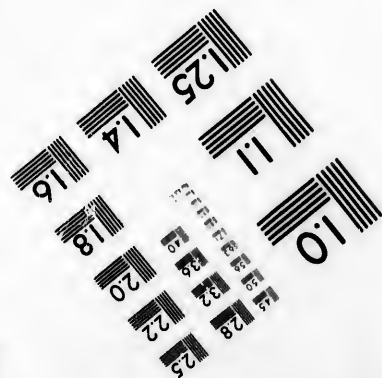
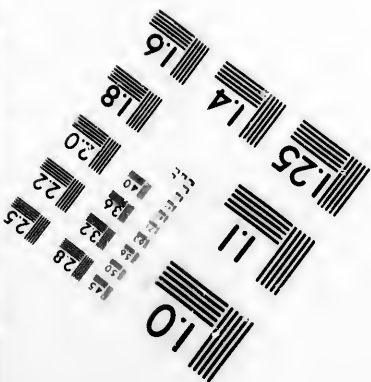
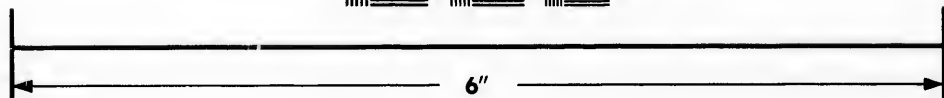
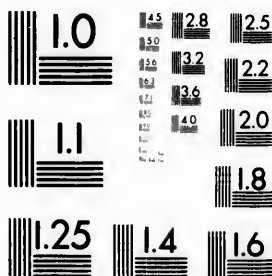
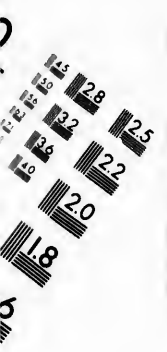


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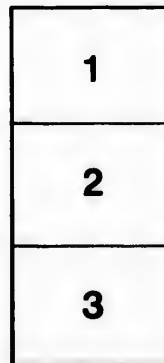
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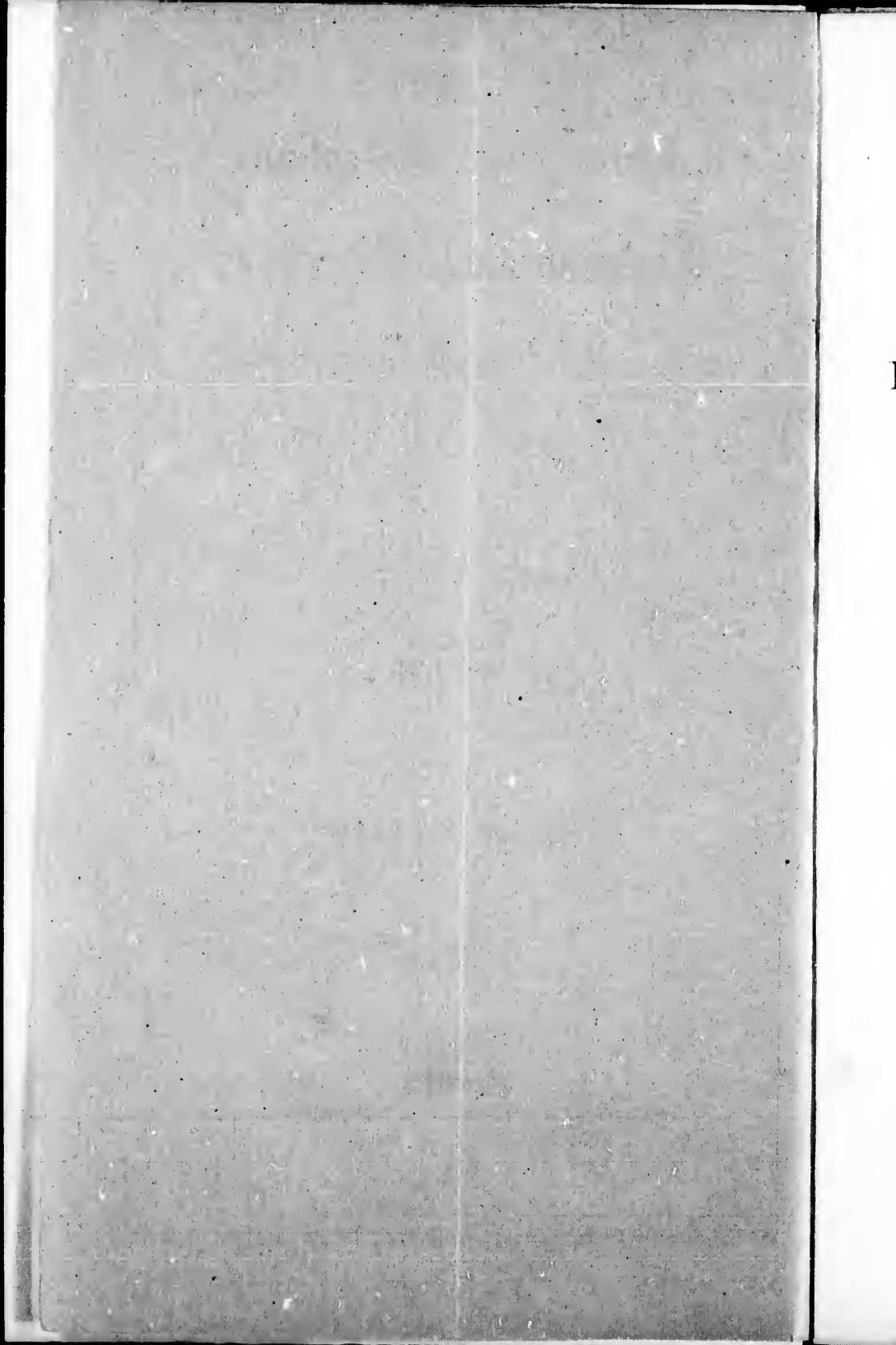
IN THE
PROVINCE OF QUEBEC.

BY
J. PONSONBY SEXTON, B.C.L.,
BARRISTER-AT-LAW OF THE PROVINCE OF QUEBEC,
—AND—
LOUIS H. PIGNOLET,
BARRISTER-AT-LAW OF THE PROVINCE OF QUEBEC,
AND COUNSELLOR-AT-LAW OF THE STATE OF NEW YORK.

Omnia probate; quod bonum est, tenete.

Louis Pignolet

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CONSTITUTIONAL QUESTIONS

IN THE

PROVINCE OF QUEBEC.

The attempts of successive Legislatures in the Province of Quebec to raise a revenue sufficient to meet the current expenditures, have given rise to a number of constitutional questions of interest to all the Provinces. And besides, on every final determination by the Privy Council of these doubtful points, another portion of the boundary line between Federal and Provincial legislation is settled and adjusted.

While political economists are at variance as to what are the most equitable and advantageous modes of apportioning the burden of taxation, it is generally conceded that indirect taxation is the least obnoxious form, as the tax can be imposed in such a way as to escape in a great measure the observation of those who really pay it; while a direct tax upon the person, property, or business, or upon rents and profits, is demanded immediately and pointedly of the person who pays it, and who necessarily feels the burden at once, and is made painfully sensible of the exact amount taken from him.

On the other hand, it has been objected that indirect taxation (however imperceptible and concealed the imposition of the burden may be) is inequitable, for the reason that it does not fall upon individuals in proportion to their means of paying it, and that it encourages careless and improvident legislatures to squander the public monies in extravagant outlays, which subserve private rather than the public interests.

The only mode of raising money granted by the Constitutional Act, to the Provinces, is by a *direct* tax, and to a limited extent, by means of licenses; the kind of licenses permitted, being vaguely indicated by the examples given in the Act. Their Lordships of the Privy Council, in their interpretation of the Constitutional Act, have shown that the Provincial Legislatures are governments of enumerated powers, and that the power of

INDIRECT TAXATION

not having been expressly given by the Act, this power cannot be exercised by them (except by means of licenses of the kind specified in the Act.)

The first Constitutional question was presented by an attempt on the part of the Legislature of the Province of Quebec to raise money by an Act affecting Insurance Corporations, which purported to be

AN INSURANCE LICENSE ACT,

but as this Act (on an appeal to the Privy Council in a test case) was found by their Lordships not to be a *License Act* at all, but in fact, to be a *Stamp Act*, and as the taxation by stamps was also found by their Lordships to fall within the category of indirect taxation, it was held, therefore, that the imposition of such a tax was not warranted by the Constitutional Act.

This decision having brought out the views of their Lordships on the Constitutionality of the whole system of taxation by stamps as practised in the Province of Quebec, *another* important question was raised as to the legality of the

STAMP TAX ON EXHIBITS,

used in legal proceedings in the Courts of this Province; and upon a case carried to appeal, this was also declared by their Lordships to be *indirect* taxation, and consequently beyond the scope of the power of the Provincial Legislatures.

A distinction was sought to be raised in this case, between the operation of the stamp tax in this Province and

that of the ordinary form of stamp tax ; but their Lordships found that the funds to be raised by the Act establishing the tax, was made part of the Consolidated Revenue of the Province, and that the purpose of the Act was to tax legal proceedings for the general purposes of the Province, and in aid of the general revenue, and not for the purpose of creating a special fund for the maintenance of the administration of justice in the Courts of the Province ; and that such taxation could not therefore be called *direct* taxation within the meaning of the Constitutional Act.

The revenue of the Province having been reduced by the prohibition against these Stamp Acts, it suffered still further diminution owing to the enactment of the

DOMINION LICENSE ACT OF 1883.

This Federal Act, which purported to regulate the traffic in intoxicating liquors throughout the whole Dominion, gave rise to a conflict of jurisdiction which has thus far interfered with the enforcement of the Provincial License Act, and with the collection of the tax.

The Dominion License Act, contained a clause that the question as to the validity of the Act might be submitted to the Supreme Court of Canada for their opinion as to what portions were valid and what were inoperative or illegal. On a reference under this clause, the Supreme Court gave its opinion, that the Provincial Legislatures had the exclusive right to regulate and issue Licenses for the sale of intoxicating liquor, by *retail*, and that the Federal Legislature had the exclusive right to issue all *vessel* and *wholesale* licenses.

This decision does not appear to have been satisfactory to either of the parties. The Provinces claim that they are deprived of the right of regulating by means of licenses, the wholesale trade within a Province, and the sale by transportation companies carrying passengers by land or water within a Province ; a right which they claim fell to them not only under the license clause of the Constitutional Act, but also under the clause assigning to them matters of police and municipal regulation within the Province.

The right of the local Legislatures to regulate the liquor traffic within a Province, by means of licenses, having been recently held by their Lordships of the Privy Council, in an Ontario case (the Hodge case) to be fully authorized under the Constitutional Act, as a matter of municipal police, this ruling sustains the Provincial claim.

The opinion of the Supreme Court was also unsatisfactory, by reason of the absence of any principle to indicate the boundary line between the two jurisdictions. The several Provinces having a different standard of what would constitute a wholesale transaction in liquor, and distinguish it from a retail transaction, there would necessarily be great difficulty in applying such a rule.

The Provinces are all opposed to Federal interference, having separately legislated upon the subject of liquor licenses, and appointed their own License Commissioners. On the part of the Provinces, it is claimed that the Ontario Liquor License Act of 1877, having been sustained by their Lordships of the Privy Council, in *Hodge* and *The Queen*, that this decision in effect declares the invalidity of any Federal Liquor License Act, for the reason that there cannot and does not exist between these two legislative bodies a concurrent jurisdiction upon the subject-matter of Liquor Licenses; and, as the power to grant Liquor Licenses cannot belong to both, and as the jurisdiction over this subject-matter has been specifically assigned to the Provincial Legislatures by the Constitutional Act, the Federal Legislature is necessarily excluded from all jurisdiction over the same subject.

On the part of the Provinces, it is contended:—

That the Legislative powers are distributed between the two legislative bodies, as follows;

That specific powers are granted to each, under separate sections, by a special enumeration of the subjects-matter upon which each is authorized to legislate

That general powers are given to the Federal Legislature by the principal clause of one section, and that general powers are also given to the Provincial Legislatures by

sub-section 15, of the other section, and that these different Legislative bodies have co-ordinate powers.

On the part of the Federal Legislature, it is claimed that the decision in *Hodge* and *The Queen* recognizes the supremacy of Federal legislation, and that this decision is not in conflict or inconsistent with the decision in *Russel* and *The Queen*, which holds that the enactment of the Dominion Temperance Act of 1878, is within the *general* power of the Federal Legislature.

That the powers of these two legislative bodies have been distributed by the Constitutional Act of Confederation as follows :—

To the Federal Legislature, has been granted a *general* power to legislate for the welfare of the whole Dominion, "in relation to all matters" not assigned specifically to the Provincial Legislatures, and that by its nature and the terms of the grant, this is an *overbearing* power.

To the Provincial Legislatures have been granted certain *enumerated* powers, specifically assigned and set forth.

To the Federal Legislature, is also granted a *specific* and *absorbing* power of legislation over certain subjects-matter, but, in such terms as not to interfere with the overbearing nature of the *general* power or restrict the force of the general terms of the grant.

That the judgment in *Hodge* and *The Queen* in effect shows that the legislative power of a Province may for the purposes of municipal or police regulation extend to the regulation of a particular traffic within the Province, and that such legislation is valid and operative unless or until *overborne* by the operation of a general Federal law dealing with such traffic for the welfare of the Dominion, passed under the *general* power, or unless or until *absorbed* by the operation of a Federal law passed under the *specific* power.

That in *Russel* and *The Queen* their Lordships of the Privy Council, held, that the Canada Temperance Act was lawfully passed by the Federal Legislature under the *general* power, as it was not an Act "in relation to" (*i.e.*, had not

for its primary object) liquor licenses or any other of the subjects-matter specifically assigned to the Provincial Legislatures.

That, in this case, the Supreme Court of Canada held, that the Canada Temperance Act was lawfully passed under the *specific* power as a "Regulation of trade and Commerce," but the Privy Council, while holding that it was lawfully passed under the *general* power, intimated that they did not wish to be understood as differing from the Supreme Court, in their opinion, that it was lawfully passed under the *specific* power.

That the *overbearing* supremacy of the *general* and the *absorbing* supremacy of the *specific* power, is recognized in the opinion of their Lordships of the Privy Council, both in *Hodge* and *The Queen*, and *Russel* and *The Queen*. The Federal Legislature, therefore, claims the right under the Constitutional Act, when legislating under the *general* power for the promotion of temperance and good order throughout the Dominion, to restrict by means of licenses, the traffic in intoxicating liquors, and to this end, to *overbear* the authorized legislation of any Province, in relation to liquor licenses, or in relation to other local objects and subjects-matter specifically assigned to the Provinces.

They also claim the right, under the *specific* power to make laws in relation to the "regulation of Trade and Commerce," to regulate the traffic in intoxicating liquor by means of licenses, and to that end, to *absorb* all conflicting Provincial legislation in relation to liquor licenses.

Thus, it is contended, that the Federal and Provincial Legislatures, are both equally sovereign and supreme, when lawfully dealing with things and matters within their assigned spheres of action, but, if while dealing with the same thing (the liquor traffic for instance) in lawfully legislating "in relation to" different subjects-matter, their legislation comes into collision, Local legislation must give way to Federal legislation, and not Federal legislation to Local legislation. In other words, when the spheres of action of these different legislative bodies interfere, Local legislation must become

subordinate to Federal legislation, and not Federal legislation subordinate to Local legislation.

The attempt has been made to assimilate a general grant of legislative power, conferred by the Imperial Parliament, in the establishment of Representative Governments for its Colonial Dependencies, to the statutory enactment of a Legislature taking away the personal liberties of the subject as a penalty for the violation of a criminal law. On the assumption of such an analogy, the application is made of the same rule of interpretation, which, by law, restricts the Judiciary in their construction of a penal statute.

It is not surprising that jurists who take such a view of representative governments, and attempt to establish such analogies, have been perplexed by some of the decisions of their Lordships of the Privy Council. But it is a well-settled rule of construction as to any grant of constitutional powers conferred upon a legislature in general terms (*i. e.*, without undertaking to restrict the grant by any specific enumeration), that it is to be liberally construed as to its extent and nature, and that it includes all the implied powers necessary to carry the general power into effect.

Amid such diversity of views, both parties are hopefully looking to the Imperial Privy Council to adjust and settle this question of jurisdiction on sound principles, so accurately enunciated that they will constitute an abiding and well-defined boundary line between Federal and Provincial authority.

The Supreme Court of Canada, owing its origin to the Federal Legislature, which gave it its power and jurisdiction, necessarily took cognizance of the questions submitted to it, although no case was before it directly involving the redress of any grievance, or the protection or enforcement of any right.

As the Imperial Statute, constituting the Judicial Committee of the Privy Council, a Court of Record, gave it a special appellate jurisdiction in cases of appeals from orders, sentences and decrees of the Colonial Courts, some doubts existed as to the competency of the Judicial Committee to

give an opinion upon the abstract question of the validity of this Federal Legislation, especially, as there would be no way of enforcing such opinion or judgment. But, as this Imperial Statute authorizes Her Majesty, to refer to the Judicial Committee for hearing or consideration, any such "other matters whatever as Her Majesty shall think fit," no difficulty can exist, if Her Majesty shall be so advised, in obtaining the opinion of the Judicial Committee on the question.

The Treasurers of the Province, having been thus far unsuccessful in their efforts to raise money by these modes of taxation, resort was had to the imposition of a

TAX UPON COMMERCIAL CORPORATIONS,

by a carefully prepared Act, purporting to impose a direct tax upon these corporate bodies, considered in accordance with the common law of this Province, as artificial persons.

This Act, apparently imposed a tax as direct in its character as an Income tax,—the tax being levied upon corporate bodies, who are generally possessed of large resources, and could not be reached in any other way. This mode of taxation has aroused greater opposition than any other, and has brought together, in a powerful combination, the services and support of a large body of legal practitioners, formidable, by the array of talent, seldom if ever before united in sustaining the same side of a controversy. Hundreds of actions are now pending against these corporations (many of whom have their head offices in other Provinces), by whom the following ingenious and subtle objections to the constitutionality of the Act have been raised :

It is objected that the legislation of this Act is not direct taxation, for the reason that it is not a general tax assessed on any *uniform* principle, but is imposed upon commercial corporations as a particular class of traders, who have been thus unequally burdened by an invidious discrimination, exempting individual traders.

In answer, it is opposed that there is nothing in the Constitutional Act, as in many of the State Constitutions of

the United States, which prescribes uniformity of taxation ; and, therefore, there is no restriction upon the legislative power of a Provincial Legislature to raise money by direct taxation, on any principle of apportionment or exemption it may see fit to adopt. And, moreover, as the Provincial Legislatures are held by their Lordships of the Privy Council to be supreme within the sphere of their jurisdictions, the right to exempt certain classes of persons, industries, and professions from taxation must be recognized as a sovereign right, inherent in the Local Legislatures.

Although political economists contend that the chief object of the members of every society must be the acquisition of wealth, and that in the struggle, the least efficient must sink and go down, and only the fittest and most successful survive ; nevertheless, it is the duty of the State to see that, in this struggle between capital and labor, those who are poorly remunerated for their labor, and are not certain of a day's subsistence, shall find some other way out of their troubles than being permanently submerged by adverse circumstances. And in order to remedy this condition of things, grants and subsidies are made, and a scheme of taxing property enacted that is far from being uniform.

Sometimes a State can only preserve its existence by finding employment for the unemployed masses, either on its waste lands or by developing industrial pursuits that will enable them to earn a subsistence. To this end, particular railroad and manufacturing corporations are sometimes exempted from taxation or encouraged by subsidies at the expense of others ; also, for the promotion of the well-being of the State, certain religious and educational associations are often exempted from taxation.

If there were in the grant of legislative power to the provinces, any requirement that taxation should be uniform, the operations of government would come to a stop from the absolute impossibility of carrying it on ; but, by the Constitutional Act it has been wisely left to the Provincial legislatures, to decide when and how, and for what public

purposes, direct taxation shall be imposed, and to select the subjects and prescribe the scheme of taxation ; for, the power of direct taxation granted to the Provincial Legislatures, necessarily implies a power to apportion the tax as they shall judge fit, because the power of apportionment has no limit where there is no constitutional restraint.

If it should be held that the tax in question was invalid, because not apportioned upon principles of just equality, it would place the power of the Judiciary Department of Government above that of the Legislative, in a matter affecting the very existence of the Government, and would, in fact, regulate the apportionment of taxation by judicial and not by legislative discretion. The only question for the judiciary is the simple question of the existence of the power. If the power exists, it cannot be impaired by reason of the objectionable or inequitable mode by which it is exercised.

It cannot be maintained that by the enactment of the Constitutional Act of this Dominion, it was ever intended by the Imperial Parliament in the scheme of their legislation to create Legislatures liable to have their independence taken away by the Judiciary Department of the Government.

Mistakes, abuses and injustice, have often occurred in general taxation ; but these are not grounds on which any particular system of meeting the current expenditure of the Government, can be condemned by the Judiciary Department as unconstitutional.

If the system of taxation adopted by a legislature is unwise or unjust, it may be reformed by the Legislature on proper petitions of remonstrance, showing the grievances complained of ; or, if a remedy cannot be found in this way, it may be wrought out at the polls, by means of a change in the members of the Legislative body.

It is urged in opposition to the Act, that, on the principle of the United States decisions, which hold, that, as the operations of a corporation, chartered by the United States Federal Legislature as a fiscal agent and instrument of the Federal Legislature for the execution of its powers, and for

federal objects and purposes, could not be interfered with by taxation by the local Legislatures, so, therefore, the operations of corporations chartered by the Dominion Legislature for the private objects and pecuniary gain of the shareholders, could not be interfered with by taxation by the Provincial Legislatures.

In answer to this, it is opposed that on a careful examination of the principle involved in the United States decisions, and the distinction between the two cases, it becomes apparent that the distinction is too broad to sustain the analogy, and the analogy failing, the reasoning based upon it must also fail. And besides, their Lordships of the Privy Council have already defined the boundary between the powers of the two Legislatures in this respect, by sustaining the validity of the Ontario legislation in *Parsons* and the *Citizens Insurance Company*. This legislation interfered with the contracts of Insurance Corporations incorporated by the Dominion Parliament, but their Lordships, notwithstanding, held that the effect of the creation of an insurance company into a corporate body by the Dominion Parliament, merely gave it a corporate existence, with the right to transact business in any Province where no restriction was placed on its operations; and that such a corporation might be prohibited from doing business in every Province of the Dominion unless it complied with the requirements of Provincial legislation. And it was explicitly laid down by their Lordships, that a company might be incorporated by the Dominion Parliament to carry on business throughout the Dominion, and it might so happen that it could do no business in any part of the Dominion, by reason of legislative restrictions in all the Provinces interfering with its operations, though it would still exist and preserve its *status* as a corporate body. This decision of their Lordships also disposes of the objection that the Act in question is a restriction on trade and commerce, and therefore objectionable, as being "in relation to" the regulation of trade and commerce, (a matter not within the scope of the Provincial Legislatures.)

This decision, also disposes of the objection that Provincial legislation cannot interfere by taxation, with the operations of Banks chartered by the Dominion Parliament.

It is also objected, that the Act in question is a tax upon the franchises of corporations, and therefore a license, and consequently *ultra vires*.

In answer to this objection, it is opposed that their Lordships of the Privy Council have declared in a former decision, that an Act cannot be a License Act unless it contains a prohibition against carrying on the business licensed if the license tax be not paid. As there is no such prohibition in the Act in question, the objection that it is analogous to a License Act has no foundation.

It is also objected that the Act in question is not in relation to taxation *within* the Province.

In answer to this objection, it is opposed that the restrictive principles necessarily governing every system of taxation is, that the power of taxation must be limited to subjects *within* the jurisdiction of the power imposing the tax. These subjects of taxation are—persons, property and business. The Constitutional Act of Canada has therefore restricted Provincial taxation in express terms, by providing that it should be “within the Province.”

But considering all corporations as artificial persons, a domestic corporation, having its *head office* within the Province, is naturally and properly treated as having its domicile there, and is therefore liable to taxation there, on the whole of its capital. And a foreign corporation, having a *place of business* within the Province where it transacts business through its agents, who represent it there, is treated as personally present and doing business, through its representatives “within the Province,” and, as the capital of a corporation is held in law to be personal or movable property, it therefore follows such artificial person or corporate body, and has its *situs* within the Province. And the whole of the capital or income of every corporate body may, therefore, become subject to taxation within the Province where it carries on business or has a residence.

The objection has also been taken that the Act in question is not an Act in relation to "direct taxation within the Province," but, on the contrary, being an interference with trade and commerce, is therefore an Act in relation to "the regulation of trade and commerce," and consequently not within the power of the Provincial Legislatures.

In answer to this objection, it is opposed that such a limited and unreasonable construction of the Provincial Clauses of the Constitutional Act has been explicitly disapproved by their Lordships of the Privy Council, who have repeatedly held that Provincial legislation "in relation to" local matters, may incidentally deal with a subject-matter assigned to the sphere of the Federal Legislature, without such legislation being necessarily "in relation to" such subject-matter, or in conflict with Federal legislation in relation thereto.

The constitutionality of the tax on commercial corporations has been sustained by the highest court of this Province, and will soon be passed upon by their Lordships of the Privy Council, and their decision in this matter and upon the validity of the Dominion License Act of 1883, will have an important bearing in settling the principles of construction of the Constitutional Act, and defining the line of demarcation between Federal and Provincial powers.

In the consideration of the constitutional limitations imposed by the Confederation Act, subtle distinctions have been drawn, both by Provincial and Dominion Judges, and such an ill-defined line of demarcation laid down between the powers of the Federal Legislature and those of the Local Legislatures, that even jurists have been perplexed in their attempts to follow it.

A lack of reverential attention to the language of the Constitutional Act, has also led to a great divergence of views in its interpretation. In some instances, equivocal expressions have been formulated as interpretations of important clauses, and though these, have sometimes been correct expositions in the sense in which they were originally used, by being substi-

tuted by other interpreters as synonymous with the text, they have led to a perversion of its true meaning.

And, moreover, it is not surprising that in the interpretation of a Constitutional Act, not yet twenty years in existence, many questions should arise difficult of solution; for, in the neighboring Republic of the United States, after an existence of one hundred years, questions are still presented as to the constitutionality of the methods of taxation adopted by the local governments. There is a further reason for the more frequent occurrence of these questions in this Dominion, from the fact, that, in the distribution of powers in the United States Republic, the Local Legislatures are possessed of general powers, and the Federal Legislature is clothed with enumerated powers only; while in this Dominion, a system, the reverse of this, has so restricted the scope of Provincial Legislation, that in cases of conflict with Federal Legislation, the sphere of the former has been held to be subordinate to that of the latter. And therefore, while each legislature is supreme in its own sphere, when their spheres of action come in collision, Provincial legislation must give way to Federal legislation.

It is a matter for congratulation that their Lordships of the Privy Council, as the court of ultimate resort, cannot be swayed by any local opinions or prejudices, and will not be diverted in their interpretation of the Constitutional Act from a careful consideration of its precise language, by any forms of expression which may have been accepted in this Dominion, as of synonymous meaning with the text of the Act. And the authoritative decision of such a tribunal can alone satisfactorily adjust and settle questions of such magnitude, involving such nice distinctions and requiring such unbiased discrimination.

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