IN THE MATTER OF THE JURISDICTION OF A PROVINCE TO LEGISLATE RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

1905
*Feb. 21, 22.
*Feb. 27.

REFERENCE BY GOVERNOR GENERAL IN COUNCIL.

Constitutional law—Sunday observance—Reference to Supreme Court—R. S. C. c. 135, s. 37—54 & 55 V. c. 25. s. 4—Legislative jurisdiction.

The statute 54 & 55 Vict. ch. 25, s. 4, does not empower the Governor General in Council to refer to the Supreme Court for hearing and consideration supposed or hypothetical legislation which the legislature of a province might enact in the future. Sedgewick J. dissenting.

The said section provides that the Governor in Council may refer important questions of law or fact touching specified subjects "or touching any other matter with reference to which he sees fit to exercise this power."

Held, Sedgewick J. contra, that such "other matter" must be *ejusdem generis* with the subjects specified.

Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain or keeping open places of entertainment is within the jurisdiction of the Parliament of Canada. *Attorney General for Ontario* v. *Hamilton Street Railway Co.* ([1903] A. C. 524) followed.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court for hearing and consideration.

The questions submitted were as follows:

1. Has the legislature of a province authority to enact a statute in the terms of the annexed draft bill?

2. If the provisions of the draft bill are beyond the jurisdiction of a province in part only

(*a*) Which of the sections or which of the provisions thereof are *ultra vires;* and

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* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

(*b*) To what extent are they *ultra vires?*

3. (*a*) Upon the repeal of consolidated statute of Upper Canada, chapter 104, would it be competent to the legislature of Ontario to enact the said draft bill in its entirety or in part; and

(*b*) If in part only, what sections or provisions thereof and to what extent?

4. Has a province jurisdiction to legislate prohibiting or regulating labour so as to prevent any work, business or labour from being performed within the province upon the first day of the week, commonly called "Sunday," except work of necessity or mercy and except work or labour of the character and to the extent comprehended in section 2 of the said draft bill?

5. Has a province power to restrict the operations of companies of its own creation to six days in each week by provisions in the charters or Acts of incorporation of such companies or otherwise so as to render it unlawful for them, their servants or agents to do any work, business or labour within the province on the first day of the week?

6. Are the following classes of companies or corporations created by the Dominion or any of them, and if so which, and the servants and agents thereof, subject to the laws of the province within which they operate in so far as the prohibition or regulation of labour upon the first day of the week is concerned:

(*a*) Those whose works are declared to be for the general advantage of Canada but authorized to operate within one province only and whose operations are confined to such provinces;

(*b*) Those to which "The Companies Act, 1902" (Dominion) applies;

(*c*) Banks and banking companies;

(*d*) Companies for carrying on the business of insurance or the business of a loan company;

(*e*) Companies whose purposes or objects are the construction and operation of any of the works and undertakings mentioned in clauses (*a*), (*b*) and (*c*) of the 10th enumeration of section 92 of the British North America Act other than those falling under clause (*a*) hereof.

7. Had the Legislature of Ontario authority to enact:

(*a*) The second clause of subsection (2) of section 14 of Revised Statutes of Ontario, 1897, chapter 208;

(*b*) Section 136 of Revised Statutes of Ontario, 1897, chapter 209;

(*c*) Section 6 of 63 Victoria, chapter 49:

(*d*) Section 39 of Revised Statutes of Ontario, 1897, chapter 257, and sections 2 and 3 of 1 Edward VII. (Ontario), chapter 36;

(*e*) Section 79 of 4 Edward VII., chapter X

The draft bill annexed was as follows:—

"No.] "BILL." [1904."

"HIS Majesty, by and with the advice and consent of the Legislative Assembly of enacts as follows:—

INTERPRETATION.

"1. In this Act unless the context otherwise requires

"(*a*) The expression 'day' means and includes the period of twenty-four hours from midnight to midnight;

"(*b*) The expression 'person' means and includes any body, corporate and politic, company, society or person;

"(*c*) The expression 'vessel,' includes any ship, vessel, boat, raft or other craft, or any contrivance made use of for the conveyance of passengers or freight by water;

"(*d*) The expression 'railway' includes steam railway, electric railway, street railway and tramway;

"(*e*) The expression 'performance' includes any game, match, sport, contest, exhibition or entertainment;

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

"(*f*) The expression 'employer' includes every person to whose orders or directions any one is by his employment bound to conform.

APPLICATION.

"2. Nothing in this Act contained shall be deemed to apply to or affect or prevent the operation of or the performance of any work or labour the regulation or prohibition of which is within the exclusive authority of the Parliament of Canada upon or with respect to:

"(*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting this province with any other or others of the provinces or extending beyond the limits of this province;

"(*b*) Lines of steamships between this province and any British or Foreign country;

"(*c*) Such works as although wholly situated within this province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces: or

"(*d*) Any work or service within the exclusive authority of the Parliament of Canada.

"3. Nothing in this Act contained shall be construed to repeal or in anywise affect the provisions of any Act respecting the Lord's Day in force in this province on the 1st day of July, 1867.

Weekly Day of Rest.

"4. The first day of each week commonly called Sunday shall be observed as a day of rest and abstention from labour, and it shall not be lawful for any person on any such day:

"(*a*) To do any work or perform any labour or transact any business or to sell or offer for sale or purchase any chattels or other personal property, or any real

estate, or to employ or be employed by any other person to do any work, business or labour;

"(*b*) To engage in any game or contest for gain or for any prize or reward or to be present thereat, or to provide, engage in or be present at any performance at which any fee is charged directly or indirectly either for admission to such performance or for any service or privilege thereat;

"(*c*) To run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire and having for its principal or only object the carriage on that day of such persons for amusement or pleasure;

"(*d*) To open to the public any park or pleasure ground or other place maintained for gain or to which an admission fee is charged directly or indirectly or within which a fee is charged for any service or privlege;

"(*e*) To shoot at any target, mark or other object or to use any gun, rifle or other engine for that purpose.

"(2.) When any performance (at which an admission fee or any other fee is so charged) is provided in any building or place to which persons are conveyed for hire the charge for such conveyance shall be deemed an indirect payment of such admission fee within the meaning of this section.

"5. It shall not be lawful for any person to advertise in any manner whatsoever any performance or other thing prohibited by this Act.

"(2) It shall not be lawful for any person to advertise in this province in any manner whatsoever any performance or other thing which if given or done in this province would be a violation of this Act.

"Notwithstanding anything in this Act contained any person may on the first day of any week do any work of necessity or mercy.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

PENALTIES.

"7. Every constable or other peace officer who suspects that a violation of this Act is being committed in or upon any premises shall, within the limits for which he is such constable or peace officer, have the right at any time to enter into or upon and to search such premises for the purpose of ascertaining whether such offence is being committed.

"(2) Every one who obstructs such constable or peace officer acting under the authority of this section shall be guilty of a violation of this Act.

"8. Every one who violates any of the provisions of this Act shall for each offence be liable to a penalty of not less than one dollar and not exceeding forty dollars together with the costs of prosecution.

"9. Every one who as employer authorizes or directs anything to be done in violation of any of the provisions of this Act shall for each offence be liable to a penalty of not less than ten dollars and not exceeding one hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

"10. Every company or corporation which authorises, directs or permits its employees to carry on any part of the business of such company or corporation in violation of any of the provisions of this Act shall for the first offence incur a penalty of two hundred and fifty dollars and for each subsequent offence a penalty of five hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

"11. Every person who owns or controls wholly or partly any vessel or railway or any building or any park, pleasure ground or other place which is used for the doing of anything which violates any of the pro-

visions of this Act shall for each offence forfeit and pay the sum of not less than two hundred and fifty dollars and not exceeding five hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

PROCEDURE.

"12. The penalties and costs incurred in respect of any offence under this Act shall be recoverable upon summary conviction before a justice of the peace or stipendiary magistrate."

The following counsel appear on behalf of the several parties interested:

Newcombe K.C., Deputy Minister of Justice, for the Dominion of Canada.

Patterson K.C. for the Province of Ontario.

Cannon K.C., Assistant Attorney General, for the Province of Quebec.

Macpherson for the Lord's Day Alliance.

Marsh K.C. for the Grand Trunk Railway Co., Michigan Central Railway Co. and Canadian Northern Railway Co.

Rose for the Wabash Railroad Company.

D'Arcy Tate for the Buffalo, Hamilton and Toronto Railway Company.

Blackstock K.C. and *H. S. Osler K.C.* for the Canadian Copper Co.

Blackstock K.C. is heard on an objection to the jurisdiction of the court to consider the first six questions referred.

Section 4 of 54 & 55 Vict., ch. 25, amending section 37 of the "Act respecting the Supreme and Exchequer Courts," authorizes the submission to the Supreme Court of "important questions of law or fact touching

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

provincial legislation or the appellate jurisdiction as to educational matters vested in the Governor in Council by The British North America Act, 1867, or by any other Act or law or touching the constitutionality of any legislation of the Parliament of Canada or touching any other matter with reference to which he sees fit to exercise this power."

We submit that the expression "provincial legislation" above referred to means some Act actually passed by a provincial legislature the constitutionality of which is challenged, and does not include speculative or academical questions as to the powers possessed by such legislature.

If this interpretation be correct the reference cannot be justified except it fall within the expression later on in the same section "touching any other matter with reference to which he sees fit to exercise this power." But any other matter must be construed as *ejusdem generis* with what goes before; in any event it only refers to some concrete, definite question which has actually arisen from particular circumstances and not to speculative matters which may possibly never arise. *Sandiman* v. *Breach* (1); *Reg.* v. *Clewworth* (2); *Palmer* v. *Snow* (3). The section was intended to cover the case of questions actually arising from the action of rival legislative authorities and not questions of this character, where the legislature may never assume to exercise the powers respecting which the court is called upon to make a deliverance.

In addition to these reasons adduced from a consideration of the statute itself, it is submitted that an intention of this kind cannot be imputed to the Parliament of Canada, because it would be an invasion of the rights, not only of provincial legislatures, but of

(1) 7. B. & C. 96. (2) 4 B. & S. 927.
(3) [1900] 1 Q. B. 725.

the individual citizen in the province. The first authority to interpret the British North America Act and to determine the jurisdiction of the federal and provincial authorities are the federal and provincial Legislatures, and these bodies are entitled to bring their actual legislation, passed after full deliberation and debate, before the ordinary tribunals of the country, unembarrassed by judicial opinions expressed in advance of the legislation itself. It is obviously not only a most inconvenient practice that is here resorted to, but it constitutes a very grave and serious invasion of the rights and powers of all those authorities among whom are partitioned the various legislative functions distributed by the British North America Act.

We also refer to the provisions of ch. 49 of R.S.O. (1897), which shows that the legislature of Ontario only concurred in the jurisdiction conferred upon the Supreme Court by the Supreme and Exchequer Courts Act to the extent of the submission thereto of actual "controversies" between the Dominion and the Province. When questions touching Sunday legislation were submitted under a somewhat similar statute to the Court of Appeal for Ontario, and subsequently by way of appeal to the Judicial Committee of the Privy Council [*Attorney General for Ontario* v. *Hamilton Street Railway Co.* (1)] their Lordships answered the question propounded as to the validity of an Act passed by the Legislature of Ontario and declared the same *ultra vires* that body, but as to the other questions submitted, which are of the same character as those propounded here, they declined to pass upon them, the Lord Chancellor using this language, at page 529 of the report:—

"With regard to the remaining questions, which it has been suggested should be reserved for further

(1) [1903] A. C. 524.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise they must arise in concrete cases, involving private rights, and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

Language of a similar character was used in reference thereto by Osler and Moss, JJ. A., when the case was before the Court of Appeal.

Newcombe K.C. contra referred to *Severn* v. *The Queen* (1).

The court reserved judgment on the objection to the jurisdiction and proceeded with the hearing on the merits.

Newcombe K.C. was heard, and was followed by *Patterson K.C.* and *Macpherson.* They contended that the legislation would be valid as dealing with civil rights and matters of a local and private nature in the province; also that, even if the subject matter was within the legislative jurisdiction of Parliament, the legislature could deal with it so long as Parliament abstained.

(1) 2 Can. S. C. R. 70.

The other counsel were not called upon.

The judgment of the court was as follows :—

After the fullest consideration of the 37th section of the Supreme and Exchequer Courts Act, under which this reference is made to us, and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that province in the matter of the Hamilton Street Railway Company, reported on appeal to the Judicial Committee, (1), at page 528, as to the principle, convenience and expediency of courts of justice answering hypothetical questions submitted to them as distinct from those arising in concrete cases, we are of the opinion that the questions submitted to us as to whether certain supposed or hypothetical legislation which the legislature of one of the provinces might in the future enact would be within the powers of such legislature, are not within the purview of the section. Questions as to the constitutionality of existing legislation are clearly within the meaning of that 37th section, and the general words "touching any other matter" must be considered as within the rule *ejusdem generis*, and may well refer to orders in council by the Governor General or Lieutenant Governors, as the case may be, passed pursuant to the Dominion or provincial legislation the constitutionality of which may be in question, or to departmental regulations authorized by statute. These orders in council cover a very large legislative area, and include regulations on the subjects of navigation, pilotage, fisheries, crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views, from which Mr. Justice Sedgewick dissents.

(1) [1903] A. C. 524.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

As, however, the practice of this court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominion or the Provinces and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the courts on similar references and proceed to answer the questions as follows;

In answer to question (1), we are unable to distinguish the draft bill submitted for our opinion from the Act pronounced by the Judicial Committee in the case before referred to as *ultra vires* of the Provincial Legislature and think, for the reasons given in that case by the Lord Chancellor, that this draft bill as a whole is also *ultra vires* of the Provincial Legislature. This answer covers also questions (2) and (3). With regard to the other questions (4) to (7) inclusive, it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognised in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

It is (Mr. Justice Sedgewick dissenting from this view) undesirable and inexpedient if not altogether impossible properly to answer categorically the questions enumerated in question 7. The rule suggested by the Privy Council is, we think, peculiarly applicable to those questions and it is quite clear that useful or satis-

factory answers could only be given to them when the questions arise in concrete cases under the statutes.

(Signed) ROBT. SEDGEWICK J.
" D. GIROUARD J.
" L. H. DAVIES J.
" WALLACE NESBITT J.

SEDGEWICK J.—In differing from my learned brothers, as indicated in the foregoing, it is necessary for me, under the statute, to give my reasons.

First, upon the question of jurisdiction. The original section 37 of the Supreme and Exchequer Courts Act giving power to the Governor in Council to refer any matter to this court for its consideration and opinion is couched in as wide and general terms as human language could enable Parliament to do. Under this section, as it then stood, the Governor in Council had power to propound any question to this court, whether that question related to a matter of law or fact or even policy. Now when, in 1891, Parliament was pleased to repeal the original section 37 and substitute in its place the present one, its object was, and I think its sole object was, to give express parliamentary authority to the Governor in Council in respect to the several matters therein mentioned, but in no way whatever to limit or modify the powers already possessed by the Executive.

Secondly, I do not think this is a case in which the doctrine of *ejusdem generis* applies, but, even if that principle does apply, then this is a case falling within it. In my view, to submit a question asking this court to determine whether a proposed Act (giving us the draft of it) is within the competency of a provincial legislature is a similar or like question to, or *ejusdem generis* with, a question asking us to pass upon the constitutionality of a provincial Act. If we decide

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Sedgewick J.

that neither the Act itself nor the proposed Act is within such competency, then they fall within the same category, and therefore the doctrine referred to applies.

I feel it to be my duty to answer, not only the questions already answered by my brother judges and myself, but also the rest of them, and my answer is in the negative, basing my opinion upon the Privy Council case above referred to and the fact that all the matters dealt with in the particular statutes mentioned fall within the ambit of the criminal law of Canada.

IDINGTON J.—The questions are raised here of the right of the Governor General in Council to ask and the jurisdiction of this court to answer questions of a speculative character touching the constitutionality of proposed or possible future legislation by the Parliament of Canada or the legislature of any of the provinces of Canada and having no relation to actual existing legislation enacted by any of these bodies.

It is urged that the 37th section of "The Supreme and Exchequer Courts Act" gives this right to ask and this power to answer, and it is said that, even if this be not so, it has been the practice heretofore to answer such questions, and that such practice should be now followed. I cannot find that such a practice has been so followed or followed for so long a time as to constitute it an established usage that has grown thereby to be law that must govern the conduct of this court.

It must be admitted that the deliberate adoption by the court of such a practice, when that adoption could not be attributed to any authority but this section 37 or that for which it is substituted, should be looked upon as an interpretation of these sections or one of them which now should bind all the judges of this court.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

In considering the question from this point of view it is worth while to review the cases. The New Brunswick penitentiary case of April, 1880, is shewn by the original records to have been a question as to the validity of Acts of the Parliament of Canada passed for the creation and regulation of penitentiaries. The Province and Dominion, I infer by consent, submitted a case, using this power of reference, however, to bring the matter before this court. The cases from Perth and Kent counties in 1884 upon the Canada Temperance Act, 1878, involved questions as to conditions precedent to the Governor in Council acting in bringing into operation the powers conferred by that Act. The "Thrasher case" arose out of contentions as to the status of the Supreme Court of British Columbia and the power of the legislature of that province to legislate in regard to procedure in that court and in regard to the residences of the judges thereof. It had been suggested that the court, having had an existence and power over its own procedure prior to the Province of British Columbia coming into confederation in 1871, was not a provincial court within the meaning of the 14th subsection of section 92 of the British North America Act and was not subject to legislation that the Legislature of the Province of British Columbia, as a member of confederation subject to the British North America Act, had enacted.

This reference was in 1883. See *Thrasher Case* (1).

His Excellency the Governor General was petitioned in 1889 to submit by way of reference to this court under sec. 52 of "The Supreme and Exchequer Courts Acts" the much agitated questions in respect of "The Jesuits' Estates Act." The late Sir John Thomson, then Minister of Justice, in reporting upon this position amongst other things said to His Excellency as follows:

(1) 1 B. C. Rep. pt. I. 153, at p. 243.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

This provision which confers that power on your Excellency was undoubtedly intended to enable the Governor General to obtain an opinion from the Supreme Court of Canada in relation to some order which his Government might be called upon to make or in relation to some action which his officers might be called on to adopt (1).

I think all the cases that can be said to have been referred solely by virtue of sec. 52 to this court down to the time when this opinion was expressed came well within the description here given of the class of cases that should or might be so referred.

There were other cases that, meantime, had been referred, which, if a wider meaning or province than Sir John Thompson assigned to sec. 52 and especially that now urged on us as what it bore, were to be given it, one would have expected to have seen them referred by virtue of the power and authority of sec. 52 unaided by special enactment giving jurisdiction.

A most significant instance is the special legislation contained in 47 Vict. ch. 32, sec. 28, specially providing for this court determining, on the Governor in Council referring to it the question, as to the competence of Parliament to pass "The Liquor License Act, 1883 and amendments thereto" in whole or in part. Why was the then existing power under sec. 52 to refer to this court thus questioned if it extended beyond the class of cases defined by Sir John Thompson? Was this special statutory reference of the constitutional limitations then in question and the trial of the conflict of authority between the Parliament of Canada and the Provinces being thus provided for, not a Parliamentary exposition of the meaning of sect. 52?

"The Railway Committee" was by the Railway Act, 1888, sec. 19, empowered to state a case for the opinion of this court upon any question which the Committee might think to be a question of law. And

(1) See 12 Legal News, 283, at p. 286.

by sec. 20 of the same Act, the court was directed to hear and determine such questions of law. And,—Was not this also, but in a more indirect way, to a limited extent, the case with the enactment of secs. 19 and 20 in the Railway Act, 1888, empowering the Committee to state a case for the opinion of the court upon such question of law as the Committee might desire such an opinion? It was under this and not as stated under sec. 52 that the Manitoba Crossings case was referred in 1888.

It is to be borne in mind that this sec. 52 was in its essential feature copied from sect. 4 of the statute (3 & 4 William IV. ch. 41) constituting the Judicial Committee of the Privy Council.

It is to be observed that the Privy Council was a consultative body and the committee then after all but a part of such body and so remained, to such an extent that, in 1871, so high an authority as Lord Cairns declared that even then the Judicial Committee had no judicial power and was not a judicial body but merely —as a portion of the Council —a consultative assembly. See Finlayson's History etc., of the Judicial Committee of the Privy Council, p. iii.

Without going further into the question this view of the origin of sec. 52 is suggestive.

And all this review of the origin of sec. 52 and the uses to which it has been put and the light in which it has been held enable me to conclude that under it there was no reference of a question such as asked here for agitating or framing future legislation and that so far as any assistance is to be got from that source in the interpretation of the present sec. 37 substituted for it there is nothing to lead me to place upon it the wide meaning now contended for but rather the contrary.

This origin of the clause is also to be considered in viewing the matter as I do hereinafter from the point

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

of view of the meaning to be put upon sec. 101 of the British North America Act.

Sec. 37 (substituted for sec. 52) so far as now in question is as follows:

> Important questions of law or fact *touching provincial legislation*, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the "British North America Act, 1867", or by any other act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching *any other matter with reference to which he sees fit to exercise this power*, may be referred. by the Governor in Council, to the Supreme Court for hearing or consideration; and the court shall thereon hear and consider the same.

Under this, enacted in 1891, The Manitoba Schools Act to which it is specially applicable was referred and all the questions asked seem clearly incidental to the question raised by that Act.

In re Provincial Jurisdiction to pass Prohibitory Liquor Laws, (1) (in 1895) was a case submitted by reference under sec. 37. Then the question of the jurisdiction of the Provincial Legislature to pass the actual legislation of the Ontario Legislature by 53 Vict., "An Act to improve the Liquor License Acts" and 54 Vict. ch. 46, "An Act respecting local option in the matter of liquor selling", raised many questions touching that legislation.

The questions submitted, save as to manufacture and importation of liquor, were, I think, arising directly from or upon this legislation, and the questions in relation to manufacture and importation were, if more remotely connected therewith, yet germane to the others. It is upon this case alone that counsel supporting the reference now in hand sought to rest the right and power now challenged. It is to be noted no such challenge or question was then made as to this right or power.

(1) 24 Can. S.C.R. 170.

In *Re Fisheries*, (1) (in 1895) the questions were all such as were directly suggested by the actual legislation of the Dominion Parliament, or of the Legislature of the Province of Ontario, or in respect of the proprietary rights in dispute between the Dominion and the provinces or some of them.

In *Re Criminal Code, Bigamy Sections*, (2) (1897), the questions referred are all directly in relation to an Act or law of the Dominion Parliament.

In *Re Representation in the House of Commons*, (3) (April 1903), the questions referred were not in relation to any Act or law of the Dominion Parliament or any other of the specific subjects named in section 37, but in fact upon the interpretation to be given to certain of the provisions of the British North America Act.

It appears, however, upon the face of the reference that it was made at the request of the provinces interested, and that they had asked that a reference be made to the Supreme Court of Canada for *a determination of the question in difference.*

In the matter of *The Representation of Prince Edward Island in the House of Commons*, (4) (June, 1903), the questions referred to were of same nature and upon the proper interpretation to be given to certain provisions of the British North America Act and an Imperial order in council admitting Prince Edward Island into the Union. It also was at the request of the province "that a reference be made to the Supreme Court of Canada *for a determination of the question in difference*" just as in the last named case.

Does this phase of the order make any difference? The reference in each of these later cases purports to be made "pursuant to the authority of the Supreme

(1) 26 Can. S.C.R. 444.
(2) 27 Can. S C. R. 461.
(3) 33 Can. S. C. R. 475.
(4) 33 Can. S. C. R. 594.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

and Exchequer Courts Act as amended by the Act 54 & 55 Vict. ch. 25" and with the *approval or upon the suggestions respectively of the province or provinces concerned.*

The Dominion and Provincial representatives appeared before the court and urged their respective claims.

This court was by the 1st section of the Act constituting it declared to be "constituted and established a court of common law and equity in and for the Dominion of Canada."

Its powers, given directly by the Act, are almost entirely of an appellate character, and it has been repeatedly said not to have inherent original jurisdiction, and with none conferred by statute but the right to issue a writ of habeas corpus.

I am not prepared, however, to say that having been constituted and established such a court, as just stated, for the Dominion of Canada that it is incompetent to hear such submission and determine the differences between parties, as the Dominion and the provinces submitting a case, consenting to be bound, as in these representation cases seems to have been the nature of the proceeding.

I would prefer to attribute its action in these cases to this consent and that source of power and authority rather than that to be drawn from the words in section 37 quoted above, i. e, "*or touching any other matter with reference to which he sees fit to exercise this power.*"

I agree with the majority of the court that these general words must be read as within the rule of law generally known as the *ejusdem generis* rule which was enunciated by Lord Campbell, as follows:

> I accede to the principle laid down in all the cases which have been cited, that, where there are general words following particular and

specific words, the general words must be confined to things of the same kind as those specified.

See Hardcastle, page 200 *et seq.*

It will be observed that there are specified in this section 37:

(1) Important questions of law or fact touching provincial legislation;

(2) In the appellate jurisdiction as to educational matters vested in the Governor in Council by the British North America Act;

(3) Or by any other Act or law;

(4) Or touching the constitutionality of any legislation of the Parliament of Canada.

It can hardly be said that the speculative questions involving something that may never become even the subject of a bill in the legislature is "provincial legislation." I take it that provincial legislation means that which has been passed. For the purposes of argument it might be assumed as possibly meaning a bill passing through the legislature, and yet it could not be stretched to apply here.

Indeed it was not seriously argued that it could be supported by these words but might be rested on the general words of "any other matter."

The words in the original section which this sec. 37 amends were "may refer to the Supreme Court for hearing or consideration *any matter* which he thinks fit to refer," etc.

Why were such comprehensive and unlimited words as these stricken out, and those now under consideration substituted if we are yet to read the general words in the substitution as unrestricted by the *ejusdem generis* rule or indeed anything else?

We ought, I submit, to credit Parliament with some intention or purpose and probably with some knowledge of the rules of construction. When we consider the

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY

Idington J.

words of sec. 101 of the British North America Act, which enabled the Parliament of Canada 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,*

and we find that there were used in doing so, words very apt for expressing the duties of a consultative body, but that might not be found so apt for the defining of the powers of a Court of Appeal, or other additional courts, as judicial bodies, commonly known and understood as such, we may find reason for the radical change of power that this amendment was intended to make. What might be innocuous in the constituting of and defining of the duties of a judicial committee of the Privy Council in England, where the historic traditions and constitutional usages having the force of law, would restrain such wide expressions of power within recognised limits might, set in the place they were here, become a source of danger, a temptation in times of stress and storm to great abuse. The experience of sixteen years may have taught this and resulted in this amendment. I will rather infer this, and the purpose to restrict, than adopt the theory that it meant nothing.

Having regard to all the applications of the executive to this court, under or purporting to be under this statute at large, or specifically under the section thereof now in question, and to the fact that in most of the cases there was in fact but a mutual submission of points in dispute to the court, and in such cases possibly but little regard had to the form, save as a means of executing this mutual purpose; and to the important fact that not in a single case had the right or power been challenged by any of the parties, and hence never argued, till this reference; I do not consider that the decisions given under such circum-

stances are to be treated as at any time an interpretation by the court of the general words used and now in question in such way and to such extent and with such meaning as we are asked in face of objection by those having a right to object, to accept here and act upon.

None of the cases have gone so far, in assuming jurisdiction to exist, as would be required, here, to answer speculative questions.

We are asked, here, to say that the court has interpreted its jurisdiction in a way that I do not find it has, and then to extend it further.

The jurisdiction to pass upon proposed or only possible future legislation, such as the governing power of the people might never assent to, is one of so grave a character fraught with such far reaching consequences, and such a departure from the recognised principle of severing and keeping as distinct as possible the respective powers and duties of the legislative, executive and judicial functions of Government that I would desire to see the power we are asked here to exercise distinctly and clearly conferred by Parliament, if it is to be conferred at all, rather than by an assumption of its existence on such slender basis as is alleged here to have expressed its existence.

All constitutional authority has placed stress upon the benefits flowing from the keeping distinct and independent the several duties of the legislative, executive and judicial functions of Government.

To bring into action the judicial authority in respect of future possible legislation before the matter has passed through the beneficent ordeal of public discussion, parliamentary investigation, and solemn determination in the high court of Parliament or Legislative Assembly is, I respectfully submit, an innovation.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

Iam not concerned here to lay down nor do I try to lay down any course of duty to be pursued by Parliament in that regard, but it seems to me that to adopt such an innovation it ought to be made clear beyond doubt as the will and intention of Parliament before I presume to attribute to it the innovating purpose that assuming jurisdiction here would clearly involve.

I desire to abstain from and to be understood as abstaining from any expression of opinion as to the power of Parliament in Canada to exercise any such innovating power and establish in this or any other court such a jurisdiction as we are asked here to exercise in that regard.

There is much that is instructive in regard to this and matters of a like nature in the constitutional history of the United States from the time when under Chief Justice Jay the Supreme Court of that country declined upon request of the President to interpret a treaty with France, down to the present time. See Story on Con. U. S. p. 388 and 24 Am. Law Review, p. 372 *et seq.*

Hence in that country (where every phase of resorting to judicial authority, for defining by adjudication constitutional limits), the duties of the judge when called upon to do so, have been the subject of much serious consideration.

Cooley on Constitutional Limitations, (5 ed.), at page 192, says, in speaking of that duty:

> It must be evident to any one the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where be can conscientiously and with due regard to duty and official oath decline the responsibility.

I, not being able to find that jurisdiction to answer, accept this high authority on the fruits of experience I have referred to, as some light upon the way to

discharge the duty to be done, under such circumstances as my finding leaves me. Not having jurisdiction I should not go further.

I, with great deference for the opinion of the majority of the court who come to the like conclusion I do, in regard to the want of jurisdiction, yet can find their way by reason of practice to express an opinion on the question submitted, feel I am constrained by the decided view I take as to the matter, to dissent from such a course, and, with the highest respect for the authority asking an answer to the questions submitted, must ask to be, for the reasons I have given, excused from answering question No. 1. My reasons given above are specially directed to question 1 and such as are of like character looking to future legislation and 1 to 6 are chiefly so.

Question No. 1 being answered in the negative I understood counsel for the Attorney General of Canada not to desire further prosecution of the inquiry as to these matters, 1 to 6, inclusive, and treat them as a group to be dealt with in like manner as the first.

I have read with interest the protest made, in *Re Manitoba Educational Statutes* (1), at page 677, by the present Chief Justice of the court in regard to the jurisdiction in question, but his point of view taken there is so entirely different from that I have taken, that I have for that reason, and that only, refrained from adverting to it in giving my reasons.

As to question 7 and the sub-sections of it, many matters which are no doubt within the range of "important questions of law or fact touching provincial legislation" are referred to and therefore within the jurisdiction given by these words in sec. 37. Upon questions properly framed (as to some of these matters) so as to discriminate between that which may be with-

(1) 22 Can. S. C. R. 577.

1905

IN RE LEGISLATION RESPECTING ABSTENTION FROM LABOUR ON SUNDAY.

Idington J.

in the jurisdiction of the Parliament of Canada and that within the jurisdiction of the provincial legislatures answers might be given that might serve some useful purpose.

A categorical answer to the question 7 (*a*) or 7 (*b*) cannot be given without probably misleading, and to answer with such limitations as would be necessary to avoid this it might be found after the best possible consideration had been given to the matter that further limitations than given in such answer would be necessary to cover the entire ground. The same holds true in a less degree as to each of the other sub-questions of question 7.

This is probably only another way of expressing the necessity for a concrete case before passing upon the question.

I desire to refrain from expressing (especially as the matter with only an *ex parte* argument now stands) any opinion as to the jurisdiction of the Parliament of Canada over any of the subject matters touched upon in question 7.

In assenting as I do under the circumstances of this reference to the disposition made by the majority of the court of question 7 for reasons stated by them, I do so without intending to assent to anything in such reasons, or their opinions, that might by implication or otherwise be held as declaring that any or all of the matters in question fall within the exclusive or other jurisdiction of the Parliament of Canada.