *Respondents*

AND BETWEEN

ISRAEL WINNER (doing business under the name and style of MACKENZIE COACH LINES) (Defendant) and CANADIAN NATIONAL RAILWAY COMPANY and CANADIAN PACIFIC RAILWAY COMPANY (Intervenants) *Appellants*

AND

S.M.T. (EASTERN) LIMITED (Plaintiff) and the ATTORNEYS-GENERAL OF CANADA, ONTARIO, QUEBEC, NOVA SCOTIA, NEW BRUNSWICK, BRITISH COLUMBIA, PRINCE EDWARD ISLAND and ALBERTA, MACCAM TRANSPORT LIMITED and CARWIL TRANSPORT LIMITED (Intervenants) *Respondents.*

(Consolidated Appeals)

Case for the Respondents

THE ATTORNEY-GENERAL FOR NEW BRUNSWICK EX REL. S.M.T. (EASTERN) LIMITED AND THE ATTORNEY-GENERAL FOR NEW BRUNSWICK, INTERVENANT.

NORTON, ROSE, GREENWELL & CO.,
116 Old Broad Street, E.C.2,
Solicitors for the Respondents.