IN THE MATTER OF A REFERENCE AS TO THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT OF CANADA TO ENACT BILL No. 9 OF THE FOURTH SESSION, EIGHTEENTH PARLIAMENT OF CANADA ENTITLED "AN ACT TO AMEND THE SUPREME COURT ACT."

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Constitutional law—Appeals to His Majesty in Council and to the Judicial Committee from Canadian courts—Whether Parliament of Canada has jurisdiction to pass an Act amending the Supreme Court Act so as to abrogate jurisdiction of Privy Council to hear such appeals.

A Bill, entitled "An Act to amend the *Supreme Court Act*" was referred to this Court by Order of the Governor General in Council for its opinion as to whether that Bill, or any of its provisions, was *intra vires* of the Parliament of Canada. Such Bill purported to enact that "the Supreme Court of Canada shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada"; and, for the purpose of giving effect to that enactment, it was in substance provided that the jurisdiction of His Majesty in Council and of the Judicial Committee to hear appeals from Canadian courts was abrogated.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 3 D.L.R. 737; [1937] 3 A.E.R. 923.

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Held, by the Court, that the Parliament of Canada was competent to enact such Bill in its entirety.

Crocket J. was of the opinion that the Bill should be declared wholly *ultra vires* of the Parliament of Canada.

Davis J. was of the opinion that the Bill referred if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following question: Is said Bill 9, entitled "An Act to amend the *Supreme Court Act*," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

Whereas there has been laid before His Excellency the Governor General in Council a report from the Right Honourable the Minister of Justice, dated April 18th, 1939, representing that, at the fourth session of the Eighteenth Parliament of Canada, Bill 9, entitled "An Act to amend the Supreme Court Act," was introduced and received first reading in the House of Commons on January the 23rd, 1939; and

That, on April the 14th, the debate on the motion for second reading of this Bill, an authentic copy of which is hereto annexed, was adjourned in order that steps might be taken to obtain a judicial determination of the question of the legislative competence of the Parliament of Canada to enact the provisions of the said Bill in whole or in part;

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and pursuant to the provisions of section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration:—

Is said Bill 9, entitled "An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada?

E. J. Lemaire,
Clerk of the Privy Council.

The text of the Act referred to this Court is the following:

An Act to amend the Supreme Court Act of Canada

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section fifty-four of the *Supreme Court Act,* chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:—

"54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

(3) *The Judicial Committee Act, 1833,* chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and *The Judicial Committee Act, 1844,* chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

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3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette*.

Aimé Geoffrion K.C., *C. P. Plaxton K.C.* and *W. R. Jackett* for the Attorney-General of Canada.

Gordon D. Conant K.C. (Attorney-General), *W. B. Common K.C.* and *E. R. Magone K.C.* for Ontario.

Eric Pepler for the Attorney-General for British Columbia.

P. H. Chrysler for the Attorney-General for Manitoba.

J. B. Dickson for the Attorney-General for New Brunswick.

J. H. MacQuarrie K.C. (Attorney-General) and *T. D. MacDonald* for Nova Scotia.

S. F. M. Wotherspoon for the Attorney-General for Prince Edward Island.

THE CHIEF JUSTICE—For convenience of discussion, it is advisable to consider separately the prerogative appeal and the appeal by right of grant, or more shortly, the appeal as of right.

And first, of the prerogative appeal. The jurisdiction of His Majesty in Council in respect of the appeal which "lies" from the decisions of "various courts of judicature" in "the East Indies, the Colonies and plantations and other dominions abroad" was affirmed and regulated by the Parliament in the Privy Council Acts of 1833 and 1844. By the former of these Acts, the Judicial Committee of His Majesty's Privy Council was established, a statutory body, to whom (it was enacted)

> 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 in Council

from the order of any Court or Judge should thereafter be referred by His Majesty. It was enacted further that the Judicial Committee should hear such appeals and make a report or recommendation to His Majesty in Council for his decision thereon.

"It is clear," says the judgment of the Judicial Committee in *British Coal Corporation* v. *The King* (1),

(1) [1935] A.C. 500, at 510.

that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of Law, to which by the statute of 1833 all appeals within their purview are referred.

The Bill referred to us purports to enact that the Supreme Court of Canada shall have, hold and exercise exclusive, ultimate, appellate jurisdiction, civil and criminal, in and for Canada; and, for the purpose of giving effect to this enactment, it is in substance provided that the jurisdiction of His Majesty in Council and of the Judicial Committee to hear appeals from Canadian Courts is abrogated.

The consideration of the questions raised involves an examination of the authority of the Parliament of Canada under section 101 of the *British North America Act* as well as its authority under its general powers to make laws for the peace, order and good government of Canada.

The authority last mentioned, to make laws for the peace, order and good government of Canada is, by the express provisions of the Confederation Act of 1867, affected by only two limitations; first, it does not extend to matters assigned exclusively to the legislature of the provinces, a limitation which still persists notwithstanding the enactments of the Statute of Westminster; and, second, by section 129, it did not authorize the repeal, abolition or alteration of any law in force in the federated provinces or of any legal commission, power or authority existing therein, enacted by or existing under any Act of the Imperial Parliament, a limitation now, since the enactment of the Statute of Westminster, no longer in force.

Section 101 is expressed in absolute terms and by it,

> 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.

Whether the second of the above mentioned limitations formerly affected the authority of Parliament under section 101 is of little, if any, importance since the statute of Westminster. I shall advert to the point later.

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I turn first to the general powers of Parliament respecting peace, order and good government. It is, I think, not wholly irrelevant to notice the nature of the sovereignty which the Parliament of Canada has been conceived to possess (within, at all events, the territorial limits of Canada) and has actually exercised since the earliest times of Confederation. Under the authority of section 146 of the *British North America Act,* the territories comprised within Rupert's Land and the North-Western Territories (to the north and west of the federated provinces) were (June, 1870) admitted into the Union. Already, in May, 1870, the Parliament of Canada had (acting under its general law making authority) provided for the establishment (to take effect upon the admission of those territories) of the province of Manitoba, for a constitution for the province including an executive authority exercisable in that province by a Lieutenant-Governor, parliamentary institutions with legislative authority respecting (*inter alia*) the administration of justice, taxation, municipal institutions, property and civil rights virtually identical with the authority granted to the original provinces under section 92. For more than thirty years thereafter, the territory west of Manitoba, extending to the Rocky Mountains, now within the provinces of Alberta and Saskatchewan, was governed under statutes of the Parliament of Canada which provided for executive authority vested in a Lieutenant-Governor, a legislative assembly with large legislative powers, for taxation, for the administration of justice and for courts of judicature. In 1905, by other statutes of Canada, the provinces of Alberta and Saskatchewan were established with constitutions similar to that of Manitoba.

True, it is, that, by the *British North America Act* of 1871, it was recited that doubts had been expressed as to the authority of Parliament to enact the Manitoba Act; but by the Act of 1871 the Manitoba Act was declared to have been validly enacted and the power to erect provinces and provide constitutions for them was explicitly vested in Parliament together with unqualified authority to legislate for the peace, order and good government of the territories not included in any province.

It would, indeed, be singular if the enactments of a legislature, charged with such responsibilities, responsibili-

ties of the very highest political nature, should be interpreted and applied in a narrow and technical spirit or in a spirit of jealous apprehension as to the possible consequences of a large and liberal interpretation of them.

The question whether the Bill falls within the ambit of the powers of Parliament under the authority to make laws for the peace, order and good government of Canada must be answered in the affirmative unless the subject-matter of the Bill is in whole or in part, in the words of section 91, a matter "coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." The main contention against the validity of the Bill on this branch of the argument is founded on clause 14 of section 92, which is in these words:

> 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,—
>
> * * *
>
> (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.

So far as concerns this contention, the subject-matter of this Bill in its substance is found in sections 2 and 3 which profess to abrogate the jurisdiction of His Majesty in respect of appeals from the courts of Canada and the statutory jurisdiction of the Judicial Committee to hear and report upon such appeals under the statutes of 1833 and 1844. I repeat, I am at the moment addressing my attention only to the prerogative appeal.

The members of His Majesty's Privy Council, as everybody knows, are nominated by the King on the advice of the Prime Minister of the United Kingdom (Anson, Vol. II, Part I, p. 153). The Judicial Committee is, as was observed in the judgment mentioned above (*British Coal Corporation* v. *The King* (1), a statutory appellate Court established and exercising jurisdiction as a court of justice under statutes of the Parliament of the United Kingdom.

The Court (the Judicial Committee) exists and exercises its jurisdiction under authority derived from the Parliament of the United Kingdom and its members are Privy Councillors who are nominated by statute in virtue

(1) [1935] A.C. 500, at 510, 511.

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of holding, or having held, specified high judicial offices in England or Scotland or are appointed by Order in Council pursuant to statutory authority. The constitution and organization of the Court in every respect is exclusively subject to the Parliament of the United Kingdom.

The constitution of the Judicial Committee is not, I think, without importance in its bearing upon the point I am now to consider; whether, namely, the subject-matter of the Bill referred to us in whole or in part falls within the category of matters defined by clause 14 of section 92.

First of all, it is obvious that the Judicial Committee is not a provincial court within the sense of that clause, it being self evident that the phrase denotes courts which, as to their jurisdiction are primarily subjects of provincial legislation and whose process in civil matters, save in certain exceptional cases which will be adverted to, does not run beyond the limits of the province. No legislature in Canada has, of course, anything to say about the constitution of the Judicial Committee or about its organization. Provision for all such matters is, as I have said, made by the legislature of the United Kingdom and orders in council pursuant to authority derived therefrom.

The argument is, however, put in this way. Decisions of the provincial courts are subject to be reversed or varied, it is said, under prevailing law, by the decisions of the Judicial Committee and the orders of His Majesty in Council; and this appellate jurisdiction includes the subsidiary power to make such orders and give such directions as the appellate tribunal may consider just and convenient for the purpose of giving effect to such decisions: and the court appealed from may be required by its own process and its own officers to carry out such orders.

It is contended that legislation which abrogates this jurisdiction so to intervene in and ordain the course of proceedings in provincial courts is legislation in relation to the jurisdiction of such courts.

I cannot agree with this view for two reasons. First, while it would, perhaps, not be an abuse of language to say that this jurisdiction of His Majesty in Council, by which he is enabled, for the purpose of giving effect to adjudications in prerogative appeals, to make orders requiring the court appealed from to carry out such adjudications is a

jurisdiction which affects the jurisdiction of the Court from which the appeal lies, it is, nevertheless, quite another thing to say that this jurisdiction or power of His Majesty's is a matter within the definition of clause 14 so that legislation to abrogate that jurisdiction is legislation "in relation to" provincial courts within the meaning of clause 14. I am unable to convince myself that such legislation would in its "pith and substance" be legislation "in relation to" the "constitution, maintenance and organization of provincial courts" or "procedure in those courts in civil matters." Its true subject matter would be the appellate jurisdiction of the Judicial Committee.

My second reason really involves a consideration of the alternative argument based upon clause 14. The general subject of clause 14 is "the administration of justice *in* the province." It is argued that the scope of these words must not be restricted by reason of the specific designation of provincial courts and matters connected therewith, as included in the general subject, and it is said interposition in proceedings in provincial courts in the manner just alluded to constitutes an intervention in the administration of justice and that the orders in council by which this is effected are truly acts done in "the administration of justice in the province"; and that legislation abrogating the jurisdiction from which they emanate is consequently legislation "in relation to" that subject.

Something must be said at this point as to the essence of the prerogative appeal which the Bill before us purports to abrogate. The judgment of the Judicial Committee in *Nadan* v. *The King* (1) (as interpreted in *British Coal Corporation* v. *The King* (2)) requires us to hold that any legislation intended to abrogate the prerogative appeal must, if it is to be effective, be "extra-territorial in its operation"; that the legislative powers vested in the Parliament of Canada under the enumerated clauses of section 91 did not, before the Statute of Westminster, enable that legislature to annul the prerogative right of the King in Council to grant leave to appeal because, however widely such powers are construed, they are confined to "action taken in Canada"; and it would, indeed, appear that the central governing act in the appeal to

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

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the Judicial Committee is the decision. If there is authority in the Court as an appellate court to pronounce an effective decision, it is because such is the law that governs, not the appellate tribunal alone, but the inhabitants of Canada and the courts in Canada which carry out the decision. To say that the authority to adjudicate exists without the authority to make the adjudication effective in Canada would seem to be a self-contradictory statement; and you cannot get rid of this authority unless you are endowed, it was held in *Nadan* v. *The King* (1), with extra-territorial powers which the Parliament of Canada did not in 1926 possess.

To return to section 92 (14). The legislative powers of the provinces are strictly confined in their ambit by the territorial limits of the provinces. The matters to which that authority extends are matters which are local in the provincial sense. This principle was stated in two passages in the judgment in the *Local Option* case (1) delivered by Lord Watson speaking for a very powerful Board at pp. 359 and 365, respectively. I quote them:

* * * the concluding part of s. 91 enacts that "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."

It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (2) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature.

* * *

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have

(1) [1926] A.C. 482.
(2) [1896] A.C. 348 (*Attorney-General for Ontario* v. *Attorney-General for the Dominion*).
(3) (1881) 7 App. Cas. 96, at 108.

been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated

The legislation of the provinces under all the heads of section 92 is, by law, confined to matters which are local "in the provincial sense." In the *Royal Bank of Canada* v. *Rex* (1) a statute of Alberta was held, in conformity with this principle, to be invalid and beyond the powers of the legislature.

inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

The subject-matter in question was beyond the powers of the province as the Judicial Committee held, because the legislation dealt with an interest of some of the parties in a deposit in the Bank of Montreal carried on its books at Edmonton which was in the nature of an equitable debt having a constructive situs at the head office of the bank which was outside the province. The principle has been applied also in *Provincial Treasurer* v. *Kerr* (2), in *Bonanza Creek* v. *The King* (3) and in other cases; and, indeed, in all the clauses of section 92, with the exception of clause 3, the territorial restriction is expressed or implied.

Construing clause 14 in light of the general principle stated as above by the Judicial Committee in the *Local Option case* (4), I am unable to accede to the proposition that the jurisdiction of the Judicial Committee and of His Majesty in Council in respect of prerogative appeals from a province belongs to the field described by the words "administration of justice in the province" as a local matter in the sense of that principle. Indeed, I think we are bound by the judgment of the Judicial Committee in *Nadan* v. *The King* (5) as interpreted by the *British Coal Corporation* v. *The King* (6), to hold that legislation intended to prevent the exercise of the prerogative in relation to the judgments of Canadian courts is not legislation in relation to a local matter in that sense.

An argument was based upon clause 13 of section 92 "property and civil rights." With great respect to those

(1) [1913] A.C. 283, at 298.
(2) [1933] A.C. 710.
(3) [1916] 1 A.C. 566.
(4) [1896] A.C. 348.
(5) [1926] A.C. 482.
(6) [1935] A.C. 500.

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who take a different view, I am unable to agree that clause 13 is pertinent. The subject-matter of administration of justice including jurisdiction of provincial courts is specifically dealt with in clause 14 and, if the particular matter with which we are now concerned does not fall within the ambit of clause 14, then I think it must be taken to be excluded from the general clause 13 as well as the residuary clause, 16. That is a principle which has been acted upon more than once in the construction of the clauses of section 92 as well as those of section 91. In the case of section 92 it was applied in determining the scope and effect of clause 11, "the incorporation of companies with provincial objects." This clause was the subject of a great deal of controversy until its effect was finally settled by the judgment of the Privy Council in *Bonanza Creek* v. *The King* (1); a controversy which would have been quite pointless if, for the purpose of ascertaining the powers of the provinces in relation to the incorporation of companies, you could properly resort to clause 13. The Dominion authority in respect of the incorporation of companies under its powers in relation to peace, order and good government rests upon the limitation imposed upon the provincial power by the language of section 11. If the provinces were entitled to invoke the general authority of clause 13 in order to fill up the gap created by the limiting words of clause 11, the reasoning upon which the Dominion authority rests under the residuary powers under section 91 would be deprived of its foundation; and, indeed, as Lord Haldane says in *John Deere Plow Co.* v. *Wharton* (2) if that were a legitimate procedure "the limitation in clause 11 would be nugatory."

Nor is the contention advanced by calling in aid the residuary clause (No. 16). That clause, as the Judicial Committee says in the passages already quoted, serves the purpose of supplementing the preceding enumerated clauses and includes "matters of a merely local or private nature within the province" not included in the preceding clauses. These words, as the judgment declares, are "wide enough to cover" all matters embraced within the preceding

(1) [1916] 1 A.C. 566. (2) [1913] A.C. 339.

clauses, all of which, it also declares, are correctly described by the words of section 91 as "matters of a local or private nature comprised in the enumeration of subjects by this Act assigned exclusively to the legislatures of the provinces." Whatever ancillary powers the provinces may possess in virtue of section 92 (16) they can only be ancillary to the local matters comprised in the preceding clauses as therein defined and they can only be exercised in relation to "matters of a merely local or private nature within the province."

As regards clause 1 of section 92, which is also relied upon, the exception "the office of Lieutenant-Governor" points to the subject-matter and the scope of the clause. The term "provincial constitution" is employed as the heading of Title V. That title deals with the Executive Government of the provinces, with constitution of their legislative institutions and very largely with appointments to Legislative Councils and elections to Legislative Assemblies. The heading of Title V may be contrasted with that of Title VI, "Distribution of Legislative Powers." There is nothing in the enactments of the earlier title supporting the contention that clause 1 of section 92 can be read as enlarging the authority of the legislature under the other clauses of that section, or as freeing the legislature from the restrictions imposed by those clauses.

I now come to section 101. That section has two branches, one which deals with a general court of appeal for Canada, while the other relates to the establishment of additional courts for the better administration of the laws of Canada. The phrase "laws of Canada" here embraces any law "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion" (*Consolidated Distilleries* v. *The King* (1)).

It may be added that it has been held to give authority to Parliament in relation to the jurisdiction of provincial courts; and to impose on such courts judicial duties in respect of matters within the exclusive competence of Parliament: insolvency (*Cushing* v. *Dupuy* (2)); in election petitions (*Valin* v. *Langlois* (3)).

(1) [1933] A.C. 508, at 522. (2) (1880) 5 App. Cas. 409.
(3) (1879) 5 App. Cas. 115, at 119, 120.

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Furthermore, the general jurisdiction of Parliament in relation to peace, order and good government has been exercised in imposing duties on provincial courts in relation of appeals from the courts of territories not within the limits of the provinces. Examples are: the appeal to the Court of Queen's Bench for Manitoba from the court of the North-West Territories (*Riel* v. *The Queen* (1)); and the appeal from the courts of the Yukon to the Supreme Court of British Columbia (*McDonald* v. *Belcher* (2)).

As respects the general court of appeal, the authority is "notwithstanding anything in this Act, from time to time" to make provision "for the constitution, maintenance, and organization of a general court of appeal for Canada." And the question for determination is whether this enactment imports an ambit of legislative authority that embraces the power to endow the court constituted under it with "ultimate and exclusive" jurisdiction in respect of appeals from provincial courts.

Prima facie, the authority is to make legislative provision for a court which shall have general authority as a court of appeal for Canada; and to provide for the constitution and organization of that court. This necessarily involves the power to subject every court of judicature or of public justice to the appellate jurisdiction of the court so to be constituted.

The section, until it is acted upon by Parliament, subtracts nothing from the legislative authority of the provinces. It subtracts nothing from any judicial authority exercisable in the Dominion. But when the Court is constituted and its jurisdiction and powers are defined by Dominion legislation, such legislation takes effect according to its scope and purport notwithstanding anything in the Confederation Act or anything done under that Act. Therefore, it is within the ambit of the legislative authority conferred by this section to define the cases in which, and the conditions under which, the appellate jurisdiction may be invoked, the powers of the court in respect of the judgments and orders it may pronounce, to provide for making such judgments and orders effective, and for that

(1) (1885) 10 App. Cas. 675. (2) (1904) A.C. 429.

purpose to require the court appealed from to give effect to such judgments and orders according to their tenor.

In other words, it is competent to Parliament to give jurisdiction to entertain an appeal in any and every case in which it thinks fit to do so, and also to confer the correlative right of appeal in such cases and in any and every case to require the court appealed from to carry out any judgment pronounced upon the appeal. This, it appears to me, is involved, without qualification, in the very words of the section.

Are you then to imply a constitutional exception imperatively exempting from the operation of legislation under the section judgments or decisions from which, by the existing law, appeal may be taken or may have been taken to the Judicial Committee?

It is of the first importance, I think, to notice that in ascertaining what powers are derived from the section, you are to give effect to its language "notwithstanding anything in this Act."

I think, since the Statute of Westminster, I cannot, without disregarding the reports of the Imperial Conferences recited therein, imply such a qualification. On the contrary, the governing object of section 101 being to invest the Parliament of Canada with legislative authority to endow a court of appeal for Canada with general appellate jurisdiction over all courts in Canada, and all persons concerned in proceedings in those courts, and with power to give complete effect to the judgments of that court,—such being the general object of the enactment, all subsidiary powers must, especially in view of the phrase just mentioned, be implied to enable Parliament to legislate effectively for that object.

Three considerations seem to me to be decisive:

(*a*) Since this legislative authority may be executed in Canada "notwithstanding anything in this Act," you cannot imply any restriction of power because of anything in section 92. Assuming even that section 92 gives some authority to the legislatures in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under section 101. Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow Parliament with power to effect high

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political objects concerning the self government of the Dominion (section 3 of the B.N.A. Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada;

(*b*) Since, in virtue of the words of section 101, Parliament may legislate for objects within the ambit of section 101 regardless of any powers the provinces may possess to affect appeals to the Judicial Committee, it follows that the general power of Parliament to make provision for the peace, order and good government of Canada in relation to such objects is in no way limited by the exception of "local matters" assigned exclusively by the introductory words of section 91 to the legislatures of the provinces; and, consequently, no existing judicial authority competent to affect the course of judicature in Canada can be an obstacle precluding the Parliament of Canada from making its legislation relating to these objects effective;

(*c*) Having regard to the reports of the Imperial Conferences recited in the Statute of Westminster, to the provisions of that statute, and to the terms of section 101, you cannot properly read anything in the Statute of Westminster or in the B.N.A. Act as precluding Parliament, for the purpose of effecting its objects within the ambit of that section from excluding from Canada the exercise of jurisdiction by a tribunal constituted, organized and exercising jurisdiction under the exclusive authority of another member of the British Commonwealth of Nations.

The exercise of such jurisdiction for Canada by a tribunal exclusively subject to the legislation of another member of the Commonwealth is not a subject which can properly be described (as subject matter of legislative authority) as a matter merely local or private within a province. And again, the power to make laws for the peace, order and good government of Canada in relation to matters within section 101 being without restriction, the power of Parliament in such matter is, as I have said more than once, paramount. In truth, the point seems to be governed by the decision in the *Aeronautics*

Reference (1) as well as by the decision in the *Radio* Reference (2). The primacy of Parliament under section 101 is just as absolute as under the enumerated clauses of section 91.

As to appeals from the Supreme Court of Canada, or from any additional courts established under section 101, it ought, perhaps, to be noticed that since the provinces can have no jurisdiction respecting them, they obviously fall within the ambit of the general power in relation to peace, order and good government.

Second, I come to the appeal as of right, so called.

Before this topic is discussed, it is advisable, I think, to refer to the contention that His Majesty's prerogative in relation to appeals was merged in the statutory powers of the Judicial Committee under the Judicial Committee Acts of 1833 and 1844. I should have thought it more accurate to say that this legislation affirmed and regulated the exercise of His Majesty's prerogative power in relation to appeals. The appeal is still an appeal to His Majesty in Council though in point of substance (*British Coal Corporation's* case (3), the appellate jurisdiction is now exercised by the statutory court of the Judicial Committee, and I should have thought it resulted from the terms of section 92 of the *British North America Act* and the judgments in *Nadan* v. *The King* (4) and in the *British Coal Corporation* v. *The King* (3) that before the enactment of the Statute of Westminster neither the Parliament of Canada, nor the legislature of a province, could subtract from or add to His Majesty's prerogative as exercised by the Judicial Committee or, to put it another way, to the jurisdiction of the Judicial Committee.

We have to consider the legislation of Ontario and Quebec touching this subject, the appeal as of right, the orders in council affecting the other provinces, except British Columbia, and the rather special position of British Columbia.

As to Ontario and Quebec, the statutory provisions with which we are concerned were first enacted by the provinces of Upper and Lower Canada in professed exercise of authority conferred by the Constitutional Act of 1791;

(1) [1932] A.C. 54.
(2) [1932] A.C. 304.
(3) [1935] A.C. 500, at 510.
(4) [1926] A.C. 482.

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they were continued in force in the province of Canada by section 46 of the Act of Union of 1840 and are still in force under the authority of section 129 of the *British North America Act*.

To begin with Ontario and Quebec. The legislation in force was considered by the Judicial Committee in the year 1880 in *Cushing* v. *Dupuy* (1). The appeal was from a judgment of the Court of Queen's Bench of the province of Quebec, reversing the judgment of a judge of the Superior Court in certain proceedings in insolvency instituted under an Act of the Parliament of Canada entitled *An Act respecting Insolvency* (38 Vict., c. 16). An application to the Court of Queen's Bench for leave to appeal to His Majesty in Council was refused on the ground that under the *Insolvency Act* its judgment was final. Article 1178 of the Code of Civil Procedure of 1867 in so far as relevant is in these words:

> 1178. An appeal lies to Her Majesty in the Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench:—
>
> 1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to her Majesty;
>
> 2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected;
>
> 3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.

The corresponding Ontario enactment is to the same effect except as to the pecuniary limit and as to another point to which reference will be made.

The effect of the *Insolvency Act* in declaring the judgment of the Court of Queen's Bench to be final in insolvency proceedings was held to preclude any appeal under article 1178 if valid; and it was also held that legislation precluding such appeal could be validly enacted in respect of insolvency proceedings by the Parliament of Canada under the authority of section 91 (21) relating to Bankruptcy and Insolvency unless it infringed the Queen's prerogative.

It was held that such an enactment would not "infringe the prerogative" for the reason that

> since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature as part of the

(1) (1880) 5 App. Cas. 409.

civil procedure of the province shall not be applicable in the new proceedings in insolvency which the Dominion Act creates, such a provision in no way trenches on the Royal prerogative.

The judgment is important, first, since it characterizes the article of the code as a provision enacted under the authority of the provincial legislature "as part of the civil procedure of the province." Second, that the legislature of the Dominion, in legislating upon a subject within its powers, could remove proceedings under that legislation from the operation of this provision and that in doing so it was in no way trenching on the Royal prerogative.

It ought also to be added as of equal importance that, the Judicial Committee having held the Court of Queen's Bench to be right in refusing to admit the appeal, it follows in point of law that there was no appeal from a judgment of the Court of Queen's Bench which the Parliament of Canada could not declare inadmissible in insolvency proceedings without infringing Her Majesty's prerogative.

Now, it is quite plain that, neither in 1867 nor in 1875 (it is conclusively settled by *Nadan* v. *The King* (1), as interpreted by the *British Coal Corporation's* case (2)), neither the legislature of a province nor the Parliament of Canada could enact laws binding upon His Majesty respecting his appellate jurisdiction. We must, consequently, hold that this provincial legislation does not, and cannot, be legislation upon the subject of His Majesty's jurisdiction.

It is legislation in relation to procedure in the provincial courts giving directions to such courts as to proceedings that may be taken in them in respect of appeals to His Majesty.

The same considerations apply to Ontario.

If the Royal Proclamation of 1763 had the effect of creating jurisdiction then we are bound to hold under the authorities mentioned that no legislature in Canada had, prior to the Statute of Westminster, authority to abrogate that jurisdiction and the powers of the provinces have not, as explained above, been since enlarged because such jurisdiction is not a local matter within section 92.

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

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The same considerations apply to British Columbia in so far as regards the statute of 1858. The order in council of 1856 must, I think, be taken to have been passed under the authority of the *Judicial Committee Act* of 1844; and the orders in council of that character I am now to consider.

The provinces, other than Ontario and Quebec, are governed in respect of the appeal as of right by orders in council under the statute of 1844. These orders in council merely regulate the exercise of the jurisdiction of the Judicial Committee; but, for the reasons given, no province can be competent to abrogate them in so far as the jurisdiction of the Judicial Committee would be thereby impaired; and it is only with this jurisdiction that we are concerned, because jurisdiction is the subject matter of this Bill. In truth, it would appear that the orders in council and the legislation of Ontario and Quebec assume the existence of the jurisdiction of the Judicial Committee. The Bill before us professes to take away that jurisdiction. The power of Parliament even under the introductory clause of section 91 in respect of that subject does not conflict with any authority of the provinces in relation to procedure in the provincial courts which postulates the existence of the jurisdiction.

The statute of Ontario professes to declare that, except in the cases specified, no appeal shall lie to His Majesty in his Privy Council. If the subject matter of this enactment really is the jurisdiction of the Judicial Committee then it is invalid. Probably, it ought to be read as a declaration that the rights given under the statute, whatever they may be, apply only in the cases specified.

To sum up with regard to the appeal as of right. In respect of that appeal, in so far as we are concerned with His Majesty's prerogative or the jurisdiction of the Judicial Committee, what I have said applies to the appeal as of right as well as to the prerogative appeal; and, I repeat, we are concerned here only with legislation abrogating the prerogative as regards Canada and with legislation abrogating the jurisdiction of the Judicial Committee as regards Canada. If such legislation is not within the ambit of the powers given to the provinces, or is within the ambit of the powers of the Dominion in respect of objects contemplated by section 101, then the Bill is valid.

I have proceeded thus far without any reference to the judgment of their Lordships of the Judicial Committee in the *British Coal Corporation* v. *The King* (1). I cannot satisfy myself whether or not their Lordships intended to express a final view that the appeal as of right is, from the provincial point of view, a local matter assigned to the provinces for legislative action by section 92. As far as I can see, that particular point did not arise for decision or for examination in that case.

We have been obliged to say in some cases, and have said with the approval of the Judicial Committee, that observations forming no part of the *ratio decidendi* in judgments of the Judicial Committee do not necessarily acquit us of the responsibility of deciding for ourselves on the point dealt with (*Dominion of Canada* v. *Province of Ontario* (2)). For my own part, if I were satisfied their Lordships had really intended to express an opinion upon the point new before us I should regard that as conclusive for the purposes of this reference; but I am not satisfied they did, and I am inclined to think they did not. In these circumstances it is my duty to form an opinion upon the point. I should add that their Lordships expressed no opinion as to the effect of section 101 and, apparently, did not consider it.

I return now to a point as to the effect of section 129 of the *British North America Act* already alluded to. Their Lordships in the *British Coal Corporation's* case (3) say that before the Statute of Westminster the Dominion legislature was subject, in legislating under section 91, to the limitations imposed not only by the *Colonial Laws Validity Act*, but also by section 120 of the *British North America Act*. I do not know that the point is now of any practical importance, but if it has not been finally decided, I venture to suggest, as regards section 101, that "notwithstanding anything in this Act" includes within its purview every part of section 129 as well as all the other sections of the Act.

My opinion, therefore, is:

First, that since, by the Statute of Westminster, the obstacles have been removed which prevented the Parlia-

(1) [1935] A.C. 500, at 520, 523.
(2) [1910] A.C. 637.
(3) [1935] A.C. 500, at 520.

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ment of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of section 101 to enact the Bill in question.

Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government.

The answer to the interrogatory addressed to us by His Excellency in Council is that the Bill mentioned in the question is *intra vires* of the Parliament of Canada in its entirety.

RINFRET J.—The question referred to this Court is as follows:

> Is said Bill 9, entitled "An Act to amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada.

The object and intent of Bill 9 is to amend the *Supreme Court Act* so that the Supreme Court shall have, hold and exercise "exclusive, ultimate" appellate civil and criminal jurisdiction within and for Canada, and that its judgments shall in all cases be final and conclusive.

My opinion is that the question should be answered in the affirmative, as to all the provisions of the Bill; and I base that opinion upon the following reasons:

It has been repeatedly laid down by the Judicial Committee adjudicating upon the powers conferred by the *British North America Act,* that

> 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

and

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*.

(*Attorney-General for Ontario* v. *Attorney-General for Canada*) (1).

Since the adoption of the Statute of Westminster, 1931, and the judgment of the Privy Council in *British Coal Corporation* v. *The King* (2), it must be taken as now settled that appeals from Canadian courts to The King in Council are

essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice.

It follows, therefore, that the real question presented for decision is whether the power to constitute the Supreme Court of Canada the "exclusive, ultimate" appellate court and to prohibit all appeals to His Majesty in Council is within the legislative competence of the Dominion Parliament or of the provincial legislatures.

The rule of construction followed in such cases is to decide, first, whether the Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislatures of the provinces. (*Citizens Insurance Company* v. *Parsons* (3). If it does not, then it must fall within the legislative competence of the Dominion Parliament, for

the Federtaion Act exhausts the whole range of legislative power, and whatever is not thereby given to provincial legislatures rests with the Parliament.

(*Bank of Toronto* v. *Lambe* (4)).

The only head of provincial legislative jurisdiction which we have to consider is head (14) of section 92:

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.

If the matter of appeals to the Privy Council be within the legislative competence of the provinces, it must fall

(1) [1912] A.C. 571, at 581, 584.
(2) [1935] A.C. 500, at 521.
(3) (1881) 7 App. Cas. 96, at 109.
(4) (1887) 12 App. Cas. 575, at 587.

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under this head, for the several compartments of section 92 cannot overlap and it must be obvious that head (14) excludes the others.

The controlling words in head (14) are "The administration of justice in the provinces." The words are not: in respect of or for the province; they restrict the power to the administration of justice "in the province." These words cannot include matters of appeal from Canadian courts to the Privy Council in London. (*Royal Bank of Canada* v. *The King* (1); *Brassard* v. *Smith* (2), and *Provincial Treasurer of Alberta* v. *Kerr* (3)).

As for the remainder of head (14) concerning the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction and the procedure in civil matters in those courts, it need only be said that obviously it cannot have any reference whatever to His Majesty in Council or to the Judicial Committee of the Privy Council.

In recent years we have had the advantage of two pronouncements of the Judicial Committee on the question of the power to abolish appeals to the Privy Council and it seems to me that they are decisive of the point which is now submitted to this Court.

In *Nadan* v. *The King* (4), there was an application for special leave to appeal from a provincial court from two convictions, one under a provincial Liquor Act and the other under the Dominion Liquor Act. The point was raised that there was no jurisdiction to give leave having regard to section 1025 of the Criminal Code of Canada. It was held that section 1025 was ineffective to annul the right of His Majesty to grant special leave to appeal in a criminal case upon two grounds, first, that the powers of the Dominion Parliament are confined to action to be taken in the Dominion and, second, that the section was repugnant to the Judicial Committee Acts and, therefore, inoperative by virtue of the *Colonial Laws Validity Act,* 1865.

The judgment in *Nadan's* case (4) was interpreted by the Board in the *British Coal Corporation* case (5), as being based upon those two grounds: the repugnancy of

(1) [1913] A.C. 283.
(2) [1925] A.C. 371.
(3) [1933] A.C. 710.
(4) [1926] A.C. 482.
(5) [1935] A.C. 500.

section 1025 to the Privy Council Acts and, therefore, to the *Colonial Laws Validity Act* and that it could only be effective if construed as having extra-territorial operation, whereas according to the law as it was in 1926 the Dominion statute could not have extra-territorial operation. The effect of those two decisions is clearly that the matter of the appeal to the Privy Council was then considered outside the territory of Canada and could only be effectively dealt with by Canadian legislation if that legislation could have extra-territorial operation, which it had not at the time. By the Statute of Westminster the restriction imposed by the *Colonial Laws Validity Act* has been removed both as regards the Dominion Parliament and the provincial legislatures. The Dominion Parliament was further given full power to make laws having extra-territorial operation; but such power was not given to the provincial legislatures. The following consequences seem to be the result from the two decisions of the Privy Council above referred to and from the subsequent enactment of the Statute of Westminster:—

The question of appeals to the Privy Council was considered by the Judicial Committee as a matter of extra-territorial operation.

It was decided that previous to the Statute of Westminster the Dominion Parliament could not effectively deal with the whole question of the appeals to the Privy Council because it had not then the power to make laws having extra-territorial operation.

It is only because such power was given to the Dominion Parliament by the Statute of Westminster that the *British Coal Corporation* case (1) was subsequently decided upholding the Dominion's jurisdiction.

We must conclude that a *fortiori* the provincial legislatures could not effectively legislate with regard to the abolition of appeals to the Privy Council as the law stood before the Statute of Westminster; and, as they continue as before to have no legislative capacity to make any law having extra-territorial operation, they have no power to deal with the matter of appeals to the Privy Council.

The result would be that this matter not being within the legislative competence of the provinces it must fall

(1) [1935] A.C. 500.

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necessarily within the competence of the Dominion Parliament.

This result is further supported in my view by section 101 of the *British North America Act*.

Under that section

> 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, etc.

The legislative authority conferred on the Dominion by that section is exclusive, paramount and plenary. It cannot be taken away or impaired by provincial legislation (*Crown Grain Co.* v. *Day* (1)). Its jurisdiction extends as well to the laws passed by the Parliament of Canada as to any provincial law. It is "a general Court of Appeal for Canada" and the Dominion Parliament may exclusively determine the appellate jurisdiction of the Court.

One of the principal functions of a general Court of Appeal should be to settle jurisprudence and that object fails completely if it is not the final and ultimate Court of Appeal. There appears to be no sound ground for the suggestion that legislation by Parliament directed to that purpose would not be legislation relating to the constitution, maintenance and organization of the Supreme Court of Canada in its character as a general Court of Appeal for Canada.

An attempt was made at the argument to make a distinction with regard to admiralty law, but I think the legislative competence of the Dominion Parliament on that subject would naturally fall under the power to deal with navigation and shipping and the further power given by section 101 as to the

> establishment of any additional courts for the better administration of the laws of Canada.

For those reasons, I have come to the conclusion that Bill 9 in toto is *intra vires* of the Parliament of Canada.

CROCKET J.—Although this bill, as it comes to us on this reference, simply entitled "An Act to amend the *Supreme Court Act of Canada*" purports to amend "*The Supreme Court of Canada Act*," c. 35 of the Revised Statutes of Canada, 1927, only by repealing s. 54 of that Act and substituting for it a new section of three com-

(1) [1908] A.C. 504.

paratively short subsections, the most cursory examination of the proposed substitution shews that it goes far beyond the mere elimination from the existing section of its express recognition of the royal prerogative to grant leave to appeal from the judgments of this court. Its real purpose is to give this court "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada," as it is expressed in s.s. 1. To accomplish this purpose the bill itself recognizes that the mere abrogation of the existing prerogative in relation to the judgments of this court will not suffice, and that it requires to make an end also of the long established prerogative of the reigning Sovereign to grant special leave to appeal to His Majesty's Privy Council from any judgment pronounced by any of His courts of justice in any of the provinces of the Dominion, and to annul as well the provisions of any and every statute or law now in force in any province under which appeals may be taken directly as of right to the Judicial Committee of the Privy Council in certain cases from the judgments of provincial courts. (The Code of Civil Procedure of Quebec, as amended by 8 Edward VII, c. 75 and 8 George V, c. 78 expressly provides for an appeal to His Majesty in His Privy Council from final judgments of the Court of King's Bench in all cases where the amount or value of the thing demanded exceeds $12,000, as well as in all cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected. The *Privy Council Appeals Act,* Revised Statutes of Ontario, 1937, provides also that an appeal shall lie to His Majesty in His Privy Council where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual fee or rent, customary or other duty or fee or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, while in all the other Provinces of Canada Imperial Orders in Council, made under the provisions of the *Judicial Committee Act,* 1933, 3 & 4 William IV, c. 41, and the *Judicial Committee Act,* 1844, c. 69, of the Imperial Statutes, 7 & 8 Vict., which provide for direct appeals from the judgments of the Supreme and other courts of the several

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provinces to the Judicial Committee without any special leave of the Imperial Privy Council, undoubtedly are now operative in the other seven provinces and have the same force and effect as if their provisions had been expressly enacted by their respective legislatures.) Hence the far-reaching, all-embracing proposal of s.s. 2:—

> (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom (this manifestly would cover the B.N.A. Act itself) or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

And that of s.s. 3, actually declaring that:—

> (3) *The Judicial Committee Act,* 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and *The Judicial Committee Act,* 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.

The undoubted effect of the enactment of such a measure by the Parliament of Canada would be an open defiance by that body of the authority of any of the provincial legislatures of Canada to legislate in respect either of appeals as of right directly to the Judicial Committee of the Privy Council from the judgments of provincial courts now or hereafter established within Canada, or in respect of the royal prerogative to grant leave to appeal thereto independently of the provisions of any statute or law duly enacted by the legislature of any province or duly established by Order in Council under the provisions of the Imperial *Judicial Committee Acts* of 1833 and 1844. It would amount to an attempt on the part of the Parliament of Canada to arrogate to itself the complete control of the administration of justice in all the Provinces of the Dominion in so far as the finality of judgments in civil as well as in criminal cases is concerned and the right of the subject or anybody submitting to the jurisdiction of a provincial court to petition His Majesty for leave to appeal to him for redress through his Judicial Committee, and thus to strike at the constitutional integrity of all the provinces of Canada as self-governing entities under the British Crown.

If any warrant exists for the presentation to the Parliament of Canada of such a drastic bill it must be found either in the Statute of Westminster, 1931, 22 George V, ch. 4, or in the *British North America Acts*, 1867 to 1930.

Sec. 4 of the first mentioned Imperial Statute, enacting that the Parliament of a Dominion has full power to make laws having extra-territorial operation, has been much stressed as a justification for the presentation of the bill in question. It is contended that its enactment would have extra-territorial operation inasmuch as it would prohibit the hearing of appeals by His Majesty's Judicial Committee of the Privy Council, which sits in the United Kingdom beyond the territorial limits of Canada.

The answer to this contention, I think, is that in so far as the direct right of appeal to the Judicial Committee of the Privy Council provided by the statutes of Quebec and Ontario and by orders in council in the other provinces of the Dominion is concerned, the principal, and indeed the only effective, operation of the now proposed enactment would be the virtual repeal of these provincial statutes and orders in council, which manifestly could have effect only in Canada. This would be true also of the proposed abrogation of the royal prerogative in relation to the granting not only of appeals from the judgments of any provincial court in Canada, but also in relation to the granting by royal prerogative of appeals from judgments of the Supreme Court of Canada. So far as the exercise by the Sovereign of the royal prerogative is concerned, it cannot in any sense be said to be localized either in the place where the Sovereign resides nor in the place where His Judicial Committee sits, as was so clearly pointed out by Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council in *Hull* v. *McKenna* (1): "The Judicial Committee of the Privy Council," said Lord Haldane,

> is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or for the future, an Irish Free State body. There sit among our numbers Privy Councillors who may be learned Judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had them from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing

(1) [1926] I.R. 402, at 404.

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out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it.

In *British Coal Corporation* v. *The King* (1), Lord Sankey in delivering the judgment of the Judicial Committee said:

> It may now be considered whether there is since the statute (authorizing appeals as of right to the Privy Council) any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of Law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian court and which concludes and reaches its consummation in the Canadian court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

The last mentioned case, which was an application for leave to appeal from a criminal conviction, decided that the extent of the legislative competence conferred on the Canadian Parliament in regard to appeals to the King in Council in criminal matters must now be ascertained from its constituent Act, the *British North America Act,* and

(1) [1935] A.C. 500, at 521.

that s. 91 of that Act, read with the rest of the Act by necessary intendment, invested the Parliament with power to regulate or prohibit appeals to the King in Council in criminal matters. In the course of his judgment Viscount Sankey said, at p. 520:

> A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is, of the Dominion of the Provinces, as the case may be.

So that, while the decision in *British Coal Corporation* v. *The King* (1) may be taken to have settled the question of the right of the Dominion Parliament (by reason of its exclusive legislative jurisdiction in relation to criminal law, including procedure in criminal cases) to prohibit appeals to the King in Council in criminal matters, that decision does not extend to appeals, either as of right or by the exercise of the royal prerogative in relation to classes of subjects, which the *British North America Act* has assigned exclusively to the Legislatures of the Provinces.

Apart, however, from these considerations and pronouncements it seems to me that it is only necessary to examine ss. 2 of s. 2 of the Statute of Westminster in connection with and in the light of ss. 2 of s. 7 of that statute to see that s. 3 of that statute respecting the power of the Parliament of the Dominion to make laws having extra-territorial operation could not reasonably be held to apply to such a matter as the royal prerogative to grant leave to appeal to the Judicial Committee of the Privy Council. Ss. 2 of s. 7 provides that ss. 2 of s. 2 shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such provinces. The provisions, therefore, of ss. 2 of s. 2 of the Statute of Westminster enacting that no law and no provision of any law made after the commencement of that Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and that the powers of the Parliament of the Dominion

(1) [1935] A.C. 500.

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shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion, applies in the same way to laws made by any of the Provinces of Canada and to the powers of the Legislatures of those Provinces as it does to laws made by the Parliament of Canada and to the powers of that Parliament. The power, therefore, to repeal or amend any Act of the Parliament of the United Kingdom or any order, rule or regulation made thereunder, whether such repeal or amendment be made by the Parliament of Canada in relation to matters within its legislative jurisdiction or by the legislature of any province in relation to matters within its legislative jurisdiction is expressly limited by the words "in so far as the same is part of the law of the Dominion," i.e., Canada and its several component provinces.

If the extra-territorial argument is not fully met by what I have already said, it is in my opinion effectually disposed of by reference to ss. 1 and 3 of s. 7 of the Statute of Westminster. The argument in behalf of the Dominion in this regard rests entirely upon the fact that ss. 2 of s. 7, which extends the provisions of ss. 2 of s. 2 to the Legislatures of the Provinces, makes no specific mention of s. 2 relating to the power of the Parliament of the Dominion to make laws having extra-territorial operation. It is claimed that this omission shews conclusively that it was the intention of the Imperial statute to confer some new power upon the Parliament of a Dominion as distinguished from the Legislatures of the Provinces. Ss. 2 of s. 7, however, explicitly enacts that

> the powers conferred by this Act (including of course that conferred by s. 3) upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively,

so that by the operation of this ss. 3 of s. 7 alone s. 3 could not well be held to confer upon the Parliament of Canada any power to make laws in relation to matters, which were not already within its competence at the time of the passing of this Imperial statute. This accords entirely with the principle laid down by Lord MacMillan in delivering the judgment of the Judicial Committee in

Croft v. *Dunphy* (1), in holding that the Parliament of Canada was competent to provide by ss. 151 and 207 of the *Customs Act* (R.S. Canada 1927, ch. 42 as amended in 1928) that any vessel registered in Canada hovering within twelve miles of Canada having on board dutiable goods, the vessel and her cargo were to be seized and forfeited. Lord MacMillan there said:

> But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the *British North America Act* the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.
>
> In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the *British North America Act,* their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

Although the Statute of Westminster was then in force and their Lordships' attention was drawn to s. 3, which it was suggested had retrospective effect, their Lordships held in the view which they had taken of that case it was not necessary to say anything on that point beyond observing that the question of the validity of extra-territorial legislation by the Dominion could not at least arise in the future. The decision, however, as I have already intimated, is clearly in line with the express provisions of ss. 3 of s. 7 of the Statute of Westminster, which so explicitly restricts the Parliament of Canada in making laws having extra-territorial operation to matters within its competence. This obviously can only refer to matters within the competence of the Parliament of Canada under the provisions of the *British North America Acts,* 1867 to 1930, in the light of the provisions of ss. 1 of that section enacting that

> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts,* 1867 to 1930, or any order, rule or regulation made thereunder.

(1) [1933] A.C. 156, at 163.

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Far, then, from conferring any new legislative powers upon the Parliament of Canada in derogation of the legislative powers of its several provinces, the Statute of Westminster plainly preserves the *British North America Acts*, 1867-1930, intact and, moreover, explicitly restricts the legislative powers of both the Dominion Parliament and the provincial legislatures to their respective legislative fields, as prescribed by those Acts.

If I am right in this view it follows that if any authority exists for the enactment of this far-reaching bill by the Parliament of Canada it must be sought within the four corners of the *British North America Act* itself.

Now, there are but two sections of that Act which are or possibly can be relied upon to support it or any part of it, viz: ss. 91 and 101.

Dealing first with s. 91, this is the well-known section, which prescribes the general authority of the Parliament of Canada 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. In addition to this general authority, and subject to the express limitation mentioned, it declares that

> for greater certainty, but not so as to restrict the generality of the foregoing terms of this section * * * (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.

Then follows the enumeration of 29 specific classes of subjects.

If the subject matter of this bill does fall within any of the classes of subjects assigned exclusively to the Legislatures of the Provinces, it seems perfectly clear that the residuary power conferred on the Parliament of Canada by the introductory words of s. 91 to make laws for the peace, order and good government of Canada does not authorize its enactment by that body. Our first duty, therefore, is to determine whether the bill does or does not relate to matters falling within the exclusive legislative prerogative of the Provinces. These 16 classes of subjects include:

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

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.

That the proposed enactment directly and vitally concerns the administration of justice in all the Provinces of Canada is self-evident. Its avowed purpose is to constitute this court a court

> of exclusive ultimate appellate civil and criminal jurisdiction within and for Canada,

and to that end,

> notwithstanding any Royal prerogative or anything contained in any Act of the United Kingdom * * * or any Act of the Legislature of any Province of Canada

to prohibit all appeals "from any court now or hereafter established within Canada" to the Judicial Committee of His Majesty's Privy Council. How then could it possibly be said that the bill does not essentially relate to the administration of justice in every province of the Dominion, or that it is not designed to nullify or render inoperative the laws of all the nine provinces of Canada, under which appeals now lie directly to that body from provincial courts —both appeals as of right in specified cases, as well as appeals in all other cases in which His Majesty may be advised to grant special leave to appeal thereto?

Counsel for the Attorney-General of Canada, however, argued that the meaning of the expression "The Administration of Justice," as used in enumeration 14, is not only limited territorially by the words "in the Province," but also by the words

> 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.

It was never intended, of course, that the laws which s. 92 exclusively empowered the legislature "in each Province" to make in relation to matters coming within the classes of subjects therein enumerated should have

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any application beyond the limits of the province in which they are enacted. That fact, however, in no way adds to the residuary power of the Dominion Parliament under the introductory words of s. 91 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," that is to say, to the legislatures of all the provinces of Canada alike. Obviously no single legislature could make laws in relation to the administration of justice in any other than its own province, but the legislatures of all the nine provinces of Canada are indisputably authorized by s. 92 (14) to exclusively make laws in relation to the administration of justice in their several provinces. The question is, not whether any single province could legislate in relation to the administration of justice in any other province, but whether the Dominion Parliament under s. 91 is authorized to make laws in relation to the administration of justice in all the provinces of Canada alike merely because the legislature of each province necessarily can make laws in relation to the administration of justice only in and for its own province. The answer to such a question, I think, must be No.

As to the argument that the quoted words immediately following narrow and limit the meaning of the general words "The Administration of Justice in the Province," Street, J. in his judgment in *Regina* v. *Bush* (1), sitting with Armour, C.J. and Falconbridge, J. in the Ontario Divisional Court in 1888, effectually, I think, disposed of this precise point when he said:

> But these words (including the constitution * * * of provincial courts) do not, as I read the clause, in any way limit the scope of the general words preceding them, by which the whole matter of the administration of justice is included. The fundamental weakness of the defendant's argument appears to be his assumption that the word "including" in this para. 14 is to be read as if it were "videlicet" or as if the words "The Administration of Justice" were to be treated, for the purpose of this discussion, as being entitled to no weight.

His Lordship in the course of this judgment said that para. 14 of s. 92 appeared to him to be sufficient to

(1) (1888) 15 O.R. 398, at 403.

confer upon the provincial legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense.

and pointed out that the general, governing words of that paragraph were subject to no other limitation than that to be found in para. 27 of s. 91 ("The Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters") and that contained is Part VII under the title "Judicature" (ss. 96 to 101 inclusive) relating to the appointment of judges of Superior, District and County courts and the payment of their salaries and to the authority of Parliament to 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.

Everything coming within the ordinary meaning of the expression "the administration of justice," not covered by (these) sections, (he said) remains, in my opinion, to be dealt with by the provincial legislatures in pursuance of the powers conferred upon them by para. 14 of s. 92 * * * . It is clearly the intention of the Act that the provincial legislatures shall be responsible for the administration of justice within their respective provinces, excepting in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred.

My Lord the Chief Justice in delivering the unanimous judgment of this court in 1938 in the matter of the Reference concerning the authority of judges and junior and acting judges, etc., to perform the functions vested in them respectively by the Ontario *Children's Protection Act* and other Acts of the Ontario Legislature (1) expressly approved the judgment of Street, J. in this case and quoted two of the passages I have ventured now to reproduce. Relating as it does so essentially to the Administration of Justice, as that expression is ordinarily understood, in all the provinces of Canada alike, it is, as I have already indicated, impossible to say that the main purpose and the real subject matter of the proposed enactment now before us does not fall within the classes of subjects, which the *British North America Act* has assigned exclusively to the Legislatures of the Provinces. For that reason the

(1) [1938] S.C.R. 398.

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residuary power of the Dominion Parliament cannot properly be invoked in its support.

This being so, the question remains, as regards s. 91, whether, notwithstanding the fact that the proposed denial of the Royal prerogative to grant direct appeals from all courts in and throughout Canada to the Judicial Committee of His Majesty's Privy Council as well as the proposed abolition of all direct appeals as of right, for which the laws of all the provinces now provide, *prima facie* fall within enumerated head 14 of s. 92, do not also fall within any one of the 29 specific classes of subjects enumerated in s. 91, in which event the power of the provincial legislatures would be overborne according to the principle laid down by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1); *Dobie* v. *Board for the Management of the Temporalities Fund of Presbyterian Church of Canada* (2), and *Russell* v. *The Queen* (3).

In expounding the principle of the pre-eminence of Dominion legislation in cases of conflict between the enumerated heads of ss. 91 and 92, as declared by the *non obstante* clause in the second branch of the former section, Sir Montague Smith in the *Parsons* case (4) pointed out that it was obvious that in some cases where apparent conflict exists it could not have been intended

> that the powers exclusively assigned to the provincial legislature should be absorbed in those powers given to the Dominion Parliament * * *. It could not (he said) have been the intention that such a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them.

Does then the real subject matter of this bill fall within any of the classes of subjects specifically enumerated in s. 91?

The only one of the 29 enumerated heads of this section having any possible relevancy on this subject is that which has already been mentioned, (27), The Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters. Reading the

(1) (1881) 7 App. Cas. 96, at 109.
(2) (1882) 7 App. Cas. 136, at 149.
(3) (1882) 7 App. Cas. 829, at 836.
(4) (1881) 7 App. Cas. 96.

two sections together and setting 21 (27) against 92 (14), there can be no doubt that the intention was that the exclusive power of the legislatures to make laws in relation to the "Administration of Justice" should be subject to the exclusive power of the Dominion Parliament to make laws in relation to the Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters, and that with that single exception, so far as s. 91 is concerned, it conferred upon the Dominion no express legislative power in relation to the administration of justice in the provinces.

While it is true that the decision of the Privy Council in *British Coal Corporation* v. *The King* (1) settled the question that s. 91 invests the Dominion Parliament with the power to regulate or prohibit appeals to the King in Council in criminal matters, that decision, as previously pointed out, manifestly proceeded on the ground that The Criminal Law, including procedure in criminal matters, was specifically placed within its jursidiction by enumerated head 27. Lord Sankey was careful to say that their Lordships were in that judgment

> dealing only with the legal position in Canada in regard to this type of appeal in criminal matters

and that it was

> neither necessary nor desirable to touch on the position as regards civil cases.

The Parliament of Canada has already by s. 17 of c. 53, 23-24 Geo. V (1933), provided that

> Notwithstanding any royal prerogative, or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

Indeed, that was the particular enactment, the constitutional validity of which was challenged in the *British Coal Corporation* case (1), and definitely held by that judgment to be within its legislative competence for the reason above indicated. This fact would seem to make it clear that the presently proposed enactment is directly aimed at the regulation and control of appeals to the Judicial Committee of the Privy Council in all civil cases throughout Canada, regardless of the provisions of any and all existing

(1) [1935] A.C. 500.

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provincial laws. I have endeavoured to shew that this is quite beyond the legislative power vested in the Parliament of Canada by s. 91 of the B.N.A. Act.

This brings me to the more difficult question as to whether justification can be found in s. 101 for the proposal of this bill to completely do away with all appeals from Canada to the Judicial Committee of His Majesty's Privy Council and to give this court "exclusive ultimate appellate and civil and criminal jurisdiction within and for Canada." That this section enacting that the Parliament of Canada may, notwithstanding anything in this Act, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, constitutes a further exception to the exclusive power of the provincial legislatures to make laws in relation to the Administration of Justice has already appeared. It is not questioned that the unrestricted power to constitute and organize a court necessarily implies power to define its jurisdiction and provide for the regulation of its procedure, nor, of course, that the exercise of such a power directly concerns the administration of justice. The difficulty arises from the fact that while s. 92 vests the exclusive legislative power in relation to the general subject of the administration of justice as well as in relation to civil rights in the Provincial Legislatures, s. 101, notwithstanding that fact, specifically invests the Dominion Parliament with power to constitute and organize a General Court of Appeal for Canada, and that we are again confronted with two apparently conflicting enactments, which must be read together and so interpreted as to give, as far as possible, reasonable and practical effect to each. This, as I take it, is the meaning of Sir Montague Smith's pronouncement above quoted in my discussion of the apparent conflict between ss. 91 and 92 regarding Procedure in Criminal Matters and Administration of Justice in the Provinces, and in my opinion it is quite as applicable to the question now under review, for, as he said, it could not have been intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those powers given to the Dominion Parliament.

It is clear enough that s. 101 must be read as conferring upon the Dominion Parliament whatever legislative authority is necessary to the constitution and organization of a

General Court of Appeal for Canada, no matter to what extent the exercise of such authority may infringe upon the exclusive legislative rights of the provincial legislatures as defined in ss. 92. Indeed, this court and the Judicial Committee of the Privy Council have both decided, as regards this conflict of legislative authority, that the provincial legislatures have no authority to limit the right of appeal to this court or in any way impair the jurisdiction conferred upon it by the Supreme Court Act. See *Clarkson* v. *Ryan* (1); *City of Halifax* v. *McLaughlin Carriage Co.* (2), and *Crown Grain Co. Ltd.* v. *Day* (3). An examination of these cases shews that the decisions all proceeded on the ground that, if the provinces could so legislate, they could take away the jurisdiction of this court entirely and thus virtually defeat the object of its constitution and organization. No such consideration arises here.

The question with which we are immediately concerned is, not the power to prescribe what type or class of case may be appealed from provincial courts to this court, but the power, not only to abrogate the Royal prerogative, in respect of the judgments of this court on such appeals, but to abrogate it also in respect of the judgments of all provincial courts, and to abolish as well all *per saltum* appeals, which now lie to the Judicial Committee of His Majesty's Privy Council under provincial laws, the validity of which has never before been brought into question. Unless such power is necessarily incidental to the constitution, maintenance and organization of a General Court of Appeal for Canada, I cannot, for my part, see how it can be justified by the terms of s. 101 or any of the cases relied upon by counsel for the Attorney-General of Canada. To hold otherwise would, in my most respectful opinion, be to practically ignore s. 92 (14) as well as s. 92 (13) and virtually transfer to the Dominion Parliament the regulation and control of these two classes of subjects—the most general and important of all the 16 classes of subjects which the B.N.A. Act has marked out as the exclusive legislative jurisdiction of the provinces—by the simple expedient of amending the *Supreme Court of Canada Act* and thus placing the final disposition of all litigation in

(1) (1890) 17 S.C.R. 251. (2) (1907) 39 S.C.R. 174.
(3) [1908] A.C. 504.

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Canada, no matter how important the constitutional and property and civil rights involved may be, in the hands of a court established and exclusively controlled by Dominion legislation, without the long cherished right of recourse to the Crown for the redress of any grievance, which may be suffered by any litigant in connection therewith. Could it fairly be said in reading s. 101 together with s. 92 with a view to give, as far as possible, reasonable and practical effect to each, that the Parliament of Canada would be justified by s. 101 in arrogating to itself, as necessarily incidental to the constitution, maintenance and organization of this court, the power to regulate and control the Administration of Justice, as well as Property and Civil Rights in all the provinces to such an extent as is proposed in this bill?

In discussing the introductory words of s. 91 in delivering the judgment of the Privy Council in the *Board of Commerce* case (1), Viscount Haldane said:

> No doubt the initial words of s. 91 of the *British North America Act* confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell* v. *The Queen* (2) appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the provincial legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one.

And further, in discussing the question as to whether the Dominion legislation there under consideration fell under s. 91 (27) (The Criminal Law) His Lordship used this language at pp. 198 and 199:

(1) [1922] 1 A.C. 191, at 197. (2 (1882) 7 App. Cas. 829.

It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the *British North America Act*, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Government. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

The King v. *Consolidated Distilleries Limited* (1) was an appeal from the judgment of Audette, J. of the Exchequer Court, granting a motion made by the defendant appellant as third party to set aside the third party notice on the ground that the issue raised by the third party notice between the original defendant and it was one over which that court had no jurisdiction. This court, Anglin, C.J. and Rinfret, Lamont and Cannon JJ., Newcombe, J. dissenting, dismissed the appeal on the ground that the matter in controversy between the original defendant and the third party was purely one of exclusive provincial jurisdiction concerning a civil right in one of the provinces. Anglin, C.J. in delivering the judgment of himself and his three brethren said:

While there can be no doubt that the powers of Parliament under s. 101 are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a court competent to deal with matters purely of civil right as between subject and subject. While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it. The matter is purely one of exclusive provincial jurisdiction, concerning, as it does, a civil right in some one of the provinces (s. 92 (13)).

(1) [1930] S.C.R. 531.

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The really decisive question on this branch of the argument regarding the conflict between the legislative power vested in the Dominion Parliament by s. 101 and that exclusively vested in the Provincial Legislatures by s. 92, as I have already said is, whether the subject-matter of this proposed enactment is comprised in the language of s. 101, as necessarily incidental to the exercise of the power thereby confided to the Dominion Parliament. Reading the section in connection with and in the light of s. 92, as it must be, it is in my opinion our clear duty to so construe it as to interfere as little as possible with the general scheme of the *British North America Act* regarding the distribution of legislative powers between the Dominion and the Provinces, and thus, while fully safeguarding the overriding legislative powers of the Dominion, in so far as they are explicitly declared, to prevent any undue or unnecessary encroachment upon what s. 92 has so unequivocally declared to be the exclusive legislative powers of the Provinces. This, I take it, to be the true guiding principle when a court is confronted with the duty of endeavouring to arrive at a reasonable and practical solution of a problem of this kind, as deducible from the pronouncements I have above reproduced and many other cases of similar import, which might have been quoted, dealing with apparently conflicting provisions of the *British North America Act*.

It is contended that the words

> to 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

necessarily imply power to declare that the judgments of these courts shall be absolutely final and conclusive, and, if the Dominion Parliament in its wisdom chooses to say so, unappealable to His Majesty's Privy Council, even by the exercise of the Royal prerogative. Power to constitute a court, it is said, covers power to define its jurisdiction, and this in turn power, not only to prescribe what cases it may hear and determine, but power to declare the consequences and effects of its judgments. If this be true of the power vested in the Dominion Parliament by s. 101 to provide for "the constitution, maintenance and organization" of the courts therein indicated, must it not also be true of the exclusive power vested in the Provincial

Legislatures by s. 92 to make laws in relation to "the constitution, maintenance and organization" of provincial courts, whether of civil or of criminal jurisdiction? Surely it cannot be said that these words have one meaning when applied to any court or courts, which the Dominion Parliament may create, and another meaning when applied to provincial courts. And I cannot for my part see that there is anything in the context, in which they are used in s. 101, which carries any larger implication than that arising from the context in which they are used in s. 92. Indeed, the contrary would seem to me to be the case. For, in s. 92 they are clearly used to indicate a specific sub-head or subdivision of the larger and more comprehensive class of subjects, viz: the Administration of Justice in the provinces.

The argument that either the general subject of the Administration of Justice in the Province or the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, is restricted by the additional words "and including procedure in civil matters in those courts" has already been dealt with in discussing the opposing submissions concerning ss. 91 and 92. I may add, however, in relation to the particular point now under consideration as to the conflict between ss. 92 and 101 that the obvious and the only reason, as it seems to me, for the alleged qualification of the general subject of "The Administration of Justice in the Province" by the words which immediately follow in enumeration 14 was to make it conform with s. 91 (27) regarding the general subject of "The Criminal Law." The latter excepts from "The Criminal Law," as a general subject for the exclusive jurisdiction of the Dominion Parliament, "the constitution of courts of criminal jurisdiction," but includes "the procedure in criminal matters," while s. 92 (14) specifically includes the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and procedure in civil matters in those courts. The clear intention, so far as s. 91 and 92 are concerned, was to vest exclusive legislative authority in the Province over the whole subject of the Administration of Justice therein, subject only to the overriding legislative jurisdiction of the Dominion in relation to the Criminal Law and all

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matters necessarily incidental thereto (except the constitution of courts of criminal jurisdiction), and to such other encroachments on this general provincial legislative power over the Administration of Justice as might become necessary in order that the Dominion Parliament might legislate effectively in relation to any other one of the 28 other specific subjects assigned to it by s. 91. If I may supplement what I have before suggested as to the basic ground of the decision in the *British Coal Corporation* case (1), it is obvious that this decision could not have been founded on any implication arising from the Dominion's power to constitute courts of criminal jurisdiction, which latter power is expressly excepted from that in relation to Criminal Law and exclusively vested in the Provinces. Its whole tenor, to my mind, is that it is the specific assignment to the Parliament of Canada by s. 91 (27) of the exclusive legislative jurisdiction in relation to such a general subject as that of "The Criminal Law," in the terms therein stated, which actually or by necessary intendment carries the power to prohibit appeals from provincial courts to His Majesty's Privy Council in criminal matters. Certainly that decision in no way supports the argument that power to constitute any court necessarily implies control of the right of appeal from its adjudications. On the contrary, it seems to me to flatly negative it for the reason just stated, viz: that the control of appeals from provincial courts of criminal jurisdiction in criminal matters is necessarily involved in the Dominion Parliament's exclusive legislative jurisdiction in relation to the general subject of The Criminal Law, notwithstanding that the constitution of courts of criminal jurisdiction is expressly excepted in s. 91 (27) from that general subject. If that be the case, as regards criminal matters, how can it consistently be claimed that the assignment by s. 92 (14) to the Provincial Legislatures of the exclusive legislative jurisdiction in relation to such a general subject as "The Administration of Justice," subject only to the limitations before mentioned, does not invest the Provincial Legislatures with the power to allow or prohibit, as they choose, appeals from the judgments of provincial courts in civil matters? Only, it seems to me, on one

(1) [1935] A.C. 500.

intelligible ground, viz: that, though s. 92 (14) indisputably comprises it, s. 101 takes it away and vests it entirely in the Dominion Parliament. But can the language of s. 101 itself, when read in conjunction with that of ss. 91 and 92, properly be so interpreted? In my opinion it cannot. The power thereby granted to the Parliament of Canada "notwithstanding anything in this Act," so far as the establishment of a General Court of Appeal for Canada is concerned, is, not only a special power relating to a single court, but is definitely limited to legislation providing for "the constitution, maintenance and organization" of such a court. While it can readily be understood that this language in association with the *non obstante* clause must be construed as necessarily entitling the Dominion Parliament to cut into the exclusive legislative jurisdiction of the provinces over the general subject of the Administration of Justice therein to such an extent as may be necessary to enable this court to fully function as a General Court of Appeal for Canada, and thus to regulate to that extent appeals to this court from provincial courts, that to my mind is the farthest limit to which the words "constitution, maintenance and organization of a General Court of Appeal for Canada" can reasonably be extended. The section itself says nothing about the finality of the judgments of the court authorized to be constituted or about its "exclusive, ultimate appellate jurisdiction," and certainly contains no suggestion of any power to divest the Crown of its prerogative to grant leave to appeal to the Judicial Committee of the Privy Council, either in respect of its own judgments, or in respect of the judgments of provincial courts, nor of any power to repeal or annul any of the laws relating to courts of civil and criminal jurisdiction existing in Canada, Nova Scotia or New Brunswick at the time of the Union, which s. 129 expressly continued in the four original provinces, as if the Union had not been made until they should be repealed, abolished or altered either by the Parliament of Canada or by the Legislatures of the respective Provinces, according to the authority of Parliament, or of the Legislatures under that Act. To say that all these things are necessarily implied by the power to constitute such a court itself is to my

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mind quite inadmissible unless some reason can be found, either in the general scheme of the Act concerning the distribution of legislative authority between the Dominion and the Provinces or in some particular provision thereof, clearly demonstrating that the grant of this special power was so intended. Singularly enough, notwithstanding the argument already dealt with that none of the matters covered by this bill fall under s. 92 (14) and that consequently they fall under the general residuary power conferred upon the Parliament of Canada by the introductory words of s. 91, s. 92 (14) is now invoked, shorn of its principal subject, for the purpose of attributing the provincial legislative power concerning the whole subject of appeals from the judgments of provincial courts to the words "constitution, maintenance and organization" of such courts, and thus by enlarging their scope, enlarging that of s. 101. Assuming this to be true of the provincial legislative power under s. 92 (14), where, as the factum in support of the now proposed enactment puts it, the quoted words are in effect qualified and curtailed by the express mention in the context of "procedure in civil matters in those courts," it is urged that

> it must *a fortiori* be true of the exclusive paramount and plenary legislative power conferred upon the Parliament of Canada by the corresponding words of s. 101, where they stand unqualified.

This argument simply brings us back to the construction of s. 92 (14), and obviously is founded upon the bald assumption that the only operative part of enumeration 14 is that which immediately follows the principal subject of the Administration of Justice, viz.: "the constitution, maintenance and organization of provincial courts both of criminal and civil jurisdiction." Such an assumption has already been shewn to be entirely insupportable as manifestly involving the complete absorption of the principal general subject by a lesser, subordinate one, which is only mentioned for the purpose of meeting the exception provided for in s. 91 (27) to the Dominion's exclusive legislative jurisdiction in relation to the general subject of the Criminal Law. That the specification of the lesser subject in no way qualifies or curtails the general subject of the Administration of Justice any more than the specification of procedure in civil matters in those courts qualifies or

curtails the subordinate, lesser subject of the constitution, maintenance and organization of provincial courts seems to me, with all respect, to be too clear to require demonstration. The legislative power of the Provinces in relation to the appealability or non-appealability of the judgments of their own courts is derivable in my opinion from the principal general subject of the Administration of Justice, which unmistakeably would have comprised that power, had the subordinate subject of the constitution, maintenance and organization of provincial courts not been introduced into enumeration 14 for the reason above indicated, not with the words "that is to say," but with the word "including."

The highly ingenious attempt to extend the scope of the power to constitute a court by separating the words "constitution, maintenance and organization of provincial courts" from their context in s. 92 (14) and thus practically deleting from that section the introductory and really governing words of enumeration 14 must, therefore, fail.

If it had been the intention of the Imperial Parliament, in constituting the Dominion and the Provinces as self-governing units thereof in 1867 and assigning to them their respective legislative rights, to annex to the special power conferred upon the Dominion to constitute this court such sweeping authority as that now insisted upon, is it to be supposed that it would in the unequivocal language of s. 92 have purported to invest the Provinces with the exclusive power "to make laws in relation to" all the classes of subjects therein enumerated, and then proceed to divest them of all effective control of such a vital subject as the Administration of Justice by merely conferring upon the Dominion Parliament a special power to create a General Court of Appeal for Canada in such language as that used in s. 101, viz.: "to provide for the constitution, maintenance and organization of a General Court of Appeal for Canada"?

While s. 101 undoubtedly clashes to some extent with s. 92 (14), I find it quite impossible to spell out of its language an intention to confer on the Dominion Parliament authority to encroach on the general subject of The Administration of Justice in the provinces any farther than is reasonably and necessarily incidental to the con-

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stitution, maintenance and organization of a General Court of Appeal for Canada or any other Federal court, which it may from time to time desire to set up for the better administration of its own laws. It surely never could have been intended by the enactment of s. 101 to empower the Dominion Parliament to extinguish the exclusive legislative rights of the provinces to the extent contemplated by this bill, the enactment of which, if validated upon such grounds as those which have been advanced on this hearing, would practically reduce the important and general subject of the Administration of Justice, as the exclusive legislative prerogative of the Provinces, to the bare matter of procedure in civil matters in provincial courts, and invest the Dominion Parliament with the actual control of the whole litigation of the country, in so far as its final disposition is concerned, without any recourse to the Crown, and this regardless of whether the matters in controversy in such litigation relate to Property and Civil Rights in the Provinces, to the Constitution of the Provinces themselves, to Taxation for Provincial Purposes or any other of the sixteen classes of subjects exclusively assigned to the legislative competence of the Provinces, subject only to the exceptions already indicated.

For these reasons I am of opinion with all possible respect that what is described in the factum of counsel representing the Attorney-General of Canada as "the cardinal object" of this bill, viz.: the total and indiscriminate prohibition of appeals from all courts now or hereafter established within Canada to the Judicial Committee of His Majesty's Privy Council as a necessary means to accomplish the end of constituting this court a court of exclusive, ultimate appellate, civil and criminal jurisdiction, without any recourse to the Crown, is not embraced within the legislative power confided to the Parliament of Canada, either expressly or by necessary implication, by the terms either of s. 91 or those of s. 101 of the *British North America Act,* and that bill No. 9 should therefore be declared to be wholly *ultra vires* of the Parliament of Canada as seeking in the form of an amendment of the *Supreme Court Act* to extend the prohibition, which that Parliament has already applied against appeals in criminal cases by s. 17 of ch. 53, 23-24 Geo. V, in amendment of the Criminal Code, and in the exercise of its exclusive

legislative jurisdiction in relation to Criminal Law, to appeals in all civil cases from this and all other courts throughout the Dominion, regardless of whether such civil cases concern matters, which fall within the legislative powers granted it by s. 91, or not.

The bill being one, the avowed object of which must fail unless every one of its provisions is *intra vires* of the Parliament of Canada, to which it has been presented for enactment, and it being impossible for the reason just stated to sever the valid from the invalid parts thereof beyond the general lines I have endeavoured in these reasons to make clear without completely recasting its material provisions, I most respectfully am of opinion that for these reasons, and in accordance with the rule laid down in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), and re-affirmed in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), the bill must be pronounced *ultra vires* of the Parliament of Canada in its entirety.

My answer, therefore, to the question referred is that the bill is wholly *ultra vires* of the Parliament of Canada.

DAVIS J.—In the submission by the Governor General in Council for the opinion of this Court as to the competence of the Dominion Parliament to enact Bill No. 9, in whole or in part, the real question, and it is a question of the greatest constitutional importance in Canada, is whether or not in civil cases the Dominion Parliament has the power to abolish the right of appeal to the Judicial Committee of the Privy Council from any of the courts in Canada (i.e., courts whether created by the Dominion or by the provinces) and to abolish the prerogative in such cases to grant special leave to appeal from any such courts.

The question of the power of the Dominion Parliament in criminal cases to abolish appeals was raised and determined by the Judicial Committee in the *British Coal Corporation* case (3). That decision sustained the constitutional validity of an amendment made by the Dominion

(1) [1924] A.C. 328, at 346. (2) [1925] A.C. 561, at 568.
(3) [1935] A.C. 500.

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Parliament to the Criminal Code in 1933 (23-24 Geo. V, ch. 53, sec. 17) which reads as follows:

> Notwithstanding any royal prerogative, or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

While it is always material in considering constitutional powers to ascertain the origin and development of the constitution and to examine the decisions of the courts on its interpretation, it would be inutile for me to attempt to traverse again the difficult territory which their Lordships in the Privy Council have so fully explored in their judgments in the *Nadan* case (1), in the *Irish Free State* case (*Moore* v. *Atty.-Gen. for the Irish Free State*) (2), and in the *British Coal Corporation* case (3). It is sufficient to say that these cases were examined and discussed at length during the argument and have been very carefully considered. The judgments are fully reported and any attempt to summarize them might only mislead. But I would venture to make the observation that it is plain from those decisions that—

(1) before the passing of the Statute of Westminster 1931 it was not competent to the Dominion to pass an Act repugnant to an Imperial Act,

(2) the effect of the Statute of Westminster was to remove the fetters which lay upon the Dominion by reason of the *Colonial Laws Validity Act* and by sec. 129 of the *British North America Act* and also by the principle or rule that the Dominion's powers were limited by the doctrine forbidding extra-territorial legislation, and

(3) whatever might be the position of the King's prerogative if it were left as matter of the common law, it may by appropriate action be made matter of Parliamentary legislation so that the prerogative is *pro tanto* merged in the statute.

We cannot escape from the conclusion that in the *British Coal Corporation* case (3) once the former limitations which had restrained legislative action by the

(1) [1926] A.C. 482.
(2) [1935] A.C. 484.
(3) [1935] A.C. 500.

Dominion were recognized as now removed by the Statute of Westminster, the judgment rests upon the fact that criminal law is one of the enumerated heads of sec. 91 of the *British North America Act* which section sets forth specific subject-matters of legislation which lie exclusively within the competence of the Dominion Parliament. It is to be observed that the validated legislation prohibited an appeal in any criminal case "from any judgment or order of any court in Canada." That being the decision, and binding upon us, the same result necessarily follows in respect of any such Dominion legislation in relation to matters properly within any of the other specific subjects enumerated in said sec. 91 or within the general power of the Dominion Parliament to make laws for the peace, order and good government of Canada. As was said by Lord Macmillan in the Privy Council in *Croft* v. *Dunphy* (1):

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in sec. 91 of the *British North America Act*, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

We were invited to say that head 14 of sec. 92,

> 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,

controls the solution of the problem. The proposed abolition of appeals to the Privy Council is not however legislation in relation to the administration of justice "in the province." Nor can head 13 of sec. 92, "Property and civil rights in the province," be regarded as controlling the Dominion power in relation to matters within the exclusive legislative authority of the Parliament of Canada.

As to appeals in admiralty. The whole subject of admiralty jurisdiction has stood upon a special footing of its own. Whatever may have been the limitations on the Dominion power (prior to the Statute of Westminster) under the *Colonial Courts of Admiralty Act* 1890, see The

(1) [1933] A.C. 156, at 163.

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Woron case (1), there never was any doubt that admiralty was not a provincial matter. As early as 1879 this Court held in *The Picton* (2), that the Dominion legislation, 40 Vic. (1877), chap 21, creating a "Court of Maritime Jurisdiction in the province of Ontario" was *intra vires* the Dominion Parliament. In 1934, the Dominion Parliament by the *Admiralty Act,* 1934 (24-25 Geo. V, chap. 31), repealed the *Colonial Courts of Admiralty Act* 1890 in so far as the latter Act was part of the law of Canada, with the exception of the provisions relating to appeals to His Majesty in Council. Legislation abolishing appeals or the prerogative to grant special leave in relation to admiralty matters in Canadian courts stands in the same position as do those subjects specifically enumerated in sec. 91.

Apart then from the power of the Dominion Parliament to abolish any right of appeal to the Privy Council and to abolish the prerogative to grant special leave to appeal in civil cases coming within any of the above mentioned classes, there remains the vital question whether there is any such right in the Dominion Parliament in relation to the specific subject-matters enumerated in sec. 92 of the *British North America Act*—subject-matters over which the provincial legislatures are given exclusive legislative authority. It is fundamental in the Canadian Constitution and has always been recognized as fundamental that the authority of the legislatures of the provinces is

> as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow,

as was said as early as 1883 in *Hodge* v. *The Queen* (3); the principle has been recognized over and over again and particularly, for our present purposes, in the *British Coal Corporation* case (4).

The Statute of Westminster does not make it competent to the Dominion to legislate in relation to classes of subjects which before the statute were outside its competence (such, for example, as "Property and civil rights in the province," head 13, and "All matters of a merely local or private nature in the province," head 16, of sec. 92). The assigned limits of subject and area under the *British North*

(1) [1927] A.C. 906.
(2) (1879) 4 S.C.R. 648.
(3) (1883) 9 App. Cas. 117, at 132.
(4) [1935] A.C. 500, at 518.

America Act, as between the Dominion and the provinces, are not disturbed. The true character and position of the provincial legislatures remain and ought to be given full recognition.

Sec. 101 of the *British North America Act*, which enables the Dominion Parliament to provide for the constitution, maintenance and organization of "a general court of appeal for Canada," cannot in my opinion be so interpreted as to extend power to the Parliament of Canada to make the jurisdiction of such court exclusive and final in relation to subject-matters which are within the sole legislative authority of the provincial legislatures.

There may be some difficulty at times in working out a division of legislative authority in appeals in civil cases but that is inherent in the practical working out of any federal system with a division of legislative powers between the central and the local legislating bodies.

It is inadvisable and indeed unnecessary to consider what powers may be possessed in the relevant regard by the legislatures of the provinces; it is sufficient for the purpose of the question submitted to the Court to determine only the powers of the Dominion Parliament itself.

I would answer the question submitted by saying that the Bill if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

KERWIN J.—By Bill No. 9, introduced and read a first time in the House of Commons in the fourth session of the eighteenth Parliament of Canada, it was proposed to repeal section 54 of the *Supreme Court Act*, R.S.C., 1927, chapter 35, and substitute a new section therefor. This Court was established under the power conferred by the following section (101) of the *British North America Act*, 1867 (hereafter referred to as the Act):—

The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and

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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.

The present *Supreme Court Act* continues this Court as a general court of appeal for Canada, and section 54 provides:—

> The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative.

The primary object of the Bill is set forth in the first subsection of the proposed new section 54:—

> (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

It is undoubted that the effect of this and the other provisions of the new section would be to confer upon this Court not only appellate jurisdiction but exclusive and ultimate appellate civil and criminal jurisdiction within and for Canada, and to abolish any right of His Majesty in Council to entertain appeals from any court within Canada now or hereafter established whether by Dominion or provincial authority.

In *British Coal Corporation* v. *The King* (1), the Judicial Committee of the Privy Council determined that Parliament had effectively and validly abolished appeals in criminal cases to His Majesty in Council from any judgment or order of any court in Canada, by enacting in 1933, after the coming in force of the Statute of Westminster, 1931, the following as subsection 4 of section 1025 of the Criminal Code:—

> 4. Notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or in the *Supreme Court Act,* no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

In substance, the question now submitted by the Governor General in Council for our opinion, is whether a similar power exists as regards civil cases.

(1) [1935] A.C. 500.

It will be convenient to investigate at the outset the position of appeals from Dominion Courts, that is, the Supreme Court of Canada and those additional courts for the better administration of the laws of Canada, which Parliament may constitute. This inquiry resolves itself into two heads, (*a*) the prerogative right of the Sovereign in Council to grant special leave to appeal from judgments of the Dominion Courts and (*b*) the power, if any, to appeal therefrom as of right. As applicable to both heads, it is of importance to recollect that in *Crown Grain Company Limited* v. *Day* (1), it was determined that a provincial legislature could not circumscribe the appellate jurisdiction of this Court by attempting to make the judgment of a provincial court final in cases where the *Supreme Court Act* permitted an appeal; and that, notwithstanding the subject-matter of the litigation was within the domain of provincial legislation.

Firstly then as to the prerogative right of the Sovereign in Council to grant special leave to appeal. While appeals in civil cases, either *de jure* or by grace, were not in question and were, therefore, not considered in the *British Coal Corporation* case (2), their Lordships did state the present position of the prerogative right in general. They explained that in early days "it was to the King that any subject who had failed to get justice in the King's Court brought his petition for redress." So far as English courts were concerned, this practice was altered whereby such petitions were brought to the King in Parliament or to the King in his Chancery, but from the Courts of the Plantations or Colonies, the petition went to the King in Council. This jurisdiction or prerogative right was settled and regulated by the Imperial Parliament in the Privy Council Acts of 1833 and 1844 and as a result, as their Lordships pointed out (page 512):

> Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of Law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

(1) [1908] A.C. 504.
(2) [1935] A.C. 500.

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That is, the Sovereign, by and with the consent of the Lords Spiritual and Temporal, and Commons in Parliament Assembled, through the instrumentality of Imperial statutes transferred the prerogative right to the Judicial Committee of the Privy Council. It therefore follows that in these matters the Sovereign has no personal discretion whatever and that under constitutional usage His Majesty in Council may not decline to give effect to the Judicial Committee's recommendations.

Prior to the passing of the Statute of Westminster, 1931, the proper body to abolish the right, as settled and fixed by the Judicial Committee Acts referred to, to grant leave to appeal in a civil case from a decision of a Dominion court would have been the Imperial Parliament, but in my opinion that statute affords a complete answer to the first branch of the pending inquiry. The statute followed upon a series of declarations and resolutions set forth in the reports of the Imperial Conferences of 1926 and 1930 and according to one of the recitals of the statute, its enactment was deemed necessary

> for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conference that a law be made and enacted in due form by authority of the Parliament of the United Kingdom.

In truth the statute embodies in legislative form the established constitutional position of the members of the British Commonwealth of Nations with respect to several matters. For present purposes, only sections 2 and 3 need be referred to:—

> 2. (1) *The Colonial Laws Validity Act,* 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.
>
> 3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

By the *Colonial Laws Validity Act,* 1865, it was declared that the law of any colony should be void to the extent that it was repugnant to any Act of the Imperial Parlia-

ment extending to the colony or any order or regulation made under such Act, but by subsection 1 of section 2 of the Statute of Westminster, the *Colonial Laws Validity Act* is not to apply to any law passed after the commencement of the statute by the Parliament of the Dominion. The meaning of subsection 2 is beyond question. In view of several expressions of opinion by the highest authorities, it is perhaps unnecessary to call in aid the provisions of section 3 but certainly the combined effect of sections 2 and 3 is to remove the fetters that previously prevented Parliament from abolishing the right of the Judicial Committee to grant leave to appeal from a judgment of a Dominion court. In view of the plain wording of section 101 of the Act, the provinces enjoyed no such powers, and the reasoning and conclusion in the *British Coal Corporation* case (1) that that Act invests Parliament with the power by necessary intendment, apply equally to civil as to criminal cases.

With reference to the second branch of the inquiry, my opinion is that Parliament has the power to prohibit appeals as of right from any Dominion court. In view of the grant and growth of self government in the Dominion, and subject to the special position of appeals in Admiralty to be mentioned later, this power existed and was recognized even before the Statute of Westminster. As stated in the *British Coal Corporation* case (1) (page 520):—

> It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is of the Dominion or the provinces as the case may be.

For the same reason that has been adverted to when considering the right to grant leave to appeal, the provinces have no power to prevent Parliament abolishing appeals as of right from Dominion courts and the necessary authority therefore resides in Parliament.

Appeals in Admiralty require a more detailed investigation. The Exchequer Court of Canada, organized under the provisions of section 101 of the Act, was by a Canadian statute declared to be a Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* 1890. By

(1) [1935] A.C. 500.

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subsection 1 of section 6 of this last mentioned statute: "The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is, as of right, no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council"; and by section 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty in Council." In *Richelieu and Ontario Navigation Company* v. *Owners of S.S. "Cape Breton"* (1), it was decided that by virtue of the *Colonial Courts of Admiralty Act* 1890, an appeal as of right could be brought from a decision of this court varying, on appeal, a judgment of a Local Judge in Admiralty. Following the enactment of the Statute of Westminster 1931, and particularly in view not only of sections 2 and 3 but also 5 and 6 of that statute, Parliament passed *The Admiralty Act,* 1934, chapter 31, establishing an Admiralty jurisdiction in the Exchequer Court. Sections 34 and 35 thereof provide:—

> 34. Notwithstanding anything in this Act contained, the provisions of any law now in force in Canada providing for an appeal to His Majesty the King in Council in Admiralty matters shall continue to be in force and shall be deemed not to have been repealed.
>
> 35. Saving the effect of the immediately preceding section, the *Colonial Courts of Admiralty Act,* 1890, chapter twenty-seven of the Acts of the United Kingdom for the year 1890, is repealed in so far as the said Act is part of the law of Canada.

So that, as Dominion legislation stands, a suitor may still appeal as of right from a decision of this Court rendered upon appeal from the Exchequer Court on its Admiralty side. By Bill No. 9 this appeal would be abolished.

The ingenious contention is that as Parliament by *The Admiralty Act,* 1934, had repealed the *Colonial Courts of Admiralty Act,* 1890 (with the exception noted), it thereby lost its jurisdiction in Admiralty, which, it is argued, was derived solely from the repealed Act. But that overlooks the fact that Parliament has jurisdiction under head 10 of section 91 of the Act over the subject matter of "Navigation and Shipping" and that it could, therefore, invest the Exchequer Court with jurisdiction over actions and suits in relation to that subject matter (*Consolidated Distillers*

(1) [1907] A.C. 112.

Limited v. *The King* (1)). The limitations upon the exercise of its powers under head 10 of section 91 and the peace, order and good government clause imposed by the *Colonial Laws Validity Act,* 1865, and the *Colonial Courts of Admiralty Act,* 1890, having been removed by the Statute of Westminster, Parliament is now clothed with the same ample authority to abolish appeals as of right in Admiralty cases as it possesses with respect to appeals in civil cases generally from Dominion courts.

Attention must now be directed to the problem as to whether Parliament has the requisite authority to abolish appeals as of right, or to abrogate the right of His Majesty in Council to grant leave to appeal, from decisions of provincial courts. Section 129 of the Act reads:—

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

All laws in force on July 1st, 1867, in the four named provinces were by this section continued therein subject to the exception and proviso. By appropriate legislation or Imperial order in council the section was made to apply to each of the other provinces as of the date of its entry into the Union. It would therefore appear convenient to ascertain what laws touching appeals were in force in the nine provinces on the relevant dates.

Ontario and Quebec

The *Constitutional Act,* 1791, divided the old province of Quebec into Upper and Lower Canada. Section 34 provided:—

> XXXIV. And whereas by an Ordinance passed in the Province of Quebec, the Governor and Council of the said Province were constituted a Court of Civil Jurisdiction, for hearing and determining Appeals in certain Cases therein specified, be it further enacted by the Authority

(1) [1933] A.C. 508, at 522.

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aforesaid That the Governor, or Lieutenant-Governor, or Person administering the Government of each of the said Provinces respectively, together with such executive Council as shall be appointed by His Majesty for the Affairs of such Province shall be a Court of Civil Jurisdiction within each of the said Provinces respectively for hearing and determining Appeals within the same, in the like Cases, and in the like Manner and Form, and subject to such Appeal therefrom, as such Appeals might before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other Provisions as may be made in this Behalf, by Any act of the Legislative Council and Assembly of either of the said Provinces respectively assented to by His Majesty, His Heirs or Successors.

The important part of this section for our present purpose is the proviso at the end. The power thereby conferred was exercised in Upper Canada by chapter 2 of the statutes of 1794, and in Lower Canada by chapter 6 of the statutes of the same year.

By virtue of section 46 of the Act of Union, 1840 (Imperial), these enactments were continued in force subject to being varied by legislation of the provinces of Canada. Such legislation was duly passed so that when the Act was passed in 1867 there were in force chapter 13 of the statutes of 1859 providing for appeals as of right in Upper Canada, and chapter 77 of the statutes of 1861, and section 1178 of the Code of Civil Procedure 1867, providing for appeals as of right in Lower Canada. In each province the right of appeal was limited to certain cases.

Nova Scotia

Except possibly for the period 1861 to 1863, either the commissions or instructions issued to the Governors of the province of Nova Scotia, from time to time, contained regulations providing for an appeal to the Sovereign in Council. By an Imperial order in council of 1863 authority was conferred upon the Supreme Court of the province to grant leave to appeal in certain cases, but the right of Her Majesty to admit an appeal in any case, upon special petition, was expressly reserved. At the time of Union, therefore, there existed in Nova Scotia under an Imperial order in council, the right, by leave of the provincial Supreme Court, to appeal *de jure* in certain cases, and the right of the Sovereign in Council in any case to give leave to appeal as of grace.

New Brunswick

Appeals from the Supreme Court of New Brunswick were provided for and regulated by an Imperial order in council dated November 27th, 1852. In all relevant respects it corresponded to the order in council of 1863 relating to Nova Scotia.

Manitoba

On June 3rd, 1870, under the relevant provisions of the Act, an order in council admitted Rupert's Land and the Northwestern Territory into the Union. In anticipation of this step the Dominion Parliament had already passed *The Manitoba Act* in the same year, carving out of the newly admitted lands the Province of Manitoba. Any doubt as to the power of Parliament so do to was removed by the *British North America Act* of 1871. No order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories.

British Columbia

An Imperial Statute of 1839, chapter 48, authorized Her Majesty from time to time to make provision for the administration of justice in Vancouver's Island, and for that purpose to constitute such court or courts of record and other courts as she should think fit. Section 3 enacted:—

> III. Provided always, and be it enacted, That all Judgments given in any Civil Suit in the said Island shall be subject to Appeal to Her Majesty in Council, in the Manner and subject to the Regulations in and subject to which Appeals are now brought from the Civil Courts of Canada, and to such further or other Regulations as Her Majesty with the Advice of Her Privy Council shall from Time to Time appoint.

Pursuant to this Act, an Imperial order in council of April 4, 1856, established a Supreme Court of Civil Justice of the Colony of Vancouver's Island, provided for an appeal to Her Majesty in Council in certain cases and preserved Her Majesty's prerogative right to grant leave to appeal in any case.

In 1858 the Colony of British Columbia (excluding Vancouver Island) was established by 21-22 Victoria, chapter 99 (Imperial), section 5 whereof, relating to appeals

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to Her Majesty in Council, corresponds to section 3 of the Act providing for the administration of justice in Vancouver's Island.

On November 19th, 1866, the Colony of Vancouver Island was united to the Colony of British Columbia under the name of "British Columbia" by a proclamation issued pursuant to 29-30 Victoria, chapter 66 (Imperial). This statute enacted that the laws in force in the separate colonies should be retained until otherwise provided by lawful authority, and the powers of Her Majesty in Council were left unaffected by anything in the statute.

Pursuant to an Imperial Order in Council, the Colony of British Columbia entered Confederation as of July 20th, 1871, at which date appeals from British Columbia courts would appear to be subject to the same terms and regulations as applied to appeals from Ontario and Quebec.

Prince Edward Island

In Prince Edward Island a system of courts was established under the authority of the instructions issued to the Governors of the province, which instructions also provided for an appeal to Her Majesty in Council in certain circumstances.

No order in council was issued regulating these appeals down to July 1st, 1873, as of which date the province joined Confederation. Since only laws that were in force at that time were continued, the *Common Law Procedure Act,* 1873, passed by the General Assembly of the province on June 14th, 1873, would appear to have no relevancy as by its terms it was not to come into operation until January 1st, 1874. In any event, it is understood that the judges of the provincial Supreme Court did not exercise the powers conferred upon them by section 158 of the 1873 Act to make rules and regulations

> directing the mode of procedure, *either pro hoc vice,* or generally, as may be required, and as may not be inconsistent with the Royal instructions and the rules and mode of procedure of the Judicial Committee of the Privy Council.

Alberta and Saskatchewan

The *British North America Act* of 1871 conferred upon Parliament the power to establish new provinces in any territories forming part of the Dominion, and accordingly, by Dominion Acts of 1905, the provinces of Alberta and

Saskatchewan were constituted as of September 1st of that year. It has been mentioned previously, when speaking of Manitoba, that no order in council appears to have been issued regulating appeals from Rupert's Land or the Northwest Territories (out of which these two provinces were formed).

These being the laws with respect to appeals to His Majesty in Council, in force in the several provinces as of the date of their entry into the Union, it may be stated that subsequent thereto appeals were regulated by Imperial orders in council passed with respect to British Columbia in 1887, Manitoba in 1892, and finally with respect to each province except Ontario and Quebec in 1910 and 1911,

with a view of equalizing as far as may be the conditions under which Her Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to Her Majesty in Council.

It is now necessary to revert to the provisions of section 129 of the Act. By virtue of that part of the section which appears in brackets, all such laws, that were enacted by or existed under Imperial Acts, could not be repealed, abolished or altered either by Parliament or by the provincial legislatures; if they were not of that description, they might be repealed, abolished or altered by the proper legislative body "according to the authority of the Parliament or of that legislature under this Act." Primarily, it is contended that these laws fall in the second division and that the provincial legislatures have the required authority under the Act; in the alternative it is contended that, if they fall within the first division, the effect of sections 2 and 7 of the Statute of Westminster is to invest the legislatures with the necessary power.

The alternative argument may first be noticed. Section 2 of the Statute of Westminster has already been referred to; section 7 is as follows:—

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

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The effect of subsection 2 of section 7 is that the *Colonial Laws Validity Act,* 1865, will not apply to any law made after the commencement of the statute by the legislature of a province, and that no law so made will be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under such Act, and the powers of a provincial legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the province. Subsection 2 must, of course, be read in conjunction with the other subsections and in my opinion the proper construction of section 7, upon a consideration of all its provisions, requires that a province or the Dominion be restricted to the powers of legislation conferred upon the legislature or Parliament, as the case may be, by the Act. The Statute of Westminster does not enlarge the classes of subjects within which fall those matters in relation to which Parliament or a legislature may make laws. If, but for the *Colonial Laws Validity Act,* 1865, or any other Imperial Act applying to the Dominion, a provincial legislature would have been empowered by the Act to legislate upon a given matter, the restrictions imposed by those statutes are removed by the Statute of Westminster, but no alteration is made in the division of subjects between the two authorities. It must also be borne in mind that while by section 3 of the Statute of Westminster the doctrine prohibiting extra-territorial legislation ceased to apply to Parliament, that section, unlike section 2, was not made applicable to the provincial legislatures.

The summaries of the laws in force in each of the provinces at the relevant dates demonstrate that, except in the cases of Ontario and Quebec, and possibly British Columbia, they existed by virtue of the *Judicial Committee Acts* of 1833 and 1844 or Imperial orders in council passed in pursuance thereof. They, therefore, fall within that part of section 129 that appears in brackets, and for the reasons given immediately above may not be repealed, abolished or altered by the provincial legislatures unless these bodies already possess the necessary power under the Act.

This brings us to a consideration of the first contention. It is said generally on behalf of all those provinces that

deny the jurisdiction of Parliament to enact the provisions of Bill 9, that their legislatures have the necessary authority under one of three heads of section 92 of the Act:—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.

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.

Taking these in reverse order, it will be noticed that by the very terms of head 14, the administration of justice is confined to the provinces, the courts which the provincial legislatures are authorized to constitute, maintain and organize are provincial courts, and the procedure in civil matters is confined to procedure in those, i.e., provincial courts. At page 520 of the judgment in the *British Coal Corporation* case (1) appears a statement, already set out, which together with the preceding sentence is relied upon by the provinces. It seems advisable to reproduce the entire passage:—

A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada that is of the Dominion or of the provinces as the case may be.

One argument based upon this passage is that the reference to the provinces would have been unnecessary if their Lordships had not felt that authority to deal with appeals here under review was in the provincial domain. But their Lordships pointed out at the end of the judgment that they had been dealing only with the legal position in Canada in regard to appeals in criminal matters and that it was neither necessary nor desirable to touch on the position as regards civil cases. There must always be kept in mind the particular thing with which a judgment is dealing. The difficulty of discovering language applicable only to particular circumstances is shown by the fact that if one's attention is confined to the sentence in the British Coal judgment preceding the passage quoted

(1) [1935] A.C. 500.

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above, it would appear as if it were categorically stated that the power to constitute law courts and regulate their procedure was by the Act vested only in the Dominion legislature; whereas it is well known, and the succeeding part of the judgment indicates, that certain powers with reference to the law courts are vested in the provinces.

The second argument, founded upon the first sentence in this passage, is that the phrase in head 14 of section 92, "administration of justice," conferred the power upon the legislatures to establish and regulate a system of appeals. Now it has been made clear in the *Crown Grain* case (1) that the administration of justice, confined as it is to the provinces, is certainly not sufficient to permit the legislatures to deal with appeals from the provincial courts to the Supreme Court of Canada, and the proper conclusion appears to be that His Majesty in Council or the Judicial Committee cannot in any sense of the term be deemed "Provincial Courts" and that the legislatures are still territorially restricted.

As to head 13, while the right to launch an appeal to His Majesty in Council may be said to be a right in the province since a litigant in the provincial courts is either a resident of the province or has attorned to the jurisdiction, the effective part of the proceeding is the hearing and determination of the appeal; and as to these, it cannot be said that they are rights in the province. It follows, I think, from the decision in *Brassard* v. *Smith* (2), that unless all the elements of the right exists in the province, head 13 can have no application.

In truth, if the provinces have not power under head 14, it is difficult to see how head 13 can have any application. As Viscount Haldane stated in *John Deere Plow Company, Limited* v. *Wharton* (3):—

> The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.

With reference to the subject matter of the appeal in that case, His Lordship had already pointed out that unless heads 11 and 13 were read disjunctively the limitation in

(1) [1908] A.C. 504. (2) [1925] A.C. 371.
(3) [1915] A.C. 330, at 340.

the former, "the incorporation of companies with provincial objects," would be nugatory. Similarly in the present instance, the limitation "in the province" in head 14 would have no application if the power under head 13 to enable an appeal to be launched carried with it the power to permit or abolish its hearing and determination.

As to head 1 of section 92, it must first be observed that the salient word "Constitution" is found in many parts of the Act. It appears in the first recital, "A Constitution similar in Principle to that of the United Kingdom"; in section 22 "In relation to the Constitution of the Senate"; in the heading of Part V "Provincial Constitutions"; in section 64 (which is included in Part V) "The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick"; in section 88 (also included in Part V) "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick"; in head 27 of section 91 "except the Constitution of Courts of Criminal Jurisdiction"; then in head 1 of section 92; and in section 101. This is not meant to be an exhaustive list but it is sufficient to indicate that the word is used in different senses throughout the Act. In head 1 of section 92, it must, I think, refer, as to the executive power, to such things as the appointment of Lieutenant-Governors and Provincial Administrators, and as to the legislative power, to such things as the legislatures for the provinces; all of these matters being dealt with by sections appearing under Part V. It can have no reference to such a particular subject as is identified by head 14.

If a province does not possess that authority, it has been made clear by a number of decisions of the Judicial Committee, some of which are referred to in the *British Coal Corporation* case (1), that such power must necessarily reside in the Dominion. It will be remembered that Bill 9 proposes to amend the Dominion statute respecting the Supreme Court of Canada. Under the opening clause of section 91, Parliament may make laws for the peace, order and good government of Canada, and by section 101 "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution,

(1) [1935] A.C. 500.

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maintenance and organization of a General Court of Appeal for Canada." In my opinion the power thereby conferred includes the power to make the decisions of such appellate court exclusive and ultimate. The reasons set forth in *Nadan's* case (1), as explained in the *British Coal Corporation* case (2), as to why Parliament could not, prior to the Statute of Westminster, abolish appeals as of grace in criminal cases, apply with equal force to explain the inability of Parliament during that period to compel a litigant desirous of appealing from the judgment of a provincial court to apply to the Supreme Court of Canada, if his suit fell within the jurisdiction of that court, and otherwise to abide by the decision against him. These restrictions have been removed by the Statute of Westminster and therefore, so far as all the provinces except Ontario and Quebec and possibly British Columbia are concerned, Parliament may validly enact the provisions of Bill 9.

It is now necessary to refer to an additional argument presented on behalf of Ontario, which is to this effect. By assenting to the *Constitutional Act* of 1791 His Majesty must be taken not only to have abandoned the prerogative right to regulate appeals as of right from Upper Canada to the Sovereign in Council but to have transferred it to the Legislative Council and Assembly of that province; that such transferred prerogative was so regulated by statute, which was continued in force by the Act of Union, 1840; that it was regulated by the Parliament of Canada by legislation, applying to Upper Canada, which existed at the time of Confederation and which was continued in force by section 129 of the Act; that thereafter Ontario continued to regulate appeals as of right and effectively abolish them, except under the condition set forth in its legislation. So much may be conceded. The remainder of the argument that Ontario has also acquired the power to abolish the right of His Majesty in Council to grant special leave to appeal is, under the authorities, not so obvious.

Granting, however, the entire premises and conclusion of this contention, it will be recollected that the power deemed to reside in Parliament to make the decisions of

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

the Supreme Court of Canada exclusive and ultimate may be exercised "notwithstanding anything contained in this Act." This *non obstante* clause places the Dominion power on the same footing as those conferred by the specially enumerated heads of section 91. As to these, their Lordships pointed out in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (*Combines Investigation Act* case) (1):—

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14, the administration of justice in the province.

In *Crown Grain Company Limited* v. *Day* (2), it is stated:—

> It is inconceivable that a Court of Appeal could be established without its jurisdiction being at the same time defined.

The pith and substance of the proposed Bill is the jurisdiction of that General Court of Appeal, so that even if Ontario had authority the two powers overlap and "the enactment of the Dominion Parliament must prevail." *Crown Grain Company Limited* v. *Day* (3); *Attorney-General of Canada* v. *Attorney-General of British Columbia* (*Fish Canneries* case) (4); *In Re Silver Bros.* (5).

Stress was placed upon a passage in the judgment of Viscount Haldane in the *Board of Commerce* case (6). The paragraph in which these words appear is as follows (the particular passage being italicized):—

> For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which

(1) [1931] A.C. 310, at 326, 327.
(2) [1908] A.C. 504, at 506.
(3) [1908] A.C. 504, at 507.
(4) [1930] A.C. 111, at 118.
(5) [1932] A.C. 514, at 521.
(6) [1922] 1 A.C. 191, at 199.

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require a title to so interfere as basis of their application. *For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures.* Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

It is quite evident that Viscount Haldane was there applying a well-known principle to the legislation in question by pointing out that Parliament could not, under the guise of establishing a provincial court for the better administration of the laws of Canada, really legislate upon matters of provincial concern. That principle has no application in the present case where Bill 9 deals with the jurisdiction of the Supreme Court of Canada, a subject matter within its exclusive power.

In all relevant respects Quebec is in the same position as Ontario. On behalf of British Columbia, it was urged that in view of section 3 of The *Vancouver's Island Act* of 1839 and section 5 of *The Colony of British Columbia Act* of 1858, the situation of that province, under section 129 of the Act, was identical with that of Ontario. It is not necessary to determine whether that be so or not, but certainly British Columbia stands in no higher position.

The views expressed with reference to the other six provinces add force to the opinion as to Ontario, Quebec and British Columbia. Without the use of express words, it could surely not have been intended that in a matter of this kind three provinces should be able to exercise a power denied to the others. From time to time all provincial courts are engaged in the duty of construing and enforcing Acts of Parliament and as to these particularly it is not to be expected that in some provinces an appeal could be taken only to this court, while in others an alternative right to appeal or ask for leave to appeal, to His Majesty in Council would still exist. If that were so, the court could not properly be described as "a General Court of Appeal for Canada."

For these reasons I would answer the question submitted to us "Yes, in its entirety."

HUDSON J.—His Excellency the Governor General in Council has submitted to this Court for its opinion a question in the following language:

> Is said Bill No. 9, entitled *An Act to amend the Supreme Court Act,* or any of the provisions thereof, and in what particular or particulars or to what extent, *intra vires* of the Parliament of Canada?

Bill No. 9 referred to proposes, first, to give the Supreme Court of Canada exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; secondly, to abolish appeals to the Privy Council; and thirdly, to repeal the *Judicial Committee Act* of 1833 and the *Judicial Committee Act* of 1844, of the statutes of the United Kingdom of Great Britain and Ireland, and all orders, rules or regulations made thereunder in so far as they affect Canada.

The validity of the Bill was supported by the Dominion and the provinces of Manitoba and Saskatchewan, and opposed by Ontario, Nova Scotia, New Brunswick, British Columbia and Alberta. Neither Quebec nor Prince Edward Island took any part.

In the division of legislative power between the Dominion and the provinces consequent upon Confederation, there was allotted to the provinces by the *British North America Act,* section 92 (14),

> Exclusive Powers of Provincial Legislatures
>
> 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,
>
> * * *
>
> 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 these Courts.

Under the authority of this provision, the provinces have defined the constitutions of their several courts and provided for their maintenance and organization.

But to enable these courts to function, the judges who interpret and apply the law must be appointed by the Dominion who must pay their salaries and under whose authority alone they can be removed; sections 96, 99 and 100; *Toronto Corporation* v. *York* (1).

(1) [1938] A.C. 415.

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The laws administered in the provincial courts are the laws applicable to the causes coming before them, whether these laws be within the legislative competence of the province or of the Dominion.

The Dominion may impose additional duties on the judges and utilize the machinery of these courts to enforce Dominion laws of a special character, such as Dominion election petitions and bankruptcy; see *Valin* v. *Langlois* (1) and *Cushing* v. *Dupuy* (2).

From final decisions of these provincial courts an appeal lies to the Supreme Court of Canada, which was established under the authority of section 101 of the *British North America Act:*

> 101. 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.

A province cannot take away or impair the jurisdiction conferred on the Supreme Court by the Dominion Act in respect of matters otherwise purely provincial: *Crown Grain* v. *Day* (3). Nor has a provincial legislature any power to grant an appeal to the Supreme Court of Canada: *Union Colliery* v. *Attorney-General for British Columbia* (4).

The Bill under consideration, if it became law, would make this Court the exclusive, final tribunal in all Canadian cases.

An appeal may also be brought from the provincial courts to the Judicial Committee of the Privy Council in all except criminal cases. There are two classes of such appeals: First, what are called "prerogative appeals" by which the Judicial Committee may, if they see fit, grant leave to any litigant to appeal thereto from any decision of any court, either Dominion or provincial. The second class is where provision has been made for what are called appeals as of right. In the provinces of Ontario and Quebec, this has been done by legislation purporting to authorize appeals to the Judicial Committee subject to defined conditions, and in the other provinces there are somewhat similar provisions made by orders in council.

(1) (1879) 5 App. Cas. 115.
(2) (1880) 5 App. Cas. 409.
(3) [1908] A.C. 504, at 507.
(4) (1897) 17 Can. L.T. 391.

The Bill under consideration would abolish appeals of both classes.

In criminal matters there is no longer any right of appeal to the Judicial Committee from any court, either Dominion or provincial. In 1933, an amendment was made to the Criminal Code of Canada, section 17 of the Statutes of 23 and 24, Geo. V, as follows:

> Subsection 4 of section 10 of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows:—
>
> Notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard.

The validity of this provision was upheld in the case of *British Coal Corporation* v. *The King* (1). Therefore, future appeals in all criminal matters are effectually barred. In giving the judgment of the Committee, the Lord Chancellor, Lord Sankey, stated:

> It is here neither necessary nor desirable to touch on the position as regards civil cases.

But the reasons for arriving at this judgment lead inevitably to the conclusion that the Canadian Parliament has a right to abolish any right to appeal to the Judicial Committee in any matter falling within the legislative jurisdiction of the Dominion Parliament, including an appeal from the decision of the Supreme Court of Canada in any matter whatsoever.

There remains for consideration the matter of appeals from the decisions of provincial courts where the law involved is within the exclusive legislative jurisdiction of the provinces.

Prior to 1833, the right of the Sovereign in Council to entertain, by way of special leave, appeals from any court in His Majesty's Dominions beyond the seas, was a settled part of the royal prerogative: "a *residuum* of the royal prerogative of the Sovereign as the fountain of justice"; *British Coal Corporation* v. *The King* (2). This appellate jurisdiction was usually exercised in a Committee of the Whole Privy Council which having heard the allegations and proofs, made their report to His Majesty in Council, by whom a judgment was finally given.

(1) [1935] A.C. 500 (2) [1935] A.C. 500, at 511.

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In 1833 there was passed an Act of the Imperial Parliament, 3-4 William IV, chap. 41, entitled *An Act for the better administration of justice in His Majesty's Privy Council,* later given the short title of *The Judicial Committee Act, 1833.* This Act created a statutory body called "The Judicial Committee of the Privy Council," and is the basis of the present constitution and procedure of this tribunal. It recites, *inter alia,* that

> from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council;

and proceeds to provide for the more effectual hearing and reporting of appeals to His Majesty in Council and on other matters, and for giving powers and jurisdiction to His Majesty in Council. The Act goes on to provide for the formation of a Committee of His Majesty's Privy Council to be styled "The Judicial Committee of the Privy Council"; and enacts that

> 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 the order of any court or judge, should thereafter be referred by His Majesty to, and heard by the Judicial Committee as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open court.

It would appear, therefore, that this Act and the Supplementary Act of 1844 did not change the character of the jurisdiction but merely provided a more efficient method of exercising it. Reference here might be made to a statement of Lord Watson in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (1). At page 208 he said:

> By a clause in the statutes of 1890 and 1891 (Statutes of Ontario and Canada), it is enacted that when the arbitrators proceed on their view of a disputed question of law, "the award shall set forth the same at the instance of either party, and the award shall be subject to appeal so far as it relates to such decision to the Supreme Court, and thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal." The concluding part of that enactment ignores the constitutional rule that an appeal lies to Her Majesty, and not to this

(1) [1897] A.C. 199.

Board; and that no such jurisdiction can be conferred upon their Lordships, who are merely the advisers of the Queen, by any legislation either of the Dominion or of the Provinces of Canada.

On the granting of self-government, many of the royal prerogatives passed to the Provinces, and, at Confederation, these and some others were distributed between the Dominion and the provinces largely in accordance with the distribution of legislative power.

There remained, however, some prerogatives which did not pass either to the Dominion or to the provinces. They have sometimes been referred to as "Imperial prerogatives." During the past few decades with the broadening of Dominion status these Imperial prerogatives, in so far as they affected Canadian affairs, passed progressively under Dominion control. To illustrate by recent events, His Majesty now makes a declaration of war so far as it affects Canada on the advice of his Canadian Ministers. Again, by the Statute of Westminster, any alteration made in the succession to the Throne was made subject to the approval of the Dominion. When a change became necessary, this was done, first, with the approval of the Canadian Ministers and afterwards confirmed by the Parliament of Canada.

The prerogative of appeal is the only one affecting Canadian affairs which continues to be exercised without the active participation of the Dominion. There were two initial legal obstacles in the way of Dominion legislation abrogating this particular prerogative. The first was that by reason of the operation of the *Colonial Laws Validity Act* such legislation by Canada would be repugnant to the Judicial Committee Acts of 1833 and 1844, and void for that reason. The second was that it would be in the nature of extra-territorial legislation and for that reason beyond the power of Parliament: see *Nadan* v. *The King* (1). However, these obstacles were removed by the Statute of Westminster: see *British Coal Corporation* case (2).

Now it is contended on behalf of a majority of the provinces that whatever remains of this prerogative is something in which they have rights and, for that reason, cannot be taken away by the Canadian Parliament.

(1) [1926] A.C. 482. (2) [1935] A.C. 500.

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The rights of the provinces must be found within the four corners of the *British North America Act*. Before dealing with the particular sections of this Act, there are some general observations which merit consideration.

Prior to Confederation, each of the original Provinces was in the nature of a unitary state. Each had general power to make laws for the peace, order and good government within the province. There was no restriction on the establishment of courts and the appointment of judges. They were in fact subject to no limitations except those imposed by the Imperial Parliament, or retained in the way of royal prerogatives. Upon Confederation, however, such powers of the provinces were greatly restricted. In addition to the distribution of legislative power, some of the Imperial prerogatives were transferred to the Dominion and many of those formerly enjoyed by the Provinces were also transferred to the Dominion.

The Governor in Council now appoints and can dismiss the Lieutenant-Governors of the provinces. The Dominion pays their salaries. The Governor General in Council now has power to disallow provincial statutes. This could not be done by His Majesty in Council (other than his Council in Canada). As has been said before, the Governor General in Council now appoints the judges of the provincial courts as well as those of the Dominion, and the Dominion pays the salaries of all. Perhaps the most important is that the reserve power to legislate for peace, order and good government was allotted to the Dominion Parliament and specific powers alone went to the provinces.

There is no mention whatever in the *British North America Act* of appeals to the Judicial Committee or in fact to any other tribunal, except only the provision in section 101 for the establishment of a general court of appeal for Canada.

The *British Coal Corporation* case (1), establishes that the right to control appeals to the Judicial Committee must now be a matter coming within the jurisdiction of either the Canadian Parliament or the provincial legislatures.

As has been stated, the reserve power to legislate for peace, order and good government is vested in the Cana-

(1) [1935] A.C. 500.

dian Parliament and, therefore, unless something can be found in the provisions of the Act which confer this power on the provinces, the Dominion must have that power. As was stated by Sir Montague Smith in the case of *Citizens Insurance Company* v. *Parsons* (1):

> The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne.

Section 92 enumerates the subjects assigned exclusively to the provinces. Of these the only relevant head of provincial legislative jurisdiction would appear to be section 92 (14).

> 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.

The first and controlling phrase is "the administration of justice in the province." These words in their natural sense mean the enforcement of justice according to law in the province. They would imply authority to provide machinery necessary for that purpose. They would not imply making law. They might or might not imply the creation of courts for the interpretation and application of law. But the following words make clear the extent and limitation of any such implication, that is,

> including the constitution, maintenance and organization of Provincial courts, both of civil and of criminal jurisdiction, and the procedure in civil matters in those courts.

It is obvious that the provincial courts must be courts functioning within the province and whose jurisdiction is limited by territorial boundaries of the province.

Now the administration of justice means the enforcement of all justice according to law, civil or criminal, Dominion or provincial, and the judges of the courts who are to interpret and apply the law for the purposes of such

(1) (1881) 7 App. Cas. 96, at 109.

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administration in the provinces are to interpret and apply both Dominion and provincial laws, and this in fact is what is done. The courts are for all parties commonly the subjects of both jurisdictions. While a province constitutes these courts and supplies the machinery for and does enforce the law, the function of judicature is entrusted to judges appointed and paid by Canada and not by the provinces. The Dominion may also impose additional duties on the judges and utilize the machinery of those courts to enforce Dominion laws of a special character, such as Dominion Election Petitions and Bankruptcy. Although called provincial courts they are in truth created by joint action, by and for the benefit of both jurisdictions.

The composition of these courts and the character of the business entrusted to them rebut any implication there might be that a province had a right to control appeals therefrom to any external tribunal.

Then there is the objection of extra-territoriality found fatal to the attempted repeal in question in the *Nadan* case, *supra*. Although this objection was removed by section 3 of the Statute of Westminster so far as it affected the Dominion, it still subsists in the case of the provinces. I am of the opinion that this section does not give the provinces the power for which they contend.

It was also contended on behalf of the provinces that subsections 1 and 13 of section 92 might supply jurisdiction. But I am unable to see that either of these confers any such power. In any event, heading 14 is the compartment dealing with the subject-matter and for this reason would exclude application on the others.

Another argument advanced on behalf of the provinces was based on section 129 of the *British North America Act*, as follows:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The obvious purpose of this section was to provide for continuity of law and administration until the new Parliament and new legislatures were organized, assembled and able to function. I think it was clearly not the intention to alter the distribution of powers made by sections 91 and 92. The introductory words "Except as otherwise provided by this Act" make this perfectly plain.

If my view is correct that none of the headings in section 92 confer on the provincial legislatures, expressly or impliedly, power to abolish the right of appeal, then the reserve powers of the Dominion would come automatically into operation, and it is, therefore, "otherwise provided" in the Act that the Dominion should have any rights which the provinces theretofore may have had in the matter.

A very able and interesting argument was presented to us on behalf of Ontario and by counsel for several of the other provinces, based in the case of Ontario on the *Constitutional Act* of 1791, and in several of the other provinces on subsequent orders in council; but holding the views that I do it is not necessary to discuss the points raised by them. I would just make one observation here. It must never be overlooked that with the passing of this Act there was a new orientation of powers, prerogative as well as legislative.

For complete accuracy, it should be stated that references herein to provincial courts do not apply to those inferior jurisdictions under consideration in a reference before this Court, the judgment in which is reported (1).

There remains to be considered the extent of the power conferred upon the Dominion by section 101. This provides:

> 101. 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.

The extent of the power thus conferred came before the Judicial Committee for consideration in the case of *Crown Grain* v. *Day* (2). The circumstances in this case were that the Manitoba Legislature had passed a *Mechanics' and Wage Earners' Lien Act* applying to the suit under appeal.

(1) [1938] S.C.R. 398. (2) [1908] A.C. 304.

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This statute enacted that in suits relating to liens the judgment of the Manitoba court of King's Bench should be final and that there should be no appeal therefrom. It was held that a provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act. Lord Robertson, in giving the opinion of the Board, said at page 507:

> The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject-matters of litigation which, like that of contracts, are committed to the provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal.
>
> It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail. This has already been laid down in *Dobie* v. *Temporalities Board* (1), and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (2).

Section 101 is included in a group of sections forming a distinct division of the Act under the heading "7. Judicature" wherein provision is made for the appointment, payment, retirement and removal of judges and concludes with the provision for a general court of appeal. It would seem to me that, reading the sections of this division together with other sections of the Act, there is envisaged the ultimate establishment of a complete system of judicature within Canada with a final, general court of appeal of a last resort in Canada, and this should be established when and with whatever jurisdiction Parliament might from time to time decide.

As has already been observed, there is no provision in the Act relating to appeals beyond Canada, but, undoubtedly, when the Act was passed in 1867 the prerogative right to appeal by special leave existed. But that did not necessarily mean that litigants who wished to appeal might not first be obliged to come to the Supreme Court of Canada. The words "a general court of appeal for

(1) (1882) 7 App. Cas. 136. (2) [1907] A.C. 65.

Canada" surely imply only one court of appeal and it would appear to be anomalous that there should be concurrently a right of appeal to two different courts. This situation could not be effectively corrected until the passing of the Statute of Westminster, not because of any provisions in the *British North America Act* but because of external constitutional limitations. These having been removed, I can see no reason why the Dominion should not exercise the full powers given by this section, either expressly or impliedly and make the decisions of the Supreme Court of Canada final and conclusive and without appeal.

A special argument was raised in regard to admiralty appeals, but I think this argument is shortly and definitely answered by the fact that "navigation and shipping" is a subject which is expressly allotted to the Dominion under section 91 of the Act, and the reasoning by which the conclusion was arrived at in the *British Coal Corporation* case (1), that Canada had the power to make the decision of the Supreme Court final in regard to criminal matters, applies equally in regard to admiralty cases.

For these reasons, I would answer the question submitted in the affirmative and say that a Bill in substantially the form of Bill No. 9 would be *intra vires* of the Parliament of Canada.