Dominion can regulate, generally, the liability of federal railways to their employees for negligence.—In *In re Railway Act*,[343] the Supreme Court have held *intra vires* of the parliament of Canada, the Dominion Act providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance or provident Association of railway employees, or of rules or by-laws of the company or Association, or of privity of interest or relation between the company and Association or contribution by the company to funds of the Association, or of any benefit, compensation, or indemnity, to which the employee or his personal representative may become entitled, or obtain from such Association; or of any express or implied acknowledgment, acquittance, or release obtained from the Association prior to such injury purporting to relieve the company from liability.

And in *Curran* v. *Grand Trunk R. W. Co.*,[344] it was held that the provision of the Dominion

similar through railways; but *semble*, a similar power would be recognised in connection with railways, which, originally provincial, had become federal by being declared by the Dominion parliament to be for the general advantage of Canada, or of two or more provinces. See *infra*, pp. 364-371. The Dominion parliament may possibly have power to bind Dominion railways as to the terms upon which they shall carry goods delivered to them in a foreign country; but unless in that way, it is not open to question that it has no jurisdiction to legislate as to the working of railways in a foreign country; or to fix upon a carrier operating such a railway any liabilities: *Macdonald* v. *Grand Trunk R. W. Co.* (1900), 31 O. R. 663, 5.

[343] (1905) 36 S. C. R. 136. See especially per Taschereau, J., at p. 141; and per Davies, J., at p. 143, 144-5.

[344] (1898) 25 O A. R. 407.

Railway Act giving to any person injured by failure to observe any of the provisions of the Act a right of action 'for the full amount of damages sustained' is *intra vires;* and that the limitation of amount recoverable contained in the provincial Workmen's Compensation for Injuries Act does not apply to a workman or his representatives proceeding under that provision.[244a]

Dominion Parliament may forbid directors of a federal railway being interested in contracts with the company.—In the same way it has been

[244a] And so in *Washington* v. *Grand Trunk R. W. Co.* (1897), 24 O. A. R. 183, Osler, J.A., at pp. 185-6, says that those provisions of the Workmen's Compensation for Injuries Act as to packing railway frogs, relating as they do to the construction or arrangement of the railway track itself, must, in his opinion, be confined in their application to railway companies which are within the jurisdiction of the provincial legislatures; and he distinguishes *Canada Southern R. W. Co.* v. *Jackson* as relating to other provisions of that Act dealing with the general law of Master and Servant. The other judges do not refer to the point, the decision turning upon the construction of s. 262 of the Dominion Railway Act, 1888; and the same applies, also, to the judgments on appeal in this case: 28 S. C. R. 184; [1899] A. C. 275. In *Monkhouse* v. *Grand Trunk R. W. Co.* (1883), 8 O. A. R. 637, Spragge, C., held the same way. But in *Canada Southern R. W. Co.* v. *Jackson* (1890), 17 S. C. R. 316, the provisions of the Ontario Workmen's Compensation for Injuries Act giving employees a right of action under certain circumstances for injuries arising from the negligence of fellow servants were held to apply to a railway though it had been declared a work for the benefit of Canada; Patterson, J., saying, at p. 325:—"The rule of law which it alters was a rule of common law, in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act which, as adopted by provincial legislation, has been applied without question to all our railways." Legislation providing for the safety of the public at, or upon, a line of railway, is a matter relating to such a work or undertaking: per Meredith, J., in *Re Canadian Pacific R. W. Co. and County and Township of York* (1898), 25 O. A. R. at p. 79. *Cf.* per Osler, J., at pp. 72-3; per Burton, J.A., at p. 70.

decided in *Macdonald* v. *Riordan*,[245] that a provision of the Dominion Railway Act enacting that no director of a federal railway shall 'enter into, or be directly, or indirectly, for his own use and benefit interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company' is *intra vires*.[246]

Dominion control over railway crossings.—In their recent decision in *City of Toronto* v. *Canadian Pacific R. W. Co.*,[247] the Privy Council reiterated and applied the propositions laid down by them in *Grand Trunk R. W. Co.* v. *Attorney-General of Canada*,[248] referred to

[245] (1899) 30 S. C. R. 619. Reported below, R. J. Q. 8 Q. B. 555. The Supreme Court simply adopt the reasons of Wurtele, J., delivering the judgment of the Court below. He says:—"It is a matter which essentially affects the internal economy of a railway company that its directors should not be adversely interested in any contract entered into by the company, or that they should not be or become partners of any contractors with the company." In his dissenting judgment in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, Anglin, J., refers to this case of *McDonald* v. *Riordan*, and expresses the view that Wurtele, J., in his remarks upon the subject restricts the ancillary legislative jurisdiction of parliament within too narrow limits.

[246] *Cf. Royal Trust Co.* v. *Atlantic and Lake Superior R. W. Co.* (1908), 13 Ex. C. R. 42, at pp. 45-46, as to the Dominion parliament having power to legislate as to where bonds issued by a Dominion railway must be registered, and so over-ride provisions of the provincial law as to where bonds should be registered. And as to the Dominion power to regulate the contracts of federal railways generally, see per Taschereau, J., in *Citizens' Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at pp. 307, 312-4. And *cf.* per Badgley, J., in *L'Union St. Jacques de Montreal* v. *Belisle*, 20 L. C. J. at p. 31. And see Legislative Power in Canada, pp. 502-505.

[247] [1908] A. C. 54. Reported below, 8 O. W. R. 348, 9 O. W. R. 785.

[248] [1907] A. C. 65.

above;[249] and held *intra vires* provisions of the Dominion Railway Act authorizing the Railway Committee of the Privy Council of Canada, in the case of a railway (*i.e.*, a federal railway) constructed across any street or other public highway, at rail level or otherwise, to 'require the company to which such railway belongs,' within such time as the said committee should direct, to protect such street or highway by a watchman, or by a watchman and gates, or other protection; and to make such orders 'respecting such works and the apportionment of the costs thereof, and of any such measures of protection between the said company and any person interested therein, as appear to the Railway Committee just and reasonable.' And they upheld an order of the Railway Committee ordering the Canadian Pacific Railway Company to provide gates and watchmen at certain level crossings in Toronto; and directing that one-half of the cost attending the placing and maintaining of the gates and watchmen be contributed by the City of Toronto.[250] Their lordships say:—"If the precautions ordered are reasonably necessary, it is obvious they must be paid for, and in the view of their lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the

[249] *Supra*, p. 347.

[250] See, also, as to the jurisdiction of the Dominion parliament here in question *Re Canadian Pacific R. W. Co. and County and Township of York* (1896-8), 27 O. R. 559, 25 O. A. R 65. These two Privy Council decisions are cited and applied to the matter of immigration in *In re Narain Singh* (1908), 13 B. C. 477.

persons interested. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province." The Board seems to have accepted the argument of Sir Robert Finlay, of counsel in this case:[351] "It is said it is not necessary the municipality should pay, but it is necessary that someone should pay. If there are three or four different ways of doing a thing you may always say no one of them is necessary, because you may take another course, but here if someone must pay, the Dominion must provide some machinery for throwing the liability in some quarter. That is necessary. The precise choice of the way of doing it is a matter that is necessarily left to the legislature, and to those to whom they entrust the authority."

In *Grand Trunk R. W. Co.* v. *Hamilton Radial Electric Co.*,[352] Street, J., held that sections of the Dominion Railway Act enacting that the plaintiffs and other railways, and any railways whatever crossing them, were works for the general advantage of Canada, and subject thereafter to the legislative authority of Parliament, and another Dominion enactment that no railway shall be crossed by any electric railway whatever, unless with the approval of the Railway Committee, were *intra vires*.[353] In *In re Portage*

[351] Report of Marten, Meredith, Henderson & White, shorthand writers.

[352] (1897) 29 O. R. 143.

[353] As appears from the report of this case, the Railway Committee had held that a provision in the defendants' Ontario Act

Extension of the Red River Valley Railway,[254] however, the Supreme Court unanimously held that, notwithstanding a Dominion Act specially declaring certain railways, amongst others the Canadian Pacific Railway, and, also, 'all branch lines or railways connecting with or crossing them or any of them' to be works for the general advantage of Canada, the Manitoba legislature could authorize the construction of a railway wholly within the province, but crossing the Canadian Pacific Railway line, the Railway Committee of the Privy Council first approving of the mode and place of crossing.

Further illustrations of Dominion incidental powers in connection with federal railways.—In *City of Toronto* v. *Grand Trunk R. W. Co.*,[255] where the majority of the Supreme Court had the same question before them, and came to the same conclusion, as the Privy Council in *City of*

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of incorporation forbidding them to cross at grade was *ultra vires*, and had made an order allowing them to cross at grade notwithstanding it. And *cf.* in support: *Credit Valley R. W. Co.* v. *Great Western R. W. Co.* (1878), 25 Gr. 507; *Canadian Pacific R. W. Co.* v. *Northern Pacific, etc., R. W. Co.* (1888), 5 M. R. at p. 313. See, also, *In re Portage Extension of Red River Valley R. W.*, Cas. Sup. Ct. Dig. 487; see, also, the report of the Minister of Justice of March 3rd, 1890, on a certain Manitoba Act: Hodgins' Prov. Legis. 1867-1895, at pp. 912-3. It by no means follows that a provincial legislature could make a similar provision as to a Dominion railway crossing a provincial one. The *non obstante* clause of section 91 must always be remembered. See *supra*, pp. 128-132; and Legislative Power in Canada, p. 445, n. 3.

[254] Cas. Sup. Ct. Dig. 487.

[255] (1906) 37 S. C. R. 232. Leave to appeal to the Privy Council was refused: 37 S. C. R. IX. See as to this case, per Idington, J., in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, at p. 219.

Toronto v. *Canadian Pacific R. W. Co.*,[256] Idington, J., in his dissenting judgment, in which he protests against the doctrine of necessarily incidental powers being carried too far,[257] says, at p. 253: "The appellant being a municipal corporation possesses only such powers as the Municipal Act of Ontario has given, and is subject to such liabilities as that Act expressly or impliedly imposes. There is no power that I can conceive of in the Dominion parliament to directly add to or take away from the powers of the municipality. Indirectly Dominion legislation, as for example, making the omission to observe a duty already existing a crime, may so operate on municipal or other corporations as apparently to conflict with this statement. On consideration there is clearly only apparent conflict." In *Grand Trunk R. W. Co.* v. *City of Toronto*,[258] however, Meredith, J., held that though the Dominion parliament could not confer corporate powers on municipal corporations which the provincial legislation had not conferred upon them, as, for example, empowering them to acquire and make new streets across Dominion railways, yet it could empower the Railway Committee of the Privy Council of Canada to decide whether it was necessary in the interest of the municipality that such streets should be made, and to direct

[256] [1908] A. C. 54. See p. 350, *supra*.

[257] In *Montreal Street R. W. Co.* v. *City of Montreal*, *supra*, Anglin, J., discusses very thoroughly, at pp. 238-248, the authorities as to what Dominion legislation will in different cases fall within the description of truly and properly ancillary, or necessarily incidental to the complete and effective control of federal railways.

[258] (1900) 32 O. R. 120, 127 *et seq.*

how and on what terms such streets might be made, where the municipal corporation had the capacity under provincial legislation to make them.

In *McArthur* v. *Northern Pacific Junction R. W. Co.*,[259] Street, J., Hagarty, C.J.O., and Osler, J.A., held that a Dominion enactment whereby all actions for indemnity for any damage or injury sustained by reason of any railway under Dominion control must be commenced within six months, was *intra vires* of the Dominion parliament,[260] being in accordance with the customary legislation in similar cases both in Canada and England; while Burton, J.A., and Maclennan, J.A., held that it was *ultra vires*, as being an unnecessary interference with property and civil rights, and with procedure in the province, the latter (p. 127) denying that any such clause is to be found in the railway legislation of either England or the United States.

Lastly, in *Keefer* v. *Todd*,[261] the Dominion Peace Preservation Acts, being Acts for the better preservation of the peace in the vicinity of public works, in which large bodies of labourers are congregated and employed, and which forbade the possession of firearms and other lethal weapons, and, also, the sale and possession of intoxicating liquors within the districts in which they were duly proclaimed in force, were held

[259] (1888-1890) 15 O. R. 723, 17 O. A. R. 86. See this case referred to in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, at p. 243.

[260] So held also in *Levesque* v. *New Brunswick R. W. Co.* (1889), 29 N. B. 588.

[261] (1885) 2 B. C. (Irving) 249. See at p. 255.

intra vires by Begbie, J., as being really laws in relation to and confined to the Canadian Pacific Railway, a public work within the meaning of sub-section (*a*) of No. 10 of section 92 of the British North America Act.

How far federal railways can be affected by provincial legislation.[262]—Much light has been thrown upon this subject by the decision of the Privy Council in *Canadian Pacific Railway Co.* v. *Corporation of Bonsecours*,[263] where the question arose as to the right of the Quebec legislature to require a ditch belonging to the railway company, and running along the side of the railway track of the company on the lands of the company for the purpose of their railway, to be kept in good order and free from obstruction which would impede the water-flow. Their lordships say (pp. 372-3): "The British North America Act, whilst it gives the legislative control of the appellants' railway, *qua* railway, to the parliament of the Dominion, does not declare that the railway shall cease to be part of the

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[262] In *Bourgoin* v. *La Campagnie du Chemin de Fer de Montreal* (1880), 5 App. Cas. 381, the Privy Council held that the provincial legislature had no power to ratify and validate the transfer of a federal railway, with its property, liabilities, rights, and powers to the Quebec government, and through it to a company with a new title and a different organization, to be governed by and subject to provincial legislation; but that ratification by a Dominion Act was necessary. They held so both on the general law of England and of Quebec, under which an Act of parliament would be required to validate such a transfer, and upon the special provisions of the British North America Act.

[263] [1899] A. C. 367, see esp. at p 373. Reported below, R. J. Q. 7 Q. B. 121.

province 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 those 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 " (*i.e.*, the Canadian Pacific R. W. Co.), " then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec:" and they read the enactment, or rather the notification to the railway

given under it, as embracing the latter purpose only.[264]

Cattle protection.—But immediately after this decision, in *Madden* v. *Nelson and Fort Sheppard R. W. Co.*,[265] the Board held that the provisions of the British Columbia Cattle Protection Act that a Dominion railway company,

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[264] See, following this decision, *Grand Trunk R. W. Co.* v. *Therrien* (1900), 30 S. C. R. 485, where the Supreme Court held that the provincial legislatures have no jurisdiction to make regulations in respect to crossings, or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. See per Sedgewick, J., at p. 492; also, *Rex* v. *Canadian Pacific R. W. Co.* (1905), 1 W. L. R. 89, where the Supreme Court of the North-West Territories held *intra vires* as applied to the defendant railway, the provisions of the Prairie Fire Ordinance respecting fires caused by sparks from an engine. So in *Grant* v. *Canadian Pacific R. W. Co.* (1904), 36 N. B. 528, it was held that certain provincial enactments against starting fires near any forests or woodlands between May 1st and Dec. 1st in any year were *intra vires* and applied to the defendant railway, McLeod, J., saying (p. 545): "These sections do not seek to control the company in the management of its railway in any way. They are simply for the protection of the property in New Brunswick against damage by fire." In *Monkhouse* v. *Grand Trunk R. W. Co.* (1883), 8 O. A. R. 637, Spragge, C., held that an Ontario Act providing for the safety of railway employees and the public by regulating the construction and maintenance of railway frogs would be *ultra vires* if intended to apply to a Dominion railway. See, also, *Washington* v. *Grand Trunk R. W. Co.* (1897), 24 O. A. R. 183, per Osler, J.A., at pp. 185-6, and Legislative Power in Canada, p. 596, n. 1.

[265] [1899] A. C. 626. Reported below, 5 B. C. 541. In *In re Railway Act* (1905), 36 S. C. R. 136, noted *supra*, p. 348, Davies, J., at pp. 146-7, refers to these two Privy Council decisions, saying that they "throw much light upon the view which the Judicial Committee of the Privy Council take as to the necessity of excluding the provinces from interfering by legislation in a matter wholly withdrawn from them, and, inferentially, show how broad should be the construction placed upon the powers of the Dominion in a matter exclusively relegated to it to legislate upon."

unless they erected proper fences on their railway, should be responsible for cattle injured or killed thereon, was *ultra vires* of the provincial legislature, and say: "Their lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific R. W. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours,*[265a] when it was decided that, although any direction of the provincial legislature to create new works on the railway, and make a new drain, and to alter its construction, would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed, that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature."[1]

Fire protection.—In connection with these two Privy Council decisions is to be also noted *Canadian Pacific R. W. Co.* v. *The King,*[266] where the Supreme Court (Idington, J., dissenting) held *ultra vires* as applied to the defendants,

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[265a] *Supra*, p. 356.

[266] (1907) 39 S. C. R. 476.

certain North-West Territories Ordinances, which prescribed penalties for kindling a fire, and letting it run at large on land of another person, but provided that there should be no liability under the Act in the case of a party in charge of a railway locomotive engine, if the same were equipped with a suitable smoke stack, and if, in the case of a line of railway passing through prairie country, it was protected by a fire-guard of ploughed land. It was conceded that the legislature of the North-West Territories had no greater jurisdiction than a provincial legislature, and the Court put their decision upon the ground that the provision as to fire-guards was imposing a duty upon companies operating railways under the legislative control of the Dominion, which no Dominion enactment imposed. They say:—"It is an enactment prescribing the maintenance of such fire-guards as adjuncts to Dominion railway lines as a condition of the lawful operation of them in the localities to which it applies; and, therefore, an enactment professing to regulate the working (if not the construction) of such lines; and consequently within Lord Watson's words, "railway legislation strictly so called."[267] In his dissenting judgment Idington, J., says: "It seems to me all to resolve itself into a question of the right of the local legislature to enact laws, tending to protect property against the dangers of a local nature, arising from that negligence which the Dominion

[267] *Se.* in *Canadian Pacific R. W. Co.* v. *Bonsecours*, [1899] A. C. 367, at pp. 372-3.

parliament never sanctioned, nor intended to sanction, nor legislated as to. . . Can a Dominion railway company in the negligent doing of the work of building, and running, or both, befoul the streams, pollute the air, endanger life and property, and destroy everything in its path, regardless of all those local regulations that bind every person, and every other corporate body, in a province.''[268]

Mechanics and wage earners' liens. — In *Crawford v. Tilden*,[269] it was held that a lien under the Ontario Mechanics and Wage Earners Lien Act cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a work for the general advantage of Canada.

Sequestration and receivers.—In *Baie des Chaleurs R. W. Co.* v. *Nantel*,[270] the majority of

[268] See pp. 488, 490-5. A report of the Minister of Justice of October 29th, 1904, in reference to an Ontario Act respecting aid to certain railways, suggests that many things which a provincial legislature could not impose as statutory requirements upon a federal railway—such as that the location of the line should be subject to the approval of the Railway Committee of the Executive Council of the province; that rates for passengers and freight should be subject to the approval of the said Committee; that there should be no special rates, rebates, drawbacks or concessions to favourite shippers, etc.—it might secure as matter of agreement between the local government and the company as a condition to the grant of a subsidy. *Cf.* as to a provincial legislature imposing Sunday observance conditions, when incorporating a provincial railway: *Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O. L. R. 588; *infra*, pp. 455-7.

[269] (1907) 14 O. L. R. 572, 13 O. L. R. 169. And *cf.*, also, *Larsen* v. *Nelson and Fort Sheppard R. W. Co.* (1895), 4 B. C. 151.

[270] (1896) R. J. Q. 9 S. C. 47, 5 Q. B. 65. As to the sale of a Dominion railway under a writ of *fi. fa.*, see *Redfield* v. *Corporation of Wickham* (1888), 13 App. Cas. 467.

the Quebec Court of Queen's Bench held that a provincial statute which provided for the sequestration of the property of a railway company subsidized by the province, when such company was insolvent, or had not complied with its charter, or had ceased to work its road, and for the maintenance and management of it by the sequestrator, and, if necessary, a sale by the sheriff under the order of the Court, was *intra vires* as applied to a Dominion railway, being merely one of procedure in order to obtain a judicial sale, there being no Dominion law providing for the liquidation of such insolvent railways. And so, also, in *Wile* v. *Bruce Mines R. W. Co.*,[m] Meredith, C.J., held that the High Court of Justice has power to appoint a receiver of a federal railway, at the instance of a creditor of the railway company, if there be no federal legislation providing otherwise, but adds: "I do not wish to be understood as expressing any opinion as to the power of the parliament of Canada, in the case of a railway under its jurisdiction, to take away the power of the provincial Courts to exercise the jurisdiction I am exercising in this case."

Sunday observance.—In *In re Lord's Day Act of Ontario*,[n] the question was submitted to the Ontario Court of Appeal by the Lieutenant-Governor in Council, pursuant to the provincial Act in that behalf, as to whether the province had power to prohibit Sunday work upon lines of steam or other ships, railways, canals, tele-

[m] (1906) 11 O. L. R. 200.
[n] (1902) 1 O. W. R. 312.

graphs, and other works and undertakings to which the exclusive legislative authority of the Dominion extends under the British North America Act, which of course includes works which, although wholly situate within the province, have been, before or after their execution, declared by the Dominion parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces. The Court unanimously answered this question in the negative, Osler, J.A., and Moss, J.A., expressly, however, reserving the right to reconsider the matter, save so far as covered by authority, should it thereafter arise in the course of actual litigation. They none of them give any reasons, except that Armour, C.J.O., rests his judgment apparently upon the fact that, in his opinion, "the profanation of the Lord's day is an offence against religion, and offences against religion are properly classed under the limitation 'crimes'; " and consequently belongs to the Dominion parliament under No. 27 of section 91 of the British North America Act.[273] On appeal to the Privy Council,[274] their lordships stated that as they held that the provincial Act before them treated as a whole was criminal legislation, it was not necessary to answer the above question; although Boyd, C., in *Kerley* v. *London and Lake Erie Transportation Co.*,[275] says that he understands them as thus affirming the view

[273] As to this, see *supra*, p. 321; *infra*, pp. 394-612.

[274] [1903] A. C. 524, *sub nom. Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*

[275] (1912) 26 O. L. R. 588. See as to this case also, *infra*, pp. 455-7.

expressed by the Ontario judges. In this last case it was by virtue of express Dominion enactment, as construed by the Court, that the provincial legislation was made to affect a federal railway.

Declaration by Dominion parliament that Works, wholly situate in one province, are for the general advantage of Canada, or of two or more of the provinces.—As the Privy Council state in *City of Montreal* v. *Montreal Street Railway*,[216] when such a declaration is made, the railway to which it refers is withdrawn from the jurisdiction of the provincial legislature, and passes under the exclusive jurisdiction and control of the parliament of Canada, and, small and provincial though it may be, stands to the latter in precisely the same relation, as far as legislative power is concerned, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea, and were originally constructed, and are now worked, in exercise of the powers conferred by the stat-

[216] [1912] A. C. at p. 339. Their lordships in this case indicate that it is proper for such declaration to be made when the circumstances of a provincial railway are such "as to affect the body politic of the Dominion." See the passage quoted *supra*, p. 174. The opinion had been expressed by some judges that such declaration can only be made by the Dominion parliament after the Work referred to has been completed: so per Burton, J.A., in *McArthur* v. *Northern Pacific Junction R. W. Co.* (1890), 17 O. A. R. 86, at pp. 112-3; per Street, J., in *City of Toronto* v. *Bell Telephone Co.* (1902), 3 O. L. R. 465, at pp. 470-1. But a contrary view was expressed per Moss, C.J.O., S. C. 6 O. L. R. at p. 339; per Garrow, J.A., at pp. 342-3; per Maclennan, J.A., at p. 348; and the Privy Council definitely over-ruled the contention: S. C. [1905] A. C. at p. 58. Note the words 'before or after their execution' in No. 10 (c) of section 92.

utes of the parliament of Canada. But in *City of Toronto* v. *Bell Telephone Co.*,[277] Street, J., says: "Where a company has been carrying on works in a province under a provincial Act of incorporation, if the Dominion parliament simply declares its works to be for the general advantage of Canada without more, the result is that the company continues to work under the provincial Acts until they are altered or amended by Dominion legislation; the provincial Acts are not repealed by the mere fact that the company has come under the jurisdiction of the Dominion parliament. However, in *Attorney-General of British Columbia* v. *Vancouver, etc., Railway and Navigation Co.*,[278] a provincial railway, which had been declared to be for the general advantage of Canada, was held not liable to actions by the provincial attorney-general, under the provincial Crown Franchises Regulation Act, whereby the provincial attorney-general was authorized to bring an action against any corporation, contravening or offending against its Act of incorporation, or misusing a franchise or privilege conferred upon it by law. Irving, J., held that the Act could not authorize the provincial attorney-general to commence an action for the cancellation of its charter against a company which by Dominion legislation had been removed from the status of a provincial company, and had become, in effect, a Dominion company. And so, after such a declaration, any power of the company to acquire land for branch lines

[277] (1902) 3 O. L. R. at pp. 473-4.

[278] (1902) 9 B. C. 338.

must be exercised in accordance with the Dominion Railway Act.[279]

Must such declaration be express, or can it be implied?—It would seem that in the opinion of James, J., as expressed in *Windsor and Annapolis R. W. Co.* v. *Western Counties R. W. Co.*,[280] such a declaration may be implied in a Dominion Act, though not made in express words. But in *Re Grand Junction R. W. Co.* v. *County of Peterborough*,[281] three judges express the view that such declaration must be made in express words.[282] In *Hewson* v. *Ontario Power Co.*,[283] Britton, J., asks the express question: "May there not be a declaration by implication, or, so far as all parties interested are concerned, what would amount to a declaration?" and seems to imply that, in his opinion, there might be, though that was not a case of mere implication as there was a distinct statement in the preamble of one of the Acts in question. He adds: "Legislation by the Dominion subsequent to the Act of incorporation, and as to some of the Acts subsequent to some work being done, is a matter fairly to be considered, if we can look for a declaration apart from the express words of the statute." On appeal, however, to the Supreme Court, Davies, J., with whose reasons Sedgewick, J., concurred

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[279] *In re Columbia and Western R. W. Co. and The Railway Acts* (1901), 8 B. C. 415.

[280] (1878) 3 R. & C. at p. 415. See Legislative Power in Canada, at pp. 601-606.

[281] (1880) 45 U. C. R. 302, 6 O. A. R. 339.

[282] *I.e.*, Cameron, J., 45 U. C. R. at pp. 316-7; Burton, J.A., 6 O. A. R. at p. 341; Patterson, J.A., *ibid.*, at p. 349.

[283] (1905) 6 O. L. R. at p. 16.

(Girouard and Idington, JJ., *contra*), expressed the view that a recital in the preamble of a special private Act enacted by the parliament of Canada to the effect that it was desirable 'for the general advantage of Canada' that the company should be incorporated, is not such a declaration as that contemplated by No. 10 (c) of section 92 of the British North America Act, in order to bring the subject-matter of the legislation within the jurisdiction of Parliament.[284]

Davies, J., says (p. 605): "In my present view . . . the declaration intended was an enacting declaration to the effect required by the Imperial Act. Such a declaration is not, I think, one which might be spelled out of the charter granted, or inferred merely from its terms, or declared from recitals of the promoters in the preamble, but one substantially enacted by Parliament." But the Court held that when the subject-matter of legislation by the parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada, or for the advantage of two or more of the provinces.[285]

In a report of November 14th, 1899, the Minister of Justice objected to a number of British Columbia Acts incorporating railway companies, because they each of them contained a provision that, in case at any time the railway was de-

[284] (1905) 36 S. C. R. 596. Held, *aliter*, by the Court of Appeal for Ontario, and by Britton, J., the trial judge: 6 O. L. R. 11, 8 O. L. R. 88.

[285] And so per Britton, J., 6 O. L. R. 11.

clared by the parliament of Canada to be a work for the general advantage of Canada, then all powers and privileges granted by the Act of incorporation of the company, or by the British Columbia Railway Act, should thereupon cease and determine. He considers, however, that these provisions, though improper, are harmless, and "were it possible that they could have any effect, the whole matter would be within the authority of Parliament, upon its declaring the work for the general benefit of Canada, so that Parliament might re-enact or confirm in each case the very provisions which the legislature says are to cease and determine."[286]

In 1901 an interesting point was raised in the department of justice, as to how far, if at all, after a railway has become subject to Dominion control, its assets can be impaired to the detriment of the holders of its securities, at the will of the local legislature. The provincial legislature, after a provincial railway had been declared a work for the general advantage of Canada, and reincorporated as a Dominion railway, sought to impose a charge by way of royalty upon certain lands previously granted to it under a provincial Act, or upon the timber cut thereon. In a report, however, of May 16th, 1902, the Minister of Justice "concluded that, inasmuch as it is competent to the legislatures to tax the property of Dominion corporations, and inasmuch as the Act respecting these railway land grants, if not declaratory, is a taxing Act,

[286] Provincial Legislation, 1899-1900, p. 106.

it would not be proper . . on that account to exercise the power of disallowance."[287]

In 1901, also, the British Columbia legislature, which seems to be especially bold in legislative experiments, provided in several Acts incorporating railways that such Acts should not come into force until such time as the companies gave security that the Lieutenant-Governor in Council should have the right to fix the maximum rates to be charged for freight and passenger traffic, and that in the event of Dominion legislation bringing the railway company under the exclusive jurisdiction of the parliament of Canada, the foregoing conditions should be carried out by the company so incorporated, as a contract and obligation of such company, prior to any charge thereon. In a report of December 27th, 1901, the Minister of Justice says: "In so far as it is attempted to follow these companies into Dominion jurisdiction, and govern them by provincial enactment intended to come into effect after they have passed beyond the authority of the province, the legislation can, in the opinion of the undersigned, have no effect . . If, at any time, railways should fall within the exclusive jurisdiction of Parliament, previously existing enactments with regard to them can have effect only so far as Parliament intends." He, therefore, abstains from recommending disallowance. The Acts were, however, disallowed on another ground, namely, that they provided, also, that no aliens should be employed upon the railways during construction.[288]

[287] Provincial Legislation, 1901-1903, p. 57.

[288] Provincial Legislation, 1901-1903, p. 63. See *supra*, p. 312.

In 1907 the Ontario legislature endeavoured to restrain the Dominion parliament in exercising its power to make a declaration under No. 29 of section 91, by providing that if the undertaking of any Ontario company operating a public utility, defined as meaning gas-works, water-works, light and power works, etc., were so declared to be a work for the general advantage of Canada, and so brought under Dominion jurisdiction, the Lieutenant-Governor in Council might declare that all or any of the powers, rights, privileges and franchises, or claim to subsidies, conferred upon that company by provincial Act or charter should be forfeited, and that, thereupon, they should cease and determine, as should, also, any right, privilege, or franchise, or any claim to any bonus, or other aid, granted by by-law or agreement of any municipality. In a report of April 21st, 1908, Sir Allen Aylesworth, as Minister of Justice, points out that, if this legislation should ever be of any effect, action could never be taken under it by the Lieutenant-Governor in Council till after the company to be struck at had been completely withdrawn from provincial jurisdiction by reason of such a declaration having been made by Parliament, when such action would be necessarily wholly inoperative, and set at naught by the Courts; and, in any event, Parliament could at once re-enact and confirm, in each case, the very provisions which the Lieutenant-Governor in Council had declared were to cease and determine; and that, in fine, the legislation was so plainly ineffective and harmless that it did not

call for any action by the Governor-General or for further notice.[289]

Dominion corporations generally.—As has been already stated, the power of the Dominion parliament to incorporate companies is not based exclusively on No. 29 of section 91, or on any other of its enumerated powers. It can incorporate companies by virtue of its general residuary power to make laws for the peace, order, and good government of Canada; but as this residuary power can only be exercised in relation to matters not coming within the classes of subjects assigned by the British North America Act exclusively to the legislatures of the provinces, no Dominion incorporation under it can give the company incorporated exemption or immunity from provincial laws.[290] Thus in *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[291] the Privy Council say of such a corporation: "What the Act of

[289] Provincial Legislation, 1899-1900, p. 106. On July 13th, 1903, Mr. Borden, in the House of Commons, in reference to a Bill to remove a certain British Columbia railway from the jurisdiction of the province to that of the Dominion under the clause in question, (10 (c) of section 92, read in connection with No. 29 of section 91), called attention to the abuse of that clause, "which was being used to bring railways, in a wholesale way, under Dominion jurisdiction, in a manner quite contrary to previous professions of the Dominion Government." See, further, Legislative Power in Canada, p. 603, n. 2.

[290] See *supra*, pp. 342-3; and *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. at pp. 116-7. Similarly Dominion laws are binding on foreign and provincial corporations carrying on business in Canada, as much as on Dominion corporations.

[291] (1883) 9 App. Cas. at pp. 165-6. This case is commented on at length by Duff, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S. C. R. at pp. 463-8.

incorporation has done is to create a legal and artificial person, with capacity to carry on certain kinds of business, which are defined, within a defined area, namely, throughout the Dominion.[292] Among other things, it has given to the Association power to deal in lands and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so."[293] And so in *Citizens Insurance Co.* v. *Parsons*,[294] their lordships say that such a company, with power to purchase and hold lands throughout Canada in mortmain, could not do so in a province where a law against holding land in mortmain prevailed.[295] Although, therefore, the Dominion parliament can give a corporation it is creating any powers and functions it likes, outside 'provincial objects'

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[292] See Story on the Constitution of the United States, 5th ed., vol. 2, p. 153, quoted Legislative Power in Canada, p. 627, n. 2. And cf. per Idington, J., in *Canadian Pacific R. W. Co.*, v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. at p. 442.

[293] And so *cf. Cooper* v. *McIndoe* (1887), 32 L. C. J. 210; *Waterous Engine Works Co.* v. *Okanagan Lumber Co.* (1908), 14 B. C. R. 238. See, also, per Newlands, J., in *Rex* v. *Massey-Harris Co.* (1905), 6 Terr. L. R. at pp. 133-134.

[294] (1881) 7 App. Cas. at p. 117.

[295] As to provincial laws requiring a license from the Crown in such cases, it is submitted, in view of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892] A. C. 437, that notwithstanding what is said in *McDiarmid* v. *Hughes* (1888), 16 O. R. 570, the Dominion could not dispense with a company incorporated by it obtaining such a provincial license, unless incidentally to the exercise of one of its enumerated powers, such as the power assigned to it to regulate banking as well as incorporate a bank: see Legislative Power in Canada, pp. 621-2.

within the meaning of No. 11 of section 92 of the British North America Act,[396] it can only regulate its exercise of civil rights in respect to the classes of subjects enumerated in section 91.

Extra-provincial companies licensing Acts.—Notwithstanding the judgments of the Privy Council in *Citizens Insurance Co.* v. *Parsons*,[397] and *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[398] just referred to, and notwithstanding, it may be added, their subsequent judgment in *Bank of Toronto* v. *Lambe*,[399] which will be more particularly noticed in reference to the provincial power of taxation under No. 2 of section 92, Ministers of Justice have constantly objected to provincial Acts imposing the necessity upon any companies incorporated under the laws of the United Kingdom, or of the Dominion, of taking out a provincial license before doing business in the province; and when such Acts have contained express prohibitory provisions forbidding the doing of business without obtaining such license, they have sometimes been disallowed, the ground being distinctly taken, until lately, that they are *ultra vires*, although other grounds of objection to them are also assigned.[400] But, although dis-

[396] See *infra*, pp. 461-487.

[397] (1881) 7 App. Cas. 96.

[398] (1883) 9 App. Cas. 157.

[399] (1887) 12 App. Cas. 575. See *infra*, p. 394.

[400] Several examples are mentioned in Legislative Power in Canada, pp. 623-6, *q.v.* The whole subject of provincial power to require extra-provincial companies, Dominion and other, to take out licenses before doing business in the provinces is discussed in reports of the Minister of Justice of November 22nd, 1900, and

crimination against Dominion corporations may be a good ground for disallowance (and as the references in the last footnote shew, the provincial governments seem to admit as much), it is submitted that a tax by way of license being, as the Privy Council have decided in *Brewers and Maltsters Association of Ontario* v. *Attorney-*

May 3rd, 1901, in connection with the Ontario Act in that regard, 63 Vict. c. 24: Provincial Legislation, 1899-1900, pp. 11-14, 19-23, 36-41. Speaking of Dominion companies, the Minister says:—"Such a company has capacity, within the scope of its charter, to trade within the provinces and elsewhere in the Dominion, just as an individual has. An enactment by a province forbidding residents of, or persons doing business in, any other province to trade in the first named province would seem to affect more than provincial trade. It would be a matter of interprovincial concern, and, therefore, *ultra vires* as relating to the regulation of trade and commerce; otherwise all interprovincial trade, which the Judicial Committee holds that the Dominion has the right to regulate, could be rendered impossible by the provinces." But, with deference, it is submitted that the crucial point must be whether the provincial Acts in question are, properly regarded, Acts prohibiting such Dominion companies from trading within the province, or are simply Acts requiring them to take out a provincial license before they do so, which is a very different thing. So far as, in his report of May 3rd, 1901, the Minister objected to the Ontario legislation on the ground that it amounted to discriminating taxation on the part of the province against Dominion companies, the Ontario Government conceded the point, under threat of disallowance, and agreed to amend so as to establish equality in regard to license fees and taxation between Dominion and provincial companies. See, also, the further report of the Minister of Justice of June 20th, 1904, and that of the provincial Attorney-General of August 4th, 1904, who, while conceding that there should be no discrimination against Dominion companies, nevertheless says:—"There should be some definition of companies chartered for Dominion as distinguished from provincial objects (see *infra*, pp. 464-479). It should not be left to the whim of the applicant, who may say in his petition, no matter how entirely local or how strictly provincial his proposed company may be—that he seeks incorporation of a company with 'Dominion objects.' It is very much like the case of a short line of railway between two towns in the interior of the province being declared 'a work for the general benefit of Canada:'"

General of Ontario,[301] direct taxation, it is unquestionable that the provincial legislature have the right so to tax Dominion or any other corporations;[302] and of late (see pp. 379, 421-2 *infra*), Ministers of Justice have ceased to dispute that. And so in *English* v. *O'Neill*,[303] it was held that the provision in the Ordinance incorporating the City of Calgary, empowering the City to pass by-laws for controlling, regulating, and licensing insurance companies, offices, and agents, and collecting license fees for the same, was *intra vires* to authorize a by-law imposing licenses on insurance agents doing business for insurance companies licensed under Dominion Acts. And, in like manner, in *Rex* v. *Massey-Harris Co.*,[304] the Court held the Foreign Com-

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Provincial Legislation, 1901-3, pp. 21-24. See, also, the report of Sir Allen Aylesworth, as Minister of Justice, of March 14th, 1911, upon an Ontario Act in reference to licensing extra-provincial companies, objecting that Dominion corporations were discriminated against, where the Ontario Government acquiesced in the propriety of the objection. See, also, Provincial Legislation, 1901-3, pp. 65-66, 74-75, and 1904-5, p. 154, in the case of British Columbia legislation; *ibid.*, pp. 103-4, 107-111, in the case of North-West Territories Ordinances, where, in a report of December 21st, 1901, the Minister of Justice expressly declares that he "does not deny to the legislatures power of taxation." Ultimately the Ordinances were vetoed by the Dominion Government. As to what constitutes carrying on business by a foreign company in a province, see *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78, 83-4.

[301] [1897] A. C. 231. See *infra*, pp. 394-6.

[302] See *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Rex* v. *Neiderstadt* (1905), 11 B. C. 347; *City of Halifax* v. *Western Assurance Co.* (1885), 18 N. S. 387; *City of Halifax* v. *Jones* (1896), 28 N. S. 454; *Waterous Engine Co.* v. *Okanagan Lumber Co.* (1908), 14 B. C. R. 238, followed *John Deere Plow Co.* v. *Agnew* (1912), 8 D. L. R. 65.

[303] (1899) 4 Terr L. R. 74.

[304] (1905) 6 Terr. L. R. 126.

panies Ordinance, 1903, *intra vires,* so far as it assumed to directly tax a company incorporated under the Dominion Companies Act with power to carry on the business of manufacturing and dealing in all classes of agricultural implements throughout the whole Dominion. But the Court says (p. 129) that possibly the Ordinance had, in some respects, gone further than it is necessary for a taxing Ordinance to go, "and may contain provisions that are at variance and inconsistent with the Dominion Companies Act, or with the rights and privileges conferred by virtue of it, and unnecessarily, so far as the purpose of taxing is concerned, impose duties of an onerous character not contemplated by the Act. If it does contain such provisions, and if the procedure prescribed is of such a character that these duties have to be performed before the tax can be received, or become payable, and the company is prohibited from doing business unless the tax is paid, the ordinance may, *quoad* such companies, be *ultra vires.*" *Sed quaere* as to such a company as the Massey-Harris Company, which is not within No. 29 of section 91, read in connection with No. 10 of section 92, nor within any of the other enumerated clauses of section 91.

Again, in *International Text Book Co.* v. *Brown,*[305] it was held that the Ontario Act for licensing extra-provincial corporations is *intra vires* as coming within No. 2 of section 92 of the British North America Act, being a mode of direct taxation within the province, or as relat-

[305] (1907) 13 O. L. R. 644.

ing to the issuing of licenses in order to the raising of a revenue under No. 9 of that section.

Other provincial attempts to interfere with the business of Dominion corporations.—We may, again, mention in this connection the case of *La Cie. Hydraulique St. Francois* v. *Continental Heat and Light Co.*,[305a] where the Privy Council held that the power conferred by a provincial legislature on an industrial company in the incorporating Act to carry on its corporate enterprise to the exclusion of every other company, in a designated territory is without effect against a company constituted for similar ends by a previous statute of the parliament of Canada, the latter incorporation, however, it must be remembered being, not under the residuary Dominion power, but under an enumerated Dominion power, viz., No. 29, of section 91. See *supra*, pp. 342-3. In a report of January 12th, 1900, the Minister of Justice objected to a provision in a British Columbia Act, entitled the Placer Mining Amendment Act, 1899, to the effect that no joint stock company or corporation should be entitled to take out a free miner's certificate unless the same had been incorporated, and not simply licensed or registered under the laws of the province, upon the ground that it had the effect of entirely excluding companies incorporated by the parliament of Canada, and seemed directly to affect the regulation of trade and commerce, or other matters within the authority of Parliament, rather than any matter within exclusive

[305a] [1909] A. C. 194. See as to this case *supra*, p. 125.

provincial control. These objections being submitted to the provincial authorities, the latter contended that the provision was *intra vires* as affecting the public property in the province. The Act was, however, disallowed, on the recommendation of the Minister of Justice, in a further report of April 12th, 1900, partly on the above grounds, and partly because the Act contained certain provisions affecting aliens which were deemed also *ultra vires.*[306]

In the same year the Minister had occasion to consider a British Columbia Act relating to extra-provincial investment and loan Societies which required such Societies, when not incorporated in the province, to obtain a license from the local authorities to carry on business within the province, and when licensed, to deposit their securities with the provincial Minister of Finance; and provided that such Society might collect its interest and dividends upon such securities so long as it remained solvent, and faithfully complied with the provisions of the Act, and of the contracts entered into by it with the province; and that any Act for the time being in force in the province relating to the winding-up of companies should apply to Societies licensed under the Act, and that upon the appointment of a liquidator of any such Society under any such Act, the securities deposited with the Minister of Finance should be immediately handed over to the liquidator for the benefit of the creditors and members of the Society within the province, to be

[306] Provincial Legislation, 1899-1900, at pp. 123-4.

realized and distributed amongst them in accordance with the laws of the province. The Minister of Justice, in a report of December 27th, 1900, remarks of this Act: "It is very likely true that a provincial legislature has authority to tax Dominion corporations, and to raise such taxes by means of license fees. This statute might possibly be supported as a taxing Act under one or other of these powers, were it not that it attempts to compel extra-provincial Societies of the character described to procure licenses under the Act, and thereupon to make these Societies subject to the provisions above referred to, which impose obligations and liabilities upon the Societies which presumably would not be authorized, or provided for, by their constituting Acts. There is a suggestion, also, that the business of the company is to depend upon its solvency, and that its business may be stopped, and its property dealt with by the local authorities in the event of insolvency. These provisions cannot be upheld under any authority vested in the province to tax or raise revenue by means of licenses; and they are, in the opinion of the undersigned, *ultra vires* as affecting the regulation of trade and commerce,[307] bankruptcy and insolvency, and other matters within the exclusive control of Parliament." The matter, however, was settled by the provincial legislature repealing the objectionable sections.[308]

Again, by report of September 27th, 1907, Sir Allen Aylesworth, Minister of Justice, stren-

[307] As to this *quære:* see *supra*, pp. 230-6.

[308] Provincial Legislation, 1899-1900, pp. 131-2, 142.

uously objected to a Nova Scotia Act of 1906, relating to loan companies, in so far as it affected companies incorporated by the Dominion parliament, and assumed to hypothecate a particular body of securities for the exclusive benefit of shareholders residing within the province, and to legislate certain shareholders within the province into a privileged and preferential position in public companies as compared with shareholders in other provinces. He took the ground that the legislation was an interference with the constitution of Dominion loan companies incompetent to a local legislature, or, if competent, an interference which could not be permitted consistently with the policy of the Dominion in incorporating and defining the powers of such companies, and the relations between them and their shareholders. He threatened disallowance unless the objectionable provisions were repealed, which the provincial Government refused to undertake. No further action was, however, in fact, taken by the Dominion Government.

A very different question arose in connection with a New Brunswick Act of the same year, respecting telephone companies, which authorized expropriation of properties, rights, powers, and franchises, of any telephone company, or companies, in the province, and required every telephone company carrying on business in the province, and charging telephone tolls, to make certain returns, and enacted that the Lieutenant-Governor might appoint auditors to examine the books of the company, and readjust, and alter, or vary the tariffs. The Minister of Justice, by re-

port of December 12th, 1907, says that such provisions are manifestly *ultra vires* so far as concerns companies incorporated by the Dominion, and that he assumes it is only intended to apply to local corporations. But it will, of course, be observed that here the reference is to companies incorporated under the express enumerated Dominion power No. 29 of section 91, read in connection with No. 10 (*a*) of section 92.

There remain certain points in connection with Dominion corporations generally which may perhaps be most conveniently dealt with here.

The Dominion parliament can alone incorporate companies with chartered powers to carry on business throughout the Dominion.—That the Dominion parliament has alone the right to create a corporation to carry on business throughout the Dominion is expressly stated by the Privy Council in *Citizens Insurance Co.* v. *Parsons*,[209] and in *Colonial Building and Investment Association* v. *Attorney-General of Quebec*[210] and is sufficiently obvious, seeing that provincial powers of incorporation are expressly confined, by No. 11 of section 92, to 'companies with provincial objects,' and whatever may be the precise import of these last words,[211] no such corporation could be said to serve only a provincial object.[212]

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[209] (1881) 7 App. Cas. at p. 117.

[210] (1883) 9 App. Cas. at pp. 164-5.

[211] See *infra*, pp. 461-487.

[212] It is, of course, competent for the Dominion parliament to incorporate under Dominion charter the members of a provincial

A Dominion corporation may, however, confine its operations to one or more provinces.—Subject, of course, to any express requirements of their charter, or Act of incorporation, the fact that a company incorporated under a Dominion Act with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Dominion parliament. This is clearly laid down in the case of the *Colonial Building and Investment Association*,[313] just referred to. That Association had been incorporated with power to carry on its business, consisting of various kinds, throughout the Dominion. It was, however, contended that inasmuch as the Association had confined its operations to the province of Que-

company, and so enlarge the scope of their operations and powers: Todd's Parliamentary Government in British Colonies, 2nd ed., at p. 437. As to whether the Dominion parliament can authorize the Governor-General in Council to permit a provincial company to transact business throughout the Dominion, or in foreign countries, see *infra*, pp. 483-5. Nevertheless, there may, no doubt, be objects for which only a provincial legislature could incorporate a company because of their necessarily provincial character: *Forsyth* v. *Bury* (1888), 15 S. C. R. 543, per Ritchie, C.J., at p. 549; per Strong, J., at p. 551; *Citizens' Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 310; Legislative Power in Canada, p. 375, n. 2; 634. It is questionable whether provincial legislatures can validly enlarge or affect the powers of a Dominion corporation. See the remarks of Sir Allen Aylesworth, in a report as Minister of Justice, dated March 30th, 1910, on a Nova Scotia Act of 1909 respecting the Victorian Order of Nurses for Canada, where he raises the question of the power of the provincial legislature to do this in the case of the Order, "which is incorporated by royal letters patent with general powers." *Cf.* per Maclennan, J.A.

[313] (1883) 9 App. Cas. 157.

bec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and, consequently, that its incorporation belonged exclusively to the provincial legislature. Their lordships overruled this contention, laying down the above principle, and adding (p. 374): "The parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant, cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared illegally constituted." They, however, add (p. 165): "It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object."[314] But whenever the objects of a company as defined by its Act of incorporation, contemplate possible extension beyond the limits of one province, it is within the exception of No. 10 (a) of section 92 of the British North America Act.[315]

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[314] Their Lordships refer to their holding in this case in *City of Toronto* v. *Bell Telephone Co.*, [1905] A. C. at p. 58. And see *supra*, pp. 76-82.

[315] Per Davies, J., in *Hewson* v. *Ontario Power Co.* (1905), 36 S. C. R. at p. 606.

CHAPTER XXV.

Provincial Enumerated Powers.

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

The *non obstante* clause in this sub-section—which is to be found in none other of the sub-sections of section 92 of the British North America Act, is to be noticed, and to be reconciled with the *non obstante* clause in section 91, which states 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.' Doubtless the earlier *non obstante* clause must dominate over the later;[1] so that we may, perhaps, state the true position thus: Under this sub-section of section 92, provincial legislatures have the same power to alter and amend the constitutions of their respective provinces (except as regards the office of Lieutenant-Governor), by their own legislative Act, as the Imperial parliament possessed at the date of the passing of the British North America Act; but, whilst the amendment of their own Constitution is conceded to

[1] The *non obstante* clause in section 91 must, it is submitted, be interpreted to mean 'notwithstanding anything hereinbefore or hereinafter enacted in this Act.'

the provinces, they might, as an unnecessary incident of amending their Constitution, enact some things which might be abrogated by a Dominion law.[1a] Otherwise, as Ramsay, J., says in *Ex parte Dansereau*,[2] No. 1 of section 92, in its widest sense, would amount to a power to upset the British North America Act,[2a]

The Lieutenant-Governor. — In *Attorney-General of Canada* v. *Attorney-General of Ontario*,[2b] Boyd C., speaking of this sub-section, "which forbids interference with the office of Lieutenant-Governor," says: "That veto is manifestly intended to keep intact the headship of provincial government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office." And so in his published argument before the Court of Appeal in this case, Mr. Ed-

[1a] See Legislative Power in Canada, p. 699, n. 1, and p. 755, n. 1.

[2] (1875) 19 L. C. J. at pp. 224-5.

[2a] The Colonial Laws Validity Act, 1865—Imp. 28-29 Vict. c. 63—enacted in section 5:—

5. ' . . . Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required, by any Act of parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony.' As to the application of this section to a provincial legislature, see *Hielding* v. *Thomas*, [1896] A. C. 600, at p. 610. See also, as to it, per Sir J. W. Colvile, in *Doyle* v. *Falconer* (1866), L. R. 1 P. C. at p. 341; and Clement's Canadian Constitution, 2nd ed., pp. 249-50.

[2b] (1890) 20 O. R. 222, at p. 247.

ward Blake said of this clause of the Federation Act:—"This means that those elements of the Constitution which can be properly deemed to be parts of the Constitution relating to the office of the Lieutenant-Governors are not to be changed, and for an obvious reason, because the Lieutenant-Governor is the link between the federal and the provincial, aye, and between the Imperial and the provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as federal connection; and, therefore, his office in the Constitution, his constitutional position as a federal officer, is not to be affected." And the Ontario Court of Appeal,[23] and the majority of the Supreme Court of Canada,[24] affirmed him in holding the Ontario Act there in question *intra vires*, though it purported to vest certain powers, authorities, and functions in the Lieutenant-Governor of Ontario, amongst others that of remitting sentences for offences against provincial penal statutes. In the latter Court, however, Gwynne, J., says:—"So to extend the powers, authorities, and functions of the Lieutenant-Governor of Ontario beyond those expressly vested in him by the Constitutional Act is, in my opinion, a violation of the terms of No. 1 of section 92 of the Act. An Act which purports to vest in a Lieutenant-Governor of the province the royal prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to

[23] 19 O. A. R. 31.

[24] 23 S. C. R. 458.

be an alteration of the Constitution of the province as regards the office of Lieutenant-Governor." The other judges of the Supreme Court do not specially refer to this clause, Strong, C.J., and Fournier, J., resting their decision in favour of the Act upon its precautionary phrases—'So far as this legislature has power to enact,' etc., while Taschereau, J., simply refers to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*.[1]

Cannot abdicate functions.—Upon the argument before the Privy Council in *Hodge* v. *The Queen*,[2] Mr. Horace Davey contended that under this sub-section, provincial legislatures "could do what Lord Selborne, no doubt correctly, said in *The Queen* v. *Burah*,[3] the Indian legislature could not do,—abdicate their whole legislative functions in favour of another body." But, as Sir A. Hobhouse remarked,[4] this they cannot do. "They remain invested with a responsibility. Everything is done by them, and such officers as they create and give discretion to."[5]

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[1] [1892] A. C. 437. In a report, however, of Sir John Thompson, as Minister of Justice, dated July 16th, 1887, upon the Quebec Act of 1886, respecting the executive power, which declared the Lieutenant-Governor, or person administering the government of the provinces, to be a corporation sole, he says: "In the opinion of the undersigned, it is immaterial whether a legislature by an Act seeks to add to or take from the rights, powers, or authorities which, by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office; and he recommended that the Act should be disallowed, and it was disallowed accordingly: Hodgins' Prov. Legisl., 1867-1895, p. 338. See, further, as to the Lieutenant-Governors, *infra*, pp. 25-29.

[2] Dom. Sess. Pap. 1884, vol. 17, No. 30, p. 11.

[3] (1878) 3 App. Cas. at p. 905.

[4] Dom. Sess. Pap., *ibid.*, p. 70.

[5] See *supra*, pp. 74-5.

Can define their own privileges.—The Privy Council have held that under this sub-section, provincial legislatures have power to pass Acts for defining their own powers, immunities and privileges, in the sense which they make clear by saying: "It surely cannot be contended that the independence of the provincial legislature from outside interference, its protection, and the protection of its members from insult, while in the discharge of their duties, are not matters which may be classed as part of the Constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province."[7]

Can refuse franchise to aliens.—In *Cunningham* v. *Tomey Homma*,[8] their lordships held that, notwithstanding the exclusive Dominion power to legislate in relation to 'naturalization and aliens,' a provincial Act enacting that no Japanese, whether naturalized or not, should have his name placed on the register of voters, or be entitled to vote at the elections for the provincial legislature, was *intra vires*, apparently under this sub-section.

2. Direct taxation within the Province in order to the raising of a revenue for provincial purposes.

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[7] *Fielding* v. *Thomas* [1896], at pp. 610-1. See Legislative Power in Canada, pp. 746-749.

[8] [1903] A. C. 151. Reported below, 7 B. C. 368, 8 B. C. 76. See *supra*, pp. 303-5.

General rule for testing validity of a provincial Act resting hereon.—In *Citizens Insurance Co.* v. *Parsons*,[9] the Privy Council point out that, 'the raising of money by any mode or system of taxation' is among the classes of subjects assigned by section 91[10] of the British North America Act to the Dominion parliament, and that the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' here assigned to the provincial legislature, and that it obviously could not have been intended that the general power should override the particular one.[11] And so in the subsequent case of *Bank of Toronto* v. *Lambe*,[12] presently to be more particularly noticed, where the question before the Board was whether a certain Quebec Act entitled 'An Act to impose certain direct taxes on certain commercial corporations' was valid, their lordships say: "To ascertain whether or not the tax is lawfully imposed, it will be best to follow the method of enquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 92 of the Federation Act, namely, 'direct taxation within the province in order to the raising of a revenue for provincial purposes?' Secondly, if it does, are we compelled by anything in section 91, or in the other parts of the Act, so to cut down the full meaning of the words of section 92, that they shall

[9] (1881) 7 App. Cas. at p. 108.
[10] No. 3.
[11] See *supra*, pp. 112-118; 315-6.
[12] (1887) 12 App. Cas. 575, at p. 581.

not cover this tax?"[13] And in this connection it is necessary to bear in mind the essential distinction between regulation and taxation.[14] And so, in this case of *Bank of Toronto* v. *Lambe*, the Privy Council say (at p. 586), with reference to the Dominion power to regulate trade and commerce: "If they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parsons'* case, they would be straining them to their widest conceivable extent." And on the same point, on the argument on the Liquor Prohibition Appeal, 1895,[15] when *Bank of Toronto* v. *Lambe* was referred to, Lord Watson asked: "Do you regulate a man when you tax him?" And Lord Herschell thereupon said: "May it not be necessary to regard it from this point of view, to find what is within regulation of trade and commerce, what is the object and scope of the legislation?[16] Is it some public object which incidentally involves some fetter on trade or commerce, or is it the dealing with trade and commerce for the purpose of regulating it? May it not be that, in the former case, it is not

[13] See, also, as to the concurrent power of taxation between the Dominion parliament and the provincial legislatures: *Attorney-General of the Dominion* v. *Attorney-General of the Provinces* (*The Fisheries* case), [1898] A. C. 700, at pp. 713-714; per Strong, J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 111; per Dorion, C.J., in *Dobie* v. *The Temporalities Board* (1880), 3 L. N. at p. 254; the argument before the Supreme Court upon the Dominion Liquor License Acts, 1883-4; Dom. Sess. Pap. 1885, No. 85, at p. 98; Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 564.

[14] See *Weiler* v. *Richards* (1890), 26 C. L. J. N. S. 338.

[15] [1896] A. C. 348.

[16] See *supra*, pp. 230-6.

a regulation of trade and commerce, while in the latter it is, though in each case trade and commerce in a sense may be affected?" And Lord Watson then says: "It would be difficult to imply from these words 'the regulation of trade and commerce,' whilst the power of direct taxation is given to the province—the clauses must be read reasonably together—it would be difficult to suppose that regulating commerce meant the passing of an Act by the Dominion legislature exempting banks from provincial taxation, for practically that is what the argument in that case" (*sc. Bank of Toronto* v. *Lambe*), "had to come to; that under the words 'regulating commerce' was implied a power of exempting a bank from provincial taxation, or the liability to be taxed by the provincial parliament."[11]

Plenary powers in matters of taxation.—And before passing on to a more particular discussion of the provincial power of taxation under this sub-section, it is worth while to observe that, in accordance with that similarity in principle to the free constitution of the United Kingdom which pervades the constitution of this Dominion, no Canadian legislature, Dominion or provincial, is subject in matters of taxation to that restriction which exists under the United States

[11] Printed report published by Wm. Brown & Co., London, 1895, at pp. 120-1. *Cf.*, also *ibid.*, at p. 141. In a letter from the Board of Trade to the Colonial Office, dated July 13th, 1878, a copy of which is on file in the Governor-General's Office at Ottawa, the Board of Trade states that 'whilst measurement of tonnage is an Imperial matter, local taxation of shipping is essentially a colonial matter:' See Legislative Power in Canada, p. 642, n.

Constitution, and requires "all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed."[18] At the same time the Dominion Government has objected to provincial Acts discriminating in the matter of taxation against extra-provincial companies or individuals doing business in the province, although not resorting to disallowance. Thus by report of December 28th, 1901, upon a Prince Edward Island Act, the Minister of Justice says: "The undersigned does not consider that the public interest is served by allowing unequal taxation within a province as between the residents of that province, and the residents of other provinces of the Dominion who may happen to be doing business there." And by a report of March 4th, 1902, referring to another Prince Edward Island Act of the same kind, the Minister says: "No doubt both these Acts discriminate against companies, or individuals, established or residing outside of the province, and this is a policy which is not favoured by your Excellency's Government."[19]

Provincial power of taxation generally.—Now, as has been already seen, provincial legis-

[18] Kent's Commentaries, 12th ed., vol. 2, p. 331. See, also, Legislative Power in Canada, pp. 254-5, 720, n. 1; and *supra*, pp. 87-8. In *Dow* v. *Black* (1875), L. R. 6 P. C. at p. 282, the Privy Council decided that No. 2 of section 92 "must be taken to enable the provincial legislature wherever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province."

[19] Provincial Legislation, 1901-1903, pp. 96-98; *Ibid.*, 1904-1905, p. 25. And see *Regina* v. *Wing Chong* (1885), B. C. (pt. 2) 150, referred to *supra*, p. 311, n., as to discrimination against aliens.

latures have no powers of legislation (save as to their own immunities and privileges), excepting those enumerated in section 92 of the British North America Act.[20] Therefore, any power of taxation they have must be found there; and as Gwynne, J., says in *Reed* v. *Mousseau*,[21] the only sub-sections of section 92, which expressly authorize the raising by Act of the provincial legislatures of any revenue whatever, by any system of taxation, are Nos. 2, 9, and 15.[22] Although, however, we cannot, as Baby, J., does in *Bank of Toronto* v. *Lambe*,[23] claim for the province an inherent right to levy money by any mode or system of taxation within the province, and for provincial ends, it may well be that they have such power so far as they can bring it within No. 16 of section 92, as a matter 'of a merely local or private nature in the province.'[24] We are now, however, immediately concerned with No. 2 of section 92.

What is direct taxation?—This question has been brought before the Privy Council in four

[20] See *supra*, pp. 153-8.

[21] (1883) 8 S. C. R. at p. 431.

[22] Section 124 of the Federation Act provides that New Brunswick may continue to levy existing lumber dues, but may not increase the amount of such dues; and that the lumber of any of the provinces other than New Brunswick shall not be subject to such dues. In *Attorney-General of Quebec* v. *Reed* (1882), 26 L. C. J. at p. 355, Dorion, C.J., points out that this is an exception to the general rule that provincial legislatures have no power of indirect taxation.

[23] (1885) M. L. R. 1 Q. B. at p. 197. *Cf.* per Mathieu, J., in *Export Lumber Co.* v. *Lambe* (1885), 13 R. L. at p. 117.

[24] See *supra*, pp. 140-3; *infra*, pp. 627-9.

cases.[25] In the last of these four cases, the Brewers and Maltsters Association case, they held valid, as direct taxation, a provincial Act imposing, in order to raise a revenue for provincial purposes, a license fee on brewers and distillers, and other persons (though duly licensed, by the Government of Canada, for the manufacture and sale of fermented, spirituous, or other liquors) for licenses to sell within the province the liquors manufactured by them.[26] After referring there to their prior decision in *Bank of Toronto* v. *Lambe*, in which they held valid as direct taxation, a Quebec Act imposing, as a tax on every bank carrying on business within the

[25] *Attorney-General for Quebec* v. *Queen Insurance Co.* (1878), 3 App. Cas. 1090; *Attorney-General of Quebec* v. *Reed* (1883), 10 App. Cas. 141; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, and *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*, [1897] A. C. 231. This last case was followed in *Rex* v. *Neiderstadt* (1905), 11 B. C. 347. In the United States Constitution it is provided (Art. 1, sec. 8) that 'no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' Hence it would seem that no tax can be a direct tax in the sense of the United States Constitution, which is not capable of apportionment according to the rules thus laid down; and it has been seriously doubted if, in the sense of that Constitution, any taxes are direct taxes, except those on polls or on lands: Story on the Constitution of the United States, 5th ed., Vol. 1, pp. 703-4. Hence the American decisions as to what are direct taxes within the United States Constitution are inapplicable to the Constitution of Canada. This distinction has been pointed out and commented on in many Canadian cases: see Legislative Power in Canada, p. 720, n. 1.

[26] As to the power of provincial legislatures to impose license fees upon extra-provincial companies, Dominion or other, doing business in the province, see *supra*, pp. 373-377. As to the provincial legislatures having a general power to impose a license fee with a view to revenue, or to delegate such a power to a municipality, see *Re Foster and Township of Raleigh* (1910), 22 O. L. R. 26, 342.

province, a sum varying with the paid-up capital, with an additional sum for each office or place of business; and to John Stuart Mill's definition[27] of a direct tax as 'one which is demanded from the very persons who it is intended or desired should pay it,' as distinguished from indirect taxes, which are 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another,' which definition they had, in *Bank of Toronto* v. *Lambe*, taken as "seeming to them to embody with sufficient accuracy for this purpose" (*sc.* the purpose of legal definition) "the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act," their lordships say:—"In the present case, as in *Lambe's* case, their lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in the ordinary course take place, or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee, trifling in amount, imposed alike upon all the brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to

[27] As to this reference to Mill and the economists, see *Bank of Toronto* v. *Lambe*, 12 App. Cas. at pp. 581-3; and Legislative Power in Canada, p. 717, n. 2.

tax the customer or consumer. It is, of course, possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax." Here, then, the Judicial Committee indicate very clearly what is to be understood as 'direct taxation' within the meaning of the clause under consideration.

In *Attorney-General for Quebec* v. *The Queen Insurance Co.*,[28] they did not find it necessary to consider the scientific definition of direct or indirect taxation, because they held that, whether as used by political economists, or in jurisprudence in the Courts of law, or in the popular use, the term 'direct taxation' did not apply to the tax they had there to deal with, namely, a stamp imposed by statute on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of law, if the stamp was not affixed.[29]

In *Attorney-General of Quebec* v. *Reed*,[30] the Board applied the same tests as in the first two decisions above mentioned, the tax in question being a stamp duty of ten cents imposed by a

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[28] (1878) 3 App. Cas. 1090.

[29] In *Attorney-General of Quebec* v. *Reed*, 3 Cart. at pp. 220-1, Ramsay, J., comments on this Privy Council decision, and denies that it "implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation." What the Privy Council decided, he says, was "only that the duty sought to be collected in that case, by a so-called license, was, in reality, an ordinary Stamp Act, and indirect taxation." So, also, per Pelletier, J., in *Choquette* v. *Lavergne* (1893), R. J. Q. 5 S. C. at pp. 122-3; per Lacoste, C.J., S. C. in App., R. J. Q. 3 Q. B. at pp. 308-9.

[30] (1883) 10 App. Cas. 141; followed *Plummer Wagon Co.* v. *Wilson*, 3 M. R. 68.

Quebec Act on every exhibit produced in Court in any action depending therein. They said that the view most favourable to the tax being a direct tax was that of Mill above mentioned; but that, even on this view of the matter, the tax was not direct,[31] for from the very nature of legal proceedings, "until they terminate, as a rule and speaking generally, the ultimate incidence of such a payment cannot be ascertained . . . The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else . . . In truth, that is a matter of absolute indifference to the intention of the legislature. On the other hand . . . . it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified, and the law which enacts it, cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumed incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between par-

[31] 54-55 Vict. c. 28, D., passed July 10th, 1891, provided, by section 5, that all fees payable on proceedings in the provincial Courts, purporting to be imposed by or under the authority of any Act of the provincial legislature, shall be payable according to the provisions of such Acts respectively. This Act, however, appears as one of those repealed from the coming into force of R. S. C. 1906, in Sched. A. of that consolidation.

ties determining who shall bear it.[32] The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if, at the time, the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the 92nd clause of the Federation Act."

One or two decisions remain to be noticed. In *In re Yorkshire Guarantee and Securities Corporation, Limited,*[33] the Supreme Court of British Columbia held, unanimously, that a tax imposed by the provincial Assessment Act upon mortgages was a direct tax, and *intra vires*, within the *indicia* laid down by the Privy Council in the above cases, notwithstanding that the evidence showed that the company required their mortgagors to recoup the amount. At p. 274, Drake, J., says: "The intention of the legislature is that the owner of the personalty is to bear

[32] It might seem that the Privy Council here intimate the view that a stamp duty upon transactions of purchase and sale would be an indirect tax, by reason of the uncertainty of the ultimate incidence of it; but *held* otherwise in the case of a stamp duty on sales of land, in *Choquette* v. *Lavergne* (1893-4), R. J. Q. 5 S. C. 108, in App. *sub nom. Lamonde* v. *Lavergne*, R. J. Q. 3 Q. B. 303. See per Lacoste, C.J., R. J. Q. 3 Q. B. at p. 305; per Pelletier, J., R. J. Q. 5 S. C. at pp. 121-3. However, when in 1911, the Ontario legislature enacted that there should be levied a tax of two cents payable by the transferor in money or stamps for every $100, or fraction thereof, of the par value upon every change of ownership of shares of debenture stock issued by any corporation, or company, made or carried into effect in the province, Mr. Doherty, Minister of Justice, by his report of January 30th, 1912, questions whether such taxation is not indirect.

[33] (1895) 4 B. C. 258.

the tax; it is imposed on him, and he is the person intended to bear it. It is not imposed on him with a view that someone else (the mortgagor) shall bear it, or that it shall be distributed over a class of persons. The tax is not imposed on the dollars, but on the owners of the dollars. Customs duties are imposed on the goods, not on the owner of the goods. I cannot see how the appellants in this case can escape from the decision of *Bank of Toronto* v. *Lambe*. This tax appears to me to fall within the *indicia* laid down by the Privy Council in that case for discriminating between a direct and indirect tax."

In *Le College de Médecins* v. *Bingham*,[34] it was held that a provincial Act requiring all members of the College of Physicians and Surgeons of the province to pay two dollars for the use of the college was *intra vires*.[34a]

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[34] (1888) 16 R. L. 283. By report of December 24th, 1894, the Minister of Justice says:—"The question may arise whether taxation which renders both the owner, occupier, and tenant of land liable for a tax, the amount of which is arrived at having regard to the extent, and value of the land so owned, occupied, or held under lease, is not indirect, and, therefore, *ultra vires* of a provincial legislature:" Hodgins' Provincial Legislation, 1867-1895, p. 1229. By report of December 27th, 1901, the Minister of Justice objected to a British Columbia Act 'to provide for the collection of a tax on persons,' which required every male person in the province to pay an annual revenue tax of $3, and that every merchant, farmer, trader, or employer of labour should pay the said annual tax for every male person in his employ, and might deduct the same from salary or wages due to such male person, and should be liable for the same, that this was clearly indirect taxation under the judgment in *Bank of Toronto* v. *Lambe*, *supra*, and that the Act should be repealed, but it appeared that similar provisions had been allowed to go into force before, and for this, and other reasons, the Act was not disallowed.

[34a] Mr. Clement (*op. cit.* p. 259) tabulates different kinds of taxation which have been held to be within the competence of a provincial legislature in the cases. And see *infra*, pp. 414-423.

'**In order to the raising of a revenue for provincial purposes.**'—A question arises whether these words in No. 2 of section 92 of the Federation Act indicate that direct taxation may not be resorted to by a provincial legislature in order to raise a revenue for local or municipal purposes, as distinguished from general provincial purposes. This has been supposed to be the intent of the clause by some judges,[35] and colour is lent to such a view by the fact that No. 9 of section 92 expressly authorizes legislation in relation to the licenses there referred to 'in order to the raising of a revenue for provincial, local, or municipal purposes.' However in *Dow* v. *Black*,[36] already referred to, where the constitutionality of a provincial Act authorizing the inhabitants of a parish to raise by direct taxation within the parish, a subsidy for a certain railway came into question, and it was contended that No. 2 of section 92 only authorizes direct taxation incident on the whole province for the general purposes of the whole province, the Privy Council say: "Their lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for

[35] See Legislative Power in Canada, p. 722, n. 1, where the words of Lord Watson, addressed to Counsel on the argument in *The Brewers and Maltsters Association of Ontario* case, [1897] A. C. 231, in reference to these words are cited:—"You construe it very reasonably as meaning revenue purposes arising within the province somewhere."

[36] (1875) L. R. 6 P. C. 272.

a local purpose upon a particular locality within the province."[37]

In the *Brewers and Maltsters Association* case,[38] the Judicial Committee, while passing, as we have seen,[39] upon the validity of the specific enactment before them, refused to answer the more academic question submitted as to whether the provincial legislature could impose direct taxation, not only in order to raise a revenue for provincial purposes, but also "for any other object within provincial jurisdiction;" but in the course of the argument in that case,[40] Lord Herschell is reported as saying as to No. 9 of section 92: "They may have put in sub-section 9 in order to make certain that

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[37] As Mr. Clement says in his Law of the Canadian Constitution, 2nd ed., p. 252, this decision 'is sufficient warrant for the whole system of municipal taxation now operative throughout Canada.'

[38] [1897] A. C. 231.

[39] *Supra*, p. 374.

[40] Manuscript transcript of notes of Marten, Meredith and Henderson, at p. 55. In a report of January 8th, 1904, the Minister of Justice says he has "very serious doubts as to the capacity of a local legislature to enact such provisions as in the Ontario Consolidated Municipal Act, 1903, whereby municipal councils are authorized to make by-laws, *inter alia*, for taking land within the municipality for purposes of a militia drill shed or armoury, and for regulating harbours, erecting wharves, piers, and docks in harbours, etc., and for aiding any regularly organized rifle association, and supplementing the sum paid during the annual drill of the militia, on the ground that militia and defence, and navigation and shipping, are exclusively subjects for the Dominion parliament, and that a provincial legislature has no power of taxation except for provincial, municipal, or local purposes; he does not, however, consider the provisions in question so objectionable in substance as to require the disallowance of the Act: Provincial Legislation, 1901-2, pp. 20-21.

a particular kind of things would beyond all question be within taxation powers.'"[41]

"**Within the province.**"—It is next to be noticed that the direct taxation authorized by No. 2 of section 92 has to be 'within the province,' and in *Woodruff* v. *Attorney-General for Ontario*,[42] the Privy Council have said that

[41] The phrase 'for provincial purposes' may be compared with the phrase 'for provincial objects' in No. 11 of section 92. *q.v.*, *infra*, pp. 464-479.

[42] [1908] A. C. 508. Reported below, 15 O. L. R. 416. But though the property must be within the province, the person to be taxed need not be domiciled, or even resident within it, as the Privy Council pointed out in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at pp. 584-5, saying:—"The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must, therefore, fall on a person or persons, or on property, not within Quebec. The answer to this is that No. 2 of section 92 of the British North America Act, does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any persons found within the province may be legally taxed there if taxed directly. This bank," (*s.c.* the Bank of Toronto) "is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the Bank, any more than its profits. The bank itself is directly ordered to pay a sum of money." *Nickle* v. *Douglas* (1875), 35 U. C. R. 126, 37 U. C. R. 51, decided that a person domiciled in Kingston, Ontario, should not be assessed upon stock owned by him in the Merchants Bank, which had its head office in Montreal, inasmuch as such stock was not property in the province within the meaning of the Ontario Assessment Act. In *Lovitt* v. *The King* (1910), 43 S. C. R. at pp. 160-1, Anglin, J., says:—"The legislature of a British province, which is empowered to impose only 'taxation within the province,' cannot by legislative declaration make anything property within the province which would not otherwise be such according to the recognised principles of English law. If it could, the constitutional limitation upon its power would be a dead letter." In connection with *Woodruff* v. *Attorney-General for Ontario*, see *Treasurer of Province of Ontario* v. *Patten* (1910), 22 O. L. R. 184.

it is *ultra vires* of a provincial legislature to tax property not within the province. They held, therefore, that the Ontario Succession Duty Act which laid a succession duty upon property, enacting (sec. 4) 'the following property shall be subject to a succession duty as hereinafter provided,' etc., did not include within its scope moveable property, being in the case before them, bonds and municipal debentures, and a cash balance in a New York bank, locally situate outside the province of Ontario, which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime, with intent that the transfers should only take effect after his death. Their lordships say (p. 513): "The pith of the matter seems to be that the powers of the legislature being strictly limited to 'direct taxation within the province,' any attempt to levy a tax on property locally situate outside the province is beyond their competence. . . Directly or indirectly the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province." Holding, then, that the provincial legislature can only tax property locally situate in the province, the Board naturally make no express reference to the maxim *mobilia sequuntur personam*, or *mobilia ossibus inhærent*, referred to in the judgments below.

In the subsequent case of *Rex* v. *Lovitt*,[13] however, they had occasion to do so. They there

[13] [1912] A. C. 212. Reported below, 43 S. C. R. 106, 37 N. B. 514. And see further, as to these maxims, *infra*, pp. 404-7.

held that, where a testator resident and domiciled in Nova Scotia, was at the date of his death possessed of a sum of money deposited in a New Brunswick branch of the Bank of British North America, the head office of which is in London, which was paid to his executors after they had obtained ancillary probate in New Brunswick, the executors were liable to pay succession duty under the New Brunswick Succession Duty Act, 1896, by which all property situate within the province is made liable to succession duty whether the deceased was domiciled in that province or not. They held, in the first place, upon the decisions respecting branch banks, that the debt of the bank to the deceased was property situate within New Brunswick.[a] The defendants, however, contended that the situation of the obligation of the bank, the property in question, was to be determined, not by its actual locality, but according to the principle expressed in the maxim *mobilia sequuntur personam,* so that, in this view, the property was neither in London nor in New Brunswick, but in Nova Scotia. Their lordships, therefore, explain this maxim as one arising from a general English rule of construction of statutes relating to legacy and succession duties, namely, that the duties are intended to be imposed only on those who become entitled by virtue of English law; from which it follows that moveable property situate in England of one who dies domiciled abroad is exempt, inasmuch as in respect to the distribution of such property,

[a] See at p. 219.

English Courts act, not on English law, but on the law of the domicile. Those who succeed to such property succeed to it, not by virtue of English law, but by virtue of the law of the domicile. They continue: "The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes, both English and Colonial, but its application may be excluded by the use of apt and clear words in a statute for the purpose . . Here the legislature of New Brunswick has expressly enacted that all property situate in the province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicile outside the province. The Act purports to exclude the application of the maxim *mobilia sequuntur personam* as regards personal estate within the province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the province."[a]

Here, then, we have two decisions of the Privy Council, one that a provincial legislature cannot place a tax directly on property locally situate outside the province—and the other that a provincial legislature can place a tax upon pro-

[a] The Act purported to bring within the scope of the succession duty:—

(a) All property situate within the province whether the deceased was domiciled there or not;

(b) All property outside the province belonging to persons domiciled therein; and

(c) All property outside the province belonging to persons not domiciled therein, if such property were devised to a person resident therein.

perty locally situate inside the province to which a person succeeds under a will or an intestacy, notwithstanding that the deceased owner was domiciled outside the province at the time of his death, provided it excludes by the use of apt and clear words the application of the maxim *mobilia sequuntur personam.*

The question remains: Can a provincial legislature indirectly place a succession duty tax on property locally situate outside the province, by placing the tax, not directly on the property, but on the transmission of the property, by succession, to a person in the province? In *King* v. *Cotton,*[a] the majority of the Supreme Court have held that it can. The Court there was called on to apply the Quebec Succession Duty Act to moveables, having a local *situs* outside the province, which formed part of the succession of a decedent domiciled within the province. The legislation in question imposed a tax *on the transmission* owing to death of 'moveable and immoveable property' in the province, calculated upon the value of the property transmitted; and specially provided that the word 'property' should include 'all moveables, *wherever situate,* of persons having their domicile (or residing) in the province of Quebec at the time of their death.' The Court (Davies and Anglin, JJ., dissenting), held, that the moveable property in question, being bonds, stocks, promissory notes, jewellery and pictures, actually situate in the United States at the date of the demise of the decedent, and forming part

[a] (1912) 45 S. C. R. 469. Reported below, R. J. Q. 20 K B. 162

of his estate, was subject to the duty imposed by the Act, distinguishing *Woodruff* v. *Attorney-General for Ontario*." Thus Fitzpatrick, C.J., says (p. 477): "There is no question here of an attempt to tax property situate beyond the jurisdiction; the Quebec statute merely fixes the conditions subject to which it gives a good title to the property of the deceased. In a word, the tax is imposed as a condition of the devolution." At p. 475, he says: "By the law of the domicile of the deceased, the title under which the heirs receive the estate, the moveable property of the deceased, wherever situate, is governed. In such a case the maxim of *mobilia ossibus inhærent* finds its application." Although, however, that maxim may be thus cited to justify, as it were, the legislation, it can have no bearing on the question of its constitutional validity; nor does his lordship say it has. Idington, J., distinguishes the Woodruff case in the same way.[a] At pp. 492-6 he says: "I cannot think any doubt can exist as to the right to tax the transmission. . . . I cannot assent to the . . . assumption that 'direct taxation within the province' necessarily means only taxation in respect of property physically within the province. . . . A man may be domiciled within a province, and can be made answerable for taxes imposed upon him in respect of property outside the province, but over which the laws of the province may

[a] [1908] A. C. 508.

[a] Pages 487-8, 492-6. As Idington, J., points out, in the Woodruff case, the property in question had actually been transferred to another person in the lifetime of the deceased; but that does not seem to affect the *ratio decidendi* of that decision.

have given him the only foundation he can have for dominion or legal possession. For example, a man domiciled within a province may build railway cars, and lease them to one of the railway companies running into the United States, and sometimes have them at home and sometimes abroad. Can he not be taxable in respect of such property? . . Then we have the income tax which forms no mean part of the aggregate municipal taxation. Yet it often rests on no other foundation in law than the domicile of the man taxed. The income tax has never been questioned. Yet the sources from which the income flows may be in every quarter of the globe. . . Surely the fact that the income may never have reached home, and may be left abroad to earn more, is not to determine the power of imposing such a tax": and he cites *Bank of Toronto* v. *Lambe*,[19] on the point of taxation of income not being indirect.

At pp. 498-9, he says: "'Direct taxation within a province,' and 'direct taxation of property within a province' are, I submit, not interchangeable terms. It is the former term that is used, and if the meaning of the latter term was what it purposed, surely it would have been so expressed. And when we find the Privy Council has not adhered to the literal expression of the same power by limiting it to the 'revenue for provincial purposes,' but has, heretofore, found in that, despite the words used, power to delegate

[19] (1887) 12 App. Cas. 575. *Sed quære:* Is there not a well recognized distinction between a tax on property, and a tax on income?

it to corporate municipal and school boards,"[50] I do not think we should seek, in another spirit of interpretation, relative to words in the same sentence, to restrict the power by something not expressed, and to something quite unusual."

Duff, J., at p. 507, says: "The point for consideration, then, is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon, or in respect of, the benefits acquired under a succession comprising in fact extra-territorial moveables, abrogated by the provision of the British North America Act, which limits the provincial power of taxation to 'taxation within the province?' . . . On what ground are we so to restrict the words 'taxation within the province' as to exclude such successions from the taxing authority of the province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt* v. *The King*."[51]

In his dissenting judgment, however, in this case, Davies, J., held that the effect of the gen-

[50] See *supra*, pp. 69-73; 400.

[51] [1912] A. C. 212. The learned judge seems to mean that, as in the Lovitt case the Court held that property in the province could be taxed, on succession, although the decedent was domiciled out of the province; why, then, cannot the succession to property out of the province be taxed where the decedent was domiciled in the province? If one is taxation 'within the province,' why is not, also, the latter? In *Re Renfrew* (1898), 29 O. R. at p. 569, Street, J., says: "There is no doubt that it was within the powers of our legislature to have enacted that the property of a deceased person situate outside the province should be considered in arriving at the aggregate value of the property of the deceased."

eral language in *Woodruff* v. *Attorney-General for Ontario*,[52] cannot be so cut down; and that that judgment was not based upon the mode in which the Ontario legislature attempted to levy succession duties there in dispute, but upon the denial of the existence of any constitutional power in the legislature, either directly or indirectly, to impose such duties upon property not within the province. Anglin, J., took a similar view. He says (p. 539): "The view which I take of the British North America Act provision is that it should be read as authorizing direct taxation only where the real subject of the tax—whether person, business, or property—is within the province . . . Under the Quebec Act imposing death duties, for the reasons I have stated, I am of the opinion that the real subject of taxation is the property passing, notwithstanding the clearly expressed intention of the legislature to fasten the tax upon the transmission;" and (at pp. 540-541) he points out, with much force, if one may presume to say so, that in the Woodruff case, the Attorney-General for Ontario argued, as reported, that "the duty claimed was not a tax on property, but a tax on the devolution or succession: the duty was imposed on persons beneficially entitled . . .; the persons taxed were resident in the province;" but that the Judicial Committee replied to this:—"Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province;"

[52] [1908] A. C. 508.

and he quotes their further words: "The pith of the matter seems to be that, the power of the provincial legislature being strictly limited to 'direct taxation within the province,' any attempt to levy a tax on property locally situate outside the province is beyond their competence."[52]

Provincial indirect taxation.—This seems the most convenient place to consider the general subject of provincial taxation, apart from No. 2 or No. 9 of section 92, which, unless we consider No. 15 should be included, are the only clauses in the Federation Act, excepting section 124 concerning New Brunswick lumber dues,[53] which give express powers of taxation to provincial legislatures, and all relate to direct taxation.[54] If, then, the provinces have any powers at all of indirect taxation, it can only be such indirect taxation as is of 'a merely local or private nature in the province,' within the meaning

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[52] And see *supra*, pp. 402-3. As to its making no difference, if the property in respect to which the impost be exacted, is in the hands of executors within the province,—that the duties are declared by the Act imposing them to be payable at the date of the death, when, *ex hypothesi*, the property had not a *situs* within the province, except constructively: see per Duff, J., in *Lovitt v. The King* (1910), 43 S. C. R. at pp. 143-4. He there says:—"The declaration that the duties should be payable at death, or within one year thereafter, appears to have been intended to afford a basis for levying interest from the date of death in default of payment when due. Such incidents of the tax appear to me, once it is clear that the legislature is aiming alone at property within the province, to be unobjectionable; and, in any view, I can see no difficulty in giving to every part of the provision its full application as regards assets which by legal construction are considered New Brunswick assets in the hands of the executors at the date of the testator's death."

[53] See *supra*, p. 393, n.

[54] As to No. 9 of section 92, see *infra*, pp. 433-445.

of No. 16 of section 92, or such indirect taxation as is incidental to the exercise of the other express powers conferred by section 92. And, moreover, any such provincial power of indirect taxation is obviously greatly restricted by section 121, which provides that 'all articles of the growth, produce, or manufacture, of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces;' and by section 122, which places customs and excise laws under the Dominion jurisdiction. Thus these two sections place beyond provincial control the main field of indirect taxation, and, speaking generally, it may therefore be, without doubt, correctly said that the provinces are confined to direct taxation.[56]

But it does not seem to follow that the provincial legislatures may not have a limited power to impose indirect taxation either under No. 16 of section 92, in which case it would have to be imposed under such circumstances and conditions as to make its imposition a merely local matter in the province—but, as has been seen,[57] a subject-matter of legislation may be this, and yet may extend in its operation over the whole province—or as incidental to one of their other express powers. Some of these seem to clearly suggest power of taxation, as No. 4 'the payment of officers,'—No. 6, 'the maintenance' of

[56] It would seem in this general sense that the Privy Council were speaking in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at p. 586. *Cf. St. Catharines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. at p. 57; *Dow* v. *Black* (1875), L. R. 6 P. C. at p. 282; *Lamonde* v. *Lavergne* (1894), R. J. Q. 3 Q. B. at p. 314; Legislative Power in Canada, p. 731, n. 2.

[57] See *supra*, pp. 140-3.

public and reformatory prisons in and for the province,—No. 7 'the maintenance' of hospitals, etc.,—No. 14 'the maintenance' of provincial courts; and there is not a word in them to limit such taxation to direct taxation.

In *Bank of Toronto* v. *Lambe*,[58] in the Quebec Court of Queen's Bench, Ramsay, J., claims the Privy Council judgment in *Dow* v. *Black*,[59] as direct authority that Nos. 2 and 9 do not exclude from the power of provincial legislatures the right to impose other forms of taxation, as, for example, under No. 16 of section 92; and points out the curious clerical error in the report of their lordships' judgment where '9th article of section 92,' is printed, instead of '16th article of section 92.' So, too, several of the Supreme Court judges in *Attorney-General* v. *Reed*,[60] express views on the whole favourable to a provincial power of imposing indirect taxes under No. 16 of section 92, or as incidental to some of the other of their express powers under that section.[61] The decision of the Quebec Court of Queen's Bench in *Bank of Toronto* v. *Lambe*,[62] may perhaps be claimed as a direct decision on

[58] (1885) M. L. R. 1 Q. B. at p. 192. See, also, per Baby, J., S. C. at pp. 197-9.

[59] (1875) L. R. 6 P. C. 272, at p. 282. *Cf.* per Dorion, C.J., in *Bank of Toronto* v. *Lambe*, M. L. R. 1 Q. B. at p. 145. The provincial Act in question in *Dow* v. *Black*, was one empowering the majority of the inhabitants of the Parish of St. Stephen, in New Brunswick, to raise by local taxation, a subsidy designed to promote the construction of a certain railway extending beyond the limits of the province into the State of Maine, but already authorized by statute prior to Confederation.

[60] *Sub nom. Reed* v. *Mousseau* (1883), 8 S. C. R. 408.

[61] See Legislative Power in Canada, p. 740, n. 1.

[62] (1885) M. L. R. 1 Q. B. 122.

the point as regards No. 16 of section 92, for, after deciding that the taxes there in question were direct taxes, the Court, as would appear from the report, went beyond what was necessary to add a clause in the formal judgment that, even assuming they were not direct taxes, the legislature had power to impose the same, inasmuch as the said taxes were 'matters of a merely local or private nature in the province.' The Privy Council, also, seem to countenance the claim to power to impose indirect taxation incidentally to the exercise of power No. 14 of section 92—'the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts'—in *Attorney-General of Quebec* v. *Reed*.[64] It is, it is submitted, more consistent with the plenary nature of the powers of provincial legislatures under the British North America Act, that they should be held to have such right to impose indirect taxation as has been suggested in the context, than that it should be denied them."

What the provinces can tax.—Dominion lands.—The restriction of provincial taxation to property in the province has already been discussed in light of the authorities as they at present exist;[65] but there are certain persons and property for which, though within the province,

[64] (1884) 10 App. Cas. 141, at pp. 144-5. See, however, *Dulmage* v. *Douglas* (1887), 4 Man. 495. *Cf. Crawford* v. *Duffield* (1888), 5 Man. 121.

[65] See, upon the whole subject, Legislative Power in Canada, pp. 730-741.

[66] *Supra*, pp. 402-411.

exemption from provincial taxation has been claimed, on account of their Dominion character. Of these it is now proposed to speak. By section 125 of the British North America Act it is expressly provided that 'no lands or property belonging to Canada, or any province, shall be liable to taxation;' and in *Ruddell* v. *Georgeson*,[66] it was held that unpatented lands are not liable to be assessed or sold for taxes under provincial Acts. Killam, J., however (p. 2), held that the provincial legislature has the power to tax any interest in Dominion lands, legal or equitable, which the Crown has really conferred on a subject, but not where no estate or interest has been so conferred; and he refers to *Canadian Pacific R. W. Co.* v. *Rural Municipality of Cornwallis*.[67] And now in *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta*,[68] the matter has again come before the Courts. The Calgary and Edmonton R. W. Co., under Dominion Act, and by virtue of a contract entered into pursuant to Orders in Council issued under that Act, was entitled to receive certain lands from the Dominion of Canada in aid of the construction of a railway; and designated certain lands to be allotted to it pursuant to Order-in-council and contract; and in 1892 assigned by deed 'all its estate, right, title, interest, claim, and demand,' in certain of the said lands to the Calgary and Edmonton Land Company. In 1906, before patents had been actually granted,

[66] (1893) 9 Man. 407.

[67] 7 Man. at p. 24 *q.v.* And see S. C. in App. 19 S. C. R. at p. 710.

[68] (1911) 45 S. C. R. 170; reported below, 2 Alta. 446.

the land was taxed under an Alberta Act of 1906, and certain prior local Ordinances. It was held by the Supreme Court, affirming the decision of the Court below, that the Land Company having become entitled to the whole equitable interest in the land, the Crown in the right of the Dominion retaining only the bare legal estate, the land was not land 'belonging to' the Crown in the right of the Dominion, within the meaning of section 125 of the Federation Act, and was, therefore, not exempt from taxation under that section; and that the provincial legislature might provide for the levy and collection of taxes so imposed, by the transfer of the interests affected by such taxes. "The exemptions provided for by that section," says Davies, J. (p. 180), "are for the protection of the interest of the Crown only, not of those who have derived beneficial interests in lands from the Crown." Idington, J., says (p. 186): "The assignees of the concessionaries were, in 1906, just as taxable, as are purchasers from the Crown paying their purchase money by instalments, as, I presume, a great part of the country in question stands today." Anglin, J. (pp. 189-191), after referring, at length, to *Regina* v. *County of Wellington*,* says:—"I think that full effect is given to section 125 of the British North America Act, 1867, by holding that it precludes the taxation of whatever interest the Crown holds in any land or property, and that so long as such interest subsists, the taxation of any other interest in the land, and any sale or other disposition made of it to satisfy

* 17 O. R. 615, 17 O. A. R. 421, 19 S. C. R. 510.

unpaid taxes, while valid, is always subject to the rights of the Crown which remain unaffected thereby.[70]

What the provinces can tax (continued).—Dominion officials.—It has now been held in *Abbott* v. *City of St. John*,[71] thus overruling a number of previous Canadian decisions,[72] that, notwithstanding No. 8 of section 91, which provides that Parliament shall have exclusive legislative authority over the fixing of, and providing for, the salaries and allowances of civil and other officers of the Government of Canada, a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income, as such, by the municipality in which he resides under the authority of provincial legislation. Duff, J., says (p. 619): "Although *Leprohon* v.

[70] See, further, per Gwynne, J., in *Whelan* v. *Ryan* (1891), 20 S. C. R. at p. 73; *Rural Municipality of Norfolk* v. *Warren* (1892), 8 Man. 481; *Alloway* v. *Rural Municipality of Morris* (1908), 18 Man. 361.

[71] (1908), 40 S. C. R. 597. Reported below, 38 N. B. 421.

[72] *E.g. Leprohon* v. *City of Ottawa* (1877-8), 40 U. C. R. 478, 2 O. A. R. 522; *Ex parte Killam* (1898), 34 N. B. 530; *Desjardins* v. *La Corporation de la Cité de Quebec* (1900), R. J. Q. 18 S. C. 434; *Ex parte Timothy Burke* (1896), 34 N. B. 200, and other cases referred to in Legislative Power of Canada, pp. 671-8, where the view of the law now upheld by the Supreme Court in *Abbott* v. *City of St. John* was anticipated. So, also, *Coté* v. *Watson* (1877), 3 Q. L. R. 157, is now evidently unsustainable, where it was held that the Quebec License Act, 1870, in so far as it sought to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Dominion Insolvent Act, 1869, (the said tax being in the form of a penalty recoverable against the assignee in insolvency for selling by auction the goods of the insolvent without taking out a license as prescribed by its provisions), was *ultra vires*.

City of Ottawa has not been expressly overruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can . . no longer afford a guide to the interpretation of the British North America Act." Davies, J., says (p. 606): "It must be borne in mind that the law does not provide for a special tax on Dominion officials, but for a general undiscriminating tax upon the incomes of residents, and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question, and there need not be assumed beforehand such a suggested misuse of the power." Maclennan, J., says (p. 616): "No attempt is made to seize or appropriate the income itself," or to anticipate its payment. He (the inhabitant who is taxed), receives it, and applies it as he thinks fit, in discharge of his obligations."[a]

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[a] When in 1904, the Quebec Legislature passed a Bill which the Lieutenant-Governor thought might be construed as rendering liable to seizure the salaries of public officers appointed by the Federal Government, he reserved it for the signification of the pleasure of the Governor-General, and by report of October 29th, 1904, the Minister of Justice expressed his opinion that, for the above reasons, the Bill should not receive effect at the hands of the Dominion Government, which was approved by Order-in-Council: Provincial Legislation, 1904-1906, p. 12. On this distinction the judgment in *Evans* v. *Hudon* (1877), 22 L. C. J. 268, that a provincial legislature has no power to declare liable to seizure the salaries of employees of the Federal Government, may perhaps still stand.

[a] Attention is called in this case to the cardinal distinction between the Australian Constitution and our own, that, in the

In the Supreme Court, as well as in the Court below, in *Abbott* v. *City of St. John*, the decision of the Privy Council on an appeal in *Webb* v. *Outrim*,[15] was relied on, the Privy Council having then held that an officer of the Australian Commonwealth resident in Victoria, and receiving his official salary in that State, is liable to be assessed in respect thereof, for income taxes imposed by an Act of the Victorian legislature. Their lordships held that there being no express provision in the Commonwealth Act restricting the power of the Victorian legislature to impose a tax on the salary of an officer of the Commonwealth, no such restriction could be implied merely because the imposition of the tax might interfere with the free exercise of the legislative or executive power of the Commonwealth. They deny the application of *McCulloch* v. *State of Maryland*,[16] on which the judges relied in *Leprohon* v. *City of Ottawa*.[17] They point out (p. 88) that: "No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and As-

case of Australia, general powers were carved out of the powers which the provinces had previous to federation, and given to the Federal parliament, the residuum of power remaining in the provinces; whereas in Canada specific powers of legislation were given to the provinces, and the residuum of power was given to the Dominion. See *supra*, pp. 89-94.

[15] [1907] A. C. 81. Reference may be made in connection with this case to the review of the Australian cases upholding the immunity of Commonwealth Agencies in an Article on the Legal Interpretation of the Constitution of the Commonwealth, by A. B. Keith, in Jl. of Comp. Legisl. N.S., Vol. XII., pp. 95-103.

[16] 4 Wheat. 316.

[17] 40 U. C. R. 478, 2 O. A. R. 522.

sembly requires the assent of the Crown, but when it is assented to, it becomes an Act of the Parliament, as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see Colonial Laws Validity Act, 1865),[18] but with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute on the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law, and must be obeyed. . . The enactments to which attention has been directed do not seem to leave any room for implied prohibition. *Expressum facit cessare tacitum.*"[19]

[18] *Supra*, pp. 53-4.

[19] This is all applicable to our Constitution under the British North America Act. See the passage from the judgment of the Privy Council in *Bank of Toronto* v. *Lambe*, cited *supra*, pp. 30-31. It is, perhaps, strictly speaking, more correct to say that the Courts with us have jurisdiction to declare Dominion or provincial statutes *ultra vires* (just as they may declare a municipal by-law *ultra vires*), than to say that they have jurisdiction to declare such statutes "unconstitutional." The British North America Act has nothing in it corresponding to the broad words in the United States Constitution respecting the jurisdiction of

In *Fillmore* v. *Colburn*[80] the Supreme Court of Nova Scotia held that a provincial Act requiring all the ratepayers of a section to perform statute labour on the highway, or commute, was *intra vires* as applied against a section-man employed on the Intercolonial Railway by the Government of Canada.[81]

What the Provinces can tax (continued).—Dominion corporations.[82]—That the provinces can tax banks, which are necessarily Dominion corporations, (No. 15 of section 91), is established by the Privy Council decision in *Bank of Toronto* v. *Lambe*,[83] who there upheld a Quebec Act imposing certain direct taxes on all banks doing business in that province; and, in that con-

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the Supreme Court, whose judicial power it provides (Act III. sec. 2), 'shall extend to all cases in law and equity arising under this constitution.'. See Story on the Constitution, 5th ed., secs. 1582-3. *Cf.* an Address by Mr. Justice Riddell on the Constitutions of the United States and Canada (1912), 32 C. L. J. 849; also the Australian case, *Baxter* v. *Commissioners of Taxation* (1907), 4 C. L. R. 1087.

[80] 28 N. S. 292.

[81] As to taxing soldiers and sailors, *cf.* per Robinson, C.J., in *Tully* v. *The Principal Officers of Her Majesty's Ordnance* (1847), 5 U. C. R. at p. 14. In *Re Toronto Harbour Commissioners* (1881), 28 Gr. at p. 195, Spragge, C., points out that there is certainly nothing to prevent provincial authorities granting compensation to the Commissioners of Toronto harbour even though that harbour may be, under the British North America Act, the property of the Dominion of Canada, when, as the fact was, the Crown as represented by the Dominion Government had not itself fixed any compensation for the Commissioners' services.

[82] As to provincial power to require Dominion and other extra-provincial companies to take out a license before doing business in the province, see *supra*, pp. 373-7. As to what constitutes carrying on business by a foreign company in a province, see *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78, 83-4.

[83] (1887) 12 App. Cas. at pp. 586-7.

nection," pointed out the contrast between provincial powers in Canada, and State powers in the United States." And in *Great North Western Telegraph Co.* v. *Fortier*,[85] the Quebec Court of King's Bench held, on the authority of this case, that a Quebec Act imposing an annual tax of $2,000 upon every telegraph company having a paid-up capital exceeding $50,000, and operating a telegraph line for the use of the public in the province doing business therein, was *intra vires*. It was in vain sought to distinguish the case of a telegraph company from the case of a bank.

As to Dominion railways, in *Canadian Pacific R. W. Co.* v. *Corporation of Bonsecours*," the Judicial Committee expressly say: "The British North America Act, whilst it gives the legislative control of the appellants' 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. . 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."

" See *supra*, pp. 30-1. In *Town of Windsor* v. *Commercial Bank of Windsor* (1882), 3 R. & G. 420, 427, Weatherbe, J., held *intra vires* a provincial Act imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve, under the Dominion Act relating to banks and banking. And see per Torrance, J., in *Angers* v. *Queen Insurance Co.* (1877), 21 L. C. J. at p. 81; *Henecker* v. *Bank of Montreal* (1895), R. J. Q. 7 S. C. at p. 262.

[85] (1903) R. J. Q. 12 K. B. 405.

[86] [1889] A. C. 367; at pp. 372-3. As to this case see, also, *supra*, p. 356.

What the Provinces can tax (continued).—Dominion licensees.—That the provinces can tax brewers licensed by the Dominion Government is established by the Privy Council decision in *Brewers and Maltsters Association of Ontario* v. *Attorney-General of Ontario*,[87] wherein they held, affirming the decision of the Ontario Court of Appeal,[88] that an Ontario Act requiring every brewer, distiller, or other person, though duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license fee therefor, was *intra vires*. So in *Fortier* v. *Lambe*,[89] the Supreme Court held *intra vires* a Quebec Act imposing a license fee on every trader doing business in Montreal by wholesale, or by wholesale and retail.

Similarly, in *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*,[90] again, the Privy Council point out (pp. 78-80) that matters which are substantially of local or private interest in a province "are not excluded from the category of matters of a merely local or private nature," because legislation dealing with them . . . may or must interfere with the sources of Dominion revenue and the indus-

[87] [1897] A. C. 231. Followed, *Rex* v. *Neiderstadt* (1905), 11 B. C. 347.

[88] January 14th, 1896, unreported. Their lordships followed their prior decision in *Regina* v. *Halliday* (1893), 21 O. A. R. 42.

[89] (1895) 25 S. C. R. 422. As to the distinction between wholesale and retail, see *supra*, p. 204, n., and *infra*, pp. 436-8.

[90] [1902] A. C. 73. See *supra*, pp 190-1.

trial pursuits of persons licensed under Dominion statutes to carry on particular trades."[91]

3. The borrowing of money on the sole credit of the Province.

4. Provincial offices and officers.

In 1887 the Ontario Government submitted to Sir Horace Davey and Mr. Haldane, for their opinion, the question whether a lieutenant-governor of a province in Canada has power to appoint Queen's Counsel; and whether a provincial legislature has power to authorize the lieutenant-governor to make such appointments. They advised that the appointment of Queen's Counsel is not a mere dignity or honour, but is the appointment to an office within this subsection, and that, therefore, a provincial legislature has power to authorize the lieutenant-governor to make such appointments for the purpose of the provincial Courts; and that, apart from this, under section 134 of the British North America Act, the Lieutenant-Governor of Ontario and Quebec can create Queen's Counsel for the purposes of the provincial Courts.[92] This has now been confirmed by the decision of the Privy Council in the Queen's Counsel case.[93]

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[91] That an imposition under a provincial Act under the name of 'interest' may be really a tax, see *Lynch* v. *Canada North-West Land Co.* (1891), 19 S. C. R. 204, *supra*, p. 274.

[92] See Appendix of Statutes and Orders in Council.

[93] *Attorney-General for the Dominion* v. *Attorney-General for Ontario (the Queen Counsel Case)*, [1898] A. C. 247. See, also, *Lenoir* v. *Ritchie* (1879), 3 S. C. R. 575, *supra*, p. 29; and Legislative Power in Canada, pp. 88-9, 133-5.

5. The management and sale of the public lands belonging to the province, and of the timber and wood thereon.[94]

In the *Fisheries* case,[95] the Judicial Committee say: "Whilst in their lordships' opinion, all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is not competent merely because it may have relation to fisheries. For example . . . the terms and conditions upon which the fisheries which are the property of the province, may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion parliament, may be conferred therein, appear proper subjects of provincial legislation, either under class 5 of section 92, 'the management and sale of public lands,' or under the class 'property and civil rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their lordships' opinion, intended to be within the scope of the class 'Fisheries' as that word is used in section 91."

In *Smylie* v. *The Queen*,[96] it was held that an Ontario Act making applicable to timber licenses the condition approved by Order-in-

[94] As to the distribution of the public property under the British North America Act, see *infra*, chapter xxix.

[95] *Attorney-General of the Dominion* v. *Attorney-General of the Provinces*, [1898] A. C. 700, at pp. 715-6.

[96] (1900) 31 O. R. 202, 27 O. A. R. 172.

Council, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and not, as contended, an infringement of the Dominion jurisdiction over trade and commerce, the Court pointing out that the legislature was dealing only with the public property of the province, and dictating the terms on which it might be acquired, and that No. 5 of section 92 gives the provincial legislatures exclusive jurisdiction over 'the management and sale of the public lands belonging to the province, and of the timber and wood thereon.'[97]

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions in the province.

General meaning of this clause.—A good deal of confusion and uncertainty at one time surrounded the interpretation of this provincial power owing to the view taken by many Canadian judges that it depended upon the municipal institutions which existed, or the powers which

[97] As to Indian lands, see *supra*, pp. 296-303; *infra*, pp. 710-721. As to the Dominion parliament authorizing expropriation of provincial Crown lands by Dominion railway companies, see *supra*, pp. 343-4.

were exercised by municipal corporations, in this, that, or the other province, before Confederation.[98] The Privy Council has, however, given a very simple and lucid explanation of it in the Liquor Prohibition Appeal, 1895,[99] by holding that it "simply gives provincial legislatures the right to create a legal body for the management of municipal affairs." And there had been premonitions of this view in what took place on the arguments before the Privy Council in two previous cases. Thus on the argument in *Hodge* v. *The Queen,* in 1883,[100] the following took place with reference to the contention that under this power, the provincial legislatures could regulate the sale of liquors:

J. W. Jeune: "The circumstance that the municipalities exercised the power before Confederation proves nothing."

Sir Robert Couch: "It does not show it was part of the municipal institutions."

Sir Robert Collier: "It is not a question of what they exercised before Confederation. We have only to deal with the statute."

And on the argument before the Judicial Committee in regard to the Dominion License Acts 1883 and 1884, Sir Farrer Herschel, as he then was, of counsel for the Dominion, discussing this, No. 8 of section 92, says:[101] "That cannot mean you may establish municipal bodies,

[98] For cases illustrating this, see Legislative Power in Canada, pp. 45-6, 59-61, 706, n. 1.

[99] *Attorney-General of Ontario* v. *Attorney-General of the Dominion,* [1896] A. C. at pp. 363-4.

[100] Dom. Sess. Papers, 1884, vol. 17, No. 30, at p. 67.

[101] The writer has had an opportunity of perusing a transcript of the Shorthand Notes of this argument.

and give them any and every power you please, or even give them every power which has ever been exercised by municipal bodies in Canada. The argument in the Court below was this: You find that some municipal bodies in some of the provinces of Canada before the Dominion Act have dealt with this question of the liquor traffic. Therefore when you give exclusive legislation with regard to municipal institutions, you give them exclusive power to create municipal bodies, and you give those municipal bodies, so created, exclusive power over this particular subject. My lords, I apprehend that that really is an argument that will not bear investigation, because, of course, the very object of this Act was to take away from the provincial legislatures some of the powers which they had before possessed, and to confer those powers upon the central Parliament, and, therefore, to say that they must necessarily have all the powers of legislation which before they could exercise through their municipal bodies is an argument which cannot be sustained. I should submit that the exclusive legislation in regard to municipal institutions enables them to create municipal institutions, and to give those municipal bodies any powers which come fairly within the subjects with which they are entitled to deal, but that unless you can find from some other provisions here that it is a subject with which they are entitled to deal, the power to create municipal institutions cannot give them the power to enable those municipal institutions to deal exclusively with a subject of legislation which is nowhere else exclusively committed to

them." Whereupon the Lord Chancellor observes that he would have thought that No. 8 of section 92 meant the creation of municipal institutions, how many they were to consist of, and how they were to be elected.

Provincial legislatures can delegate powers to municipalities.—In *Hodge* v. *The Queen*,[102] the Privy Council held that within the limits of section 92, provincial legislatures are supreme,[103] and can confide to a municipal institution or body of their own creation authority to make by-laws, or resolutions, as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect, saying: "It is obvious that such an object is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out may become oppressive, or absolutely fail."

And have all other necessarily incidental powers in respect to municipal institutions.—So Bain, J., says in *Schultz* v. *City of Winnipeg*,[104] that in giving provincial legislatures exclusive powers to make laws in relation to municipal institutions, power was, of course, given to make all such laws as would be reasonably necessary to establish, carry on, and work such institutions. Thus in *Reg. ex rel. McGuire* v. *Birkett*,[105] it was held that the provincial legislatures had power

[102] (1883) 9 App. Cas. 117, at p. 132.
[103] See *supra*, pp. 64-73.
[104] (1889) 6 Man. at p. 57.
[105] (1891) 21 O. R. at p. 162.

to invest the Master in Chambers at Toronto with authority to try controverted municipal election cases, for, as observed by MacMahon, J. (p. 173): "As the provincial legislature has the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections." No. 8 is here, of course, supplemented by No. 14, 'the administration of justice in the province;' and so, in *Clarke* v. *Jacques*,[106] it was held that by virtue of these two powers, the provincial legislature might regulate the matter of appeals in controverted municipal elections.

Discriminating against aliens.[107]—A British Columbia Act of 1900, whereby it was enacted that no Chinaman, Japanese, or Indian should be entitled to vote at any municipal election for the election of mayor or alderman, was allowed to go into operation, on the ground, apparently, that it was *intra vires* under section 92 of the Federation Act; and that the rights or privileges of the Japanese residents of British Columbia, if prejudicially affected, were not sufficiently so to warrant interference.[108] But in a despatch from the Colonial Office to the Foreign Office of August 8th, 1901, we find the opinion expressed that such an Act is *ultra vires;* and No. 24 of section 91 ('Indians and land reserved for Indians'), as well as item 25 ('naturalization and aliens'), is curiously enough referred to.[109]

[106] (1900) R. J. Q. 9 Q. B. 238.

[107] See *supra*, pp. 303-312.

[108] Provincial Legislation, 1899-1900, p. 139.

[109] *Ibid.*, p. 144. See *supra*, p. 388; and *infra*, p. 442.

Dominion power over municipal corporations.—In *In re Canadian Pacific R. W. Co. and County and Township of York*,[110] in connection with the Dominion power to compel municipalities to contribute to the cost of protecting railway crossings over federal railways,[111] Rose, J., says: "It must be borne in mind that when the parliament of Canada is legislating respecting any subject within its exclusive legislative authority, its jurisdiction and powers cannot be affected, limited, or controlled by any provincial legislation; it deals with the Dominion as a whole, irrespective of any territorial divisions, municipal or otherwise.[112] Therefore, if a provincial legislature sees fit to create a municipal corporation, and to vest in such corporation highways or lands, such legislation manifestly cannot prevent the parliament of Canada from dealing with such lands so vested in such corporation, and the corporation in which they are vested, in the same way and manner as if such lands had been in the hands of private citizens."

The cases, again, of *Hart* v. *Corporation of the County of Missisquoi*,[113] *Cooey* v. *Municipality of the County of Brome*,[114] and *Township of Compton* v. *Simoneau*,[115] suggest the possibility of powers and functions being conferred upon municipal corporations by the Dominion parlia-

[110] (1896) 27 O. R. 559, at p. 569.

[111] As to which see now *City of Toronto* v. *Canadian Pacific R. W. Co.*, [1908] A. C. 54; and *supra*, pp. 170-2.

[112] As to this, see *supra*, pp. 123-7.

[113] (1876) 3 Q. L. R. 170.

[114] (1872) 21 L. C. J. 182.

[115] (1891) 14 L. N. 347.

ment, in respect to matters not of provincial competency under the British North America Act. In *Cooey* v. *Municipality of the County of Brome*,[116] Dunkin, J., observes: "Each provincial legislature, alone, can create municipalities, properly so called, establish their functionaries, and assign them their proper duties and their powers, but always within the limits of its own. Whether or not it can render them incapable of other duties and powers to be delegated by Parliament, is a question that need not here be considered."[117] And in *In re Prohibitory Liquor Laws*,[118] Sedgewick, J., says: "Regulations made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects committed to it, such, *e.g.*, as weights and measures, the fisheries inspection, navigation, etc., give to municipal councils power to make by-laws." But it would seem from *Grand Trunk R. W. Co.* v. *City of Toronto*,[119] that the Dominion parliament cannot give new corporate powers to municipal corporations, or confer upon them capacities which

[116] 21 L. C. J. at p. 186.

[117] Under No. 8 of section 92, in conjunction with No. 14 ("the administration of justice in the province") the provincial legislature may provide for the trial of contested municipal elections: *Reg. ex rel. McGuire* v. *Birkett* (1891), 21 O. R. 162; *Crowe* v. *McCurdy* (1885), 18 N. S. 301; and regulate the matter of appeals therein: *Clarke* v. *Jacques* (1900), R. J. Q. 9 Q. B. 238.

[118] (1885) 24 S. C. R. at p. 247. Mr. Clements cites the Canada Temperance Act as one example of powers conferred and duties imposed upon municipalities by federal law (Law of Canadian Constitution, 2nd ed., p. 265, n. 4.)

[119] (1900) 32 O. R. 120, 125.

the provincial legislation has not given them, *e.g.*, the legal capacity to acquire and make new streets across Dominion railways.[120]

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

'Other licenses.' — Privy Council decisions have now removed several points of uncertainty in respect to the proper construction of this subsection, and the scope of the power by it conferred on provincial legislatures. To begin with, many judges in our own Courts,[121] though not all,[122] had felt themselves constrained to interpret 'other licenses' by the rule of *ejusdem generis*. In *Russell* v. *The Queen*,[123] however, the Judicial Committee indicated that, in their view, these words did not refer only to licenses

[120] See, however, *supra*, pp. 354-5. As to Dominion Companies, incorporated under the enumerated classes of powers in section 91, being exempt from municipal control in respect to the exercise of their charter powers, see *supra*, pp. 339-343.

[121] For cases, see Legislative Power in Canada, pp. 27, n. 1; 726, n. 2. To the cases there referred to may be added *City of Halifax* v. *Western Assurance Co.* (1885), 18 N. S. 387.

[122] For cases, see *ibid.* In *Lee* v. *de Montigny* (1899), R. J. Q. 15 S. C. 607, Langelier, J., held that a provincial Act authorizing the City of Montreal to require laundries to take out a license was *intra vires*, resting the right, erroneously as it is, with deference, submitted, on No. 8 of section 92, as relating to municipal institutions. See *supra*, pp. 426-9. In *Re Foster and Township of Raleigh* (1910), 22 O. L. R. 26, 342, a provincial Act exacting payment of an annual license fee for keeping billiard tables for hire was held valid.

[123] (1882) 9 App. Cas. 829.

ejusdem generis as the shop, saloon, tavern, and auctioneer licenses expressly mentioned (if indeed these can be comprised within any one genus), for they speak there *obiter* of "licenses granted under the authority of sub-section 9, by the provincial legislature, for the sale or carrying of arms." And in the *Fisheries* case,[124] they speak of provincial legislatures being able to impose the obligation of obtaining a license, as a condition of the right to fish, in order to raise a revenue for provincial purposes.[125] Finally, in the *Brewers and Maltsters Association* case,[126] going beyond what was absolutely necessary to dispose of the appeal, they say: "Their lordships were not satisfied by the argument of the learned counsel for the appellants that the license which the enactment renders necessary" (*sc.* a license on brewers and distillers to sell wholesale within the province), "is not a license within the meaning of sub-section 9 of section 92. They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include 'shop, saloon, tavern, and auctioneer' licenses, and which would exclude brewers' and distillers' licenses;" and thus they destroy the authority of *Severn* v. *The Queen*,[127] upon the one point on which, if any, its authority remained unimpaired.[128]

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[124] [1898] A. C. 700.

[125] And see *International Text Book Co.* v. *Brown* (1907), 13 O. L. R. 644.

[126] [1897] A. C. 231.

[127] (1878) 2 S. C. R. 70.

[128] A provincial legislature, legislating to prevent the sale of intoxicating liquor without a license, may prohibit within de-

Taxation by license is direct taxation. — Again some judges in Canadian Courts had expressed the view that taxation by means of licenses under this sub-section was indirect taxation,[129] whereas, as has been already pointed out, in the *Brewers and Maltsters Association* case, the Privy Council has decided that it is direct taxation, within No. 2 of section 92.[130] With deference, it is submitted that the probable explanation of the sub-section under consideration is that it was intended by it to authorize the provinces to raise a revenue by the licenses referred to, although some doubt might exist as to whether this was not indirect taxation.[131] And that provincial legislatures must not, under colour of licenses, tax indirectly, is declared by the judgment of the Privy Council, in *Attorney-General of Quebec* v. *Queen Insurance Co.*,[132] where it was held that a certain Quebec Act, entitled 'An Act to compel assurers to take out a license,' and which purported to be, on the face of it, an exercise of the power conferred by No. 9 of section 92, was not, in substance, a license Act at all, but a simple Stamp Act on policies, and was indirect taxation,

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fined areas the sale of any liquid containing any alcohol at all, even though not in intoxicating quantities: *The King* v. *Bigelow* (1907), 41 N. S. 499.

[129] See Legislative Power in Canada, p. 361, n. 2.

[130] *Supra*, pp. 394-6.

[131] And so per Spragge, C.J., in *Regina* v. *Frawley* (1882), 7 O. A. R. at p. 264; per Maclaren, Q.C., *arguendo* in *In re Prohibitory Liquor Laws* (1895), 24 S.C. R. at p. 179; per Davey, Q.C., *arguendo* in the Matter of the Dominion License Acts, 1883-4: Transcript from Marten and Meredith's Shorthand Notes, at pp. 126, 131.

[132] (1878) 3 App. Cas. 1090.

and *ultra vires*. As a matter of fact, the Act did not compel the supposed licensee to take out, or pay for, a license, but merely provided that 'the price of such license' should consist of an adhesive stamp to be paid in respect to each transaction, not by the licensee, but by the person who dealt with him. And in the *Brewers and Maltsters Association* case, their lordships say: "If the legislature were under the guise of direct taxation, to seek to impose indirect taxation, nothing that their lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise."

Applicable to wholesale as well as retail businesses.—Again it had been held by the Supreme Court,[132] that this power of taxing by way of licenses did not authorize a provincial legislature to impose a license fee on brewers, though, of course, it did a tax upon retail shop, saloon, and tavern keepers. And in several provincial Courts, judges had expressed the view that wholesale trade had a quasi-national, rather than municipal character, and comprised the trade and commerce of the country in some fuller sense than the retail trade; and that, thus, a line of cleavage between Dominion and provincial powers was to be found in the distinction between wholesale and retail trade.[134] But in *The Queen* v. *McDougall*,[135] Townshend, J., relying on the decision of the Judicial Committee in the Matter of the

[132] *Severn* v. *The Queen* (1878), 2 S. C. Rr 70.
[134] See Legislative Power in Canada, p. 727, n. 3.
[135] (1889) 22 N. S. at p. 491.

Dominion License Acts, 1883-4,[136] says: "The distinction between wholesale and retail so far as making it a test of the respective powers of the two legislatures under the British North America Act, has been abandoned;"[137] for the Board there found that nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions in question dealt in wholesale quantities, and not in retail quantities.[138] And in the Liquor Prohibition Appeal, 1895,[139] they, in like manner, draw no distinction whatever between the sellers of liquors in wholesale quantities, and other sellers, and say of the Canada Temperance Act, 1886: "They draw an arbitrary line at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions." And now, as we have seen,[140] in *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*,[141] their lordships have held that the license fees imposed by the Ontario Act before them being direct taxation, the Ontario legislature had power to impose them, although those affected were wholesale dealers, selling by wholesale being defined by the Act, as selling in

[136] Cas. Dig. S. C. 509.

[137] And so in *Regina* v. *Halliday* (1893), 21 O. A. R. at p. 44, Boyd, C., says that the regulation of the liquor traffic, both wholesale and retail, must now be considered to be a matter of provincial competence.

[138] See further as to the matter of the Dominion License Acts, 1883-4; Legislative Power in Canada, pp. 403-6, 727-9.

[139] [1896] A. C. 348, at pp. 367-8.

[140] *Supra*, pp. 394-6.

[141] [1897] A. C. 231.

quantities of not less than five gallon casks, or one dozen bottles, etc., the distinction between wholesale and retail trade being treated, as has always been usual in our statutes and judicial utterances, as depending on the quantity sold."[146] Thus, as in the matter of the Dominion Liquor License Acts, 1883-4, where the object of the legislation was mainly regulation of the liquor traffic, so in the *Brewers and Maltsters Association* case, when the main object of the Act before them was to raise a revenue for provincial purposes, the Privy Council finds nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions dealt in wholesale quantities, and not in retail quantities.

'**In order to the raising of a revenue.**'—The licensing power under sub-section 9, is thus restricted; as has been called attention to in many judgments. Thus in *Severn* v. *The Queen*,[147] Strong, J., says: "The imposition of

[146] What would seem the more essential difference between wholesale and retail trade, namely, that the wholesale merchant supplies the trade, whereas the retailer deals directly with the general public; and whether any line of severance of legislative power can be founded on this distinction, does not appear to have been discussed in any of the cases, except so far as the wholesale merchant in this sense may be identified with the manufacturer, as to whom, in the Liquor Prohibition Appeal, 1895, just referred to, the Privy Council expressed the opinion (at p. 371), that under certain circumstances the provincial legislatures might have power to control his business in the absence of conflicting legislation by the parliament of Canada. They do not hold that the mere fact that he is a wholesale manufacturer, and not a retail dealer, determines under which legislative jurisdiction he falls.

[147] (1878) 2 S. C. R. at pp. 108-9.

licenses authorized by this sub-section 9 of section 92 is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the provincial legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be pronounced *extra vires.*'"[144] And so in *Russell* v. *The Queen*,[145] their lordships say: "It is to be observed that the power of granting licenses is not assigned to the provincial legislatures for the purpose of regulating trade, but in order to the raising of a revenue for provincial, local, and municipal purposes."

Licenses as a method of police regulation.—But, quite apart from No. 9 of section 92 of the Federation Act, there seems nothing to prevent provincial legislatures imposing the necessity of obtaining licenses, as a method of police regulation.[146] And so in *O'Dunaher* v. *Peters*,[147] where the New Brunswick Liquor License Act, 1887, was held *intra vires* in imposing the necessity of taking out a license on wholesale sellers of liquor, no mention is made of No. 9 of section 92 at all, but it would seem that the Act was viewed in the light rather of police regulation. And in *Hamil-*

[144] For other like citations, see Legislative Power in Canada, p. 376, n. 3.

[145] (1882) 7 App. Cas. 829.

[146] As to which, see *infra*, pp. 580-627; *supra*, pp. 206-9.

[147] (1889) 17 S. C. R. 44.

ton Powder Co. v. *Lambe*,[148] a Quebec Act requiring those who stored, or kept, gunpowder in any building, to take out a license under a penalty was upheld as being in the nature of a police regulation, and not as coming within No. 9 of section 92. And in *O'Dahaher* v. *Peters*, Taschereau, J., remarks: "Whether he" (the defendant) "sold wholesale or retail is immaterial, it is not because he sold a large quantity that he can claim to have the action against him dismissed;" and Patterson, J., says: "The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without a license, cannot now be treated as an open question." And so there would seem no doubt, in accordance with what has already been said as to the distinction between wholesale and retail trade, that, as under the American decisions cited by Ritchie, E.J., in *Keefe* v. *McLennan*,[149] so in Canada, the power of police regulation extends to wholesale trade, though in *Severn* v. *The Queen*,[150] Strong, J., expressed the view, apparently concurred in by Ritchie, and Taschereau, JJ.,[151] though a point not necessary to be decided for the disposition of the case, that the wholesale trade in liquor is not a proper subject of police regulation, though the retail trade of course is.

[148] (1885) M. L. R. 1 Q. B. 460. See, also, *City of Montreal* v. *Walker* (1885), M. L. R. 1 Q. B. at p. 472.

[149] (1876) 2 R. & C. at p. 12.

[150] (1878) 2 S. C. R. at pp. 105-6.

[151] *Ibid.*, at pp. 100-2, 115. See, also, per Strong, J., in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at p. 204.

Not restricted to ante-Confederation licenses. —Some judges have favoured the view that, in taxing by means of licenses under No. 9 of section 92, provincial legislatures are confined to licenses of the same kind as those in existence in the provinces before Confederation.[152] The difficulties of such methods of interpretation of the powers conferred by the British North America Act, have, however, already been pointed out.[153] And the weight of authority seems clearly in favour of the view expressed by Strong, J., in *Severn* v. *The Queen*,[154] who referring to the judgment of Richards, J., in that case, and in *Slavin* v. *Village of Orillia*,[155] says: "I am unable to accede to the doctrine that we are to attribute to the words 'other licenses'" (*sc.* in No. 9 of section 92), "the same meaning as though the expression had been 'such other licenses as were formerly imposed in the province,' or equivalent words. The result of such a construction would be that the same words would have a different meaning in different provinces, and that the several provincial legislatures would have different powers of taxation, though the power is included in the same grant . . I cannot think this was the intention of the Imperial parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every

[152] See *Slavin* v. *Village of Orillia* (1875), 36 U. C. R. at p. 176; per Richards, C.J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 87; *Keefe* v. *McLennan* (1876), 2 R. & C. at p. 12. And see Legislative Power in Canada, at pp. 44-49.

[153] *Supra*, pp. 15-16.

[154] (1878) 2 S. C. R. at p. 109.

[155] (1875) 36 U. C. R. 159.

particular, were conferred by the Act on the provinces,[156] and I know of no principle of interpretation which would authorize such a reading of the British North America Act as that proposed."[157] And so in the course of the argument in the *Brewers and Maltsters Association* case,[158] Lord Herschell observed: "There is very great difficulty in construing section 92, which applies to all the provinces, and saying that the powers of the provincial legislature would differ according to what had been done by the provinces prior" to Confederation.[159]

Discriminating against aliens.—In 1900 the British Columbia legislature passed an Act whereby Mongolians and Indians were excluded from those who might sign petitions for liquor licenses, which, though objected to, was not disallowed by the Dominion Government, on the ground, apparently, that it was *intra vires* under section 92 of the Federation Act, and that the rights or privileges of the Japanese residents of British Columbia, if prejudicially affected, were not sufficiently so to warrant interference.[160]

[156] See *supra*, pp. 159-160.

[157] It must be admitted, so far as Strong, J., is concerned, that in *Huson* v. *Township of South Norwich* (1895), 24 S. C. R. at pp. 150-1, he withdrew from the position he took up in the above passage, and says:—"These observations were not material to the judgment I then gave, which was founded entirely on the 9th sub-section of section 92, and I have now come to the conclusion that they were not well-founded."

[158] [1897] A. C. 231. Manuscript transcript of Marten, Meredith and Henderson's Notes, p. 80.

[159] As to the power of provincial legislatures to require extra-provincial companies to take out licenses before doing business in the province, see *supra*, pp. 373-7.

[160] Provincial Legislation, 1899-1900, at pp. 134-138. And see *supra*, p. 430.

The Dominion, also, can tax and regulate by way of license.—It is, almost, unnecessary to cite authority for the proposition that the Dominion parliament can also tax by way of license. However, in the *Fisheries* case,[161] their lordships say: "In addition to the legislative power conferred by the 12th item of section 91 ('Sea Coast and Inland Fisheries'), the 3rd item of that section confers upon the parliament of Canada the power of raising money by any mode or system of taxation. Their lordships think it is impossible to exclude, as not within this power, the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of section 92, the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes, but this cannot, in their lordships' opinion, derogate from the taxing power of the Dominion parliament, to which they have already called attention. Their lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter, and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislature concerned."[162] Again,

[161] *Attorney-General for the Dominion* v. *Attorney-General for the Provinces*, [1898] A. C. at pp. 713-4.

[162] See, also, as to both the Dominion parliament and the provincial legislatures having power to tax by way of license: per Ritchie, C.J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 101; per Taschereau, J., in *Angers* v. *The Queen Insurance Co.*, (1877), 16 C. L. J. N. S. at pp. 204-5.

the liquor trade is as much part of the trade and commerce of the country as any other trade, and, therefore, it must be within the power of the Dominion parliament to regulate it, in any manner, and in any degree, which comes within the meaning of No. 2 of section 91 of the British North America Act, 'the regulation of trade and commerce;' and notwithstanding some dicta to the contrary,[163] it seems equally clear that the Dominion parliament in so regulating might do so by means of licenses. Indeed, as Hagarty, C.J.O., observes in *In re* Local Option Act,[164] the Canada Temperance Act, 1878, which the Privy Council held to be *intra vires* of the Dominion parliament in *Russell* v. *The Queen*,[165] itself contemplated the issuing of licenses to brewers and distillers and manufacturers of native wines. And so in the course of the argument before the Judicial Committee in the matter of the Dominion License Acts,[166] Sir Baines Peacock observes: "You could not say that the Parliament could not create a criminal offence for selling liquors without a license in the same way as they might create a similar offence for carrying arms without a license, or manufacturing dynamite without a license." As Palmer, J., says in *Ex parte Donaher*,[167] "constitutional limitations

[163] As per Fournier, J., in *Molson* v. *Lambe* (1888) 15 S. C. R. at p. 265. See, also, per Ritchie, C.J., S. C. at p. 259, and per Cartwright, Q.C., *arguendo* in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at p. 188.

[164] (1891) 18 O. A. R. at p. 580.

[165] (1882) 9 App. Cas. 829.

[166] Transcript from Shorthand Notes of Marten & Meredith at p. 140.

[167] (1888) 27 N. B. at p. 590.

look only to results, and not to the means by which results are reached."

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

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

(b) Lines of steamships 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.

As concerns the sub-divisions (*a*), (*b*) and (*c*) of this sub-section, being the exceptions to the general provincial power in respect to local works and undertakings, these have been fully dealt with under No. 29 of section 91.[168] It remains to note the authorities bearing upon the power to make laws in relation to local works and undertakings not within these excepted classes.

Provincial power to authorize construction of a railway to the limit of a province.—No doubt, as Garrow, J.A., says in *City of Toronto*

[168] See *supra*, pp. 337-383. As to the Dominion power to withdraw local works and undertakings from provincial jurisdiction, see *supra*, pp. 364-371. As to the Dominion power to control crossings by provincial railways of Dominion railways, see *supra*, pp. 350-353.

v. *Bell Telephone Co.*,[169] speaking of sub-division (*a*) of the clause under consideration: "The moment it appears in the application for a charter, or special Act, that the projected works or undertakings will, when constructed, extend beyond the provincial boundaries, they take their place beside railways, canals, ships, etc., having similar extra-provincial *termini;* and at once become subjects of exclusive Dominion jurisdiction." But the question arises whether a provincial legislature can authorize the construction, or operation, of such works and undertakings as railways, or electric light and power transmission lines, or telephone lines, extending to the provincial boundary. The *European and North American R. W. Co.* v. *Thomas*,[170] brought up this question. There a railway company had been incorporated by a New Brunswick Act, passed prior to Confederation, for the purpose of constructing a railway from St. John to the boundary of the United States, and its charter of incorporation was amended after Confederation by a further provincial Act which it was contended was *ultra vires,* because the railway was a part of a scheme for a continuous railway extending through the province into the State of Maine. The Supreme Court of New Brunswick, however, held, that it was *intra vires* under section 92, No. 10, of the British North America Act, Ritchie, C.J., observing: "We think we have no right to look to the intentions, or anticipations, or doings, of parties outside the provincial

[169] 6 O. L. R. at p. 343. In App. [1905] A. C. 52.

[170] (1871) 1 Pugs. 42.

legislature, either in the State of Maine, or in the province of New Brunswick, and that the intention of the legislature as expressed in the Act, alone can control us—that the fact of the legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own legislature to legislate on, and deal with, railway undertakings, provided always such railways do not connect the province with any other or others of the provinces, nor extend beyond the limits of the province. This is the simple question, and all we have to consider in determining on the validity of the Act."

In *Hewson* v. *Ontario Power Co.*,[m] however, where a question arose, although not material to the decision of the case, as to whether a provincial legislature could grant an electric power company the right to connect its wires with those of United States companies—Davies, J., with whom Sedgewick, J., expressed concurrence, says as to this (p. 608): "It seems clear to me that the legislature could not grant a local company power to connect its wires with those of a local company in any of the other provinces. If it could, each company would cease to be one of a 'local or private nature,' and become interprovincial and general. How then could the legislature grant power to connect the wires of the company it was creating with those of the companies of a foreign country? The local or private company, on such connection taking

[m] (1905) 36 S. C. R. 596, 8 O. L. R. 88, 6 O. L. R. 11.

place, would at once cease to be 'local or private' within the British North America Act, 1867, and become international. It was agreed that the province has as much right to confer powers beyond its jurisdiction upon the corporation it calls into existence, as the Dominion parliament has beyond Canada. In a certain sense that may be true. But there is a difference and a rational one too. Provincial charters are defined by the British North America Act, 1867, as matters of a local or private nature not connecting the province with any other or others of the provinces, and 'not extending beyond the limits of the province.' Dominion charters are not controlled by any such statutory limitations, and while the exercise of the powers they confer upon a company of connecting at the international boundary line with the works of a foreign company may be subject to the municipal law of that country, and permitted and controlled by the comity of nations, there is no statutory prohibition in the British North America Act preventing the granting of the power by the Canadian parliament to a company it incorporates to connect with a company of the United States at the boundary line." But it seems necessary to point out that No. 10 of section 92 does not speak of undertakings of a 'local and private nature,' as the learned judge appears to imply, but simply of 'local works and undertakings'; and, furthermore, it distinctly implies that the classes indicated by (*a*) and (*b*), are within what it means by 'local works and undertakings,' although they are inter-provincial or extend beyond the limits of the province, and although

they are excepted out of the general provincial power, over 'local works and undertakings.' So far, in other words, as the part located within the province is concerned, they may be considered local works and undertakings; but the province cannot make laws in relation to them. The learned judge seems to have had in his mind the form of expression in No. 16 of section 92, 'matters of a merely local or private' nature in the province.

However, in *Dow* v. *Black*,[172] the Supreme Court of New Brunswick held *ultra vires* a provincial Act empowering the majority of the inhabitants of a parish in New Brunswick to raise by local taxation a subsidy designed to promote the construction of a certain railway extending beyond the limits of the province into the State of Maine, but already authorized by statute prior to Confederation, upon the ground that it was legislation in relation to a local work or undertaking extending beyond the limits of the province within No. 10 (*a*) of section 92. The judgment of the Privy Council on appeal in this case[173] does not help us, because they took quite a different view of the nature of the Act in question, holding it valid as direct taxation under No. 2 of section 92.[174] But Ministers of Justice have repeatedly questioned the competency of a province to authorize the construction or operation of a railway to the boundary line of a province, or having its two *termini* upon the bound-

[172] (1873) 14 N. B. 300, *sub nom. The Queen* v. *Dow.*
[173] (1875) L. R. 6 P. C. 272.
[174] See *supra*, p. 400.

ary, though abstaining from disallowance, and leaving the matter to the determination of the Courts. Thus in a report of January 5th, 1901, in reference to certain British Columbia statutes, the Minister of Justice quotes the exception No. 10 (*a*) and says: "In view of the fact that the works and undertakings with regard to which a province may legislate must be local, and having regard to the exception quoted, it seems questionable to the undersigned whether it is competent to the province to authorize the construction or operation of a railway to the boundary line of a province, or having its two *termini* upon the boundary. The undersigned does not on that account recommend the disallowance of these statutes, but he commends the matter to the consideration of the provincial government, and the companies concerned, leaving the question to the determination of the Courts, if necessary."[178]

And when in 1901, the British Columbia legislature assumed to confer authority upon the Crow's Nest Southern Railway Company to construct, and operate, railways connecting a point upon the boundary between British Columbia and the United States, with two points upon the boundary between British Columbia and the North-West Territories, the Minister of Justice, in a report of September 19th, 1901, observes that the power of a provincial legislature to authorize such works depends upon the interpretation of No. 10 of section 92 of the British North America Act, and upon "whether upon the fair construction of all the provisions of sections 91

[178] Provincial Legislation, 1899-1900. p. 138.

and 92 of that Act, a provincial legislature can be held to have authority to provide for the construction and operation of railways running through the province, and connecting the United States with the province, and the other portions of the Dominion." He continues: "It would seem to be certain that if the lines of railways in question occupied the same relation to two provinces of the Dominion which they do to the United States and the North-West Territories, the Act would be *ultra vires*, but the United States is a foreign country, and the North-West Territories are not a province, so that these undertakings do not fall within the letter of the express exception above quoted" (*i.e.*, that in item 10 (*a*) of section 92). "It is doubtful, however, whether works making such connection can be considered local in their character, and, therefore, within the power conferred. It is observed, also, that Parliament is given exclusive power to legislate with regard to ferries between a province, and any British or foreign country, or between two provinces; that lines of steamships between any British or foreign country are excepted from provincial power, and having regard to the intention and scope of the section defining the respective authority of Parliament and the legislatures, it would seem to be anomalous that a legislature should authorize the construction of lines of railway such as those in question. Similar objections have heretofore been stated with regard to provincial railways touching the international or provincial boundaries, but it has not been considered in such cases that the public interest demanded disallow-

ance, because of the facilities afforded for raising these questions in the Court where they may be judicially determined."[116]

Perhaps, in view of this state of the authorities, and in spite of the fact that it seems to have become a sort of tradition in the Department of Justice, to object to provincial Acts authorizing the construction of a railway to the boundary line of a province, it may be here submitted, with all proper deference, that such Acts are *intra vires;* and the same would, of course, apply to Acts authorizing the construction of canals, telegraphs, telephones, or electric power transmission lines to the boundary of the province. The plenary powers of provincial legislatures are not to be restricted by construction,[117] save so far as is necessary to allow for the enumerated Dominion powers under section 91;[118] and what Nos. 10 (*a*) and (*b*) of section 92 except from provincial power, and No. 29 of section 91 places under Dominion power, are such lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings as themselves connect the province with any other or others of the provinces, or extend beyond the limits of the province: and if the local work or undertaking comes to an end at the boundary, it cannot be said to do this; although the connection or exten-

[116] Provincial Legislation, 1901-1903, p. 58. See also report of November 24th, 1902, on statutes of New Brunswick, and report of December 31st, 1901, on statutes of Manitoba: Provincial Legislation, 1901-1903, pp. 34, 36; also report April 29th, 1909, on Saskatchewan Statutes.

[117] See *supra*, pp. 64-74.

[118] See *supra*, pp. 112-118; 315-6; 389.

sion may be made by another work or undertaking which meets it at the boundary.

Interference with Dominion lands. — We have seen that the Dominion parliament can authorize a federal railway company to expropriate and cross provincial Crown lands,[179] but it by no means follows that a provincial legislature could, quite apart from any question of Dominion veto, authorize a provincial railway company to expropriate and cross Dominion Crown Lands. No. 1 of section 91, which gives the Dominion parliament the exclusive power to make laws in relation to 'the public debt and property,' coupled with the *non obstante* clause of that section, would certainly seem to forbid this. And so in his report of July 4th, 1887,[180] with reference to a Manitoba Act respecting the Red River Valley railway, by which power was given to appropriate so much of the public lands as should be deemed necessary for the purposes of the railway, the late Sir John Thompson pointed out that the public lands of Manitoba were, for the most part, and with the exception of those especially transferred to the province, vested in Her Majesty, in the right of the Dominion; and stated that it was not competent for the legislature of that province to authorize any one to enter upon, and to appropriate for any purpose, the lands so vested in Her Majesty in right of the Dominion, and accordingly recommended the disallowance of the Act, which was disallowed accordingly.[180a]

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[179] *Supra*, pp. 343 4.

[180] Hodgins' Provincial Legislation, 1867-1895, at pp. 855-6.

[180a] As to public lands in Manitoba now, see *infra*, p. 708, n.

Power to legislate as to bonds of provincial railways held by persons domiciled abroad.—In *Jones* v. *Canada Central R. W. Co.*,[181] Osler, J., held that, though a debenture bond of an Ontario railway company might, when the holder resided in England, be properly held to be a debt domiciled out of the province, and so not within the provincial jurisdiction to affect under No. 13 of section 92, 'property and civil rights in the province'; yet that the company in question, being a local work or undertaking within the meaning of subs. 10 of section 92, such provincial legislature had jurisdiction to legislate in respect to such a debt in carrying out by statute a scheme for the financial re-organization of the company; and that its powers were not paralyzed merely because some or all of the debts payable were payable to creditors resident outside of the province: and, therefore, not property or civil rights in the province. He says,[182] somewhat vaguely: "It is well settled that the Dominion parliament may legislate with respect to property and civil rights within the province where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters exclusively within their own legislative authority. If the powers conferred upon the provincial legislatures are to be effectually exercised, they must, I think, receive a not less liberal construction." To be a little more precise, it is to be observed that to make laws in rela-

[181] (1881) 46 U. C. R. 250.

[182] At p. 260. *Cf.* per Savary, Co.J., in *In re Killam* (1878), 14 C. L. J. N. S. p. 242. See, also, now, *Royal Bank of Canada* v. *The King*, [1913] A. C. 283; *infra*, p. 504.

tion to debenture bonds of provincial railway companies which are held and owned abroad does not appear to come within any of the enumerated classes of Dominion subjects in section 91, but would, perhaps, be within the power of the Dominion parliament, under its general residuary power of legislation:[183] but so far from this residuary power of legislation residing in the Dominion, 'notwithstanding anything assigned to the province,' we have seen[184] that exactly the reverse is the case, namely, that that power is given only in relation to matters not coming within the classes of subjects assigned exclusively to the provinces; and, therefore, the provinces might be held to have power when legislating on one of the classes of subjects enumerated in section 92, incidentally to invade this area, although, as has already been stated,[185] there seems no authority going so far as to impute to the provinces the right actually to invade Dominion territory comprised in the enumerated subjects for the purpose of provisions ancillary to one of their own Acts.

Power to impose condition of Sunday Observance.—In *Kerley* v. *London and Lake Erie Transportation Co.*,[186] Boyd, C., says: "As I read the opinion given upon the special case in 35 S. C. R." (*sc.* in *In re Legislation respecting Abstention from Labour on Sunday*),[186a] "the

[183] See *supra*, pp. 91-4; 99-101.

[184] See *supra*, pp. 89-94; 140-3.

[185] *Supra*, pp. 180-3.

[186] (1912) 26 O. L. R. 588.

[186a] 35 S. C. R. 581. See *supra*, p. 322, n.

Court intimates that a province has no power to restrict the operation of companies of their own creation to six days in each week, because that restriction seems to be within the views expressed in the Privy Council,[187] and to be regarded as a matter of criminal law, *ultra vires* of the province. See pp. 582 and 592 in answer to question 5. This point, in this limited way, as to purely provincial corporations was not before the lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the judges of the Supreme Court, I cannot regard the opinion expressed on this head, as a judgment binding on me, nor can I accept it as the law. I fail to see why the province may not legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days in the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed, or an accepted, salutary rule of conduct imposed for the benefit of the workmen, and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? . . . Here is no general criminal intent, but the incorporation of a local concern, over which the province has plenary power of legislation, covering all things and conditions considered expedient and desirable by the incor-

[187] So, in *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524; as to which case, see *supra*, pp. 321-2.

porating power . . . The power to legislate as to the Lord's Day by the provincial law-makers, as to railways subject to their legislative authority, is recognized in the Dominion Lord's Day Act, R. S. C. 1906, c. 153, sec. 3 (2).[188] . . . The late decision of the Supreme Court on Sunday law in *Ouimet* v. *Bazin*,[189] is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the province has constitutional power and competence." And so he says of Ontario legislation, enacting that no company operating an electric railway shall operate the same, or employ any person thereon, on Sunday, subject to certain exceptions,—" the legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the province;" and he holds it to be *intra vires*.[190]

Restriction on employment of aliens.—It is very apposite in connection with the *dicta* of

[188] See *supra*, pp. 362-4.

[189] (1912) 46 S. C. R. 502.

[190] This judgment has now (May 5th, 1913) been reversed by the Appellate Division, which, however, does not find it necessary to deal with the constitutional point, but proceeds entirely upon the ground that the provincial legislation in question does not apply to the defendant company, which had been incorporated by Dominion Act, and the incorporation of which was exclusively of Dominion competence, in addition to the fact that the incorporating Act specially declared it to be a work for the general advantage of Canada. The judgment of the Appellate Division will be reported in Vol. 28 O. L. R.

Boyd, C., in the above case of *Kerley* v. *London and Lake Erie Transportation Co.*,[191] to refer to the attempts which have been made, recently, in British Columbia to attach to the incorporation or subsidizing of provincial railways the condition that no Chinese or Japanese shall be employed thereon. Thus in 1900 the British Columbia legislature passed an Act granting a subsidy to a certain railway, but providing that no Chinese or Japanese should be employed or permitted to work in the construction or operation of the railway, under a penalty, and the Act was disallowed by the Governor-General in Council.[192]

In the same session the British Columbia legislature passed a number of Acts incorporating railway companies, and other companies, each of which contained a provision, in effect, that Chinese or Japanese persons should not be employed by the company. The Attorney-General of British Columbia in a report, approved on Feb. 8th, 1900, defended these Acts on the ground that "all that is sought to be attained by the legislation in question is that Chinese or Japanese persons shall not be allowed to find employment on works the construction of which has been authorized, or made possible of accomplishment, by the granting of certain privileges or franchises by the legislature. It will, therefore, be seen that the restrictive provisions are merely in the nature of a condition in agreements or contracts between the provincial Government and

[191] (1912) 26 O. L. R. 588.

[192] Provincial Legislation, 1899-1900, pp. 104, 123.

particular individuals, or companies, whereby certain privileges, franchises, concessions, and, in some cases, also subsidies and guarantees, are granted to such individuals or companies in consideration of only white labour being employed in the works which are the subject-matter of such agreements."[193] By a report of April 12th, 1900, the Minister of Justice, while refraining from disallowance, says that he is of the opinion that the above provisions are *ultra vires* of the provincial legislature as affecting aliens, and adds a hint that the same indulgence must not be expected in future.[194]

The same Minister, however, speaks much more positively as to such legislation being *ultra vires* in a report of Sept. 19th, 1901, where, referring to a British Columbia Act to incorporate the Crow's Nest Southern R. W. Co., he says: "Section 23 of the Act provides that 'no alien shall be employed on the railway during construction, unless it be demonstrated to the satisfaction of the Lieutenant-Governor in Council that the work cannot be proceeded with without the employment of such aliens.' This provision is manifestly *ultra vires,* and, therefore, harmless; and inasmuch as the undersigned has come to the conclusion that he ought not to recommend disallowance for the other reasons stated in this report, he does not consider it expedient to do so because of the obvious invalidity of this provision relating to aliens.[195]

[193] Provincial Legislation, 1899-1900, p. 112.

[194] *Ibid.*, pp. 122-3.

[195] Provincial Legislation, 1901-3, p. 58.

Finally, by a report of December 27th, 1901, the Minister takes the decisive step of recommending the disallowance, unless amended in time, of a number of British Columbia Acts incorporating railway companies which contained a provision, in effect, the same as that referred to in his report of September 19th, 1901, just mentioned, saying: "The subject of aliens is clearly within the exclusive authority of Parliament. Immigration is also within Dominion jurisdiction, and it has been, and is, the policy of your Excellency's Government to promote immigration, large sums of money being annually expended from the Dominion Treasury to that end. The efforts of your Excellency's Government would, however, be certainly paralyzed if the immigrant, upon coming to Canada, is to find the way of employment closed to him by provincial legislation. The policy of these enactments is so contrary to that of your Excellency's Government, and the enactments themselves so manifestly *ultra vires*, that the undersigned considers that no course is open to your Excellency's Government, consistently with the public interest, but the exercise of the power of disallowance, unless, indeed, the provincial legislature repeal these provisions."[196] Disallowance, however, became unnecessary as the provincial government agreed to make the necessary amendments.[197]

Provincial corporations subject to Dominion laws.—Provincial corporations are, of course,

[196] Provincial Legislation, 1901-1903, p. 64.

[197] *Ibid.*, pp. 74-75. See *supra*, pp. 48-9.

just as subject to Dominion laws, validly enacted, as individuals are. Thus in *Schoolbred* v. *Clarke*,[198] Patterson, J., says: "The body politic created by any provincial Act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of subjects over which exclusive legislative jurisdiction is given to the parliament of Canada, as well as others in relation to which the Parliament may make laws for the peace, order, and good government of Canada, the legislation in which must govern all corporate bodies, as well as natural bodies, for example, interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency." Conversely with a corporation created by Act of the old province of Canada, in *Hamilton Powder Co.* v. *Lambe*,[198a] the Quebec Court of Queen's Bench decided that such a company though incorporated with the power to manufacture and sell gunpowder, was, nevertheless, subject to be interfered with as to the privileges so conferred upon it and hitherto enjoyed, by provincial legislation after Confederation requiring it to take out a license as a matter of police regulation in connection with its business.

11. The incorporation of companies with provincial objects.

This clause of section 92 of the British North America Act is concerned with the

[198] (1890) 17 S. C. R. at p. 274. And see *St. Francois Hydraulic Co.* v. *Continental Heat and Light Co.*, [1909] A. C. 194; *supra*, p. 377.

[198a] (1885), M. L. R. 1 Q. B. 460.

incorporation of private companies. Such, at least, seems to be its purport. The creation of municipal corporations would fall under No. 8 of section 92; of charitable, and other similar corporations, under No. 7; of what may, perhaps, be called governmental corporations, such as the Hydro-Electric Power Commission of Ontario, under No. 1, No. 4, or No. 14; and of educational corporations under section 95. The question of the proper interpretation of the words 'with provincial objects' has occasioned, however, a considerable divergence of judicial opinion; and, also, been the crucial point in a long-standing contention between the Dominion and provincial authorities. This, and a number of questions connected with it, and dependent on it, as to the respective Dominion and provincial powers in regard to the incorporation of companies, were argued in February, 1913, before the Supreme Court, and stand for judgment and will, no doubt, afterwards, come before the Judicial Committee of the Privy Council, on the reference by the Governor-General in Council, which occasioned the preliminary question of jurisdiction so to refer, now determined affirmatively by the Privy Council, [199] on appeal from the judgment of the Supreme Court.[200] All that

[199] [1912] A. C. 571.

[200] *In re References by the Governor-General in Council* (1910), 43 S. C. R. 536. The questions submitted on this reference are: (1) What limitation exists under the British North America Act, 1867, upon the power of the provincial legislatures to incorporate companies?

(2) Has a company incorporated by a provincial legislature, under the powers conferred in that behalf by section 92, No. 11, of the British North America Act, 1867, power or capacity to do

can be done in the meantime is to endeavour to state concisely, and correctly, how the authorities stand at the present time.

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business outside the limits of the incorporating province? If so, to what extent and for what purpose?

(3) Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts: (*a*) within the incorporating province insuring property outside the province; (*b*) outside of the incorporating province insuring property within the province; (*c*) outside of the incorporating province insuring property outside of the province? Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country? Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

(4) If in any or all of the above-mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the Insurance Act, 1910, 9-10 Edw. VII., c. 32, s. 3, s.-s. 3, D.? Is the said enactment, the Insurance Act, 1910, c. 32, s 3, s.-s. 3, *intra vires* of the parliament of Canada?

(5) Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by (*a*) the Dominion parliament; (*b*) the legislature of another province?

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

(7) Is it competent to a provincial legislature to restrict a company incorporated by the parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers as conferred, or to limit the exercise of such powers within the province? Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on,

'With provincial objects'—Can a provincial insurance company take risks on property situate outside the province?—The contention that by 'provincial objects' is meant 'public

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or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporation before they can engage in business within the province? Can such a company so incorporated by the parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

Previously to the argument of the above questions before the Supreme Court, the following questions were argued, in November, 1912, before that tribunal on another reference and also stand for judgment:—

(1) Are sections 4 and 70 of the Insurance Act, 1910, or any or what parts of the said sections *ultra vires* of the parliament of Canada?

(2) Does section 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance in Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

The following are the sections of the Dominion Insurance Act, 1910, above referred to:—

Sec. 3, sub-sec. 3: 'Any company incorporated by an Act of the legislature of the late province of Canada or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province, may, by leave of the Governor in Council, avail itself of the provisions of this Act on complying with the provisions thereof: and if it so avails itself the provisions of this Act shall thereafter apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada.'

Sec. 4: 'In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency

provincial objects' was long ago discouraged in the judgment of the Privy Council in *Citizens Assurance Co.* v. *Parsons*;[201] and does not seem to have been ever again revived. Their lordships refer in that connection, in a marked way, to certain Acts of the Dominion parliament in which the power of the provinces to incorporate insurance companies for carrying on business within the provinces is explicitly recognized; and point out that this recognition is directly opposed to such contention. What the phrase does mean

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relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.'

Sec. 70 prescribes penalties for—

'Every person who:—

(*a*) In Canada, for or on behalf of any individual underwriter or underwriters, or any insurance company not possessed of a license provided for by this Act in that behalf and still in force, solicits or accepts any risk, or grants any annuity or advertises for, or carries on any business of insurance, or prosecutes or maintains any suit, action, or proceeding, or files any claim in insolvency relating to such insurance, or acting as an insurance agent, receives directly or indirectly any remuneration from any British or foreign unlicensed insurance company or underwriters: or, except as provided for in sec. 139 of this Act, issues or delivers any receipt or policy of insurance, or collects or receives any premium, or inspects any risk, or adjusts any claim; or

(*b*) except only on policies of life insurance issued to persons not resident in Canada at the time of issue, collects any premium in respect of any policy' . . .

By sec. 3, sub-sec. 2 (*b*), the provisions of the Act are not to apply:

(*b*) 'To any company incorporated by an Act of the legislature of the late province of Canada, or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province.'

[201] (1881) App. Cas. at p. 116.

was exhaustively considered by five of the judges of the Supreme Court in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*,[202] although no two of them can, perhaps, be said to have come to precisely the same conclusion. And as four of their lordships now have an opportunity of reconsidering the matter on the reference above mentioned, while an appeal to the Judicial Committee is likely to follow immediately, all that seems necessary now is to endeavour, without making lengthy abstracts from their judgments, to state the interpretations they respectively put upon the words 'with provincial objects' in *Canadian Pacific Railway Co.* v. *Ottawa Fire Insurance Co.*, above referred to. It should be first stated, however, that the point actually decided by the majority of the Court in that case (Fitzpatrick, C.J., and Davies, J., dissenting), was that a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance of property, also outside those limits.[203]

[202] (1907) 39 S. C. R. 405. Reported below, 9 O. L. R. 493, 11 O. L. R. 465; but the constitutional point was not raised or discussed there.

[203] So held previously, in *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1882), 27 L. C. J. at p. 299; *Clarke* v. *Union Fire Insurance Co.* (1883), 10 O. P. R. 313. And see also *Hewson* v. *Ontario Power Co.* (1905), 36 S. C. R. at p. 604; *Re York County Loan and Savings Co.* (1908), 11 O. W. R. 507; and Legislative Power in Canada, pp. 637-638. On the argument in the matter of References by the Governor-General in Council to the Supreme Court, [1912] A. C. 571, *verbatim* report (Wm. Briggs, Toronto), at p. 47, Lord Atkinson is reported as remarking: "I see it is asked whether a provincial corporation can insure foreign property; that is a question which is not touched by the law of Canada at all."

Fitzpatrick, C.J.,[204] holds that 'provincial objects' in No. 11 of section 92 means "such objects as are within the legislative jurisdiction of a province to effect:" and, at the place cited, he says: "Admittedly the Dominion parliament has the right to create a corporation to carry on business throughout the Dominion, and it appears to me impossible to maintain that a provincial legislature, if it can deal with the incorporation of insurance companies at all, can create a company with powers co-extensive with those conferred by the Dominion on a company incorporated for the purpose of carrying on the business of insurance." Davies, J., holds that the word 'provincial' in the clause in question is to be read in a territorial sense, as opposed to Dominion in the same sense; and expressly says[205] that it does not mean "companies or subjects within provincial legislative jurisdiction." He holds, therefore, that a provincial legislature can only incorporate companies to do insurance business within the province: and[206] that any contract made by such a provincial insurance company out of the province is wholly void, and that "neither the place where the contract was made, nor the ratification of the shareholders, had such been given, nor any comity, or consent, or license, given by any foreign State, or province, could inject vitality into that which in its substance or essence was void and dead." He adds, however, "while the objects and purposes of the company must be confined to the province, things might

[204] 39 S. C. R. at pp. 412-3.
[205] At p. 424.
[206] At pp. 429-30.

be legally done outside the province strictly in furtherance of those objects. . . I put it upon the principle that everything necessary to enable a company to carry out, properly and efficiently, the purposes for which it was incorporated is impliedly granted to them, and that if it is necessary for a provincial company, in order fully and effectually to carry out the objects and purposes for which it was incorporated, to purchase abroad the machinery or other articles necessary to enable it to manufacture, including in such the raw material, it could legally do so. But I squarely challenge the proposition that a provincial manufacturing, or trading, or insurance company has the world for its market or business, or that it can carry on its business at all beyond the province, excepting to the extent, and for the legitimate purpose, of enabling it efficiently to carry out the functional purposes of its incorporation within the province by which it was incorporated." Davies, J., then holds that the very essence of the meaning of the phrase 'with provincial objects' is that the corporate business of the company properly so called, must be confined to the area of the province.

Idington, J., holds,[207] that the intention of the phrase 'with provincial objects' is to distinguish the subjects exclusively assigned to the provinces, from those assigned to the Dominion as the line of incorporating power given, thus approximating to the view of Fitzpatrick, C.J. He says that No. 11 "clearly was pointed at something in the nature of a partition of the sovereign

[207] See at pp. 444-8.

legislative powers between the Dominion and the provinces;" but that this has no bearing on the power of a corporation, once created, to enjoy rights given by the comity of nations. "What happens," he says, "once the corporation is thus created, is that other provinces, or foreign States, either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body, as a legal entity, doing the like kind of business for the carrying on of which it was created;" and he denies (p. 451), that any distinction can be drawn between the powers of the Dominion parliament and the provincial legislatures in regard to the status of their corporate creations abroad; "either Dominion or provincial corporation stands upon the same footing in a foreign State." At pp. 445-3, he says: "It is not that the comity adds to the power of the corporation, as some seem to suggest this theory implies. It is that any State creating a corporation without restricting its powers is supposed to know as a matter of international law that the same kind of business it enables it to do can then legally be done abroad by this creation, in States that choose to accord it recognition."[208]

Maclennan, J.A.,[209] says: "I think the expression 'provincial objects' is used in contradiction to Dominion objects, and means no more than this: that just as Parliament in incorporating companies must confine itself to Dominion ob-

[208] At p. 455, Idington, J., refers to an Article on the status of Foreign Corporations and the Legislature, in 23 L. Q. Rev. (No. 91), p. 296.

[209] At pp. 457-8.

jects, as between the Dominion and other countries, so each province, not only as between itself and other countries, but between itself and the provinces, must confine itself to provincial objects; and as Parliament cannot empower a company to go into another country and there construct a railway, or canal, or telegraph, or telephone line, so neither can a provincial legislature confer any such powers on a company incorporated by it. And as a Dominion company, desiring to exercise such powers in Maine or Michigan, must obtain them from those States, so a company desiring to exercise such powers in more than one province must be incorporated by a province, and then apply for the required powers to the other province, or provinces."

Lastly,[210] Duff, J.,[211] says: "In this sub-section (*sc.* No. 11 of section 92), "the word 'objects' seems to be used in the sense in which it is commonly used in relation to the subject dealt with,—the incorporation of companies; . . . and to denote the purposes for which a company is established, or its undertaking as defined by its constitution. . . . The characteristic 'provincial' which is to mark the objects of such a company, is not necessarily, I think, to be found in every act or transaction of the company,—but, in the undertaking of the company viewed as a whole. If the company is one formed for gain, then the 'objects of the company' is only another expression for the business of the company—the business by means of which the com-

[210] Girouard, J., did not deal with the constitutional point in his judgment.

[211] At pp. 460, 467, seq.

pany, under its constitution, is permitted to acquire that gain; and the question,—Are such and such objects, regarded as the objects of a 'company,' as these words are used in sub-section 11, 'provincial' objects?—is another form of the question:—Would the business of a company constituted with such objects regarded as a whole, fairly come within the description 'provincial?' . . . There is, I think, a very real distinction between a company whose undertaking is limited in the manner I have mentioned, and a Dominion company having power to establish itself, and conduct its business to any extent in any one or more of the provinces it may select. . . . The constitution and powers of a corporation restricted as to its residence or places of business to one province are mainly the concern of that province; and it seems impossible to find any ground upon which to deny the character 'provincial' to such a company, confined in its administration and as to its residence, to the province of its origin: elsewhere always a foreigner, and a non-resident, foreigner." And in reference to the immediate point in the case before the Court, namely, whether a company incorporated under the authority of a provincial legislature, to carry on the business of fire insurance, is, or is not, entirely incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside those limits,—he cites and comments on *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.*,[212] as the nearest approach to an authority on

[212] [1903] A. C. 59.

the point, and that in favour of the provincial insurance company having the capacity to enter into such a contract.

In view of this conflict of judicial opinion, the writer may, perhaps, be permitted to submit, in his own way, his own view of the meaning of 'with provincial objects' in No. 11 of section 92, which, if he may say so, without undue presumption, concurs with that expressed by Maclennan, and Duff, JJ., in the above case, according to his understanding of their judgments. It is, then, submitted, with deference, that what No. 11 of section 92 means is that provincial legislatures may incorporate companies whose objects or purposes are provincial in this sense, that, in the first place, they are not such objects and purposes as, under the various sub-sections of section 91 of the British North America Act, the Dominion parliament can alone incorporate companies to carry out; and in the second place, are not such objects and purposes as from their very nature, impliedly or expressly, authorize direct corporate action, as of right, outside the province in order to effectuate them. Thus a province cannot incorporate a company with the object or purpose of banking, or with the object or purpose of establishing a line of steam or other ships, railways, canals, telegraphs, and other works or undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; and if it incorporates a navigation or shipping company of any kind, it cannot absolve such company from compliance with the

Dominion laws as to navigation and shipping;[213] neither can it incorporate a company with authority under its charter, to carry on an insurance business throughout the Dominion, or throughout two or more provinces thereof, although the right of the Dominion parliament to incorporate such an insurance company rests, not on any of the enumerated powers of section 91, but on the residuary legislative power of the Dominion Parliament, as explained by the Privy Council in *Citizens Insurance Company* v. *Parsons*.[214] The provincial legislature can only create a provincial corporate person; it cannot create a Dominion corporate person.

But, it is submitted, provided provincial legislatures do not transgress the limitations thus marked out, they have precisely the same powers of incorporating companies as the pre-Confederation self-governing colonies, now represented by them, possessed; and there is nothing in the British North America Act, whatever there may, or may not be, in their respective charters, to prevent or forbid such provincial companies operating in other provinces, or in foreign countries, by the grace or comity of such other provinces, or such foreign countries. As Tessier, J., says in *Colonial Building and Investment Association* v. *Attorney-General of the Province of Quebec*,[215] the power of establishing agencies in places outside the province, belongs to a pro-

[213] *Queddy River Driving Boom Co.* v. *Davidson* (1883), 10 S. C. R. 222; *In re Provincial Fisheries* (1896), 26 S. C. R. 444, 515, [1898] A. C. at p. 77. See *supra*, pp. 243-5.

[214] (1881) 7 App. Cas. 96, at pp. 116-7.

[215] (1882) 27 L. C. J. at p. 299.

vincial corporation, "as it belongs to every individual whatsoever, providing he submits to the laws of the country in which he establishes that agency."[215a]

Nor, it is submitted with great deference, is this the same thing as to say that a provincial legislature can create a company with powers co-extensive with those which can be conferred by the Dominion on a company incorporated for the purpose of carrying on a like business, as Fitzpatrick, C.J., seems to say it is, in the passage above quoted from his judgment in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*[216] The difference, it is submitted, is this. The Dominion parliament can create a corporation with charter rights to operate all over the Dominion, or in two or more provinces thereof, for all legislative power relating to the internal affairs of Canada, which is not vested in the provincial legislatures, is vested in the Dominion parliament.[217] And if the Dominion parliament incorporates such company under and by virtue of its express enumerated powers in section 91, no provincial legislature can forbid it to carry out the objects and purposes expressed in its charter, although provincial legislatures can tax it, when found operating within their boundaries.[218] But if the Dominion incorporation is

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[215a] For an Article on 'Foreign Partnerships and Corporations in the Province of Quebec,' by E. F. Surveyer, see (1901) 35 Am. L. R. 402, *et seq.*

[216] *Supra*, p. 467.

[217] *Supra*, pp. 96-99; 121.

[218] *Supra*, pp. 339-344; 421. And see *St. Francois Hydraulic Co.* v. *Continental Heat and Light Co.*, [1909] A. C. 194, where it was held that the power conferred by a provincial legislature on an

not under any of those express enumerated powers, but merely under the residuary power, then such company is subject to the laws of any province in which it operates.[219] But a provincial legislature, on the other hand, can only give companies of its incorporation chartered rights to operate within the province; and any business such provincial companies do outside the province, they do by the mere grace and comity of the other provinces, or foreign countries, in which they operate, and, in all respects, subject to the laws thereof.[220]

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industrial company in the Act which incorporates it, to carry on an enterprise to the exclusion of every other company, in a designated territory, is without effect against a company constituted for similar ends by a previous statute of the parliament of Canada. The same, it is submitted, would be the case if the Dominion incorporation was subsequent. See, also, *Kerley* v. *London and Lake Erie Railway and Transportation Co.*, in the Appellate Division (1913), 28 O. L. R.

[219] *Supra*, pp. 371-3. Reference may also usefully be made to a speech of the late Honourable David Mills in the Dominion House of Commons on June 15th, 1899, on the moving of the second reading of the Loan Companies Bill, 62-63 Vict. c. 41, in which he deals with the subject of Dominion loan companies. In the course of it he observes that if a company wishes to have "as of right" the power to exercise its franchises in every province of the Dominion—"its objects are not provincial, and it must look elsewhere than to the legislature of a province for its incorporation." He adds: "It is true that a provincial company may do business in another province than that in which it is incorporated, but it does so as a foreign company. Elsewhere, except in the province in which it is incorporated, it stands upon the footing of a foreign corporation; and most companies, in so far as they can, prefer that their franchises should exist, not as a matter of forbearance, but as of right everywhere in the country in which they intend to carry on their operations." As to their being some objects and purposes, so necessarily provincial in their character that only a province could incorporate companies with them, see *supra*, p. 382, n.

[220] As Meredith, J., says in *Tytler* v. *Canadian Pacific R. W. Co.* (1898), 29 O. R. at p. 657, a Canadian corporation, incorpor-

The views of Ministers of Justice.—It must be admitted, however, that Ministers of Justice have always taken strong ground that companies with power to transact business beyond the limits of the province, including fire and life insurance companies, or marine insurance companies with power to take risks on vessels not touching provincial ports, or on vessels going beyond the limits of the province, though the policies be granted within the limits of the province, or steamship companies for the purpose of running steamers on 'the coast of the province and elsewhere,' are not companies 'with provincial objects' within the meaning of No. 11 of section 92 of the British North America Act.[321]

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ated under federal legislation, cannot be deemed, in any of the provinces, a corporation of foreign origin. As to whether the Dominion parliament can authorise a provincial company to transact business throughout the Dominion, or in foreign countries, see *supra*, p. 381, n.; *infra*, pp. 483-5; and as to provincial corporations being subject to validly enacted Dominion laws, see *supra*, pp. 124; 472-3,

[321] See Legislative Power in Canada, pp. 638-639: to the citations there may be added: report of November 24th, 1902, on an Ontario Act incorporating a company with power to employ steam vessels for transporting goods to any place in Canada; Provincial Legislation, 1901-1903, p. 12; report of November 10th, 1905, on certain Nova Scotia Acts incorporating companies or amending such Acts, some of them being objected to because they authorized the companies to have their head offices out of the province: *Ibid.*, 1904-1906, p. 52, seq.; report of December 18th, 1905, in reference to a New Brunswick Act, providing that a provincial electrical company might, with the consent of the legislature of the State of Maine, sell and supply electricity in that State; and might consolidate and work its franchise with those granted by the State of Maine as one single enterprise: *Ibid.*, pp. 76, 77, 84; report of October 31st, 1907, objecting to a Manitoba Act, because it appeared to empower a trust company to loan money in the province on lands situate outside the province; report of January 30th, 1911, as to a Nova Scotia Act incorporating the Pacific Whaling Co.

Sometimes they have been disposed to insist that provincial Acts of incorporation should contain provisions expressly limiting the business to the province. The Minister of Justice did this in his report of November 10th, 1905, as to certain Nova Scotia Acts;[222] and elicited the following reply from the provincial Attorney-General, which, it is submitted, has much force: "While these Acts of incorporation do not in terms provide that the business of the respective companies shall be carried on only in the province of Nova Scotia, yet as the jurisdiction of the legislature only extends to the province, these Acts empower them only to exercise the powers conferred upon them within the province. With any business transacted by these companies respectively beyond the province the legislature and Courts of Nova Scotia are not concerned beyond the provisions of their Acts of incorporation generally. If these companies undertake to extend their business, make contracts, and avail themselves of the protection of the Courts of any other country, they should be at liberty to do so, when by the laws of comity among nations such corporations are recognized and permitted to make contracts, and to sue and be sued in the Courts. . . . To amend these Acts of incorporation so as to expressly confine the exercise of the companies' powers to this province, would be to prohibit and prevent them from taking ad-

[222] So, too, in a report of November 1st, 1905, in reference to certain Manitoba Acts relating to some fire insurance companies, and a land and investment company: Provincial Legislation, 1904-1906, pp. 102-117; and a report on certain Quebec Acts of 1905, *Ibid.*, p. 32.

vantage of the law of comity which is almost universally recognized." The Minister rejoins by a report of June 29th, 1906, in which he seems to uphold the view that the powers of a provincial company must, under No. 11 of section 92, be confined to doing business within the boundaries of the province only, which would accord with the view of Davies, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*,[223] above mentioned.[224] The Minister did not, however, recommend disallowance.[225] But he expressed the same view of the construction of No. 11, in a letter to the Attorney-General of British Columbia, in reply to one from the latter of April 3rd, 1907, respecting two British Columbia Acts. The provincial Attorney-General had urged that: "What can be done by the comity of States or nations can also, I think, be done by the comity of provinces. A company incorporated by Ontario can obtain under our laws a license authorizing it to carry on business in this province. I am not aware that it has yet been decided that a company incorporated by one province cannot do business in another province provided the other province consents." The Minister of Justice, in his letter in reply, expresses the view that the doctrine of the comity of nations cannot possibly be applied to the case of a provincial corporation, because "provincial corporations being limited by the British North America Act to provincial objects, have no quality which can be recognized by the comity of nations, so far as

[223] (1907) 39 S. C. R. 405, at p. 424.

[224] *Supra*, p. 467; *cf. International, etc., Co.* v. *Registrar* (1913), 9 D. L. R. at p. 298.

[225] Provincial Legislation, 1904-1906, pp. 54-59.

concerns the carrying on of business, or the making of contracts in any provinces other than the incorporating province. In this case, also, however, he did not recommend disallowance.[226] But in some recent cases, Ministers of Justice have gone so far as to recommend disallowance where provincial legislatures have assumed to authorize companies of their creation to carry on business outside the province.[227]

It must be remembered, however, that Ministers of Justice are not judicial functionaries. They are members of the Dominion Government; and naturally lean in favour of upholding federal authority where arguable points arise. And no one can read the reports of Ministers of Justice on provincial legislation without seeing that certain positions become traditional in the Department; and Ministers of Justice seldom feel at liberty to abandon those taken up by their predecessors, unless and until judgments of the Supreme Court, or it may be, of the Judicial Committee of the Privy Council, render them no longer tenable.[227a]

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[226] Provincial Legislation, 1904-1906, pp. 165-6.

[227] Report of December 7th, 1910, as to some Prince Edward Island Acts; report of December 7th, 1910, as to certain Manitoba Acts; report of February 23rd, 1910, as to a New Brunswick Act, and of January 12th, 1911, as to a Quebec Act, in both of which the addition of the words 'of Canada' to the name of a provincial company is expressly objected to as indicating that the company could carry on a general business throughout Canada; report of January 9th, 1911, as to some Saskatchewan Acts incorporating certain loan trust and investment companies, and purporting to give them power to transact business outside the province.

[227a] In this connection the words of Mr. Edward Blake (whose own reports as Minister of Justice are so conspicuous) in the argument in *In re Portage Extension of the Red River Valley*

Provincial incorporation of a body already incorporated with similar powers in another province.—Although the Dominion parliament can alone incorporate companies to carry on business throughout the Dominion, and can alone incorporate companies for objects other than provincial, yet if the view of the law expressed above is correct,[228] there would seem to be no doubt that a provincial corporation existing in one province may be incorporated with similar rights and powers in another province by the legislature of the latter. And so in *Dobie* v. *Temporalities Board*,[229] Dorion, C.J., says: "It can hardly be contested, each local legislature would have power to grant to a body, already incorporated in one province, the same franchises to be exercised within the limits of its own jurisdiction, and all the local legislatures might successively do the same. These corporate rights would not

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Railway, Cass. Sup. Ct. Dig. 487 (printed *in extenso* by A. S. Woodburn, Ottawa, 1888) may well be cited: "I do not understand that even apart from the special circumstances of this case, your lordships would pay any particular attention to the circumstance that the Minister of Justice on an *ex parte* proceeding, without anybody complaining, without his attention having been called to those facts, is to be considered as a judicial authority whose conclusion, when he is advising the Executive,—sometimes, it is whispered, upon political considerations, as well as upon those strictly legal considerations which alone should animate him in the discharge of that duty,—is to be considered by your lordships: (p. 105). These objections, however, to the value of reports of Ministers of Justice as opinions on the law of legislative power in Canada are obviously much more applicable in some cases than in others, and in many would seem not to apply at all. See, also, per Fitzpatrick, C.J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. at p. 415; per Davies, J., S. C. at p. 432.

[228] See *supra*, pp. 472-5.

[229] (1880), Doutre on the Constitution of Canada, at p. 260.

cease to be civil rights, nor to have provincial objects, for having been successively granted in more than one province of the Dominion." Ministers of Justice, however, have taken up a different position. Thus in 1906, the province of Alberta passed two Acts purporting to authorize two Manitoba companies to carry on their business in Alberta to the same extent as in Manitoba, and as if each company had been incorporated for its corporate purposes by Act of the legislature of Alberta. But by report of December 19th, 1906, the Minister of Justice objected, saying that it seemed to him "very difficult to affirm that the two legislatures can together constitute or enlarge the powers of a corporation so that it may carry on its business equally in each province. This is an authority, which in the opinion of the undersigned, is vested solely in Parliament. The constitution of a company incorporated by Manitoba is not within the legislative jurisdiction of Alberta to enlarge or alter." He, however, allowed the Acts to come into operation, leaving the decision of the question thus raised to the determination of the Courts.[230] And similar objections were raised, in similar cases, by the Minister of Justice in his report of Febru-

[230] Provincial Legislation, 1904-1906, pp. 175-7. *Cf.* report of November 24th, 1902, on an Ontario Act, authorizing a company incorporated by another provincial legislature to do business in it: *ibid.*, pp. 12-13; report of January 8th, 1904, as to certain Manitoba Acts: *ibid.*, p. 44. It is submitted that for one province to give liberty to a company incorporated in another province to do business within its territory, is in no way different to giving any individual from another province liberty to do business in its territory. To avail itself of such liberty might, of course, be *ultra vires* of the company.

ary 12th, 1912, upon a Quebec Act of 1911, to authorize the National Trusts Company, incorporated by Manitoba Act, to do business in the province of Quebec; and in his report, of the same date, in reference to a Saskatchewan Act. But where a Quebec Act of 1907 purported to authorize companies incorporated by other provinces to apply to the Government of Quebec for incorporation of its shareholders in Quebec. Sir Allen Aylesworth, as Minister of Justice, says: "The undersigned does not doubt the power of the legislature of Quebec to incorporate the shareholders of an existing company as a new company for local purposes; but such new corporation could never be other than an entirely distinct and different company from the original company. To transfer to such new company the rights and obligations of the original company, unless with the unanimous consent of its shareholders, and of its creditors, or those interested in the enforcement or preservation of such obligations, might be to destroy the civil rights of all persons interested in the original company, or with whom it had existing dealings."

Provincial company connecting its wires with those of a local company in another province.—It is likewise impossible, if the view of the law above submitted[231] be correct, to acquiesce in the *dicta* of Davies, J., in *Hewson v. Ontario Power Co.*,[232] as to a provincial legis-

[231] *Supra*, pp. 472-5.

[232] (1905) 36 S. C. R. at pp. 608-9.

lature not being able to give an electric light and power company of its creation, the right to connect its wires with those of a local company in another province, or with those of a company in the United States.

Provincial companies may need Dominion assistance in order to the effectual execution of their corporate purposes.—This is a subject which has already been discussed and illustrated in reference to No. 10 of section 91 of the British North America Act.[232]

But the Dominion parliament cannot enlarge the charter powers of a provincial company.—Thus in *Canadian Pacific Railway Co.* v. *Ottawa Fire Insurance Co.*,[234] dealing with the question whether the Dominion parliament has authority to authorize the Governor-General in Council to permit a company locally incorporated to transact business throughout the Dominion,[234a] or in foreign countries, Fitzpatrick, C.J., says: "If a company is within the exclusive jurisdiction of a province, then the Dominion parliament can-

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[232] *Supra*, pp. 243-4. See Article on Companies Dominion and Provincial (1902), 38 C. L. J. 740; also one on 'Company Incorporation Jurisdiction in Canada,' by R. A. Reid (1912), 32 C. L. T. 749, 944; also one on The Conflict of Control of Corporations (1908), 44 C. L. J. 249.

[234] (1907) 39 S. C. R. at p. 415. As to this case generally, see *supra*, pp. 466-472. As to a statute enlarging powers and extending the business of a company being binding on all the shareholders whether assenting or not to the application for it, see *Canada Car and Manufacturing Co.* v. *Harris* (1875), 24 C. P. 380.

[234a] Sir Allen Aylesworth, as Minister of Justice, expresses very grave doubt as to whether Parliament has any such power, in a report of June 29th, 1906: Hodgins' Prov. Legisl. 1904-6, p. 60. And see *supra*, p. 382, n.

not interfere to extend or limit its powers so long as it remains a provincial company. I concede that the Dominion might make a company a Dominion company; but so long as a company is subject to the provincial legislature, the Dominion has no authority or power to extend or restrict. The Dominion cannot enlarge the Constitution of an Ontario company, or limit the powers locally conferred. The same company cannot be subject, at the same time, to the legislative jurisdiction of the Dominion and of a provincial legislature with respect to its corporate powers." And so, at pp. 433-4, Davies, J., referring to the Dominion Act, 51 Vict. c. 28, which authorizes provincial companies by leave of the Governor-in-Council, and on complying with certain provisions of the Act, to have the power of transacting their business throughout Canada, says: "I cannot see how, or by what authority, the Dominion parliament could alter, extend, or abridge a provincial company's charter. The Imperial Act divides legislative power between the parliament of the Dominion and the legislatures of the provinces. Whatever powers the latter have are exclusive. . . It seems to me that only by the creation of a new entity or corporation could the object sought for be achieved. Comity cannot extend the circumscribed powers of an incorporated company, nor can a foreign legislature by any legislation or system of licensing, enlarge such powers, or make that legal which the charter did not warrant or authorize. It would not be argued that, assuming the powers of this company to be confined to the province of Ontario, the State of Maine could

by any possible legislation enlarge those powers short of creating a new company. Nor can I see how the Dominion parliament has any other or greater power to enlarge a provincial company's charter than one of the States of the United States would have."

The Dominion parliament may not, under colour of incorporating a Dominion company, infringe the exclusive provincial power under No. 11 of section 92.—There is some little authority, although, as might be expected, very little, bearing upon this proposition. In *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[235] where the Privy Council held that the mere fact that a Dominion company chose to limit its operations to one province only, did not invalidate its charter, their lordships say: "It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act" (*sc.* of incorporation); and it would seem that the case here suggested is one in which Parliament had been induced, while ostensibly exercising its proper power of incorporating Dominion companies, to, in fact, incorporate a company with a provincial object, thus infringing upon the exclusive jurisdiction of the provinces under No. 11 of section 92.[236] There may, also, be cited in this

[235] (1883) 9 App. Cas. at p. 165.

[236] (1880), Doutre in the Constitution of Canada, at p. 260.

connection the words of Dorion, C.J., in *Dobie v. Temporalities Board,* [237] where he says: "The Dominion parliament could not claim to interfere and grant to a Society incorporated in Quebec the same corporate rights in Ontario, under the pretence that the Society being already incorporated in Quebec, its operations would extend to more than one province, by the new Act of incorporation."

Provincial legislation dealing with rights of corporators of a provincial company.—In the course of the argument in *In re Dominion Provident and Endowment Association,* [238] Armour, C.J., is reported as having said: "If the local legislature has power to incorporate the Association, it has power to say what are the rights of the parties under the incorporation;" and, again, at p. 261: "If that legislature has power to incorporate, it has power to deal with rights acquired under the incorporation." The question which arose in that case was as to the power of the Ontario legislature to confer upon the Master in Ordinary the powers it assumed to confer upon him by the Ontario Insurance Corporations Act, 1892, which provided for the appointment of a receiver after cancellation of a corporation's registry under the Act, and enacted that the Master 'shall settle schedules of creditors and contributories, direct the realization of assets, the discharge of liabilities, and the distribution of the surplus . . . and generally have

[237] (1880), *ibid.* at p. 260, 1 Cart. at pp. 388-9. And see *supra* pp. 76-82.

[238] (1894), 25 O. R. at p. 620.

all the powers which might be exercised on any reference to him under a judgment or order of the High Court.' The Court held the Act *intra vires;* and the above *dicta* of Armour, C.J., must, of course, be understood in the light of the matter before him, which did not involve the question of the power of a provincial legislature, when incorporating a company, to, in any way, impinge upon the Dominion area. For example, the case in no way raised any question of a right in the Ontario legislature to provide for the dissolution of a corporation created by it, by a compulsory process upon insolvency.[239] And we have seen the objections taken by Ministers of Justice to provincial Acts attempting to include a condition against the employment of aliens in the incorporating Acts of railway and other companies.[240] The question of the right of provincial legislatures to import conditions of this sort into the incorporation of provincial companies, cannot be said to have been decided. The writer would submit that they have such power, for that including in a charter of incorporation a condition as to the winding-up of that particular company, is not making a law in relation to bankruptcy and insolvency, or in relation to aliens, within the meaning of section 91 of the British North America Act. In the great majority of the enumerated classes of subjects in section 91, what seems to be contemplated is general legislation upon general subjects. Nevertheless, it must be admitted, in *Quirt* v. *The Queen*,[240a] the Su-

[239] See Legislative Power in Canada, p. 458, n.

[240] See *supra*, pp. 457-460.

[240a] (1891), 19 S. C. R. 510. See *supra*, p. 144.

preme Court held that, by virtue of its powers to make laws in relation to bankruptcy and insolvency, Parliament can provide for the winding up in insolvency of a single institution.[240b]

12. Solemnization of marriage in the province.—This provincial power has been dealt with under No. 26 of section 91.[240c] It may be worth while, however, to add to what is there stated, that the law officers of the Crown in England, in 1869-70, when the question as to the power to legislate upon publication of banns and marriage licenses, was referred to them, observed in their Opinion:—"The phrase, 'the laws respecting the solemnization of marriage in England' occurs in the preamble of the Marriage Act (Imp. 4 Geo. IV. c. 76), an Act which is very largely connected with matters relating to banns and licenses, and this is, therefore, a strong authority to show that the same words used in the British North America Act, 1867, were intended to have the same meaning.[241]

13. Property and civil rights in the Province. —Must be construed in light of the Dominion powers.[242]—We have seen that in order to construe the general terms in which the classes of

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[240b] Mr. Clement (*op. cit.* at p. 165) remarks that Dominion private bill legislation would be prohibited if they can legislate only on general subjects.

[240c] *Supra*, pp. 314-9.

[241] Dom. Sess. Pap. 1877, No. 89, p. 340.

[242] As to the power of provincial legislatures to interfere with vested rights or pass *ex post facto* laws, or laws impairing the obligation of contracts, see *supra*, pp. 82-5. As to how far Dominion corporations are subject to provincial laws in relation to property and civil rights, see *supra*, pp. 339-343; 356-363.

subjects of legislation in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be looked at, to ascertain whether language of a general nature must not, by necessary implication, or reasonable intendment, be modified and limited; for that the British North America Act has to be construed as a whole, and where some specific matter is mentioned as within the exclusive power of one body, Dominion parliament or provincial legislature, as the case may be, which, but for that reference, would fall within the more general description of a subject-matter confined to the other, the statute must be read as excepting it from that general description.[243] And so, as the Privy Council say in *Attorney-General of Ontario* v. *Mercer*,[244]—"The extent of the provincial power of legislation over 'property and civil rights in the province' cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sections 91 and 102."[245]

Thus, as Burton, J.A., says in *Hodge* v. *The Queen*,[246] "property and civil rights would comprise the power of regulating contracts of every kind, including bills of exchange and promissory notes. When, therefore, we find the Dominion entrusted with an exclusive power to legislate upon bills and notes, the only way to

[243] *Supra*, pp. 112-8; 315-6; 389.

[244] (1883) 8 App. Cas. at p. 776.

[245] S. 102 creates a consolidated revenue fund for Canada out of the duties and revenues over which provincial legislatures at the Union had power of appropriation. See Appendix of Statutes.

[246] (1882) 7 O. A. R. at p. 274.

make the Act consistent is to read this as an exception to the general power granted to the province."

But many other of the enumerated Dominion powers involve, in a less direct way, the right to affect property and civil rights in the different provinces. Thus in *Cushing* v. *Dupuy*,[247] the Privy Council say:—"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights. . . It is, therefore, to be presumed, indeed it is a necessary implication, that the Imperial statute in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure, within the provinces, so far as a general law relating to these subjects may affect them."[248] And in the same way, they point out in *Tennant* v. *The Union Bank of Canada*,[249] that among the enumerated classes of sub-

[247] (1880) 5 App. Cas. 409.

[248] *Cf.* their similar language in *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A. C. 189, to which case they make special reference in their subsequent judgment in the Fisheries Case, [1898] A. C. 700, at pp. 715-6. And see *supra*, pp. 164-179; and Legislative Power in Canada, pp. 425-439. In *Quirt* v. *The Queen* (1891), 19 S. C. R. at pp. 521-2, Patterson, J.A., raises the question, where, if the necessity arose in connection with bankruptcy proceedings for curing some irregularity so as to validate, or remove doubts as to, titles taken under the proceedings—the power of passing the necessary legislation would be; and expresses the view that it would be, obviously, in the Dominion alone. *Cf.*, per Osler, J.A., S. C. 17 O. A. R., at pp. 443-4.

[249] [1894] A. C. at p. 45.

jects in section 91, are 'patents of invention and discovery,' and 'copyrights,' and that it would be practically impossible for the Dominion parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces. As their lordships say in *City of Toronto* v. *Canadian Pacific R. W. Co.*:[250] "The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province."

The true constitutional position in this matter would seem to be as follows:—The provincial legislatures have general jurisdiction, and they alone have general jurisdiction, over property and civil rights in the province; but this is not to be understood, on the one hand, as meaning that they can legislate upon any one of the subjects assigned exclusively to the parliament of Canada by section 91; nor is it to be understood, on the other hand, as meaning that the parliament of Canada cannot incidentally affect property and civil rights by its legislation, so far as such power is implied in its power to legislate upon the subjects exclusively assigned to it by section 91, or so far as is required as ancillary to the power to legislate effectually, and completely, on such subjects;[251] and as, on the one hand, the operation of Acts of the provincial legislatures respecting property and civil rights

[250] [1908] A. C. 54, at p. 59. For this case, see further, *supra*, pp. 170; 350.

[251] See *supra*, pp. 170; 350.

in the province, or other provincial subjects, may be interfered with by reason of the operation of Acts of the Dominion parliament, so, also, Dominion Acts may be interfered with by reason of the operation of Acts of the provincial legislature,[252] although Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will over-ride and place in abeyance, provincial legislation which directly conflicts with it.[253]

Dominion legislation as to property and civil rights under its residuary power.—But it would be impossible for Parliament to legislate even under its general residuary power 'to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the province,' if it was restricted from incidentally affecting property and civil rights in the different provinces, and other matters assigned to the latter.[254] And so in *Russell* v. *The Queen*,[255] the Privy Council held that the Canada Temperance Act, 1878, was within the competency of the Dominion parliament to pass, its primary object and design[256] being to preserve public order and safety, al-

[252] See *supra*, pp. 164-179; 180-9; 193.

[253] See *supra*, pp. 123-7.

[254] See *supra*, pp. 164-5.

[255] (1882) 7 App. Cas. 829.

[256] See *supra*, pp. 210-213.

though its provisions might incidentally affect, and interfere with, property and civil rights; for say they,[257] it could not have been intended, while assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude Parliament from the exercise of its general power to make laws for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the provincial legislatures, whenever any such incidental interference would result from it.

Dominion interference must not be more than is necessary to the effectual exercise of its own powers.[258]—But as Ritchie, C.J., observes in *Valin & Langlois*,[259] although the power of the local legislature was, indeed, to be subject to the general and special legislative powers of the Dominion parliament, yet, while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, such latter right must be exercised, "so far as may be, consistently with the right of the local legislatures, and, therefore, the Dominion parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating, generally and effectually, in relation to matters confided to the parliament of Can-

[257] At p. 839.

[258] See *supra*, pp. 166-179.

[259] (1879) 3 S. C. R. at p. 15. *Cf.* his language in *Citizens Assurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 242.

ada."[260] And so, says Fisher, J., in *Steadman* v. *Robertson*:[261] "In conferring upon the local legislatures the power to legislate upon property and civil rights, I am of the opinion it was the intention that this power should only be trenched upon to the extent required to enable Parliament to exercise the authority to legislate upon the different subjects assigned to it, and the Parliament in legislating upon the subjects within its competency, can only so far interfere with property and civil rights as is necessary to work out the legislation upon the particular subjects delegated to it."[262]

The difficulty is, as we have seen, to apply this rule of necessity;[263] but it does not seem possible to concur in the view expressed in some of the earlier judgments, that there is any special sanctity, or significance, in the provincial power over property and civil rights, beyond that of the other provincial powers;[264] although, no doubt, as said by Fournier, J., in *Citizens Insurance Co.* v. *Parsons*,[265] the aim of the law-giver in dividing the legislative powers by sections 91 and 92 of the

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[260] In this sense only, can the words of Burton, J.A., in *Regina* v. *Hodge* (1882), 7 O. A. R. at p. 274, "that the provincial legislatures are absolute and supreme over the subject-matters assigned to them without any possibility of interference by the Dominion legislature," be now accepted.

[261] (1879) 2 P. & B. at pp. 595-6.

[262] So, also, in the United States, the federal power has exercised its jurisdiction over civil rights and property: cf. per Taschereau, J., in *Citizens Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 308.

[263] See *supra*, pp. 166-179.

[264] *E.g.*, per Fisher, J., in *Queen* v. *Mayor, etc., of Fredericton* (1879), 3 P. B. at pp. 169-170.

[265] (1880) 4 S. C. R. at p. 255. *Cf. supra*, pp. 133-6; 184-192.

British North America Act between the Federal Government and the provinces was, so far as compatible with the new order of things, to conserve to the latter their autonomy in so far as the civil rights peculiar to each of them were concerned; and, although, as intimated by the Privy Council, in the same case,[266] the words 'property and civil rights' are to be understood in their largest sense.

Provinces cannot legislate as to property and civil rights necessary to a Dominion object.—Consistently with the above, and as stated by Ramsay, J., in *Dobie* v. *Temporalities Board*,[267] the provincial power, under consideration, over property and civil rights in the province, is not to be understood as applying to such property and civil rights as are necessary to the existence of a Dominion object. He says: "In practice it never has been contended that property means all property. Railroad companies incorporated by Parliament, for instance, hold and manage their property under Dominion laws, and such companies evict people from their private property in the province under Dominion laws. No one will venture to affirm that a local Act could confiscate the property of a railway company incorporated by Parliament, or transfer it to another company or person." And he refers to *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal*,[268] and adds: "nor by parity of reasoning,

[266] (1881) 7 App. Cas. at p. 111.

[267] (1880) 3 L. N. at p. 248.

[268] (1880) 5 App. Cas. 381. See *supra*, p. 356, n.

could the local legislature confiscate the surplus funds of a bank on the pretext that it was property in the province."[268a] But the measure of the limitation of the power of a provincial legislature over property of a railway or other corporation, incorporated under one of the Dominion enumerated powers, or under Dominion control, must, it is submitted, be found in the application of the principle already laid down,[270] that the British North America Act, by necessary implication, only intended to confer on the Dominion parliament legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures, such as property and civil rights in the province, so far as Dominion Acts relating to any of the classes of subjects enumerated in section 91 may affect them, and to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. And the sweeping assertion of Ramsay, J., in *Dobie* v. *the Temporalities Board*,[271] that a provincial Act which disposes of the property of a corporation created by a federal law is necessarily unconstitutional does not seem defensible. What the Privy Council say on appeal in that very case seems to show this. The question was as to the validity of a Quebec Act of 1875, which assumed to alter and amend an Act of the old province of Canada incorporating a Board for the management of the temporalities fund, which had its

[268a] *Cf.*, however, *The Alberta and Great Waterways Railway* case, noted *infra*, p. 504.

[270] *Supra*, pp. 164-179.

[271] (1880) 3 L. N. at p. 251.

corporate existence and corporate rights in both of what afterwards became the provinces of Ontario and Quebec. After saying that the Quebec Act of 1875 dealt with the civil rights of a corporation, and of individuals present or future, for whose benefit the corporation was created and existed, their lordships say: "If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority."[272]

Power of Dominion parliament over property may depend upon what the property is.—When a question arises as to whether the Dominion parliament has power, in any case, over any property or civil rights in a province, it is necessary to consider what is the particular subject-matter in such case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the subject.[272a] Thus in *Queen* v. *Robertson*,[272b] Gwynne, J., says: "The first item enumerated in the 91st

[272] (1882) 7 App. Cas. at p. 152.

[272a] As to the Dominion parliament having control over the disposition of fines, forfeitures, and penalties, imposed under Dominion laws, see report of David Mills, as Minister of Justice, on North-West Territories legislation, of August 12, 1898: Hodgins' Prov. Legisl. 1896-8, pp. 118-9. See, however, *Dumphy* v. *Kehoe* (1891), 21 R. L. 119. *Cf. In re Bateman's Trusts* (1873), L. R. 15 Eq. 355.

[272b] (1882) 6 S. C. R. at pp. 65-6.

section as placed under the exclusive control of the Parliament is the 'public debt and property,' and by section 108, the provincial public works and property are declared to be the property of Canada. The jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of Canada; but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the property of individuals, should be no longer subject to the control of the Dominion parliament any more than any other property of an individual should be." And so in *Attorney-General of British Columbia* v. *Attorney-General of Canada*,[m] when the Privy Council were dealing with the rights of property of the Crown, as represented by the Dominion Government, in what is known as the railway belt in British Columbia, they say: "The object of the Dominion Government was to recoup the cost of the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration." But, as we have seen, the fact that legislative jurisdiction in respect of a particular subject-matter is conferred on the Dominion or provincial legislatures, affords no evidence or presumption that any proprietary rights with respect to it are

[m] (1889) 14 App. Cas. at p. 302. And see *supra*, pp. 414-7.

transferred to the Dominion or provinces, respectively.[275]

'Property and civil rights in the province.'[275a]—Having spoken of the limitations and qualifications which the necessity of reading the British North America Act as a whole, imposes upon the construction of the broad words in which this provincial power is expressed, we can now pass on to consider what is the scope which is left to it. In *Citizens Assurance Co.* v. *Parsons*,[276] where it was contended that 'civil rights' in this clause meant only such rights as flow from the law, as for example, the status of persons, their lordships say that they "find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights.' The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts. And they refer to section 94 of the Act, which they term the "uniformity section," whereby the parliament of Canada is empowered to make provision for uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in those three

[275] *Supra*, pp. 224-229. In *Sawyer-Massey Co.* v. *Dennis* (1907), 1 Alta. 125, Beck, J., held that the provincial legislature was competent to say that a mortgage, or an agreement to give a mortgage, upon land, prior to recommendation for patent, is void.

[275a] As to 'civil rights in the province' see further *infra* pp. 501-13; as to 'property in the province," see further *infra* pp. 511-3.

[276] (1881) 7 App. Cas. at pp. 109-11. See per Britton, J., in *Bradburn* v. *Edinburgh Assurance Co.* (1903), 5 O. L. R. 657, at pp. 664-6.

provinces, if the provincial legislatures choose to adopt the provisions so made, and point out that: "The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is, in the main, French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words 'property and civil rights' are obviously used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity." Otherwise, they say, "the Dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act."[m] The Privy Council then refer to section 8 of the Quebec Act, 14 Geo. III., c. 83, which enacted that Her Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights as they had before done, and that, in all

[m] *Cf.* per Caron, J., in *Doble* v. *Vallée* (1879), 5 O. L. R. at p. 37.

matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws, and say: "In this statute, the words 'property and civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."[278] But, of course, as we have already seen, an Act may affect the use of property, or civil rights, and yet not be legislation in relation to 'property and civil rights in the province' within the meaning of No. 13 of section 92, these not being the primary matters dealt with.[279]

'In the province.'—As the Privy Council judgment in *Dobie* v. *Temporalities Board* suggests,[280] the provincial power over both property and civil rights extends only to such as have a local position within the province. Provincial legislatures have no such power in relation to property or civil rights having their local position in another province; and if, in any case, they cannot legislate in relation to the one, without at

[278] In the despatch from the Lieutenant-Governor of Ontario to the Secretary of State, of January 22nd, 1886, on the subject of the power to appoint Queen's Counsel (as to which, see *supra*, pp. 29; 424), section 8 of the Quebec Act is, also, referred to, to show the extensive purport of the words 'property and civil rights,' and it is added:—"Under the same words, in the Upper Canada Act, 33 Geo. III. c. 1, the whole law of England, except the criminal law (which was the subject of another enactment), was held to be introduced:" Ont. Sess. Pap. 1888, No. 37, at p. 17.

[279] See *supra*, pp. 492-3, and as to laws against gambling, *cf. Regina* v. *Keefe* (1890), N. W. T. (No. 2) 86; S. C. 1 Terr. L. R. 280; *Regina* v. *Fleming* (1895), 15 C. L. T. 242.

[280] (1882) 7 App. Cas. 136.

the same time legislating in relation to the other, that is a case beyond their powers of legislation altogether. In *Dobie* v. *Temporalities Board*, the validity of a Quebec Act of 1875 was in question, which purported to alter and amend an Act of the old province of Canada, incorporating a Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland; and in the course of their judgment, their lordships say: "The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created, and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority. . . The corporation and the corporate trust, the matter to which its "(*sc.* the Quebec Acts in question)" provisions relate, are in reality not divisible according to the limits of provincial authority. . . The legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province." And so in the Liquor Prohibition Appeal, 1895,[m] the Privy Council say: "A law which prohibits

[m] *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1896] A. C. at p. 364.

retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in that province and persons in other provinces, or in foreign countries, concerns property in the province which would be the subject-matter of the transactions, if they were not prohibited, and, also, the civil rights of persons in the province;" and they imply that, in their opinion, such a law might well be authorized by No. 13 of section 92, as a law in relation to property and civil rights in the province." But later on, in the same judgment, when alluding to the provision in the Canada Temperance Act, 1886, which permits wholesale dealers in liquors to sell for delivery anywhere beyond the district wherein they carry on business, unless such delivery is to be made in an adjoining district where the Act is in force, they say: "If the adjoining district happened to be in a different province, it appears to their lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature." It would seem, especially in the light of the former passage quoted above, that their lordships mean that such a legislative restriction affecting, as it would do, transactions in liquor between persons in the province and persons in foreign countries, would be legislation in relation to property and civil rights out of the province, as well as in the province, and therefore would not be authorized by No. 13 of section 92.[282]

[282] At the same time it seems a little hard to understand why a provincial legislature would not have power to enact with

Now it might appear that the remarks of the Judicial Committee in these two cases as to 'civil rights in the province' only extending to such civil rights "as have a local position in the province," if by that is to be understood 'civil rights based upon obligations completely localised in the province,' are *obiter*, and not necessary to the decision of the matters before the Board. In the *Dobie* case their lordships especially say that the matters to which the provincial Act with which they were dealing related, were "in reality not divisible according to the limits of provincial authority." But in the recent case of *The Royal Bank of Canada* v. *The King*,[aaa] popularly known as the Alberta and Great Waterways Railway Company Case, their lordships undoubtedly base their decision upon the above construction of the provincial power over 'civil rights in the province.' In that case it will be remembered parties in London had advanced moneys upon the bonds of the Alberta Railway Company, and these moneys had been paid into the Royal Bank of Canada at its branch in New York, and under instructions of the Head Office of the Bank at Montreal, placed to the credit of the Provincial Treasurer of Alberta in a special account at the Branch of the Bank at Edmonton, all under an agreement or under-

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regard to any property locally situate in the province, that it shall not be taken out of the province. Section 121 of the British North America Act, which provides that 'all articles of the growth, produce, and manufacture of any one of the provinces shall, from and after the Union be admitted free into each of the other provinces,' is obviously, as it would seem, *alio intuitu*, and aimed against inter-provincial tariffs.

[aaa] [1913] A. C. 283.

standing with the Government of the province, and the railway company, that these monies should be paid out upon the construction of the railway, as the work progressed. The provincial Government guaranteed the bonds. Then when the construction of the railway had been barely commenced, the provincial legislature, under circumstances not necessary to mention here, in 1910, passed an Act confiscating the money to the general revenue purposes of the province, while reaffirming the guarantee, and providing for the indemnification of the railway company as to all claims which might be brought against it. Their lordships say, referring to this Act:—"It purports to appropriate to the province the balance standing at the special account in the Bank, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. . . It appears to their lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the Bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right. In the opinion of their lordships, the effect of the statute of 1910 if validly enacted, would have been to preclude the Bank from fulfilling its legal obligation to return their money to the bondholders whose right to this return was a civil right which had arisen and remained enforce-

able outside the province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province, nor directed solely to matters of merely local or private nature within it."

It might have been thought, disregarding as *obiter* the *dicta* in the Dobie case above referred to, that No. 13 of section 92 has the effect of giving provincial legislatures complete control of what rights can be enforced by way of action, or by way of defence, in the provincial Courts, just as No. 14 gives them complete control over the administration of justice in the province. But their lordships now distinctly hold in this Alberta case, that this is not so in the case of a right which has arisen and is enforceable outside the province. Provincial legislatures cannot direct their own Courts to refuse to recognise such a right in an action brought in them. The decision is obviously a most important one. Their lordships, in fact, gave effect to the contention of Sir Robert Finlay, who was of counsel in the case:[***] "My submission to your lordships is that where the property to be dealt with is a debt, when the civil rights to be affected are the civil rights in respect of a debt, in order that the legislature may have jurisdiction to deal with that debt, it is necessary that both debtor and creditor, and all parties concerned, should be within the local limits. So long as any other per-

[***] *Verbatim* report of argument from notes of Marten, Meredith and Co., of 8 New Court, London. 2nd day, p. 34.

sons have rights in this debt, if these other persons are outside the province of Alberta, it is enough, I submit, to exclude the jurisdiction of the Alberta legislature." And they refused to give effect to the contention of Mr. Buckmaster, (3rd day, p. 21):—"If the law which you must invoke is the law of a particular province, or State, the civil right which you assert is a right within that State. It is not a civil right which you possess by virtue of being a citizen somewhere else. It is a civil right which you possess by virtue of having obtained the benefit of the administration of laws within that particular area;" which seems to come very near what the writer would have liked to have seen submitted to the Board, namely, that a civil right in a province, or anywhere, is nothing else than a right to invoke the assistance of the civil Courts of that province, or other place, to give effect to some claim of a party to litigation, whether by way of action, or by way of defence to an action: that so far as anyone has such a right, he has 'a civil right' in that province, or other place, whether he has or has not a similar right, under the same set of facts, elsewhere or not: and over such a civil right in a Canadian province, the provincial legislature has plenary power, saving always the powers of Parliament.[sss]

There were made in the course of this argument certain remarks by members of the Board

[sss] See, also, an Article on this case by Mr. J. S. Ewart, K.C., in 33 C. L. T. 269 *et seq.*, where he defends the Alberta Act as *intra vires* under No. 10 of sec. 92, as relating to a 'local Work and Undertaking.' See, also, 9 Dom. L. R. at pp. 346-363.

which are, of course, of interest.[2810] Thus (2nd day, p. 34): Lord Moulton. "I am puzzled how an Alberta Act can be relevant in an action against people outside Alberta, unless it is with regard to entirely local property, such as land, or something of that kind."

(2nd day, p. 61): Lord Atkinson. "If a man owns some land they might pass an Act that, unless he developed it in some way within the course of five years, it would be forfeited."

Lord Haldane, L.C. "I think it must be so because the preamble of the British North America Act recites that the 'provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in principle to that of the United Kingdom,'—that is to say the principle of a Sovereign parliament which may confiscate or do anything it pleases. . We know no restriction under our Constitution of Sovereign powers. These are transferred to Canada, sub-

[2810] The suggestiveness and value of the remarks by members of the Board quoted in this work, and in The Law of Legislative Power in Canada, from *verbatim* reports of arguments before the Privy Council, seem to the writer beyond all question. But at the same time, it does not follow that it is proper to cite them in Court, especially before the Judicial Committee. In the Lord's Day Act Case, [1903] A. C. 524, Mr. O'Meara, of counsel for one of the parties, attempted this, but Lord Davey said:—"They ought not really even to be cited:" Marten, Mefedith, Henderson and White's Shorthand Report, 2nd day, p. 59. However on the argument in *Cunningham* v. *Tomey Homma*, [1903] A. C. 151, Mr. C. Robinson, of counsel for the appellant, is reported as quoting words of Lord Watson, spoken on the argument in *Fielding* v. *Thomas*, [1896] A. C. 610, without any objection being raised: *Verbatim* report of Barrett and Barrett, p. 10.

ject only to this that they are the creation of an Imperial statute."

(3rd day, p. 18): Lord Moulton. "'Civil rights in the province' does not mean civil rights according to the law of the province. Suppose two people from Alberta are in London, and they make a contract, and they say 'this is to be interpreted according to the law of Alberta,' does that make it civil rights within the province of Alberta?"

(3rd day, p. 43): Lord Haldane, L.C. "Supposing the legislature has passed legislation which has given civil rights to persons outside the province. Can the legislature repeal the legislation which has had that effect? Because, although speaking for myself, I quite agree that we are dealing with sovereign powers, they are sovereign powers which are distributed, and it may be that the Dominion has got that power to the exclusion of the province."

(3rd day, p. 52): Lord Haldane, L.C. "You may authorise the legislature to create civil rights outside the province, and those civil rights may be validly created, regard being had to the power subsisting at the time. It is quite another thing to say that you can take those away merely because you can repeal the Act."

Mobilia personam sequuntur.—In some of the earlier Ontario decisions, it seems to have been supposed that this maxim, or the same maxim in its quainter form, *mobilia ossibus inhaerent*, may in some way apply to restrict the scope of the provincial power over 'property and civil

rights in the province'; so that provincial legislatures may not have jurisdiction over personal or movable property, or over civil rights, though situate within the province, if the owner of them be domiciled in another province, or abroad.[383] But, as we have seen, these maxims cannot, in any way, either restrict or enlarge the provincial legislative power under No. 2 of section 92, of 'direct taxation within the province,'[384] so neither can they, in any way, affect the scope of provincial power over 'property and civil rights in the province,' which can, it is submitted (subject to restriction in the import of those terms rendered necessary to allow scope for the other provisions of the British North America Act),[385] have "no practical limit except the lack of executive power to enforce their enactments," to adopt the words of the Judicial Committee in *Dobie* v. *Temporalities Board*.[386] In other words, if 'property and civil rights' have such a local position in the province, that the legislative arm can reach them, the provincial legislature has, subject as aforesaid, jurisdiction over them, no matter where the domicil of the owner of them may be. The application of the maxims referred to, is, as Mr. Dicey explains

[383] So per Strong, V.-C., in the *Goodhue Case* (1873), 19 Gr. at p. 452. And in *Jones* v. *Canada Central R. W. Co.* (1881), 46 U. C. R. 250, Osler, J., certainly seems to countenance the idea that the domicil of the owner of a debenture might determine whether the provincial legislature had jurisdiction in relation to it under No. 13 of section 92.

[384] See *supra*, pp. 403-7, and Legislative Power in Canada, pp. 757-759.

[385] See *supra*, pp. 488-492.

[386] (1882) 7 App. Cas. at p. 146. See *supra*, pp. 64-85.

in his Conflict of Laws,[887] to be found in the fact that debts or choses in action are generally, and other personal property sometimes, to be looked upon as situated in the country where they are properly recoverable or can be enforced.[888]

Owner in one province: property in another.—Assuming, then, that the maxim *mobilia personam sequuntur* has no application to this matter of legislative power, it is submitted further that if a person domiciled in Ontario owns property in Quebec, his right to that property is also a 'civil right' in Quebec, within the meaning of the clause we are considering. But it must be admitted that if this be so, certain words of the Privy Council in *Dobie* v. *Temporalities Board*,[889] are puzzling, where their lordships say: "When funds belonging to a corporation in Ontario are situated or invested in the province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by sub-

[887] 2nd ed., pp. 309-310.

[888] As to the *situs* of debts and choses in action, and the distinction between whether a debt is one by contract or by specialty: see per Duff, J., in *Lovitt* v. *The King* (1910), 43 S. C. R. at p. 131; and as to the *situs* of the obligation of a bank under a deposit receipt issued by one of its branches: see S. C. in appeal, [1912] A. C. 212; and per Duff, J., 43 S. C. R. at pp. 133-142. See, also, *Henty* v. *The Queen*, [1896] A. C. 567; per Burton, J.A., in *Nickle* v. *Douglas* (1875), 37 U. C. R. at pp. 61-62; per Patterson, J.A., S. C. at p. 71; Per Wilson, J., S. C. at p. 145. The Minister of Justice objected, as might be expected, to a provincial Act authorizing the sale by the Attorney-General, as administrator, of real estate situate outside the province of intestates dying without known relations in the province: Hodgins' Provincial Legislation, 1867-1895, pp. 151, 156-7.

[889] (1882) 7 App. Cas. at p. 151. See, also, *Royal Bank of Canada* v. *The King*, [1913] A. C. 283; *supra*, pp. 504-7.

section 2 of section 92, or may impose conditions upon the transfer or realization of such funds; but that the Ontario legislature shall have power, also, to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867." For we have seen that the power of provincial legislatures over property and civil rights in the province is plenary; and they can confiscate property and vested rights, in the exercise of that power, if they see fit so to do.[1000] And, therefore, it is submitted that their lordships' words must be read as having reference only to such legislation as was then before the Board, where the Quebec legislature had assumed to confiscate—or rather divert—the funds in Quebec of a corporation incorporated by an Act of the old province of Canada, and essential to the purposes of the incorporation. The writer submits that, so far as constitutional power goes, a provincial legislature could under No. 13 of section 92, confiscate any property, whether of a corporation or an individual, situate within the limits of the province,[1001] excepting, indeed, the public property of the Dominion which, by No. 1 of section 91, is placed under the exclusive jurisdiction of the Dominion parliament, or property which belongs to a Dominion corporation, with, of course, a Dominion object, and the control of which is essential to prevent such Dominion object being defeated, for example the track of a Dominion railway.[1002] The

[1000] *Supra*, pp. 82-5.

[1001] See *supra*, pp. 83-4.

[1002] As to which, see *supra*, pp. 495-7.

property of a corporation might be confiscated without necessarily affecting its constitution or status as a corporation.[xxx]

'Property in the province.'—In *In re Windsor and Annapolis R. W. Co.*,[xxxi] the majority of the Court held that the property and civil rights of a railway, which, though authorized to extend beyond the province, and connect with lands without the province, yet had, as a matter of fact, not done so, but operated wholly within the province, were within the jurisdiction of the provincial legislature, no declaration having been made, under No. 10 of section 92 of the British North America Act, that the railway was a work for the general advantage of Canada, and this though all, or nearly all, the shareholders and creditors were outside the province.

Affecting rights of extra-provincial creditors.—And as to provincial legislation, under No. 13 of section 92, affecting the rights of extra-provincial creditors, reference may be made to the words of Osler, J., in *Clarkson* v. *Ontario Bank*,[xxxii] in regard to the Ontario Act respecting

[xxx] *Cf. Cowan* v. *Wright* (1876), 23 Gr. 416, where, however, the properties in question, as the report shews, belonged to particular congregations in Ontario, not to Church bodies existing in the various provinces as a corporate whole, so that the case is not any authority on the subject of legislative power over property in one province of corporations belonging to another province.

[xxxi] (1883) 4 R. & G. at pp. 322-3. The company was incorporated by Act of the Nova Scotia legislature shortly before the coming into force of the British North America Act.

[xxxii] (1888) 15 O. A. R. at p. 190.

assignments for the benefit of creditors, of which he says: "It directly affects the rights of all their creditors whether in this, or the other provinces, or elsewhere. So far, therefore, as it controls the rights of extra-provincial creditors, it is not confined to dealing with property and civil rights in the province, although that, as held in *Jones* v. *Canada Central R. W. Co.*,[395] may not be an objection in the case of creditors under an Act of a purely private or local character." But, it is submitted, the Act referred to only controls the rights of extra-provincial creditors so far as such creditors seek payment of their debts against the property of an insolvent person within the province; and it seems quite consistent with principle that so far as outside creditors seek their remedy within the province, they are subject to the law of the province.[396] The Privy Council, on appeal,[397] in dealing with the only provision of the Act which was before them, namely, that whereby executions not completely satisfied by payment were postponed to an assignment for the general benefit of creditors, do not expressly discuss the point that the effect of it extends to extra-provincial creditors; but say (at p. 198): "Now there can be no doubt that the effect to be given to judgments and executions, and the manner and extent to which they may be made available for the recovery of debts, are *prima facie* within the legislative powers of

[395] (1881) 46 U. C. R. 250. As to this case, see, also, *supra*, pp. 454-5.

[396] See *supra*, pp. 504-7, and *The Royal Bank of Canada* v. *The King*, [1913] A. C. 283, as there cited.

[397] [1894] A. C. 189.

the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament."

It remains to notice other examples of statutes and matters which have been held to be, or not to be, within this provincial power over 'property and civil rights' in the province.

Statutes and matters which have been held to be within No. 13 of section 92.—In the Liquor Prohibition Appeal, 1895,[***] we have seen that the Privy Council said that a law which prohibits retail transactions, and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces, or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and, also, the civil rights of persons in the province; and may, perhaps, be authorized under No. 13 of section 92, as legislation in relation to property and civil rights in the province; but they do not consider it necessary to determine whether such legislation is authorized under that head or not, because, if not, it would fall, *prima facie*,[***] within No. 16 of

[***] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348.

[***] By '*primâ facie*' here their lordships seem to mean that the vice of intemperance might prevail so universally throughout the Dominion that the restriction or prohibition of the sale of liquor therein, was more than a matter of merely local or private nature or interest in particular localities, and had become a matter to be dealt with in a Canadian aspect for the peace, order and good government of Canada generally, by the Dominion par-

section 92, as a matter of a merely local or private nature.

In *Citizens Insurance Co.* v. *Parsons*,[300] the Privy Council held that a provincial Insurance Act intended to regulate the business of fire insurance companies in the province, with a view to securing uniform conditions in their policies, fell within No. 13 of section 92, and not within No. 2 of section 91, 'the regulation of trade and commerce.'

In *Gower* v. *Joyner*,[301] the Supreme Court of the North-West Territories decided that an ordinance enacting that for ill-usage, non-payment of wages, or improper dismissal of a servant by his master, a justice of the peace might order such master to pay the servant one month's wages in addition to arrears and costs, and in default, imprisonment for a month, was *intra vires* of the Legislative Assembly under No. 13 and No. 14 (the administration of justice), Rouleau, J., dissenting.

In *Florence Mining Co.* v. *Cobalt Lake Mining Co.*,[302] the Ontario Court of Appeal says: "The right to bring an action is a civil right." And so, in No. 13 and No. 14, of section 92, has been found the power of provincial legislatures to authorize the initiation of legal proceedings against defendants out of the jurisdiction.[303]

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liament; and on this latter theory they upheld the Canada Temperance Act, 1878, in *Russell* v. *The Queen* (1882), 7 App. Cas. 829. As to No. 16 of section 92, see *supra*, pp. 140-3, and *infra*, pp. 627-9.

[300] (1881) 7 App. Cas. 96.

[301] (1896) 2 Terr. L. R. 387.

[302] (1909) 18 O. L. R. 275. In App. to the Privy Council, 102 L. T. 375.

[303] *Stairs* v. *Allan* (1896), 28 N. S. 410, at pp. 418-9; *McCarthy* v. *Brener* (1896), 2 Terr. L. R. 230. See also, *supra*, pp. 104-5, a.

In *Ex parte Ellis*,[***] a provincial Act providing for the imprisonment of a person making default in payment of a sum due on a judgment, in case (amongst other things) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally, was held valid, because rightly viewed it was an Act for enforcing the payment of judgments; and in the words of Allen, C.J.: "Surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice and procedure in civil matters in the province, all of which are expressly within the jurisdiction of the provincial legislature."[***]

In *Regina* v. *Wason*,[***] an Ontario Act to provide against frauds in the supplying of milk to

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[***] (1878) 1 P. & B. 593.

[***] In connection with this case may be mentioned *Re Stinson and College of Physicians* (1911), 22 O. L. R. 627, where Riddell, J., held that the provisions of Ontario statutes conferring power on the Council of the College of Physicians and Surgeons of Ontario to erase from their register the name of a practitioner for misconduct amounting to an indictable offence, although he may not have been convicted of the offence, is not *ultra vires*, because an enquiry under it—"is not a criminal trial involving punishment for the crime alleged;—it is merely the determination of facts upon which the civil rights of the accused may depend, just as an enquiry under R. S. O., 1897, c. 172, s. 44, by the Benchers of the Law Society . . It is not a matter of criminal law but of civil rights": (p. 634). It will be seen that many provincial Acts may be rested indifferently on No. 13 of section 92, as relating to property and civil rights in the province, or on No. 14 (the administration of justice in the province), or on No. 16 (matters of a merely local or private nature in the province), and cases may be found noticed under those two subsections, which might also have been noticed here; and *vice versa*. *Infra*, pp. 525-573; 627-9.

[***] (1889-1890) 17 O. R. 58, 17 O. A. R. 221.

cheese and butter manufactories, was held valid as relating to property and civil rights. Maclennan, J.A., says[807] in this case: "What was here enacted, although it may in its widest sense be regarded as a criminal law, falls under section 92 as a legitimate dealing with property and civil rights in the province." Osler, J.A. observes:[808] "The legislature, when really dealing with property and civil rights, must have power to say 'thou shalt' or 'thou shalt not;' and as the breach of the legislative command is always, in one sense, an offence, the line between what may and what may not be lawfully prescribed without trenching upon criminal law is sometimes difficult to ascertain and different according to circumstances."[809]

Provinces in legislating under No. 13 of section 92 may in some incidental way regulate trade and commerce.[810]—In *Regina* v. *Taylor*,[811] Wilson, J., says of an Ontario Act concerning bills of lading, and giving consignees and endorsees the same rights, and imposing on them the same liabilities as if the contract had been made with them: "I think that the same Act which the Ontario Legislature passed as a general provision affecting property and civil rights over which it has exclusive jurisdiction,

[807] 17 O. A. R. at p. 251.

[808] *Ibid.*, at pp. 240-1.

[809] As to this case of *Regina* v. *Wason*, see further *infra*, pp. 590-2.

[810] As to the construction of the Dominion power over the regulation of trade and commerce under No. 2 of section 91, see *supra*, pp. 230-6.

[811] (1875) 36 U. C. R. at p. 206.

the Dominion parliament might, also, have passed as a necessary and convenient matter to be dealt with in the regulation of trade and commerce. . . . And the Ontario Act, just as it is, not professing to regulate trade, and not doing so, but in an incidental manner only, is not, in my opinion, *ultra vires* so far as the statute itself can be, as I think in such a case it can be, supported as dealing only with property and civil rights."

Provinces in legislating under No. 13 of section 92 may in some incidental way touch the subject of bankruptcy and insolvency.[511a] *In re Killam,*[511] Savary, Co.J., referring to a Nova Scotia Act for the relief of insolvent debtors, which provided for discharge from prison of a debtor on assignment of his property in trust to pay his debts, says: "So long as the party seeking the benefit of that chapter has not become insolvent under the Dominion statute, all the proceedings under it are valid and effectual, for they only relate to property and civil rights; but as soon as the Dominion statute of insolvency is invoked, that chapter has no more force as to him, or his case, and the relief it contemplates can only be obtained under the Dominion statute. He is then in bankruptcy or insolvency within the meaning of the British North America Act, and the Insolvent Act of Canada, therefore, attaches, with exclusive authority upon his person

[511a] As to the Dominion power over bankruptcy and insolvency, see *supra*, pp. 279-293.

[511] (1878) 14 C. L. J. N. S. at pp. 242-3.

and property."[313] And in *Parent* v. *Trudel*,[314] Andrews, J., says: "Though a general bankruptcy and insolvency Act, such as that, for instance, recently in force here, under the title of the Insolvency Act of 1875, is admittedly a matter to be dealt with by the Federal parliament, it seems to me that a law defining the conditions under which a writ of capias can be obtained (even though it apply in some of its enactments merely to insolvent traders) is within the power of our local legislature to deal with."

But in his report of Nov. 11th, 1899, the Minister of Justice objected to a Quebec Act providing with reference to railway companies subsidized by the province, that in certain cases it should be lawful for the Lieutenant-Governor in Council to authorize the Commissioner of Public Works to cause the railway and roadbed and all the rolling stock and equipment thereof to be sequestrated or sold. He says: "One of the events upon which these proceedings may be had is the insolvency of the company. The statute proceeds to enact the procedure consequent upon such order. . . It is, in the opinion of the undersigned, clearly incompetent to a provincial legislature to provide for the sequestration or the sale of a company's property, or the winding-up of the affairs of the company, by reason of the company's insolvency." He did not however proceed to recommend disallowance.[315]

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[313] There has been no Dominion legislation in relation to bankruptcy or insolvency, save as to corporations, since 1880, when all existing insolvency Acts were repealed by 43 Vict c. 1, D.

[314] (1887) 13 O. L. R. at p. 139.

[315] Provincial Legislation, 1899-1900, at p. 49.

Right of voting not a 'civil' right within the meaning of No. 13 of section 92.[116] *In re North Perth, Hessin* v. *Lloyd*,[116a] Boyd, C., takes occasion to observe that the right of voting for a member of parliament is not an ordinary civil right. It is, he says, historically and truly a statutory privilege of a political nature, and the right of voting for the Dominion House of Commons "falls within the category, not of civil rights in the province, but of electoral rights in Canada."

Section 94 of the British North America Act.—It remains, before closing the subject of property and civil rights, to mention this section under which the Dominion parliament may make provision 'for the uniformity of all or any of the laws relative to property and civil rights' in Ontario, Nova Scotia, and New Brunswick, 'and of the procedure of all or any of the Courts in those three provinces; and from and after the passing of any Act in that behalf the power of the parliament of Canada to make such laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the parliament of Canada making provision for such uniformity shall not have any effect in any province unless and until it is adopted and enacted as law by the legislature thereof.' On March 12, 1902, Dr. Benjamin Russell moved a resolution

[116] See the remarks of the Privy Council in reference to this section, in *Citizens' Insurance Co.* v. *Parsons*, quoted, *supra*, pp. 499-501.

[116a] (1891) 21 C. R. 538.

in the Dominion House of Commons favouring steps being taken to carry out the provisions of this section for securing the uniformity of the laws relating to property and civil rights in all the provinces of Canada except Quebec."[1166] He urged that there were other subjects on which it was as important that there should be uniform legislation throughout the Dominion as in the case of bills of exchange and promissory notes, such as the sale of goods, the formation, operation and discharge of contracts, joint stock companies, and the devolution of real and personal property. The seconder of the resolutions, however, expressed doubt whether there was anything in the terms under which the provinces of Manitoba, Prince Edward Island, and British Columbia entered Confederation which gave the Federal parliament power to enact such legislation in regard to them. Another member (Mr. John Haggart), stated (as the mover also had done) that it was the general hope and expectation of the men who drew up the British North America Act and were the founders of Confederation "that as soon as our first Parliament met, a step would have been taken in this direction, but instead we have followed the policy of drift until we have reached the present stage when that confusion exists among the various laws which the honourable member has so well described." Mr. R. L. Borden expressed the view that—"It would be idle for this Parliament to undertake a work of this kind until the provinces

[1166] Debates of House of Commons, Vol. 56, p. 1069, *et seq.* The motion was debated at considerable length though no vote was taken.

had got together and ascertained whether there was any basis upon which they could agree on any subject coming within the definition of property and civil rights. . . . We have had various opinions and speculations in the Privy Council and the Supreme Court as to whether this or that subject came within the description of property and civil rights, or of some other subject as to which the provincial legislatures have jurisdiction under the British North America Act."

Reference may also be made to an Address on Uniformity of Laws in Canada delivered by Mr. Eugene Lafleur, K.C., before the Canadian Club at Ottawa, on December 7th, 1912. The learned writer discusses how far uniformity is desirable, and how, if desirable, it is attainable. He mentions as departments of law in which uniformity is eminently desirable, the law of commercial sales, succession duty, insurance and the licensing of insurance companies, and the incorporations of companies, and as to these last says (p. 7): "I have yet to hear any sound reason for the existence in the Dominion of ten different systems for incorporating and licensing insurance companies and joint-stock companies (nine provincial and one federal), ten different kinds of insurance law, and ten different kinds of company law. The only objection which I have heard on the part of the provinces is that a concentration of all these powers in the Dominion would deprive them of the revenue which they derive from incorporating, licensing, or registering such companies. But assuredly this is a matter of detail which could be adjusted equit-

ably by attributing to the several provinces the fees exigible from such corporations, according to the situation of the head office of each corporation, or in some other appropriate manner. It is unnecessary to dwell on the enormous advantages of such a fusion. Every corporation could exercise its powers throughout the Dominion, and in foreign countries, as far as the comity of nations permits, without fear of exceeding its own charter powers. A fire insurance company in Ottawa would no longer be perplexed as to whether it can insure property in Quebec or in the State of Maine, and a commercial corporation in Montreal would not be in doubt as to how far it can operate in British Columbia or in California. The system of incorporating local companies 'with provincial objects' was devised before the existence of our great transcontinental railways, and before the enormous expansion of corporate undertakings. It serves no useful purposes to restrict commercial corporations by geographical bounds. . . Even if we cannot make up our minds to have all insurance companies and commercial corporations chartered by the Dominion (which, in my humble opinion, would be the best way of solving doubts as to the extent of their powers), what is to prevent us from having identical legislation in all the provinces on insurance law and on company law?"

As to methods of attaining the desired uniformity, Mr. Lafleur suggests proceeding by the voluntary and concerted action of the provinces themselves, and asks—"What possible objection can there be to our meeting together, examining

our points of difference, ascertaining which of these might be advantageously removed, and passing concurrent and identical legislation on any given subject in our respective legislatures? The experiment has been successfully tried in the United States by the appointment of State Boards for promoting uniformity of legislation.'"[816b]

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.[817]— In a remarkable report of the late Sir John Thompson, as Minister of Justice, supporting the disallowance of a certain Quebec Act, 51-52 Vict. c. 20, amending the law respecting District Magistrates, which report was affirmed by the Governor-General in Council on January 22nd,

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[816b] Reference may also be made to A Plea for a Uniform Contract of Fire Insurance in Canada in (1899) 19 C. L. T. 112; and Articles on Uniformity of Provincial Laws by R. B. Henderson, in 19 C. L. T. 209; and on Uniform Legislation by W. Seton Gordon in 20 C. L. T. 187. See, also, 46 C. L. J. 41.

[817] 'The constitution of provincial Courts of criminal jurisdiction,' as distinguished from 'procedure in criminal matters,' which by No. 27 of section 91 of the British North America Act is for the Dominion parliament exclusively, has been discussed, *supra*, pp. 333-7. And as to the power to appoint Queen's Counsel, see *supra*, pp. 29; 424. As to the power of the Dominion parliament to create new Courts to exercise jurisdiction in federal matters, and to deprive the provincial Courts of such jurisdiction, see *supra*, pp. 293-4; *infra*, pp. 553-5, and section 101 of the Federation Act, *infra*, pp. 672-688. As to how far 'maintenance' in this subsection implies power of taxation, see *supra*, pp. 411-414. As to predominance of Dominion parliament over provincial penal laws, see *infra*, pp. 623-7. And as to provincial Courts, see the words of Ritchie, C.J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at pp. 20-2, and *supra*, pp. 148-153; *infra*, pp. 541-7.

1889,[318] Sir John Thompson says that "the most remarkable instance in which provincial legislation has overrun the limits of provincial competence, has been the legislation in reference to the administration of justice." He is referring, especially, to provincial legislatures interfering with, or trespassing upon, the power given to the Governor-General in the matter of the appointment of judges by section 96 of the British North America Act. This section enacts as follows:

96. The Governor-General shall appoint the Judges of the Superior, District and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Before, then, considering what the provinces may do in the matter of the appointment of judicial officers, or otherwise, under No. 14 of section 92, it may be well to consider what, under the Dominion authorities, they may not do by reason of this section 96, and the general interpretation of this latter section.[319]

[318] Hodgins' Provincial Legislation, 1867-1895, p. 368. This report is also set out at length in Legislative Power in Canada, at pp. 140-174.

[319] The arrangement by which the Governor-General was to appoint the Superior, District, and County Court judges, while the provinces were to constitute the Courts, and in civil matters, settle the procedure, was regarded by some with much dismal foreboding. See the speech of Mr. Dunkin in the debates on the Quebec resolutions in the parliament of Canada: Debates on Confederation, 1865, pp. 508-9. In his law of the Canadian Constitution (2nd ed., pp. 301-2), Mr. Clement discusses whether the power to appoint County and District Court judges, in section 96, carries with it the power to remove, section 99 of the Act apply-