

McMillan J. restored. Their Lordships will humbly advise His Majesty accordingly.

The respondent company will pay the costs of this appeal.

Solicitors for appellant: *Trinder, Capron & Co.*

Solicitors for respondent: *W. H. & A. G. Herbert.*

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FAIRCLOUGH

v.

SWAN
BREWERY
COMPANY,
LIMITED.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE }
OF ONTARIO AND OTHERS } APPELLANTS ;

AND

ATTORNEY-GENERAL FOR THE DOMINION }
OF CANADA AND ANOTHER } RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867—Policy of the Act—Legislation authorizing the putting of Questions to the Courts—Intra vires both of the Dominion and the Provinces.

In 1875, 1891, and 1906 Acts were passed by the Dominion Parliament authorizing the Executive Government of the Dominion to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact ; and nearly all the provinces have passed Acts in similar terms requiring their own Courts to answer questions put by the provincial Governments :—

Held, that it was intra vires of the respective Legislatures to impose this duty on the Courts. Though powers to that effect were not granted in express terms by the British North America Act, 1867, they were not repugnant thereto, but incidental to the complete self-government of Canada which was contemplated by that Act. The answers are only advisory, and by giving them it cannot be said that a Court ceases to be such a judiciary as the Act provides for.

APPEAL from a judgment of the Supreme Court of Canada (October 11, 1910), reported in 43 S. C. R. 536, dismissing a motion to strike the inscription of this and two other references from the list upon the ground of want of jurisdiction.

The question raised by the appeal was whether under the

* *Present* : EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

J. C. Canadian Constitution the Governor-General in Council has
1911 power to frame and refer to the Supreme Court questions as to
ATTORNEY- the constitutional powers of the provinces, as to the effect of
GENERAL provincial statutes, and as to the interests of individuals who
FOR ONTARIO may be unrepresented upon such reference, and to require the
v. Supreme Court to answer such questions.
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The appellants contended that the Governor-General in Council had no such power, and that the reference in question, which so far as material to this appeal related to the powers inter se of the Dominion and provincial Legislatures to incorporate companies, and to the effect of such incorporation having been made without the consent and against the protest of the provinces concerned, could not be entertained by the Supreme Court.

The particular reference now in question was made by the Governor-General to the Supreme Court of Canada for hearing and consideration of certain questions of law in relation to the incorporation of companies and other particulars as therein stated. It was made under the authority of s. 60 of the Supreme Court Act, R. S. C., 1906, c. 139, which is as follows :—

“60. 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."

Various sub-sections follow which prescribe the mode of dealing with the reference so made, and sub-s. 6 enacts :

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. 54 & 55 Vict. c. 25, s. 4 ; 6 Edw. 7, c. 50, s. 2."

The Attorney-General of each of the provinces was notified of the hearing of this reference pursuant to an order of Idington J.

The original Supreme Court Act was passed in 1875, being 38 Vict. c. 11. It was re-enacted in substance in 1886 by R. S. C., 1886, c. 135, amended in 1891 by 54 & 55 Vict. c. 25, and again by 6 Edw. 7, c. 50, and finally re-enacted by R. S. C., 1906, c. 139.

The said order of dismissal was made by a Full Court (Fitzpatrick C.J., Davies, Duff, and Anglin JJ., Girouard and Idington JJ. dissenting).

The Chief Justice was of opinion that the Court should entertain the reference and answer the questions on the grounds : (a) That precedent had been established therefore by the numerous previous cases in which the Court had answered such questions in the past, some of the answers to which had been appealed to the Judicial Committee of the Privy Council, which assumed that it had jurisdiction to deal with them ; (b) that independently of precedent it was the duty of the judges of the Supreme Court of Canada to advise the Executive Government in analogy to the procedure by which the judges in England have often been called to give their opinions on points of law ; that this was sufficiently provided for by s. 3 of the Supreme Court Act by which the Court was established under the authority of s. 101 of the British North America Act, 1867, 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," and that,

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quoting the words of the Chief Justice, "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, the British North America Act"; (c) that as to the constitutionality of the provisions of the Supreme Court Act under which the references were made, Parliament had the necessary legislative jurisdiction under s. 91 of the British North America Act, 1867, 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; and that if Parliament possess the power, that power is vested in the Executive.

Davies J. agreed with the Chief Justice in thinking that s. 60 of the Supreme Court Act was authorized by s. 101 of the British North America Act as being the establishment of an additional Court for the better administration of the laws of Canada, and that in any event it was authorized by the general provision of s. 91. He considered that there was no necessary conflict between the powers assigned to the provincial Legislatures under s. 92, sub-s. 14, of the British North America Act and the power claimed by the Dominion of Canada to refer questions to the Supreme Court under s. 60 of the Supreme Court Act, and further, that even if there was any such conflict the words "Notwithstanding anything in this Act," at the beginning of s. 101 of the British North America Act, indicate that it was the intention of the Imperial Parliament to override s. 92, sub-s. 14, by s. 101.

The opinions of Duff and Anglin JJ. were substantially to the same effect.

Girouard J. was of opinion that the jurisdiction of the Court in references by the Governor-General was confined to Federal matters, and that in so far as the subject-matter of this reference was provincial it was ultra vires of the Governor-General in Council and beyond the jurisdiction of the Court.

Idington J. was of opinion that s. 101 of the British North America Act, besides authorizing the establishment of a general Court of Appeal for Canada, authorized the creation of additional

Courts for the better administration of Federal laws. He held that whilst the Supreme Court had jurisdiction in references in which both the provinces and the Dominion have agreed in submitting the questions asked, it had no jurisdiction to entertain references by the Dominion authorities of questions affecting the provinces without their consent and against their wish.

On March 4, 1911, an Order in Council granted special leave to appeal against the said opinion or judgment. The appellants were the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta. The respondents were the Attorney-General for the Dominion and the Attorney-General for the Province of British Columbia. The latter of the two did not appear.

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Sir R. Finlay, K.C., Nesbitt, K.C., and Geoffrey Lawrence, for the appellants, contended that the Governor-General in Council had no power to refer to the Supreme Court questions which affect the interests of the provinces without obtaining their consent to such reference. On the true interpretation of the British North America Act, 1867, it appears that s. 91, sub-s. 27, and ss. 96—101 expressly and exhaustively define the powers of the Dominion Parliament as to the administration of justice. It is inadmissible to imply further powers and regard those further powers as vested by the statute in the Court. If s. 60 of the Supreme Court Act (R. S. C., 1906, c. 139) authorizes the reference in question it is ultra vires of the Dominion Parliament. That Act and its predecessors constituted the Supreme Court as a general Court of Appeal for Canada. Sect. 60, however, purports to create a Court not as a general Court of Appeal nor for the administration of the laws of Canada, but as a branch of the Executive Government, an advisory committee for the purpose of advising the Executive upon any question which the Governor-General sees fit to refer to it. The giving of such advice is no part of the administration of the law, and it would necessarily include, inter alia, advice upon the legislation of the Imperial Parliament and of the various provincial Legislatures in Canada. So far from aiding in the administration of law it may easily be so used as to hamper and interfere with that administration. The points

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involved in such references may afterwards arise in the course of legal proceedings between private suitors or between the provinces and the Dominion. The duty would then be cast on the provincial Courts and ultimately on the Supreme Court of deciding such points according to law. It was contended that it would or might be highly prejudicial to the administration of justice that the members of the Supreme Court should have been previously required to express opinions upon any such points until they actually arose for adjudication and had been argued before them. It was contended that the Dominion Parliament had no power to impose upon the Supreme Court the obligation to express extra-judicial opinions on matters which might thereafter come judicially before them. The obligation is inconsistent with the primary duty of the Court and the purpose for which it was created, namely, the administration of law. So far as that administration is impeded or overridden by the obligation imposed by s. 60 the Court ceases to be such a judiciary as the Constitution provides for, and it was ultra vires of the Dominion so to enact. The appellants on behalf of the provinces contended that that obligation conflicts with the powers assigned to provincial Legislatures by s. 92, sub-s. 14, of the British North America Act, 1867. Under that sub-section everything which relates to the administration of justice in the province is assigned exclusively to the Legislature of the province. It is not competent for the Dominion to interfere therewith under the authority of the general power of its Parliament to make laws for the peace, order, and good government of Canada. The scope and intention of that Act of 1867 was to effect a division of legislative powers between the Dominion and the provinces, giving to each as far as possible exclusive legislative authority in its own sphere. In the absence of express words it could not have been intended that either the Dominion or the provinces should have the power of calling in question the legislative competency of the other by referring to the Courts of law hypothetical or other questions framed ex parte.

The questions propounded in this reference were designed to obtain the opinion of the Supreme Court on the question whether companies incorporated under provincial statutes have power or capacity to do business outside the limits of the incorporating

province. It was contended that the answers to such questions would or might affect the standing of a great number of companies incorporated by the provinces since the confederation in 1867 and now carrying on business in two or more provinces. They might also affect the legislative control over companies incorporated in the several provinces prior to their entry into confederation. These are obviously questions of vital importance to the appellants, who were not consulted as to the framing of them. Previous references had been made with the consent of the provinces, and so the question of jurisdiction had never before been raised or decided.

With regard to the practice which has obtained in England of putting questions upon matters not in litigation to the Judicial Committee, the House of Lords, and His Majesty's judges, and which was relied upon by the judges of the Supreme Court, it was contended that that practice had grown up under an unwritten Constitution, whereas the validity of the practice which had grown up in Canada depends upon the construction of a written Constitution, namely, the British North America Act, 1867, and the Supreme Court Acts. With regard to the House of Lords and His Majesty's judges the cases referred to were *In re Westminster Bank* (1); *M'Naghten's Case* (2); *O'Connell v. Reg.* (3) The practice observed in those cases afforded no guide to the construction of the British North America Act, although 3 & 4 Will. 4, c. 41, s. 4, seems to have suggested its introduction into Canada. The practice which has grown up under the British North America Act and the various Acts constituting the Supreme Court is more important, and it was contended that on examination it resulted that every previous reference under s. 60 of the Act of 1906 or its corresponding predecessor in the earlier Acts had been made with the consent of the provinces concerned. In consequence the question of jurisdiction raised in this case had not previously been submitted or decided. The cases referred to were *In re Sproule* (4); certain references as to the status of the Supreme Court of British Columbia and under the Liquor Laws Amendment Act, 1883, s. 26, to be found in Coutlée's Supreme Court

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(1) (1834) 2 Cl. & F. 191.

(3) (1844) 11 Cl. & F. 155.

(2) (1843) 10 Cl. & F. 200.

(4) (1886) 12 Can. S. C. R. 140.

J. C. Digest, vol. 1, col. 273 and col. 797; *In re County Courts of British Columbia* (1); *In re Certain Statutes of the Province of Manitoba relating to Education* (2), and on appeal, *Brophy v. Attorney-General of Manitoba* (3); *In re Prohibitory Liquor Laws* (4), and on appeal, *Attorney-General for Ontario v. Attorney-General for the Dominion* (5); *In re Provincial Fisheries* (6), and on appeal, *Attorney-General for the Dominion v. Attorneys-General for Ontario, Quebec, and Nova Scotia* (7); *In re Representation in the House of Commons* (8) and *In re Representation of P.E.I. in the House of Commons* (9), and on appeal, *Attorney-General for Prince Edward Island v. Attorney-General for the Dominion* (10); *In re Railway Act* (11), and on appeal, *Grand Trunk Railway of Canada v. Attorney-General of Canada*. (12) Reference was also made to *In re Criminal Code Sections relating to Bigamy* (13) and *In re Criminal Code* (14); to an Australian case, *McLeod v. Attorney-General for New South Wales* (15); *In re Legislation respecting Abstention from Labour on Sunday* (16), citing *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (17); *In re International and Inter-provincial Ferries* (18); and to *L'Association St. Jean Baptiste de Montreal v. Brault*. (19) With regard to any analogy presented by the American Constitution, the President has the right to require the written opinion of his ministers, but not in regard to the judicial department, which is bound to abstain from extra-judicial opinions upon points of law even though solemnly requested by the Executive: see Story on the Constitution of the United States, s. 1571, note 2, and *Marbury v. Madison*. (20) Sect. 91 of the British North America Act, 1867, gives to the Dominion wide general powers, but it was contended that they must be read so as to harmonize with

- (1) (1892) 21 Can. S. C. R. 446.
- (2) (1894) 22 Can. S. C. R. 577.
- (3) [1895] A. C. 202.
- (4) (1895) 24 Can. S. C. R. 170.
- (5) [1896] A. C. 348.
- (6) (1895) 26 Can. S. C. R. 444.
- (7) [1898] A. C. 700.
- (8) (1903) 33 Can. S. C. R. 475.
- (9) (1903) 33 Can. S. C. R. 594.
- (10) [1905] A. C. 37.

- (11) (1905) 36 Can. S. C. R. 136.
- (12) [1907] A. C. 65.
- (13) (1897) 27 Can. S. C. R. 461.
- (14) (1910) 43 Can. S. C. R. 434, 441.
- (15) [1891] A. C. 455.
- (16) (1905) 35 Can. S. C. R. 581.
- (17) [1903] A. C. 524.
- (18) (1905) 36 Can. S. C. R. 206.
- (19) (1901) 31 Can. S. C. R. 172.
- (20) (1803) 1 Cranch. 137, 171.

s. 101, which is almost identical with provisions in the American Constitution.

E. L. Newcombe, K.C., and *Atwater, K.C.*, for the Dominion of Canada, contended that the judgment of the Supreme Court was right. The reference to the Supreme Court and this appeal simply involve a question of jurisdiction derived from the enacting clauses of the British North America Act. In other words, it was contended that s. 60 of the Supreme Court Act is within the legislative authority of the Dominion Parliament under the British North America Act, either under s. 91 or s. 101. The powers conferred by s. 60 did not conflict in any way with the powers and rights reserved exclusively to the provincial Legislatures by s. 92 of the Act of 1867. The legislation of the Parliament of Canada authorizing the reference of questions in the manner adopted in this case has been in force ever since the constitution of the Supreme Court in 1875: see 38 Vict. c. 11, s. 52. The power so conferred has been acted upon in many cases, as shewn by the authorities cited on the other side. There has thus arisen a long series of precedents already laid before the Board for the answering of such questions not only by the Supreme Court, but also on appeal by the Judicial Committee. Reference was also made to *Grand Trunk Railway of Canada v. Attorney-General of Canada*. (1) *Grand Trunk Pacific Ry. Co. v. Rex*, decided last month (2), was referred by the Governor-General of Canada. Further similar legislation has been enacted by the provincial Legislatures, or most of them, authorizing the provincial Governments to put questions of law or fact otherwise than by litigation to the chief Courts of jurisdiction within their respective provinces. Reference was made to Revised Statutes of Nova Scotia, vol. 2, c. 166, p. 709, entitled Of the Decision of Constitutional and other Provincial Questions; to Revised Statutes of Ontario, 1897, c. 84; Revised Statutes of Quebec, 1909, vol. 1, arts. 579—583; New Brunswick Cons. St. 1903, c. 18; New Brunswick Judicature Act, 1906; Acts of 1909, c. 5, s. 16; Revised Statutes of Manitoba, 1902, c. 33; Revised Statutes of British Columbia, 1911, c. 45; R. S. Saskatchewan, c. 57. Reference was also made

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(1) [1907] A. C. 65.

(2) See p. 204, ante.

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to cases from the provinces where the authority to put the questions was undisputed while the duty of the Court to answer them was sometimes brought under discussion. See *In re Legislation respecting Abstention from Labour on Sunday* (1), where Blackstock, K.C., raised objections to the hearing of the questions, p. 587, but not to the power of Parliament to authorize the putting of them. See also *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (2) and *Attorney-General for the Dominion v. Attorney-General for Ontario.* (3)

There is no inconvenience resulting from the practice of the judges giving advisory opinions. On the contrary it is a proceeding of utility, if not a necessity, in the determination of the various constitutional difficulties arising in the construction of the British North America Act. Advisory jurisdiction is within the functions of a Court of law, which need not be for all purposes indistinguishable from a Court of justice: see judgment of Fry L.J. in *Royal Aquarium, &c., Society v. Parkinson.* (4) Reference was also made to the judgment of Dr. Lushington in *In re Schlumberger* (5), as to questions referred under 3 & 4 Will. 4, c. 41. See also *Ex parte County Council of Kent and Council of Dover* (6); *Crown Grain Co., Ltd. v. Day.* (7) As to the construction of the general powers given to the Dominion Parliament by s. 91 of the Act of 1867, see *Valin v. Langlois* (8); *Bank of Toronto v. Lambe* (9); *Brophy v. Attorney-General of Manitoba.* (10) The Court, if it considered that its answers to the questions put might prejudicially affect the administration of justice in future cases, might refuse to answer the questions, stating their reasons for so doing, or the Legislature might modify its enactment. The appellants had failed to shew that it was ultra vires of the Dominion Parliament to authorize the Executive Government to put the questions purporting to be authorized by s. 60.

Sir R. Finlay in reply.

(1) 35 Can. S. C. R. 581.

(2) [1903] A. C. 524.

(3) [1898] A. C. 247.

(4) [1892] 1 Q. B. 431, 446.

(5) (1853) 9 Moo. P. C. 1, 12.

(6) [1891] 1 Q. B. 728, 729.

(7) [1908] A. C. 504.

(8) (1879) 5 App. Cas. 115, 118.

(9) (1887) 12 App. Cas. 575, 579.

(10) [1895] A. C. 202, 222.

The judgment of their Lordships was delivered by

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EARL LOREBURN L.C. The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorizing 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.

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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 within 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

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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 answer 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 wisdom 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

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 1912 wise is clearly repugnant to its sense. For whatever belongs to
 ATTORNEY- self-government in Canada belongs either to the Dominion or to
 GENERAL the provinces, within the limits of the British North America
 FOR ONTARIO Act. It certainly would not be sufficient to say that the exercise
 v. of a power might be oppressive, because that result might ensue
 ATTORNEY- of a power might be oppressive, because that result might ensue
 GENERAL from the abuse of a great number of powers indispensable to
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 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 (1) 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

(1) *Sic.*

of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable 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, by the 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 stigmatized 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

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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 fifty 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 similar 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 authorizing 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 to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance 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 shewing 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

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J. C. now appellants, the Judicial Committee would have so often
 1912 failed even to advert to a departure so serious as is now main-
 ATTORNEY- tained from what is due to the independence and character of
 GENERAL Courts of justice. It is clear indeed that no such apprehension
 FOR ONTARIO ever occurred to any of the great lawyers who heard those
 v. cases. And that circumstance militates very strongly against the
 ATTORNEY- view now put forward, that it is repugnant to the British North
 GENERAL America Act and subversive of justice to require the Court to
 FOR CANADA. 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 s. 101 of the British North America Act forbids this being done by the Dominion Parliament, that argument cannot apply to the provincial Legislatures, because s. 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 thirty-five 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 resworn 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.

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Solicitors for respondent: *Charles Russell & Co.*

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