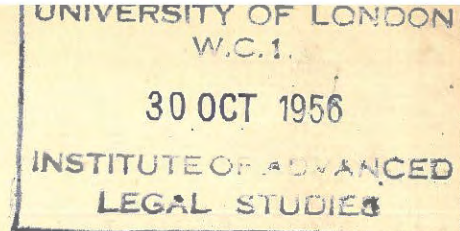


In the Privy Council.

No. 74 of 1907.



29913

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE CROWN GRAIN COMPANY, LIMITED (Defendant) *Appellant*

AND

HENRY L. DAY ... (Plaintiff) *Respondent.*

CASE FOR THE APPELLANT.

Record.

10 1. The sole question for determination on this Appeal is whether the Legislature of the Province of Manitoba had power to enact that the Judgment of the Court of King's Bench of Manitoba, sitting *in banc*, was final and binding and not susceptible of appeal in respect of a right created by the Legislature affecting property and civil rights in the Province.

20 2. The Appellant Company entered into a contract with one, Cleveland, for the construction of certain works in its factory. Cleveland made a sub-contract with the Respondent Day for the construction of a portion of these works, namely, the erection of certain dust appliances. Not having been paid in full by Cleveland, Day lodged with the Registration Officer in Manitoba a claim for a lien on the property of the Appellant under the terms of The Mechanics' and Wage-Earners' Lien Act (Revised Statutes of Manitoba, 1902, chapter 110).

3. Subsequently, the Respondent Day instituted an Action against p. 1 Cleveland for the recovery of the sum alleged to be due to him under the sub-contract, and asked that the lien should be made effective as against the property of the Appellant.

Record.

p. 4

4. Mr. Justice Richards, before whom the Action was tried, in his Judgment dated the 11th September, 1905, condemned the Defendant Cleveland to pay the Plaintiff, the present Respondent Day, the sum of 2140.60 dols. and costs in the action, and also declared and adjudged that the present Respondent was entitled to a lien for a like amount upon the lands and premises of the Appellant, and made certain other orders, *inter alia*, in regard to priorities among lien holders.

p. 6

5. From this Judgment the present Appellant appealed to the Court of King's Bench sitting *in banc* in the Province of Manitoba, and that Court, composed of the Honourable Chief Justice Dubuc and the Honourable Justices 10
Perdue and Mathers, on the 10th May, 1906, gave Judgment reversing the Judgment of Mr. Justice Richards and dismissing the Respondent's Action as against the Appellant.

6. From that Judgment the present Respondent Day took an Appeal to the Supreme Court of Canada.

p. 9

7. Before the case came on for argument in the latter Court the Appellant served the Respondent with a notice that the Court had no jurisdiction to hear the Appeal, and that the point would be raised when the Appeal was called for argument. The argument came on on the 22nd May, 1907, when Counsel for the Appellant raised the objection that the Court had no jurisdiction to hear the 20
Appeal. This appears from the official report of the proceedings contained in volume 39 of the Supreme Court Reports (admitted by parties to form part of the Record), pages 258 to 264 inclusive. The Report states that:—

(Page 259)--

“ On the Appeal coming on for hearing, Galt, for the Respondent ” (the present Appellant) “ moved to quash the Appeal on the “ ground that, under Section 36 of ‘ The Mechanics’ and Wage- “ Earners’ Lien Act (R.S.M. 1902 ch. 110) ’ there could be no Appeal “ from the Judgment in question. Without calling upon the “ Appellant’s (present Respondent) ‘ Counsel to reply ’ the Court 30
“ ordered the argument to proceed upon the merits of the Appeal.”

p. 10

8. On the 24th June, 1907, the Supreme Court of Canada gave Judgment in the cause reversing the Judgment of the Court of King's Bench sitting *in banc* in Manitoba. The Honourable Chief Justice (Fitzpatrick) and the Honourable Justices Idington and Duff concurred in that Judgment, and the Honourable Justices Davies and Maclellan dissented therefrom.

p. 14

9. From the official report, which is made a part of the Record by consent of the parties, it appears that no reference whatever was made by the Judges in their final opinions to the preliminary objection raised by Appellant's Counsel to the jurisdiction of the Court. The decision of the Supreme Court, 40

as appears from the report, was given entirely upon the question, whether the lien as required by the Act was registered within thirty days after the completion of the work. Whether the Sub-Contractor's claim was registered in time is the sole question discussed in the Supreme Court Judgments. Three of the Judges were of opinion that the lien was registered within thirty days after the completion of the work, and that it was in consequence a valid lien; whereas, two of the Judges, agreeing with the three Judges of the Court of King's Bench in Manitoba, were of opinion that it was not registered within thirty days after the completion of the work, and that consequently the lien had been lost. But that question is not now relevant to the present Appeal.

10. The Mechanics' and Wage-Earners' Lien Act, Revised Statutes of Manitoba, 1902, Chapter 110, provides that:—

(Section 4)—

20 “Unless he signs an express agreement to the contrary, any
 “person who performs any work or service upon or in respect of, or
 “places or furnishes any materials to be used in the making, con-
 “struction, erecting, fitting, altering, improving or repairing of, any
 “erection, building, land, wharf, pier, bulkhead, bridge, trestlework,
 “vault, mine, well, excavation, sidewalk, paving, fountain, fishpond,
 “drain, sewer, aqueduct, roadbed or way, or the appurtenances to
 “any of them, for any owner, contractor or subcontractor, shall by
 “virtue thereof have a lien for the price of such work, service or
 “materials upon the erection, building, land, wharf, pier, bulkhead,
 “bridge, trestlework, vault, mine, well, excavation, sidewalk, paving,
 “fountain, fishpond, drain, sewer, aqueduct, roadbed, way, and ap-
 “purtenances thereto, and the lands occupied thereby or enjoyed
 “therewith, or upon or in respect of which the said work or service
 “is performed, or upon which such materials are placed, or furnished
 “to be used, limited, however, in amount to the sum justly due to
 “the person entitled to the lien and to the sum justly owing (except-
 “ing as herein provided) by the owner.

Nature of
lien.

30 “Provided that no such lien shall exist under this Act for any
 “claim under the sum of twenty dollars. (A) Such lien, upon regis-
 “tration as hereinafter provided, shall arise and take effect from the
 “date of the commencement of such work or service, or from the
 “placing of such materials, as against purchasers, chargees or
 “mortgagees under instruments, registered or unregistered.
 “61 V. c. 29 s. 4.”

No lien for
sum under
\$20.

Commence-
ment of lien.

40 And (by sect. 5) “The lien shall attach upon the estate or interest of the owner
 “as defined by this Act, in the erection of building,” &c., “and the lands
 occupied thereby.” . . .

Record.

By sect. 7 it is provided that "the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor." By sect. 14 the claim for lien must be registered in the Lands Titles Office. By sect. 17 (a) nothing can dispense with registration, and by sect. 20 "a claim by a contractor or sub-contractor may be registered before or during the performance of the contract, or within thirty days after the completion thereof." Sects. 27 and following relate to the "enforcement of lien." By sect. 29 "An action to enforce a lien may be tried by a Judge of the Court of King's Bench at any regular sittings thereof for the trial of actions, or when the aggregate amount of the liens involved does not exceed the sum of one thousand dollars by a local Judge of the said Court within whose judicial district the cause of action has arisen." 10

Section 35 of the Act makes provision for the finality of a judgment "where the total amount of the claims of the plaintiff and other persons claiming liens is one hundred dollars or less."

"35. In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is one hundred dollars or less, the said judgment shall be final, binding and without appeal, except that upon application, within fourteen days after judgment is pronounced, to the Judge or local Judge who tried the same, he may grant a new trial. 61 Vic. c. 29, s. 35." 20

When Appeal
lies.

11. Section 36 of the Act is the one requiring the main consideration under this Appeal. It is as follows:—

"36. In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than one hundred dollars, any party affected thereby may appeal therefrom to the Court of King's Bench in banc, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure upon appeal from the judgment of a local Judge shall be the same as upon appeal from a judgment of a Judge. 61 V. c. 29, s. 36." 30

If this clause was competently enacted by the Legislature of Manitoba, the decision of the Court of King's Bench was final and conclusive, and not susceptible of appeal to the Supreme Court of Canada. The subject-matter of the legislation is a matter of merely local or private nature in the Province, and in relation to property and civil rights in the Province. Each of the Provinces of the Canadian Dominion has dealt with the matter of liens as creating rights in respect of property in the Province. The legislation in question does not overlap or come in conflict with any legislation of the Parliament of Canada, nor is it subordinated to legislation of the Parliament of Canada as affecting civil rights incident to legislation on any of the subjects exclusively coming within the classes of subjects enumerated in Section 91 of the British North America Act, 1867. The rights acquired under the Act are 40

the creation of the Statute and are subject to its limitations and restrictions. The power that creates the right has the power to limit its exercise, or even to annul it altogether by the repeal of the Statute. The existence or non-existence of the right is not a matter that concerns the Parliament of Canada, or any authority that the Parliament of Canada has the power to create.

10 12. This legislation in no way competes with Dominion legislation, in which civil rights of property is affected as an incident of legislation on any of the subjects exclusively under the jurisdiction of the Parliament of Canada. The creation of the right and the limitation of the right are not matters of Dominion or national concern, but relate exclusively to local matters in the Province of Manitoba. If the power that creates the right has not a concomitant power to limit its exercise, then the creative power is reduced to naught. The Legislature that created the right has chosen also to enact the methods for determining how its existence shall be ascertained and enforced, and when so ascertained, has enacted that such decision shall be final and conclusive, and shall not be susceptible of appeal. Can the will of the Legislature in respect of a matter exclusively under its jurisdiction and control, where the field is clear and unencumbered by any countervailing or overlapping Federal Legislation, be overborne by the Act of the Canadian Parliament creating the Supreme Court of Canada?

20 The power of the Parliament of Canada to create a General Court of Appeal for Canada is derived from Section 101 of the British North America Act, 1867, which is as follows:—

“101. The Parliament of Canada may, notwithstanding any—
 “thing 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.”

This section does not enact that there shall be an appeal from every Court of last resort in the Provinces. It makes no reference to appeals from Courts of
 30 last or other resort in the Provinces. As a matter of fact, appeals to the Court of last resort from the Provinces are not compulsorily carried to it. It has no legislative authority to attract these appeals. There is an appeal from the Court of last resort in the Provinces (subject to the limitation made in each of the Provinces as to amount) to the Judicial Committee of the Privy Council. It was so at the date of the creation of the Supreme Court of Canada, and that right is in no way limited by any provision in the Supreme Court Act. All the Parliament of Canada could do was to provide a General Court of Appeal for Canada, as an additional recourse for legal decision, where
 40 an appeal was permitted. The Supreme Court Act does provide another avenue for judicially determining legal disputes between litigants, but it does not oust the right of appeal to His Majesty in Council, and it cannot destroy the right of the Provinces to limit appeals in respect of matters within its competency.

13. The intention of the Legislature in the Lien Act which was assented to by the Crown is clearly manifested, namely, that the decision of the Court of King's Bench for Manitoba *in banc*, shall be final and binding, and that no appeal shall lie therefrom. In other words, the decision should not be subject to the incident of review. (*Theberge v. Laundry* (1876) L.R. 2 App. Cas. 102.)

14. The right affected is a civil right arising out of Contract, and such a right is not included in express terms in any of the enumerated classes of subjects in Section 91 of the British North America Act. (*Citizens Insurance Company v. Parsons*, L.R. 7 App. Cas. 96 at p. 109 (1881)).

15. The Provincial Legislature has exclusive authority to make laws in 10 relation to the matters enumerated in Section 92 of the British North America Act 1867, "authority as plenary and as ample within the limits prescribed by "Section 92 as the Imperial Parliament in the plenitude of its power possessed "and could bestow. Within these limits of subjects and area the Local Legisla- "ture is supreme," etc. (*Hodge v. The Queen*, L.R. 9 App. Cas. 117, at p. 132 (1883)).

16. The subject matter of the legislation and the restriction of the right, are not matters of national interest and importance, and they have not attained such dimensions as to affect the body politic of the Dominion. They are strictly matters of local and provincial concern. The exercise of the legislative authority 20 by the Parliament of Canada in regard to all matters not enumerated in Section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any one of the classes of subjects enumerated in Section 92.

To interfere with the exercise of the power to create and limit the right, would practically destroy the autonomy of the Provinces. (*Attorney-General for Ontario v. Attorney-General for the Dominion*, 1896 App. Cas. 348 & 361.)

17. The legislation in regard to liens in the Province deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and in no way comes into competition with legislation on any subject falling within the domain of the Federal power. (*Attorney-General of Canada v. Attorneys-General of Ontario, Quebec and Nova Scotia* (1898) A.C. 700 at p. 716). 30

It is a matter substantially of local or of private interest, in the Province, of a local or private nature "from a provincial point of view." (*Attorney-General of Manitoba v. Manitoba License Holders' Association* (1902) A.C. 73 at p. 79).

18. It is a case in which the field is clear and the Legislature is acting within the boundaries of the field. (*Grand Trunk Railway Company of Canada v. Attorney-General of Canada* (1907) App. Cas. 65 at p. 68). 40

19. Mr. Justice Strong, with clear prevision, saw that the question would some day arise. (*Danjou v. Marquis*, 3 Canadian Supreme Court Reports 251) (1879.) His observations are set out in the Appendix hereto.

The decisions in *Clarkson v. Ryan*, 17 Canadian Supreme Court Reports 251 (1890); *Forristal v. McDonald*, Cassell's Digest (2nd edition) 422, and *Coutlee's Canadian Supreme Court Digest*, 739; and the *City of Halifax v. McLaughlin Carriage Company* 39 Canadian Supreme Court Reports (1907) 174, are also set out in the Appendix, but they don't afford much aid in determining the question submitted. The Supreme Court appears, not only in this case but
10 in the other cases referred to, to have been averse to questioning its own jurisdiction.

20. The terms of Section 101 of the British North America Act do not prescribe that there shall be a right of appeal in every case from the Court of last resort in the Province. They do not exclude the right of appeal from the Province direct to the Privy Council, which when exercised ousts the jurisdiction of the Supreme Court of Canada, and the words of Section 101 cannot be intended to divest the Provinces of the rights which they had, and have to limit the right of appeal in matters in which they have jurisdiction. The general rule deduced from the cases is stated in "*Safford and*
20 *Wheeler's Privy Council Practice*," at page 732:—

"Attention will be paid to the wishes of the Colony as expressed
"by their legislation, and the exercise of the prerogative (to grant
"special leave to appeal) will not be recommended except in cases of
"general importance."

21. The true effect of Section 101 of the British North America Act, 1867, would appear to be, to authorize the Parliament of Canada to create a "General Court of Appeal for Canada," to which litigants might resort when they did not choose to go to the Judicial Committee of the Privy Council, and when the appeal was not competently taken away by the Provincial jurisdiction. It is
30 permissive in terms and does not confer upon the Parliament of Canada any jurisdiction to legislate in a manner out of harmony with the provisions of Sections 91 and 92 of the same Act. The subject is not dealt with in Sections 91 and 92, all that "notwithstanding anything in this Act" means, is that the subject is not to be excluded from consideration by the Parliament of Canada, having due regard being had to the rights of the Dominion and the Provinces.

22. It has even been suggested that the power to provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, means a Court for determining differences to which the laws of the Dominion of Canada are applicable as distinguished from those to which the
40 laws of the Provinces are applied.

The introductory words of Section 91 of the Imperial Act refer to the general power of the Parliament of Canada "to make Laws for the Peace,

"Order, and good Government of Canada," &c. It is certainly significant that in the same sentence in which the Parliament of Canada is authorised to provide for a General Court of Appeal for Canada, it is also authorised to provide for "the establishment of any additional Courts for the better administration of the Laws of Canada, and that there is no mention whatever of Appeals from the decisions of the Courts of last resort in the Provinces.

23. Whether that view is maintainable or not, it is respectfully submitted that under authorization contained in Section 101 of the British North America Act, no authority was delegated to the Parliament of Canada to create a General Court of Appeal in which discrimination as between the different Provinces should exist in respect of access to it. The Supreme Court Act, passed under the authority of Section 101 of the British North America Act, differentiates the right of Appeal in one Province from that in others. In the Province of Quebec there is no appeal to this General Court of Appeal from the Judgment of the Court of last resort in the Province unless the sum of 2,000 dollars is involved. If the Parliament of Canada has the power to fix varying amounts as the qualification for the right of appeal from different Provinces, it might bar the right of appeal in respect of one or more Provinces altogether, by making the amount so excessive that an appeal would become practically impossible—which cannot have been within the contemplation of the Imperial enactment providing for the creation of a "General Court of Appeal for Canada."

24. The power to create a General Court of Appeal for Canada does not imply that the Provincial Legislature may not limit an appeal in respect of a matter within its jurisdiction, a matter of a merely local or private nature in the Province, which does not come in competition with Federal Legislation or with any Dominion or National interest an appeal in respect of a right which is the creature of the Statute.

25. It is respectfully submitted that the Supreme Court of Canada had no jurisdiction to entertain the Appeal from the Court of King's Bench *in banc* in Manitoba, and that the Judgment under appeal should be reversed and the Judgment of the Court of King's Bench of Manitoba restored, for the following, among other

REASONS.

1. Because the subject-matter of the Lien Act (Revised Statutes of Manitoba, 1902, cap. 110) is *intra vires* of the Manitoba Legislature.
2. Because the said Act has been assented to by the Crown, relates to a matter of purely local concern in the Province—a civil right in respect of property—and has no relationship to any matter of Dominion or National concern.

3. Because the said Act deals directly with property, its disposal, and the rights to be enjoyed in respect of it, all of which matters fall clearly within the distribution of powers of legislation assigned to the Legislatures of the Provinces, and its provisions are not in competition with any Dominion Legislation affecting the same subject.
4. Because the lien itself is the creature of the Statute, and must be limited by its provisions.
- 10 5. Because the limitation by a Provincial Legislature of the right of appeal in respect of a matter of purely local concern, in no way conflicts with the permission granted to the Parliament of Canada (Section 101, B.N.A. Act, 1867) 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."
- 20 6. Because the jurisdiction of the Legislatures of the Provinces to limit the right of appeal to His Majesty in Council (saving His Majesty's Prerogatives) is unquestioned, and a similar right of limitation competently exercised exists as regards an Appeal to the Supreme Court of Canada.
7. Because the right of appeal (subject to limitations enacted by the Provinces) to His Majesty in Council exists, notwithstanding the constitution and organization of the Supreme Court of Canada, and such appeal ousts the jurisdiction of the Supreme Court.
- 30 8. Because the true intent and meaning of Section 101 of the B.N.A. Act, 1867, is to create a General Court of Appeal for Canada, to which dissatisfied litigants can resort, on the like terms and conditions throughout Canada, in all cases in which the right of appeal is not competently limited by the Province in which the litigation arose, or in which, in the alternative, an appeal has^{not} been taken to His Majesty in Council either in the exercise of a right or by special leave.
- 40 9. Because the Supreme Court of Canada had no jurisdiction in the premises to entertain an appeal from the decision of the Court of King's Bench of Manitoba sitting *in banc*, and should have dismissed the said appeal on the objection and motion made by the present Appellant.

DONALD MACMASTER.

ALEXANDER C. GALT.

JAMES CLAUD HICKSON.

APPENDIX (see over)

CROWN GRAIN COMPANY, LIMITED, v. DAY.

APPENDIX.

Memorandum of Authorities.

I.—CUVILLIER v. AYLWIN (1832), 2 Knapp, P.C. 72.

In this case it was held that, an Act having been passed by the Colonial Legislature (called the Judicature Act, 34 George III.) limiting the right of appeal to cases where the sum in dispute was not less than £300 sterling, a 10
petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in Council, although there was a special saving in the Colonial Act of the rights and prerogatives of the Crown. The following is the complete Judgment delivered by Sir John Leech, then Master of the Rolls.

“ It is not necessary to hear counsel on the other side. The King
“ has no power to deprive the subject of any of his rights; but the
“ King, acting with the other branches of the Legislature, as one of
“ the branches of the Legislature, has the power of depriving any of
“ his subjects, in any of the countries under his dominion, of any of 20
“ his rights. This petition must therefore be dismissed.”

II.—THE QUEEN v. EDULJEE BYRANJEE (1846), 5 Moore, P.C. 276.

This was an appeal in a criminal case. A royal charter had been granted to the Bombay Company, authorizing the creation of Courts of criminal and civil jurisdiction, and providing that in criminal cases the Supreme Court should have full and absolute power of allowing or denying appeals. The charter also contained a reservation of power to the King in Council of entertaining appeals from all judgments or decisions of the Supreme Court. Held: That so far as regarded criminal appeals the Crown had entirely parted with its prerogative, and the Court below having refused to allow an appeal, the King 30
in Council had no right to permit an appeal. The following extract appears to be much in point:—

“ There is no expression directly referring to and subjecting
“ to further appeal, the full and absolute power of allowing or
“ denying appeals in criminal cases conferred upon the Supreme
“ Court. *And yet, if such had been the intention of the Charter, it*
“ *would be natural to suppose that when such a power had been given*
“ *to the Supreme Court in such very strong terms, the right of*
“ *reviewing their decision, if it were intended to be reserved, would*
“ *have been expressed in language directly noticing the absolute* 40

"power just before given, and in terms admitting of no doubt, establishing a control over that, as regards which, *prima facie*, by the plain meaning of the words, they were not to be subjected to any control or revision thereof. We do not find in its reserving clause that which we should have expected to find, if it applied to the preceding one, but we do find that from the commencement to the end it is peculiarly applicable to civil cases, and that every expression in it may be satisfied by confining it to civil cases only."

N.B.—Page 294, containing a careful comment on and adoption of 10 *Cuvillier v. Aylwin*, *supra*.

III.—THE QUEEN v. ALLOO PAROO (1847), 5 Knapp, P.C. 296.

This case is reported next to the preceding case, and of course the Judgment mentions and approves of the last two preceding cases.

IV.—THEBERGE v. LAUDRY (1876), Law Reports, 2 App. Cas. 102.

Head-note :—

20 "The petitioner having been declared duly elected a member to represent the Electoral District of Montmanier, in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by a judgment of the superior court under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council. Held : That such application must be refused. Although 30 the prerogative of the Crown cannot be taken away except by express words, and the 90th section of the above Act, providing that 'such judgment shall not be susceptible of appeal' does not mention either the Crown or its prerogative ; yet the fair construction of the above Act and of the previous legislation is, that it was the intention of the Legislature, in this Act, which was assented to by the Crown, to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative."

Extracts from Judgment delivered by Lord Chancellor Cairns : Page 105 :

40 "That Act of 1872 appears to have been the Act which in Quebec transferred to the Court the decision of controverted elections, which before that time was vested in or was retained in its own hands by the Legislative Assembly of the Province. By the force of the two Acts of 1872 and 1875, in Quebec, as in this country, the decision of questions of that kind has now become vested in the Superior

"Court. The 89th section to the later of these two Acts, the Act of 1875, provides that the Superior Court sitting in review shall determine, &c., &c. Then the 90th section enacts, '*Such judgment shall not be susceptible of appeal.*'"

Page 106 :—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words ; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. *These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights ; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the Colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should, as soon as possible, become conclusive and enable the constitution of the Legislative Assembly to be distinctly and speedily known*"

Page 108 :—

"In other words, their Lordships have to consider, not whether there are express words here taking away prerogative, *but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown.* In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that *the judgment shall not be susceptible of appeal*, is an enactment which indicates clearly the intention of the Legislature under this Act—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party—to create *this tribunal* for the purpose of trying election petitions in a manner which should make its decision final to all purposes and should not annex to it the incident of its judgment being reviewed by the Crown in its prerogative. In the opinion, therefore, of their Lordships, there is not in this case, adverting to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused."

V.—In the *Citizens Insurance Company v. Parsons*, L.R. 7 App. Cas. 96 (1881), the Judicial Committee of the Privy Council made the following observations with regard to the powers vested in local legislatures under Section 92 of the British North America Act, 1867 :—

(Page 109)—

10 “The main contention on the part of the Respondent was that
 “the Ontario Act in question had relation to matters coming within
 “the class of subjects described in No. 13 of Section 92, viz.:
 “‘Property and Civil Rights in the Province.’ The Act deals with
 “policies of insurance entered into or in force in the Province of
 “Ontario for insuring property situate therein against fire, and
 “prescribes certain conditions which are to form part of such
 “contracts. These contracts, and the rights arising from them, it
 “was argued, came legitimately within the class of subject, ‘Property
 “‘and civil rights.’ The Appellants, on the other hand, contended
 “that civil rights meant only such rights as flowed from the law, and
 “gave as an instance the status of persons. Their Lordships cannot
 “think that the latter construction is the correct one. They find no
 “sufficient reason in the language itself, nor in the other parts of the
 20 “Act, for giving so narrow an interpretation to the words ‘civil
 “‘rights.’ The words are sufficiently large to embrace, in their fair
 “and ordinary meaning, *rights arising from contract, and such rights*
 “*are not included in express terms in any of the enumerated classes*
 “*of subjects in Section 91.*”

VI.—In *Dobie v. Temporalities Board*, 7 App. Cas. 136 (1881), the Judicial Committee made the following observations in regard to the distribution of legislative powers between Sections 91 and 92 of the British North America Act :—

(Page 149)—

30 “According to the principles established by the judgment of this
 “Board in the cases already referred to, the first step to be taken,
 “with a view to test the validity of an Act of the Provincial Legislature,
 “is to consider whether the subject-matter of the Act falls within
 “any of the classes of subjects enumerated in Section 92. If it does
 “not, then the Act is of no validity. If it does, then these further
 “questions may arise, viz.: ‘Whether, notwithstanding that it is so, the
 “‘subject of the Act does not also fall within one of the enumerated
 “‘classes of subjects in Section 91, and whether the power of the
 “‘Provincial Legislature is or is not thereby overborne.’”

40 VII.—In *Hodge v. The Queen*, L.R. 9 App. Cas. 117 (1883), the Judicial Committee made the following observations on the same subject :—

(Page 132)—

“It appears to their Lordships, however, that the objection thus
 “raised by the Appellants is founded on an entire misconception of

“the true character and position of the Provincial Legislatures. They
 “are in no sense Delegates of, or acting under, any mandate from the
 “Imperial Parliament. When the British North American Act enacted
 “that there should be a Legislature for Ontario, and that its Legislative
 “Assembly should have exclusive authority to make laws for the
 “Province and for Provincial purposes in relation to the matters
 “enumerated in Section 92, it conferred powers not in any sense to be
 “exercised by delegation from or as agents of the Imperial Parliament,
 “but authority as plenary, and as ample within the limits prescribed
 “by Section 92 as the Imperial Parliament in the plenitude of its 10
 “power possessed and could bestow. Within these limits of subjects
 “and area the Local Legislature is supreme, and has the same authority
 “as the Imperial Parliament, or the Parliament of the Dominion,
 “would have had under like circumstances to confide to a Municipal
 “institution or body of its own creation authority to make by-laws or
 “resolutions as to subjects specified in the enactment, and with the
 “object of carrying the enactment into operation and effect.”

VIII.—In *Tennant v. Union Bank of Canada*, L.R. 1894 App. Cas. 31, the Judicial Committee held, following *Cushing v. Dupuy*, 5 App. Cas. 409 (1880), that where the legislation of the Dominion Parliament relates strictly to 20 one of the subjects enumerated in Section 91 of the British North America Act, its authority is paramount, even though the exercise of such authority interferes with property and civil rights in the Province.

IX.—In *The Attorney-General for Ontario v. The Attorney-General for the Dominion*, 1896 App. Cas. 348, it was held by the Judicial Committee that :—

“The general power of legislation conferred upon the Dominion
 “Parliament by s. 91 of the British North America Act, 1867, in
 “supplement of its therein enumerated powers, must be strictly
 “confined to such matters as are unquestionably of national interest 30
 “and importance; and must not trench on any of the subjects
 “enumerated in s. 92 as within the scope of provincial legislation,
 “unless they have attained such dimensions as to affect the body
 “politic of the Dominion.”

At pages 359 and 360 their Lordships observed :—

“It was apparently contemplated by the framers of the Imperial
 “Act of 1867 that the due exercise of the enumerated powers
 “conferred upon the Parliament of Canada by s. 91 might,
 “occasionally and incidentally, involve legislation upon matters which
 “are *prima facie* committed exclusively to the provincial legislatures 40
 “by s. 92. In order to provide against that contingency 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 Company of*
 “ *Canada v. Parsons* (7 App. Cas. 108) 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.

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“ It also appears to their Lordships that the exception was not
 “ meant to derogate from the legislative authority given to provincial
 “ legislatures by these sixteen sub-sections, save to the extent of
 “ enabling the Parliament of Canada to deal with matters local or
 “ private in those cases where such legislation is necessarily incidental
 “ to the exercise of the powers conferred upon it by the enumerative
 “ heads of Clause 91. . . . ”

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“ The general authority given to the Canadian Parliament
 “ by the introductory enactments of Section 91 is ‘ to make laws
 “ ‘ for the peace, order. and good government of Canada in relation
 “ ‘ to all matters not coming within the classes of subjects by this
 “ ‘ Act assigned exclusively to the legislatures of the provinces ; ’ and
 “ it is declared, but not so as to restrict the generality of these words,
 “ that the exclusive authority of the Canadian Parliament extends to
 “ all matters coming within the classes of subjects enumerated in the
 “ clause. There may, therefore, be matters not included in the
 “ enumeration, upon which the Parliament of Canada has power to
 “ legislate, because they concern the peace, order, and good govern-
 “ ment of the Dominion. But to those matters which are not specified
 “ among the enumerated subjects of legislation, the exception from
 “ Section 92, which is enacted by the concluding words of Section 91,
 “ has no application ; and, in legislation with regard to such matters,
 “ the Dominion Parliament has no authority to encroach upon any
 “ class of subjects which is exclusively assigned to provincial
 “ legislatures by Section 92. These enactments appear to their Lord-
 “ ships to indicate that the exercise of legislative power by the
 “ Parliament of Canada, in regard to all matters not enumerated in
 “ Section 91, ought to be strictly confined to such matters as are
 “ unquestionably of Canadian interest and importance, and ought not
 “ to trench upon provincial legislation with respect to any of the
 “ classes of subjects enumerated in Section 92.”

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Page 361—

“ To attach any other construction to the general power which,
 “ in supplement of its enumerated powers, is conferred upon the

“Parliament of Canada by section 91, would, in their Lordships’ opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.” 10

And again :—

Page 361—

“These enactments would be idle and abortive if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of section 91 to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.” 20

X.—Attorney-General of Canada v. Attorneys-General of Ontario, Quebec and Nova Scotia (1898), A.C. 700 :—

(Page 716, Lord Herschell)—

“But whilst, in their Lordships’ opinion, all restrictions or limitations by which public rights or fishing are sought to be limited or controlled, can be the subject of Dominion legislation only, *it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relation to fisheries* For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the head, ‘Property and Civil Rights,’ within Section 92, and not as in the class, ‘Fisheries,’ within the meaning of Section 91. So, too, the terms and conditions upon which the fisheries which are the property of the Province may be granted, leased or otherwise disposed of, and the rights which, consistently 30 40

“ with any general regulations respecting fisheries enacted by the
 “ Dominion Parliament, may be conferred therein, appear proper
 “ subjects for provincial legislation, either in Class 5 of Section 92,
 “ ‘The Management and Sale of Public Lands,’ or under the Class
 “ ‘Property and Civil Rights.’

“ *Such legislation deals directly with property, its disposal and*
 “ *the rights to be enjoyed in respect of it, and was not, in their*
 “ *Lordships’ opinion, intended to be within the scope of the Class*
 “ *‘Fisheries,’ as that word is used in Section 92.”* (? 91)

10 XI.—In the Attorney-General of Manitoba v. Manitoba License Holders’
 Association (1902), A.C. 73, it was held that :—
 (Page 79, Lord MacNaughten)—

“ The judgment of this Board in the case of Attorney-General
 “ of Ontario v. Attorney-General of the Dominion, 1896, A.C. 348, has
 “ relieved the case from some, if not all, of the difficulties which
 “ appear to have presented themselves to the learned judges of the
 “ Court of King’s Bench.

20 “ This Court held that a provincial legislature has jurisdiction to
 “ restrict the sale within the Province of intoxicating liquors so long
 “ as its legislation does not conflict with any legislative provision
 “ which may be competently made by the Parliament of Canada and
 “ which may be in force within the Province or any district thereof.
 “ It held further that there might be circumstances in which a pro-
 “ vincial legislature might have jurisdiction to prohibit the manufacture
 “ within the Province of intoxicating liquors and the importation of
 “ such liquors into the Province. For the purposes of the present
 “ question it is immaterial to inquire what those circumstances may
 “ be. The judgment, therefore, as it stands, and the Report to Her
 “ Late Majesty consequent thereon (referred to in a note) show that in
 30 “ the opinion of this tribunal, matters which are ‘substantially of local
 “ or of private interest’ in the provinces—matters which are of a local
 “ or private nature ‘from a provincial point of view,’ to use expres-
 “ sions to be found in the judgment—are not excluded from the
 “ category of ‘matters of a merely local or private nature,’ because
 “ legislation dealing with them, however carefully it may be framed,
 “ may or must have an effect outside the limits of the province, and
 “ may or must interfere with the sources of Dominion revenue and the
 40 “ industrial pursuits of persons licensed under Dominion statutes to
 “ carry on particular trades.”

XII.—In the *Grand Trunk Railway Company of Canada v. The Attorney-General of Canada*, 1907 App. Cas. 65, Lord Dunedin made the following observations :

(Page 67)—

“ The construction of the provisions of the British North America Act has been frequently before their Lordships. (Page 68). It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in 1894, viz., *Attorney-General of Ontario v. Attorney-General of Canada* (1894 A. C. 189) and *Tennant v. Union Bank of Canada* (1894 A. C. 31)—seems to establish these two propositions : First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two Legislations meet, then the Dominion legislation must prevail. 10

“ Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.”

XIII.—In the *Toronto Corporation v. Canadian Pacific Railway Company*, 1908, A.C. 54, Lord Collins refers to questions of conflict between the two jurisdictions, that of the Dominion and of the Province, and observed (page 58) that the result of the decisions is summed up by Lord Dunedin as above stated, and concludes (page 59) :—

“ Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the Provincial Legislature dealing with the same subject-matter and in some sense inconsistent.”

XIV.—In *Danjou v. Marquis*, 3 Can. Sup. Ct. Reps. (1879), 251, it was held that the appeal in cases of mandamus under the then section of the Supreme and Exchequer Court Act is restricted by the application of Section 11 to decisions of “ the highest Court of final resort ” in the province ; and that an appeal will not lie from any Court of the Province of Quebec but the Court of Queen’s Bench (Ritchie, C.J., and Strong and Taschereau, J.J., in support of the Judgment, and Fournier and Henry, J.J., dissenting). In coming to the conclusion that there was no appeal in that case on the construction of the Supreme Court Act itself, Mr. Justice Strong expressly excluded from consideration the point at issue in this Appeal, namely—whether Parliament can allow an Appeal where the Legislature has expressly denied it. 40 At page 260 he observes :—

“ Without touching on what may hereafter come to be an important constitutional question, that regarding the powers of Parliament to

“confer appellate jurisdiction in particular cases or classes of cases on this Court, and the right of the Provincial Legislatures to withhold it, it would not, I think, be possible to attribute to the terms in which jurisdiction is conferred by the Supreme Court Act in the 11th Section already referred to, even if it were read as an isolated enactment without any light from other parts of the Statute, a construction which would embrace appeals in cases in which the Provincial laws had precluded resort to the Provincial Court of Appeals. It must be presumed that the Provincial Legislature, in denying the right of appeal, designed to subserve the ends of justice and the requirements of good policy, and it must equally be presumed, in the absence of express words, that Parliament did not intend to subvert those laws, and thus to annihilate Provincial Legislation regulating the finality of lawsuits concerning property and civil rights.

“These observations have no reference to the constitutional question which would arise if Parliament was to give an appeal in a case in which the Legislature of a Province had expressly denied it, but they are only intended to show how strong an influence such considerations ought to have in favour of a construction which would avoid such a conflict.”

XV.—In *Clarkson v. Ryan*, 17 Can. Sup. Ct. Reps. 251 (1890)—

Mr. Foy referred to the Ontario Statute requiring leave to appeal when the amount in controversy is under \$1,000.00. Ritchie C.J. observed that (page 253) :—

“We have repeatedly stated in this Court that we are not bound by that Statute. . . . The matter has been before this Court more than once, appeals from Ontario being objected to on the ground that leave has not been granted under the Ontario Act, and it has been stated most unequivocally that this Court is not bound by the Act. If it is, then each province could legislate so as to take away the jurisdiction of this Court altogether. In one case where the Court of Appeal refused leave to appeal, this Court granted it on that ground alone. (*Forestall v. McDonald*, Cassell’s Digest, 241, 406.)”

XVI.—This decision followed *Forristal v. McDonald*, Cassell’s Digest (2nd ed.) 422, also Coutlee’s Can. Sup. Ct. Dig. 739 :—

“An appeal to the Court of Appeal for Ontario by defendants was dismissed, the matter in controversy amounting to \$576.30, exclusive of costs. Defendants’ application under section 43 of the Judicature Act for special leave to Appeal to the Supreme Court of

“ Canada being refused, application was made to Fournier, J. in chambers for leave to appeal within thirty days after judgment, and Fournier, J. referred it to the full Court. In the course of the argument the Court expressed great doubts as to the constitutionality of section 43 of the Ontario Statute, but it was ordered that the defendant be at liberty to give security to prosecute an appeal, and that appellant might pay \$500 into the Supreme Court to the credit of the Registrar as security for the costs of the Appeal.”

XVII.—Later, in the *City of Halifax v. McLaughlin Carriage Co.*, 39 Can. Sup. Ct. Reps. (1907) 174, it was held by— 10

Fitzpatrick, C.J., and Duff, J. :—

“ That as the appeal was from the final judgment of the Court of last resort in the Province, this Court had jurisdiction under the provisions of the Supreme Court Act and it could not be taken away by provincial legislation.”

This decision was arrived at on a stated case, and it does not appear what grounds of objection were urged to the jurisdiction of the Court. The Chief Justice appeared to be of opinion that—

“ If the case comes within the terms of the Supreme Court Act, there the matter ends.” (P. 183.) 20

In the Privy Council.

No. 74 of 1907.

On Appeal from the Supreme Court of Canada

BETWEEN

THE CROWN GRAIN COMPANY,
LIMITED ... (Defendant) *Appellant*

AND

HENRY L. DAY ... (Plaintiff) *Respondent*

Case for the Appellant
AND APPENDIX.

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