CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes technique et bibliographiques

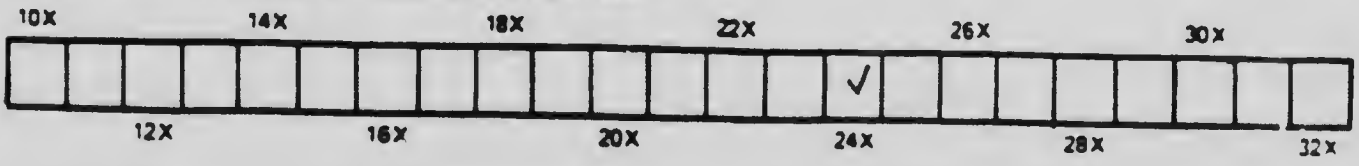
The Institute has attempted to obtain the best original copy avai! ble for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

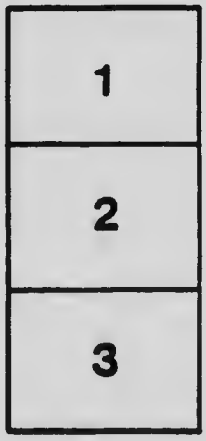
- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☐ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments / Commentaires supplémentaires:

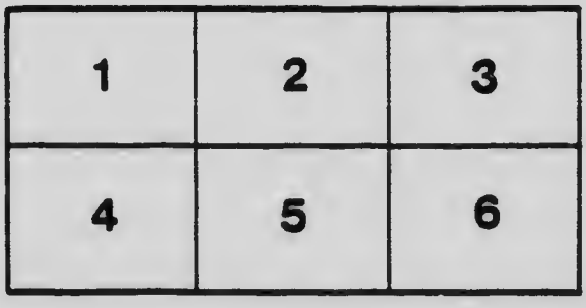
L'Institut a microfilmé le meilleur examplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☑ Showthrough / Transparence
- ☐ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary material / Comprend du matériel supplémentaire
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- ☐ Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleur image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

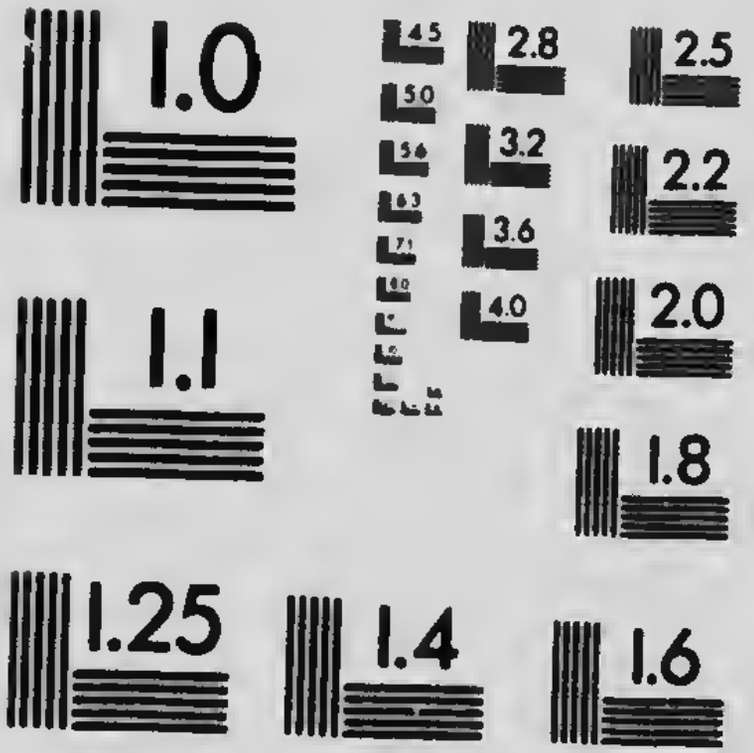






MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

In the Privy Council.

Council Chamber,
Whitehall
December 12th, 1911.

Present:

THE LORD CHANCELLOR (LORD LOREBURN)
THE RT. HON. LORD MACNAGHTEN
THE RT. HON. LORD ATKINSON.
THE RT. HON. LORD SHAW OF DUNFERMLINE.

AND

THE RT. HON. LORD ROBSON.

Between

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA - - Appellants

AND

THE ATTORNEY-GENERAL FOR CANADA
Respondent

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA - - Respondent

C 351

13-4-90
Acc.

The Privy Council.

Council Chamber,
Whitehall
December 12th, 1911.

Present:

THE LORD CHANCELLOR (LORD LOREBURN)
THE RT. HON. LORD MACNAGHTEN
THE RT. HON. LORD ATKINSON.
THE RT. HON. LORD SHAW OF DUNFERMLINE.

AND

THE RT. HON. LORD ROBSON.

Between

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA - - Appellants

AND

THE ATTORNEY-GENERAL FOR CANADA
Respondent

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA - - Respondent

Printed by WILLIAM BRIGGS,
29-37 Richmond Street West, Toronto.

TABLE OF CONTENTS

In the Privy Council.

Council Chamber,
Whitehall
December 12th, 1911.

Present:

THE LORD CHANCELLOR (LORD LOREBURN)
THE RT. HON. LORD MACNAGHTEN
THE RT. HON. LORD ATKINSON.
THE RT. HON. LORD SHAW OF DUNFERMLINE.

AND

THE RT. HON. LORD ROBSON.

Between

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA - - Appellants

AND

THE ATTORNEY-GENERAL FOR CANADA
Respondent.

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA - - Respondent

(Transcript of the Shorthand notes of Marten, Meredith & Co., 8 New Court, Carey Street, W.C.)

Counsel for the Appellants: The Rt. Hon. Sir R. Finlay, K.C., Mr. W. Nesbitt, K.C., Mr. A. Geffrion, K.C., and Mr. Geoffrey Lawrence. (Instructed by Messrs. Blake & Redden).

Counsel for the Attorney-General for Canada: Mr. E. L. Newcombe, K.C., and Mr. A. W. Atwater, K.C. (Instructed by Messrs. Chas. Russell & Co.).

Solicitors for the Attorney-General for British Columbia: Messrs. Gard, Rook & Co.

Sir ROBERT FINLAY: My Lords, this is an appeal brought by the Attorneys-General of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta, against the decision of the Supreme Court by a majority to hear and decide on a reference of certain questions to them under the Judicature Act of the Dominion.

The Province of British Columbia, your Lordships will see, is not an Appellant, but is entered as a Respondent. I believe no one appears for the Province of British Columbia on the present occasion.

Mr. NEWCOMBE: No.

Sir ROBERT FINLAY: A letter has been written by the agents for the Province of British Columbia saying that their attitude is that they object to any such reference without consent of the Provinces interested. Our contention goes further than that. We not only share that view with British Columbia, but we say that the reference is in itself unconstitutional.

The motion, my Lords, which was decided by the Supreme Court and to which this appeal relates will be found at page 7 of the Record. This is the notice of Motion:

"In the matter of certain references by His Excellency the Governor-General-in-Council to the Supreme Court of Canada, pursuant to Section 60 of the Supreme Court Act of certain questions for hearing and consideration.

"(1) As to the respective legislative powers under the British North America Act of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of Companies and as to the other particulars therein stated.

"(2) As to the powers of the Legislature of British Columbia to authorise the Government of that Province to grant exclusive rights to fish as therein mentioned.

"(3) Relating to The Insurance Act, 1910.

"Take notice that on the opening of the Court on Tuesday, the 4th day of October, 1910, a motion will be made on behalf of the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta, by way of protest against the Court or the individual members thereof entertaining or considering the questions referred to it by the Executive Council and that the inscription thereof be stricken from the list, and that the same be reported back to the Executive Council as not being matters which can properly be considered by the Court as a Court or by the individual members thereof under the constitution of the Court as such nor by the members thereof in the proper execution of their judicial duties." Your Lordships are aware that there have been a certain number of references of this nature, questions put not arising in any judicial proceedings, to the Supreme Court, and in some cases there have been protests by the members of the Court, and in some cases the matter has come up before Your Lordships' Board on appeal. In some of these cases Your Lordships' Board has expressed the opinion that the questions were of a nature which ought not to be answered, but the present reference is of such a nature that there has been a sort of constitutional revolt by the Provinces, and I shall ask Your Lordships to say that the attitude of the Provinces is thoroughly justified. Would Your Lordships be good enough to look at page 3 of the Record, and there Your Lordships will find what the questions sent to the Supreme Court are:

"In the Supreme Court of Canada.

"P. C. 877.

"A report of the committee of the Privy Council, approved by His Excellency the Governor-General on the 9th May, 1910.

"The Committee of the Privy Council have had under consideration a report, dated 2nd May, 1910, from the Minister of Justice, stating that important questions of law have arisen as to the respective legislative powers under the British North America Acts of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of Companies and as to the other particulars hereinafter stated, and it is expedient that these questions should be judicially determined.

"The Minister accordingly recommends that under the authority of Section 60 of the Supreme Court Act, Revised Statutes of Canada, 1906, Chapter 139, the following questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration, namely:—

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

"What is the meaning of the expression 'with provincial objects' in Section 92, article 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

"2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by Section 92, article 11 of 'The British North America Act, 1867,' power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?

"Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?

"3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business,

there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts.

"(A) Within the incorporating province insuring property outside of the province;

"(B) Outside of the incorporating province insuring property within the province;

"(C) Outside of the incorporating province insuring property outside of the province?

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

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

"4. If in any or all of the above-mentioned cases, (A), (B) and (C), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, Revised Statutes of Canada, 1906, Chapter 34, as provided by Section 4, Subsection 3?

"Is the said enactment, Revised Statutes of Canada, 1906, Chapter 34, Section 4, Subsection 3, *intra vires* of the Parliament of Canada?"

Your Lordships will find in a second order of the Privy Council that that fourth question is modified so as to have relation to a Statute of 1910.

MR. NEWCOMBE: Which was passed in substitution of this one?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: Substantially the same?

SIR ROBERT FINLAY: Substantially the same.

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

"(A) The Dominion Parliament?

"(B) The legislature of another province?

"6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until

the companies obtain a license so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?

"For examples of such provincial legislation, see Ontario, 63 V. Cap. 24; New Brunswick, Cons. Stat. 1903, Cap. 18; British Columbia, 5 Edw. VII., Cap. 11.

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

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

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?" Then the next order of the Privy Council mak s the substitution to which have referred of the Act of 1910 for the Act of 1906 under the fourth question in the first order. Then there is a further Order of the Privy Council making a verbal alteration.

MR. NEWCOMBE: Merely to correct a clerical error.

SIR ROBERT FINLAY: Yes. Section 3 is erroneously described as Section 23. It is merely a clerical error. My submission to your Lordships will be that answering such questions as these is really inconsistent with the functions of a Court of Justice.

These questions raise points of very great difficulty which materially affect business men throughout all the Provinces and throughout the whole Dominion, and points which certainly must come before first the Provincial

Courts and in all probability afterwards, this same Supreme Court in the course of ordinary litigation when they are properly raised.

I submit to Your Lordships that, in the first place, the questions with which we have to deal here are not the sort of questions that ought to be sent to any Court. They are absolutely different from any questions that have ever been sent to Your Lordships' Board under the 3rd and 4th William IV. They require the Supreme Court to write a sort of treatise upon a number of questions, hypothetical questions, with regard to incorporation of Companies, insurance business, the business of various Companies, and a number of other points which may be interesting, but certainly are wholly unsuited for discussion in this shape before a Court, but I go a great deal further than that, and I shall respectfully submit to Your Lordships' that the whole of these references of abstract questions to the Supreme Court is unconstitutional, and that section 60 of the Supreme Court Act of Canada, which purports to authorize such references is *ultra vires.*

LORD MACNAGHTEN: This Board has often declined to answer hypothetical or academic questions.

SIR ROBERT FINLAY: Yes, my Lord, repeatedly, and I submit that these questions are of a class which no Court should answer.

LORD MACNAGHTEN: Because the answer binds nobody.

SIR ROBERT FINLAY: It binds no one.

LORD MACNAGHTEN: It may prejudice, but it does not bind.

SIR ROBERT FINLAY: And one point I shall submit to your Lordships is this, it may cause the greatest unrest among business men if opinions are expressed by the Supreme Court on a point which vitally affects their interest. It is perfectly true that I suppose in theory the Supreme Court would not be bound by their own answers to these questions, but it would be extremely disquieting if there were a series of answers given on the vast number of difficult points which are raised by these questions which I have just read, and it appeared that these

answers if they were proved ultimately to be correct would very seriously affect business relations throughout all the Provinces.

LORD MACNAGHTEN: And if they were incorrectly answered might discredit the Supreme Court.

SIR ROBERT FINLAY: Yes. References of this kind are really inconsistent with the duties of a Court of Justice; the references to Your Lordships' Board under the Statute of William IV. have been carefully guarded. To begin with they are under an Act of the Imperial Parliament. Definite questions have been put which arose and Your Lordships have had no difficulty in dealing with them; but questions of this kind belong to another category altogether and now that the attempt is being made to use the power in this way, the Provinces have had to reconsider the whole position and although in the past they have in some cases not protested and in other cases consented to the questions being raised in that form, they now say that the jurisdiction really does not exist, and they ask Your Lordships' Board to say that the opinion of the minority of the Supreme Court to that effect is the correct one.

THE LORD CHANCELLOR: What is the date of the Canadian Act under which the reference is made? I see this Act is 1906, but was that the first, or was that a continuation of previous legislation?

SIR ROBERT FINLAY: The first Act was in 1875.

THE LORD CHANCELLOR: It is a very long time ago.

SIR ROBERT FINLAY: Yes, my Lord.

MR. NEWCOMBE: When the Court was constituted.

SIR ROBERT FINLAY: Then there have been two or three variations altogether I think in the form that was adopted in 1875.

Now I will call your Lordships' attention presently to these previous Acts and to the cases of reference which have occurred under them and to the occasional protests which have been made, but I desire in the first instance to call Your Lordships' attention to the British North America Act, the Statute defining the constitution of the Dominion, with a view to throwing light on the question whether this section 60, of the Supreme Court Act is constitutional at all. I think Your Lordships will find the

material sections set out in the Appellants' Case at page 2. Sections 91 and 92 and then 96 to 101 are the material sections. Your Lordships have been very familiar within the last few days with sections 91 and 92 and to some parts of these sections I have again to call attention. Section 91 of the British North America Act is: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

* * * * * *

"27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

* * * * * *

"29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

* * * * * *

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act, assigned exclusively to the legislatures of the Provinces." Then 92: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

* * * * * *

"11. The Incorporation of Companies with Provincial objects.

* * * * * *

"13. Property and Civil rights in the Province.

"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."

Then 96, under the head "Judicature":

* * * * * *

"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.

"97. Until the Laws relative to property and Civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

"98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

"99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

"100. The salaries, allowances and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada." Then comes section 101, which is, perhaps, the most material one in this connection: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

Now Your Lordships will see that that section has two branches: the subject of the Court of Appeal for Canada is dealt with in the earlier lines of the section. The

Parliament may provide for a general Court of Appeal for Canada. It has been held, and as I submit rightly held, that that means that the Court of Appeal for Canada was to take cognizance of the Provincial Laws. If a case came from a Province, they were to decide that case according to the law of the Province in their capacity as a Court of Appeal, but then the second branch of the section is concerned with the law of Canada; the power to establish additional Courts for the better administration of the laws of Canada cannot be exercised with regard to the "better administration" of any Provincial law; that branch of the section relates to such Courts as Admiralty Courts, the Exchequer Court, the Railway Board, and Courts for the trial of Election Petitions, with regard to elections to the Dominion Legislature. There is a sharp contrast between the two limbs of the section, the first relates to the functions of the Supreme Court as a Court of Appeal, the second to any functions that may be entrusted to it by way of administering the laws of Canada, which mean the laws of the Dominion as distingnished from the laws of the Provinces, and what I shall submit to your Lordships is, that this section 101, deals specifically with the constitution and functions of the Supreme Court, and in such a way as to show that the attempt which was made to impose upon that Supreme Court the duty of answering questions sent by the Governor-General in Council is unconstitutional. I shall submit to Your Lordships that having regard to the well-known fact that such a power was conferred on the King with reference to your Lordships' Board by the section of the Act of 3rd and 4th William IV. to which I have already alluded, having regard to the fact that it was well known that the Supreme Court of the United States declined to answer questions of this nature sent to them on one occasion by a President on the ground that by the constitution they sat as a Court and not as an Advisory Board, having regard to the notoriety of these facts, it is impossible to snppose that it was not intentional that any power of this kind was omitted and if the subject was considered it would probably be thought that the power of the King here, to refer a question to Your Lordships' Board might be called into play in any

great question. No provision is made, and I am going to ask Your Lordships to say that in the absence of any provision of that kind in the constitution the enactment which the Parliament of Canada has passed providing for such references was beyond their power.

Now, I pass to the Supreme Court Act of the Parliament of Canada. The extracts here given from the Supreme Court Act are from the Revised Statutes of Canada for 1906, chapter 139. I have got the Revised Statutes here, but I am reading from the Appellants' case: "The Court of Common Law and Equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general Court of Appeal for Canada, and as an additional Court for the better administration of the laws of Canada, and shall continue to be a Court of Record." Your Lordships see the same distinction is kept up, a Court of Appeal for Canada and an additional Court for the better administration of the laws of Canada. Then section 60 is the section on which this case turns: "Important questions of law or fact touching,—

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

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

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

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

"(*e*) Any other matter, whether or not in the opinion of the Court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

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

"3. In case any such question relates to the constitutional validity of any Act which has heretofore been, or shall hereafter be passed by the Legislature of any Province, or of any provision in any such Act, or in case, for any reason, the Government of any Province has any special interest in any such question, the Attorney-General of such Province shall be notified of the hearing, in order that he may be heard if he thinks fit.

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

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

"6. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties." Then section 67: "When the Legislature of any Province of Canada has passed an Act agreeing and providing that the Supreme Court of Canada shall have jurisdiction in any of the following cases, that is to say:—

"(*a*) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the Parliament of Canada, when

in the opinion of a Judge of the Court in which the same are pending such question is material;

"(*b*) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the Legislature of such Province, when in the opinion of a Judge of the Court in which the same are pending, such question is material;"

THE LORD CHANCELLOR: This section 67 is not in point of fact raised in this case.

SIR ROBERT FINLAY: No, my Lord, it is only printed for this reason, that it shows that provision is made in a regular and proper way for sending any point that arises in litigation with regard to the constitutionality of any such Act. That is the only reason, my Lord, why I refer to it—"the judge who has decided that such question is material shall, at the request of the parties, and may without such request, if he thinks fit, in any suit, action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly.

"2. The Supreme Court shall thereupon hear and determine the question so raised, and shall remit the case with a copy of its judgment thereon to the Court or Judge, whence it came to be then and there dealt with as to justice appertains."

THE LORD CHANCELLOR: This section relates to actual litigation.

SIR ROBERT FINLAY: To actual litigation.

THE LORD CHANCELLOR: And concrete questions arising in the particular litigation, so that it is on quite a different footing from the other sections.

SIR ROBERT FINLAY: On an absolutely different footing, and it is by reason of the contrast that I invite your Lordships' attention to section 67. Then: "3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

"4. This section shall apply only to cases of a civil nature." Then in the next paragraph follows a list of the Statutes, which were formerly passed, and which have resulted with modifications in the enactment in the Revised Statutes of 1906. I shall call your Lordships' attention to these earlier Statutes in their order and to any references that arose under them, but I desire in the first instance before going into details to submit to Your Lordships' broadly, that the whole powers of the Parliament of Canada with regard to the Supreme Court are contained in section 101, and that these references are inconsistent with the duties of the Supreme Court as prescribed in section 101. It is a general Court of Appeal for Canada. It cannot be pretended that it comes under that. It is not an appeal from any Court in the Provinces. "For the establishment of any additional Courts, for the better administration of the laws of Canada"——I submit it cannot come under that. In the first place, it is not the administration of law at all; in the second place, it is not the administration of the law of Canada, so far as it relates to Provincial questions. The administration of the law means dealing with matters in the due course of law when they arise in a suit. A concrete question arises in a suit; that is dealt with: the administration of the law proceeds on such lines as these, and only on such lines. This is asking that the Supreme Court shall write a sort of treatise on a very great number of questions which it is apprehended may arise under the constitution. That is not the administration of the law at all. Secondly, even if the first difficulty could be got over, and it could be considered as in some way falling under the head of administration of the law, which I submit is not the case, it certainly would not be the administration of the law of Canada. The "law of Canada" in this section means the law of the Dominion as a whole; it does not mean the law of the various Provinces which form the Dominion, and the references here relate very largely to the question of the Provincial laws and the powers of the Provincial legislatures and of the Provincial Governments, with regard to the incorporation of companies and other matters. So that on both these grounds I submit that it cannot fall within this second limb of sec-

tion 101. But I go further: I respectfully submit that section 101 shows that the Supreme Court was to be a Court and a Court only, and that to cast upon it such advisory functions as the Supreme Court Act purports to throw upon it is inconsistent with the duties of a Court. The Court would be most grievously hampered in its functions as a Court, and I put it to your Lordships that to throw upon the Supreme Court, the authority for the creation of which is found in section 101, such duties as section 60 of the Supreme Court Act attempts to impose upon it, is inconsistent with its duties under section 101. It is not merely that the constitution, the British North America Act, is silent as to the power to send questions of this kind. I submit that any power to send such questions is really inconsistent with the British North America Act, because it is inconsistent with section 101, which defines what the Supreme Court is to be, and under which the Parliament of Canada proceeded when it created this Supreme Court. And, my Lords, an attempt was made to justify the action of the Governor-General in Council in sending such questions by the authority of this section 60 by reference to the earlier words of section 91. Your Lordships will remember that in those words which were read so often last week it is made lawful for the Sovereign, "by and with the advice and consent of the Senate and House of Commons"—that is for the Parliament of the Dominion—"to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act, assigned exclusively to the legislatures of the Provinces." I am not here to deny, of course, that it would be perfectly competent for the Parliament of Canada to provide that questions of this kind might be sent to any body of experts that they choose to nominate for the purpose. They might provide for any advisory help that they thought desirable. What I do say is, that they cannot in face of section 101 turn the Supreme Court into that advisory body, because it is inconsistent with the functions which the constitution, the British North America Act, throws upon the Supreme Court.

LORD ROBSON: You do not suggest that the Provinces would have power to make any such provision as that of which you now complain?

SIR ROBERT FINLAY: I submit not, my Lord.

LORD ROBSON: You say there is no such power in the Provinces, either?

SIR ROBERT FINLAY: No, that is to say, to throw it on a Court. They might get any assistance that they thought fit. I should think a power of this kind might be beneficially exercised, and if exercised in the proper way might provide employment for members of the Bar, who are not much engaged in Court, but who are admirably qualified to deal with constitutional matters, but I say that to throw it upon a Court so as to hamper that Court in its proper work—

THE LORD CHANCELLOR: You have to put it, have you not, that to employ a Court of Justice in this way is incompatible with it being a Court for the administration of the law?

SIR ROBERT FINLAY: Yes, that is to say, that it tends to hamper it in its functions, and does hamper it in its functions as a Court of Justice, and that it cannot be done, because the constitution is not only merely silent as to any such power, but it has made provision which tends to show that no such power was meant to be exercised.

LORD ATKINSON: Paragraph (*c*) of section 60 entitles the Governor-General to put any question he likes on any subject, whether or not, in the opinion of the Court *ejusdem generis* with the foregoing enumerations.

SIR ROBERT FINLAY: Yes: the point upon that section, my Lord, is that this is *ultra vires* of the Parliament of Canada. Nothing could be wider.

LORD ATKINSON: I do not see at present, how a question on any subject the Governor-General chooses to submit, can have anything to do with the better administration of the laws of Canada.

SIR ROBERT FINLAY: It cannot possibly. With regard to sub-head (*c*) to which your Lordship referred, a gallant attempt was made on one occasion, I believe, to maintain that although sub-head (*c*) said that it might relate to any other matter, whether or not, *ejusdem generis* with the

foregoing enumerations, the last words of the sub-head really brought it back to being *ejusdem generis*, because it goes on "with reference to which the Governor in Council sees fit to submit any such question," and it was argued that that limited the astonishing generality of sub-head (*c*) by showing that it must be some such question, and therefore it would be after all *ejusdem generis*.

THE LORD CHANCELLOR: "Such question" means a "question of law or fact." Section (*c*) may be open to strictures on the grounds specified by Lord Atkinson, but your contention is a wider one.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: You would not be satisfied with the view, for instance, that sub-section (*c*) was *ultra vires*?

SIR ROBERT FINLAY: No, I should not.

THE LORD CHANCELLOR: You wish to preclude the asking for advisory assistance from the Court in regard to abstract questions; that is your real point?

SIR ROBERT FINLAY: I do, my Lord, that is the first and broad contention.

LORD ATKINSON: Of law or fact; it is not confined to questions of law?

SIR ROBERT FINLAY: No; any important question of law or fact; any question of historical research.

LORD ROBSON: They might use the Supreme Court as a Commission to make inquiries into *quasi* political matters.

SIR ROBERT FINLAY: Yes, my Lord, a sort of standing Royal Commission.

LORD ROBSON: The question is, whether they have power to do that under the words "peace, order and good government." That is the real question; it turns entirely upon section 91 of the British North America Act.

SIR ROBERT FINLAY: Under "peace, order and good government," they may appoint any Royal Commissions to give assistance by way of advice, but I say they cannot constitute the Supreme Court, which is formed under section 101, into such a Royal Commission, and I say section 60 is *ultra vires*. That is my first important broad contention.

But, secondly, I shall submit to your Lordships that the questions in this particular case are of such a nature that the Court ought not to answer them, and that is covered by the Notice of Motion on page 7 of the Record, which I have read.

THE LORD CHANCELLOR: Law of this kind has been in operation for 36 years?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Have matters so referred, been appealed to this Board?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: And no question of jurisdiction has arisen?

SIR ROBERT FINLAY: No question of jurisdiction has arisen or has been raised before this Board. The question of jurisdiction has more than once been raised by members of the Supreme Court themselves, but, all parties consenting, the questions have been answered and any objection that has proceeded has been either from the Supreme Court on its own account, or from this Board, pointing out that the questions were hypothetical or might affect private rights and that this Board declined to answer them.

THE LORD CHANCELLOR: Has the attitude of this Board been this. Notwithstanding the generality of the words applicable to the Canadian Court, that they shall answer; has this Court said that they decline to answer them unless they are appropriate to their functions?

SIR ROBERT FINLAY: Yes, my Lord, on more than one occasion.

LORD SHAW: Would you allow me to ask you, under this procedure, which has been adopted, I presume that the opinion of the Court may be had upon subjects intimately affecting private rights?

SIR ROBERT FINLAY: Yes, my Lord.

LORD SHAW: Assume a litigation, subsequent to that, and ignoring that opinion, what is the attitude of the Supreme Court in consequence of its having issued its *ab ante* opinion?

SIR ROBERT FINLAY: It is said by the Chief Justice in the Supreme Court that the opinions they express in answer to such questions bind nobody, not even themselves,

so that theoretically the Supreme Court would approach an appeal raising the very same point with its hands free, but in practice it would be far otherwise.

LORD SHAW: If I do not interrupt you, the view which was occurring to me was this, that when it is a real litigation all contesting parties are, of course, fully heard out, but when it is not so, when it is a question in *abstractum*, or *ex hypothesi* then all parties may not be heard.

SIR ROBERT FINLAY: They may not.

LORD SHAW: That may be, of course, extremely awkward with regard to a question of law reaching down to the foundations of the constitution, but it may also be still more awkward with regard to questions of fact.

SIR ROBERT FINLAY: Certainly, my Lord. May I, in illustration of what your Lordship has said, refer to a point that came up in a case, which I am going to cite to your Lordships. There was a Statute passed in the Parliament of Canada providing for the punishment of bigamy, although the second marriage took place outside the Dominion of Canada, and it provided that in the case of persons, British subjects, resident in Canada, if they left the Dominion for the purpose of contracting such a second marriage abroad, they might be punished for bigamy in Canada. The point whether that Statute was *intra vires* was raised by a question sent under this section 60 to the Supreme Court. Nobody appeared on the other side. It was argued for the Dominion, and the Supreme Court with some hesitation held that it was *intra vires*. One of the Judges pointed out, as I submit very shrewdly, that the real offence, inasmuch as the power is only to legislate within the Dominion, is leaving the Dominion with the intention of contracting the marriage, and that was not the indictment; but the inconvenience of this procedure is, I am told, illustrated by the fact that that opinion so expressed, I think I am right in saying, without argument on the other side at all, and the Chief Justice dissenting, has been acted upon. Your Lordships are aware that a similar enactment in Australia was held to be *ultra vires*. There was no clause limiting it to British subjects, resident in Australia.

THE LORD CHANCELLOR: Resident or domiciled?

SIR ROBERT FINLAY: "Resident" is the word of the Statute, I think, subsection 4: Your Lordships' Board held in the case of McLeod, which I will refer to presently, that an enactment of that kind in general terms in Australia must be confined to cases of the second marriage occurring in Australia; otherwise it would be *ultra vires*. Here, it was held that such an enactment, applied to British subjects resident in the Dominion, was good, although the marriage was outside the limits of the Dominion. That is a question of enormous gravity, and I submit anything more inconvenient than that, the law should be supposed to be laid down by an opinion of that kind, expressed without hearing both sides cannot be imagined.

THE LORD CHANCELLOR: Of course, it is not binding.

SIR ROBERT FINLAY: It is not binding.

THE LORD CHANCELLOR: It illustrates the incongruity.

SIR ROBERT FINLAY: It illustrates the extraordinary inconvenience.

The matter is of so great importance that I was about to put your Lordships in possession of the successive enactments which have taken place, beginning in 1875, and the cases that have arisen under it. The first is the Supreme Court Act which was passed on the 8th April, 1875. By that Act there was established the Supreme Court by section 1. It is the 38th of the Queen, chapter 11. The Act is entitled: "An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada." The first section provides: "There are hereby constituted, and established, a Court of Common Law and Equity, in and for the Dominion of Canada, which shall be called 'The Supreme Court of Canada,' and a Court of Exchequer, to be called 'The Exchequer Court of Canada'." Then there is provision as to the Judges, and so on, and then comes section 52, which is the material section in this connection. It is under the heading: "Special cases referred to the Court."

"52. It shall be lawful for the Governor in Council to refer to the Supreme Court for hearing or consideration, any matters whatsoever as he may think fit; and the Court shall thereupon hear and consider the same and

certify their opinion thereon to the Governor in Council: Provided that any Judge or Judges of the said Court, who may differ from the opinion of the majority, may in like manner certify his or their opinion or opinions to the Governor in Council." And then section 53 contains a provision for reporting by the Court on private Bills or Petitions. With that, we are not concerned at the present moment.

LORD ROBSON: That last provision, section 53, would equally fall within your objection.

SIR ROBERT FINLAY: I think it would, but that does not arise here.

LORD ROBSON: No.

SIR ROBERT FINLAY: It is an attempt to utilize the Supreme Court for another purpose altogether.

MR. NEWCOMBE: Did you read section 53?

SIR ROBERT FINLAY: My friend desires that I should read section 53, I stated its effects, but I will read it. "53. The said Court, or any two of the Judges thereof, shall examine and report upon any private bill or petition for a private Bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons." That would fall under my objection, but my objection would apply, I am bound to say, with far less force to that, because you could not have on a private Bill, questions of such general and far reaching importance, and with so many ramifications as the questions which might be submitted under section 52, relating to the constitutionality.

LORD ATKINSON: Does that limit at all the questions which may be put upon a private Bill?

SIR ROBERT FINLAY: No, it is merely that they may report upon it.

LORD ATKINSON: Whether it was desirable to have legislation in the manner proposed by the Bill would be a question of "good government."

SIR ROBERT FINLAY: However, the objections would be much less forcible, I think, to reporting on private Bills, though I do not think it would be right, than to questions of this kind.

LORD MACNAGHTEN: The Judges do report on private Bills in this country, do not they—the House of Lords?

SIR ROBERT FINLAY: The House of Lords has always power, and I shall refer to that by and by, in connection with any legislation to ask the Judges their opinion upon a point of law.

LORD ATKINSON: Is not that upon what the existing law is which it is proposed to change?

SIR ROBERT FINLAY: What the existing law is. Even with regard to that limited power Mr. Justice Maule expressed himself somewhat forcibly on the occasion of a reference of that kind; he pointed out the great inconvenience of questions in that abstract form; but a question as to the existing law is another thing altogether. This may be on any important question of law or fact.

LORD ATKINSON: That case you referred to established there that they would only answer on the question as to what was the existing law on the particular subject?

SIR ROBERT FINLAY: Certainly, my Lord.

THE LORD CHANCELLOR: I am speaking from recollection and from general reading, my impression is, that at one period, questions of law were not infrequently put by the Executive Government to the Judges, and some of the answers are in the form of resolutions.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: I am under that impression.

SIR ROBERT FINLAY: I am sorry to say at one time it was the habit of the Sovereign to ascertain beforehand what decisions the Judges were likely to give in cases which came before them.

THE LORD CHANCELLOR: That was an abuse. I mean not as an abuse, but it was the practice. I do not say it was necessarily a good constitutional practice.

SIR ROBERT FINLAY: Perhaps it might be convenient, it at this moment I gave your Lordships the references which I have, with regard to that practice. It lies on the threshold of this subject, I think it would be convenient to do it now. There is one case, Lord George Sackville's case, reported in 2 Eden at page 371. That was a case with regard to a Court Martial proposed to be held in the very celebrated case of Lord George Sackville, who had

been in command of the British Cavalry at the Battle of Minden and who, for some reason, refused to charge when he was ordered to, and, when he afterwards expressed his readiness, was very suavely informed by the Commander-in-Chief that it was now too late. Of course it was a very serious matter. His name was struck off the list of Privy Councillors and the King himself said that the punishment was worse than that of death. This was a case as to the power to hold a Court Martial upon him when he had resigned his commission. This is a certificate of the Judges respecting the Court Martial proposed to be held on Lord George Sackville, and there is a letter of Lord Mansfield to the Lord Keeper, enclosing the certificate in 1760. "In obedience to your Majesty's commands, signified to us by a letter from the Right Honourable the Lord Keeper, referring to us the following question, 'Whether an officer of the army, having been dismissed from His Majesty's service, and having no military employment, is triable by a Court-Martial for a military offence lately committed by him, while in actual service and pay as an officer?'

"We have taken the same into consideration, and see no ground to doubt of the legality of the jurisdiction of a Court-Martial in the case put by the above question. But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the Court has no jurisdiction; or if the Court should refuse to proceed, in case the party thinks they have jurisdiction; we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient.

"All which is humbly submitted to your Majesty's royal wisdom." Then that is signed by the Judges. Then there is a note here: "A similar consultation took place a few years prior to it in the case of Admiral Byng, and another in the reign of George 1st, as to the right of the Sovereign to the education and marriage of the children of the Prince of Wales. The proceedings upon the latter of these are in Lord *Fortescue's* Reports, 401; and more fully in 15

Howell's State Trials 1195. The former of these works also contains several early precedents, in which this mode of proceeding has been resorted to, and authorities by which it is justified, page 386 *et seq.*

"Mr. *Hargrave,* however, in a note to his edition of *Co. Lit.* 110 a, n. 129, has, on the great authority of Lord *Coke,* expressed serious doubts as to the propriety of these extra-judicial consultations; and, indeed, many of the precedents given in the books are extremely objectionable. As in the instances mentioned by *Kelynge,* 9 and 10, preparatory to the trial of the regicides, the judges met at the request of the *Attorney-General,* to advise the King not only as to framing the indictments, but in relation to overt Acts and evidence, Fortescue 390. So in the case of *Francis Francia,* in 1717, a conference was held among the judges, three of whom who were to try the prisoner, at which the *Attorney* and *Solicitor-General,* who were to conduct the prosecution next day, lent their assistance, *Foster,* 241; *Fortescue,* 390.

"Lord Bacon, in a letter to *James* 1st, gives curious account of his management in endeavouring, according to the King's direction, to obtain the opinion of the Judges of the *King's Bench* separately and privately, previous to the trial of Mr. *Peachman,* a minister, indicted for certain treasonable passages in an unpublished sermon, and of Lord *Coke's* honourable reluctance to give the desired answer. *Bacon's* Works, vol. 4, 595; *Kippis,* Bio. Brit. vol. 3, 682.

"It appears also, not only from the guarded manner in which the present answers is expressed, but, from Lord *Mansfield's* letter to the Lord *Keeper,* in which it was enclosed, and which is here subjoined from the original amongst Lord *Northington's* papers, that the Judges felt considerable disinclination to have their opinions called for in this mode. A similar degree of caution was exhibited in a great cause which occurred in the reign of Queen *Anne,* in the year 1711. Upon the revival of the Arian heresy by *Whiston,* doubts were entertained, whether the convocation could, in the first instance proceed against a person for heresy; and the Queen, in consequence of an address given from the Upper House, took the opinion of

the Judges. Four of the Judges thought that the convocation had no jurisdiction. The remaining eight, (who, together with the *Attorney* and *Solicitor-General*, gave their opinions in favour of the jurisdiction, etc.), expressly reserved to themselves a power to change their mind, in case, upon an argument that might be made for a prohibition, they might see cause for it." Then, here is the letter of Lord Mansfield to the Lord Keeper enclosing the certificate which I have read in Lord George Sackville's case. "My Lord,

"I laid His Majesty's commands before the Judges. They are exceedingly thankful to His Majesty for his tenderness in not sending any question to them till the necessity of such reference became manifest and urgent. They have considered the point, and they all agree. In general, they are very averse to giving extra-judicial opinions, especially where they affect a particular case; but the circumstances of the trial now depending, ease us of difficulties upon this occasion, and we have laid in our claim not to be bound by this answer. Mr. Justice *Clive* is now at *York*, upon the circuit, so that there was no opportunity to have his concurrence." It is subscribed by Lord Mansfield.

There is a passage relating to the practice in the time of the Stuart Kings in England, which occurs in a volume of the Massachusetts Reports, where historically this subject is dealt with at some little length. It is in the twelfth volume of Lathrop's Massachusetts Reports, volume 126 of the Massachusetts Reports generally, at page 561. I will just read a few passages. It is in the Supplement. It is the opinion of the Justices to the Senate and House of Representatives. I only cite it for this historical passage: "The practice of the Stuart Kings in taking extra-judicial opinions of the Judges upon questions about to come before them judicially was an unconstitutional abuse of the Royal Authority in this respect. But since the Revolution of 1688, so sturdy an asserter of the independence of the Judges as Lord Holt, joined with the other Judges of the time in opinions to King William III. upon the extent of the power of pardon, and to Queen Anne upon the question whether a writ of error should be granted

as of right; and as late as 1760, Lord Mansfield, Chief Justice Willes, and other Judges, gave an opinion to King George II. upon the jurisdiction of a Court-Martial to try an officer, after his dismissal from the army for a miltary offence committed while in actual service." Then they go on: "We are not aware of any instance since 1760, in which the Crown has exercised the power of asking the opinion of the Judges." That is Lord George Sackville's case. "But the right of the House of Lords to put abstract questions of law to the Judges, the answer to which might be necessary to the House in its legislative capacity has been often acted on in modern times."

THE LORD CHANCELLOR: "In its legislative capacity"?

SIR ROBERT FINLAY: Yes, my Lord, and I propose to refer your Lordships now to the cases with regard to the power of the House of Lords to consult the Judges.

THE LORD CHANCELLOR: Judicially they can, obviously.

SIR ROBERT FINLAY: Judicially, but also in a legislative capacity. This is in the matter of the London and Westminster Bank in 2 Clark & Finnelly, 191. In that case: "Certain persons having united themselves together under the name of the London & Westminster Bank Company, applied to Parliament for a Bill to incorporate them under that name. The Bill passed the House of Commons, and on being brought up to this House was read as a matter of course, a first time. When it stood for a second reading it was moved and agreed to, that counsel should be heard at the bar of the House on the subject of the bill. It was then moved and agreed to, that the Judges be ordered to attend the House." Then the order is set out. The Judges attended, and at the bottom of page 192, Lord Wynford interrupting counsel says: "That the Judges had communicated to him that they felt some difficulty as to the possibility of their answering the question which had been submitted to them by their Lordships." That was: "Are the provisions of this bill inconsistent with the Bank of England's rights, as secured to it" under the acts enumerated. Lord Wynford "moved that they should retire, for the purpose of considering whether they could answer the question. The Judges having retired, remained absent above three-quarters of an hour, when Lord

Chief Justice Tindal, on their return, said, 'His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they, therefore, with great deference and respect to Your Lordships, request to be excused from giving an answer.'

"Lord Wynford intimated that he had before thought it doubtful whether the Judges could answer the question." That shows how strictly the Judges, when consulted by the House of Lords confined their answers to the strict legal construction of existing laws.

LORD ROBSON: But you do not dispute that, if Parliament directed them by Statute to give answers to questions of this kind, that legislation would be good.

SIR ROBERT FINLAY: No, I should not dispute that for a moment.

LORD ROBSON: Is not the question here, whether the Dominion Parliament has the same power in relation to that subject matter as the British Parliament?

SIR ROBERT FINLAY: Yes, my Lord. Of course the British Parliament is omnipotent. The Dominion Parliament can only act within the limits of the constitution.

LORD ROBSON: The whole question here is, whether these come within the limits of the constitution, as laid down in the British North America Act?

SIR ROBERT FINLAY: Yes, my Lord.

LORD ROBSON: The legislation may be very impolitic, and open, as it obviously is, to great abuse. That may illustrate the problem, but it does not decide it.

SIR ROBERT FINLAY: That is on my view a reason for thinking that it is *ultra vires*. The power is not given in express terms, and the very grave inconveniences which attend the exercise of such a power—and which really could not be better illustrated than by the questions put in the present case are, I submit, reasons for thinking that the omission from the constitution was designed, and it was never intended that they should have such a power. Then, my Lords, there is a note here, from Mr. Coxe's Manuscripts to this case; "Mich. 27, George 2. A question having been started, on occasion of the late Act of Parlia-

ment concerning the naturalisation of the Jews, which Act was repealed this session, whether Jews are entitled to purchase and hold lands in England, Lord Temple, after the repeal of the Act, moved in the House of Lords that some method might be taken to ascertain this question, and that for this purpose the Judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly because the Judges are not obliged to give their opinions to the House upon such extra-judicial questions, and where no Bill is depending";

LORD ATKINSON: "Where no Bill is depending."

SIR ROBERT FINLAY: Yes, my Lord, "and the Duke of Argyll mentioned a case in Queen Anne's time where such a question being put to the Judges, Lord Chief Justice Holt, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such question; and his objections thereto were allowed by the House"; so that it was really confined in that case between the House of Lords and the Judges to judicial proceeding, appeals pending, and pure questions of law.

LORD ATKINSON: I suppose the idea is if you are about to change the law you should first ascertain what the existing law is?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Apart from any particular appeal or not?

SIR ROBERT FINLAY: Apart from any particular appeal or not. First, that the case for putting the question must have arisen on an appeal pending; second, that the question must be a proper question of law. I think that is the result of the authorities. Then in Macnaghten's case, which is reported in 10 Clark & Finnelly at page 200, where the rule as to the appeal pending and as to that being necessary was trenched upon, because there had been a trial and an acquittal on the ground of insanity. Then at page 202 it is stated: "This verdict and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords (the 6th and 13th March, 1843; see Hansard's Debates,

vol. 67, pp. 288, 714), it was determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th of May, all the Judges attended their Lordships, but no questions were then put."

On the 19th of June, the Judges again attended the House of Lords; when (no argument having been had) the following questions of law were propounded to them:— Then various instances as to what is the law as to insanity, excusing a man for a crime are given; and then on page 204, Mr. Justice Maule says this: "I feel great difficulty in answering the questions put by your Lordships on this occasion:—First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience, both of the bar and the Court being confined to questions arising out of the facts of particular cases:—Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument:—and Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions; but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned; fearing that my answers may be as little satisfactory to others as they are to myself." He then proceeds to give his answers, with which I do not trouble Your Lordships. Then Lord Chief Justice Tindal, at page 208, begins thus:

"My Lords, Her Majesty's Judges (with the exception of Mr. Justice Maule, who has stated his opinion to Your Lordships), in answering the questions proposed to them by Your Lordships' House, think it right, in the first place, to state that they have foreborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of Justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to Your Lordships' questions.

They have therefore confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by Your Lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions seriatim, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships." Then follows the answers.

MR. NEWCOMBE: Would you mind reading Lord Brougham's judgment on page 212?

SIR ROBERT FINLAY: Certainly; these answers having been given by the judges, on page 212, Lord Brougham says this:—

"My Lords, the opinions of the learned Judges, and the very able manner in which they have been presented to the House, deserve our best thanks. One of the learned Judges has expressed his regret that these questions were not argued by Counsel. Generally speaking, it is most important that in questions put for the consideration of the Judges, they should have all that assistance which is afforded to them by an argument by Counsel; but at the same time, there can be no doubt of Your Lordships' right to put, in this way, abstract questions of law to the Judges, the answer to which might be necessary to Your Lordships

in your legislative capacity. There is a precedent for this course, in the memorable instance of Mr. Fox's Bill on the law of libel; where, before passing the Bill, this House called on the Judges to give their opinions on what was the law as it then existed."

Then Lord Campbell says: "My Lords, I cannot avoid expressing my satisfaction, that the noble and learned Lord on the woolsack carried into effect his desire to put these questions to the Judges. It was most fit that the opinions of the Judges should be asked on these matters, the settling of which is not a mere matter of speculation; for Your Lordships may be called on, in your legislative capacity, to change the law; and before doing so, it is proper that you should be satisfied beyond doubt what the law really is. It is desirable to have such questions argued at the bar, but such a course is not always practicable. Your Lordships have been reminded of one precedent for this proceeding, but there is a still more recent instance; the Judges having been summoned in the case of the Canada Reserves, to express their opinions on what was then the law on that subject." Then what Lord Cottenham says is very short, but I think it is worth reading:

"My Lords, I fully concur with the opinion now expressed, as to the obligations we owe to the Judges. It is true that they cannot be required to say what would be the construction of a Bill, not in existence as a law at the moment at which the question is put to them; but they may be called on to assist your Lordships, in declaring their opinions upon abstract questions of existing law."

Lord Wynford says: "My Lords, I never doubted that your Lordships possess the power to call on the Judges to give their opinions upon questions of existing law, proposed to them as these questions have been. I myself recollect, that when I had the honour to hold the office of Lord Chief Justice of the Court of Common Pleas, I communicated to the House the opinions of the Judges on questions of this sort, framed with reference to the usury laws. Upon the opinion of the Judges thus delivered to the House by me, a Bill was founded, and afterwards passed into a law."

And the Lord Chancellor says: "My Lords, I entirely concur in the opinion given by my noble and learned

friends, as to our right to have the opinions of the Judges on abstract questions of existing law." So that there, my Lords, in that case the right was carried a step further. It was not confined to an actually pending appeal, but the House proceeded on the view that where legislation was probable, or even possible, they had the right as a preliminary before embarking upon an actual appeal, to have the view of the Judges as to what the law was.

LORD ATKINSON: It might be interesting to know what was proposed in the debate; was it proposed that the law should be changed?

SIR ROBERT FINLAY: I do not think it is stated. reference is given to the debate in Hansard, but I do not think that that is stated. The reference will be found in Hansard, Volume 67, pages 288 and 714, of the debates on the 6th and 13th March, 1843.

Then, of course, my Lords, there is the well-known case of O'Connell in 11, Clark and Finnelly, page 155.

THE LORD CHANCELLOR: That was strictly judicial?

SIR ROBERT FINLAY: Yes, my Lord, that was strictly judicial.

THE LORD CHANCELLOR: I mean there is no doubt whatever.

SIR ROBERT FINLAY: No, my Lord, it never has been doubted, as far as I know.

THE LORD CHANCELLOR: And that of course was a Court of Law.

SIR ROBERT FINLAY: That was a court of law. I think these are the cases at common law in England. Then I ought in this connection to give Your Lordships the terms of the Section of the Act of 3 and 4 William IV., Section 4 of the Act of 3 and 4 William IV., Chapter 41, the Act of 1833, is the Section which regulates the constitution of the Judicial Committee, and what it says is this:

"And be it further enacted, That it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same and shall advise His Majesty thereon in manner aforesaid." Your Lordships see that Section 4 provides for a reference of any other

matters that His Majesty may think fit. That refers, of course, to Section 3, which had provided that all appeals, or complaints in the nature of appeals, which may be brought before His Majesty, in Council, should, after the passing of the Act, be referred by His Majesty to the Judicial Committee of the Privy Council.

THE LORD CHANCELLOR: Which Section is that?

SIR ROBERT FINLAY: That is Section 3, the immediately preceding Section. Section 3 deals with appeals to be referred to the Judicial Committee, and Section 4 is the Section which is repeatedly put into operation providing that any other matters may be referred by the King to the Judicial Committee. I am citing from Safford and Wheeler's book on Privy Council Practice, and if I may I should like to refer to the note in it upon Section 4—it is Note (*n*), on page 33:

"The Judicial Committee have no power to place any limit as to the matters which may be referred to them by the Crown." (And for that Schlumberger's Patent in 1853, 9 Moo. 1, is cited.) "Before this provision there was apparently a power in the Privy Council to place a limit on the matters which would be considered by them." (For that the case of the Army of the Deccan, 1833, in 2 Knapp, 103, is referred to.) "No judgment or report in open Court is delivered in matters referred for advice under this Section."

THE LORD CHANCELLOR: You must remember with regard to that Act, the Judicial Committee of the Privy Council consists of members of the Privy Council, and their judicial functions are regulated, but in their position of Privy Councillors, they are bound to give the advice.

SIR ROBERT FINLAY: Exactly, my Lord.

THE LORD CHANCELLOR: And Section 4 only means that it shall be lawful for the King to apply to the Committee.

SIR ROBERT FINLAY: Precisely.

THE LORD CHANCELLOR: I am not at all sure it was necessary.

SIR ROBERT FINLAY: I do not think it was, but it was thought expedient to enact that; by becoming members of the Judicial Committee; they did not necessarily become Privy Councillors for all purposes. That is what it really

comes to. The omission of any such powers from the Canadian Constitution, from the British North America Act, I submit was intentional. It was known that there was this power existing if any question of great gravity arose affecting the Dominion or the Provinces, and that the King had power to ask the opinion of the Judicial Committee upon it. That is a power which has been exercised sparingly and has only been exercised in suitable cases.

THE LORD CHANCELLOR: I suppose that the Dominion Parliament could pass a section analogous to Section 4, saying that the Privy Councillors of Canada might be consulted even although they happened to be members of the Judicial Tribunal.

SIR ROBERT FINLAY: Yes; in their individual capacity.

THE LORD CHANCELLOR: They do not seem to have a Court in Canada which consists of members of the Privy Council.

SIR ROBERT FINLAY: No, I think not, my Lord.

THE LORD CHANCELLOR: That is the analogy, no doubt.

SIR ROBERT FINLAY: I am told by my learned friend that the Judges are not members of the Privy Council, but I ought to qualify that by saying that some of the members of the Supreme Court have been members of the Government and sworn of the Privy Council and do not cease to be members of the Privy Council on becoming members of the Supreme Court.

THE LORD CHANCELLOR: But they do not constitute a Court of themselves?

SIR ROBERT FINLAY: No. Then I submit to Your Lordships that the existence of this power exercised within the limits within which it has been always exercised in this Country to refer matters to the Judicial Committee might be a very good reason indeed for not inserting any such power in the Constitution of Canada—anyhow it has not been inserted.

My Lords, I resume the consideration of the successive Statutes. The Act of 1875 by Sections 52 and 53 made the provisions which I have read to your Lordships, and I might mention that under this Act it was decided in Sproule's Case (12 Supreme Court Reports, page 140) that that Act

did not constitute the individual members of the Court, Separate Courts; it was one Court under that Act of 1875. Now, my Lords, in 1883 there took place a reference in what is known as the Thrasher Case with regard to British Columbia. The only report I have got of it is in Cantlee's Digest, a Digest of the decision of the Supreme Court of Canada, page 273. There was a Reference by the Governor-General of questions as to the status of the British Columbia Supreme Court and the validity of certain Acts, and the questions were answered. No objection appears to have been taken at all. I do not desire to plunge into the particulars of all these cases, but your Lordships will see on glancing at the Report, columns 273 and 274 of Cantlee's Digest, that the questions were of this nature:

The first was: 'Is the Supreme Court of British Columbia a Provincial Court within the meaning of the 14th subsection of Section 92 of the British North America Act?" and the answer of the Supreme Court was that it was such a Court. I need not read the other answers. The only importance of it is that questions of that nature were asked and were answered. That was in 1883.

LORD SHAW: What was the question?

SIR ROBERT FINLAY: The question was a question as to the status of the Supreme Court of British Columbia; that was the first question, and the second question was:

"Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province? If not, to what extent has it such authority? There are five questions altogether.

THE LORD CHANCELLOR: And they were answered?

SIR ROBERT FINLAY: Yes, they were answered. Then the next Reference was not under the section that I have read from the Act of 1875, but was under a special enactment contained in the Liquor License Act of 1883.

THE LORD CHANCELLOR: What year was that?

SIR ROBERT FINLAY: 1884, my Lord. The report of that case will be found in the same Digest at page 797. The Liquor License Amendment Act contained a Section, Section 26, which gave an express power to refer questions as to the validity of the Liquor License Act of 1883. On page 797 your Lordships will find the Section is sufficiently re-

ferred to and a Reference was made under that Section. Of course the same question would arise as to the validity of that Section 26, as I raised with regard to the validity of Section 60. That was a Section in a special Act providing for a reference of certain questions to the Supreme Court, and if it were material I should raise the same objection to the provisions as I should to the more general provisions contained in Section 60.

LORD ATKINSON: The Statute of 1883 was a Dominion Statute.

SIR ROBERT FINLAY: Yes, it was a Dominion Statute. Now that case came up to Your Lordships' Board. It is not reported, but I have here the Order that was made. The Judicial Committee reported to the King in reply to the two questions referred to them:

"Do this day agree humbly to report to Your Majesty as their opinion in reply to the two questions which have been referred to them by Your Majesty that the Liquor License Act, 1883, and the Act of 1884, amending the same are not within the Legislative authority of the Parliament of Canada. The provisions relating to adulteration if separated in their operation from the rest of the Acts would be within the authority of the Parliament but as in their Lordships' opinion they cannot be so separated, their Lordships are not prepared to report to Your Majesty that any part of these Acts is within such authority."

THE LORD CHANCELLOR: Was that a reference under Section 4, or under the Canadian Act?

SIR ROBERT FINLAY: It was a reference under Section 26 of the Liquor License Amendment Act. This came on appeal from the Supreme Court.

THE LORD CHANCELLOR: That is what I meant.

LORD MACNAGHTEN: There was no formal judgment given?

SIR ROBERT FINLAY: There was no formal judgment given. Lord Herschell, who was then Lord Chancellor, says in the volume I have, containing the proceedings with regard to this Act; "Their Lordships will consider the matter. There will be no judgment delivered here, but their Lordships will report to Her Majesty," and I have read the terms of the report from the Order-in-Council

which is dated 12th December, 1885. Then, my Lords, the next Act was the Supreme Court Act of 1886—that is in the Revised Statutes of Canada for 1886, chapter 135. In that Act, section 52 of the Act of 1875, was re-enacted as section 37—it is precisely in the same terms, and it is a mere alteration of the number of the section. No cases, as far as I am aware, arose further under that Act, so that we have under the Act of 1875, and the Act of 1881, which is identical really, only the one case, namely, the Thrasher case. Then came the Supreme Court Act of 1891, 54 and 55 Victoria (Canadian Act), chapter 25. That Act repealed section 37 of the Act of 1886, which represented section 52 of the Act of 1875, and substituted another section for it. It is the fourth section of this Act of 1891 which contains the enactment in question: "Section 37 of the said Act is hereby repealed, and the following is substituted therefor:

"37. Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by 'the *British North America Act*, 1867,' or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred, by the Governor-in-Council, to the Supreme Court for hearing or consideration, and the Court shall thereupon hear and consider the same:

"2. The Court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said Court; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons." Then there was a provision for giving notice to the Attorney-General of any province which may be affected by the questions and to parties interested for the appointment of Counsel by the Court, and there is a provision that the opinion of the Court, though advisory only shall for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between the parties, and a provision that

general rules may be framed. Your Lordships will see that that is much less detailed in its specification of the class of question which may be referred.

THE LORD CHANCELLOR: If you are right on one, you are right on the other, and if you are wrong on one, you are wrong on the other—is not that what it comes to?

SIR ROBERT FINLAY: Yes, but I thought your Lordships should be in possession of that Statute, because one point made against me is that this has gone on for a long time. I say the fact that it has gone on for a long time, does not make it constitutional for it is outside the power.

THE LORD CHANCELLOR: What strikes me is this, that the Act of 1875 began on the analogy of section 34.

SIR ROBERT FINLAY: It is similar.

THE LORD CHANCELLOR: Then it seems that the Act of 1891 was in the nature of a dilemma, and diminishes the width of the language of the Act of 1875?

SIR ROBERT FINLAY: Now, my Lord, in the last edition, it has come round to being as extensive as anything can be, because although it enumerates a certain number of things specifically, it winds up by saying: "Any other matter" or thing, whether *ejusdem generis*, or not.

THE LORD CHANCELLOR: But it could not be more general than the 1875 Act?

SIR ROBERT FINLAY: It could not. Now under the Act of 1891, which I have just read, there have been nine cases of reference. The first was in 1892, in a case reported in the 21st volume of the Supreme Court of Canada reports, page 446. That was a Special Case referred by the Governor-General-in-Council, in *re* the County Courts of British Columbia. It was a case in which the question was put as to whether the power given to the provincial governments to legislate, regarding the constitutionality and so on, of the provincial courts, included the power to define the jurisdiction of such Courts territorially, as well as in other respects, and to define the jurisdiction of the Judges who constituted such Courts. The question was answered, and it was answered in the affirmative. At page 452 your Lordships will find that the Province of British Columbia appeared, and had been heard. Mr. Justice Strong gave the answers of the Court, and he

begins his judgment at the top of page 453, by saying that he is of opinion that both the sections referred to were within the powers of the Legislature of British Columbia. Then he proceeds to answer:

THE LORD CHANCELLOR: Does he do more than answer the questions?

SIR ROBERT FINLAY: No, my Lord, but Mr. Justice Taschereau did, at page 454. Mr. Justice Taschereau said, "I do not take part in this consultation. I have some doubts on the constitutionality of some of the enactments contained in the 54 and 55 Victoria, chapter 25, and on the power of Parliament to make this Court an Advisory Board to the Executive Power, or its officers, or, as it seems to me to have done in some instances by that Statute a Court of original jurisdiction." Mr. Justice Gwynne, and Mr. Justice Patterson merely expressed their concurrence with Mr. Justice Strong, and did not say anything on the point which Mr. Justice Taschereau raised.

The second case was in the year 1893, in the matter of certain statutes of Manitoba relating to education. The case is reported in the 22nd Volume of the Reports of the Supreme Court of Canada, at page 577. That was a reference under the same section, raising certain points with regard to education. The Counsel for the Attorney-General of Manitoba is stated to have appeared. Your Lordships will find the passage on page 625. Mr. Robinson says: "I appear, under the Statute, by direction of the Court." The Court under the power which your Lordships know exists, had power to direct that Counsel should attend under any interest affected, and Mr. Robinson said: "I appear, under the Statute, by direction of the Court."

J.—You represent Manitoba, Mr. Robinson? It is just as well to know whom you represent.

THE CHIEF JUSTICE: You appear under the Statute?

MR. ROBINSON:—I appear, under the Statute, by direction of the Court."

Then Mr. Wade said:

"I appear on behalf of the Province of Manitoba. I desire to state, that while Manitoba appears here it is simply to acknowledge that the Province has been served

with a copy of the case by the Clerk of the Privy Council, and not to take any part in the argument; I appear, out of deference to the Court to acknowledge that the Province has been served.

"I might say further, my Lords, as to Mr. Robinson, that the Province does not know him in the matter;" he represented the minority, who might have been affected by the Education Acts.

MR. NEWCOMBE: He represented a Province.

SIR ROBERT FINLAY: Then on page 652 the Chief Justice explains the procedure which had been followed. He says:

"The matter was brought before the Court by the Solicitor-General, on behalf of the Crown, but was not argued by him. On behalf of the Petitioners and Memorialists who had sought the intervention of the Governor-General, Mr. Ewart, Q.C., appeared. Mr. Wade, Q.C., appeared as Counsel on behalf of the Province of Manitoba, when the matter first came on, but declined to argue the case, and the Court then, in exercise of the powers conferred by 54 and 55 Victoria, chapter 25, section 4 (substituted for the Revised Statute of Canada, chapter 135, section 37), requested Mr. Christopher Robinson, Q.C., the senior member of the Bar practising before this Court, to argue the case in the interests of the Province of Manitoba, and on a subsequent day the matter was fully and ably argued by Mr. Ewart, and Mr. Robinson."

Then he proceeds to deal with the questions, and on page 677, Mr. Justice Taschereau again expressed his doubts as to the jurisdiction. He said:

"I doubt our jurisdiction on this reference or consultation. Is section 4 of 54 and 55 Victoria, chapter 25, which purports to authorize such a reference to this Court for hearing or consideration *intra vires* of Parliament? By which section of the British North America Act is Parliament empowered to confer on this Statutory Court any other jurisdiction than that of a Court of Appeal, under section 101 thereof? This Court is evidently made, in the matter, a Court of first instance, or rather, I should say, an Advisory Board of the Federal Executive, substituted *pro hac vice* for the Law Officers of the Crown, and not

performing any of the usual functions of a Court Appeal, nay, of any Court of Justice whatever. However, I need not, at present, further investigate this point. It has not been raised, and a similar enactment to the same import has already been acted upon. That is not conclusive, it is true; but our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no Court of Justice, not even this Court. We give no judgment, we determine nothing, we end no controversy; and, whatever our answers may be, should it be deemed expedient, at any time, by the Manitoba Executive to impugn the constitutionality of any measure that might hereafter be taken by the Federal authorities against the Provincial Legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the Courts of the country remains open to them. That is, I presume, the consideration, and a very legitimate one, I should say, upon which the Manitoba Executive acted by refraining to take part in the argument on the reference."

LORD SHAW: Is there anything in any of the judgments equivalent to an admission or a statement of any learned judge, that the equivalent of a *res judicata,* would be inferred from a pronouncement of the Court.

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: Mr. Justice Taschereau is the only one apparently, who says anything about it; do any of the other judges say anything about it?

SIR ROBERT FINLAY: They say nothing about it, my Lord. Then he goes on.

"That is, I presume, the consideration, and a very legitimate one I should say, upon which the Manitoba Executive acted by refraining to take part in the argument on the reference, a course that I would not have been surprised to see followed by the petitioners, unless indeed they are assured of the interference of the Federal authorities should it eventually result from this reference that constitutionality, the statutory power to interfere with the provincial legislation as prayed for exists. For if, as a matter of policy, in the public interest, no action is to be

taken upon the petitioners' application, even if the appeal lies, the futility of these proceedings is apparent.

"Assuming then, that we have jurisdiction, I will try to give, as concisely as possible, the reasons upon which I have based my answers to the questions submitted."

Then that reference was brought on appeal before your Lordships' Board, and is reported in Appeal Cases, 1895, page 202, under the name of Brophy v. The Attorney-General of Manitoba. The head note is:—

"Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby.

"Held, reversing the judgment of the Supreme Court on a case submitted to it."

That is inaccurate, because it was not a judgment at all:

" (a) That such appeal lay under sect. 22, subsect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof."

I need not go through the other answers. No point was taken as to jurisdiction, and nothing is said about it.

LORD ATKINSON: What form did the appeal take to this Board?

SIR ROBERT FINLAY: It was an appeal from the answers of the Supreme Court to the questions submitted.

THE LORD CHANCELLOR: But you see the dissenting judgment, or rather the criticisms of Mr. Justice Taschereau were in the shape of a judgment in that case, and it therefore would have been before the Privy Council.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: But there the point was not raised before the Council, and it was not raised before the Board.

SIR ROBERT FINLAY: It was not mentioned at all apparently, my Lord. It was desired to get answers, and the answers given by the Supreme Court were dissented from by Your Lordships' Board.

THE LORD CHANCELLOR: On page 210 and on page 229 there are long and most elaborate passages giving answers which could only be given under the Statute which you now say is unconstitutional.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: It is a matter of observation.

SIR ROBERT FINLAY: It is a matter of observation, I admit, but I submit that that observation is answered by this consideration ,that here there was a question of enormous importance, like all questions affecting education and religion; it excited intense feeling; it was felt that there was ground for reconsideration of the answers given by the Supreme Court, and that re-consideration was invited. Your Lordships did not decline to consider the question, no one objecting, and came to the conclusion that the answers given by the Supreme Court had been quite wrong. So that I submit not much can be said in the way of affirmance of the jurisdiction by that court. It certainly could not confer jurisdiction, and I submit that it cannot be treated as a decision by your Lordships' Board that jurisdiction exists.

THE LORD CHANCELLOR: Certainly, not a decision; I have no doubt it was not raised, and it was not held.

SIR ROBERT FINLAY: Nobody wanted it raised really; they wanted really to get this burning question reviewed in a calmer atmosphere.

Then, my Lords, the third case is a case in 1894 in Canada—and I am simply giving the order in which it took place. It is reported in the 24th volume of the Supreme Court Reports, at page 170. It is headed: "In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws."

There was a reference of that under the section by the Governor-General as to the power of the provincial legislators with regard to the prohibition of the sale of liquors, and Ontario, Quebec and Manitoba were represented at the hearing. That appears at page 172; different Counsel appearing for several parties, as well as for the Dominion of Canada, who appeared by the Solicitor-General. The questions were answered; no question as to jurisdiction was raised, and Mr. Justice Taschereau was absent, so that

the matter passed without any protest of any kind. The case was taken on appeal to your Lordships' Board, and it is reported in Appeal Cases, 1896, at page 348. This case was cited before Your Lordships last week in the railway case before you, and it was in this case that Lord Watson delivered a somewhat elaborate judgment, a great part of which was read to Your Lordships the other day. There again, my Lords, the questions were answered, no question being raised.

The fourth case is the Fisheries case, reported in 26 Supreme Court Reports at page 444. That was in the year 1895: "In the matter of jurisdiction over Provincial Fisheries." There, as appears at page 449, Ontario, Quebec, Nova Scotia and British Columbia were represented, and the Court answered the questions in conformity with a previous decision of its own given in a former case which came before it judicially.

LORD ATKINSON: And there was no question of jurisdiction?

SIR ROBERT FINLAY: No, I do not think there is a word raised about jurisdiction from beginning to end. That case came before your Lordships' Board, and it is reported in Appeal Cases, 1898, page 700. Again no question was raised as to the jurisdiction, and the questions were answered, but at page 717 there is a passage in which Lord Herschell states refusal on the part of the Board to answer certain questions.

LORD SHAW: Before you go to that, will you allow me to express a certain difficulty which I have with regard to the previous case. I have been looking at Lord Watson's judgment on page 371, where, as you say, the question of jurisdiction was not raised, but this Board then advised His Majesty to discharge the Order of the Supreme Court, and to substitute therefor several answers to the several questions submitted. So that this Board was, as it were, stepping into the shoes of the Privy Council of Canada, so that it is stronger than merely saying that the question was not raised.

SIR ROBERT FINLAY: Of course where the parties argue a question, and ask the opinion of the Board on the question, the form to which your Lordship refers follows really

almost as a matter of course, unless the Board itself were going to say: "We decline jurisdiction." Of course one can perfectly understand how these things go on in a particular case where great interests are concerned, and the parties come to your Lordships, and are anxious to get an opinion. There might be very naturally, and very properly, I submit, great reluctance to send them away empty, when they had come from Canada desiring to have reversed opinions which they thought carried with them considerable injustice.

LORD MACNAGHTEN: The point was never suggested.

SIR ROBERT FINLAY: No, it was never suggested. Then, my Lords, in the case reported in 1898, Appeal Cases to which I was about to refer, the expression by Lord Herschell at page 717 is this:

"Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors." Now that observation has a very great bearing indeed, upon the questions submitted in the present case, and I may ask your Lordships again to refer to the questions appearing in the Order of the Privy Council at page 4. Your Lordships recollect that in the British North America Act, by section 92, under head 11, power is given to the Legislature of each Province exclusively to make laws in relation to certain classes of subjects, the 11th clause dealing with the incorporation of companies with provincial objects. Now there are a great many companies incorporated in that way, and your Lordships will see at page 4 that we have this group of questions:

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

"What is the meaning of the expression 'with provincial objects,' in section 92, article 11, of the said Act? Is the limitation thereby defined territorial, or does it have

regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

"2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11 of 'The British North America Act, 1867,' power or capacity to do business outside of the limits of the incorporating province? If so, to what extent, and for what purpose?"

LORD SHAW: They embrace every kind of thing.

SIR ROBERT FINLAY: Yes, my Lord, it reminds one of that most exasperating form of question which one has had put so many times "and to advise generally on behalf of the infants."

"Has a company incorporated by a provincial legislature, for the purpose . . . of buying and selling or grinding grain." . . . . There there is a question about power of capacity to buy, grind, or sell grain outside the incorporating province. Then there is a series of questions about insurance companies, whether they have power or capacity to make and execute contracts.

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

"(b) Outside of the incorporating province insuring property within the province;

"(c) Outside of the incorporating province insuring property outside of the province?

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

"Do the answers to the foregoing enquiries, 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"?

Now, my Lords, every one of these questions will vitally affect the rights of companies which have been incorporated by the Provincial Legislature.

LORD ATKINSON: 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.

SIR ROBERT FINLAY: That is covered by Head (*e*).

LORD ATKINSON: But it is not touched by the law of Canada.

SIR ROBERT FINLAY: That is so, my Lord, and I desire particularly to call your Lordship's attention to the extraordinary inconvenience of adopting this course. Here you have a series of detailed questions which I venture to say it must be almost impossible to answer, but the answers if they are given, and it is said the Supreme Court is bound to answer them, would vitally affect vast numbers of companies which are in existence and carrying on business. It is said it has no binding effect, but it is impossible not to realize what the effect on the prosperity of those companies, and on the value of their shares in the market would be if the Supreme Court pronounced the opinion that they had no right to carry on a class of business from which most of their profits are derived.

THE LORD CHANCELLOR: Referring to page 717, what Lord Herschell there, in fact said was:

"You have no right to ask the question," but he did say he was not bound to answer, and gave his reasons.

SIR ROBERT FINLAY: Yes, I have read your Lordship the terms of the motion.

THE LORD CHANCELLOR: Section 60 says "Shall."

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: But you see without objection made, the Courts have hitherto answered the questions.

SIR ROBERT FINLAY: Yes, they have, my Lord.

THE LORD CHANCELLOR: It being thought that the answer had a constitutional result, but Lord Herschell thought the Board had a right to decline.

SIR ROBERT FINLAY: Yes. The Supreme Court is of course in some difficulty owing to the wording of Section 60. I was about to say earlier in the argument on this same point that there may be a distinction between the case of your Lordships' Board and the case of the Supreme Court, because no Statute of Canada could possibly be binding on your Lordships' Board, and it could have no jurisdiction to say that your Lordships' Board shall answer nor has it affected to do so. The Statute, however, has enacted that the Supreme Court shall answer, and my first observation is that such an enactment is unconstitutional,

and that they have no power to impose it; secondly, that if the point arose, I should submit that with regard to questions fraught with such very serious consequences, and so extraordinarily detailed in their character, it would be the duty of the Supreme Court, and I ask your Lordships to say so, if the point arises—"we decline to answer."

MR. NEWCOMBE: May I interject this remark, that the only question debated or raised in the Supreme Court, or raised by my friends in their case here, is the question of jurisdiction. The question of the power of the Parliament to enact this section, the question as to the propriety of the questions, and as to whether they should be answered or not, or what view the Court will take, is not before us.

THE LORD CHANCELLOR: The point is that there is the word "shall" in the Statute.

MR. NEWCOMBE: Certainly.

LORD SHAW: Am I not right in saying that a perusal of these questions shows at each stage the very facts?

SIR ROBERT FINLAY: They appear at every turn. May I refer my friend to the terms of our Notice of Motion. I read it at the beginning of my opening, but I think I had better read it again having regard to his interposition. Your Lordships will find it at the bottom of page 7 of the Record.

"Take notice that . . . a motion will be made on behalf of the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta by way of protest against the Court or the individual members thereof entertaining or considering the questions referred to it by the Executive Council and that the inscription thereof be stricken from the list, and that the same be reported back to the Executive Council as not being matters which can properly be considered by the Court as a Court or by the individual members thereof under the constitution of the Court as such nor by the members thereof in the proper execution of their judicial duties." Of course my first point is that the whole thing is unconstitutional, and my second point is that these particular questions are such that the Court ought not to answer them.

THE LORD CHANCELLOR: In the argument before the Dominion Court was the question discussed as to whether the Court could say consistently that these were questions of a kind which they felt it their duty as Judges not to answer. Was that point raised?

SIR ROBERT FINLAY: I think both my friends Mr. Newcombe and Mr. Nesbitt were present, but I do not know how far that was so; my friends, I have no doubt, will be able to agree about it.

THE LORD CHANCELLOR: I want to know first is it constitutional to make such a law as Section 60 at all though it uses the word "shall" and is it constitutional to insist upon a point depriving the Judges of the right of saying "We think it is interfering with private rights." Was that discussed?

SIR ROBERT FINLAY: I cannot tell your Lordship how far it was touched upon. No doubt the first question, the big question of constitutionality, bulked much more largely, whether and to what extent, if any, the second was touched upon my friend Mr. Nesbitt will be in a position to tell your Lordships. But your Lordships will observe the terms of Section 60 of the Supreme Court Act of Canada in the second paragraph are very imperative. "When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred." It is very specific, when any questions are put, Parliament says to the Supreme Court: "It shall be your duty to hear and determine and answer each question that is put."

The next case to which I refer is a very important case relating to the law of bigamy which I mentioned to your Lordships by way of illustration at an earlier period. It is reported in the 27th Volume of the Supreme Court Reports, page 461, and it is headed: "In the matter of the Criminal Code, 1892, sections 275-6, relating to bigamy." "Special case referred by the Governor-General in Council." The point had arisen in two inferior courts, in the King's Bench and Chancery Courts, and different views had been taken upon the question and then a question was sent by the Governor-General under section 60. It was held, or rather it was answered, that sections 275-6

of the Criminal Code respecting the offence of bigamy are *intra vires* of the Parliament of Canada. Mr. Justice Strong dissented. Section 275 your Lordships will see defines bigamy: "Bigamy is—

"(*a*) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world." Then subsection (4) says: "No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject, resident in Canada, leaves Canada with intent to go through such form of marriage."

THE LORD CHANCELLOR: This is the basis of the decision.

SIR ROBERT FINLAY: This is the basis of the decision, my Lord.

THE LORD CHANCELLOR: The point really on the constitutional question was that a question was asked as to the meaning of it?

SIR ROBERT FINLAY: Exactly, my Lord. Of course I refer to this case in the first place as showing that it is another instance of a reference being made. It was my duty to mention it in that connection, but I further mention it as shewing the extraordinary importance of the question, and, as I submit, the extraordinary inconvenience of allowing a question of this kind to be, for practical purposes, decided in this manner. Two Courts had differed; the point was not taken by way of appeal; Counsel were not heard, but the Governor-General sent a question to the Supreme Court under the alleged powers of section 60, and no Counsel appeared to oppose the validity of the said section. There was nobody interested, and the Court could not authorize the appearance of Counsel on behalf of any person who might possibly think of committing bigamy. I mean to say there was no class of persons who could appear, and the result was that it was argued without any cause being shown at all.

THE LORD CHANCELLOR: Was the constitutional question raised and discussed?

SIR ROBERT FINLAY: No.

THE LORD CHANCELLOR: The significance of it is the fact that the question was answered, which you say illustrates the gravity of it.

SIR ROBERT FINLAY: Yes, my Lord. My friend, Mr. Newcombe was the only Counsel who appeared, but he appeared for the Government of Canada, and, of course, did not question the validity of the reference which the Governor-General had made. I am not going to launch out into the subject of bigamy, but I mention McLeod's case from Australia in order to illustrate the gravity of the question.

(*Adjourned for a short time.*)

SIR ROBERT FINLAY: Before your Lordships rose, Lord Atkinson called attention to the fact that in M'Naghten's case the Lord Chancellor announced in his speech in the House of Lords that he proposed to introduce a measure in a few days dealing with the subject, and then he went on to say that it would be a great advantage if the law could be declared to the House by the Judges before that measure was discussed; so that that does not diverge very far from the rule which was supposed to have existed that it should be with regard to a pending Bill.

I was about to say a word or two with reference to the effect of the answer given in that case with regard to bigamy. Your Lordships are aware that in the case of Macleod, a similar question came from Australia, and it was argued before your Lordships' Board. It is reported in the Appeal Cases for 1891 at page 455.

THE LORD CHANCELLOR: Is that the bigamy case?

SIR ROBERT FINLAY: Yes, my Lord. It came from New South Wales, the Appellant be[illegible]; Macleod, the person who had been convicted of bigamy, the Respondent being the Attorney-General for New South Wales, and the point raised by the Appellant, was that he could not be convicted in respect of a marriage outside of Australia. Section 54 of the Criminal Law Amendment Act of 1883, of Australia, provided that: "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years":—

"*Held,* that these words must be intended to apply to those actually within the jurisdiction of the legislature, and consequently, that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America."

THE LORD CHANCELLOR: This is no more than a decision of what is the state of the law relating to bigamy.

SIR ROBERT FINLAY: What your Lordships held on appeal was that the Australian Statute must be construed as relating to second marriages taking place in Australia; otherwise it would be *ultra vires.* Then in the question submitted to the Supreme Court in Canada, they had to do with a Statute which contained a general provision of that kind, but qualified it by saying that it should apply, if the marriage took place outside of the Dominion, only to persons resident in the Dominion who left the Dominion for the purpose of contracting the marriage—words to that effect and I am told that that answer, given without argument on the other side, without there being any judicial proceeding whatever, there having been two conflicting decisions in the Courts before, has governed the subsequent practice. My friend, Mr. Nesbitt, tells me that that is so, and I submit to your Lordships very respectfully that it is a very good illustration of the extraordinary inconvenience of this practice. I told your Lordships that in the Canadian case the Chief Justice dissented, and at page 478 occurs the expression to which I referred: "Had the offence created by the act been confined to leaving the Dominion with intent to go through a bigamous marriage in a foreign country in which case an act committed in a foreign state or without the jurisdiction, would not have been essential to the completion of the offence, which would in that case have been wholly local, it would in my opinion have been within the jurisdiction of the Dominion Parliament, but as I have shown above, in the legislation before us the criminal act is the marriage without the jurisdiction preceded by the act of leaving the Dominion with intent to celebrate it."

THE LORD CHANCELLOR: That really relates only to the law of bigamy.

SIR ROBERT FINLAY: Certainly, my Lord. I only read it by way of showing that an answer of that kind—the Chief Justice dissenting, and no party having been heard on the other side—has regulated the practice——

THE LORD CHANCELLOR: That is obvious, on the practice you can ask a question on the law of bigamy and get an answer, but, whatever authority it has, it does not show whether it is constitutional or not.

SIR ROBERT FINLAY: The sixth case of reference under the Statute of 1891 is in the matter of representation in the House of Commons, reported in the 33 Supreme Court Reports at page 475. There there was a reference at the request of the Provinces of New Brunswick and Nova Scotia, the Provinces concerned. The dispute was as to the unit of representation, and whether the Provinces had ceased to have right to so many members in the House of Commons. The reference went ultimately to your Lordships' Board and is reported in the Appeal Cases for 1905 at page 37. No objection was taken there, nor in the Privy Council. At that page in the Reports of the Appeal Cases is reported the decision on appeal from the New Brunswick and Nova Scotia cases and also of the Prince Edward Island case, on a similar point, which is reported in the same volume of the Supreme Court Reports, volume 33 at page 594.

THE LORD CHANCELLOR: That is another one.

SIR ROBERT FINLAY: That is another one, but they are both dealt with in the same report in the Privy Council.

Then, my Lord, the seventh case was a case relating to legislation with regard to abstention from labour on Sunday. It is in the 35th Supreme Court of Canada Reports at page 581. There a new question arose. Your Lordships will observe that in the Act of 1891 there are no words such as occur in the present Act with which your Lordships are concerned, dealing with the right to refer questions as to legislation, whether it has been carried out or not, in other words to put questions regarding pending bills or proposed bills or possible bills. There is no power to put such a question, although that is conferred by the section as amended in the Act now before your Lordships, and in this case with regard to abstention

from labour on Sunday, at page 581, it was held that that section that I have referred to of the Act of 1891 does not empower the Governor-General to refer questions as to possible legislation which may or may not be enacted, and the contention about head (*e*) as to cases *ejusdem generis* that I referred to before was disposed of in that case. Then the questions that were put were answred by Mr. Justice Gironard, Mr. Justice Davies, Mr. Justice Nesbitt and Mr. Justice Sedgewick, by the three former on account of the practice of the past, but under protest, following the Attorney-General for Ontario and the Hamilton Street Railway Company. Now, the protest your Lordships will find at page 591. This is the passage:

"The judgment of the Court was as follows:—

"After the fullest consideration of the 37th section of the Supreme and Exchequer Courts Act, under which this reference is made to us, and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company, reported on appeal to the Judicial Committee, (1903 Appeal Cases 524)."—

THE LORD CHANCELLOR: You have not given us that.

SIR ROBERT FINLAY: No, my Lord, that was a Provincial reference.

THE LORD CHANCELLOR: "To the Judicial Committee."

SIR ROBERT FINLAY: Yes, but it was a reference made not by the Government of Canada, but by the Government of the Province of Ontario to the Provincial Court, and then the answers of the Provincial Court were brought to your Lordships' Board on appeal under a corresponding Provincial Statute. "After the fullest consideration of the 37th section . . . , and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company, reported on appeal to the Judicial Committee, at page 528, as to the principle, convenience and expediency of Courts of Justice answering hypothetical questions submitted to them as distinct from those

arising in concrete cases, we are of the opinion that the questions submitted to us as to whether certain supposed or hypothetical legislation, which the legislature of one of the provinces might in the future enact, would be within the powers of such legislature, are not within the purview of the section. Questions as to the constitutionality of existing legislation are clearly within the meaning of that 37th section, and the general words 'touching any other matter' must be considered as within the rule *ejusdem generis*, and may well refer to orders in council by the Governor-General or Lieutenant Governors, as the case may be, passed pursuant to the Dominion or provincial legislation, the constitutionality of which may be in question, or to departmental regulations authorized by Statute. These orders in council cover a very large legislative area, and include regulations on the subjects of navigation, pilotage, fisheries, crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views, from which Mr. Justice Sedgewick dissents.

"As, however, the practice of this court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominion or the Provinces and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the Courts on similar references and proceed to answer the questions as follows"; The protest there related to the fact that the questions related not to any existing legislation, but to proposed legislation. Then there is one passage in the judgment of Mr. Justice Idington at page 594, to which I desire to call attention. Mr. Justice Idington says: "The questions are raised here of the right of the Governor-General in Council to ask and the jurisdiction of this Court to answer questions of a speculative character touching the constitutionality of proposed or possible future legislation by the Parliament of Canada or the legislature of any of the provinces of

Canada and having no relation to actual existing legislation enacted by any of these bodies.

"It is urged that the 37th section of 'The Supreme and Exchequer Courts Act' gives this right to ask and this power to answer, and it is said that, even if this be not so, it has been the practice heretofore to answer such questions, and that such practice should be now followed. I cannot find that such a practice has been so followed or followed for so long a time as to constitute it an established usage that has grown thereby to be law that must govern the conduct of this court.

"It must be admitted that the deliberate adoption by the court of such a practice, when that adoption could not be attributed to any authority but this section 37 or that for which it is substituted, should be looked upon as an interpretation of these sections or one of them which now should bind all the judges of this court." And then Mr. Justice Idington reviewed the cases. I think I have mentioned the cases to which he referred, and at page 604 he says this: "I am not concerned here to lay down nor do I try to lay down any course of duty to be pursued by Parliament in that regard, but it seems to me that to adopt such an innovation it ought to be made clear beyond doubt as the will and intention of Parliament before I presume to attribute to it the innovating purpose that assuming jurisdiction here would clearly involve.

"I desire to abstain from and to be understood as abstaining from any expression of opinion as to the power of Parliament in Canada to exercise any such innovating power and establish in this or any other Court such a jurisdiction as we are asked here to exercise in that regard." That all relates to future possible legislation, and then he refers to the practice in other countries, the United States and the separate States of the United States. Then the passage which was referred to in the judgment of the Privy Council occurs in the report in the Appeal Cases for 1903, beginning at page 524. The Lord Chancellor, Lord Halsbury, says this at page 529, and this is the passage I think to which the Supreme Court referred: "With regard to the remaining questions which it has been suggested should be reserved for further argument, their

Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

Then, my Lord, the eighth case, and there is only one other under this Statute, is in re The Railway Act, in the 36th volume of the Supreme Court of Canada Reports at page 136.

THE LORD CHANCELLOR: In the case you last gave us this Board did answer the first question.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: It discriminated,

SIR ROBERT FINLAY: It discriminated.

THE LORD CHANCELLOR: It refused to answer the others? Does not that look like an opinion that it was lawful to ask but not imperative to answer?

SIR ROBERT FINLAY: The question had never been raised, and of course, on the very face of the questions there arose this further objection, that the question was of a speculative nature on a hypothetical state of facts and for that reason Lord Halsbury said it was very inexpedient to answer it, and they would not answer it, although the point was not raised at all as to the constitutionality of the reference. I submit that it does not amount to a decision.

THE LORD CHANCELLOR: No, I do not say it does. It looks like an opinion.

SIR ROBERT FINLAY: It is passed by—I must admit that in many of these cases, where the parties consented, the matter has been allowed to go through.

LORD ATKINSON: If they had jurisdiction to ask, were not the Judges bound to answer?

SIR ROBERT FINLAY: Section 60, of course, could not apply to your Lordships' Board.

LORD ATKINSON: No.

SIR ROBERT FINLAY: But it would apply to the Supreme Court, and that is, as I submit to your Lordships, a very strong reason for holding that the whole section is *ultra vires*, because there is no limit to it. Any question however complicated, however momentous the consequences to private individuals may be, if the Governor-General in Council puts it to the Supreme Court under the Statute, if that Statute be *intra vires*, the Supreme Court is bound to answer. I submit, my Lords, it is a strong reason for holding that the enactment itself is unconstitutional and *ultra vires* of the Parliament of Canada.

LORD ATKINSON: Because it says it shall be the duty of the Court to hear and consider it and to answer.

SIR ROBERT FINLAY: And to answer each of the questions.

LORD ATKINSON: Each of the questions.

SIR ROBERT FINLAY: So that it is extremely specific.

THE LORD CHANCELLOR: It is quite true the Statute says so. If it be true that it is not imperative to answer—I do not say that it is—it means that to that extent at least the Statute is *ultra vires*, it involves that, so far as it is an obligation which is unconstitutional it is *ultra vires*, but that is not the same thing as saying that it is *ultra vires* to authorize the Executive Government to ask the question.

SIR ROBERT FINLAY: My submission covers the whole ground, I submit any reference of this kind to the Supreme Court is *ultra vires*. I quite conceive they might establish any body of experts they like, to advise them on such points, but I submit it is *ultra vires* to ask any such question in this way of the Supreme Court. Further, there arises that question of whether it is *ultra vires* to impose the obligation as they have affected to do on the Supreme Court to answer.

LORD ROBSON: Your contention is, Sir Robert, that nothing but questions as to existing law can be referred by the Governor-General of Canada to the Supreme Court?

SIR ROBERT FINLAY: I should not concede even that, my Lord. That is the law here, with regard to the Judges being consulted.

LORD ROBSON: I put it this way, that your contention is, that they have no constitutional authority to pass an Act which will entitle any questions at all, except questions of law to be put?

SIR ROBERT FINLAY: No, not even questions of law.

LORD ROBSON: The Supreme Court must deal only with questions of law brought before it in the ordinary course.

SIR ROBERT FINLAY: In the regular way in the course of administration of justice.

LORD ROBSON: I do not at present see—I daresay you will deal with it—why do not the words "peace, order and good government" cover a power of that kind? The English Parliament clearly may refer questions of that kind to the Privy Council; it has jurisdiction to do it within the constitution, but why has not the Parliament of Canada the power to do the same thing? I can understand this, that the Dominion Parliament would not have power to make the Supreme Court deal with questions that might be in excess of the jurisdiction of the Dominion Parliament. For instance, I see among the heads put in section 60 are the interpretation of Dominion Statutes, I can quite understand that there should be some limitation upon the power of the Dominion Parliament to submit this very wide range of questions to the Supreme Court, but I do not at present see why the Dominion Parliament should not have power in regard to matters well within its jurisdiction to refer them to the Supreme Court under the head of "peace, order and good government." It may be very impolitic legislation—I think it is—it is not only impolitic but open to the very gravest abuse.

SIR ROBERT FINLAY: The reason I submit for that contention is, that the Supreme Court is constituted under the authority of section 101, of the British North America Act.

LORD ROBSON: Section 101 does not override the generality of section 91. Section 91 gives the jurisdiction to deal with "peace, order and good government," and it gives that in the widest terms. It points out in that section that the generality of that power is not to be limited by the mere enumeration that follows it. The doctrine of *ejusdem generis* is expressly excluded, so that you have got to deal with nothing but the words "peace, order and good government" in their widest sense, and that sense is not to be restricted by any succeeding enumeration or by any succeeding section.

SIR ROBERT FINLAY: But your Lordship will see in the first place, that power as to "peace, order and good government" is to be exercised, according to the very terms of section 91, only "in relation to all matters not coming within the classes of subjects by this Act, assigned exclusively to the legislatures of the Provinces."

LORD ROBSON: Certainly; in other words they cut out there an exclusive sphere of action for the Provinces.

SIR ROBERT FINLAY: But they are claiming by this section to refer to the Supreme Court questions which relate to purely Provincial matters.

LORD ROBSON: I put that a moment ago. I said I could understand that argument—I could understand that Parliament should not be empowered to refer questions like that in section 60, (of course, I am not expressing any opinion upon it) on the interpretation of Provincial legislation. I can understand an argument arising on that, which I say nothing about, that that is *ultra vires,* but I want to have your contention. Do you say as to matters not within the scope of section 92, matters which have nothing to do with Provincial legislation, but merely to do with Dominion legislation, the words "peace, order and good government" would not entitle the Dominion Parliament to refer such matters within their own jurisdiction and competence, to the Supreme Court for advice?

SIR ROBERT FINLAY: I do, on account of section 101, because the Supreme Court is specifically dealt with by section 101, and it is under section 101 that the Supreme Court has been erected.

LORD ROBSON: Yes, but how do you get over the difficulty that section 101 is not to be taken to limit the generality of the power given under the words "peace, order and good government"? Section 101 undoubtedly specifies what before is merely general, in the words "peace, order and good government," but if the Dominion Parliament likes to constitute a Supreme Court and to take, if it pleases, those very persons and constitute them a Commission, and then if it likes to combine the powers of the Supreme Court with a Commission, why does not that power come under the heading of "peace, order and good government?"

SIR ROBERT FINLAY: There are two answers to that. In the first place they have not done that. Section 60 in terms says, that the reference is to be to the Supreme Court, that they are to hear it argued, give judgment and the reasons, and that it shall be a judgment for the purposes of appeal; so that they have not treated it as a Commission at all. If they had treated it as a Commission no appeal to the Privy Council would have been possible. Then, secondly, I say that the functions of the Supreme Court are defined and exhaustively defined in section 101, which is the section under which it has been created. Now, if your Lordship would look at section 101 you will see that its functions are two-fold. The first is a Court of Appeal, that is purely sitting as a Law Court to decide actual cases in which points have been raised, secondly to act as an additional Court for the better administration of the laws of Canada.

LORD ROBSON: They are both Law Court purposes.

SIR ROBERT FINLAY: Both law court purposes, and that is all. I say that is an exhaustive definition of the functions of the Supreme Court, which by section 101 the Parliament of Canada is authorized to create. They cannot go outside that, and I go further, and I say that the imposition of such duties as answering questions in the abstract is repugnant to the functions of a Court of Justice. The Supreme Court if it is to have questions of this kind sent to it, is fettered in its discharge of its duties as a Court of Justice. And I therefore say, in the first place, that the exhaustive definition of the duties of the Court

in section 101, excludes such references: In the second place that such references are in their nature such as to hamper the efficiency of the Court, and, therefore, cannot be imposed.

LORD ROBSON: I was going to make another point rather in your favour. Your observations about the functions of the Court being exclusive do not impress me at present very much, but there is this to be considered: the Supreme Court is there authorized to be constituted for the benefit, both of Dominion and Provinces. The Provinces have a right to have a Supreme Court. They have a right to have it merely to decide their questions of law, but to be there, deciding apparently nothing but questions of law. If the Dominion Parliament had the authority which they contend for, it might be said you are not giving the Provinces what the Statute directs you to give them, that is a pure and proper Court of Law.

SIR ROBERT FINLAY: Exactly. That is exactly my contention, and I was about to say, and it bears directly on that point and on what your Lordship has said as to the power to legislate for the peace, order and good government of Canada: that I do not for a moment question the right of the Parliament of Canada to appoint any commission or body of experts to whom they might refer such questions. What I say is, they cannot make the Supreme Court that body.

LORD ATKINSON: Does not your argument come to this, although the "peace, order and good government" provision may enable you to supplement the things especially enumerated, you cannot make use of it to repeal the enumerated clauses?

SIR ROBERT FINLAY: Exactly: that is my submission, and here you have two broad facts: first, that section 101 contemplates a Court of Law in the most proper sense of the term, whether sitting in appeal or by way of original jurisdiction.

LORD ATKINSON: That is if one of the enumerated clauses sets up a Court of Law, you cannot make use of the "peace, order and good government" provision to turn it into an advisory body, which would amount practically to a repeal of this: indeed, it would change its nature.

SIR ROBERT FINLAY: Yes, my Lord, and it goes further, because I submit such duties are so inconsistent with the nature of a Court and so calculated to hamper it, that it is really setting the Act at defiance to impose it.

LORD ATKINSON: Practically a repeal *pro tanto*.

SIR ROBERT FINLAY: Yes, my Lord.

I was about to refer to a case in the 36th Supreme Court of Canada Reports, at page 136. It is enough to say that the reference there was as to the validity of an Act of the Parliament of Canada providing that railways should not be relieved from liability for personal injuries to any employee by any notice or condition. No protest was made. The question was answered. No objection was taken by anyone, and with some difference of opinion the Court answered the question that the Statute was *intra vires* of the Parliament of Canada. That came up before your Lordships' Board in the Appeal Cases for 1907, at page 65. It was held to be *intra vires*. Again, no point was taken.

Then the last case under the Act of 1891 is the Provincial Ferries case in the 36th Supreme Court of Canada Reports, at page 206. There Counsel appeared for the Dominion of Canada and for the Province of Ontario, and the Act was held to be *intra vires*. Again, the point was not taken, and no protest was made.

Now, these are all the cases that I am aware of with reference to the Act of 1891.

Before I pass to the new legislation of 1906, which introduced words so as to enable the Governor-General to refer questions with regard to any possible future legislation, the Act containing words to that effect, may I mention one other case on an incidental point which I think is not unimportant in the construction of section 101? It is the case of l'Association St. Jean-Baptiste de Montreal v. Brault, in 31 Supreme Court of Canada Reports, at page 172. That was not the case of a reference at all, and the question was as to whether appeals could be entertained from the Provincial Courts on questions of the Provincial Law. The point was taken, it seems rather a startling one, and was rejected by the Court, that the Supreme Court could only administer the Canadian Law, and that, there-

fore, an appeal on the Provincial Law was invalid. That was rejected, of course, by the Court: they pointed out that so far as the Supreme Court is to act as a Court of Appeal, it must of course administer the law prevailing in the Province from which the appeal arises, but that so far, under the second limb of section 101, as it is to administer justice under the Law of Canada, it administers the Law of the Dominion, not any Provincial Law, but that the Courts to be erected under that are Admiralty, Exchequer, and so on, Acts relating to the administration of the general law of the Dominion. I need only read a very few lines of this.

THE LORD CHANCELLOR: What is the point raised there?

SIR ROBERT FINLAY: The point raised was that the appeal from the Provincial Court was incompetent on the ground that the Supreme Court was to administer the Law of Canada, and that this appeal related to the Provincial Law. That contention of course, was rejected.

THE LORD CHANCELLOR: I understand that: I only meant, what is the bearing of it?

SIR ROBERT FINLAY: I only cite it for this reason, that the second head of section 101 as to original jurisdiction, the power of any Court to be created under section 101, relates only to the Law of Canada: that is the Law of the whole Dominion. Your Lordships, see section 101 first provides for a Court of Appeal.

THE LORD CHANCELLOR: Yes, besides that a general Court of Appeal for Canada is for all the Provinces of Canada.

SIR ROBERT FINLAY: And with reference to all the L , and under the second head it administered the Law o nada.

THE LORD CHANCELLOR: Canadian Law.

SIR ROBERT FINLAY: Canadian Law. That is the only bearing of that case.

Then I pass on to the Supreme Court Act of 1906, which is the Act with which we have at present to deal. It was originally the 6th Edward VII., chapter 50, section 2: now it is re-enacted in the Revised Statutes of Canada

for 1906, chapter 139, section 60. That is the section which is before your Lordships.

LORD ATKINSON: Is not the result of all those authorities this: that the Judges have power to refuse to answer?

SIR ROBERT FINLAY: Yes, my Lord, at all events, that has been laid down most particularly by the Judicial Committee so far as their functions are concerned and their example was followed in that case to which I referred last but one by the Supreme Court. The Supreme Court did assert their independence to that extent by saying that they were not bound to answer.

LORD ATKINSON: I did not catch as you went through the Acts, were there any words in those other Acts before the Act of 1906, section 60, equivalent to those words "it shall be the duty of the Court to hear and consider it, and to answer"?

SIR ROBERT FINLAY: I think so.

LORD ATKINSON: They held that notwithstanding those words, they were not bound to answer.

SIR ROBERT FINLAY: I beg your Lordship's pardon, the words are not exactly the same: the words are these. I will read them. It is the second subsection of section 37 as enacted by the Act of 1891: "The Court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said Court; and any Judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons."

LORD ATKINSON: Does it come to this, that all those authorities establish that notwithstanding that imperative language, they were still entitled not to answer?

SIR ROBERT FINLAY: In one case they did assert that. Of course that could not have any binding effect upon your Lordships' Board. I think I went a little too far—my learned friend, Mr. Nesbitt, reminds me the point taken in that case to which your Lordship is referring and to which I referred specially, was, that the question did not refer to any existing legislation, but was a question merely as to what would be the effect of possible legislation, and what the Supreme Court held was that that was not

within the terms of the Act as it then stood—which dealt only with existing legislation. That was the precise decision, so that I ought to have limited my answer to what your Lordship asked to that extent.

LORD ATKINSON: The ground was that it was outside the Act.

SIR ROBERT FINLAY: Outside the Act. So that I cannot say I doubt whether the Supreme Court could say, if this legislation is *intra vires* at all, that the command to answer is not binding upon it.

THE LORD CHANCELLOR: I am not at all sure about that. The use of the power must be constitutional, but there are certain constitutional rights in the Provinces. It is a court of appeal from them and in which they are interested. They may say, you cannot depart from the constitutional position of judges and you cannot compel judges to answer questions which would be contrary to the constitutional usage. In England, for instance, I should have thought it would be regarded as what we call unconstitutional to compel the Judge to exercise any function inconsistent with his impartiality and with being able to discharge his duty.

SIR ROBERT FINLAY: Yes, my Lord, to exercise any function which would involve his publicly expressing an opinion on a point on which he might afterwards have to adjudicate in his judicial capacity.

LORD ROBSON: In short, the Provinces have a right to a real Court of Appeal, not a Court of Appeal performing non-judicial duties.

SIR ROBERT FINLAY: Yes, my Lord. The truth is that on all the most burning questions, the appeal to the Supreme Court might become absolutely useless, because by putting a series of interrogatories to the Supreme Court on every point that was likely to arise, the Dominion Government would have made sure of her ground.

THE LORD CHANCELLOR: Yes, but it seems that the Court, including this Board, have for a period of a good many years been in the habit of considering these questions, and notably this Board on at least two occasions declining to answer questions, because they thought they were not appropriate questions. In the Canadian Courts it may

be they have not quite taken that attitude, although they go very near it. That is about asking questions and the convenience of asking them, and it may be convenient to get answers. The other point is whether you can compel the answer.

SIR ROBERT FINLAY: That is so: the points are distinct to that extent.

THE LORD CHANCELLOR: What is your proposition as far as the first is concerned? The Provinces, as well as the Dominion, have repeatedly availed themselves of it without the least objection.

SIR ROBERT FINLAY: I say that the whole thing is wrong, and that no convenience in particular cases leading to consent or acquiescence, can confer jurisdiction if there is no jurisdiction. That is my submission, and that there is no indication of an opinion by your Lordships' Board on the question.

THE LORD CHANCELLOR: It is a difficult thing rather to say that a thing is unconstitutional, which has been in practice, acted upon by this Board for a good many years?

SIR ROBERT FINLAY: Not where you are dealing with a written constitution. I agree if it were the case of an unwritten constitution, long practice would be a most valuable element. Here, we have the constitution in writing in a modern Act of Parliament.

THE LORD CHANCELLOR: If it can be made to depend on section 91, that is an answer, but if you have to invoke what is a constitutional position of a Court of Law in the administration of justice, it may be that it is not quite so easy.

SIR ROBERT FINLAY: I agree. Practice is valuable in determining what an unwritten constitution is, but in construing a written constitution of recent date, I submit it is no help. There are a hundred reasons why the point was not taken: it was convenient to get an opinion from your Lordships' Board. The point was never argued, and it is not your Lordships' practice to raise points which are not taken by the parties who have come at great expense to get the opinion of this Board. My main point is that, consent or no consent by the Province or the Dominion, or both of them, there is no power in the Parliament of un-

ada to pass such an Act as this authorizing any reference of any question to the Supreme Court in an advisory capacity.

LORD ATKINSON: If they are compelled to answer, it makes the thing so much stronger.

SIR ROBERT FINLAY: It makes it so much the worse. It is another argument for holding the section *ultra vires.* That is my main proposition. The Provinces now are beginning to taste the fruits of their acquiescence in having the points brought up in this way, when they thought it convenient to have these points so decided. Now, they find themselves with this recoiling upon them, and that a series of questions, the answers to which would have a most vital effect upon Provincial enterprise and Provincial Legislation are being put, which would really tie the hands for all practical purposes of the Supreme Court as a Court of Appeal. It would be necessary in every such case, if it arose judicially to omit going to the Supreme Court, because it would cease to be valuable for this purpose, and to go straight to your Lordships' Board. That was not the intention of the framers of the Supreme Court, and I say that this use of the Supreme Court is in violation of the very terms of section 101.

THE LORD CHANCELLOR: That is the end of the cases in the Supreme Court?

SIR ROBERT FINLAY: There are one or two more under this later Act, but what I was about to call your Lordships' attention to, was the fact that in this Act the most recent Act, in the Revised Statutes of Canada, 1906, chapter 139, as it is set out at page 4 of the Appellants' Case, words were introduced under head (*d*):

"60 important questions of law or fact touching:—"

* * * * *

"(*d*) The powers of the Parliament of Canada, or of the Legislatures of the Provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed."

LORD SHAW: That completely removes it.

SIR ROBERT FINLAY: Yes, my Lord, absolutely, and dispels the difficulty which was experienced by the Supreme Court in that case with regard to the proposed legislation.

Now, my Lords, under this Act there have been only two cases, the first of which is reported in the 43rd volume of the Supreme Court Reports, page 434; and the second is the present case. The case in the 43rd volume of the Supreme Court Reports is headed: "In re Criminal Code. In the matter of an order in Council respecting section 873 (*a*) of The Criminal Code and section 17 of The Lord's Day Act."

The Alberta and Saskatchewan Provinces, which were interested in some of the questions, were represented on the question as to the validity of certain provisions. The Provinces were really moving in the matter, and they wanted to get a sort of informal trial in this way.

MR. NEWCOMBE: The request was made by His Excellency at the request of the Attorney-General.

SIR ROBERT FINLAY: Yes, so that it could not be expected that there would be any objection; and the Dominion, of course, raised no objection at all. On page 441 of the report—I am not troubling your Lordships with the precise points raised in these cases—Mr. Justice Idington said:—

"The creation of this Court has been generally supposed to have been intended as an exercise of the powers given by the 'British North America Act,' section 101, which is as follows:

"'The Parliament of Canada may, notwithstanding anything in this Act, from time to time,'"——and he reads the section. Then he goes on:—

"It was constituted as a court of law and equity. It was given an appellate and other jurisdiction.

"In consequence of doubts expressed in, *In re Legislation respecting Abstention from Labour on Sunday*, (35 Can. S. C. R., 581), the 'Supreme Court Act' was amended by 6 Edw. VII. ch. 50, now section 60 of the Act.

"I must be permitted to doubt if it can as such be made a court or commission of general inquiry, as the amendment seems to read.

"The words used in section 101, *i.e.*, 'the better administration of the laws of Canada,' may, however, cover a pretty wide field. If this inquiry extends beyond that field it probably is *ultra vires*.

"Assuming, but doubting if, in some such way the inquiry falls properly within the second part of the above section 101, it becomes pertinent thereto at the threshold to try to understand what Parliament was about when amending the Criminal Code, by section 873 (*a*)" and so on.

Then Mr. Justice Duff at page 451 makes some observations on the same topic:

"To all the questions submitted I answer 'no.' For my reasons I refer to the opinion of my brother Davies. I desire, however, to add one or two observations upon the legal quality and effect of these answers and the opinions upon which they rest. The practice of asking the extra judicial advice of the judges upon questions of law is an ancient practice. Seemingly the last recorded instance in England in which without statutory authority such advice was sought by the Crown occurred in 1760, when a question arising out of the proceedings against Lord Geo. Sackville was submitted through Lord Mansfield and answered. In that case, as in many previous cases, the judges expressly declared that if the question should afterwards be brought before them judicially they should be ready 'without difficulty to change' their opinion (2 Eden [Appendix], pages 371-372). It has long been settled that the House of Lords is entitled to require the answers of the common law judges upon questions as to the existing state of law, whether arising out of litigation pending before the House or not. But in such cases the opinions of the judges have not in themselves the authority of judicial precedent."

THE LORD CHANCELLOR: I think we should remember in this connection that the House of Lords in theory is a judicial body in itself.

SIR ROBERT FINLAY: It is.

THE LORD CHANCELLOR: The whole of it.

SIR ROBERT FINLAY: The whole of it, my Lord, and of course the judicial functions of the House of Lords were discharged by the whole body. Very important cases were decided by the House of Lords—one I think was *Ashby* v. *Wood*, which was decided by the House, generally acting on the opinion of the Chief Justice.

THE LORD CHANCELLOR: I only wanted to point that out to you.

SIR ROBERT FINLAY: At the same time, I suppose, the judicial functions of the House of Lords are separate from its legislative functions. It might be sitting judicially or legislatively, but it could not necessarily, because it had the right to get the opinion of the Judges in a judicial matter, take the opinion of the Judges in a legislative matter.

THE LORD CHANCELLOR: No, they are distinct powers.

SIR ROBERT FINLAY: Then Mr. Justice Duff goes on:

"In *Head* v. *Head*, T. and R., 138, at page 140, Lord Eldon said:

"'The answers given by the Judges, therefore, although entitled to the greatest respect as being their opinions communicated to the highest tribunal in the Kingdom, are not to be considered as judicial decisions.' Lord Eldon is here speaking of opinions given in answer to questions arising out of contentious litigation actually pending before the House and given after full argument. The view of a very able and experienced Judge touching the value of such opinions where there is no cause and no argument may be gathered from the following passage in the opinion of Maule, J., in Macnaghten's case." Then he reads what I have already read and says:

"In more recent times it has been held that the jurisdiction of the High Court of Justice upon questions submitted to it under Section 29 of the 'Local Government Act' is consultative only and not judicial. *Ex parte County Council of Kent and Council of the Borough of Dover.* ([1891], 1 Q.B. 725.)

"With regard to questions submitted under the Dominion Statute the course of the Judicial Committee has, I think, been very instructive. The authority conferred by the Statute has been sometimes used for the submission of specific points in controversy between the Dominion and the provinces upon the construction of the 'British North American Act' which, as bearing upon the validity of specific statutes, it was thought desirable to have determined; both sides to the controversy having accepted the issue and the tribunals having the benefit of the fullest

argument upon it. Even in such cases the Board has usually refused to pass upon questions touching private interests not represented [the question relating to the rights of riparian proprietors for example, (Attorney-General of Canada v. Attorney-General for Ontario, Quebec and Nova Scotia; 1898, A.C. 700, at p. 717)], or to answer questions the replies to which might properly be influenced by the circumstances in which the questions should arise for actual judicial decision. *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*, (1903, A.C. 524) at page 529.

"The questions submitted in this case relate to the construction of statutes governing criminal procedure and the answers to them could not well be affected by the circumstances of any particular case in which they might arise; and they are therefore not open to the same objections as may be taken to purely hypothetical questions. But the court is called upon to answer them, having heard argument from one point of view only; and in these circumstances it is clear that the opinions expressed in the answers given cannot have the weight attached either to a judicial deliverance or to an extra-judicial opinion pronounced after hearing the possible diverse views of the question presented in argument. Indeed, there is not a little danger that such answers may, as Maule, J., said in the passage already quoted, tend 'to embarrass the administration of justice,' (not only in this court, if, as is most likely we should hereafter be called upon to answer the same questions when raised litigously), but in other courts also, which may naturally feel greater delicacy than this court on a proper occasion would feel in treating the questions passed upon as *res novae*, notwithstanding such opinions."

Then Mr. Justice Anglin refers to this point also in the course of his Judgment on page 454:

"Parliament has advisedly denied to the Crown the right to appeal to this Court in criminal cases from judgments of provincial courts in favour of defendants. Because a review of the judgment of the Supreme Court of Saskatchewan in *The King* v. *Duff*, (2 Sask. L.R. 388), is unavoidably involved in the disposition of the present case

and also because of the strong disapprobation expressed by the Judicial Committee of the Privy Council of the practice of procuring judicial opinions upon abstract questions (*Attorney-General for Ontario* v. *Hamilton Street Railway Co.*: [1903, A.C. 524]; *The Brewers' Case*), *Attorney-General for Ontario* v. *Attorney-General of Canada*, 1896, A.C. 348; the court answers the questions now submitted with reluctance and diffidence, solely in obedience to the imperative provisions of the Statute ('Supreme Court Act,' Section 60), and in deference to the order of the Governor-General-in-Council."

LORD SHAW: Was the question of jurisdiction raised in that case by the parties?

SIR ROBERT FINLAY: I do not think it was, my Lord.

LORD SHAW: Because it is almost as if the Courts recognized that they were confronted by a large question.

SIR ROBERT FINLAY: Yes, Your Lordship will recollect that earlier protests were made by Mr. Justice Taschereau. He made them once and repeated them in another case.

LORD SHAW: One cannot listen to the Judgment of Mr. Justice Taschereau without seeing how thoroughly he had gone into it.

SIR ROBERT FINLAY: Yes, the truth is that only lately the importance of the point has been recognized in its full gravity. Before, the parties were content with getting particular questions answered.

THE LORD CHANCELLOR: For a long time they found it an extremely convenient thing, and no one objected.

SIR ROBERT FINLAY: Except Mr. Justice Taschereau.

THE LORD CHANCELLOR: Then they found that it might be a very inconvenient thing.

SIR ROBERT FINLAY: Yes; and whether convenient or inconvenient the naked question remains, is it authorized by the constitution; and that is totally unaffected, I submit, by all the changing current of feeling which has influenced the Courts in this matter.

There is only one other sentence I want to read from Mr. Justice Anglin's judgment, and it is this:

"It must be understood that as this opinion is given without the advantage of argument except on behalf of the provincial Attorney-General, it would not be proper that

it should be deemed binding in any case which may hereafter arise, whether in this Court, or in any provincial court."

Now Your Lordships see that Mr. Justice Anglin points out that Parliament had advisedly denied to the Crown the right of appeal to this Court in criminal cases, but the Crown takes it—not in a particular case, but if a decision is given which they consider is wrong they can submit the question under Section 60. I submit it is a most inconvenient and unconstitutional power. It may be convenient to state that the case of "In *re* reference by the Governor-General-in-Council," is reported in the same volume of the Supreme Court reports, Volume 43, at page 536, and the Judgments are stated in the Appendix to this case. I propose to read them to your Lordships, but before reading them I should like to make one or two observations with regard to the practice in the United States, which it is impossible to suppose was not in the view of those who framed the constitution under the British North America Act. Now, in the United States it is well known the Supreme Court only gives judgment—.

THE LORD CHANCELLOR: Is not this rather wide?

SIR ROBERT FINLAY: I will not go into detail at all; I will only say this that the Supreme Court of the United States under the constitution does not deal with any abstract questions, and has refused to entertain them.

THE LORD CHANCELLOR: Yes, very likely. We will take it as a fact as you state it; but surely it is not necessary to go into detail about it. It is a different law.

SIR ROBERT FINLAY: It is a different law, and all I meant was this—that it is hardly possible to suppose that those who drew up the British North America Act had not in view that fact, and knowing that fact they abstained from introducing any such power here.

It may be convenient, my Lords—I will not read the passages—but merely as a matter of reference to mention that this matter is discussed at very great length in reference to the Australian Constitution in two Treatises of Messrs. Quick and Groom on Judicial Power, and Messrs. Quick and Garran on the Australian Constitution.

THE LORD CHANCELLOR: That is a living author commenting on an Act which we all of us remember.

SIR ROBERT FINLAY: Then, my Lords, I will not occupy your Lordships' time with it. It is really a discussion on a general question in which the disadvantages of such a power are pointed out.

Now I will proceed to deal with the Judgments in the present case; they begin in the Record at page 15. The first judgment is the judgment of the Chief Justice; he says:—

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

"The questions relate to:

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

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

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

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

"Various questions involving, as those now submitted, the true construction of the 'British North America Act,' with respect to the exercise of the legislative power of Parliament and of the provinces respectively have been at different times submitted to this Court by the executive and answered; in some instances, it is true, in recent years, under protest. The answers given to those questions have been on several occasions appealed to the Judicial Com-

mittee of the Privy Council and that body assumed it had jurisdiction to deal with them, although certainly in no respect under the legislative control of the Parliament of Canada. A list of those references will be found on page 267 of Mr. Cameron's 'Supreme Court Practice.'

"Speaking for myself, I feel bound by the rule established for us by these precedents which date back to the very beginning of this Court. They have established a rule of conduct which now has for me the force of law. If the practice originated (as a learned legal writer says) in error, yet the error is now so common that it must have the force of law.

"I entertain no doubt, however, that independently of all precedent it is our duty to consider the questions submitted. It is not necessary for us to say now whether everything that is or may be involved in the consideration of each of the questions referred would or would not properly fall under our cognizance.

"If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings. Lord Watson, in the *Brewers' Case* (1896 A.C. 348). In other words even in the absence of those special provisions in the 'British North America Act,' and the 'Supreme Court Act,' to which I will hereafter refer, I would still hold that the members of this Court are the official advisers of the Executive in the same way as the judges in England are the counsel or advisers of the King in matters of law, our constitution being 'similar in principle to that of the United Kingdom.' (Preamble of the 'British North America Act.') The same Act, in the distribution of powers, declares 'that the executive government and authority of and over Canada continues to be and is vested in the Queen.'"

Here, my Lords, I should like to refer to the preamble

of the British North America Act in reference to what the Chief Justice says: It is merely this:

"Whereas 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."

LORD SHAW: It is not necessary for your argument to claim the exact accuracy of those three lines on page 16, is it?

SIR ROBERT FINLAY: No, my Lord, I should submit it is not; there is no trace of the importation of that part of our Constitution.

THE LORD CHANCELLOR: This you say is all one continuous thing which may be liable to misinterpretation from time to time.

SIR ROBERT FINLAY: Yes, my Lord.

LORD SHAW: The British North America Act is a tribute to that Constitution itself; it says similar in principle.

SIR ROBERT FINLAY: Yes. I submit that it is straining the words and the meaning they bear. A Constitution really grows, and although there is no definite moment perhaps when you can say a change has taken place, at the end of a hundred years it is hardly recognizable. I suppose some theorists would say that our Constitution was the same under the Plantagenets as it is now. Well, that of course would be extravagant. Things practically have changed, and of course that attitude of mind has been very much intensified by the way in which the popular cause was advocated in the seventeenth century, when it was asserted that the change which was insensibly in progress was merely recovering for the people their ancient liberties. It really was a beneficial change I daresay, but still it was a change for all that.

THE LORD CHANCELLOR: I do not suppose it will be stated that in 1867 in the British North America Act of that day it would be quite accurate to say that the Judges in England were the Counsel and advisers of the King in matters of law.

SIR ROBERT FINLAY: No.

THE LORD CHANCELLOR: It would be overstating it.

SIR ROBERT FINLAY: It would be overstating it altogether. Then the Chief Justice goes on:

"In England the practice of calling on the judges for their opinion as to existing law is well established. Evidence of its existence will be found as far back as history and tradition throws any light on British legal institutions. (*Beekman* v. *Mapelsden*, O. Bridg. 60, at p. 78). After quoting the section of the constitution of Massachusetts which provides for taking the opinion of the judges by the Executive or legislative department, Chief Justice Gray says: (Op. of Justices, 126, Mass. 557, at p. 561.)

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

"The case in which the Lords in their judicial capacity called for the opinion of the judges, is a very familiar one. I might mention O'Connell's case (11 Cl. and F. 155), in which the decision of the Lords was against the opinion of the majority of the judges. A well-known precedent may be cited of McNaghten's case (10 Clark and Finnelly, 200.) Here not only was there no litigated question before the Lords, but not even any pending legislative question."

(That must be taken subject to what Lord Atkinson pointed out.)

"The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the Central Criminal Court, but not in any way before them, a case developing interesting questions in the law relating to insanity, conceived that they would like to know a little more accurately what the law on those points was. They accordingly put a set of 'abstract questions' to the judges—questions not arising out of any business before them, actual or contemplated."

That is a mistake; it did arise out of the contemplated appeal. Then he goes on:

"One of the judges protested against this proceeding and his objections bear a close resemblance to those urged in support of this preliminary objection, *e.g.*, that the questions put 'do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms, that he had heard no argument;' and that he feared 'that as the questions relate to matters of criminal law of great importance, the answers to them by the judges might embarrass the administration of justice when they are cited in trials.' The Lords took notice of this and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on 'abstract questions of existing law.'

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

I do not know whether it is contended that the House of Commons has any similar power, and they are at least as important in regard to legislation as the House of Lords.

"These words of Lord Campbell are absolutely applicable to this reference. In anticipation of possible legislation on the important subjects of insurance, incorporation of joint stock companies and control of fisheries, the Executive of Canada desires to be advised as to the constitutional limitations upon its legislative power. In McNaghten's case (10 Cl. & F. 200) Lord Brougham refers to the case of 'Fox's libel Act,' when the judges answered questions about the existing law of libel. Lord Campbell cited an instance where the judges were called on to give their opinion upon the questions of law propounded to them respecting the 'Clergy Reserves (Canada) Act,' (7 and 8 Geo. IV., ch. 62). One of the questions was whether the Legislative Assembly of United Canada had exceeded their lawful authority in legislating with respect to the sale of the Clergy Reserves. Lord Wynford said he did not

doubt the power of the House to call on the judges and to have their opinion as to existing law. He recalled the instance when he was Lord Chief Justice of the Court of Common Pleas, that he communicated to the House the opinion of the judges with regard to the usury laws, and the House subsequently passed a law on the subject. The Lord Chancellor (Lord Lyndhurst) concurred 'as to our right to have the opinions of the judges' on existing law. In a previous case the judges begged to be excused from giving an opinion, requested by the House of Lords, upon the question whether a pending Bill was in conflict with previous Acts relating to the Bank of England. The questions were argued by counsel on both sides; but the judges said that the inquiries were not 'confined to the strict construction of existing Acts of Parliament.' "In *re* Westminster Bank (2 Cl. & F., 191). This is not a case in which we are called on to express an opinion by anticipation on causes actually depending before the Courts."

(That may be, but such a case may come up any day.)

"Nor is it to be supposed for one moment that we will consider ourselves bound by the opinions given in answer to the questions submitted to us if the principles involved are brought before us in due course of law."

But if a man has expressed publicly an opinion on a point which has been referred to him by such a question as that, he may say, as the Judges said in Lord George Sackville's case, "We will change our opinions." But I defy any man to change a deliberate opinion which he has formed without difficulty. He may be convinced that he was wrong and change his mind, but it is idle to say that a man is in the same position to appreciate a point judicially as if he had not formed and publicly expressed an opinion upon the very same point before.

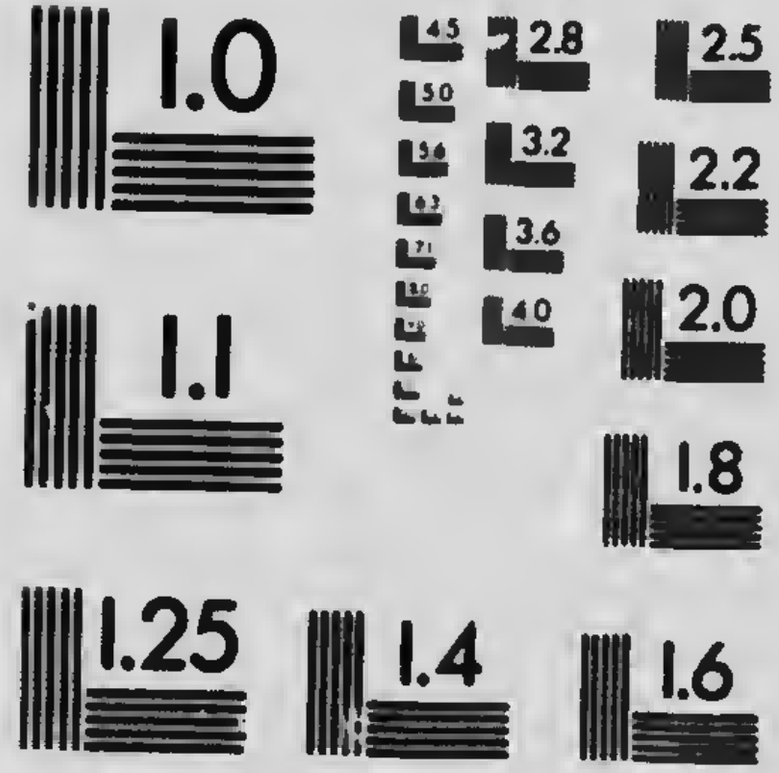
Then I go on:

"As Lord Mansfield said in the Sackville Case, (2 Eden 371), 'we shall be ready, without difficulty, to change our opinions, if we see cause, upon objections that may then be laid before us, though none have occurred to us at present which we think sufficient.'

"I am certainly of opinion that the practice of taking counsel, as it were, with the judges, to ascertain and elicit

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

their opinions upon a specific question before it had been brought judicially before them is objectionable. And I entirely agree with what is said by Mr. Hargrave. (Co. Litt. 110, *a* [5]).

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

"At the same time we must not forget that judges are officers of the Crown, and I adopt without any reserve the opinion expressed by Dorion, C.J., a man of wide political and judicial experience, when, speaking for the full Court of Queen's Bench in Quebec, he said in *Brunean et al* v. *Massue* (23 L.C. Jur. 60):

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

I refer to these inconveniences as the reason for not conferring any such power and for excluding it.

"These words were subsequently quoted with approval by Chief Justice Sir W. Meredith in *Langlois* v. *Valin* (5 Q.L.R. 1), at page 16, and they are specially applicable in the present circumstance. This court was established by the Parliament of Canada 'as a general court of appeal for

Canada, and as an additional court for the better administration of the laws of Canada' (Sec. 3, Supreme Court Act)."

Then he reads Section 101, and goes on:

"And we are asked to answer certain questions submitted to us by the Executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian Constitution."

My lords, it is not in the process of the administration of the law that the Court answers these questions at all. What the purpose of the question is we do not know; it may be with reference to possible legislation; it may be in order that the Government may be informed in advance of what the limits are within which these companies formed provincially, may trade.

LORD ATKINSON: I suppose it might be in anticipation of a prosecution or some civil action taken by the Government against some company that traded outside its own grounds.

SIR ROBERT FINLAY: Exactly. I need hardly remind your Lordships again how very important this question to the companies in the Dominion is. It is a question of extraordinary importance, what the intentions of the companies incorporated by the provincial legislation are and how far they extend for provincial objects. Your Lordships see it is capable of almost indefinite ramification and development, and it is a burning question of a most practical nature.

LORD ATKINSON: One can well understand a company carrying on business in the provinces being utterly shaken.

SIR ROBERT FINLAY: Yes, utterly shaken, and thousands of individuals ruined by an answer given by the Supreme Court to such a question, which, as they say, does not even bind themselves, but which would certainly affect the minds of other people who do not realize that the answers to such questions have no weight, and which although in point of law have no weight, for all practical purposes possess great weight. Then he goes on:

"And we are asked to answer certain questions submitted to us by the Executive for the express purpose of

obtaining information which may assist in the administration of the fundamental law of the Canadian Constitution."

From that the learned Chief Justice means to argue that therefore the question is put and is answered in the course of the administration of the law. I submit there is a complete *non sequitur* there.

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

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

With very great respect to the Chief Justice, I submit that not only do these words not bear the meaning he puts upon them, but that they are absolutely incapable of bearing it, and they negative it. The proper administration of the law means administering it when the point arises judicially in the course of the law, and it does not, because it has a reference to the law which is to be afterwards administered in the slightest degree follow that this question or the answer is in the course of its administration.

"It cannot now be doubted either in view of the decision of the Privy Council in *Valin* v. *Langlois*, (5 App. Cas. 115), that if the Parliament of Canada might have created a new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new

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

I respectfully submit *Valin and Langlois* does not bear that out in the slightest degree. That was the case as to the Election Judges. There it was held that Courts might be constituted for the purpose of trying election petitions and that there was nothing unconstitutional about that, and that their decisions might be made final. That has no bearing, as I submit, at all on the questions with which your Lordships have now to deal. In the case of *Valin* and *Langlois* the Courts were created for the purpose of administering the law relating to elections, but that is a different thing altogether from asking general questions of this kind.

THE LORD CHANCELLOR: When the section says "Courts for the better administration of the laws of Canada," it does not mean the executive administration of the law in Canada, but judicially.

SIR ROBERT FINLAY: Certainly, my Lord.

THE LORD CHANCELLOR: I do not say that is so, but I am asking you.

SIR ROBERT FINLAY: I submit that it is so, and that disposes really of the whole argument which we have had so far from the Chief Justice.

LORD SHAW: It is administration through a Court?

SIR ROBERT FINLAY: Yes, that is it exactly.

LORD SHAW: That is to say, the word "administration" is distinguished from the word "administrative."

SIR ROBERT FINLAY: Yes, my Lord; it is the administration of justice or the judicial administration of law. That is what I submit the words manifestly mean, and so far from being capable of the construction which the Chief Justice puts upon them, I submit they actually negative the conclusion at which he arrives.

Adjourned to to-morrow at 10.30 o'clock.

SECOND DAY.

13th December, 1911.

SIR ROBERT FINLAY: I was reading the judgment of the Chief Justice at page 18 of the Record, and I had just got to the middle of the page: "Could better words be used to convey the widest discretion of legislation with respect to the all-embracing subject 'the better administration of the laws of Canada?" I commented on that and pointed out that it was not "administration of the laws of Canada" to answer such questions as these. Administration refers to the work of the Court, but, secondly, my Lords, if it were administration it is certainly not "administration of the laws of Canada," when the questions relate to the Provinces and to the laws of the Provinces. I cited to your Lordships purely for that purpose the case of L'Association St. Jean Baptiste in the 31st Supreme Court Reports, where in the judgment the Court points out that as a Court of Appeal the power is not restricted as in the case of additional Courts of First Instance to the administration of the laws of Canada. "The laws of Canada" mean the law of the Dominion.

LORD MACNAGHTEN: Is that so very clear? I am not quite sure about that. I should have thought "the laws of Canada" might embrace the laws of the several Provinces, too. It is not against you.

SIR ROBERT FINLAY: May I give your Lordships my reason for making that submission? It is this. The administration of the laws of the Provinces is confided to Provincial legislatures. This is a power given in the 101st section to provide additional Courts for the administration of the laws of Canada. If that comprised the administration of the laws of the Provinces, it would be in conflict with the exclusive power given to the legislature of the Provinces under section 92. My submission is that the second branch of section 101 is confined to the erection of Courts for the administration of laws of the whole Dominion as such. For instance, the creation of Courts of Admiralty, the creation of Courts of Exchequer, the creation of the Railway Board, the creation of Courts

for the trial of Election Petitions relating to elections to the Dominion Parliament.

LORD MACNAGHTEN: Now, what do you say with regard to the laws of Ontario, Nova Scotia, and New Brunswick, because the Dominion Parliament has got power to bring about uniformity in those laws? I am not at all sure that it is a material point at all, but I think there might be something said on the other side.

SIR ROBERT FINLAY: Yes, my Lord. Your Lordship refers, I think, to section 94: "The Parliament of Canada may make provision for the uniformity of all or any of the laws relative to Property and Civil Rights in Ontario," etc. That is to say, there is this special power conferred by this section to render these laws uniform. Then as regards the administration of the laws my submission is that that is confided to the Provincial Legislature in each Province.

LORD ATKINSON: The last two lines of section 94 are: "but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the Legislature thereof."

LORD MACNAGHTEN: When they have adopted it—I do not know whether they have or not—I do not think it is necessary—there is a good deal to be said on the other side. It is rather a by point.

SIR ROBERT FINLAY: I contend that it is not the administration of the law at all.

LORD ATKINSON: The importance of it is as to that law, it is in effect if it is adopted by an Act of the Province.

SIR ROBERT FINLAY: That is undoubtedly.

LORD MACNAGHTEN: It really is a by point?

SIR ROBERT FINLAY: It is. Even if it were so, it relates only to rendering the laws uniform; it does not touch the administration of the laws by the Courts of Justice, and section 101 unless the second branch of it were confined in the manner I have suggested, would trench upon the exclusive power given under head 14, of section 92 to the Legislatures of the Provinces, that head being "The Administration of Justice in the Province,

including the constitution, maintenance, and organization of Provincial Courts."

That is my submission, my Lords, on that point. Now I pass on to line 29: "It cannot now be doubted either in view of the decision of the Privy Council in *Valin* v. *Langlois*, (5 A.C. 115), that if the Parliament of Canada might have created a new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new jurisdiction to this Court. 'The distinction between creating a new court and conferring a new jurisdiction upon an existing Court is but a verbal and non-substantial distinction.'" My Lords, it would not be a Court that would be created; it would be a Committee of Reference, an Advisory Committee, and section 101, as I have submitted prevents such duties being thrust upon the Supreme Court.

LORD ROBSON: Is that a quotation: "The distinction between," etc.?

SIR ROBERT FINLAY: It is in inverted commas; I do not know where it comes from.

LORD ROBSON: Does that come from *Valin* v. *Langlois* in 5, Appeal Cases?

SIR ROBERT FINLAY: I will have it looked up. "If any doubt remains as to the legislative jurisdiction of Parliament in the premises, a reference to Section 91 of the British North America Act, which provides that the Parliament of Canada may from time to time make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces should dispel that doubt." My Lords, of course section 91 could not under that head authorize their doing anything which was in conflict with the true construction of section 101, and, secondly, this would interfere with section 92, head 14, the due administration of justice in the Provinces, a matter which is assigned exclusively to the Provincial Legislatures. The only object of sending those references to the Supreme Court is to get the opinion of highly competent men and the prestige of opinions proceeding from those who will afterwards have to deal with the matter judicially if it should arise in any case. My

Lords, the delivery of such opinions as proceeding from such a Court must tend to embarrass the Provincial Courts in the administration of justice, as Mr. Justice Maule pointed out in that passage which I read yesterday.

LORD SHAW: I suppose there is no difference on the two sides of the Bar on this proposition, that, whatever they say, that, *quoad* its judicial function, has no effect whatever?

SIR ROBERT FINLAY: There would not be.

LORD SHAW: Both sides agree to that?

SIR ROBERT FINLAY: Undoubtedly. In practice beyond all question it would have a very important effect. One of the best illustrations is that bigamy case that I referred to, where two decisions being in conflict a question was stated for the opinion of the Supreme Court under Section 60, and the answer of the Supreme Court has been treated since that——

THE LORD CHANCELLOR: That is the general point that you have been making the whole time.

SIR ROBERT FINLAY: One sees it in various lights and from different points of view as one goes on, but it always comes back to the same point.

THE LORD CHANCELLOR: You have always the central light upon it.

SIR ROBERT FINLAY: Then line 40: "Lord Halsbury, delivering the judgment of the Judicial Committee in *Riel v. The Queen*, (10 A.C. 675), at pp. 678-9, said, interpreting the words peace, order and good government:

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

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

not been vested in the Executive."—Then His Lordship read section 37 of the Supreme Court Act as originally enacted. That is from the Act of 1875, and he goes on at line 12:

"In view of doubts expressed by members of this Court at different times as to whether the intention of the Legislature had been clearly expressed, changes have been made widening the scope of that section until we finally have Section 60 of the 'Supreme Court Act,' which is in the following terms"——and then His Lordship reads it. Then on page 20, line 10:

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

"Section 37 of the "Supreme Court Act' as it was originally enacted, seems to have been taken from 3 & 4 William IV., c. 41,"——and then His Lordship reads that. Then:

'In *re Schlumberger*, (9 Moore P.C. 1), at p. 12, speaking of this section, the Right Honourable Dr. Lushington said, dealing with an objection to the jurisdiction of the Privy Council to hear and consider a petition referred to them by order in council:

"The only construction that can be placed upon the section above quoted is a construction which shall give to the words therein contained their complete meaning, without limitation whatsoever, and further, 'that the Judicial Committee were not entitled to put any limitation on these words in any matter referred to them by the Crown.'

"In addition to those above mentioned, constitutional cases of great importance to a colony have been referred by the Sovereign to the Judicial Committee, such as to the power of the legislature of Queensland in respect of money bills and the validity of Protestant Marriages in Malta and upon their report have been decided by the Governor in Council."

That is a different question altogether. There the Imperial Parliament whose competency was undoubted and to which no doctrine of *ultra vires* can apply had directed these references.

objection was taken by some of the judges of this Court during the hearing of the reference *re Sunday legislation* (35 Can. S. C. R. 581). At the argument on the appeal to the Privy Council, it appears from the report that Mr. Newcombe, in reply said: 'Then my Lords, Mr. Riddell has questioned the jurisdiction under the Supreme Court Act to make the reference. I do not know whether your Lordships desire me to reply to that.' To which Lord Macnaghten said: 'I think we know the terms of the Act. They are wide enough to embrace it.'" That is with regard to the Supreme Court Act. It is not the point of *ultra vires* at all.

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

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

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

"Sections 60-67 inclusive, which define the special jurisdiction of the Supreme Court, which includes not only references by the Governor in Council but also references by the Senate and House of Commons, Habeas Corpus and Certiorari, and cases removed by Provincial Courts.

"In addition we have Section 55 of the 'Railway Act,' R.S.C. 1906, c. 37, which provides that the Railway Commissioners may refer questions for the opinion of the judges of the Supreme Court."

THE LORD CHANCELLOR: Is that a question for the particular litigation?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: That is on points of law, I suppose?

SIR ROBERT FINLAY: Yes, my Lord, I have it here: it is the Revised Statutes of Canada, 1906, chapter 3 , section 55:

"The Board may of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council, state a case, in writing, for the opinion of the Supreme

Court of Canada upon any question which in the opinion of the Board is a question of law.

"2. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon."

THE LORD CHANCELLOR: That is in a particular litigation, is it?

SIR ROBERT FINLAY: So I understand it. It is in a group of sections headed "Practice and Procedure." The Montreal Street Railway case last week, my friend, reminds me, came under that.

MR. NEWCOMBE: No, it did not come under that.

THE LORD CHANCELLOR: Of course it is very common, an Arbitrator can state a case, and Justices can state a case in this country. If that is the kind of thing, it does not help us. If that is the kind of thing, this section would not affect the argument.

MR. ATWATER: The Montreal Street Railway case came direct on appeal from the Board of Railway Commissioners.

SIR ROBERT FINLAY: The Montreal Street Railway case came under section 56, I am told.

MR. ATWATER: It came on appeal from the Railway Board.

SIR ROBERT FINLAY: Then line 5: "This power has been freely exercised by the Commission and we have never to my knowledge refused to answer the questions submitted. Can it now be successfully argued that the Railway Commissioners have the power to make references to this Court and that the Parliament, that created the Commission, has not got that power?

"Section 55 of the 'British North America Act' provides that a bill may be reserved for the signification of the Sovereign's pleasure. Before exercising this prorogative of rejection would it not be within the power of the Home Government to refer the question involved to the Judicial Committee under the 4th sec. of 3 and 4 Wm. IV., ch. 41, above quoted? If so, by analogy, may we not argue that the same principle would apply to the case of disallowance which may be exercised in connection with the power of

supervision over Provincial Legislation entrusted to the Dominion Government, as provided for in Section 60 of the 'British North America Act? If a Provincial Act is reserved by a Lieutenant-Governor for the consideration of the Governor-General in Council, the opinion of the members of this Court as to its constitutionality might well be taken for the guidance of His Excellency. If this may be done after an Act has been passed, why should it not be competent to seek such advice in advance of legislation?" I submit, my Lords, that does not advance the argument one bit. It is merely stating that he thinks that they might take the opinion.

"For all these reasons I hold:

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

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

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

"This additional Court is a court of common law and equity in and for Canada and is merely advisory. Its decision binds no one, R.S.O. ch. 129, s. 3.

"The consent of the provinces is not sufficient to give us jurisdiction, unless they agree to the reference and constitute what may be called a submission to the court which is always open to litigants even at common law; and in

such a case the decision of this court should be binding as to the parties to it."

Your Lordships see that Mr. Justice Girouard thought that that part of the questions, the very large part of course that related to the laws of the Provinces, was bad, so far as it related to the Federal Statutes or Federal matters it might be good. My contention, of course, is wider than that.

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

"The preamble to Canada's Constitutional Act refers to the expressed desire of the provinces then confederated 'to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom,' and the Act was passed to carry into effect that expressed desire.

"In the division of legislative powers assigned to the Canadian Parliament and legislatures, Parliament is empowered generally to 'make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces,' and is given exclusive and paramount legislative authority over all matters coming within the 29 classes of subjects specifically enumerated.

"The classes of subjects exclusively assigned by the 92nd section to the legislatures of the provinces embrace,

"14. The Administration of Justice in the province, including the Constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

"In addition to this division of legislative power, Section 101 provides for the establishment by Parliament 'notwithstanding anything in this Act' of a General Court of Appeal for Canada and of any additional courts for the better administration of its laws.

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

LORD ATKINSON: Do you concur in that?

SIR ROBERT FINLAY: No, I do not. I differ very strongly. 'The Federation Act,' as was said by the Judicial Committee in *Bank of Toronto* v. *Lambe* (12 A.C. 575), at page 588, 'exhausts the whole range of legislative power and whatever is not thereby given to the provincial legislatures rests with the Parliament.'"

LORD ROBSON: That is a proposition affirmed by the Privy Council. "The Federation Act exhausts the whole range of legislative power," etc.

SIR ROBERT FINLAY: I think that is quoted from 12 Appeal Cases in the *Bank of Toronto* v. *Lambe*. That of course is the whole power of legislation in conformity with the terms of the Act. It comes back to the effect of Section 101.

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

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

"The latter authorizes the Governor-General-in-Council to submit important questions to this court, relating to the powers of Parliament and the legislatures respectively, and to other subjects affecting the general administration of the laws of Canada.

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

"But even if it was decided that such conflict did exist, it would by no means determine the invalidity of the clause attacked. The enquiry would then be removed one step further back and would require the proper construction of Section 101 authorizing Parliament, 'notwithstanding anything in the Act,' to constitute 'a general court of appeal for Canada' and also "additional courts for the better administration of the laws of Canada.'

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

"In my opinion the language of the section is quite broad and ample enough to confer the required and assumed power. The section says that 'notwithstanding anything in this Act' the Parliament of Canada may, etc., so that even if the powers conferred when exercised necessarily conflicted with any of the exclusive powers of the legislatures they would be constitutional. We all know that the laws of Canada are administered by the several departments of Government, that these laws consist not only of the statutes passed by Parliament but of the rules

and regulations authorized by these statutes to be made by the Governor-in-Council, the better to carry out the general object and purpose of the statutes. The administration of these statutes and regulations often and necessarily under our constitution involves the determination of most difficult and novel, legal and constitutional questions. It would only seem right and proper that there should have been in the Constitutional Act some means authorized by which the opinions of some independent tribunal might be obtained on such questions as related to the proper interpretation of the Constitutional Act itself; the constitutionality or interpretation of Dominion or provincial legislation; or the exercise by the Governor-General-in-Council of any of the judicial or quasi-judicial functions he may under the Constitutional Act be called upon to discharge, as well as other kindred questions.

"In my judgment such an apparently desirable object was accomplished by the language of the 101st Section. The powers given to Parliament by that section whatever they may be construed to cover and include were certainly paramount powers, not limited by any powers of legislation assigned to the provincial parliament. They are given expressly, 'notwithstanding anything' in the Constitutional Act.

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

I have already more than once made my point that Section 101 clearly contemplates only a Court of Law, a Court of Appeal, and secondly a Court for the better administration of the laws of Canada. It would not be acting in either of these capacities, when it is answering questions of this nature. The "administration of the laws" means the judicial administration of the laws. Then on page 24, Mr. Justice Davies continues:

"If I am right in my construction of this Section 101, nothing more remains to be said on the question before us. It is said that this Court is a general Court of Appeal for Canada, but I see no constitutional reason if we were that and that alone, why Parliament could not impose on it the duty of giving reasoned answers to such important questions as it might authorize the Governor-General-in-Council to ask." I ask, suppose Section 101 simply authorized the creation of a general Court of Appeal for Canada, how could it be said that to put such questions was asking that court to discharge a function as a Court of Appeal for Canada?

"But Parliament has made this Court more than a mere general Court of Appeal. It has made it also a 'Court for the better administration of the laws of Canada,' and, as I have already said, that, to my mind, removes any reasonable doubt upon the point in question.

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

now raised, if well taken, could have escaped the observation of all the distinguished counsel who have argued the question on the many references made, and the jurists who constituted the Board of the Judicial Committee and decided those of them which were appealed to that Board." The jurists engaged in these several cases did not take points I presume which their clients did not desire to have raised. What they wanted I suppose was, in the particular case, to have the question decided. With regard to your Lordships' Board, it would have been a very difficult position if your Lordships' Board had taken a point which nobody raised, which had not been argued in the courts below, and had insisted on having that argued. Probably it would have involved an adjournment for the first time before this Board, none of the parties desiring to take the point.

LORD SHAW: No doubt it is true as you say, but my difficulty is that this Board have not only gone the length of correcting or affirming, as the case may be, what has been done in Canada, but they have stepped out of their way, so to speak, to instruct that the correct answers to these questions should be so and so instead of so and so. That surely assumes, at all events in practice, that this Board thought it was within its own province. It is a strong thing to say to this Board that it has been acting in an unconstitutional sphere all the time. You see the difficulty that is in my mind?

SIR ROBERT FINLAY: I perfectly follow, but surely is not the answer to that this, that all the parties were there, they had all come over and they were anxious to have the points determined; nobody objected to jurisdiction and it would have been very embarrassing if your Lordships had *mere motu* brought forward this point and insisted on an argument upon it. That is my respectful submission in reply to what your Lordship has said:

Then the Judgment proceeds:

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

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

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

"My conclusions, therefore, are, first, that the legislation challenged by the motion now before us is constitutional under Section 101 of our Constitutional Act, and that if there is a doubt upon that point it comes clearly within the power of legislating for the peace, order and good government of Canada, because it is in accordance

with British precedent and practice, and is not in conflict with any of the powers exclusively assigned to the legislatures of the provinces. I say nothing whatever about the particular questions now before us awaiting argument. Whether they go further than they should must be determined later." My short answer to the argument that underlies the whole of that judgment is first, that Section 101 most certainly does not authorize such references. More than that I say it is inconsistent with such reference and that therefore the general powers as to the "peace, order and good government of Canada" cannot carry a power to make an Order which would be inconsistent with the terms of a portion of the same Act.

LORD ATKINSON: If "peace, order and good government" did enable you to pass enactments inconsistent with the specified purposes of the Act I do not see any use in their specification at all.

SIR ROBERT FINLAY: That general power would override everything.

THE LORD CHANCELLOR: It is always understood in all the cases surely, is not it, that that must not be so; that the general words are to be taken in the context of the Acts?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: They are very large powers and it is intended that all the powers should be given to one or the other.

SIR ROBERT FINLAY: Yes, my Lord, subject to the terms of the Constitution itself. If I am right in saying that Section 101 indicates that the functions of the Supreme Court were to be confined to those first of a Court of Appeal for the whole Dominion, and secondly to those of a Court for the better administration of the laws of Canada in the sense of judicial administration, then—

THE LORD CHANCELLOR: I agree, but it is not, I suppose, contended that the words 'peace, order and good government' involve the faculty of rewriting the whole Constitution?

SIR ROBERT FINLAY: No, and yet that to some extent I think is involved perhaps in some portions of this Judgment. It is true that the first point of the learned Judge

is that Section 101 authorizes this sort of thing. His second point is that it at all events does not forbid it, and that if there is any ambiguity in it they can fall back on the general power. My submission is that the Section forbids it. Then Mr. Justice Idington dissented. He says:

"The jurisdiction of this Court to answer the questions submitted by these references has been challenged by the motion made.

"I respectfully dissent from the conclusion arrived at by a majority of the Court. I agree in regard to our jurisdiction to answer some of the questions submitted. But the decision as a whole implies not only that Parliament has, but also has exercised, the power of commanding this Court, originally constituted and established a Court of Common Law and Equity, never supposed to have been constituted by virtue of any other power than Section 101 of the 'British North America Act.'" Then at line 42 he says:

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

"Section 101 of the 'British North America Act' does not so clearly as it might cover the ground of authority for the creation of a Court of quasi original jurisdiction to dispose of such constitutional controversies as said references imply between the Dominion and Provinces. But said Section 101 and Subsection 14 of Section 92 of the 'British North America Act' coupled together do lay such a foundation of authority and followed by Section 67 of the 'Supreme Court Act,' and the correlative provincial legislation provided for therein, do seem to me sufficient to confer jurisdiction within the limits thus assigned." I respectfully dissent from that portion of the Judgment for the reasons I have already given. Then:

"However that may be, the jurisdiction of the Court I think, was always wide enough to cover submissions made jointly by Dominion and Province. And the Province in some cases has so legislated as to render it necessary to inform the Attorney-General of the Province of any

constitutional question raised in any case, and enabled him to intervene.

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

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

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

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

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

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

"The like result would also follow if a point of constitutional law happened to arise in an action between private litigants and be there decided.

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

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

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

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

"Moreover, the power of Parliament to delegate its powers of trying election petitions to a Provincial court, was duly maintained, though it might have constituted under section 191, a court of its own for the purposes of such trials.

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

"I am, therefore, prepared to hold that if and in so far as this Court has been or may be duly given jurisdiction to administer any laws of Canada, and so far as the proceedings in question can be brought thereunder, we are bound to observe and discharge such judicial functions as implied therein. In the submission *in re Criminal Code* (43 Can. S. C. R., 434), made to us last term, though inclined to think the reference pushed the power and duty to the verge of the reasonable limits, section 101 of the 'British North America Act' would permit, I, with some doubt, agreed the questions might fall within the words of that section.

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

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

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

"This brings us to the solution of the problem of whether or not Parliament can by any method impose upon this Court the duty of answering or constitute by any method a judicial Court that can properly be asked to answer, in an enquiry of this kind now submitted to us and in face of the submission being objected to by all the Provinces concerned, and only spoken to by counsel for the Dominion and possibly our nominee.

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

"No one can pretend that answering these questions is an exercise of or falls within the appellate jurisdiction of this Court. Everyone will admit, however, that the questions of law involved therein, may each and all involve the very issue of law to be presented at any moment by a

private litigant or be raised by a province in private litigation or come within the range of a controversy which section 67 and Provincial legislation have paved the way for, if not expressly provided for, being dealt with by mutual submission.

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

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

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

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

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

"What would be thought of a judge who had expressed to a private litigant an opinion more or less deliberate upon the questions upon the solving of which the determination of that litigant's rights must turn, sitting afterwards upon his case, hearing and adjudging it?

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

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

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

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

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

"It was sought thereby to eliminate by such a system for the administration of justice a mass of appellate work which the growing demands then present and prospective required should be disposed of in this country, and at the same time the way be kept open in the more important and far reaching judgments pronounced here and elsewhere for an appeal to an Imperial Tribunal.

"It never was intended by the creation of this Court or the power given to create it to change the leading features of constitutional government expressly designed after the model of the British constitution as adopted and in use for a quarter of a century in a number of the provinces

confederated by the 'British North America Act,' and thereby (subject to the features of the federal system) intended to be continued by the Dominion and inferentially, also, by each of the Provinces, so far as circumstances would permit.

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

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

"Is it any answer to say that an enquiry may be made of the Privy Council, historically and by statute duly constituted by a plenary parliament a consultative, as well as a judicial body? Is it any answer to say that at rare intervals in modern times there have been submissions to the Judges by virtue of a survival of a part of a practice having an historical record traceable to times when the separation of the legislative, executive and judicial functions were not supposed to be as necessary, indeed, speaking generally, so cardinal a principle of modern constitutional government as modern thought has held necessary?

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

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

"But the language forbids the thought.

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

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

"Moreover, the expression 'any law of Canada' when used in an Act of Parliament dealing with a subject matter that might well have implied, giving it the full remedial effect and measure of relief that seemed necessary, and by its purview to incorporate the local laws therewith, this Court held itself bound by the phrase to limit the operation of that statute to an enactment of the Parliament of Canada.

"I refer to the case of *Ryder* v. *The King*. (36 Can. S.C.R. 462), where it was attempted to be maintained that by force of the said expression in subsection (*d*) of section 16, of the Exchequer Court Act, giving relief against the Crown in the case of workmen entitled to compensation it covered the right in a local law. It was held it could not be so extended.

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

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

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

"In the first place, I repeat the 'British North America Act' has by section 101 impliedly exhausted the subject

and covered everything of a judicial character possible to assign, when we have regard to section 92, subsection 14. And thus as well by the application of the maxim *expressio unius est exclusio alterius* as that by the inherent character of the subject matter, having regard to what has already been said, everything directly involved herein has been disposed of.

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

"Let the interpretation of the law of Canada, now before us in section 60, of the 'Supreme Courts Act,' be considered here.

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

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

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

"I prefer, if possible, assuming Parliament never intended such a submission as those respecting powers over which it has no control, or power to meddle with, and where no one will appear or can be brought forward to appear. I prefer assuming the legislation presupposed that the provinces would appear in accordance with the practice I have already adverted to; either willingly or by force of public opinion; or at all events that the jurisdiction is to be restricted in other cases to the classes of appeals such as involved in the *Manitoba School Case* (22 Can. S.C.R. 577), or relative to the laws of Canada, wherein no ques-

tion of a conflict with a province or its exclusive rights and powers could be at all involved or anything relative thereto.

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

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

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

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

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

"Or let us assume that an appeal is taken and the court above us has as heretofore refused to answer or to attempt to solve in that way mere speculative or theoretical issues. Where are we left? Where can we, and how can we remedy the evil plight into which we have plunged our Court or the commercial interests we have involved; or perhaps both?

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

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

"As germane to what I have already said of the constitutional models and problems involved in the framing of the 'British North America Act,' and the inherent improbabilities of such a thing being attempted as the creation of our Court with such powers, I might be permitted to refer to the history of such references in the United States. In my opinion on the '*Lord's Day*' *Case* (35 Can. S.C.R.

581), I referred thereto, and now make the further reference to Back on Constitutional Law, p. 84, where a further collection of authorities may be found.

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

"We know we are much indebted to the experience of that country for the form of government we in Canada enjoy. I think we can, despite what may have been said to the contrary, in arriving at the true interpretation of our 'British North America Act' (brought into being when civil war there had become an object lesson which bore fruit in the form of federation adopted by that Act), especially on questions of this kind, receive most useful lessons, both of instruction and warning from the experience of that country and from many of its master minds that have dealt with the solving of such problems as are now presented to us.

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

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

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

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

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

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

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

"It has been said that it is quite competent for Parliament to impose upon this Court any duty it sees fit, and the Election Case of *Valin v. Langlois* (3 Can. S.C.R. 1), from which judgment leave to appeal was refused, (5 A.C. 115) is relied upon.

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

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

"Can Parliament constitute this Court a Tariff Commission, a Civil Service Commission, a Conservation Commission, a department for the management of any of the affairs of State, or an adjunct to any of the departments discharging such duties, or an advisory adjunct to the provincial courts?

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

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

"I do not deny for one moment the competence of Parliament to constitute a Board for any one of these

suggested purposes or to annex thereto an advisory committee for the purposes of enquiry into and answering questions of law.

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

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

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

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

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

"To anyone who supposes all or any of these suggestions as to the duty we are asked to undertake as fanciful, let him turn to the hypothetical questions put, and some that are not so purely hypothetical, but all intended to be disposed of on an *ex parte* argument decisive of the right of nine provinces to legislate on a variety of subjects. Let him turn to the cases giving rise to some few of the many contentions involved, and having read them and considered, again read these questions.

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

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

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

"*The Manitoba School Case* (22 Can. S.C.R. 577) was relied upon.

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

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

"It has no relation to what arises herein. If the mere statement of the legal facts relative to each of these two classes of cases cannot be grasped so that their distinction becomes thereby clear, it would, I fear, be hopeless to make anything I have said understood.

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

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

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

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

"When the provinces have done their best and exercised the greatest care and study of the facts and the operation of the conditions to be understood if a right conclusion is to be reached one may well doubt if it is possible to find continuously existent that depth of insight into the future to reach right conclusions. A direct specific power of supervision by means of the veto is assigned to the Dominion as the corrective of any presumption on the part of any Provincial Legislature to exceed its powers. Does not that direct power exclude the adoption of any indirect method such as the expedient now in question? A workable conclusion can never be reached save by the slow methods that from time to time have been exercised to solve other questions of law and liberty by a treatment of concrete cases as the occasions arise.

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

"I agree it is so to a certain extent, and I think I have demonstrated from what it contains the absolute negation of any such power of interference with the exercise of the powers of the provinces as claimed herein. But beyond that when and where the terms of the instrument may be found ambiguous we must, I submit, approach its inter-

pretation somewhat after the fashion or in the like manner in which we approach any other written instrument of ambiguous import and have as its surrounding circumstances, regard to its origin, its general character and purposes and then these considerations I have adverted to may well be borne in mind.

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

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

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

My Lords, I respectfully submit that there is a very great deal in that Judgment which is very weighty indeed with regard to the question. The only criticism I venture upon it is this—the learned Judge points out that the power under the Second branch of Section 101 relates to creating Courts for the administration of the laws of Canada. He says that means the laws of the Dominion as distinguished from the Provinces, and he rests part of his Judgment upon that. But then he seems to assume in that part of the Judgment that the administration of the laws of Canada would cover putting such questions. I must respectfully deny that, and I say that the utmost it means, as he says, indeed using the phrase he uses in another part of his Judgment, is the judicial administration of the laws of Canada and that only, and that anything extra-judicial such as references of this kind is entirely outside purview and contrary to the construction of Section [illegible].

THE LORD CHANCELLOR: You go as far as to say that no question whatever may be put?

SIR ROBERT FINLAY: Yes, I do my Lord—no question whatever. That is my first contention. Of course I do not throw over the other contentions.

THE LORD CHANCELLOR: That is your thesis?

SIR ROBERT FINLAY: Yes, that is my root—my primary contention. Then, my Lord, Mr. Justice Duff says:

"The objection taken *in limine* by the provincial governments is that the questions in so far as they expressly call for an expression of opinion respecting the extent of the legislative powers of the provinces are such as Parliament has no authority to require or authorize this court to answer. I think it cannot be disputed that Parliament might constitute a body (whether described as a Court or not) empowered to exercise a purely consultative jurisdiction in respect of questions touching the limitations imposed upon the legislative powers of the Dominion or the provinces in respect of any given subject. This authority would seem to be a necessary adjunct to the legislative authority with which Parliament is invested—limited as it is (within the boundaries of Canada) by reference to the powers conferred upon the local legislatures. Subject to some limited exceptions (with which we are not here concerned), full legislative authority within Canada is divided between Parliament and the Provincial Legislatures. All such authority as is not given to the Legislatures is vested in Parliament. In most cases in which controversy arises respecting the limits of Dominion legislative authority the limits of provincial authority are to a greater or less extent involved. Very obviously, I should think, it must frequently be desirable if not absolutely essential, that Parliament be in a position to inform itself as thoroughly as possible in advance of legislation upon any particular subject, not only how far its own powers extend in reference to that subject but what authority may be lawfully exercised by the Provinces in relation to it. Parliament may desire in some cases to legislate to the full limit of its own powers. In other cases it may be desirable that as far as possible legislative action in given conditions should be left to the local legislatures. In all such cases the advantage of trustworthy legal advice respecting the constitutional authority of the Dominion and

the Provinces respectively must be evident. It seems, therefore, to be outside the range of dispute apart from any special provision that authority to take such steps must be regarded as involved in the grant of the legislative powers conferred upon Parliament. The substantial question presented by the appeal is whether there is anything in the character of this Court as a 'general Court of Appeal for Canada' established under Section 101 of the 'British North America Act' which is necessarily incompatible with the exercise of the functions that Section 60 of the 'Supreme Court Act' professes to require the Court to perform. In other words, is there anything in Section 101 which by necessary implication prohibits the exercise of such functions by a Court of General Appeal for Canada established under it?

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

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

of the High Court of Justice are really administrative powers formerly exercised by the Lord Chancellor in his administrative capacity. Even Habeas Corpus seems to have been thought by an eminent Judge (Lord Bramwell in *Cox* v. *Hakes* (15 A.C. 506), at pp. 525-6) not to be an act of judicature. The Lord Chancellor has been a member of the Cabinet since Cabinets existed, and has always exercised wide administrative powers. The common law judges have always been subject to be summoned by the peers to advise upon questions of law. The High Court of Justice in one instance at least (under Section 29 of 'the Local Government Act,' 1888), exercises a purely advisory jurisdiction, *Ex parte County Council of Kent* (1891), 1 Q.B. 725). There is nothing then in the fact that this Court is a Court which, according to traditional British notions is necessarily inconsistent with the exercise of such duties. Nor do I think there is anything in the circumstance that the Court, as constituted under Section 101, is a Court of Appeal. The 'Supreme Court Act' confers or professes to confer upon the Judges of this Court jurisdiction in habeas corpus where the question involved relates to criminal proceedings under a statute of the Parliament of Canada; and I do not think the validity of this provision has ever been questioned. I have mentioned the Lord Chancellor, and the House of Lords; and even the High Court of Justice now exercises appellate jurisdiction. In none of these cases, as I have pointed out, has the exercise of legislative, administrative or advisory functions been regarded as incompatible with the judicial character of the body exercising those functions.

"The objection to some extent is also rested upon Section 92, Subsection 14, of the Act. I quite agree that if Section 60 on its true construction required this Court to do any act directly affecting the action of the Courts of any of the provinces in respect of such a question either by way of declaring a rule which those Courts should be bound to follow or creating a judicial precedent binding upon them, or upon this Court in its capacity as a Court entertaining appeals from the Provincial Courts under Section 101, or imposing on this Court any duty incompatible with the due exercise of its jurisdiction in respect of

such appeals—such for example as pronouncing, *ex parte*, at the behest of the executive upon a question raised, *inter partes*, in such an appeal—I quite agree, I say, that if that were the effect of Section 60, then the validity of that section might be open to objection as Dominion legislation professing to deal with the subject of the administration of justice in the administration of justice in the provinces after a manner not justified by the 'British North America Act.' But I do not think the submission (for advice) of questions relating to the legislative jurisdiction of the provinces or the giving of such advice necessarily constitute such an interference with the administration of justice.

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

Then Mr. Justice Anglin says:

"If the jurisdiction of the Parliament of Canada to enact it depended solely upon Section 101 of the 'British North America Act,' I am not certain that Section 60 of the 'Supreme Court Act' would be *intra vires*. The duties which it imposes do not appertain to the work of 'a general Court of Appeal for Canada'; and the constitution of this Court 'as an additional Court for the better administration of the laws of Canada' (Sup. Ct. Act, Section 3), I incline to think, contemplates its having jurisdiction to interpret, apply, and carry out (administer) such laws rather than to act as the adviser of the Executive, or of the Parliament, or its component branches, upon questions of jurisdiction to enact prospective legislation (Section 60 [*d*]). It may be that, having regard to the preamble of the 'British North America Act,' the power to create a court involves the right to impose upon it the duties prescribed by Section 60 and that, *ex vi termini*, when constituted it is endowed with the powers necessary to enable it to discharge such duties. But such implied or inherent jurisdiction, whether legislative or judicial, is apt to prove, like public policy, 'a very unruly horse.' Its limits are vague and ill-defined. It may become a specious pretext to cloak an unwarranted assumption of power. I prefer to rest my opinion that section 60 of the 'Supreme Court Act' is *intra vires* upon the pro-

vision of Section 91 of the 'British North America Act' empowering Parliament." So far, my Lords, that portion of the judgment of Mr. Justice Anglin is entirely in my favour. I now come to the portion of his judgment in which he takes the contrary view:

"To make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces."

"In Section 92, which deals with the 'exclusive powers of provincial legislatures,' I find no subject enumerated with provincial jurisdiction over which anything in Section 60 of the 'Supreme Court Act' could be deemed an interference. It has been argued that the administration of justice in the Provinces (Section 92, Subsection 14), would be affected by the exercise by this Court of the jurisdiction which Section 60 purports to confer. If Parliament had attempted to give to opinions of this Court thus obtained the effect of judgments *inter partes*, there would be much force in this contention, because, assuming the validity of the legislation, provincial courts might then properly deem themselves bound to regard such opinions as binding upon them. But the express declaration that, except for purposes of appeal to His Majesty in Council, the opinion of the Court on any reference under Section 60 is 'advisory only.' (subsection 6), denudes it of all the other notes of a judgment of this Court sitting as 'a general Court of Appeal for Canada,' leaving this Court itself and every other Court throughout the Dominion—inferior as well as superior—free to disregard it. The views of members of this Court upon the character and effect of their answers to questions referred to them under Section 60 have been expressed in several cases: *Re Provincial Fisheries* (26 Can. S.C.R. 444), p. 539; *Re Sunday Labour Legislation* (35 Can. S.C.R. 581); *In Re Criminal Code* (43 Can. S.C.R. 434). I therefore fail to perceive in the impugned legislation any interference with 'the administration of justice in the Provinces.' On no other ground was it suggested that Section 60 invaded the field of legislation exclusively assigned to the Provinces.

"The words of the 'British North America Act' empowering Parliament to make laws for the peace, order and good government of Canada, 'are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.' *Riel* v. *The Queen* (10 A.C. 675), at p. 678. Lord Chancellor Halsbury, delivering the judgment of the Judicial Committee, further said that their Lordships were of the opinion that there is not the least colour for the contention, 'that if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government that they would be entitled to regard any statute directed to those objects, which a Court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.'

"Parliament having the responsibility of legislating must be allowed to decide for itself what particular measures are calculated to promote peace, order and good government. If its legislation does not on the one hand trench upon the exclusive domain of provincial legislative jurisdiction and on the other does not overstep the restrictions necessarily flowing from the inherent condition of a dependency, or conflict with paramount Imperial legislation, no Court may question its validity, because 'the "Federation Act" exhausts the whole range of legislative power, and whatever is not thereby given to provincial legislatures rests with the Parliament.' *The Bank of Toronto* v. *Lambe* (12 A.C. 575) at p. 588; and 'when acting within the limits' of its jurisdiction our Parliament 'has and was intended to have plenary powers of legislation, as large and of the same nature as those of the (Imperial) Parliament itself.' *The Queen* v. *Burah*, (3 A.C. 889), at p. 904.

"That Parliament could have provided for the creation of a body of law officers and have imposed upon it the duty of advising upon such questions (speaking generally) as are now propounded for our consideration admits of no doubt. I know of nothing to prevent its requiring the discharge of such duties by lawyers who happen to be members of this Court. The wisdom of such legislation as a matter of policy, Parliament, and not this Court, must determine.

"I am, therefore, of opinion that we may not decline to

entertain this reference on the ground that Section 60 of the 'Supreme Court Act' is *ultra vires* of Parliament.

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

THE LORD CHANCELLOR: All those judgments, every one of them, seem to me to say that there may be questions put.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: I am only speaking as to the extent that Section 60 is *ultra vires*, but they all seem to think that there is nothing unconstitutional in putting questions, though they also seem to think, taking the words of the Chief Justice, "If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the Executive, for that reason, not to insist upon answers being given;" or, in other words, as Mr. Justice Anglin says, if they could not and should not be answered; it all comes to that.

SIR ROBERT FINLAY: It does.

THE LORD CHANCELLOR: There is one more thing. The protest which was made by the Provinces which is at page 14, is a protest "against the Court or the individual members thereof entertaining or considering the questions referred to it by the Executive Council" (we know what the questions referred were) "and that the inscription thereof be stricken from the list, and that the same be reported back to the Executive Council as not being matters which can properly be considered by the Court as a Court or by the individual members thereof under the Constitution of the Court as such nor by the members thereof in the proper execution of their judicial duties." It does not raise the broad and big question, namely, in no circumstances can any question be put. That is rather the view I take.

SIR ROBERT FINLAY: I respectfully submit that the notice of motion covers the broad point.

THE LORD CHANCELLOR: It may be so.

SIR ROBERT FINLAY: And I think my friend Mr. Newcombe in the course of my argument with reference to some part of it said the argument in the Court below was exclusively directed to the question of jurisdiction to put any questions. That was what my friend Mr. Newcombe said just now.

THE LORD CHANCELLOR: It is perfectly open to you, no doubt, to raise the big question, and I do not want to deprecate your raising it; on the contrary, it will have to be considered, but as I understand it all the Judges seem to think that some questions may be put and that some questions may be refused an answer.

SIR ROBERT FINLAY: Certainly, and I respectfully ask your Lordships to say that to that extent even those judges who are in my favour as to some part of my case, went wrong, and I was about to say a very few words by way of summing up my argument upon that head.

As regards the terms of the motion, I submit it is wide enough to cover the jurisdiction, and that was the point which was mainly at all events argued in the Court below. Taking the last judgment, the judgment of Mr. Justice Anglin, the whole of the first paragraph on page 37 is an adoption of a great part of the argument I have submitted to your Lordships. Then he proceeds to say that he thinks some of the questions are objectionable; he proceeds to deal with the point raised as to whether these questions, or some of them, were objectionable as conflicting with the exclusive jurisdiction of the provincial legislation under Section 92, subsection 14, and he gets rid of that, as he thinks, by saying that the Parliament of Canada has not said that the answers of the Supreme Court to the questions are to be binding on the provincial courts, and therefore they will not be embarrassed. I most respectfully submit that there is a great fallacy there. It is true they are not legally binding, but why is it that it is absurd to submit these questions to the Supreme Court? For this reason; that the answers given by the Supreme Court have a weight and prestige attached to them that answers given in any other quarter would not have. It is not merely because they want to get advice; it is because they want advice which is published that they put these questions,

because these answers are published like ordinary judgments, and they form the subject of appeal.. They desire to have opinions from the Supreme Court publicly delivered on account of the weight which they carry, and as a matter of fact, I have given your Lordships at least one illustration of the way in which points on which the provincial courts had differed have been submitted to the Supreme Court and decided in this way.

LORD ATKINSON: All the proceedings are judicial, or bear the form of judicial proceedings. The Attorney-General may appear to represent such other interests as are deemed necessary to be represented and an appeal will lie.

SIR ROBERT FINLAY: Yes.

LORD SHAW: That is all subject to this, is it not—that Section 60 itself says that these opinions given are merely advisory?

SIR ROBERT FINLAY: It does undoubtedly, my Lord. But take the effect produced by an opinion publicly delivered by the Judges of the Supreme Court that the business of an insurance company outside the province where it was constituted was *ultra vires*.

LORD ATKINSON: The proceedings of this Board are advisory; we advise the King.

LORD SHAW: If I may say so, I do not think the two things are analogous at all; the proceedings of this Board are advisory in the sense that the King acts upon them in the interests of all parties concerned, but the word advisory here is used with a precisely opposite consideration.—to show that the parties' interests are not concerned either locally or finally.

SIR ROBERT FINLAY: I freely concede that as regards the legal aspect of the case; but what I am dealing with is the practical effect. Why is it that the Dominion Government insists on this right to refer to the Supreme Court and to have opinions delivered as if they were judgments, and published in the same way? Indeed, in fact, even such learned people as those who report for your Lordships' Board in one instance in a head note spoke of the opinion of the Judges in such a reference as a judgment—I called attention to it when reading the head note—"The judg-

ment appealed from"—but it is not a judgment except that it is a judgment for the purpose of appeal. But my point is the effect which undoubtedly such opinions so expressed must have in the provinces upon those concerned.

With regard to one other point which was mentioned just now by the Lord Chancellor, as to the possible right to refuse answers to particular parts of a question; if this section is *intra vires*, I do not very well see how the Supreme Court can refuse, because it is precise in its terms. "They shall answer each of the questions," and, dropping all other business, they must apply their minds to the composition of a treatise on the question.

THE LORD CHANCELLOR: As at present advised, I rather agree, but what I want to point out is that the Judges in principle seem to entirely agree on two propositions though they find in different ways.

SIR ROBERT FINLAY: Yes, my Lord. The last observation I shall make is this: I take Mr. Justice Anglin's judgment; I illustrate the point arising in the other judgments also. He attempts to get rid of interfering with the exclusive jurisdiction of the provinces and the administration of justice in the provinces by saying, "Oh, the opinion of the Supreme Court is not binding upon them." I have attempted to answer that. But what he does not deal with is that Section 101 is inconsistent, or it is inconsistent with the terms of Section 101 to give this power under the head of "peace, order and good government of Canada" and comes into conflict at once with the very terms of Section 101, and it is certainly no part of the work of a Court of Appeal but, on the contrary, it is repugnant to the work of a Court of Appeal.

LORD ROBSON: Your contention is that the provinces are entitled to have as part of their constitutional privilege a general court of appeal for the whole of Canada?

SIR ROBERT FINLAY: Yes.

LORD ROBSON: And I suppose what you say is, if you make it more than a court of appeal and give it extra judicial functions, you are making it something else?

SIR ROBERT FINLAY: Yes, and it approaches its judicial functions in fetters.

LORD MACNAGHTEN: You say it should be a court of appeal unbiassed by any expression of opinion?

SIR ROBERT FINLAY: Just so, my Lord.

LORD SHAW: It is the psychological aspect of it that appeals to me. It seems to me they have shunted themselves on to a certain siding by an advisory opinion given, and a certain wrench is required to get back again.

SIR ROBERT FINLAY: Very great indeed. I should hope every man is ready, if he is convinced that an opinion he has deliberately formed is wrong to retract it.

LORD SHAW: I think it was a Scotchman who put it on the proper lines when he said: "Having regard to the person who asked me I should say so and so, but I reserve liberty to myself to change my mind."

SIR ROBERT FINLAY: As regards the second branch of Section 101, Courts for the administration of the laws of Canada, it is clearly not for the administration of any law whatever. Administration means judicial administration.

LORD ATKINSON: You disfigure the Court of Appeal to which the Provinces are entitled.

SIR ROBERT FINLAY: You do.

LORD ROBSON: Of course the privilege which is given the Provinces of a separate and Supreme Court of Appeal is enacted in a rather significant way in the Act itself. Sections 91 and 92 deal with the distribution of legislative powers, and they there allocate to the Provinces under Section 14 exclusive control over all the provincial courts. Now they make a section and do not distribute legislative power in the same sense and way, and in the same section as they distribute legislative power over the other functions of government.

SIR ROBERT FINLAY: Exactly.

LORD ROBSON: Because they are there apparently taking something out of the general terms "peace, order and good government" and making it applicable to both the Dominion and the Provinces as a separate branch of their constitutional position.

SIR ROBERT FINLAY: It is a separate head, and a special provision of that head necessarily qualifies any general words; and those words on which so much stress is laid in some of the judgments, "Notwithstanding anything in this

Act" contained at the beginning of section 101, I take it, have reference almost entirely to the provision that the provincial legislature shall have exclusive authority with regard to the administration of Justice in the Provinces. It might be supposed to interfere with that if you created a Court of Appeal from the Provinces—it would in fact; so section 101 begins by saying, notwithstanding that enactment about the exclusive jurisdiction as to justice in the Provinces, and notwithstanding anything else, if there be anything else in the Act, a Court of Appeal is created for Canada. I submit it destroys the Court of Appeal; certainly it is not establishing a Court because it is not a Court at all for this purpose—it is not establishing a Court for the administration of the laws of Canada.

MR. NESBITT: My Lords, I shall not keep you long, but I have one or two observations to make with reference to what his Lordship, the Lord Chancellor, has said, about the point not having been raised on the trial in the Court below as it has been raised here. I think my friend Mr. Newcombe will agree with me that the arguments here are practically the same on the point of jurisdiction.

THE LORD CHANCELLOR: All I wanted to convey was that the point raised admits of being answered either by saying there can be no question, or by saying that these questions ought not to be required to be answered.

MR. NESBITT: If your Lordship pleases. If you will look at page 12 of the Record—the Court allowed a document to be put in as the point was very important.

MR. NEWCOMBE: They put it in there but they said it should not form part of the Record; it was put in under the Queen's Order for the same reason.

MR. NESBITT: All I am saying is that their Lordships allowed it to be put in. No one suggested that it was part of the Record in that sense. I will read it:

"It is submitted, therefore, that the action demanded of this Court by Section 60 of the Supreme Court Act, is an action of an entirely advisory and non-judicial character and is not an action by way of the exercise of the functions of a Court of Appeal or of a Court for the administration of the laws of Canada and is not, therefore, within the terms of Section 101 of the British North America Act.

"It may, however, be urged that the Dominion of Canada has, if not under the terms of Section 101 of the British North America Act, yet otherwise the right to obtain the advice of any person upon any subject of interest to it. This may very well be true, but it has no jurisdiction to demand or compel the giving of this advice by the members of the Supreme Court of Canada, who once duly appointed are no longer in any sense under the Orders of the Parliament of Canada except in so far as that Parliament has jurisdiction to legislate for that Court as a Court."

Then, if your Lordships will look at page 34 of the Record you will see that Mr. Justice Idington at least understood what our suggestion was I am reading from lines 44 and 45:

"In conclusion I hold that if we have jurisdiction we are in duty bound to answer so far as our knowledge and understanding enable us to." His Lordship there apparently was of the view that my suggestion is the correct one, that if it is *intra vires* of the Governor-in-Council to ask these questions so far as the Supreme Court of Canada is concerned it is their duty to obey the language of the Act, and they are bound to answer any questions which may be submitted. Very different considerations, perhaps, apply to your Lordships' Board (though as to that I desire to read a passage from 3 and 4 William IV., ch. 41), if your Lordships entertain any appeal at all. I did not argue as it has been argued here that, granted they were bound to answer questions, those questions were in a form they were not bound to answer, because my conception of the matter was, as Mr. Justice Idington said, that if the act is *intra vires*, if the Governor-in-Council has a right to say to the Court "You shall answer." as he has said—if the act is *intra vires* as to that it is *intra vires* as to the other. But supposing an appeal lies to this Court, I ask your Lordships' attention for a moment to the language of 3 and 4 William IV., even as to your Lordships' Court. "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, Judge, or Judicial Officer, and all such

appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and that such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for His decision." Now, assume the case that they have answered all the questions as in duty bound, my suggestion is that perhaps your Lordships might feel yourselves bound under that language to give a report and recommendation on all those questions and answers.

THE LORD CHANCELLOR: It rather seems to me this does permit entertaining under the law an appeal from the Court which has to administer exactly the same law as was considered by the Supreme Court. If that be so, arguing backwards, it would rather seem that if this Board refused to answer certain questions it would import that there was a right to embody them among the questions in the Court in Canada.

MR. NESBITT: If the Court has answered, look where it leaves the question, as in the Fisheries Case, where this Court refused to answer the question as to the right of the riparian proprietors. The result has been that you have the view of the Supreme Court—no expression of opinion —the view of the Supreme Court on everything else; and supposing it is said by this Committee to be wrong, left untouched, it certainly does embarrass the administration of justice.

THE LORD CHANCELLOR: It may be, but the point really is, and as far as I can see at present it is partially in favor of your contention—if the Board here decline to answer it must be upon the ground that they think the Court below ought not to answer.

LORD ATKINSON: Was there any suggestion as to on what ground the Court is not obliged to answer any particular question—it must be the mischievous effect, or it must be that there is no jurisdiction to put the question?

MR. NESBITT: That, so far as I know, my Lord, has not been discussed in the Court of Canada. I think it was rather put on the ground suggested in 35 Supreme Court cases, that as this Court had said in the Hamilton case,

the question was hypothetical, they took advantage of that suggestion and said "this is a hypothetical question, and we will not answer it." The point is new to me which has been made by your Lordships.

LORD ROBSON: They have all been hypothetical under section 60, have they not?

LORD ATKINSON: I can understand their not answering a hypothetical question, but as to being asked to advise I cannot understand.

MR. NESBITT: The discussion here yesterday was to me absolutely new.

THE LORD CHANCELLOR: Is it new? The contention is that there is no right to put any question at all. If that is right the whole thing is at an end, but with the right to put questions, it is quite compatible that the Executive in Canada should have a right to put questions, but that the judicial body themselves are to determine whether those questions are to be answered.

MR. NESBITT: That suggestion your Lordship made yesterday, and that suggestion so far as I know, has not been made in Canada, except you adopt the language in 35 Supreme Court Cases, because this Committee had said certain questions were hypothetical and should not be answered, and they, as a matter of policy, would not answer them.

THE LORD CHANCELLOR: Did not all the judgments proceed upon this, that some questions might be put, and other questions might not be put?

MR. NESBITT: The judgment of Mr. Justice Idington does not, I suggest, except that even he, notwithstanding the language I have pointed out to your Lordship on page 34, said that when the questions related purely to the law of Canada he found there was jurisdiction.

THE LORD CHANCELLOR: As far as I can see all the judges seemed to think that there are certain classes of questions which may be put, and that there are certain classes of questions which ought not to be answered, which imports that they ought not to be put; and it also seems that the Court itself is to say whether they are to be answered or not. That seems to me to be the effect of the judgments. I do not say it is hostile to your argument.

MR. NESBITT: I think, with respect, your Lordship is right with this qualification—that Mr. Justice Idington apparently says if there is jurisdiction to put a question—that is, if there is a question relating to the laws of Canada which can be put, "we are in duty bound to answer."

LORD ROBSON: Then he would say the section was *ultra vires* so far as the questions relate entirely to the scope of Dominion legislation, and *ultra vires* when they begin to trench on the sphere of provincial legislation.

MR. NESBITT: With this qualification—providing the Provinces consent to the reference; in other words, that the previous references which have taken place, all of which have been of that character, I think, except as to Manitoba—and he points out the distinction there, and that is the reason he brings in the Manitoba case—have all been by consent, and jurisdiction has been given just as if it were a stated case.

LORD ROBSON: But for the questions to be left either to be answered or refused without regard to respective limits of jurisdiction between the Provinces, would mean that they would be left to say whether on any particular question within section 60, section 60 was *ultra vires* or not.

MR. NESBITT: It would be a difficult position, because the Judges would then be judges of policy.

THE LORD CHANCELLOR: Will you refer to Mr. Justice Idington's Judgment at page 27, line 9—he says: "I am, therefore, prepar hold that if and in so far as this Court has been or may be duly given jurisdiction to administer any laws of Canada, and so far as the proceedings in question can be brought thereunder, we are bound to observe and discharge such judicial functions as implied therein. In the submission in *re Criminal Code* (43 Can. S.C.R. 434), made to us last term, though inclined to think the reference pushed the power and duty to the verge of the reasonable limits, section 101 of the 'British North America Act' would permit, I, with some doubt, agreed the questions might fall within the words of that section."—so there you see he does.

MR. NESBITT: That is what I said, my Lord, that in so far as section 60 is *intra vires*, which he thinks it is in reference to the laws of Canada pure and simple, he is

bound to answer any question, no matter what it is, because it is imperative and that is *intra vires,* but in so far as it relates to provincial statutes then it is *ultra vires,* and his duty is not to answer at all. He also says that in a case where the province and the Dominion joined in asking the Court to answer the question, it is in the nature of a stated case, and by consent they give jurisdiction and they are answered. He differs in the Manitoba case. He says all the others have been dealt with under that practice, except the Manitoba case, and he differentiates that case which is under another section of the British North America Act, the education section. I merely wanted to draw your Lordships' attention to those facts, if one may so describe them.

Now, in this particular matter there are one or two other submissions I would like to make. Your Lordships have heard for the first time as far as I am aware the Dominion asserting a jurisdiction, asking through the Governor-in-Council for the advice of the Supreme Court, in conflict with the interest of every single province. Every province you have now before you saying "without our consent at any rate," and many of them saying "with or without our consent, and we object entirely."

MR. NEWCOMBE: No, not at all.

MR. NESBITT: "We object entirely to your utilizing the machinery of the Supreme Court for the purpose of advice." There is a conflict of interest, therefore, between the Crown as represented by the Governor-in-Council and the provinces as represented by the Lieutenant-Governor.

MR. NEWCOMBE: My learned friend is not correct. Saskatchewan is one of the provinces that refrains from holding that view, and British Columbia.

MR. NESBITT: British Columbia objects, as we heard yesterday, and I thought it was plain—at any rate, it is sufficient for my argument that as to seven of the provinces the observation is correct.

Then, my Lords, I submit that that indicates that such a thing having arisen it may well have been in the minds of the framers of the British North America Act that the method of obtaining advice if desired, which should be adopted in cases of conflict between the Dominion and the

provinces, was contained in 3 and 4 William IV.—that is that the King in Council here might well upon suggestion or request through the Colonial Office or the Foreign Office ask this Committee here for advice on the subject.

LORD SHAW: But suppose a case in which, being asked for advice, they gave it with the caveat which is usual and proper that that shall not affect the numerous private interests which will possibly have to come before them—suppose that case, and suppose it comes to this Board on appeal, and this Board affirms the judgment, what is the position of private litigants who have not been heard. Would not they be in a very confused and embarrassed position?

MR. NESBITT: The practical position, my Lord, is that no one would ever advise them to go on with the litigation, either before this Board or in the Supreme Court.

LORD SHAW: You see the Judges are going back upon their own opinion, and upon opinion which has been formed in a situation in which there has not been contentious litigation.

MR. NESBITT: And remember, my Lord, in this particular case what makes it more objectionable is that these questions which your Lordships have heard are entirely framed by the parties seeking the advice, and your Lordships know how easy it is to get a certain—shall I say squint of the law—by framing a question in a particular manner. I suppose the custom is not unknown here of a man asking an opinion, not for advice, but for newspaper publication. That is a good deal the same as this type of thing. These questions are framed by the other side with a design running all through them which I need not trouble to discuss, but which I could easily point out.

THE LORD CHANCELLOR: It seems to me you are coming right up against an old fundamental doctrine of the English Court of Justice—differing from the Roman system—that the Courts here never give an opinion, except on the actual facts of the case, and that is the way in which the law has been administered in this country. But alongside that, remember there has been a certain license to the Executive Government and also to the House of Lords rather indefinable, to ask the opinion of the Judges in

regard to any particular questions. It is rather vague, you see, and I do not think any case has arisen since the time of Lord George Sackville in the year 1760.

MR. NESBITT: I think that is so. On that point, my Lord, the Lord Chancellor said you did not want to hear anything of the American constitution to which Mr. Justice Idington referred in his Judgment, but I should like to make this suggestion—the language of the constitution there, as far as appertains to this point is that the judicial power of the United States shall be vested in one Supreme Court.

THE LORD CHANCELLOR: That is the constitution?

MR. NESBITT: Yes, that is in the constitution. Construing that language, Chief Justice Marshall (who I assume your Lordship will say was a very great authority), said, the reason that the Supreme Court declined to answer questions was because the very language itself of the constitution contemplated a judicial body in a Supreme Court, and it was inconsistent with its duties once clothed with that function, to take on the duties of an advisory body; therefore throughout the United States you will find the idea prevalent, that where advice of this kind is sought for there must be express authority for it in the written constitution. Now, that is of some weight I submit to your Lordships.

THE LORD CHANCELLOR: I only wanted to indicate the point—of course different countries, different constitutions. What is the reference to that?

MR. NESBITT: The language is in Article 3. Section 1 of the Constitution. Your Lordship will find it in Story on the Constitution, Volume 1, 25. XXVII. of the 3rd Ed. (1858). Then in the same work, Story on the Constitution, Volume 2, page 373, Note 2. your Lordship will find the reference.

THE LORD CHANCELLOR: Is the opinion of Chief Justice Marshall there referred to?

MR. NESBITT: Yes, my Lord. The main decision, I think, is in the case of Marbury v. Madison, which, speaking from recollection, contains a very elaborate judgment, and is reported in 1 Cranch's Reports, page 137, and particularly at page 171. I will read the note: "President

Washington, in 1793, requested the opinion of the Judges of the Supreme Court upon the construction of the Treaty with France, of 1778; but they declined to give any opinion upon the ground stated in the text." That is the ground I have put to your Lordships. Now, if that view meets with your Lordships' approval, I ask you to apply it to this section. You have section 91, giving the Parliament of Canada, under the head of "peace, order and good government," which, by the way, as far as Canada is concerned, comes from the Treaty of Paris, I think, and was for years the only power under which most of the corporations were created and so on—you have the general power given, but that must be read, my submission is, and harmonized with the special powers, namely, the powers of section 101, which is self-contained, and which as far as the early part of it is concerned—that is as to the general court of appeal for Canada—is in almost precise language with the Act I have referred to, the constitution of the United States. The judicial power of the United States is vested in one Supreme Court. Therefore, the same reasoning would apply to that, and if that is so, when you get the Judges, when appointed, clothed with judicial functions for the appellate courts of the Province, is it not idle to say if you clothe them with other and differing powers which shackle and fetter their ability to carry out the powers with which they are properly clothed, namely, by putting them in a position of having expressed opinions and so on, that that is not an interference with the exclusive administration of justice in the province?

LORD SHAW: There is a long and somewhat involved sentence in Mr. Justice Idington's Judgment, which I have been trying to unravel and which seems to me to express in two lines your view. Would you mind looking at it; it is on page 25, and I will read it as I have attempted to unravel it. He dissents from the conclusion that Parliament has "the power of commanding this Court . . . to become an advisory adjunct of the department of justice and fill the place usually held by subaltern law officers of the Crown." Now, that was Chief Justice Marshall's view as I happen to know, and I take it that is the view which you would like us to affirm, and which could not be

affirmed in broader terms than that, dissenting from the view that Parliament had " the power of commanding this Court . . . . to become an advisory adjunct of the Department of Justice "—that is the Supreme Court. That is your argument, I suppose, in a nutshell?

MR. NESBITT: That is my argument in a nutshell, my Lord, and it has been throughout. I read sections 91 and 92, together and endeavour then to harmonize them from that point of view. Then I was answered by one of the Judges with this: " That is all very well, but what do you do with the latter part of section 101, which enables the Dominion to create additional Courts. *Valin* v. *Langlois* says, they may name any individual and create him a court "? My answer to that was, as has been put more than once to your Lordships here, that you are not dealing with them as a court—that is a court for a particular purpose—for the administration of the laws of Canada. I care not whether you mean by the laws of Canada, the laws of Canada, including the provinces, or the laws of Canada, but it means a court of administration.

(*After a short adjournment.*)

MR. NESBITT: With reference to the effect of the Judges once being clothed with the Judicial Office, and the interest of the Province, so to speak, in them, will your Lordships let me refer again to how that has been viewed in the Supreme Court of the United States, in Story, which I have already given you. It is Section 1571, and at page 373 (p. 423 of 3rd Ed. 1858) he says:

" We have seen that by law the President possesses the right to require the written advice and opinions of his Cabinet Ministers, upon all questions connected with their respective departments. But he does not possess a like authority in regard to the Judicial Department. That branch of the Government can be called upon only to decide controversies, brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive."

LORD MACNAGHTEN: That is not Chief Justice Marshall, it is Story, the author, is it?

MR. NESBITT: Mr. Justice Story was a colleague of the Chief Justice. I am not able to answer your Lordship's question, because the reference is to 5 Marshall's Life of Washington, Chap. 6, and that is not to be seen here.

THE LORD CHANCELLOR: Was Story one of the colleagues of Chief Justice Marshall when he delivered judgment in *Marbury* v. *Madison?*

MR. NESBITT: Yes, I think so. He died in 1841.

LORD MACNAGHTEN: He was a great authority.

MR. NESBITT: He was for many years a colleague. This is purporting to state the substance, whether the exact language, or not, I cannot say.

In further reference to that, might I ask your Lordships' attention to this, that where it is found in the British Constitution necessary to provide, as you do find provided in 3 and 4 William IV., that this body, even, shall be called upon in an advisory capacity, you have the express legislative enactment to that effect. Nothing of the sort is found in the British North America Act. You find, on the contrary, that the tribunal which they have asked the question to be submitted to here is a specially constituted tribunal with special appellate powers for the administration of the laws coming up from the Province by way of appeal; and I think your Lordships have given sufficient intimation for me to say that I take it to be your Lordships view, that the "additional courts for the administration of Justice" means administration of Justice in the sense that Sir Robert has argued for. I think my friends on the other side will argue, and must argue, that if there is the right in the Governor-in-Council to ask these questions, when you find, in the same legislation, the express command that they shall be answered, it is their duty to answer. Let me give your Lordships the history which you have already had about that. The Act, as it stood in 1891, did not contain the language which you find in the Act of 1906, that is, touching any questions of law or fact, whether the legislation was in existence or prospective. The Supreme Court in the *Lord's Day Case* declined to answer certain of the questions, or at least raised the question that as it was an Act that was proposed to be established only by the Provincial Legislature of Ontario it did not fall

within the language of the Supreme Court Act, Section 60, as it then was. In order to make certain that there could be no doubt about the duty of the members of the Supreme Court in the future, the next session an Act was passed which contained the provision that whether the Legislation was in existence, whether it was a legislation they desired to have an opinion upon, or as to what its legality would be when passed—no matter what it was—it was their duty to answer the questions and they must give their reasons therefor. I cannot conceive how the Supreme Court, if there is jurisdiction as to any question whatever, have any right to say "As Judges we decline to answer this" because it presupposes they are not being asked as Judges and the duty is cast upon them in some other capacity.

Now as to the suggestion that they may be a consultative body—that, just as they could appoint a Conservation Commission or Immigration Officers, they could appoint any people they thought fit and make them such a body, as, says my friend Mr. Newcombe in advising the Crown in his legal capacity. But that is not what this Act is. It is time enough for us to borrow that trouble when they attempt to do that. I venture to say that Parliament, if it cannot get the advantage of the opinions of the Supreme Court, as a Supreme Court, in an advisory capacity, will hesitate long before they appoint any separate consultative body. They will probably do, as they do now, employ Counsel, trained experts in the law, to whom they will pay something for advice so as to know what the law is, or for the best view they can give them. But the effect of this is that the Court having been appointed to which every citizen has a right to bring his case, either first getting the opinion of the Trial Judge with his local knowledge, and then of the Appellate Court of the Province, and all that brought in a proper legal form before this body as a Court of Appeal—he has a right to have that brought up unhampered by previous opinions which may have been given upon questions similar in principle, if not exactly in point, and an Appeal taken further on here. As it is, hampered and fettered as you find the body by such a procedure as this, it is no longer a Court of Appeal designed by Section 92 of the

Act, and is therefore an interference with the exclusive rights of the provincial subjects to have their affairs administered through their provincial Courts.

I submit, therefore, that the point was properly taken, and well taken.

(Adjourned for a short time.)

MR. NEWCOMBE: My Lords, I should like to explain, in the first place, the notice which is on page 7 of the Record under which this question came up in the Supreme Court. You will see at line 18:

"In the matter of certain references by His Excellency, the Governor-General-in-Council to the Supreme Court of Canada pursuant to Section 60 of the Supreme Court Act of certain questions for hearing and consideration.

"(1) As to the respective legislative powers under the British North America Act of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of Companies and as to the other particulars therein stated." That first enumeration defines the present reference, the reference which is here under appeal. Two others are mentioned, viz.:

"(2) As to the powers of the Legislature of British Columbia to authorize the Government of that Province to grant exclusive rights to fish as therein mentioned.

"(3) Relating to the Insurance Act, 1910."

Now it happened as a mere coincidence, not because there was any connection between these cases whatever, in mere point of time, that these three references were made by His Excellency in Council to the Supreme Court at about the same time. The questions in the first one have been read to your Lordships, and those are the questions now under consideration. The second reference, as to the powers of the legislature of British Columbia in respect of their fisheries, was a reference made by the Governor-in-Council by agreement and after consideration with the local Government as a desirable proceeding for the purpose of obtaining the opinion of the Court upon certain conflicting views as between the two Governments with regard to the fishery rights of the Province, notably in the Railway Belt, which has been under discussion in respect of waters and in

respect of minerals before Your Lordships on two occasions. Then the third reference was with respect to the validity of a certain clause of the Insurance Act, which provided that Insurance Companies could not carry on business in Canada without license from the Governor-in-Council to be issued upon compliance with certain conditions. Then the curious thing happened that these references were joined in one motion by my learned friend with a view to have it declared that the Parliament had no jurisdiction to authorize these references, and the Provinces were divided upon the subject. Of course, the Province of British Columbia was advocating that the decision of No. 2, and No. 3 was really a matter in which, so far as I am aware, the Provinces did not take very much concern, but upon the decision being given they confined their application and subsequent proceedings to reference No. 1 which embraces the questions your Lordships have heard. The appeal is upon this reference only. Now this appeal, I submit, involves a mere question of jurisdiction based upon the consideration as to whether it was within the enacting authority of the Parliament of Canada to enact section 60 of the Supreme Court Act. In the Record at page 15 your Lordships will see the judgment. My learned friend has read the Reasons of the respective Judges. The Judgment is on pages 14 and 15, page 14 contains the usual recitals of the Judgment of the Supreme Court, and at the top of page 15: "This Court doth declare that it has jurisdiction to hear these references." That is the Judgment of the Court, that it has jurisdiction to hear these references. That is all that was decided. That is the only question that was debated before the Supreme Court, and that is the only question which arises for your Lordships' consideration upon the appeal. The Memorandum, which has been printed in the Case, and which my learned friend, Mr. Nesbitt refers to, was handed in by my learned friend during the argument in the Supreme Court in support of his motion. It was a printed memorandum produced there and it has found its way into the Record, but it is valuable now as showing the grounds upon which the motion was deliberately put. It opens with the statement that:

"It is submitted that this Court has no jurisdiction to consider and reply to the questions referred, and that it should refrain from doing so." Then on page 9, line 20:

"The jurisdiction of the Dominion of Canada to enact the section above quoted must be supported, if at all, under the terms of Section 101 of the British North America Act, which reads as follows," and that is argued out, and the conclusion of the memorandum is on pages 12 and 13, showing (I need not read those pages), that the point involved was a question of jurisdiction merely. And so, looking to the Judgments, which my learned friend has read, on page 15, "The question, and the only question," says the Chief Justice, "we have now to dispose of, is a preliminary objection which has been taken to our hearing and considering these references made to us by Order-in-Council, on the ground that notwithstanding anything contained in the 'British North America Act, 1867,' the Parliament of Canada cannot impose upon this Court the duty," and so on. Then on page 21 at line 25 he holds: "That it is the duty of the members of this Court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way embarrass the administration of justice." Mr. Justice Girouard in the following line said: "As to the motion to quash, I would prefer to wait for judgment till the matter is discussed on the merits." The matter was not discussed on the merits. Mr. Justice Davies on page 25, at the conclusion of his Judgment, says: "I say nothing whatever about the particular questions now before us awaiting argument. Whether they go further than they should must be determined later." Then going on to the Judgment of Mr. Justice Duff at the foot of page 36: "I should, perhaps, add that I do not wish to be understood as expressing any opinion upon the propriety of the questions now before us. I confine myself to the precise point raised by Mr. Nesbitt." And Mr. Justice Anglin, at the conclusion of his Judgment, says: "I reserve consideration of whether and how far each of the several questions included in the present reference falls within the purview of Section 60 and can be or should be answered, until we have had

the advantage of argument and discussion upon them." So all that matter of the character of the questions, the propriety of the questions and the expediency of answering them, was not discussed or considered by the Supreme Court and is outside of any question which I submit is presented for your Lordships' consideration, the point being really that which my learned friend, Sir Robert, has argued so fully as to whether it is constitutional that the Parliament should authorize the Governor-in-Council to submit any questions for advice to the Supreme Court.

Now, my Lords, this jurisdiction, as my learned friend has stated and proved so fully by reference to the authorities, is a jurisdiction which has been from the constitution of the Court very frequently exercised, and my learned friend has referred to a number of the cases. There are some other cases, and perhaps to complete the list I might refer to them. There is the case of in re New Brunswick Penitentiary referred to in Cameron's Supreme Court Practice, 1907, at page 267, which seems not to be reported; then the case in *re Canada Temperance Act, 1878, and the County of Kent* in Cassels' Digest of the Supreme Court decisions, at page 106, and in *re Canada Temperance Act, 1878, and County Perth* in Cassels' Digest, 105. Then I am not sure that my learned friend referred to the case of the *Grand Trunk Railway Company and the Attorney-General of Canada*, which is known as the contracting-out case, with which your Lordships are familiar.

SIR ROBERT FINLAY: I think I did.

MR. NEWCOMBE: I omitted to make a note of that if he did. That was determined by the Supreme Court and on appeal by this Court (reported in 1907 Appeal Cases 65). Then there is the very latest case of the *Grand Trunk Pacific Railway Company v. The Attorney-General of Canada*, the implementing case, which was decided by your Lordships so recently as last month, which was referred by the Council to the Court under this very power. Section 55 of the Railway Act which my learned Friend referred to which puts a corresponding power, in another Act into the Railway Commission to make references for opinion. Now my Lords, not only is there this long line of authority in the way of practice and decision under this sec-

tion which was first enacted in 1875 so far as the Dominion is concerned, but in, I think, all or most of the leading Provinces there is corresponding legislation with regard to references, by the local Governors, to the Provincial Courts. I would refer to the Revised Statutes of Nova Scotia 1900, Volume 2, Chapter 166. That is entitled: "Of the decision of Constitutional and other Provincial Questions," and it provides that "The Governor-in-Council may refer to the Supreme Court of Nova Scotia, for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same.

"2. The court shall certify to the Governor-in-Council its opinion on the matter referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion, with his reasons therefor, to the Governor-in-Council.

"3. If the matter relates to the constitutional validity of any Act which has heretofore been, or hereafter is passed by the legislature of this province, or of any provision in any such act, the Attorney-General of Canada shall be notified of the hearing in order that he may be heard if he thinks fit.

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

"5. Where any interest affected is not represented by counsel, the court may, in its discretion, request counsel to argue the case in such interest, and the reasonable expenses thereby occasioned shall be paid out of the general revenues of the province.

"6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to the Supreme Court of Canada, or to Her-Majesty-in-Council, be treated as a final judgment of the court between parties."

That is the provision of the Legislative Assembly of Nova Scotia. Then my Lords in Chapter 84 of the Revised Statutes of Ontario, 1897, Volume 1. . . . . .

LORD SHAW: They seem to have got into the habit of it not only the Dominion Government but the Provincial?

MR. NEWCOMBE: Yes, my Lord. It is "An Act for expediting the decision of Constitutional and other provincial questions." It is the same with some variation. It begins with the provision:

"The Lieutenant-Governor-in-Council may refer to the Court of Appeal or to the High Court for hearing or consideration any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same.

"2. The Court is to certify to the Lieutenant-Governor-in-Council its opinion," and so on. There is provision for notice to the Attorney-General of Canada where it might affect his interests; and provision to direct any person or class of persons to be represented on the argument.

"5. Where any interest affected is not represented by counsel, the Court may in its discretion request some counsel to argue the case in such interest, and the reasonable expenses thereof shall be paid out of the Suitors' Fee Fund or otherwise.

"6. The opinion of the Court shall be deemed a Judgment of the Court, and an appeal shall lie therefrom as in the case of a judgment in an action." This Statute differs from the Dominion Statute and from the Statute of Nova Scotia in that it does not contain the statement that the opinion shall be advisory merely. The provision is that the opinion shall be deemed a judgment of the Court.

LORD ATKINSON: It is the same here. Here although advisory it is to be taken as a Judgment for the purposes of appeal.

MR. NEWCOMBE: For the purposes of appeal, but this does not say that it shall be advisory only.

"7. In case of the matter being appealed from the High Court to the Court of Appeal, sections 2, 3, 4, 5 and 6 shall apply in like manner as if the original reference had been to the Court of Appeal. An appeal to Her Majesty in Her Privy Council from a judgment of any Court on a reference under this Act shall not be subject to the restrictions

contained in the Revised Statute of this Province respecting appeals to Her Majesty in Her Privy Council." The Statute of Quebec has this title: "Questions referred to the Court of King's Bench by the Lieutenant-Governor-in-Council." That is in Volume 1 of the Revised Statutes of Quebec, 1909, articles 579 to 583. These Revised Statutes of Quebec differ from other Revised Statutes, in that their sections are known as "articles," and they run all through from the beginning consecutively, so that the number of the articles gets rather large. This article 582 contains the provision: "The opinion of the court upon any question referred to it under this chapter is advisory only, and cannot be appealed from." It begins with the statement that (Art. 579): "The Lieutenant-Governor-in-Council may refer to the Court of King's Bench, Appeal side, for hearing and consideration, any question which he deems expedient, and thereupon the court shall hear and consider the same.

"580. The Court shall send to the Lieutenant-Governor in-Council for his information its opinion duly certified upon the questions so referred——"

THE LORD CHANCELLOR: They are all the same in kind.

MR. NEWCOMBE: Yes, my Lord. I will not take up time to refer to those particularly. These are examples of them —I have referred to Nova Scotia, Quebec and Ontario— Chapter 5 of 1909, Section 16 of the New Brunswick Judicature Act, 1906; Chapter 33 of the Revised Statutes of Manitoba, 1902; the Supreme Court Act of British Columbia, 3 and 4 Edward VII., Chapter 15; Chapter 57 Revised Statutes, Saskatchewan, 1909, which is a re-enactment of Chapter 11 of 1901, of the Ordinances of the North-West Territories. The new Provinces of Saskatchewan and Alberta were recently carved out of the North-West Territories and the North-West Territories had previously a legislature of their own constituted by Dominion Statutes, and under that they had legislated for these references, and the Province of Saskatchewan, having revised its legislation, has brought that section into its Revised Statutes. The original Statute, however, I presume, remains in force in Alberta, where they have not proceeded with their revision.

Now that is the condition of the legislation in the Provinces.

LORD ATKINSON: Were these Statutes referred to in the argument before the Supreme Court, because there is no notice taken of them in the Judgment?

MR. NEWCOMBE: Not in detail. I think it was mentioned that the Provinces did have similar legislation. It is well known there, and it is a matter of frequent occurrence, to have these references in the Provincial Courts. I will not detain your Lordships by referring to the various cases in the Provinces which have been referred; but as one example of the exercise of that jurisdiction provincially I might refer to the case of *The Attorney-General of Canada v. The Attorney-General of Ontario* in 1898, Appeal Cases at page 247. That is familiarly known as the Queen's Counsel Case. That was a reference made by the Lieutenant-Governor of Ontario, under the Statute which I have read, to the Court of Appeal to determine whether a Queen's Counsel appointed by the Governor-General had precedence in Provincial Courts. It was really a question of precedence as between Dominion and local Queen's Counsel involving the question as to whether the Dominion had the right to make these appointments or whether the Provinces had the right to make them, so far as Provincial Courts were concerned. That question was determined favourably to the Provinces by the Court of Appeal and the Judgment of the Court of Appeal was sustained by your Lordships' Board (in 1898 Appeal Cases). Although the Courts naturally always expressed reluctance to take up and consider and determine these references, involving the difficulties which are inseparable from the consideration of questions stated more or less in the abstract, and although all objections, I think, which ingenuity could suggest were raised from time to time against the propriety of these proceedings, it was never thought of until the Lord's Day case, to which I am going to refer in a moment, that there was any doubt about the Constitutional authority of the Parliament to make such a provision. There were two Lord's Day cases, the first case, my learned friend has referred to, it was an example of another reference by the Lieutenant-Governor of Ontario to the Court

of Appeal under the Local Statutes. It is in the Appeal Reports here, under the name of *Hamilton Street Railway and Attorney-General of Ontario.* Questions were put as to the validity of a Statute known as the Lord's Day Act, and answered, and came on appeal to this Court, and your Lordships' Board answered one of the questions and made the remarks which my learned friend has read as to the inexpediency of answering the others, and then it was that certain questions were referred by His Excellency in Council, which are reported in 35 Supreme Court of Canada Reports at page 581, and when that reference came down for hearing to the Court, Mr. Blackstock, who appeared for the Canadian Copper Company, which was a Company apparently interested in maintaining the principle of breaking the Lord's Day, raised objection to the hearing of these questions, and his argument is reported on page 589. He makes his point: "It is obviously not only a most inconvenient practice that is here resorted to, but it constitutes a very grave and serious invasion of the rights and powers of all those authorities among whom are partitioned the various legislative functions distributed by the British North America Act." The Court proceeded to determine those questions notwithstanding that; although they did answer, protesting that questions as to hypothetical legislation, legislation not actually in force, did not come within the purview of Section 60, but they did not suggest that there was any absence of legislative authority in the Parliament to enact the section; and even my learned friend, who was there in another capacity did not at that time attempt to assert the views which he is advocating here.

Now, my Lords, the questions relate to nothing but the interpretation of the British North America Act, and they are within the letter and intent of Section 60, I do not know that that is disputed. The Section, according to the words of it authorizes the putting of these questions.

THE LORD CHANCELLOR: I do not think the contrary was argued. If section 60 can stand, then these questions are within it.

MR. NEWCOMBE: Yes, and I say they relate merely to the question of the distribution of powers under the Imperial Statute as between the Dominion Parliament and the

local legislatures. Now, what we submit upon that is that the Section is *intra vires* under Section 101 of the British North America Act, or the general words of Section 91, and I do not think for the purpose of my argument that it is really necessary to distinguish betweeen these powers.

THE LORD CHANCELLOR: You have referred to all these different Provincial Statutes as well as the Dominion Statute, authorizing references of this kind. Has it been a familiar practice in Canada? The Statutes exist, but have they been regularly made use of?

MR. NEWCOMBE: Yes, not infrequently.

THE LORD CHANCELLOR: Both by the Provinces and by the Dominion?

MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: For a considerable time?

MR. NEWCOMBE: For a considerable time, my Lord, and I am aware of several cases in British Columbia—I referred to two in the Province of Ontario—several times in Quebec, my learned friend who belongs to that Bar informs me, and I think these provisions authorize a practice, which right or wrong, has been found very convenient, and is, I may say, frequently resorted to by the Executives for their assistance in the administration of the Constitution and their Governments. Now, my Lords, the only observation I have to make with regard to Section 101 is this. My learned friend has said that it is divided into two parts, (1) Provision for the constitution of a Court of Appeal, and (2) for the establishment of any additional Courts for the better administration of the laws of Canada. This, of course, cannot be contended very well, I suppose to be appeal jurisdiction, there is no appeal about this, there is no resort from any other Court, and your Lordships have expressed, perhaps, a view unfavourable to the power, being included under the "establishment of any additional Courts for the better administration of the laws of Canada." I should have thought with all deference that the "administration of the laws of Canada" is a very broad expression; it is not merely the Courts who are engaged in the administration of the law; the Executive Government is also engaged in the administration of the law.

LORD MACNAGHTEN: How is it a Court at all for the purpose of answering these questions?

MR. NEWCOMBE: I do not know precisely what is involved in the word "Court," but it is a broader constitution than mere Courts of Justice.

In the case of the *Royal Aquarium* v. *Parkinson*, in 1892, 1 Queen's Bench, at page 446, Lord Justice Fry says in consideration of a question as to whether a statement made by a County Councillor in the County Council was privileged: "Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word 'court'"—that is the word "tribunal"—"because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a military Court of inquiry, 'though not a Court of Record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted and recognized in the articles of war and many acts of Parliament.' I do not desire to attempt any definition of a 'court.' It is obvious that, according to our law, a Court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative; the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not Courts of Justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of Justice, but whether it is a Court in law. Wherever you find a Court in law, to that the law attaches certain privileges, among which is the immunity in question." So that in the broad definition of the word "Court" I submit, my Lords, that it is not inconsistent with the qualities of a Court that it should entertain this advisory jurisdiction, and as to the "administration of the law" it is for the better administration of the law to aid in the administration of the law, to assist the Executive, if you like, in a remote degree as to the administration of the law which falls upon them. The

provision is, your Lordships will notice, that the Parliament of Canada may, notwithstanding anything in this Act; so that this is an overriding provision. I am not disposed to differ from my learned friend, that perhaps those words were put in to make room consistently with this section for the provision in section 92, item 14, of the Provincial powers which provide for "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." However, notwithstanding that provision, and notwithstanding any other provision which there may be in the British North America Act, the Parliament may do this. It was, perhaps, I say, necessary to put in that provision, having regard to section 92, head 14.

I say that this is done for the better administration; and as to the "laws of Canada," whatever those may include, whatever the extent of that description is, I submit it must include the British North America Act, which is the fundamental law of the country, and these references are made, as I have stated, for no other purpose than to interpret that Act. But while I think, as His Lordship, Lord Macnaghten, said, that it is really a by point, the Courts, take the Exchequer Court for instance, which is a Court of original jurisdiction, the trial Court for Dominion causes, are engaged in the administration, not only of the general Statutes and general law of the country, but the special laws of each Province in nearly every case which they undertake. Let me illustrate. We have a Statute which is construed to render the Crown liable for the negligence of its officers and servants in the discharge of their duties. Now, when a Petition of right arises against the Crown for negligence, it necessarily arises in some Province. Take the Province of Quebec; there the law is quite different with regard to negligence and measure of damages from what it is in Ontario. The law of common employment prevails in some of the Provinces; in others, it does not. When the learned Judge goes to try an action which has arisen in the Province of Quebec he gives a very different judgment depending on

the law of the Province, from what he would under similar circumstances if the accident had taken place in Ontario, and he is there considering the law of the Province; but I submit it is also "the law of Canada"; it is a law by which Canada is bound and which, in its administration, results in a declaration that damages are, or are not, payable by the Crown.

THE LORD CHANCELLOR: Do you maintain, Mr. Newcombe, that under the section which is under your consideration the establishment of additional Courts does not mean the establishment of additional Courts of Law or Equity? Does it mean a Court in a different sense?

MR. NEWCOMBE: Not confined to Courts of Law and Equity.

LORD MACNAGHTEN: What is it an addition to?

MR. NEWCOMBE: Additional to the Supreme Court, I should submit to your Lordships. The words are "A general Court of Appeal for Canada, and for the establishment of any additional Courts." Suppose, for instance, they had had no thought of putting in a provision to provide for a Court of Appeal, I presume the enactment would have been that the Parliament of Canada may provide for the establishment of Courts for the better administration of the laws of Canada. It seems to me "additional" is only worked into the section, having regard to the fact that a Court has already been named there.

THE LORD CHANCELLOR: Do not you notice that from Section 96, down to, and including, 101 of the British North America Act is under the heading of "Judicature?"

MR. NEWCOMBE: I did notice that, and I am subject to whatever disadvantage arises to my argument, because of that heading, but, notwithstanding that, I do not think the Courts have carried those words, which are put in there by the draughtsman for the purpose of facility of reference, very far in the way of limiting the construction.

THE LORD CHANCELLOR: It does not go a very great length, but it indicates what it is, does not it?

MR. NEWCOMBE: It is an indication that they are Courts of Judicature.

THE LORD CHANCELLOR: You see the scheme of the Act

is, among various other things, to separate executive power, legislative power and judicature.

MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: You are really, I think, in your argument as to section 101, purporting to contend that under the use of the general word "Court" that would include something which is of an executive character.

MR. NEWCOMBE: No, my Lord, advice, judicial in its nature, to the Executive. It is connected, remotely perhaps, but it is connected with the administration of the law.

THE LORD CHANCELLOR: Be it so. You referred to the word "administration" in Section 101 and said that that was not merely judicial, but that there were other kinds of administration. Do not you think that it is rather straining the last words to suggest that "administration" in the sense of any other than judicial administration is admissible within Section 101? It does not conclude your argument at all; it is only one point of it. Of course you know best.

MR. NEWCOMBE: I do not want to press that too far against your Lordship's view.

THE LORD CHANCELLOR: I was only suggesting my own misgiving.

LORD ATKINSON: This group of sections, beginning with Section 96, is the only group of sections specially dealing with the appointment of Judges by the Dominion at all.

MR. NEWCOMBE: Yes, my Lord.

LORD ATKINSON: Because I see that in head 27, of Section 91, they have only to deal with the Criminal Law, except the constitution of Courts of Criminal jurisdiction. Then, when you come to Section 92, it gives them power as to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction. No doubt in that provision they refer to Courts, ordinarily so called, where matters are judicially determined one way or the other. Then comes Section 96 and the following sections which are the only sections dealing with the power of the Dominion to erect Courts at all.

MR. NEWCOMBE: I might say under head 14, they put

the constitution of the Provincial Courts unreservedly, I think, into the hands of the local legislatures.

LORD ATKINSON: Those Courts are evidently Courts for the decision of cases.

MR. NEWCOMBE: Quite so, my Lord, but does your Lordship suggest that under that power the local legislatures could not confer the power which they have conferred in the Statutes, corresponding to this Dominion Statute to which I have referred—"the constitution, maintenance and organization of Provincial Courts." The same words are used in Section 101 " For the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts."

LORD ROBSON: That means a Court of Law, does not it?

LORD ATKINSON: Surely, that means a Court of Law?

MR. NEWCOMBE: It goes on to say: " for the better Administration of the Laws of Canada." That is what it says, and, in construing that clause, you must not be too rigid about it. A Court, as Lord Justice Fry says, is a Court which exercises various functions.

LORD ROBSON: What sort of functions? Apparently this is a function to advise the Attorney-General.

MR. NEWCOMBE: This is a function to advise judicially.

LORD MACNAGHTEN: To write a treatise on any subject that the Executive requires to be instructed in.

MR. NEWCOMBE: I think that is perhaps putting it rather in the extreme.

LORD ATKINSON: You must contend that they had a right to institute a Court that did nothing but advise them.

MR. NEWCOMBE: It is admitted that they could do that, except that they say, I think, that they could not call it a Court.

LORD ATKINSON: It must be an "additional Court." According to your argument it must be that they could establish a Court that did nothing but advise them?

MR. NEWCOMBE: They could establish a tribunal.

LORD ATKINSON: Establish "additional Courts for the

better administration" of the law. If that be so they could establish a Court solely for the purpose of advising them.

LORD ROBSON: Is advising as to the law the same thing as "administering the law?"

MR. NEWCOMBE: No, my Lord, but it assists in the "administration" of the law. That is my point.

LORD ROBSON: It is not the same thing?

MR. NEWCOMBE: It is a part of the administration of the law, it is a part of the process, it may competently be made a part of the process of the administration of the law, I submit.

LORD ROBSON: Is it? Is Counsel's advice part of the "administration" of the law?

MR. NEWCOMBE: Are not the Law Officers engaged in the "administration" of the law, their duty mainly being to advise the Departments of the Government who are executively concerned in carrying out what the law is. They are all part of the administration.

LORD ATKINSON: The Court which pronounces the opinion, and the Sheriff who executes the Court's decree are both engaged in the "administration" of the law; but they have very different functions.

MR. NEWCOMBE: They are different functions. At any rate, that is my submission upon Section 101 taken by itself. But, however, the case may stand as to Section 101, we have the broad power in Section 91 in the opening paragraph "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

LORD ATKINSON: Must not any legislation that you pass under that be consistent with the different Sections of the Act?

MR. NEWCOMBE: No doubt the whole Act must be taken together.

LORD ATKINSON: If they did not do that they could practically repeal all the Sections.

MR. NEWCOMBE: Certainly, my Lord, but except in so far as a legislative power is especially conferred upon the Provinces, the whole field of legislation is open to the

Dominion under those general words of Section 91. Now, my Lords, when they constituted the Court in 1875, they gave it appeal jurisdiction. They gave it original jurisdiction because at that time it was the Supreme and Exchequer Courts of Canada and the two courts were combined. The Judges went on circuit, and tried the Exchequer Court cases. It was afterwards divided, I think in 1887, and they gave the Supreme Court advisory jurisdiction, the jurisdiction which we are now considering. If these were incompatible, all being enacted at the same time, why should the Court stand for one of these jurisdictions more than another? Suppose my learned friends were interested to say that this Court had no appellate jurisdiction and approached it from that point of view, here, they would say, is a tribunal created with the power to advise; it has the power to advise, which they admit the Parliament can confer upon it, by one of the provisions. Then by other provisions it has the power to hear appeals, and determine original cases. It is inconsistent, they would say, it is incompatible that one tribunal should have both these functions; therefore this Court cannot have appellate jurisdiction; it has the advisory jurisdiction, Parliament having the undoubted power to confer that, and inasmuch as that cannot be grouped with the appellate, the appellate must fall. I submit, my Lords, that my learned friend's argument would apply equally to deny any appellate jurisdiction to the Supreme Court as it does to deny the advisory jurisdiction.

SIR ROBERT FINLAY: No, certainly not.

MR. NEWCOMBE: Well, I am submitting that. My learned friend may be quite right, but I confess I do not see why his argument would not have been quite as forcibly directed to the denial of appellate jurisdiction. The constitution of the tribunal is nothing but a bundle of powers. Here they are grouped together in one Statute. Now he says you cannot put all these together; therefore he rejects the one I want to sustain.

LORD ROBSON: I should have thought that the use of the word "Court" would make some difference. You say either branch, advisory or legal, is open to attack, but there is the use of the word "Court."

MR. NEWCOMBE: The word "Court" I think is the same as "tribunal." It is easy to see what the legislature is doing.

THE LORD CHANCELLOR: When you have a Court, under the head of "Judicature" provisions, if you choose one instance of that, what is generally meant by "Court of Justice" or "Court of Law," or "Court of Equity," that carries with it, does not it, a bundle of traditions and customs attached to it? Remember, we are speaking about the Constitution. One knows what is implied by an appellate Court of Justice, a Court to hear appeals from another Court. It is a very different thing, when you come to consider it in the larger meaning of the word "Court," and may not it well be that a part of the duties ascribed to it in the Act of 1875 are perfectly valid and that other parts might be *ultra vires*.

MR. NEWCOMBE: Of course one must consider this particular section about the advisory jurisdiction as one that has been specially emphasized, because after the original enactment that section was repealed and re-enacted in a somewhat different form showing the particular intention of Parliament that this very power should be vested in the tribunal. Now when my learned friend admits that Parliament has the power to constitute a body of men, a commission as he terms it, who have the duty of advising, and Parliament has shown unmistakably its intent that this power shall be exercised, as is shown by a later Act, by the Supreme Court, why should not this particular power prevail, happen what may to the other jurisdiction of the Court?

My Lords, as to the suggestion that the provinces have a right to the Court of appeal as a court of law, is not that rather approaching the question from the point of view that the British North America Act had provided the constitution of the Court? If the British North America Act had said there shall be and there is hereby constituted a Supreme Court with certain jurisdiction, then it would be a fixture and the provinces would no doubt have a vested right in it, but it is not necessarily contemplated, and the Act did not require that there should be a Court. The Act said the Parliament of

Canada may constitute a Court if it see fit. It may never constitute a Court. It may constitute a Court, and it may disestablish a Court, and as to the character of the Court, so long as it is a Court, it is just such a Court as the Parliament of Canada sees fit to constitute and the provinces have nothing to do with it. Your Lordships determined so late as 1908 Appeal Cases that the legislation of the provinces could not extend to affect the right of appeal, in the case of the *Crown Grain Company v. Day*, which your Lordships will find reported in 1908 Appeal Cases, page 504. There there was an attempt on the part of the Legislature of Manitoba to authorize a proceeding and judgment to be given which should not be appealable to the Supreme Court, and they expressed that in terms, but your Lordships held that the constitution of the Court, its powers and jurisdiction, were entirely a matter for the Dominion and could not be affected by provincial legislation. Therefore the Court is a Court entirely in the judgment of the Parliament; it may be a good Court or it may be a poor Court; it is just such a Court as the Parliament provides for; it is subject to their exclusive jurisdiction.

LORD ROBSON: But you will admit, I suppose, that section 101 is a qualification by the Dominion Legislature upon the exclusive administration of justice that it gave to the province under subsection 14 of Section 92, because the formation of a Court of Appeal to some extent limits their provincial autonomy.

MR. NEWCOMBE: Yes.

LORD ROBSON: Therefore the Legislature has said, "We will qualify that to some extent by making the Dominion establish a Court of Appeal." Do you say under those words the Dominion might still further qualify the rights of the province by establishing not merely a court of appeal in the ordinary sense, but by establishing a court of inquiry into the propriety of provincial legislation, because that is what you are contending for? The question you put as to the interpretation of provincial legislation amounts to this: that the Court established under Section 101 may approve or condemn—it cannot, of course, repeal— such legislation after inquiry into it. Is not that

a very extensive addition to the qualifications the Dominion may put upon provincial power? It is one thing, you know, to say the Dominion may establish a court of law, and another thing to say it may establish a general court of inquiry or investigation into the misdoings of the provinces.

MR. NEWCOMBE: It has established a court of appeal and an additional court for the better administration of the laws of Canada, and consistently with that it has power to pass laws for the peace, order and good government of Canada generally. Now your Lordship's suggestion is that it is incompatible with the constitution of that court as such to have this jurisdiction cast upon it. I would like to refer your Lordship to the case of Ex parte County Council of Kent, reported in 1891, 1 Queen's Bench Division, reading particularly the observations of the Lord Chancellor, Lord Halsbury, commencing at page 728. Now my Lords, that arose on a clause of the Local Government Act, 1888, which provided that "If any question arises, or is about to arise, as to whether any business, power, duty, or liability, is or is not transferred to any County Council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of Court may be directed by the Court; and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question"—a very similar authority I submit to that contained in section 60 of the Supreme Court Act, and perhaps the statement "without prejudice to any other mode of trying it" is not more than equivalent to the statement that the decision should be advisory only. Then Lord Halsbury said: "And now, dealing with the subject matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative. In the first place, it is not necessarily a question that has arisen, but

one which may be about to arise. It is to be a question of the transference of the 'business, power, duty or liability'" just as in this case the question is as to the distribution of legislative power — "It is to be a question of the transference of 'business, power, duty or liability' from one set of authorities to another, and it appears to have been thought convenient, without any existing legislation justifying the intervention of a Court of Justice, that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such 'business, power, duty, or liability.' We have used the words, 'might be consulted,' because, although the actual language is 'submitted for decision,' it is a question which might be 'about to arise;' and can, therefore, only be decided in the sense of expressing the opinion of the Court how it ought to be decided when it does arise. It is to be 'without prejudice to any other mode of trying it,' and it can only be submitted 'on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned.' So far as we can see, there is no obligation on the High Court to hear anybody who might be interested as a matter of fact in the decision of the question. And when one sees that the only parties to such a consultation are the authorities which may be charged with the administration of the 'business, power, duty, or liability,' it is to our minds clear that the Legislature did not contemplate an actual determination of an existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a Court of law, but was solely dealing with the question of which set of authorities should be charged with such and such portions of administration. The legislature sufficiently guarded private rights by saying that such an application to the High Court should be without prejudice to any other mode of trying it. They gave discretion to the Court to hear such parties as the Court itself should think just, and confining the decision, as we think they did, to the High Court of Justice, they appear to us to have carefully avoided the use of any language, or any forms of procedure which involve a right of appeal."

THE LORD CHANCELLOR: Substantially, although I believe not in form, this is in the nature of a special case to be decided by the High Court as regards questions which are about to arise as well as questions which have arisen.

MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: It has some resemblance I think to the Statute we are now considering.

MR. NEWCOMBE: Yes.

LORD SHAW: Whether a particular "business, power, duty or liability," is, or is not, transferred.

MR. NEWCOMBE: The only question here is as to the British North America Act which came in, constituted a federal government, and distributed the powers. Now the question that is submitted here is as to the distribution of those powers. It arises in a number of ways, and a number of considerations would come up if we are dealing with the question on the merits, but that is the principle of the reference, that is the object of the reference, to obtain a construction of the Act in respect of these particulars.

THE LORD CHANCELLOR: The chief value of this case for your argument seems to me to be this: that it was not treated at all events by Parliament in England, as an unconstitutional thing to take the Judges of the High Court, and to authorize specified people to apply to them in regard to questions which are about to arise.

MR. NEWCOMBE: Yes, my Lord, and without giving a decision it would be advisory only, and it would not prejudice the suitor when it came up in actual litigation.

THE LORD CHANCELLOR: My impression is that it would be conclusive upon the people concerned. You see it is about the distribution of powers.

MR. NEWCOMBE: Yes, but if these powers were executed to the prejudice of an individual, he would not be bound by that advice if he brought his action.

THE LORD CHANCELLOR: I agree.

MR. NEWCOMBE: Therefore he is protected here, and it seems to me the two provisions are very much alike, and shew that there is not that incompatibility between these powers which is suggested. That consideration is also dealt with very well, I think, in the judgment of Mr. Justice Duff, which my learned friend has referred to.

Now my learned friend, Mr. Nesbitt, referred to the Constitution of the United States, Article 3.

THE LORD CHANCELLOR: May I draw your attention first to this difference, because I think it is rather an important one. Of course it is a question of distribution of power, duties, or liabilities, and whether or not they are referred to a County Council or Joint Committee. The consequence is, as the Court has power by rules to direct the manner of trial, they would be able to be certain that all persons interested would be before them.

MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: So if it has to decide on a question about to arise, or arising between A, B and C, specified persons, the Court is able to notify those persons, and see that all interests are before it. I do not say it deprives the case of the significance which you attach to it, but it is limited in that way.

MR. NEWCOMBE: So far as that feature of it is concerned I do not know whether it affects your Lordship's view, but the judges of the Supreme Court have power to make general rules and orders for regulating the procedure of the Supreme Court, and so on.

THE LORD CHANCELLOR: What is the reference to that?

MR. NEWCOMBE: That is chapter 139 of the Revised Statutes, 1906. Under the Supreme Court Act they have the power to make rules, and in pursuance of that power they have made rules for dealing with these references—general rules which provide for directions being given as to notice, and service, and so on. In this very case already, there are certain outside interests which have intervened with the permission of the Court to support the propriety of the questions, and perhaps there are others the other way—I do not know. There is the Manufacturers' Association which is on the record, and I think there is an Order somewhere.

MR. NESBITT: They were allowed to be heard.

LORD ROBSON: These provisions only shew that the Dominion Parliament behaved reasonably, that is all.

MR. NEWCOMBE: It only shows, my Lord, that there are provisions intended, as far as foresight can determine, to

provide that every person shall have reasonable opportunity of being notified, and represented.

Then, my Lords, as to my learned friend's observations with regard to the Supreme Court of the United States and provision being made in the Constitution that there shall be one Supreme Court, what happened there was that the President proposed to consult the Court, very much as in those days the King would have consulted his judges, and it was said by Chief Justice Marshall that that was inconsistent with the Constitution.

THE LORD CHANCELLOR: I have been looking at this case of *Marbury* v. *Madison* to see if I can learn something from it, but I do not see the passage in question in Chief Justice Marshall's decision in which he speaks about the question.

SIR ROBERT FINLAY: I do not think it does occur there, my Lord; it must be in one of the other references. That is the only volume referred to in the note to Story which we have, and I think the Chief Justice's opinion must be under some other reference.

MR. NEWCOMBE: Apparently it is in the Life of Washington.

SIR ROBERT FINLAY: Yes, probably, we could not get the book.

THE LORD CHANCELLOR: As I gather, the principle was certainly acted upon in the United States.

MR. NEWCOMBE: I think it is very likely, for this reason that there is this distinction, and it a broad distinction, between our Constitution and theirs. The Federal Legislature of the United States has only those limited and express powers which are conferred upon it by the constitution, as a grant by the States which are regarded as having sovereign powers, and who subject to that grant use them, and the grant must be strictly construed as a grant and not as limiting legislative powers. Now it is the other way in the Dominion; all legislative powers are vested in Parliament, except those specially enumerated, which are with the Provinces, and where there is any conflict, the Dominion legislation prevails.

THE LORD CHANCELLOR: I agree to that, but what do you say about this—the ratio decidendi did not relate to any question of whether the powers which were delegated, were

from the centre, or came from the circumference—they turn upon the essential need of the judicial tribunal.

MR. NEWCOMBE: I agree—I think so, my Lord—they were to constitute one Supreme Court, that is all that they could do. Their grant is to be strictly construed. It was not necessary to that at all, and perhaps not usual, we might say, that there should be an advisory jurisdiction to the Executive vested in the tribunal—that is all that is involved in Chief Justice Marshall's statement, I submit. But it would be quite otherwise if he had found in the Constitution a provision that the federal legislature could make all laws for the peace, order and good government of the country, excepting in respect of those special matters which were committed to the States.

Now my learned friend referred to, but did not quote from Dr. Lushington's judgment in Re Schlumberger, 9 Moore Privy Council, page 12. That was the case under the Statute of 3 and 4 William IV., section 4. I only want to read a passage from it to show that Dr. Lushington considered the construction of section 4 which says: "It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid." He said: "Now these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion, though it did not come before the public, that they were not entitled to put any limitation upon these words, in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships upon the present occasion, namely, that they are bound to advise Her Majesty as to Her revoking the Order in Council and annulling any warrant which Her Majesty may have caused to be made for the making of any such Letters Patent, as prayed in the petition. Their Lordships are of opinion that there is enough in this reference not merely to justify, but absolutely to require them to proceed, because this is referred to them by an Order

in Council, and the Order in Council which refers it to them, falls within the purview of the provisions of the Statute, 3rd and 4th William IV., c. 41, sec. 4, which enacts and prescribes what shall be their duty, and in compliance with that duty they must entertain the prayer of this Petition, and hear it." I refer to that in order to show that it was not, although His Lordship suggested it may have been unnecessary to enact that Statute, and perhaps His Majesty would have had the power to call upon His Privy Councillors for advice independently, yet the Statute being passed—it was not in respect of the Constitutional, or common law right of His Majesty that Dr. Lushington was speaking, but on the construction of the Statute, which is in terms very much in correspondence with this one.

Now, my Lords, with regard to the generality and scope of the powers of Parliament under the general words of Section 91, in the case of *Hodge* v. *The Queen*, 9 Appeal Cases, pages 131 and 132, your Lordships speaking of the constitution of the local assemblies said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion"—"authority as plenary and as ample * * *as the Imperial Parliament * * * possessed and could bestow."

In 5 Appeal Cases, page 118, in the case of *Valin v. Langlois*, Lord Selbourne, referring to the distribution of powers, said:

"In the present case their Lordships find that the subject matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to

the Canadian Parliament, is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made; upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the provinces." Then in the case of the *Bank of Toronto v. Lambe*, 12 Appeal Cases, pages 587 and 588, Lord Hobhouse says: "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution." And in *Brophy* v. *The Attorney-General of Manitoba*, 1895, Appeal Cases, at page 222, Lord Herschell said: "It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North American Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament."

THE LORD CHANCELLOR: There is no doubt I suppose that if you can only draw the line of demarcation, which is not always easy, there is a distribution of all the powers between Provincial and Dominion?

MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: But at the same time when you look at those powers have you not to remember that there is also a duty set up by the British North America Act, and I suggest to you whether it might not be that the judicature

also has its limits by reason of its being a judicature in a constitution similar to that of the United Kingdom.

MR. NEWCOMBE: Not a limit I submit which excludes the capacity to exercise a power conferred by the Parliament. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the Provinces—all subjects of legislation; and in the case of *Reil* v. *The Queen*, reported in 10 Appeal Cases, page 675, the Lord Chancellor (Lord Halsbury) referring to these words "peace, order, and good government," said: "The words of the Statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to." Now broader language than that I submit could not be used. If, as is argued, it be incompatible to exercise this advisory jurisdiction, it certainly is not unusual. We have had ancient practice and we have had modern practice in this country for the summoning of the Judges, and the requirement that they shall answer these questions. We have a constitution based on that of the Mother Country. In pursuance of that, and, following that example, Parliament has legislated to authorize the executive to make these references; and therefore I submit whether the Court be acting as a Court or be acting as the nominee of Parliament for the purpose of doing this, they are doing it within their constitutional powers. The Court and its members of course, like other subjects, are bound by the Statutes; they are not immune from legislative authority; and it does seem to me that the Parliament of Canada, constituted under the British North America Act, with all the powers which it possesses, or has been supposed to possess, is really a pretty small affair if it cannot impose upon the Court the duty to answer questions respecting the distribution of power under the British North America Act. If that be compatible with the constitution of the Court, apparently there is no objection, and apparently that is the end of the case; if it be incompatible, it is the intention of Parliament that they should do it—the rest goes, but that remains.

THE LORD CHANCELLOR: You mean supposing the Court be, by Canadian Statute, authorized to be a Court of Appeal in the ordinary sense, and also authorized to discharge this function of answering questions, do you say that the second must prevail come what may; and if it is incompatible with the judicial function, then the judicial function is *ultra vires?*

MR. NEWCOMBE: Yes, if Parliament has manifested that intention and it does something else, I submit when it deliberately enacts this, it is so.

LORD ATKINSON: Could they enact that they shall not hear appeals, but shall execute their own decrees—that would be all in the administration of justice. Surely you cannot say that the Legislature, under this power of "peace, order, and good government," can practically tear up the sections of the British North America Act.

LORD SHAW: That would be a distinct repeal of Section 101, which was passed for the provision of, and the organization of a general Court of Appeal.

THE LORD CHANCELLOR: I can see your point, Mr. Newcombe, but might I suggest the difficulty which is in my mind? In England, admitting and supposing that a Court of Justice, according to the principles of the Constitution which you have adopted in Canada, namely the Act of 1867, does import certain things—I mean it does import that it shall act, and not be prohibited from acting judicially and so forth—supposing that to be so, do you say, according to the judicial position as prevailing in England, and as is constitutional in England, there is included the practice of, under some circumstances, answering questions which are asked, not in the litigation, and that being so the Canadian Parliament can properly legislate with regard to the form and mode of asking questions which it is constitutional, both in England and Canada, to ask. That I understand to be your argument?

MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: And there is a great deal of force no doubt, in it; but then comes this: in the Canadian Act it says the Judges must answer—it is put upon

them as an imperative duty. That may be lawful or not, but is not that going further than the English precedent?

MR. NEWCOMBE: It may be so, but that question does not arise. That question has not been debated. They can put the questions, and the Court has jurisdiction to entertain argument as to whether they should answer those questions or not. That is the position in which it comes before your Lordships, and we would be entitled to have the views of the Supreme Court of Canada upon the question as to whether they are bound to answer this question before it is considered by your Lordships on appeal.

THE LORD CHANCELLOR: That is why I want to probe the real position you are arguing for. Is your position this: we can ask any question and treat it as a breach of Statute whatever the consequences may be, and say: "You disobey the law, you Judges, if you do not answer? Or is your answer that we can put the questions, but if there is any reason why, as Judges, you think it is incompatible with the administration of Justice that you should answer them, then we acknowledge that you are not compelled to answer them?

MR. NEWCOMBE: That is the point of it; the Government is entitled to ask to be heard.

LORD ROBSON: The second point is not one you have considered, or rather is not one you maintain here. Are you contending that the Judges must answer, whether they like it or not, or that they have some discretion as to the character of the questions put to them, and may refuse to answer?

MR. NEWCOMBE: We do not deny the right to exercise a discretion, but we say we are entitled to be heard to show it is expedient to answer the questions.

THE LORD CHANCELLOR: I thought that was your position: "We say we have a right to ask the questions and we have a right to be heard before you as to whether you are bound to answer them. We acknowledge you are the authority to say whether you are entitled to answer them or not."

MR. NEWCOMBE: Yes, my Lord, and we are met at the outset by the statement that there is no power to put the questions.

LORD ATKINSON: Do you consider the Act means "and shall, if they think it right, answer the questions"—because your argument must come to that. Is it to be read, "shall if they think fit," or "if they think right?"

MR. NEWCOMBE: The Judges have always exercised the power to discriminate and point out reasons, if there be reasons, why a question cannot be conveniently answered.

LORD ATKINSON: Certainly, if that was the object of the Act it was most inaptly expressed, because it says, "shall answer."

THE LORD CHANCELLOR: Would you mind, Mr. Newcombe, considering a point which is to me very crucial and important, namely, what is the exact position you want to take up in argument with regard to that—whether it is that there is an obligation to ask, and a duty to answer in all circumstances, or whether it be that there is a right to ask, but a right also on the part of the Court to say "We think this interferes with the administration of justice."

MR. NEWCOMBE: I will consider that, my Lord.

(Adjourned to to-morrow, 11 o'clock.)

THIRD DAY, 14TH DECEMBER, 1911.

MR. NEWCOMBE: My Lords, with regard to the inquiry which Your Lordship, the Lord Chancellor, made as the Court was adjourning yesterday, as to Section 60, the direction of the Parliament is, that questions of the character defined here, may be referred by the Governor-in-Council to the Supreme Court for hearing and consideration, and that it shall be the duty of the Court to hear and consider the reference, and to answer each question so referred. Then, later on it says: "The opinion of the Court" shall be "advisory only"—that is that the Court are to advise upon these questions; but it never occurred to me, and it has never been suggested in any of these arguments or in this case—though the stage has not been reached—to argue that the Court, regardless of all considerations which might appeal to them to the contrary, were bound to answer categorically and in substance every one of those questions.

LORD MACNAGHTEN: But the Act says so.

MR. NEWCOMBE: In effect it says the Court shall advise upon them.

LORD MACNAGHTEN: "Shall . . . . answer each question."

MR. NEWCOMBE: It is a matter of construction—if your Lordship puts that construction upon it—.

LORD MACNAGHTEN: I am not putting any construction upon it—those are the words.

MR. NEWCOMBE: Yes, those are the words.

LORD MACNAGHTEN: How do you propose to qualify them?

MR. NEWCOMBE: Simply, having regard to the enactment that they shall advise—that it shall be an advisory opinion. They deal with each question and advise upon it, and is it not competent to them to advise that it is not expedient for them to answer this, and that question in substance, because it is coming up in a case to be argued to-morrow in which it will be decided *inter partes*. It seems to me with submission, my Lord, that that would be a perfectly proper answer for a Court to return to any question. That is my submission upon it, and that is, I

think, apparent, although the question was not discussed, because, as I say, we have not reached that stage in this reference yet. It is asserted, as far as the views of the Judges are stated, and the Judges whose opinions have been read, entertain the same view, because they either held that in reserve, or they said that in certain circumstances it would be open to them to report that it was not desirable to return answers in substance at the present time. My Lords, all that has been decided so far is—and I submit it is the only point before your Lordships—the point as to the power to make the reference and as to the jurisdiction of the Court to entertain it. No one doubts, I suppose, that the Imperial Parliament may pass such a Statute as this with regard to the Court of Appeal or any Court in this country; and if such a Statute were passed here, the Court would have the power—whether it would enlarge the power of the Court I do not know—because it seems the Judges have from ancient times been summoned to advise—but suppose it to confer an additional power the Court would still remain, and the Court of Appeal would be none the less a Court of Appeal in England, because this power was conferred upon them by the Parliament. The effect of Imperial Legislation would be precisely the same, I submit, as to the Court of Appeal, as the Canadian legislation is, with regard to the Supreme Court. In either case the Court still remains. It may be said that it is not a good Court, that the Judges are liable to be biassed by reason of having previously formed opinions; that it may be more difficult for a suitor in an imaginable case to get a Judgment reversed than it would otherwise be; but the Court remains and its power remains, and therefore there is still a Court of Appeal. The Court of Appeal for Canada is not abolished or affected by this power which the Parliament of Canada casts upon it for the peace, order and good government of the country in respect of matters unquestionably not committed to the local legislatures, and the Parliament has, within the ambit of its powers, authority as plenary as the Imperial Parliament, and it confers these powers with the express declaration that they are not to affect the administration of justice in the Provinces, because it says the opinion is to be advisory only.

It does not bind. It has been interpreted and reported on all through by the Judges, that it does not bind any of the parties, and not even the Court. Therefore, it seems to me that my learned friend's argument really comes to nothing beyond this, that the legislation is unwise and inexpedient.

THE LORD CHANCELLOR: With that we have nothing to do.

MR. NEWCOMBE: No, my Lord, because it has been said in the Fisheries Case by Lord Herschell, reported in Appeal Cases, 1898, at p. 713, "that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The Supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected." And in another case—the case of the Union Colliery, Lord Watson said, that the exercise of the power need not be discreet. The Court has nothing to do with that.

THE LORD CHANCELLOR: I do not think you need labour that.

MR. NEWCOMBE: The constitution of the Court is for the Parliament in the broadest terms, and if the Parliament enacted, for instance, that the Judges should hold office during pleasure, of course, it would not be a very satisfactory court, but I take it it would be within the power of the Parliament to do so, and to constitute the Supreme Court in that way.

THE LORD CHANCELLOR: But that would be contrary to the Act, would it not?

MR. NEWCOMBE: That might raise a question.

THE LORD CHANCELLOR: It would be the reason of it. If it was *ultra vires* it would be because it was upsetting the constitution in one of the Articles.

MR. NEWCOMBE: Yes, in one of the Articles. This is certainly a side question. "The Judges of the Superior Courts shall hold office during good behaviour," is supposed to refer to the Superior Provincial Courts in section 96 and not to qualify the powers the Parliament has under Section

101, to constitute a Supreme Court. It merely illustrates this—that although your Lordships may think it makes a very poor Supreme Court, and that it is a bad constitution, and very unsatisfactory, still it is a Court, and such a Court as Parliament has in its judgment seen fit to set up. If, for instance, it were required here, that the Judges of the Supreme Court should be members of the King's Privy Council for Canada, that would put them, I suppose, in the same position as to the Governor-General that your Lordships are in with regard to the King, and advice might be sought independently of the Statute.

LORD SHAW: I cannot help feeling that all these illustrations, each and all of them, may be accompanied with most delicate constitutional principles. I have the feeling that, by way of illustration, points may be raised of great delicacy, and unless one is forced to consider them, one would rather not.

THE LORD CHANCELLOR: It seems to me that the point against you comes ultimately to this—whether under this law, the British North America Act, in speaking of Judicature and Courts and Judges, takes with it a constitutional rule that the Judges shall not be consulted otherwise than openly. It seems to me that that is what it ultimately comes to.

MR. NEWCOMBE: I think that is so, my Lord, but how can that be involved, having regard to the history of the Courts and the action of the Legislature in this country? May I refer, before I close, to two other Statutes?

LORD SHAW: Before doing that, upon the point you were on, do I gather you agree that any answers given would be really of no account judicially?

MR. NEWCOMBE: Yes, my Lord.

LORD SHAW: What I am interested to know from you, on behalf of the Attorney-General for the Dominion, is if that were so, why were all these provinces through their Attorneys-General convened to this discussion. if it was a matter that was to have no judicial effect in their provinces at all? You see on page 7, each of them by the Deputy Minister of Justice was convened, and my difficulty is, if it was to be as it were blank cartridge with regard to all these provinces, why set everybody in warlike array?

MR. NEWCOMBE: Of course the rules require the Attorneys-General to be notified.

LORD SHAW: Do they? that may be the answer.

MR. NEWCOMBE: It certainly has always been the practice, but, notwithstanding that, it only goes to this, I submit, that the bringing in of the parties and the arguing and discussing of the question leads to the better opportunity to form an opinion, but not to the quality or the binding effect of the opinion.

LORD ATKINSON: It has no judicial effect, but has it not a prejudicial effect?

MR. NEWCOMBE: That may be.

LORD ATKINSON: As provinces, have not they a right to complain of the Court which is their Supreme Court, being put to a task which may affect their interest, altogether foreign to the ordinary work of a Judge?

MR. NEWCOMBE: They may complain, I submit, as Lord Herschell said, to those by whom the legislature is elected, but they have no right to complain to the Court because the Court is there. The same consideration might arise in this way—the Supreme Court is made a Court, also for the better administration of the laws of Canada, independently of matters of appeal altogether; questions come up, original or otherwise, independently of appeal, and the Judges come to opinions. Could the provinces have any constitutional objection to that? Then, on the same lines I was going to refer to chapter 104 of the Revised Statutes of 1906, which is the Public and Departmental Enquiries Act. This Statute authorizes the Governor-in-Council, whenever he deems it expedient, to cause enquiry to be made into any matter connected with or concerning the good government of Canada or the conduct of public business, to issue a commission of enquiry, and the commissioners have power to summon witnesses, take evidence and report, with their recommendations. That power is not infrequently used by appointing the Judges of the Supreme Court and Judges of the Exchequer Court as Commissioners.

THE LORD CHANCELLOR: Here, I see they take power to examine witnesses on oath by Statute; you have to get

power in England to examine witnesses on oath on any Royal Commission, and they appoint Judges on them.

MR. NEWCOMBE: Yes. Quite recently the Judge of the Exchequer Court held a very prolonged enquiry into one of the Public Departments and reported with regard to official misconduct and various matters. Actions might well arise out of that, and they would come to the Courts for trial, and it might have been a very undesirable thing to appoint any Judge as a Commissioner; but I humbly submit he could not be challenged as disqualified to hear the case. Suppose the learned Chief Justice maintaining the view which he does, that independently of Statute the Governor has the right to summon his Judges to give opinions, and any one were summoned and gave his opinion, and a suitor came before him the next day with an appeal which involved the very point, is it possible he could object to the Chief Justice sitting on the argument, because he had tendered this advice; and if he could not object, and if the judge be not disqualified, then the fact that he does it under the direction of Parliament does not any the more disqualify him.

The other Statute is the Judges Act, 1906, chapter 138, section 28, of the Revised Statutes of Canada. It provides for the removal of County Court Judges, and it says in subsection 4, that the Governor-in-Council may, for the purpose of making enquiry into circumstances of misbehaviour, inability or incapacity of such Judge, issue a Commission to one or more of the Judges of the Supreme Court of Canada or any one or more of the Judges of the superior Courts and they may report for the information of the Crown. Nothing happens—there is no adjudication—it is merely for information; but the same prejudice might result.

Now, my Lords, I have nothing further to say, except that there is a long line of decisions here, advisory only, still they have been thought to have been pronounced in the execution of the power under the Statute. The constitution of the country in many respects stands upon these equally with the statutory words which they expound. New legislation has been passed; tremendous changes were made in the local and provincial legislation having regard

to the decision of your Lordships in the Fisheries Case; as another illustration, the Manitoba School Case, of course, was attended with very great changes and political results; and here the other day your Lordships entertained an appeal upon questions submitted on the construction of an agreement involving a very large amount of money. All the questions were considered and every question answered, reversing in all points the Judgment of the Supreme Court.

THE LORD CHANCELLOR: There is a string of cases.

MR. NEWCOMBE: Yes, my Lord, and I submit that it would be a very serious thing if, at this stage in the development of the country and constitution, we should have it declared that all these proceedings have been taken in error.

MR. ATWATER: My Lords, I do not know that I can add anything usefully to what my learned friend Mr. Newcombe has said in connection with this subject, and I will not detain your Lordships longer than may be necessary, but as Mr. Newcombe has concluded by remarking, the question which has been raised on this appeal for the first time is one of very great importance, not only to the Dominion, but to the Provinces. If your Lordships, as a body, have assumed that powers had not, and never were conferred upon the Provinces by the British North America Act at all events it is a custom which has been in force ever since, practically this Act came into operation; it has been in force for 35 years without question or suggestion of question, and as my learned friend Mr. Newcombe said, it has been the whole basis of your Lordships' decisi and the Supreme Courts' decisions on these very referel , and it has been the basis to a very large extent of our constitution, and what has grown out of these decisions. But referring to the question of the Manitoba School Case, decided by the Supreme Court, to the effect that the Government of Canada had nothing to do with questions of education in the Province of Manitoba, it came to your Lordships, and your Lordships decided, contrary to the decision of the Supreme Court, that the Dominion Government had power to legislate. Acting upon your Lordships' decision upon that very reference, the Dominion of Canada

took action, and legislated, with the result that the whole of the political features of the country, and the history of the country for the last fifteen years have been changed. In all this line of cases, the assumption has been at all events, that the Governor-General-in-Council has the power to submit these questions to his Courts—to the only Court he could refer them to—that is the Supreme Court of Canada. And a similar power of reference has been exercised, rightly, or wrongly, ever since Confederation by the different Lieutenant-Governors of the Provinces. If the power did not exist in a Governor-General-in-Council to refer to His Majesty's Judges for Canada the questions for decision, or for advice, then equally, the power did not exist for any of the Lieutenant-Governors to refer them. Yet, they seem to have assumed that they had that power under the general powers contained in subsection 14, section 92, which your Lordships have been so frequently referred to—that is, that the Provinces have the right to pass laws regarding "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts." That is the only legislation which your Lordships will find in the British North America Act which could confer such a power on the Lieutenant-Governors of the Provinces. Yet under the words "constitution of the Courts" I presume, or under the inherent right, which the Lieutenant-Governors have considered they have to refer questions to the Courts of the Provinces, they have constantly referred questions of these Courts, and that has been going on for a great number of years, as far as the Province of Quebec, with which I am most familiar, is concerned. In very recent years the Lieutenant-Governor-in-Council has referred some of the most important questions as to his authority, and the authority of the Legislature of the Province, to the Judges to legislate on, as to certain questions, whether it was *intra vires* or not to do so, and the Court has assumed, and the Lieutenant-Governor has acted accordingly. Recently a question came up which involved the rights of the Legislature of Quebec to pass an Act authorizing an investigation into certain municipal affairs, and so on, and one question which was in issue was the administration of the affairs

of the City of Montreal, and on the decision of the Court of Appeal that the Legislature had power, they took it, and an enquiry followed which had the most far-reaching results.

LORD ATKINSON: I do not think our attention was called to any cases in which this point had been raised and debated.

MR. ATWATER: No, my Lord, I agree that the question never may have been challenged, or the power may have been challenged of the Government of the Dominion, or of the Legislatures to do so, but I very respectfully submit that some custom must prevail, particularly as any constitutional matters must be regarded as having the force of law, and if we are not bound by the strict limits of our charter, if I may call it so, or of our constitution, and of the British North America Act—if we are fettered by that, and if we cannot find any authority in it on the part of the Governor, or of any Lieutenant-Governor, to refer matters to his Courts, of course the question must resolve itself, as my friend tries to make out, into a pure question of the interpretation of the Statute. But I think there is a broader principle, if I may submit it to your Lordships, than that, I respectfully submit that the constitution of Canada, is in fact, and was intended to be similar in principle, to that of the United Kingdom.

LORD ATKINSON: Similar to what it was in the year 1867, or similar to what it was in the time of the Tudors and the Stuarts?

MR. ATWATER: I should hardly think it was the intention of the British Parliament in 1867 to subject us to a constitution so old as that. Would it have been impossible for a sovereign through the House of Lords, or by his constitutional advisers, to have referred a question to his judges? If it were a question of the advisers of His Majesty, wishing the advice of his judges, would it not be still constitutional?—would it not be under your system, constitutional to do so? I am not arguing, nor do I think it necessary for me to argue, the question of whether that would be advisable, or whether such a course might not have the effect, as my friend puts it so strongly, of influencing or prejudicing the opinions of any judge, if he subse-

quently was required to sit upon the matter in a case *inter partes*. But, my Lords, that is not the question as it seems to me. The question is whether that would be a constitutional thing to do or not. Now, if it were a constitutional thing for the sovereign, or his advisers, or the House of Lords advising the sovereign, to ask for the opinion of His Majesty's judges, could they not do so?

THE LORD CHANCELLOR: I think the question has to be put a little differently—whether it is an unconstitutional thing for Parliament to pass an Act enabling it to be done. Of course it may be that it has not been done of late years in England, and it has not, no doubt—I mean by the sovereign—but at the same time, there is no case that I remember which has been called to our attention, which says that it cannot be done. There are previous cases in which it has been done, and I think 1760 or 1761 was the last occasion. If that is so, does the mere fact that the "Judicature" has been set up by the British North America Act, carry with it a negation of the right of Parliament to impose duties, other than judicial duties, on the judges. That seems to me to be the way in which the question will have to be answered.

MR. ATWATER: If I may answer that, my Lord, it seems to me, that, assuming that we have the principles of the British constitution, and that there would be an inherent right on the part of the Governor-in-Council, which would exist, we will say in His Majesty—and suppose there is that same right conferred on the Governor of Canada and his advisers, then it may come to be a question of what judges he might refer such questions to, and the question then would be whether the judges, the Statutory Court which was created under the British North America Act or their functions would be limited, so as to exclude the possibility of such a reference being made to them. Now, in that respect I submit they are not precluded from considering such a question, because if your Lordships will refer to the language of section 101 of the British North America Act, it says that: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for

the establishment of any additional Courts for the better administration of the laws of Canada." Now, I submit that nothing could be more fundamental on the law of Canada, and the basic law of its constitution than the British North America Act itself, and this is the only Canadian Court which has jurisdiction to be created by the British North America Act. All the other Courts are Provincial Courts. If the Governor-in-Council was to have the right to submit to any judges any questions of importance, or any constitutional questions on the interpretation of the Act, he clearly could not submit them to the provincial courts; he must submit them only to his own Court—that is to the Canadian Court; and if your Lordships will look at the third section of the Supreme Court Act of Canada, it constitutes the Supreme Court, not only an Appellate Court, but it says, "The Court of common law and equity in and for Canada, now existing." This Act came into force in the year 1875. It says that the common law and equity Court, "now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general Court of Appeal for Canada, and as an additional Court for the better administration of the laws of Canada, and shall continue to be a Court of Record." Now, it is quite true that that Court has judicial functions, but my submission is that that does not exclude the judges of it from rendering advice to the Governor-in-Council. If there is an inherent right on the part of the sovereign in Canada, as represented by the Governor-General, to consult his judges, to refer to his judges, this is the only Court he could come to. So that if my submission is correct, it comes to this—that it is immaterial whether section 60 of the Supreme Court Act were enacted or not—section 60 is merely an assumption by Parliament to impose a statutory duty on the Supreme Court. But even if that section were not in the Supreme Court Act, my submission would be that the Governor-in-Council could refer constitutional questions upon which he wished the advice of the judges, to the judges of the only Court in Canada to which he could refer such questions. He could not manifestly submit them to any provincial Court. They are all judges in a sense, and all act as His Majesty's judges, but he could not refer

a question of grave constitutional importance for opinion to the judges of Saskatchewan or Quebec; he must refer, if he is going to have that right, to the judges of the only Canadian Court. Nor, my Lords, does that Court, and the imposition of these powers on such Court, or the exercise of such rights on the part of the Government, take away the judicial character of the Court. I think one of your Lordships remarked that the provinces were entitled to a Court of Appeal. That, I submit, goes further than the Act says. All that the Act says in section 101 is, that "The Parliament of Canada may * * * from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada." It was optional with Parliament whether they did so or not. For eight years after the British North America Act came into force in 1867, the Parliament of Canada did not avail itself of that Act, and there were great doubts, and great discussion at the time whether such a Court might not seriously affect the interests of some of His Majesty's subjects.

LORD ROBSON: I suppose between 1867 and 1875, a Province, if they had any conflict as to the jurisdiction, would have only this body?

MR. ATWATER: Yes.

LORD ROBSON: Then, the Dominion of Canada placed in front of this Court the Supreme Court, which is to deal with all provincial questions?

MR. ATWATER: No, not necessarily, my Lord.

LORD ROBSON: So far as they are in conflict with the Dominion—as between the Dominion and the Provinces, the Supreme Court is to decide, so that the Supreme Court is to be in a sort of arbitral position, if I may use the word, between the Dominion and the Provinces. Under these circumstances, have not the Provinces a right to insist that the Court, once established, and placed between them and the King, shall preserve its functions unimpaired and exercise them, without any kind of prejudice towards the Provinces?

MR. ATWATER: I do not know whether I answer your Lordship's question by making this remark: there is no obligation on the part of a suitor in Canada, whether the

matter be between the Dominion [illegible] of the Provinces or between a private individual a[illegible] the Dominion, to go to the Court; he can come here. For instance, if a concrete question arose as to their jurisdiction, as between the Dominion and one of the Provinces of Canada, the matter would have to commence in the Court of one of the Provinces, and from there it would travel to the Court of Appeal of that Province. Then the losing party could appeal directly to your Lordships. In very many cases, your Lordships will remember, which have come under your Lordships' consideration there has been no reference or appeal made to the Supreme Court of Canada at all—that Court has been ignored, and the parties have come here directly, so that there is no right conferred on the Provinces to have such a Court established. That Supreme Court in regard to Canada cannot in any way be assimilated to the position of the Supreme Court in the United States. There there is a constitutional right on the part of the different States to have a Supreme Court, and it was one of the essential features of the Act by which the original States of the Union came together, when they agreed to part with a certain amount of their legislative powers, each to a central authority, that they stipulated as part of the bond that an Appellate Court should be established, and that as part of the constitution [illegible] established, and it was in connection with the character of that Court that I submit Chief Justice Marshall was induced to give the ruling that he did—that they had nothing but judicial functions. If that argument was applicable to the Supreme Court of Canada, I could quite understand your Lordships' proposition, that it would be to a certain extent depriving the provinces of the advantage of not having an Appellate Court which was provided for by the constitution; but it is not provided for by the constitution; all that the constitution says under this head, in giving these powers, is that it "may . . . from time to time." It may enlarge from time to time; it may absolutely derogate if it was found to be necessary in its working, and, as I said, at the time the Supreme Court Act was enacted, there were serious doubts and serious objections as to whether the effect of having such a Supreme Court for all Canada might not

operate in injustice to the inhabitants and the subjects of the province of Quebec. Therefore, one part of the Supreme Court Act provides that at least two of the Judges of the Supreme Court shall always be taken from the Bar of the Province of Quebec in order to see that the rights of His Majesty's subjects in Quebec, which to a certain extent were guaranteed them by the Treaty of Cession, were protected by a proper representation from the Bar of that Province on the Bench. There is nothing, therefore, in the British North America Act which is in any way a sacrament, that between the provinces, or as a bond to the provinces they must have an Appellate Supreme Court whose functions shall be exclusively confined to those of judicial functions only. It is created as a Court, not only of appellate jurisdiction, but as a Court for the better administration of the laws of Canada as well, and, I submit, for the very grave and serious questions which may come up from time to time for the consideration of his Excellency in Council. Your Lordships must remember that His Excellency, the Governor-General of Canada in Council, has all the power quoad the Provinces that His Majesty has quoad Canada. He has powers of veto with regard to provincial legislation under section 90, of the British North America Act, and your Lordships will find under this head, applicable to the original four provinces, which constituted the Dominion; "The following provisions of this Act, respecting the Parliament of Canada, namely,—the provisions relating to Appropriation and Tax Bills, the recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces, as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen, and for a Secretary of State, of one year for two years, and of the Province for Canada." Your Lordships will also find that under section 57 of the British North America Act a Bill may be reserved for the signification of the Queen's pleasure and may be disallowed. So that the

power of veto of provincial legislation rests on His Excellency in Council. The powers of the Crown are vested by the British North America Act quoad the rest of Canada in the Governor-General.

Now, my Lords, I submit there may be questions of the very gravest and most serious importance upon which the Governor-General may wish the advice of His Judges, and those questions he has the right, I respectfully submit, to refer to the Courts, and, as I said before, the only Court to which he can refer them is the Supreme Court of Canada. He cannot refer them to a provincial Court obviously. Therefore, if a question comes up as to whether provincial legislation, which is being passed is *ultra vires* of the province or not, or whether as to their own legislation it is *intra vires* of Parliament to pass a certain measure, surely it is perfectly proper and wise in the administration of the laws of Canada, which is the administration of the British North America Act (and the question as to *intra vires* of an Act is surely a question of the fundamental basic constitutional Act of Canada) to test the question. It is a question, surely, which affects very nearly the proper administration of the laws of the country, and it is those questions which I submit the Governor-General should have a right to put before his responsible Judges.

THE LORD CHANCELLOR: It really comes to this, that you say, assuming administration alone, meant judicial administration, that the consulting of the Judges on a matter of public importance, apart from the legal aspect, may not be necessarily *inter partes*.

MR. ATWATER: I say it is not necessarily *inter partes*, particularly on constitutional questions. The argument has been used very ably, that it is a disadvantage to have a Judge expressing himself upon a question which may hereafter come before him judicially, and that it would create a prejudice in his mind and would disenable him from giving an impartial judgment later on, if an actual conflict arises. That may be so, but at the same time the Act distinctly says that their decisions are not to bind them, and their giving opinions of that nature would be very much less prejudicial, I submit, than if they were restrained altogether from expressing any opinion. In

other words, it seems to be more advantageous that questions of constitutional importance and so on should be settled in the abstract, and at once by references of this sort than to wait until the concrete question arises. The mischief, if mischief there is to be, that would follow the putting into force of an unconstitutional Act by a province and the allowing of interests to be formed under it, would be far greater than having a question decided once and for all by the highest Tribunal in Canada, who would say whether it was unconstitutional or not.

LORD SHAW: I see the force of that, but, of course, the constitutional point is a little broader than that—it is whether the executive is entitled to have the judiciary as its standing Counsel.

MR. ATWATER: I think, my Lord, one must leave a certain amount to the discretion of the Governor and his advisers in the way of putting all questions. I hardly think it could be assumed that he would put before the Court all questions, as your Lordship puts it, and constitute them as standing Counsel.

LORD ROBSON: This, you know, Mr. Atwater, is a tremendously strong case.

MR. ATWATER: I admit that, my Lord.

LORD SHAW: I have tried to count the questions, but I am afraid I have quite lost count of them.

MR. ATWATER: I am not attempting to defend them at all, and I do not think I should trouble your Lordships by discussing the merits of these particular questions.

LORD ROBSON: If you are right, you know, these questions are not only admissible, but many more would be admissible of a worse character without any unreasonableness on the part of the Governor-General or his advisers, but simply regarding it as a constitutional right.

LORD ATKINSON: You must defend the Act, and the Act does not define constitutional questions, but it says, any "questions of law or fact"—and that is the Act you have to defend.

MR. ATWATER: Yes, my Lord, but I am using the constitutional question argument in this way—if it is the right of the Governor to put to his Judges questions at all, naturally those which he would put would probably be

constitutional questions, but if you take away all authority from the Court——

LORD ATKINSON: You do not defend this Act by proving an analogy to the British constitution, and that he has power to put some important questions of law. You must defend the Act by showing that he has power to put any important question of law or fact, because those are the words of the Act.

MR. ATWATER: My submission is that even under section 60, by which Parliament imposes a certain duty on the Supreme Court, it is part of its constitution. Your Lordships will notice that the wording of section 101, which provides for the constitution of a general Court for Canada, is identical in language with subsection 14 of section 92, which provides for the establishment of provincial Courts. Subsection 14 says, that the provinces have the right of the administration of justice in the provinces, "including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction," and then section 101 says, that "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada." There you have the same words, and taking it under the word "Constitution" the Legislatures have assumed to cast this burden upon the Provincial Courts.

LORD ATKINSON: I thought this was defended on the ground that they would have power to establish an additional Court for this thing, and if they had power to establish an additional Court there is no objection to throwing the duty they would throw on this additional Court, if created, on to the Court of Appeal. That is certainly the argument in the Judgments, because it was said there they could throw it on an additional Court, and if they could throw it on an additional Court they could throw it on an existing Court.

MR. ATWATER: That was the language of the Judgment of the Chief Justice. He took that ground, if I might refer your Lordship to it—

LORD ATKINSON: It is in my mind, but the thing that is pressing upon me is this—you might argue that the Governor-General had power to consult the Judges on some points, but that will not hold the statute; you must say he has power to consult them on any question which may be an important question of law or fact.

MR. ATWATER: My submission, my Lord, is that even without section 60, the right would exist to refer questions to the Court. As to what those questions might be—whether they were constitutional questions or whether they were important questions—would be perhaps for the Court to decide.

LORD ATKINSON: Do you admit that the Court would have power to refuse to answer because they did not admit it to be an important question?

MR. ATWATER: It is declared to be important if it is referred.

THE LORD CHANCELLOR: My difficulty is not in seeing that there is power to ask particular questions or power to make and authorize them to be asked, but my difficulty is to see where, consistently with the Statute, you leave to the Judges the right to say: "We do not decline the duty; we recognize the duty, but we think in this particular question, on this particular point of fact or law, it would be inconsistent with the administration of justice to answer it." If you are to clog the power with a right of that kind on the part of the Judges, one would understand it, but I do not see under the Statute that there is any loop-hole left to the Judges to refuse. I do not say that it is so, but it is not very apparent.

MR. ATWATER: I must admit, my Lord, that the Statute so far as it goes—section 60, and its subsections—of the Supreme Court compels an answer—it imposes a duty on the Judges of answering any such questions; but would that be anything more than this; supposing Parliament assumed that right, would they be doing anything more than imposing something upon a Court of their own creation which would be part of their constitution?

THE LORD CHANCELLOR: What strikes me is, that it is not so much in the construction, but it is laid down that this is a Parliament of plenary powers for the peace, order

and good government, and no Court of Justice is to assume that they are going to act unreasonably or to say that their power is limited in law, because of any apprehension that they may use it improperly. We are bound to assume as regards the Parliament of Canada the same thing as we should assume with regard to the Parliament of Great Britain, that it is going to do what is right, and is not going to abuse any power in it. I am not expressing any final opinion at all, but it seems to me that that is the real answer to the point.

MR. ATWATER: Of course, if the Parliament of Canada has the right to pass legislation, imposing these duties on the Court, I submit that they have the right to require an answer as well.

THE LORD CHANCELLOR: The Statute undoubtedly does, because it uses the word "shall."

MR. ATWATER: Undoubtedly, and I think the Statute contemplates that the answer shall be not merely an answer, saying they will not consider but an answer on the merits.

LORD ATKINSON: It seems to me the Governor would be the sole Judge of the question which should be put, and if he thinks it is important he will put it.

LORD MACNAGHTEN: And the Court has no power—it has to answer any questions submitted to it.

MR. ATWATER: There is no doubt the intention of the Act was to declare that any question that the Governor-in-Council chose to submit to the Court was to be a question which they were bound to consider—that, I think, must be conceded.

LORD ROBSON: Practically any question?

MR. ATWATER: Yes.

THE LORD CHANCELLOR: Then comes in the proposition that we are to assume that what the Governor of Canada will do is right, and if the question be such as in the opinion of the Court upon a reference ought not to be answered, we are not to assume that the Governor of Canada will insist upon their answering it.

MR. ATWATER: Exactly. It seems to me that this language of Section 60, by which it declares that any question shall be an important question of fact, assumes

a sort of definitive statement as to what are questions of law and fact to try as distinguished from what are questions of law and fact to leave open to the Court, and to leave it open in each case to state which it is.

LORD ATKINSON: I cannot get my mind away from this, that the question you have to attack here is that the Parliament of Canada had a right to pass this Act, whether in particular the Governor-General might or might not insist upon the Judges answering a question which they might deem it inexpedient to answer, is not really the question; the question is, had the Parliament power to pass an Act which enjoins upon them a duty to answer.

MR. ATWATER: My submission with regard to that is, that if it is part of the constitution of the Court—if it is both a Court of Appeal and an additional Court for the administration of justice.

LORD ATKINSON: But does it not come back to the question, whether this Act is practically forbidden by Section 101?

MR. ATWATER: It might.

THE LORD CHANCELLOR: It really comes to that.

MR. ATWATER: But. my Lord, it might also come to the question of whether these questions referred by the Governor might not be questions on matters connected with the peace, order and good government of Canada, and the proper administration of the laws of Canada. Taking a question which his Excellency in Council considers of sufficient importance to get the advice of his Judges upon, surely that is a matter very much connected with administration.

THE LORD CHANCELLOR: Really that is what it comes to, and that is a reason for saying it is not prohibited by Section 101.

MR. ATWATER: Quite so.

THE LORD CHANCELLOR: But the point is whether it is prohibited not by the Act but by the effect of section 101.

LORD ATKINSON: Of course, I do not suggest, if the Governor-General had these powers, he would abuse them.

MR. ATWATER: I should hardly suppose they would be abused by any Governor, but I submit not only does this come within the powers conferred by section 101, but that

it is practically contemplated by it—that Canada may establish any Court which in its opinion may be for the better administration of its laws, and that it may impose such duties upon it as part of its constitution as it might see fit, just as they gave to the local legislatures the powers to regulate the constitution of the local Courts or provincial courts.

LORD ROBSON: Let me put the question in this way. Does it not come to this—whether in enacting section 101, which gave the Dominion Parliament power to create a Court of Appeal that might decide questions, the Imperial Parliament intended to give it not only a power to decide questions of law but to deal with purely provincial questions at the instance of the Governor-General, which is a more extensive interference with subsection 14, section 92 than is contemplated, I think, by section 101. Parliament might very well say: "We will let the Dominion of Canada constitute a Court of Law, a Court of Appeal, and to that extent we qualify the provincial autonomy." But has Parliament, in saying that, qualified provincial autonomy to the further extent of enabling the Governor-General to put questions directly to the Court directly affecting the administration of the Dominion?

MR. ATWATER: I would not say so, and besides that, if your Lordship will allow me to remark, not only an Imperial Parliament gave the right to Canada to constitute a Court of Appeal but it may be done away with—it is a permissive right. There is no constitutional right on the part of the province to establish a Court of Appeal, and besides that the Supreme Court or any Court of Appeal has appellate jurisdiction upon questions between parties as well as provinces. Then this Court is constituted, and Parliament has given the right not only to create a Court of Appeal but any additional Courts which may be required, and this Supreme Court is constituted not only a Court of Appeal but an additional Court, so that it has both functions.

LORD ROBSON: Does one function interfere with the other in such a way as to make an undue call or affect the rights of the provinces when they come to the provincial Courts for decision?

MR. ATWATER: I submit that provincial autonomy would not be affected by it, because on these questions which might come up, asking that the Supreme Court might give a decision on a constitutional question between one of the provinces and the Dominion on a concrete case which the Province itself might raise, if anybody considered himself badly treated, or ignored by the Supreme Court entirely they could come directly to your Lordships' Committee for a decision. So that the Supreme Court is not a decisive and conclusive tribunal, which absolutely disposes, as a finality, of all the rights and questions which may come up between the Provinces and the Dominion. If your Lordships will allow me to refer for a moment again to the case of *Valin* v. *Langlois*, which has been so frequently referred to here, reported in 5 Appeal Cases,—it deals with this question of an additional Court, or the functions of the Supreme Court as an additional Court. Your Lordships will remember that the Chief Justice in his Judgment on page 18, referred to this case in these terms: "I presume it will not be suggested that the Imperial Parliament could not constitutionally confer upon the Canadian Legislature the power to establish a court competent to deal with such references as we have now before us; and, if not, how could more apt words be found to express their intention to confer that power? Could better words be used to convey the widest discretion of legislation with respect to the all embracing subject 'the better administration of the laws of Canada?'" That is what I was calling your Lordships' attention to: "It cannot now be doubted either in view of the decision of the Privy Council in *Valin* v. *Langlois*, (5 App. Cas. 115), that if the Parliament of Canada might have created new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new jurisdiction to this court. 'The distinction between creating a new court and conferring a new jurisdiction upon an existing court is but a verbal and non-substantial distinction.'" I think your Lordships put the question as to whether that was a quotation from your Lordships' decision in the case of *Valin* v. *Langlois*. Now I refer to the judgment in *Valin* v. *Langlois*, and to the language of your

Lordships at pages 120 and 121 of the report. On page 120, Lord Selborne in giving judgment, says:

"There is therefore nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial Courts, or to give them new powers, as to matters which did not come within the classes of subject assigned exclusively to the Legislatures of the Provinces. But in addition to that, it appears that by the Act of 1873, which, even by those judges who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done."

Then on page 121 his Lordship says:

"Therefore their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act as to its principle, and those provisions of the former Act which all the judges of all the Courts in Canada, apparently without difficulty, held to be lawful and constitutional." So that, my Lords, I submit the Chief Justice was right when he said that there was an unsubstantial distinction between the creation of the new Court, and the imposing upon the old Court of new powers. If, therefore, instead of creating a new Court, which I think could be done, and I think must be conceded could be done, to determine such questions, they imposed on the Supreme Court, as they did in the language of section 3 of the Supreme Court Act, the duties of a new court, there is no substantial distinction to be taken in regard to it.

My Lords, I do not think there is anything more I can usefully submit to your Lordships, except as I said before the importance and far reaching nature of your Lordships' decision in this case. As to the arguments upon this question which are put to your Lordships, or put to the Courts rather, I again submit that your Lordships have nothing to do with them. You have nothing to do with the argument that these questions are creating alarm and apprehension, and trouble. I submit that that is not a consideration which should enter into your Lordships' judgment in the matter. I personally am not aware of any such disturb-

ance having been created, and it seems to me that if there is doubt as to some of the powers of some of the Legislatures or of Parliament that is suggested by the questions put, it would be far better to have them decided at once, than to have them left as an open and constantly recurring matter. That was the course that was adopted in the questions which have come before your Lordships before. In the Manitoba School Case, in the Fisheries Case, and in the Licensing Case, there were these questions which involved the most important considerations as to the respective authority of the Legislatures. They have been decided, and they form really the basis of a great deal of our constitution.

SIR ROBERT FINLAY: The last observation which my learned friend made was that it was a great advantage to have questions which might arise decided at once, and decided with expedition. The opinions expressed are not binding, but they are such that the answers to them are such as to cause very grave embarrassment, as I submit, to the proper business of the Court. Now, Lord Shaw, put to my friend Mr. Newcombe the question why it was that the Attorney-General of all the Provinces were cited, and my friend Mr. Newcombe replied that that was because the rules require it. But the question is only moved a stage further back. Why do the rules require it? It is because this case is only one illustration of the principle that pervades all these references—that matters are raised in which the central government, the Dominion Government and the provincial government are really opposing parties, or may be opposing parties, and therefore the rules most properly provide that that should be done which was done in the present case. The fact that the rules so provide really adds cogency to the argument that arises on the fact that the various provinces have been cited. It must have been left out of sight in dealing with this matter that this question arises only finally when the Governor-General, really the Dominion Government, may be on the one side and the provinces or some of them on the other side. I submit to your Lordships that the only mode of determining questions of that kind is by a test action in which the matter is raised in a concrete form and determined

judicially. It cannot be decided in any other way. To allow the Dominion Government, which may be so to speak, one party to the dispute, to put a series of questions to the Supreme Court of Appeal of Canada, would really have a tendency to lower the confidence felt in that Court of Appeal, and in a vast number of cases it might deprive Canada of recourse to their own Supreme Court of Appeal. Time after time applications would be made for leave to come direct to your Lordships' Board on the ground that the judges of the Supreme Court of Canada had already expressed their opinion in answer to such questions, and therefore it would be mere useless expense to go to the Supreme Court of Canada. I submit to your Lordships that that is a very grave consideration, and that if such a power exists it might be exercised at the pleasure of the Dominion Government—any questions may be put, and it might, and probably would result in depriving Canada of its own Court of Appeal as an available tribunal for entertaining appeals from the provincial courts.

LORD MACNAGHTEN: If section 60 had been confined to A, B and C, would you have still said it would be unconstitutional?

SIR ROBERT FINLAY: I should, my Lord, and I should respectfully submit it is unconstitutional for this reason—that each of the questions under A, under B, or under C, may arise in an actual suit—in litigation. They affect the provinces of the Dominion Government, and of the provincial governments; and I put it to your Lordships that no power has been conferred upon the Dominion Government to send to the judges for their views upon any questions, including of course questions that might arise under A, B and C.

LORD SHAW: I cannot charge my memory, but I rather think that in the development of the constitution of the United States, all the dicta of Chief Justice Marshall were pronounced with regard to limited cases—I think that is so.

SIR ROBERT FINLAY: Undoubtedly the Supreme Court of the United States has no power whatever to declare a Statute unconstitutional unless it arises in the course of litigation.

LORD SHAW: In reference to what my noble friend has put, question A seems to be at the first blush a very natural thing to ask,—that in Canada, the central Government, so to speak, should ask its Judges what the Constitution means. On the first blush that seems natural but on the other hand you have across the border an example of that having been dealt with in a very ample way.

SIR ROBERT FINLAY: Yes, my Lord, and my submission is that, legislating with a knowledge of what had taken place in the United States, it is perfectly impossible to suppose, that if anything of this kind had been intended by the framers of the constitution, they would not have expressed it. It is a power that would certainly have been expressed if it had been intended to confer it, and having regard to the practice in the United States, and in England, on the principles of which this Constitution is stated to be framed, I submit to your Lordships that it cannot be possibly implied and the only proper inference is that it was intentionally left out. My friend Mr. Newcombe referred to the Revised Statutes of Canada, chapter 104, providing for the issue of commissions, but that is a very different thing indeed, and I only mention it because I think that my friend said that judges of the Supreme Court had been appointed on such commissions. My friend is of course more likely to be right than I am, but I have the assistance of my friend Mr. Nesbitt who tells me that a judge of the Exchequer Court has been appointed on such a commission, but the provinces have nothing to do with the Exchequer Court.

THE LORD CHANCELLOR: Surely that does not matter?

SIR ROBERT FINLAY: No, it does not.

THE LORD CHANCELLOR: Judges have been appointed on commissions here.

SIR ROBERT FINLAY: Yes, my Lord, Lord Justice Vaughan Williams sat as Chairman of the Commission which dealt with the question of the Welsh Church. As a matter of fact I am told that they have abstained from appointing on such commissions, judges of the Supreme Court.

MR. NEWCOMBE: If anything turns upon it, those commissions are on record, and I can get a certified copy.

SIR ROBERT FINLAY: I am taking the statement from my friend Mr. Newcombe, and if he has an opportunity of refreshing his memory he will do so, but my friend Mr. Nesbitt is of quite a different opinion, and of course my mind is a blank upon it.

LORD ATKINSON: The judges sit there as individuals no doubt, the same as judges appointed on Commissions in England.

SIR ROBERT FINLAY: Very well, my Lord, I will not say a word more on the point. Then my friend Mr. Newcombe referred to the Revised Statutes of Canada, 1906, chapter 138, section 28. As soon as that section is looked at, it is seen that it relates to a totally different matter. It relates to enquiries into circumstances respecting the misbehaviour, inability or incapacity of a County Court Judge, and empowers the issue of a commission to one or more judges of the Supreme Court or to any Superior Court in any Province, empowering them to make such enquiries. I dismiss that section as irrelevant. Then my friend referred to another section which is much more relevant—section 33, which provides that "No judge of the Supreme Court of Canada * * * shall, either directly or indirectly, as director or manager of any corporation, company or firm, * * *.engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties." A judge would be much more harmlessly employed as a director of a bank, I submit, than in answering questions of this sort, which would certainly interfere with the proper discharge of his official duties.

My friends have pressed your Lordships very much, and from their point of view not improperly, with a long series of cases in which such references have taken place. Now I submit that that is not entitled to any weight in this connection. If it were the case of spelling out an unwritten constitution, I agree a long series of instances might be of great service, but here we have to deal with a written constitution of very recent date—only in 1867—and I submit to your Lordships that it is quite impossible to say that

a certain number of cases which we have had—there are not more than a dozen at the very outside—in which the parties desirous of having particular questions settled, have submitted to the jurisdiction, have invoked indeed the jurisdiction—I submit it is perfectly impossible to say that such a consideration can properly influence the Court now that the question is raised as to the correct construction of the written constitution.

LORD SHAW: The odd thing remains, and you will recognize the force of it, that this Board has not only done it at the request of the parties, but they have remitted to Canada what were the proper answers the Canadian judges should give; now, it turns out that the whole of this was an unconstitutional procedure.

SIR ROBERT FINLAY: My Lord, is not the answer to that found in considering how the question presented itself in any one of these individual cases? A large number of parties have come over from Canada to argue these questions which they wanted answered at the time. They have presented themselves at the Bar of Your Lordships' Board, but none of them raise the question of jurisdiction; indeed, so far from raising it, they are all anxious that your Lordships should deal with the answers.

LORD SHAW: They have obtained from this Board, and from the Courts of Canada advice on which they both consented to act.

SIR ROBERT FINLAY: Yes, and in fact that is illustrated by the attitude of British Columbia in the present litigation. British Columbia is a party, as defendant, and their attitude is shewn by the letter which I read to your Lordships in opening this case, and it is that such references may be held with the consent of the provinces, but not without their consent. That is the attitude assumed throughout in these cases where this question was not raised, but I say that cannot give jurisdiction, and above all, it cannot by any possibility affect the construction of the statute, now that the question is raised.

MR ATWATER: Will you pardon me for interrupting. Sir Robert states that in the questions which have come before your Lordships and before the Supreme Court heretofore, there has been consent. There has, perhaps, in

the case of the particular province raising the question, taking the Liquor Licensing Act for example, where there were questions involving the constitutionality of Acts passed by the Provincial Legislatures with regard to licensing. The reference in that case was consented to merely by the Province of Ontario, and the Attorney-General of the Domi[illegible], but the decision of your Lordships in that case, and of the Supreme Court, affected not only the Province of Ontario, but every one of the nine Provinces of the Dominion of Canada, none of the other eight being present, or consenting at all. So that I want to disabuse your Lordships' minds of the idea that all the Provinces were consenting parties to these references which have come before your Lordships heretofore it was only one province in each case.

SIR ROBERT FINLAY: When I said consent, I meant consent by the parties who were before the Board, and desired to have the question settled. But, my Lords, what my friend has just said intensifies, very much indeed, the objection to these references. [illegible]ow says that where one province appeared, and a q[illegible]ion was raised which affected not only that province [illegible] its relations to the Dominion, but also affected all t[illegible] other provinces, the other provinces were not parties, and not being parties, of course, they did not consent; yet, their interests would be affected, as I submit, by this very irregular procedure, because, although it has no authority, it is regarded by most people as having more weight than it has in point of law. And why is it that they have provided that the opinions shall be delivered as if they were judgments in a litigation? They are to be delivered in public as if the point arose for judgment in the course of an ordinary litigation, with the inevitable result which must have been contemplated, that the minds of people would be impressed with the fact that the judges were giving judgment.

LORD SHAW: And the dissenting judge is to give his reasons for dissenting.

SIR ROBERT FINLAY: Exactly. It is most carefully and elaborately provided, so that there shall be all the pomp and ceremony of a judicial decision, when it is not

a judicial decision at all, but a great many people will be impressed with the idea that it is.

LORD ATKINSON: There is a list, and they have power to appoint a particular person to represent any particular interest they may deem advisable.

SIR ROBERT FINLAY: Exactly. Reference has been made by my friend Mr. Newcombe t ıe case arising in England, which he says is an instance of such advisory functions being thrown upon the High Court. That is the case of *Ex parte the County Council of Kent* v. *Council of Dover*, which is reported in Law Reports 1891, 1 Queen's Bench, page 725, but I venture to think, when that case is looked into, it will be found that it does not bear any such colour at all. The passages which my friend referred to are at pages 728 and 729. Now, reading the section under which these proceedings take place, it will be seen at once how different that case was from the present case. The section was section 29 of the Local Government Act, 1888, and as your Lordships are aware, that Act entirely reconstituted the local government throughout England, and all sorts of questions might arise as to what functions, what powers and what liabilities devolved upon the different authorities created, particularly as regards the County Councils, and Joint C mmittees. Here is the section which provides for solving such difficulties. It is printed in a note at the bottom of page 726 of the Report: "If any question arises, or is about to arise, as to whether any business, power, duty, or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of Court may be directed by the Court; and the Court, after hearing such parties, and taking such evidence (if any) as it thinks just, shall decide the question." That is not advisory at all, as soon as one looks at what the question was.

MR. NEWCOMBE: The Lord Chancellor said it was a consultative jurisdiction.

SIR ROBERT FINLAY: He used the words consultative jurisdiction, but I am going to shew in what sense he used them. They were to decide the question, and the whole point Lord Halsbury was dealing with was this—was the decision of the High Court final, or did an appeal lie to the Court of Appeal; and the opinion Lord Halsbury came to was, that the High Court was selected to decide the question finally; that is to say, that it was provided that their decision should govern the matter—that it was not sent to the High Court as a branch of the judicature, but they were picked out in order to decide this question without appeal. The judgment will show what Lord Halsbury intended to decide. It begins at page 727: "The only thing with which we have to deal is whether in the form in which the question now arises before us, there is an appeal to this Court. We are of opinion that there is not. An appeal must be given, and is not to be presumed. We do not, of course, mean that it must be given in so many words. If the thing appealed from becomes a judgment, or order, a decree or rule of the High Court, it would, of course, be appealable under section 19 of the Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used.

"Now, the language of section 29, of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe presently), is to be 'decided' by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject matter dealt with in the section, they certainly imply no right of appeal. In the case of *Overseers of Walsall* v. *London and North Western Railway Company* (4 App. Cas. 30), though the Court of Appeal was divided on the subject of whether an appeal existed in that case or not, no doubt was (nor, indeed, we think could be) expressed, that if the proceeding then in question had been purely of a consultative character no appeal would lie; but for reasons partly depending upon the forms of the

procedure, which involved a rule quashing an order of sessions, the House of Lords ultimately held that an appeal did lie. Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is 'decision.'

"We think the Legislature must be taken to have been aware of the state of the law as pronounced by the House of Lords in 1878";—(That is in the Walsall case)—"and if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out 10 years before by the decision of the House of Lords in the case to which we have referred. But the Legislature has not done so. It has used a popular, and not a technical or legal, word; and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal.

"And now, dealing with the subject matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative."

That, of course, does not mean advisory: it is that this point was referred to them for decision and for final decision. "In the first place, it is not necessarily a question that has arisen, but one which may be about to arise. It is to be a question of the transference of the 'business, power, duty, or liability' from one set of authorities to another, and it appears to have been thought convenient, without any existing legislation justifying the intervention of a Court of justice, that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such 'business, power, duty, or liability.' We have used the words, 'might be consulted,' because, although the actual language is 'submitted for decision,' it is a question which might be 'about to arise'; and can, therefore, only be

decided in the sense of expressing the opinion of the Court how it ought to be decided when it does arise. It is to be 'without prejudice to any other mode of trying it,' and it can only be submitted 'on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned.' So far as we can see, there is no obligation on the High Court to hear anybody who might be interested, as a matter of fact, in the decision of the question. And when one sees that the only parties to such a consultation are the authorities which may be charged with the administration of the 'business, power, duty, or liability,' it is to our minds clear that the legislature did not contemplate an actual determination of an existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights a citizen to maintain it in a Court of law, but was solely dealing with the question of which set of authorities should be charged with such and such portions of administration. The legislature sufficiently guarded private rights by saying that such an application to the High Court should be without prejudice to any other mode of trying it. They gave discretion to the Court to hear such parties as the Court itself should think just, and confining the decision, as we think they did, to the High Court of Justice, they appear to us to have carefully avoided the use of any language, or any forms of procedure which involve a right of appeal." For these reasons they were of opinion that there was no appeal.

My Lords, the case is one where as between the authorities they were to decide; it did not affect private rights, and a question might be raised if it were capable of being again raised in any competent procedure.

My Lords, there are other illustrations of the same thing. Your Lordships are aware that under the Arbitration Act an arbitrator may state a case in the course of the proceedings for the opinion of the Court. Evidence is objected to, and the question may be of such magnitude that it is well to have an authoritative opinion expressed in the case, and accordingly there is power given by the

Arbitration Act to state a case in this interlocutory way for the opinion of the Court.

THE LORD CHANCELLOR: That is a case of litigation between A. and B.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: It has nothing to do with this.

SIR ROBERT FINLAY: And it has been held there, that no appeal lies from what is called the consultative judgment or consultative decision of the High Court.

I submit that, so far from helping my friend's argument, as soon as the true bearings of that case are appreciated, it tends very strongly the other way.

Now, attention was called by the Lord Chancellor to the very important question of how such references in England would be regarded; are they or are they not alien to the British constitution as it existed at the date of the British North America Act? I submit to your Lordships that they are absolutely alien. In England there never has at any time been anything like this. There have been cases under the Stuart Kings and under the Tudors, where the Judges were consulted on behalf of the Crown; in fact, I remember seeing in a book on the duties of Law Officers that one of the privileges of a Law Officer was to confer with a Judge with regard to any case that was coming on, and to see how it should be handled. I certainly was never aware that such a privilege existed, and I think any Judge would probably treat any Law Officer with scant courtesy who tried to exercise the supposed privileges.

LORD SHAW: The Judges in those days were also Parliament men. "Don't tell me," said a great Judge, "how to interpret this Statute: I made it." The three functions, judiciary, legislative and executive were all mixed up.

SIR ROBERT FINLAY: Yes. What I do say is this, the idea of such legislation as this by the Imperial Parliament is an absolutely impossible one.

THE LORD CHANCELLOR: That is only because Parliament, you say, would not pass it?

SIR ROBERT FINLAY: Yes, my Lord, because it would be unconstitutional.

THE LORD CHANCELLOR: You mean it would be contrary to what is in the constitution?

SIR ROBERT FINLAY: Yes. To see how alien putting any such duties on Judges is according to modern ideas in this country, one has only to endeavour to realize what would be said if any Department brought in a bill to enable them to send a series of questions, such as are now before your Lordships in this case, to the Judges to decide in reference to legislation which might be contemplated or questions of administration that might arise between that Department and private individuals. The thing would be intolerable.

THE LORD CHANCELLOR: No doubt, but after all, if it be the case to say that the House of Commons or the House of Lords would not entertain a Bill or a proposal of that kind, is not really to settle the question.

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: The question is as to whether in the British North America Act there is nothing which in terms says you may do this, or there is nothing which in terms says you may not do this. There is on the one hand the right to make laws for the peace, order and good government of Canada; on the other hand, there is the establishment of a Judicature. It seems to me, and it has for some time, that it really turns upon that, looking at section 101, whether you can say that the institution of a Court of Justice, meaning what it does, according to the constitution of Great Britain or of Canada, imports the negation of the right to consult the Judges.

SIR ROBERT FINLAY: I entirely agree, and that is the way I venture to present it to your Lordships. All I am at present saying, and I shall be very brief indeed upon this head, is that this constitution states that it is to be according to the principles of the British constitution, and it is so alien to the principles of the British constitution, as it is now understood, that there should be any such use made of the Judges that, if it had been intended to confer such a power, you most certainly would have had it in express terms. I submit to your Lordships that, although the Imperial Parliament may do anything it likes, the in-

troduction of a Bill of this kind would be regarded by all parties of all shades of opinion as an outrage.

Now, your Lordship yesterday, referred to Mr. Justice Story's book in which there is a passage which throws some light upon the principles which should govern such questions. I found the reference to the 5th volume of the Life of Washington, by Chief Justice Marshall himself, Chief Justice of the United States. The references given in Story are wrong, at all events they are wrong according to the edition that I got from the Middle Temple Library.

THE LORD CHANCELLOR: If you will give us the date of the edition, perhaps it may help us.

SIR ROBERT FINLAY: It is the edition of 1807. I should think it must be the first edition. The two pages are 356 and 365. The question that had arisen there was as to the rights of the United States under their treaties with France. It was in 1793, at the time of the First Republic, and a British Merchantman had been captured and had been taken into a port in the United States, and there converted into a privateer, and was about to sail, and the question was whether that should be permitted.

THE LORD CHANCELLOR: Captured by whom?

SIR ROBERT FINLAY: By the French.

THE LORD CHANCELLOR: Taken into an American port?

SIR ROBERT FINLAY: Yes, my Lord. A series of questions was put to the Secretary of State, and at page 356 there occurs this passage: "In answer to this letter the Secretary stated the assurances which had on that day been given to him by M. Genet," (that is the representative in the United States), "that the vessel would not sail before the President's decision respecting her should be made. In consequence of this information, immediate coercive measures were suspended. In the Council, the next day, it was determined to request the answers of the Judges of the Supreme Court of the United States, to a series of questions, comprehending all the subjects of difference which existed between the executive and the Minister of France, relative to the exposition of the Treaties between the two countries; and in the meantime, to retain in port such privateers as had been equipped by any of the belligerent powers within the United States. This deter-

mination was immediately communicated to M. Genet; but, in contempt of it, the Little Democrat proceeded on her cruise." The "Little Democrat" was the name which was given to this converted vessel. Then at page 365 occurs this passage: "About this time, it is probable, that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them, were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, those gentlemen deemed it improper to enter the field of politics, by declaring their opinions on questions not growing out of the case before them. This communication being actually received, on the emergency being too pressing to admit of further delay, the consideration of a complete system of rules to be observed by the belligerents in the ports of the United States, was taken up pending the deliberations of the official conduct of M. Genet." Then the other reference in Story in the note is to Hayburn's case, reported in 2 Dallas' Reports of the Supreme Court at pages 409-10, and it is not so much the case, I think, that is referred to as the notes. There is an elaborate note which runs over two pages. I do not propose to read it all to your Lordships, but it relates to the reasons given by the Judges of the Circuit Courts for declining, as some of them did, absolutely to carry out an Act which threw upon the Judges duties as to settling claims by widows and orphans who were barred by some limitations that were established under previous legislation. I will only read a very few sentences, just to show the note which was struck. The first is from the resolutions passed by the Circuit Court for New York District: "That by the constitution of the Unifed States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches, can constitutionally assign to the judicial, any duties, but such as are properly judicial, and to be performed in a judicial manner." Then they go on to give reasons for thinking that these duties were not judicial.

"As, therefore, the business assigned to this Court, by the Act, is not judicial, nor directed to be performed judicially, the Act can only be considered as appointing Commissioners for the purposes mentioned in it, by official, instead of personal, descriptions." And the Judges of this Court said that they felt at liberty to act on that view of the Act as appointing them Commissioners although it was by their official description as Judges of the Circuit Court. The Circuit Court for the District of Pennsylvania expressed themselves on the general principle in this way. after referring to the Constitution: "It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their judicial power not in Congress, but in 'Courts.' They have ordained that the 'Judges of those Courts shall hold their offices during good behaviour,' and that 'during their continuance in office, their salaries shall not be diminished.'" I am not reading the whole of this. "Upon due consideration, we have been unanimously of opinion, that, under this fact, the Circuit Court held for the Pennsylvania District could not proceed:

"1st. Because the business directed by this Act is not of a judicial nature" and so on.

THE LORD CHANCELLOR: As I understand it, the practice in the United States is not to make these references.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: Based upon the theory that the judicature should be independent of the Executive, and only judicial power.

SIR ROBERT FINLAY: Exactly, my Lord. Then there is the opinion given by the Circuit Court of North Carolina. I am reading from the reprint of the Reports of the Supreme Court from what is called the Lawyer's Edition, published at New York in 1901, edited by Dr. Williams. The notes I presume are in the original report in Dallas; anyhow of course whatever authority they have proceeds from their being the opinions of these Judges.

Then your Lordships have been told that in some of the separate States of the United States the Constitution provides for such references to the Judges asking answers to questions.

THE LORD CHANCELLOR: Are not we getting rather far? This is the constitution of the States of the Union.

SIR ROBERT FINLAY: I did not propose to go into it. I was only going to cite the opinion delivered by Mr. Justice Story on a proposal made to strike out this clause of the Constitution of one of the States and the reasons he gave for it.

THE LORD CHANCELLOR: To strike it out in Court?

SIR ROBERT FINLAY: No, at a Convention. Your Lordship is aware that as a preliminary step towards changing the Constitution of the individual States a convention is held, and Mr. Justice Story at this convention gave the reasons for thinking that such a power ought not to exist, but I will not read it; it states in different language and very emphatically what is implied in the extract from the Life of Washington that I have read and what has been stated in these passages cited in the note. The quotations I have given from the report of the Massachusetts Convention of 1820 are set out in the 11th Volume of the new series of the American Law Review for 1890 at pages 391-2.

Then, my Lords, of course I mentioned that this question had been mooted in connection with the Australian Constitution, which does not contain any such power, any more than the South African does, and I am not going to read to your Lordships what has been said there. It is a very forcible disquisition as to the evils which attend the insertion of such a power, which it is pointed out does not exist under the Constitution of Australia.

Now, my Lords, my friend Mr. Newcombe made reference to two cases in the 9th and 12th Appeal Cases, *Hodge* v. *The Queen and the Bank of Toronto* v. *Lambe*, and, as I understood my friend, the use . desired to make of these cases was to show that the power to send such questions to the Supreme Court must be in some legislative body in Canada. The short answer to that is that it is not in either, if it is inconsistent with any part of the Constitu-

tion. Sir Barnes Peacock delivered the judgment, and all that there is in *Hodge* v. *The Queen* (the passage which my friend cited is at page 132 in the 9th Appeal Cases) is a very emphatic statement that the Parliament of Canada and the Provincial Assemblies are not acting as the delegates of the Imperial Parliament. They are acting as legislative assemblies supreme within the limits prescribed by the Constitution. That throws no light upon the question which is what the limits of the Constitution are. The *Bank of Toronto* v. *Lambe* was cited for the sake of one sentence on page 588: "And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament." That, of course, is so, but it is all that is given; it is all within the limits of the Constitution—must be within one or the other of these two authorities.

Now a great deal has been said on the question whether the Judges could refuse to answer any questions which they thought mischievous, and my friend Mr. Newcombe for the purpose of rendering this Act more tolerable in its operation has, if I rightly understand him, said that he holds the view that the Judges might refuse to answer any questions which they thought were dangerous in their tendency or inconsistent with their judicial duties—I so understood my friend—inexpedient to answer. My friend puts that argument forward.

MR. NEWCOMBE: Stating their reasons, which, in themselves, would constitute an answer to the question within the meaning of the Act.

SIR ROBERT FINLAY: I do not think a statement that you decline giving any answer as it is inexpedient would constitute an answer within the meaning of an Act of Parliament or within the meaning of the word as used anywhere. It is a reason for not answering; it is not an answer. The terms of the Act are wholly inconsistent with my friend's view. The Act says: "and any questions touching any of the matters aforesaid, so referred by the Governor-in-Council, shall be conclusively deemed to be an important question." It is not open for them to say it is not import-

ant. "When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor-in-Council, for his information, its opinion upon each such questions, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court," and any dissentient Judge is to give his reasons. I submit to your Lordships that the Act is perfectly clear and that any attempt to lighten, to float this Act, to get this Act over the bar by saying that it is subject to the right of the Judges to refuse to answer is totally unsustainable. The words will not bear it. The words are imperative, and to take my friend's view would amount to inserting a vital alteration in the terms of the Section.

Then, my friend said: Oh, but the Dominion Government may waive their rights; they will act reasonably; they will waive their rights. How can a possible waiver by the Dominion Government of their rights under this section affect the question of whether the section itself is constitutional or not?

Then I desire to add a very few words upon the point to which, as the Lord Chancellor has indicated, the whole thing comes back, the effect of Section 101. Section 101 deals first with the Supreme Court as a Court of Appeal. I am not certain whether it has ever been suggested that in answering such questions this Court would be acting as a Court of Appeal; I do not think it has. I say that it certainly is not. A Court of Appeal means entertaining appeals from Judgments given by inferior Courts, and I say not merely that it is not acting as a Court of Appeal, but that it is inconsistent with the functions of a Court of Appeal to be asked to commit itself beforehand upon such questions.

Then, my Lords, it was attempted to sustain these references by saying that it might fall under the second branch of the section, which gives power to create additional Courts for the administration of the law of Canada. Therefore, in the first place it must be a Court, to fall within that. Secondly, it must be for the administration of the law, and thirdly, it must be for the administration

of the law of Canada—not one of the three. It really reminds me of what was once said of the "Holy Roman Empire," that it was neither holy, nor Roman, nor an Empire. This is not a Court, it is not for the administration of any law, and it is not for the administration of the law of Canada.

My friend referred to a passage in the Jud, ment of Lord Justice Fry in the Law Reports, 1892, 1 Q.B. at page 446.

THE LORD CHANCELLOR: Surely it means a Court of Justice. There are all sorts of Courts.

SIR ROBERT FINLAY: Yes, but occurring in this passage it means what is defined in Coke, upon Littleton at page 58 (*a*): "a place where justice is judicially ministered." That definition is perfectly right, and it is not vitiated by the absurd definition which Lord Coke goes on to give. He says *curia* comes from *cura, quia in curiis publicis curas gerebant.* In substance it is all right, although the etymology is defective.

Then the expression "High Court of Parliament" was used. That is an expression which has come down from the days when the King administered justice in the *aula Regia,* which is all that there was of Parliament then. At present there are no judicial functions except in the House of Lords, and the House of Lords is one of the Courts and appears in any list of Courts in any legal treatise. The House of Commons is not a Court of Law. Lord Coke said that if anyone said that the House of Commons was not a Court of Record he would that his tongue clave to the roof of his mouth. Whether it has the powers of a Court of Record—of course it has the power of committing for contempt and so on—it is not a Court in the ordinary sense. In the second place for the "administration of the law." That, again, I think, I have sufficiently argued to answer such questions. Thirdly, it must be the law of Canada. On that point, I submit, that means the administration of the federal law, the Federal Statutes, and not of the Provincial law. May I say in this connection the case of *Valin* v. *Langlois,* to which reference was made was the case of the creation of an additional court. It was a Court to try

election petitions and it really has no analogy at all and no bearing on this point.

Then something was said, I think by Mr. Atwater, as to the Provinces of Canada having passed Acts for such references for their Provincial Courts. Of course, there may be different considerations arising there, and I do not desire to plunge into an argument upon that question. I am not prepared to admit that the Provinces have the right to do it, because I say it is inconsistent with the idea of a Court, but you have not got in that case Section 101, the pivot on which the whole of this controversy turns.

May I, in conclusion, merely say that this case is one of great importance, having regard to the great interests involved, I submit it is also of vast importance as affecting the standing in public estimation of the Judges of the Supreme Court of Canada.

THE LORD CHANCELLOR: We shall take time to consider.

THE FINALE.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of Ontario and others v. The Attorney-General for the Dominion of Canada and another, from the Supreme Court of Canada; delivered the 16th May, 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD ROBSON.

[DELIVERED BY THE LORD CHANCELLOR.]

The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorising questions either of law or of fact to be put to the Supreme Court and requiring the Judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament. Much care and learning have been devoted to the case, and their Lordships are under a deep debt to all the learned Judges who have delivered their opinions upon this anxious controversy.

In 1867, the desire of Canada for a definite constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the other hand, cover the whole area of self-government wtihin the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to

the Province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the Province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of Law is to decide in each particular case on which side of the line it falls in view of the whole Statute.

In the present case, however, quite a different contention is advanced on behalf of the Provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of Provincial rights, but not because the power of asking such questions belongs exclusively to the Provinces. The real ground is far wider. It is no less than this—that no legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present Appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a Provincial Legislature within its own Province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of Law, which are part of the ordinary machinery of Government in all civilized countries.

Broadly speaking the argument on behalf of the Provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the Provinces and of individual citizens. Any question, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it with their reasons. Though no direct effect is to result from the answers so given, and no right or property is thereby to be adjudged, yet, say the

Appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The Appellants further insist that although the Act in question provides for requiring argument and directing that Counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights.

This view, which was most powerfully presented, has a two-fold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wis-

dom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is, whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the Statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For, whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and, obviously, bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power.

Is it then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the

101st section the Dominion is enabled to establish a Supreme Court of Appeal from the Provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the Provincial Courts. But of any power to ask the Court for its opinion, there is no word in the Act. All depends upon whether such a power is repugnant to that Act. The Provinces by their Counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the Provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body, according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain to whose constitution the Constitution of Canada is intended to be similar, as recited in the British North America Act, 1867. And they say that to place the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it or with the free access to an unbiassed tribunal of Appeal to which litigants in the Provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court able to be so treated ceases to be such a judiciary as the Constitution provides for. The argument on behalf of the Provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*.

In course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, House of Lords, and His Majesty's Judges.

It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the 4th section of

the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the 4th section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand it must be remembered that the members of the Judicial Committee are all Privy Councillors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatised as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the Judges and to ask of them such questions as it may think necessary for the decision of a particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords possesses in its legislative capacity a right to ask the Judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some 50 years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a sim-

ilar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

Very little assistance is afforded by the almost or altogether obsolete practice of His Majesty's Judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's Judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the Judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board.

It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

The first step towards authorising the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act, any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed, providing for the same thing with more detail though not in wider terms, and it is the 1906 Act which gave rise to the present Appeal. Between 1875 and today the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accord-

ance with these Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee, under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such Appeals, as though they were Appeals from the ordinary jurisdiction. In all cases the Appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals. These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorney-General, as showing that the Acts now alleged to have been *ultra vires*, were in fact acted upon, and so treated as valid, not only by the Court in Canada but also on appeal in Whitehall. It was urged on the other hand for the Provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now Appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained, from what is due to the independence and character of Courts of Justice. It is clear indeed that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

Great weight ought also to be attached to another significant circumstance. Nearly all the Provinces have

themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that Section 101 of the British North America Act forbids this being done by the Dominion Parliament, that argument cannot apply to the Provincial Legislatures, because Section 101 does not apply to the Provinces. Either, then, these Provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the Provincial Acts as well as that of the Dominion are *ultra vires* upon the general ground already dwelt upon, that a Court of Justice ceases in effect to be a Court of Justice when such a duty is laid upon it. Certainly it is remarkable that for 35 years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has been tranquilly acted upon without question by the Legislatures of the Dominion and Provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada. It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (*e.g.*, must Justices of the Peace and Judges be re-sworn after a demise of the Crown?) no one would ever have thought of saying it was *ultra vires*. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the Provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinions of the Law Officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can however either point out in its answer these or other

considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

Yet the argument, that to put questions is *ultra vires,* must be the same whether the power is rightly or wrongly used. If you say that it is *intra vires* to put some kinds of question, but *ultra vires* to put other kinds of question, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the Appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people, and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be dismissed.