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*Mar. 7.
*April 20.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF SECTION 17 OF THE ALBERTA ACT.

Constitutional Law—The Alberta Act (D., 1905, c. 3), s. 17—Constitutional validity—Review of constitutional legislation—Dominion powers—Variation of s. 93 of B.N.A. Act, 1867, in its application to Alberta—Education—Separate schools—Appropriation and distribution of moneys for schools.

S. 17 of *The Alberta Act* (D., 1905, c. 3), varying the provisions of s. 93 of *The B.N.A. Act, 1867,* in their application to the province of Alberta, and enacted to perpetuate under the Union the rights and privileges with respect to separate schools and with respect to religious instruction in the public or separate schools, as provided under the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

terms of chapters 29 and 30 of the Ordinances of the North-West Territories passed in the year 1901, and to prevent discrimination in the appropriation and distribution of moneys for support of schools, was within the powers of the Dominion Parliament, and is wholly *intra vires.*

Constitutional legislation reviewed.

REFERENCE, by order of the Governor General in Council, of 24th June, 1926, to this Court for hearing and consideration, pursuant to s. 60 of the *Supreme Court Act,* of the following question:

"Is section 17 of *The Alberta Act,* in whole or in part, *ultra vires* of the Parliament of Canada, and, if so, in what particular or particulars."

E. Lafleur K.C. and *L. Cannon K.C.* for the Attorney General of Canada, in support of the validity of the legislation.

F. H. Chrysler K.C. contra (under appointment of the Court, pursuant to s. 60 of the *Supreme Court Act,* to represent all interests opposed to the validity of the Act).

G. F. Henderson K.C. for the province of Alberta.

H. Fisher K.C. for the province of Saskatchewan.

The judgment of the Court was delivered by

NEWCOMBE J.—By order of the Governor General in Council of 24th June, 1926, the following question was referred to the Supreme Court of Canada for hearing and consideration, pursuant to s. 60 of the *Supreme Court Act:*

Is Section 17 of the *Alberta Act,* in whole or in part, *ultra vires* of the Parliament of Canada, and, if so, in what particular or particulars?

The reasons for the reference are thus stated in the order:

The Committee of the Privy Council have had before them a report, dated 24th June, 1926, from the Minister of Justice, stating that as the result of certain negotiations looking to the transfer to the province of Alberta of the public lands within that province, now vested in the Crown and administered by the Government of Canada for the purposes of Canada, an agreement was entered into on the 9th January, 1926, between the governments of the Dominion of Canada and of the province of Alberta, respectively, whereby it was agreed that certain provisions of the *Alberta Act* should be modified to the intent that all Crown lands, mines, minerals and royalties within the province, and sums due or payable for such lands, mines, minerals or royalties should, from and

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after the coming into force of the said agreement, belong to the province, subject to any trusts existing in respect thereof and to the several other terms and conditions particularly set forth in said agreement. Subsequently, the two governments agreed upon certain additional provisions to be inserted in the said agreement relative to the transfer and administration of the School Lands Fund and certain specified school lands, to parks and forest reserves affected by the agreement, and to the rights and properties of the Hudson's Bay Company. Notice was given by a resolution that a bill would be introduced into Parliament, at its present session, to approve and give effect to the said agreement as so modified, but a question having been raised as to the constitutional validity of section 17 of the *Alberta Act*, relative to the subject of education and schools within the said province, it was decided not to proceed with the proposed legislation as drafted until this question of doubt could be authoritatively settled.

In accordance with the directions which were subsequently given, pursuant to the rules, the Attorney General of Saskatchewan and the Attorney General of Alberta received notice of the hearing, but neither of them filed a factum, although it was expressly directed that each might do so, and each of them announced his intention to appear, but not to take part in the argument. The Attorney General of Canada, represented by counsel, filed a factum maintaining the enacting authority of Parliament, and the Court, in the exercise of its discretion under subsec. 5 of section 60, requested Mr. Chrysler, K.C., to argue the case in opposition to the view submitted by the Attorney General of Canada, and the hearing was postponed to afford adequate time for preparation. The difficulties in the way of the opposition were very great, as will presently appear, but it is needless to say that any interest, whatever it may be, which is concerned to have s. 17 of the *Alberta Act* pronounced invalid, can have no cause to complain that Mr. Chrysler did not exhaust the legitimate resources of advocacy in support of his case.

The province of Alberta was carved out of that part of the Dominion which was described in s. 146 of the *British North America Act, 1867*, as Rupert's Land and the Northwestern Territory. By this section it was lawful for the Queen in Council, upon address from the Houses of Parliament of Canada, to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions as were in the address expressed and as the Queen thought fit to approve, "subject to the provisions of this Act"; and it was declared that the pro-

visions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom. The manner in which this power was exercised, and the subsequent acts and proceedings leading up to the constitution of the new prairie provinces, may be briefly mentioned.

By the effect of the *Rupert's Land Act, 1868*, 31-32 Vic., c. 105; the surrender of the Hudson's Bay Co. of 19th July, 1869, and the Order of the Queen in Council of 23rd July, 1870, Rupert's Land and the Northwestern Territory, which I shall hereinafter call the Territories, were admitted into and became part of the Dominion, and it was declared that the Parliament of Canada should have authority to legislate for the peace, order and good government, or the future welfare and good government, thereof. Temporary provision for the government of the Territories was made by Act of the Dominion, c. 3 of 1869; the province of Manitoba was constituted by the *Manitoba Act,* 1870, 33 Vic., c. 3, and these Acts were confirmed by the *British North America Act, 1871,* 34-35 Vic., c. 28. By the latter Act, upon the recital that doubts had been entertained respecting the powers of the Parliament of Canada to establish provinces in Territories admitted, or which might thereafter be admitted, into the Dominion, and that it was expedient to remove such doubts and to vest such powers, it was enacted, by s. 2, that the Parliament of Canada might, from time to time, establish new provinces in any territories forming, for the time being, part of the Dominion, but not included in any province, and might

> at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament.

It was also enacted, by s. 4, that

> the Parliament of Canada may, from time to time, make provision for the administration, peace, order and good government of any territory not, for the time being, included in any province.

By the two remaining sections, 5 and 6, the Act for the temporary government of Rupert's Land and the Northwestern Territory, and the *Manitoba Act,* 1870, were confirmed, and it was declared that it should not be competent to the Parliament of Canada to alter the provisions of the last mentioned Act "or of any other Act hereafter estab-

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lishing new provinces in the said Dominion." Subsequently, by Order of Her Majesty in Council of 31st July, 1880, it was comprehensively ordered and declared that:

> From and after the first day of September, 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any of such Territories or Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.

By the *British North America Act, 1886,* entitled "An Act respecting the representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any province," it is recited that it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any province, and it is provided that the Parliament of Canada may make provision for such representation; it is also provided that any Act theretofore passed by the Parliament for the purpose mentioned shall, if not disallowed, be deemed to have been valid and effectual from the date when it received the assent, and, subjoined to this provision, which is to be found in s. 2, is the following declaration:

> It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

There is also the concluding provision which was relied upon as declaratory of the unity of the several Acts. It provides that:

> This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

It was in pursuance of the powers thus conferred and existing that the Parliament of Canada, on 20th July,

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1905, enacted the *Alberta Act,* to come into force on 1st September of that year. It recites the provisions of the *British North America Act, 1871,* and that it is expedient to establish as a province the territory therein described, and to make provision for the government thereof, and the representation thereof in the Parliament of Canada. The territory described was wholly comprised within the North-western Territory or Rupert's Land, which, down to the time of the constitution of the new province, had been governed under the provisions of the *North West Territories Acts,* enacted by the Parliament of Canada pursuant to the powers derived from the *British North America Act, 1871.* The authority of the Parliament to make laws for the peace, order and good government of the territory which became the province of Alberta, so long as it remained a part of the Territories, and to provide that it should be constituted into a province, is thus incontestable, and it was not contested. But it was said that the Parliament could not vary, for the new province of Alberta, s. 93 of the *British North America Act, 1867,* which defines the provincial legislative powers relating to education in each of the original provinces. It was sought to introduce a limitation into the ample and comprehensive powers declared by the *British North America Act, 1871,* depending, as I understood the argument, not upon the fact that the enactment is designed to regulate education, but upon a general exception, which, it was said, is to be found in the words of s. 146 of the *British North America Act, 1867,* "subject to the provisions of this Act," and that these words must, by implication, be read into s. 2 of the Act of 1871; it was argued that these words must be impliedly incorporated, because s. 146 provides for the admission into the Union, not only of the colonies of Newfoundland, Prince Edward Island and British Columbia, but also of Rupert's Land and the Northwestern Territory, or either of them, "on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act." It was ingeniously urged that the provisions referred to were all those which were, in the *British North America Act, 1867,* common to the original provinces, and that the Terri-

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tories thus became constitutionally incapable of incorporation into the Union as provinces upon terms or conditions in anywise different from those which applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. This contention, if maintainable, might have constituted a very serious impediment, if not an insurmountable obstacle, to the framing of satisfactory constitutions, but it does not appear to have occurred to anybody before the hearing of this case, and the argument does not rest upon any sound foundation, as I think the following considerations will show.

The provisions of s. 93 of the *British North America Act, 1867*, are well known, and they have frequently been the subject of judicial interpretation. The section provides that

in and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions.

These provisions are set out in four enumerations, the first of which is that:

Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

The second enumeration is designed to ensure equality in relation to separate schools as between Ontario and Quebec, and the other two enumerations contain special provisions for the working out of the general principle enunciated by the first:

By s. 17 of the *Alberta Act* it is provided as follows:

Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is

employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

It was enacted by s. 3 of the *Alberta Act* that:

The provisions of The British North America Acts, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

There is a corresponding provision in the *Manitoba Act*, 1870, s. 2, and in the terms of Union with British Columbia, clause 10; also in the terms of Union with Prince Edward Island, the penultimate clause. In each case the provisions of the *British North America Act, 1867*, were to apply, except so far as varied by the terms of Union, and it was thus, in these particular cases, found not incompatible with admission into the Union with provincial status that the terms of Union should have the right of way. But, so far as the Territories are concerned, the powers conferred by s. 146 were exhausted or spent by their admission into the Union under the Order in Council of 23rd July, 1870; I cannot discover that any terms were introduced which conflict with the provisions of the *British North America Act, 1867*, and nobody doubts, and it is not denied, that the Territories were lawfully admitted. Consequently, it is not necessary for present purposes to interpret the general meaning or effect of the words "subject to the provisions of this Act," as found in s. 146. The Territories were admitted in the execution of competent powers under the provisions of the Act of 1867 and the *Rupert's Land Act, 1868*, and the legislative powers of the Parliament of Canada with regard to them were declared in the most comprehensive terms by the Act of 1871. Parliament, it is declared, may make laws for the peace, order and good government of the Territories. These words, as said by Lord Halsbury in *Riel* v. *The Queen* (1), are

apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire. Forms

(1) (1885) 10 App. Cas. 675, at pp. 678-679.

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of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. They are the common words which are used in the execution of the powers of the Crown or of Parliament for the constitution of Colonial Governments.

Chapters 29 and 30 of the Ordinances of the North-west Territories, 1901, which are mentioned in s. 17 of the *Alberta Act,* are the *School Ordinance* and the *School Assessment Ordinance* which were in force at the time of the constitution of the province, and which regulated the matter of education and taxation for school purposes, under the authority of the then existing legislation of Canada, comprised in the *Northwest Territories Act* and its amendments. The Territories had, from the time of their admission into the Union, exercised, under legislative grant from the Dominion, powers of self-government which had gradually been expanded, until, when the Ordinances of 1901 were passed, they had for many years enjoyed a representative assembly, with powers of legislation not far inferior to those of the provincial Legislatures. See the *North-west Territories Act,* as enacted in c. 50 of R.S.C., 1886, as amended, particularly c. 19 of 1888, and c. 22 of 1891, of the Dominion. It is useless, in view of the governing cases, to suggest any doubt as to the authority of Parliament to confer these legislative powers. *The Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Liquidators of The Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (3). These authorities make it clear that the Parliament of Canada had plenary powers of legislation as large and of the same nature as those of the Parliament of the United Kingdom itself; and, thus construed, so long as there was no repugnancy to an Imperial Statute, there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new provinces therein, for the constitution and administra-

(1) (1878) 3 App. Cas. 889, at pp. 903-905.

(2) (1883) 9 App. Cas. 117, at pp. 131, 132.

(3) [1892] A.C. 437, at pp. 441-443.

tion of any such province, and for the passing of laws for the peace, order and good government thereof, and for its representation in the Parliament of Canada.

It was to perpetuate under the Union the rights and privileges with respect to separate schools, or with respect to religious instruction in the public or separate schools, and to avoid discrimination in the appropriation and distribution of the legislative grants for education, as provided for in the *North-west Territories Acts* of the Dominion, and in the Territorial Ordinances of 1901, that s. 17 of the *Alberta Act* was enacted, and it would be strange indeed if, when the new provinces emerged, constitutional guarantees could not be afforded by a law-making body which had the powers of the Imperial Parliament to legislate for their constitution and administration, and to define their powers to pass laws for their peace, order and good government. The Ordinances, as I have shown, derived their force mediately from the Parliament of Canada, which had conferred the territorial legislative powers under which they were directly enacted. It is unquestionable that they had the force of law in the Territories from the time of their enactment down to the constitution of the province of Alberta in 1905, and it seems to be as plain as words can tell that, at the time of the establishment of the province of Alberta, the Parliament of Canada had the power to define and to regulate the legislative powers which were to be possessed by the new province. It is, I think, as impossible as it is inexpedient to cast any doubt upon the generality and comprehensive nature of constitutional powers conferred for peace, order and good government, and I do not find, either in the *British North America Act* of 1867 or of 1871, anything expressed or implied which limited the power of the Parliament of Canada in 1905 to define the constitution and powers of the provinces which were at that time established and constituted within the Territories.

Of course, if the second paragraph of s. 2 of the *British North America Act, 1886,* be intended to have general application, the case is relieved of any possibility of a suggestion or accent of doubt, because it is there declared that

any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act, or in the

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British North America Act, 1871, has effect notwithstanding anything in the British North America Act, 1867.

But, in the view which I take, it is not necessary to consider the application of this provision, which, it may be suggested, is limited, having regard to the title of the Act, and its purpose as set forth in the recital, and the concluding sentence of the paragraph to which I have referred, which makes provision for representation in the Senate and House of Commons of Canada, a subject which, it may be observed, is also expressly included in s. 2 of the *British North America Act, 1871.*

For the above reasons my answer to the question submitted is that s. 17 of the *Alberta Act* is not, in whole or in part, *ultra vires* of the Parliament of Canada.

Question referred answered accordingly.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*