1951

*Feb. 22, 23
*Oct. 12

KONRAD JOHANNESSON and HOLMFRIDUR JOHANNESSON,.. } APPELLANTS;

AND

THE RURAL MUNICIPALITY OF WEST ST. PAUL, ... } RESPONDENT;

AND

THE ATTORNEY GENERAL OF MANITOBA, ... } INTERVENANT;

AND

THE ATTORNEY GENERAL OF CANADA, ... } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Constitutional Law—Aeronautics—Airports—Aerodromes—Licensing and Regulation thereof—Within Parliament's exclusive jurisdiction—Beyond Provincial Legislature's competence—The British North America Act—The Municipal Act (Manitoba) R.S.M. 1940, c. 141, s. 921—The Aeronautics Act, R.S.C. 1927, c. 3, s. 4.

Section 921 of *The Municipal Act* (Manitoba) R.S.M. 1940, c. 141, provides that any municipality may pass by-laws for licensing and within defined areas preventing the erection of aerodromes or places where aeroplanes are kept for hire or gain. The appellants, holders of an air transport license from the Air Transport Board of Canada, secured an option on land within the respondent municipality for the purpose of a licensed air strip. Before the transaction was completed the respondent under authority of s. 921 passed a by-law prohibiting the establishment of an aerodrome within that part of the municipality in which the optioned lands were situate.

Held: The subject of aeronautics is within the exclusive jurisdiction of Parliament consequently section 921 of *The Municipal Act* and the by-law in question passed thereunder are *ultra vires*.

In re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54; *In re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304; *Attorney General for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193, referred to.

Judgment of the Court of Appeal for Manitoba [1950] 1 W.W.R. 856, reversed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Coyne J.A. dissenting) the appellants' appeal from the judgment of Campbell J. (2) of

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ.

(1) [1950] 1 W.W.R. 856; 3 D.L.R. 101.

(2) [1949] 2 W.W.R. 1; 3 D.L.R. 694.

their application for a declaration that s. 921 of *The Municipal Act,* R.S.M., 1940, c. 141, and by-law No. 292 of West St. Paul R.M. are *ultra vires.*

F. P. Varcoe K.C., A. G. Eggertson, K.C. and *D. W. Mundell, K.C.* for the Attorney General of Canada, Intervenant. The trial judge erred in holding that the authority of Parliament in relation to "aeronautics" arose only under s. 132 of the B.N.A. Act. He and the judges in the majority in the Court of Appeal erred in holding (*a*) that control of the selection or location of aerodromes and the rights of persons to engage in aeronautical activities are not part of the subject matter of "aeronautics" within the authority of Parliament and outside s. 92; (*b*) that even if these are within the subject matter of "aeronautics" the legislature of a province may legislate in relation to them from the aspect of property and civil rights and the legislation will be operative so long as it is not overridden by federal legislation; (*c*) that s. 921 is not overridden by the *Aeronautics Act.*

S. 921 of *The Municipal Act,* R.S.M. 1940, c. 141 is *ultra vires.* If a provincial statute is not authorized under any legislative head of s. 92 of the B.N.A. Act, (or ss. 93 and 95 not relevant here), then it is *ultra vires. Citizens Insurance Co.* v. *Parsons* (1). S. 921 is not legislation in relation to "Municipal Institutions," but to a power of control and regulation conferred on them. It is not legislation in relation to any other head in s. 92. The decision in the *Aeronautics Reference,* (2) that Parliament may enact legislation in relation to "aeronautics" is a decision that as a legislative subject matter "aeronautics" does not fall in s. 92. The heads of s. 92 must, therefore, be interpreted as not including any part of "aeronautics" within the enumeration in s. 91. *John Deere Plow Co. Ltd.* v. *Wharton* (3); *Great West Saddlery Co.* v. *The King* (4); *A.G. of Alta.* v. *A.G. of Can. (Debt Adjustment* case), (5); *A. G. of Can.* v. *A.G. of Que. (Bank Deposits Case)* (6); *Postal Reference* (7). Further, since it was held that Parliament's authority also rests on the opening words of s. 91, this is a decision that the subject matter "aeronautics" as

(1) 7 A.C. 96 at 109.
(2) [1932] A.C. 54.
(3) [1915] A.C. 330 at 340.
(4) [1921] 2 A.C. 91 at 116.
(5) [1943] A.C. 356.
(6) [1947] A.C. 33 at 43.
(7) [1948] S.C.R. 248.

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a whole falls outside s. 92 since authority to legislate under these words is "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces". Moreover, it was expressly stated that "aeronautics" does not fall within either head 13 or head 16. Further, as a matter of fact, "aeronautics" as a subject matter of legislation is clearly one that from its inherent nature is of national concern *Re Canada Temperance Act* (1). Control and regulation of the use of the air for transportation and control of the earth's surface for the use of the air for transportation is indivisible. Regulation for local purposes cannot be separated from regulation for the purposes of the heads of s. 91 or for interprovincial or international purposes, which are clearly of national concern. The Attorney General also relies on the judgments of the judges in the Court of Appeal that "aeronautics" is a subject matter for which Parliament may legislate under s. 91. Since "aeronautics" is a subject matter on which Parliament can legislate it falls outside s. 92 and the authority of the province. S. 921 must therefore be outside the authority of the Legislature of Manitoba since it is legislation in relation to the subject matter of "aeronautics". To ascertain the "matter" in relation to which legislation is enacted, regard must be had to the "pith and substance" or "the true nature and character" of the legislation. To determine this, regard is to be had to the effect and the object or purpose of the legislation. The question is—At what subject matter is the legislation "aimed" or "directed"? *A.G. of Ont.* v. *Reciprocal Insurers* (2); *A.G. for Alta.* v. *A.G. for Canada* (*Bank Taxation* case) (3); *A.G. for Can.* v. *A.G. for Que.* (*Bank Deposits* case) (4). The purpose and effect of s. 921 are to control and regulate the use of part of the surface of the earth for the landing and taking off of aircraft and to abrogate rights and liberties of persons to use their property for aeronautical activities. It is, therefore, directed at "aeronautics". These are matters that fall within "aeronautics". It was so held in the *Aeronautics Reference*. Moreover, apart from authority, "aeronautics" must necessarily include control of use of the earth's surface in connection with the use of the air

(1) [1948] S.C.R. 248.
(2) [1924] A.C. 328 at 337.
(3) [1939] A.C. 117 at 130.
(4) [1947] A.C. 33 at 44.

and of rights of persons for such purposes and the control and regulation of the use of the air and of the means of using it as a mode of transport. Control in every respect of the places where airplanes may land and take off, including the location of such places, is quite as essential a part of the control of aeronautics as control of where and the conditions under which airplanes may fly. In legal terms, this means that Parliament may legislate to vary or abrogate existing rights, powers or liberties or to create new rights, powers or liberties with respect to the ownership or operation of aircraft in the air or on the ground with respect to the use of property in connection with the operation of aircraft and aeronautical activities. This is the legal content of the subject matter "aeronautics". It follows that these rights, powers and liberties are not within the rights of "Property" and "Civil Rights" in the Province as these terms are used in s. 92. The trial judge and the judges in the majority in the Court of Appeal erred in holding that control of the location of aerodromes is not included in the subject matter "aeronautics" and in holding that the use of property for an airport is a "Civil Right" in the Province that falls in s. 92. The Provincial Legislature cannot enact legislation to control or regulate for any purpose the use of the earth's surface for aeronautical activities or the rights and liberties of persons to engage in aeronautical activities even though it might appear that the legislation is enacted from an aspect other than "aeronautics". Such legislation deals with an essential part of the subject matter "aeronautics". It is therefore wholly outside s. 92. *Postal Reference* (1). The judges in the court below erred in holding that control of locations for airports or of the right to use property for airports is not an essential part of the subject matter "aeronautics". Even if s. 921 could be enacted by the Legislature from some aspect other than aeronautics, it is overridden by s. 4 of the *Aeronautics Act,* which is valid federal legislation. *A.G. for Alta.* v. *A.G. for Can.* (*Debt Adjustment Reference*) (2) since s. 921 confers power to obstruct and interfere with the powers conferred by s. 4 of the *Aeronautics Act.* The judges in the Court of Appeal erred in holding that the powers conferred by s. 921 are not overridden by s. 4. They relied on cases where it had been held that there might be

(1) [1948] S.C.R. 248.

(2) [1943] A.C. 356 at 375.

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a dual requirement under provincial and federal legislation for obtaining licenses. In such cases, however, the licenses were not directed at exercising a control for the same purpose or to achieve the same effects, but were required for different purposes and the discretions, if any, to grant or refuse the licenses involved different considerations. The *Aeronautics Act* and the Regulations made pursuant to its authority are valid federal legislation, within the authority of Parliament in relation to the subject matter "aeronautics". Even if Parliament had no authority in relation to "aeronautics" as a subject matter outside of s. 92, the *Aeronautics Act* is valid legislation for the carrying out of the International Civil Aviation Convention of 1944. Parliament has authority to carry out this Convention under s. 91. *Radio Reference* (1). Conventions of this kind, including the International Civil Aviation Convention, are distinguishable from the very exceptional type of conventions under consideration in the *Labour Conventions Reference* (2). The International Civil Aviation Convention, falls under the decision in the *Radio Reference*. Parliament has, therefore, legislative authority to carry out its terms. This being so, the Aeronautics Reference is an authority showing that the *Aeronautics Act* is within Parliament's authority to carry out the Convention.

C. I. Keith K.C. for the appellants. The importance of this appeal is that the power to prohibit the creation of aerodromes which the judgment appealed from holds is possessed by the Province of Manitoba will be a serious obstacle to the development of aeronautics if allowed to stand, and particularly if similar legislation is passed by the other provinces. It has been assumed that the effect of the judgment in the *Aeronautics Reference* (*supra*) was to place every phase of aeronautics as dealt with in the *Aeronautics Act* in the exclusive jurisdiction of the Parliament of Canada. On no reported judgment prior to this case has doubt been cast on this conclusion and in at least three subsequent judgments of the Privy Council, it has been commented on as having this effect. The *Radio* case, the *Labour* case and the *Canada Temperance Federation* case (*supra*). Once it is acknowledged that aeronautics is within the exclusive power of Parliament, the principles

(1) [1932] A.C. 304 at 312. (2) [1937] A.C. 326.

which have been applied to railways within the Dominion jurisdiction are applicable to the subject of aeronautics. *C.P.R.* v. *Notre Dame de Bonsecours Parish* (1). The appellants rely generally on the dissenting judgment of Coyne J.A. and the authorities there cited.

W. J. Johnston, K.C. for the Attorney General of Manitoba, Intervenant. There are two points in issue (*a*) Does the decision in the *Aeronautics Reference* (2) place the subject of aeronautics in all its aspects within the legislative competence of the Dominion? (*b*) Assuming that such is the case, is the Province precluded from enacting and enforcing zoning regulations with respect to the location of airports? Coyne J.A. in his dissenting judgment (3) erred in finding that the *Aeronautics Reference* placed the subject matter of aeronautics solely and exclusively within the legislative competence of the Dominion. The correct interpretation is to be found in the judgment of the trial judge, Campbell J. (4)—In the alternative, even if the Dominion derives legislative power from sources other than s. 132 it is not such a power as would preclude the Province from dealing with the location of airports as a zoning regulation since that could hardly be classed as legislation on aerial navigation. The Intervenant relies upon the reasons of Dysart and Adamson J.J.A. concurred in by McPherson C.J.M. and Richards J.A. (3) and submits that the appeal should be dismissed.

The *Aeronautics* case goes no further than to hold that the Dominion's power to pass the aeronautics legislation then under review was derived from s. 132 of the B.N.A. Act and not under an express delegation of legislative power over the subject "aeronautics." The Province relies upon subsequent decisions of the Privy Council in which the judgment in the *Aeronautics* case has been explained and clarified. The first case was the *Radio* case (5). The judgment delivered by Viscount Dunedin, a member of the Board in the *Aeronautics* case, gave the chief ground of the decision in the latter case as s. 132 of the B.N.A. Act.

(1) [1899] A.C. 367; 68 L.J.P.C. 54.
(2) [1932] A.C. 54.
(3) [1950] 1 W.W.R. 856.
(4) [1949] 2 W.W.R. 1.
(5) [1932] A.C. 304; 1 W.W.R. 563.

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In *A.G. Can.* v. *A.G. Ont* (1) (Reference re labour legislation). Lord Atkin, a member of the Board in the *Aeronautics* case, also confined it to s. 132 (pp. 350 A.C.; p. 309 W.W.R.). In the *Labour Legislation Reference* the conventions under review were made by Canada under its new status as a Sovereign State and s. 132, which relates to treaties made by Great Britain, did not apply. It was therefore contended by the Dominion that the subject matter of the legislation had become one of national concern and, in support of the contention, the *Radio* and *Aeronautics* cases were relied on. The contention was rejected by the Board, (p. 352 A.C. and p. 311 W.W.R.). In *Reference re Natural Products Marketing Act,* (2) accepted as the *locus classicus* on the "peace, order and good government" clause, Duff, C.J.C. at p. 425 pointed out that the *Aeronautics* case did not hold that the Dominion's jurisdiction over aeronautics came within the above clause. In making this submission the decision in *A.G. Ont.* v. *Canada Temperance Federation* (3) where a casual reference is made to the decisions in the *Aeronautics* and *Radio* cases, has not been overlooked. The legislation there under review was the Canada Temperance Act as re-enacted in 1924. The original 1878 Statute was considered by the Privy Council in *Russell* v. *The Queen,* (4) and upheld under the "peace, order and good government" clause as being legislation, the subject matter of which had attained national concern as affecting the body politic of the nation. The Canada Temperance Act survived on the pronouncement in the *Russell* case and its constitutional validity was not again challenged until the *Temperance Federation* case. While the *Russell* case has stood as the basis for Dominion competence in the temperance field, the reasoning behind the decision based on the "peace, order and good government" clause has undergone a marked change in subsequent judgments of the Board. The *Board of Commerce* case (5); *Snider's* case (6). The Temperance case cannot be considered as over-ruling the well established principles on the interpretation of the "peace, order and good government" clause. The present interpretation to

(1) [1937] A.C. 326; 1 W.W.R. 299.
(2) [1936] S.C.R. 398.
(3) [1946] A.C. 193.
(4) 7 A.C. 829.
(5) [1922] 1 A.C. 191.
(6) [1925] A.C. 396.

be placed on that clause still remains the pronouncement of Lord Atkin previously referred to in *A.G. Can.* v. *A.G. Ont.* at pp. 352-3. The law on that matter as pronounced by Duff C.J. and adopted by Lord Atkin is to be found in the *Marketing Act* case (1) that, except in those instances where the subject matter of legislation has under extraordinary circumstances acquired aspects of such paramount significance as to take it into the national field, the "peace, order and good government" clause can have no application in a field assigned exclusively to the Province under s. 92. The clause can usurp the provincial field only where the subject matter is one of paramount national importance or in case of emergency. Lord Atkin's pronouncement was adopted and reaffirmed as late as 1949 in *C.P.R.* v. *A.G. of B.C.* (2).

The effect of the decision in the *Aeronautics* case is to give to the Dominion an overriding power to enact such legislation as may be necessary to fulfill an obligation under the Aerial Navigation Treaty and hence to encroach on the Provincial Legislative field for such purpose. The grounds of the decision having been reduced to this single proposition it can no longer be taken to have overruled the judgment of the Supreme Court (3) insofar as the judges of that Court may have assigned legislative jurisdiction to the Dominion or to the Provinces.

The Dominion's power to license and regulate airports cannot be supported as incidental or ancillary to any of the enumerated heads of s. 91 of the B.N.A. Act. *Montreal* v. *Montreal Street Railway* (4); *L'Union St. Jacques de Montreal* v. *Belisle* (5). Even assuming that licensing and regulation of commercial airports is incidental or ancillary to the legislative power of the Dominion under s. 132; as licensing and regulation of airports, particularly with respect to location, clearly falls within s. 92 the double aspect rule will apply and unless the Dominion has occupied the field, provincial legislation is competent. *A.G. Ont.* v. *A.G. Can.* (6); *Forbes* v. *A.G. Man.* (7). Under s. 4 of the *Aeronautics Act* regulations have been passed relating to airports, (See Part II of Air Regulations 1948), but the

(1) [1936] S.C.R. 398 at 414-26.
(2) [1950] A.C. 122; 1 W.W.R. 220.
(3) [1930] S.C.R. 663.
(4) [1912] A.C. 333 at 344.
(5) [1874] 6 L.R.P.C. 31 at 37.
(6) [1896] A.C. 348 at 366.
(7) [1937] A.C. 260 at 273-4.

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Dominion has not occupied the field in so far as location of airports is concerned and in so far as it has dealt with licensing and regulation of airports, it has not exceeded the limited power referred to by Duff J. in his judgment in [1930] S.C.R. 663 at 690. The licensing and regulatory provisions of the Regulations are merely to enforce compliance with those regulations which have been enacted to carry out treaty obligations and are not an occupation of the whole field to the exclusion of the Province.

S. 921 of *The Municipal Act* which deals with location does not clash with Dominion legislation in respect to licensing and regulation. It has not been superseded by Dominion legislation and is therefore valid and existing legislation under the Province's licensing powers contained in s. 92(9), raising revenue, and as ancillary to its legislative powers under s. 92 (13), property and civil rights, and 92(16), matters of local interest. *Hodge* v. *The Queen* (1); *R.* v. *Cherry* (2); *Shannon* v. *Lower Mainland Dairy Products Board* (3).

Assuming that the Dominion has jurisdiction over the subject of aeronautics generally by virtue of the "peace, order and good government" clause, the Province is not precluded from enacting s. 921, since in pith and substance it is nothing more than a zoning regulation, within the legislative competence of the Province under 92(13), property and civil rights, or 92(16), matters of local or private nature.

Under the "peace, order and good government" clause the Dominion derives legislative power under two propositions: 1. That matter is not within any of the enumerated heads of s. 92; or 2. That the matter has attained such paramount national importance as to affect the body politic of the nation. Leaving aside the question of aeronautics generally and dealing only with the subject matter of s. 921, what is there dealt with is directly within 92(13) or (16) and the Dominion could therefore acquire no authority under the first proposition. Dealing with the second proposition, jurisdiction under it can arise only when Parliament has legislated on a matter and thus by inference indicated that it has acquired such proportions as to be of paramount

(1) [1883] 9 A.C. 117 at 130-1. (2) [1938] 1 W.W.R. 12 at 16-18.
(3) [1938] A.C. 708 at 721.

national importance. Therefore, where there is no Dominion legislation and the matter is otherwise within s. 92, provincial legislation must be *intra vires*. *McLean* v. *Pettigrew* (1), per Taschereau J. at 79.

That a particular operation is subject to Dominion control does not mean that it is never subject to provincial legislation. Both may legislate on the same subject matter in different aspects and so long as there is no clash both may stand side by side. *Hodge* v. *The Queen* (2); *Reg.* v. *Wason* (3); *G.T.R.* v. *A.G. Can.* (4); *R.* v. *Magid* (5).

S. 921 of *The Municipal Act* is legislation which in pith and substance is zoning regulation and hence a local matter dealing with property and civil rights. It is not in pith and substance legislation on aerial navigation.

W. P. Fillmore, K.C. for the Respondent. The respondent relies upon the judgment of the trial judge and the majority judgments in the Court of Appeal. There is nothing in the *Aeronautics Act* or in the Regulations, or in the Convention discussed in the *Aeronautics* case, which either expressly or by necessary implication takes away or restricts the right of the Province to authorize a local body to pass by-laws relating to health or safety or any other matter of a local or private nature which is a proper subject of municipal by-law. Encroachment on provincial rights in this case cannot be justified as a measure of peace, order or good government in Canada or otherwise.

The Minister may exercise the widest control over aerial navigation and the licensing, inspection and regulation of aerodromes consistently with the right of the Province to designate where they may or may not be located. In any event until the Dominion invades this field a Province may continue to do so. It cannot be assumed by the Court that a municipality would pass by-laws in bad faith or with an ulterior motive. *A.G. for Ont.* v. *A.G. for Can.* (6); *City of Montreal* v. *Beauvais* (7); *Stengel* v. *Crandon et al* (8), (Florida S.C. 1945), annotation at p. 1232.

The questions involved in this appeal are to a certain extent academic in that the appellants had not obtained a license from the Minister, and the Minister might not

(1) [1945] 2 D.L.R. 65.
(2) (1883) 9 A.C. 117 at 130-1.
(3) (1890) 17 O.A.R. 221 at 240-1.
(4) [1907] A.C. 65 at 68.
(5) (1936) 43 M.R. 563 at 579-80.
(6) [1912] A.C. 571.
(7) 42 Can. S.C.R. 211.
(8) 161 A.L.R. 1228.

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grant a license where the aerodrome is located in defiance of local by-laws. The *Aeronautics Act* does not purport to give any person or company the right to locate an airport in breach of local by-laws. Assuming that the Dominion has ample power in this regard, it has not exercised the power. In the case of railways the *Railway Act* gives the railway power, subject to the approval of the Board of Transport Commissioners, to locate the line of a railway and to expropriate property. In *City of Toronto* v. *Bell Telephone Co.* (1), it was held that the scope of the respondent's business contemplated by the Act involved its extension beyond the limits of any one province, and was therefore within the express exception made by s. 92(10) (*a*) of the B.N.A. Act from the class of local works and undertakings assigned thereby to provincial legislatures. It is obvious from the facts here that the aerodrome contemplated by the appellants is designed and is only suitable for operations of a very local and private nature.

As the constitutional problems and cases are carefully reviewed in the appeal of the A.G. for Manitoba the respondent will not cover that ground.

The Dominion has not invaded, and cannot, and need not, invade the whole field: *The Provincial Secretary* v. *Egan* (2); *Reference re Validity of s. 31 of the (Alta.) Municipal District Act Amendment Act, 1941* (3). There is nothing in the *Aeronautics Act* or the Regulations which intereferes with provincial jurisdiction over property and civil rights or matters of a local or private nature in the province. The right of the Province to legislate in respect of zoning regulations is also an exercise of the right of control over municipal institutions in the province. *Ladore* v. *Bennett* (4); *The King* v. *Eastern Terminal Elevator Co.* (5); *Reference re Dairy Industries Act* (6).

Varcoe K.C. and *Keith K.C.* replied.

THE CHIEF JUSTICE—Notwithstanding that the International Convention under consideration in the *Aeronautics* case (7), was denounced by the Government of Canada

(1) [1905] A.C. 52.
(2) [1941] S.C.R. 396.
(3) [1943] S.C.R. 295.
(4) [1939] A.C. 468 at 482.
(5) [1925] S.C.R. 434.
(6) [1949] S.C.R. 1.
(7) [1932] A.C. 54.

as of April 4, 1947, I entertain no doubt that the decision of the Judicial Committee is in its pith and substance that the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament. In the language of their Lordships at p. 77:—

> Aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

In those circumstances it would not matter that Parliament may not have occupied the field. But, moreover, the convention on International Civil Aviation, signed at Chicago on December 7, 1944, has since become effective; and what was said in the *Radio Reference* (1) by Viscount Dunedin at p. 313, applies here. Although the convention might not be looked upon as a treaty under s. 132 of the British North America Act, "it comes to the same thing".

I fail however to see how it can be argued that the Dominion Parliament has not occupied the field. The *Aeronautics Act,* R.S.C. 1927, c. 3, as amended by c. 28 of the Statutes of 1944-45, c. 9 of the Statutes of 1945, and c. 23 of the statutes of 1950, makes it the duty of the Minister "to supervise all matters connected with aeronautics * * * to prescribe aerial routes * * * to prepare such regulations as may be considered necessary for the control or operation of aeronautics in Canada * * * and for the control or operation of aircraft registered in Canada wherever such aircraft may be * * * for the licensing of navigation and the regulation of all aerodromes and air-stations, etc."

Such regulations have been passed under the authority of the *Aeronautics Act* by P.C. 2129, part of which deals with the subject matter of airports and provides for the issuing of licenses by the Minister. In the circumstances, the Dominion legislation occupies the field, or at least so much of it as would eliminate any provincial legislation, and, more particularly, that here in question.

I think, therefore, that the provincial legislation under discussion is *ultra vires* and the by-law adopted by the respondent, the Rural Municipality of West St. Paul, falls with it.

(1) [1932] A.C. 304.

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Rinfret, C.J.

The appeal, therefore, should be allowed with costs in this Court against the respondent, but without costs to either intervenant. As the parties had agreed that there would be no costs awarded in the Courts below, this agreement, of course, should stand.

KERWIN J.:—This is an appeal by Mr. and Mrs. Johannesson against a judgment of the Court of Appeal for Manitoba affirming an order of Campbell J. dismissing their application for an order declaring that s. 921 of *The Municipal Act,* R.S.M. 1940, c. 141, was *ultra vires* as not being within the legislative competence of the Legislature, and that by-law 292 of the rural municipality of West St. Paul, passed May 27, 1948, in pursuance of such section, was, therefore, null and void.

Section 921 of *The Municipal Act* appears in Division II "Public Safety and Amenity" under the sub-head "Aerodromes" and reads as follows:

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

This section first appeared in 1920, being enacted by s. 18 of c. 82 of the statutes of that year as paragraph (*y*) of s. 612 of *The Municipal Act,* R.S.M. 1913, c. 133. That s. 612 was one of a group of sections appearing in Part IX of the Act "Legislative Powers of Councils", under the sub-head "Various Trades and Occupations." It next appeared in s. 97 of the Consolidated Amendments to the Municipal Act, 1924, and then, in 1933, as s. 910 in Division II of *The Municipal Act,* 1933, c. 57, "Public Safety and Amenity" under the sub-head "Aerodromes" the same relevant position that the present s. 921 now occupies.

The enacting parts of By-law No. 292 of the rural municipality of West St. Paul provide:

> 1. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued within that part of The Rural Municipality of West St. Paul, in Manitoba, bounded as follows: All those portions of River Lots One (1) to Thirty-three (33) both inclusive, of the Parish of Saint Paul, in Manitoba, according to a plan of same registered in the Winnipeg Land Titles Office as No. 3992, which lie to the East of the Eastern Limit of the Main Highway as said Highway is shewn on said Plan No. 3992.

2. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued in any other part of the said Rural Municipality of West St. Paul, unless and until a license therefor shall first have been obtained from the said Municipality.

3. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in that part of The Rural Municipality of West St. Paul in Manitoba described in paragraph One (1) hereof.

4. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in any other part of the said Municipality unless and until a license therefor shall first have been obtained from the said Municipality.

Section 921 of *The Municipal Act* does not confer powers to provide generally for zoning, or for building restrictions; the powers are specifically allotted with reference to "aerodromes or any places where aeroplanes are kept for hire or gain." The by-law follows the section so that, if the latter is *ultra vires* the Provincial Legislature, the former cannot be upheld.

The circumstances which give rise to the present dispute are important as showing the far-reaching effect of the provisions of the section. The appellant Johannesson had been engaged in commercial aviation since 1928 and held an air transport licence, issued by the Air Transport Board of Canada, to operate an air service at Winnipeg and Flin Flon. The charter service which he operated under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and had substantially increased in volume over the years. This service was operated with light and medium weight planes, which in the main were equipped in summer with floats and in winter with skis in order to permt landing on the numerous lakes and rivers in this territory, and these planes had to be repaired and serviced in Winnipeg, which was the only place within the territory where the necessary supplies and any facilities were available for that purpose. The use by small planes of a large airfield, such as Stevenson Airport near Winnipeg which was maintained for the use of large transcontinental airplanes, was impractical and would eventually be prohibited. No facilities existed on the Red River in Winnipeg for the repairing and servicing of planes equipped with floats, and repairs could only be made to such planes by dismantling them at some private dock and transporting them, by truck, through Winnipeg to Stevenson Airport.

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After a long search by Johannesson in the suburbs of Winnipeg for a site that would combine an area of level land of sufficient area and dimensions and location to comply with the regulations of the Civil Aviation Branch of the Canadian Department of Transport relating to a licensed air strip with access to a straight stretch of the Red River of sufficient length to be suitable for the landing of airplanes equipped with floats, he found such a location (but one only) in the rural municipality of West St. Paul and acquired an option to purchase it but, before the transaction was completed By-law 292 was passed. Title to the land was subsequently taken in the name of both appellants and these proceedings ensued. The Attorney General of Canada and the Attorney General of Manitoba were notified but only the latter was represented before the judge of first instance and the Court of Appeal. Leave to appeal to this Court was granted by the latter.

On behalf of the appellants and the Attorney General of Canada, reliance is placed upon the decision of the Judicial Committee in the *Aeronautics* case (1). Irrespective of later judicial comments upon this case, in my view it is a decision based entirely upon the fact that the Dominion Aeronautics Act there in question had been enacted pursuant to an International Convention of 1919 to which the British Empire was a party and, therefore, within s. 132 of the British North America Act, 1867:

> 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries.

However, in the subsequent decision in the *Labour Conventions* case (*A.G. for Canada* v. *A.G. for Ontario* (2)), Lord Atkin, who had been a member of the Board in the *Aeronautics* case, said with reference to the judgment therein:

> The *Aeronautics case* (3) concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sect. 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion.

(1) [1932] A.C. 54. (2) [1937] A.C. 326.
(3) [1932] A.C. 54 at 351.

The remarks of Viscount Simon in *A.G. for Ontario* v. *Canada Temperance Federation* (1), must be read when considering the words of Lord Sankey in the *Aeronautics* case in another connection. At the moment all I am concerned with emphasizing is that the *Aeronautics* case decided one thing, and one thing only, and that is that the matter there discussed fell within the ambit of s. 132 of the British North America Act.

At this stage it is necessary to refer to a matter that was not explained to the Courts below. According to a certificate from the Under-Secretary of State for Foreign Affairs, the Convention of 1919 was denounced by Canada, which denunciation became effective in 1947. This was done because on February 13, 1947, Canada had deposited its Instrument of Ratification of the Convention on International Civil Aviation signed at Chicago December 8, 1944, and which Convention came into force on April 4, 1947. With the exception of certain amendments that are not relevant to the present discussion, the *Aeronautics Act* remains on the statute books of Canada in the same terms as those considered by the Judicial Committee in the *Aeronautics* case. Section 132 of the B.N.A. Act, therefore ceased to have any efficacy to permit Parliament to legislate upon the subject of aeronautics.

Nevertheless the fact remains that the Convention of 1919 was a treaty between the Empire and foreign countries and that pursuant thereto the *Aeronautics Act* was enacted. It continues as c. 3 of the Revised Statutes of Canada, 1927, as amended. Under s. 4 of that Act, as it stood when these proceedings were commenced, the Minister, with the approval of the Governor in Council, had power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular but not to restrict the generality of the foregoing, he might make regulations with respect to * * * (*c*) the licensing, inspection and regulation of all aerodromes and air stations. Pursuant thereto regulations have been promulgated dealing with many of the matters mentioned in the section, including provisions for the licensing of air ports. If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic

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of Canada, it falls under the "Peace, Order and Good Government" clause of s. 91 of the B.N.A. Act since aeronautics is not a subject-matter confined to the provinces by s. 92. It does not fall within head 8, "Municipal Institutions", as that head "simply gives the provincial legislature the right to create a legal body for the management of municipal affairs * * * The extent and nature of the functions" the provincial legislature "can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8": *Attorney General for Ontario* v. *Attorney General for Canada* (1). Nor, on the authority of the same decision is it within head 9: "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes." Once it is held that the subject-matter transcends "Property and Civil Rights in the Province" (head 13) or "Generally all matters of a merely local or private nature in the Province" (head 16), these two heads of s. 92 have no relevancy.

Now, even at the date of the *Aeronautics* case, the Judicial Committee was influenced (i.e. in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions. That that is so at the present time is shown by the terms of the Chicago Convention of 1944 and the provisions of the Dominion Aeronautics Act and the regulations thereunder referred to above. The affidavit of the appellant Johannesson, from which the statement of facts was culled, also shows the importance that the subject of air navigation has attained in Canada. To all of which may be added those matters of everyday knowledge of which the Court must be taken to be aware.

It is with reference to this phase of the matter that Viscount Simon's remarks in *A.G. for Canada* v. *Canada Temperance Federation* (2), must be read. What was there under consideration was the Canada Temperance Act, originally enacted in 1878, and Viscount Simon stated: "In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such

(1) [1896] A.C. 348 at 364. (2) [1946] A.C. 193 at 205.

that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (1) and the *Radio* case (2), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures." This statement is significant because, while not stating that the *Aeronautics* case was a decision on the point, it is a confirmation of the fact that the Board in the *Aeronautics* case considered that the subject of aeronautics transcended provincial legislative boundaries.

The appeal should be allowed, the orders below set aside, and judgment should be entered declaring s. 921 of the Act *ultra vires* and By-law 292 of the rural municipality of West St. Paul null and void. By agreement there are to be no costs in the Courts below but the appellants are entitled to their costs in this Court against the municipality. There should be no order as to costs for or against either intervenant.

The judgment of Kellock and Cartwright, JJ. was delivered by:

KELLOCK J.:—The question in this appeal is as to the constitutional validity of the following section of *The Municipal Act,* R.S.M. 1940, c. 141, namely,

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain definite areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

Purporting to act under this legislation, the respondent municipality enacted a by-law prohibiting aerodromes in a defined area in the municipality and permitting aerodromes elsewhere in the municipality only upon license. The appellant, who holds an air transport license issued by the Air Transport Board of Canada to operate an air service at both the City of Winnipeg and the town of Flin Flon, has been operating a charter aeroplane service in Manitoba and Saskatchewan for some years, using mainly float and ski planes. For the purposes of his business, the appellant acquired an area in the respondent municipality having

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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access to a stretch of the Red River. These premises were acquired having in view the requirements of the Department of Transport with respect to aerodromes, and it was subsequent to the appellant's acquisition that the by-law in question was passed. The appellant's motion for an order declaring the above legislation and by-law *ultra vires* was dismissed by the judge of first instance, and this order was affirmed by the Court of Appeal, Coyne J. A. dissenting.

In this court, we were informed on behalf of the Attorney General of Canada that the convention under consideration in the *Aeronautics* case (1), was denounced by the Government of Canada as of April 4, 1947, on which date also the convention on International Civil Aviation, signed at Chicago on December 7, 1944, became effective. Insofar, therefore, as the above decision depends for efficacy upon s. 132 of the British North America Act, that foundation has ceased to exist.

In the *Aeronautics* case, the Privy Council held that the "whole field of legislation in regard to aerial navigation belongs to the Dominion" by virtue of s. 132, s. 91 heads 2, 5 and 7, and the residuary power in s. 91 to make laws for the peace, order and good government of Canada. Their Lordships expressed the view also, at p. 73, that aeronautics was not a class of subject within property and civil rights, and at p. 77, that it was not a subject vested by specific words in the provinces. On the latter page, their Lordships went on to say:

> Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

It is true, as the judgment itself shows, and as later pronouncements of the judicial committee have repeated, that s. 132 was the leading consideration in the judgment. In the *Radio Reference* (2), the convention there in question was not one to which s. 132 was applicable, but, as pointed out by Lord Atkin in 1937 A.C. at p. 351, that convention dealt with classes of matters which did not fall within s. 92 but entirely within subject matters of Dominion jurisdiction under s. 91. In these circumstances, their Lordships said in the *Radio* case that, although the convention there in

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

question was not such a treaty as fell within s. 132, it came to the same thing. At p. 313 Viscount Dunedin said:

> The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

To the extent, therefore, to which the subject matter of the Chicago convention of 1944 falls within s. 91, the language of Viscount Dunedin is equally apt. In my opinion, that subject matter is exclusively within Dominion jurisdiction.

In my opinion, the subject of aerial navigation in Canada is a matter of national interest and importance, and was so held in 1932. In the *Canada Temperance Federation* case (1), Viscount Simon said at p. 205:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (2) and the *Radio* case (3)), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

This statement is a recognition of the situation which is well known and understood in this country. It was quite frankly and quite properly admitted by Mr. Fillmore for the respondent, whose argument was merely that the Dominion had not in fact legislated in the field of s. 921 of the provincial statute.

It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field.

Once the decision is made that a matter is of national interest and importance, so as to fall within the peace,

(1) [1946] A.C. 193. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the provinces. I think, therefore, that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.

The *Aeronautics Act*, R.S.C. 1927, c. 3, as amended by c. 28 of the statutes of 1944-45, c. 9 of the statutes of 1945, and c. 23 of the statutes of 1950, provides in part as follows:

3. It shall be the duty of the Minister

(*a*) to supervise all matters connected with aeronautics.

* * *

(*f*) to prescribe aerial routes.

* * *

(1) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada and for the control or operation of aircraft registered in Canada wherever such aircraft may be.

* * *

4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to

* * *

(*c*) licensing, inspection and regulation of all aerodromes and air-stations.

(*d*) the conditions under which aircraft may be used or operated.

(*e*) the conditions under which goods, mails and passengers may be transported in aircraft and under which any act may be performed in or from aircraft or under which aircraft may be employed.

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified.

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft.

(*h*) aerial routes, their use and control.

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada and of aircraft registered in Canada wherever such aircraft may be.

* * *

(3) Every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year or to both fine and imprisonment.

(4) Every person who violates an order or direction of the Minister made under a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

12. (1) Subject to the approval of the Minister, the Board may issue to any person applying therefor a license to operate a commercial air service.

* * *

(5) In issuing any license the Board may prescribe the routes which may be followed or the areas to be served and may attach to the license such conditions as the Board may consider necessary or desirable in the public interest, and, without limiting the generality of the foregoing, the Board may impose conditions respecting schedules, places of call, carriage of passengers and freight, insurance, and subject to the *Post Office Act*, the carriage of mail.

* * *

15. (1) No person shall operate a commercial air service unless he holds a valid and subsisting license issued under section twelve.

Regulations were passed under the authority of the above statute by P.C. 2129 of May 11, 1948. Part III deals with the subject matter of "airports." The following paragraphs are pertinent:

1. No area of land or water shall be used as an airport unless it has been licensed as herein provided.

2. Licenses to airports may be issued by the Minister and may be made subject to such conditions respecting the aircraft which may make use of the airport, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Minister may direct.

4. The license of an airport may be suspended or cancelled by the Minister at any time for cause and shall cease to be valid two weeks after any change in the ownership of the airport, unless sooner renewed to the new owner.

5. Every licensed airport shall be marked by day and by night as may be from time to time directed by the Minister.

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7. (1) No person shall without authority of the Minister—

(*a*) mark any unlicensed surface or place with any mark or display any signal calculated or likely to induce any person to believe that such surface or place is a licensed airport;

(*b*) knowingly use or permit the use of an airport for any purpose other than those for which it has been licensed.

(2) The onus of proving the existence of any authority or license shall be upon the person charged.

8. No water-craft shall cross or go upon that part of the water area forming part of any airport which it is necessary to keep clear of obstruction in order that aircraft may take off and alight in safety, having regard to the wind and weather conditions at the time, and every person in charge of a water-craft is guilty of a breach of these regulations if such craft crosses or goes upon such area after reasonable warning by signal or otherwise.

9. There shall be kept at every licensed airport a register in which there shall be entered immediately after the alighting or taking off of an aircraft a record showing the nationality and registration marks of such aircraft, the name of the pilot, the hour of such alighting or taking off, the last point of call before such alighting and the intended destination of the aircraft.

10. (1) Every licensed airport, and all aircraft and goods therein shall be open to the inspection of any customs officer, immigration officer, officer or person holding or named in any Writ of Assistance or any officer of or other person authorized by the Minister, but no building used exclusively for purposes relating to the construction of aircraft or aircraft equipment shall be subject to inspection except upon the written order of the Minister.

(2) All state aircraft shall have at all reasonable times, the right of access to any licensed airport, subject to the conditions of the license.

In my opinion, just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole. The provincial legislation here in question must be held, therefore, to be *ultra vires,* and the by-law falls with it.

The appeal should therefore be allowed. By agreement, no costs were asked or awarded in the courts below. I think, however, that the appellant should have his costs in this court as against the respondent, but that there should be no other costs.

The judgment of Taschereau and Estey, JJ. was delivered by:—

ESTEY J.:—The appellants submit that s. 921 of the Municipal Act (R.S.M. 1940, c. 141) is legislation in relation to aeronautics and, therefore, beyond the competency of the Legislature of Manitoba to enact.

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

The facts out of which this issue arises are as follows:

The appellant, Konrad Johannesson, has been engaged in commercial aviation in northern Manitoba and Saskatchewan since 1928. He desired an airport at Winnipeg and on September 27, 1947, obtained an option upon, and on April 20, 1948, purchased a portion of River Lot 33 Pl. 3992 in the respondent municipality for the purpose of equipping and maintaining it as an aerodrome.

The respondent municipality, under date of May 27, 1948, passed By-law No. 292, by virtue of the foregoing s. 921. The effect of this by-law may be briefly expressed: (*a*) As to lots 1 to 33, Pl. 3992, in the respondent municipality, the erection or maintenance of any aerodrome or machine shop for testing or repairing aircraft is entirely prohibited; (*b*) in the remaining portion neither of the foregoing may be erected or maintained without a licence from the respondent municipality.

The appellants, on October 22, 1948, asked the Court to declare s. 921 *ultra vires* of the Legislature of Manitoba and the enactment of By-law 292 by the respondent municipality a nullity.

Mr. Justice Campbell held that the Provincial Legislature had jurisdiction to enact s. 921 and that the by-law was valid. His judgment was affirmed by a majority of the Court of Appeal in Manitoba, Mr. Justice Coyne dissenting.

The Attorneys-General for Manitoba and the Dominion (the latter for the first time in this Court) have intervened and contended respectively that the Province has and has not competent authority to enact s. 921.

The judgments in the Court below proceed upon the basis that the Aeronautics Convention in Paris, ratified on behalf of the British Empire on June 1, 1922, was still

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in effect. Mr. Varcoe, on behalf of the Attorney General of Canada, however, informed the Court that this convention had been abrogated by the Civil Aviation Convention in Chicago in 1944, and became binding on Canada on April 4, 1947. This is important as the Chicago Convention, unlike the Paris Convention, is signed by Canada in her own right and, therefore, s. 132 of the British North America Act has no application in determining the jurisdiction of the Parliament of Canada and the Provincial Legislatures in relation thereto. *Radio* case (1); *Labour Convention* case (2). This does not, however, mean that the *Aeronautics* case (3), is of no importance in a consideration of the present issue. In that case the Judicial Committee considered three questions:

(1) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the convention entitled "Convention relating to the Regulation of Aerial Navigation?"

(3) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the *Aeronautics Act*, c. 3, R.S.C. 1927?

(4) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting: * * * (*c*) the licensing, inspection and regulation of all aerodromes and air stations?

The Paris Convention, drawn up at the Peace Conference in Paris and dated October, 1919, was ratified by His Majesty on behalf of the British Empire June 1, 1922. Canada already had enacted in 1919 the Air Board Act (S. of C. 1919, c. 11, 1st Session), amended it in 1922 (S. of C. 1922, c. 34) and styled it the "Aeronautics Act" (R.S.C. 1927, c. 3). It will be observed that the Air Board Act was enacted in the same year that the Paris Convention was drawn up, no doubt with the convention in mind, but the latter is not mentioned and the comprehensive language of the statute deals with aeronautics in all its phases. This is evident from the following provisions:

3. It shall be the duty of the Air Board—

(*a*) to supervise all matters connected with aeronautics;

* * *

(*f*) to prescribe aerial routes;

* * *

(1) [1932] A.C. 304; Plaxton 137. (2) [1937] A.C. 326; Plaxton 278.
(3) [1932] A.C. 54; Plaxton 93.

(*k*) to investigate, examine and report on all proposals for the institution of commercial air services within or partly within Canada or the limits of the territorial waters of Canada;

(*l*) to consider, draft, and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada; and,

(*m*) to perform such other duties as the Governor in Council may from time to time impose.

It was this legislation that the Privy Council had before it in the *Aeronautics* case. Moreover, it should be noted that while question (1), as submitted by the Governor in Council, dealt with the legislative jurisdiction of Canada in relation to the Paris Convention, questions (3) and (4) concerned the legislative jurisdiction of the Parliament of Canada to enact s. 4 of the Aeronautics Act and the regulations thereunder without regard to the Convention.

In the course of the judgment itself their Lordships sated at p. 64:

> The determination of these questions depends upon the true construction of ss. 91, 92 and 132 of the British North America Act.

Their Lordships suggest that it may come under s. 91(2), (5) and (9), but expressly state that it does not come under (10) (Navigation and Shipping). They also point out that it does not come under Property and Civil Rights (92 (13)) and then state:

> * * * transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of these sections deals specially with that branch of transport which is concerned with aeronautics.

Then, after discussing s. 132, they conclude:

> To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order, and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

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Their Lordships, apart from s. 132, and in support of their answers to questions (3) and (4), were of the opinion that legislation in relation to aeronautics was within the competence of the Parliament of Canada. The remark of Viscount Dunedin, in the *Radio* case *supra,* (at 311) that

> the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867,

and that of Lord Atkin in the Labour Convention case *supra* (at 351) that

> The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries,

particularly when read in relation to their context, do not detract from the foregoing, while the observations of Viscount Simon in the *Canada Temperance Federation* case (1), would appear to support the foregoing view when, at p. 205, he states:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

The Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive jurisdiction of the Dominion, it follows that the province cannot legislate in relation thereto, whether the precise subject matter of the provincial legislation has, or has not already been covered by the Dominion legislation.

It is then submitted that if aeronautics is within the legislative competence of the Parliament of Canada, including the power to license and regulate aerodromes, it would not include the location and continuation of aerodromes, which would be a provincial matter under Property and Civil Rights. With great respect, it would appear that such a view attributes a narrower and more technical meaning to the word "aeronautics" than that which has been attributed to it generally in law and by those interested in

(1) [1946] A.C. 193.

the subject. Indeed, the definition adopted by Mr. Justice Dysart, as he found it in Corpus Juris, 2 C.J.S. 900,

> The flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground,

contemplates the operation of the aeroplane from the moment it leaves the earth until it again returns thereto. This, it seems, in itself makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation. This view finds support in the fact that legislation in relation to aeronautics and aerial navigation, not only in Canada, but also in Great Britain and the United States, deals with aerodromes, as well as the conventions above mentioned. Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.

The submission that in the granting of the licence the sufficiency of the location will always be considered and might even be the controlling factor in the granting or refusing of a licence, in so far as it may be of assistance, emphasizes the importance of the location of the aerodrome and of the essential part the aerodrome plays in any scheme of aeronautics. Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the Provincial Legislatures.

It is submitted that s. 921 is zoning legislation, as that term is now understood in municipal legislation. The general provisions for the enactment of zoning by-laws are contained in ss. 904, 905 and 906 of this statute. As notwithstanding this general provision such legislation may be enacted under other sections, it is necessary to determine the nature and character of the provisions of s. 921. The foregoing ss. 904, 905 and 906 are typical of legislation authorizing zoning by-laws. The end and purpose of zoning legislation, as the name indicates, is to authorize the municipality to pass by-laws in respect of certain areas and make those areas subject to prohibitions and restrictions designed to provide uniformity within those particular

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areas. The Legislature, in enacting s. 921, provided that, without regard to the nature and character or the use and purpose made of the area, the municipality may prohibit entirely, or permit only under a licence issued by it, an aerodrome within certain areas. Such legislation is in pith and substance in relation to aerodromes and, therefore, in relation to aeronautics rather than to zoning.

The appeal should be allowed with costs to the appellants, Konrad Johannesson and Holmfridur M. E. Johannesson, against the respondent municipality.

LOCKE J.:—The proceedings in this matter were initiated by notice of a motion to be made in the Court of King's Bench for an order declaring s. 921 of *The Municipal Act* (R.S.M., 1940, c. 141) to be *ultra vires* and the respondent municipality's by-law No. 292, enacted in part under the authority of that section, to be of no effect. On the hearing before Campbell J., the Attorney-General for Manitoba appeared and supported the position for the municipality and the application was dismissed.

Section 921 provides that any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuation of aerodromes or places where airplanes are kept for hire or gain. The terms of the by-law are quoted verbatim in other judgments delivered in this matter and need not be repeated.

On the appeal, Dysart, J.A. considered that s. 921 in so far as it authorizes a municipal corporation to prohibit the erection, within a described area, of an aerodrome intended for other than Dominion Government use, was *intra vires* and that the by-law was valid to that extent. He decided also that the requirement that a licence (in the sense of a building permit) should be obtained was within provincial powers and the by-law, accordingly, effective to this further extent. As to the remainder of the by-law, he considered it to be *ultra vires.*

Adamson J.A. was of the opinion that s. 921 of the Municipal Act would be within provincial powers if the words "licensing and regulating" and the words "continu-

ance and maintenance" were deleted. With these amendments, the section would read:

> Any municipal corporation may pass by-laws within certain defined areas preventing the erection of aerodromes or places where airplanes are kept for hire or gain.

As to the by-law, he considered paragraphs 1 and 3 to be *intra vires* if the words "and continued" were eliminated but that paragraphs 2 and 4 in their present form, were *ultra vires* as requiring a licence from the municipality to operate an aerodrome after location. He expressed the further view that if these paragraphs were amended to require merely a building permit prior to licensing by the Minister under the *Aeronautics Act,* they would be valid. Coyne J.A. dissented, considering s. 921 to be *ultra vires* the province. The formal certificate of the Registrar of the Court of Appeal says that the Chief Justice of Manitoba and the late Mr. Justice Richards concurred in the result. While two members of the Court thus considered both the section and the by-law to be in part *ultra vires,* since neither the learned Chief Justice nor the late Richards J.A. expressed their views on these matters, the appeal was dismissed *in toto.* In the result, both the section and the by-law have been found *intra vires* the province and the municipality respectively.

The material filed by the appellants on the motion shows that Konrad Johannesson, described as a flying service operator, has been engaged in commercial aviation since 1928 and holds a licence issued by the Air Transport Board of Canada to operate an air service at Winnipeg and Flin Flon: that the service which he operates under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and is conducted with light and medium planes mainly equipped in summer with floats and, in the winter, with skis in order to permit landing on the numerous lakes and rivers in this territory and that these planes have to be repaired and serviced at Winnipeg, the only place within the territory where the necessary supplies and facilities are available for that purpose. It is said that there are no existing facilities on the Red River in Winnipeg for the repairing and servicing of planes equipped with floats and that repairs can only be made for such planes by dismantling them at some private dock and transporting them by trucks to the Stephenson Airport.

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According to Johannesson's affidavit, he searched the areas surrounding Winnipeg for an area of level land having access to a straight stretch of the Red River of a sufficient length for the landing of airplanes equipped with floats, which would comply with the regulations of the Civil Aviation Branch of the Department of Transport relating to a licensed air strip, and the only portion of land which he had found was that purchased by him and his wife in the rural municipality of West St. Paul. The material does not state, and it was apparently assumed, that the Court would take judicial notice of the fact that there is no body of water in the area between Emerson on the south and Selkirk on the north, other than the Red River, on which planes equipped for alighting on water could land or take off. The material further discloses that, due to the lack of suitable facilities for their servicing and repair, float-equipped planes from the United States and other provinces of Canada are by-passing Winnipeg.

The question to be determined is one of far-reaching importance. Johannesson apparently contemplated the establishment of an aerodrome, within the meaning of that term as defined by the Air Regulations hereinafter referred to, where light and medium weight planes not equipped with radio but with suitable equipment for alighting either upon land or water, could land and take off and where they could be repaired and otherwise furnished with service.

The control of aeronautics in Canada was first dealt with by statute by Parliament, by c. 11 of the Statutes of 1919. During the sittings of the Peace Conference in Paris at the close of the Great War, a convention relating to the regulation of aerial navigation was drawn up which was subsequently ratified by His Majesty on behalf of the British Empire and it was with a view to performing the obligations of Canada as part of the Empire under this convention, then in course of preparation, that the Air Board Act of 1919 was passed. That statute set up a board whose duties included that of supervising all matters connected with aeronautics, constructing and maintaining all government aerodromes and air stations, prescribing aerial routes, licensing and regulating all aerodromes and air stations and prescribing the areas within which aircraft coming from any places outside of Canada were to land.

By c. 34 of the Statutes of Canada 1922 the Act of 1919 was repealed and all the powers and functions vested by it in the Board were directed to be exercised by or under the direction of the Minister of National Defence. The duties and powers of the Minister were further defined by c. 3, R.S.C. 1927, and include duties similar to those of the Air Board under the Act of 1919. Under powers contained in the statute as originally enacted, Air Regulations dealing in detail with the control of aerial navigation were enacted, and the right of Parliament to sanction the making of certain of these regulations and the matter of the exclusive legislative and executive authority of Parliament to perform the obligations of Canada or of any province thereof under the convention and the matter of its legislative authority to enact, in whole or in part, the provisions of s. 4 of the *Aeronautics Act,* c. 3, R.S.C. 1927, were referred to this Court by the Governor-General in Council under s. 55 of the *Supreme Court Act.* An appeal was taken to the Judicial Committee from the answers made in this Court to the questions submitted. The judgment of the Board allowing the appeal found that exclusive legislative and executive authority for performing the obligations of Canada or of any province under the convention was in the Parliament of Canada, that s. 4 of the Act was *intra vires* and that it was within the power of Parliament to sanction the making and enforcement of the said Air Regulations (1932 A.C. 54).

We were informed upon the argument of this matter that the Convention, the terms of which were considered on the appeal to the Privy Council, had been denounced by Canada and a new International Convention entered into by this country with other States in the year 1944, by which substantially similar international obligations were assumed. This fact was not drawn to the attention of the Court of Appeal but, in my opinion, it does not affect the questions to be determined here. Apart from the fact that, as I understand the arguments addressed to us, it is not contended on behalf of any of the respondents that the *Aeronautics Act* is *ultra vires* the Parliament of Canada or that it was without authority to sanction the Air Regulations in force at the time of the commencement of this litigation, if, as was found by the Judicial Committee, it

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was within the legislative competence of Parliament to enact c. 3, R.S.C. 1927, it would not become invalid by this circumstance (*A.G. Ontario* v. *Canada Temperance Federation* (1).

Parliament had thus dealt generally with the matter of aeronautics when in the years following the Great War the Manitoba Legislature, by s. 18 of c. 82 of the Statutes of 1920 of Manitoba, passed an amendment to s. 612 of *The Municipal Act,* R.S.M. 1913, c. 133, assuming to empower municipal councils to make by-laws:

> for licensing, regulating and within certain defined areas, preventing the erection, maintenance and continuance of aerodromes and places where airplanes are kept for hire or gain.

With a slight change in the phraseology which does not affect the present matter, the present s. 921 of c. 141, R.S.M. 1940, is to this effect. Neither the word "aerdromes", as it was spelled in the statute of 1920, or the word "aerodromes" as it appears in the present statute, were defined. Neither word appears in the Oxford English Dictionary, but in the shorter Oxford Dictionary the word "aerodrome" is defined as:

> A course for the use of flying machines: a tract of level ground from which airplanes or airships can start.

In the Supplement to Murray's New English Dictionary issued in 1933 the word is defined as:

> A course for practice or contest with flying machines: a tract of level ground from which flying machines (airplanes or airships) can start.

The area within which the prohibition of the erection, or maintenance, or continuation of an aerodrome is contained in the by-law is the portions of river lots 1 to 33 lying to the east of the main highway running to the west of the Red River and includes property such as Johannesson's fronting upon the river. Whether in view of the decision in *Patton* v. *Pioneer Navigation & Sand Co.* (2), dealing with the rights of the owners of lands fronting upon the Assiniboia River, also a navigable non-tidal stream, it was intended by the by-law to prevent planes equipped with floats from alighting upon and taking off from the waters of the Red River adjoining Johannesson's property, does not appear. Since, however, the right to alight and take off without the right to maintain facilities upon the shore

(1) [1946] A.C. 193 at 207. (2) (1908) 21 M.R. 405.

where the planes might be serviced and repaired would be presumably valueless, the prohibition in the by-law against the building or installation of any machine-shop for the testing or repairing of aircraft in the defined area is effective in preventing the operation by Johannesson of a commercial airport or aerodrome for planes designed to alight upon the water.

In my opinion, the position taken by the province and by the municipality in this matter cannot be maintained. Whether the control and direction of aeronautics in all its branches be one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which Provincial and Dominion legislation may overlap, I think the result must be the same. It has been said on behalf of the respondents that the by-law is merely a zoning regulation passed in exercise of the powers vested in the municipality elsewhere in the Municipal Act and I understand the section referred to is that portion of section 896 which, under the heading "Zoning trades", empowers a municipal corporation to pass by-laws for preventing the erection of certain specified buildings and the carrying on of certain occupations within defined areas, these including the erection, establishment or maintenance of machine shops which would presumably cover those designed for the repair of aircraft. The by-law, in so far as it prohibits the erection, maintenance or continuation of aerodromes, must depend for its validity upon s. 921: subsec. 3 is apparently based upon subsec. (*h*) of s. 896. The inclusion of the prohibition of the erection or maintenance of a machine-shop, however, is obviously for the purpose of preventing the use either of the strip of land fronting upon the river or the surface of the river adjoining to the east as an effective aerodrome. Section 921 was undoubtedly passed for the purpose of enabling municipal corporations to prohibit or to license or regulate the activity of aeronautics in and upon the lands and the waters within their boundaries, and not merely as an addition to the powers of zoning trades assumed to be given by s. 896. Had this been intended and irrespective of any question as to its validity, no doubt it would have been done by amendment to subsec. (*f*) or (*h*) of s. 896. The powers sought to be conferred upon the Municipal Council appear to me

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to be in direct conflict with those vested in the Minister of National Defence by the *Aeronautics Act*. Section 3(*a*) of that statute imposes upon the Minister the duty of supervising all matters connected with aeronautics and prescribing aerial routes and by s. 4 he is authorized, with the approval of the Governor in Council, to make regulations with respect to, *inter alia*, the areas within which aircraft coming from any place outside of Canada are to land and as to aerial routes, their use and control. The power to prescribe the aerial routes must include the right to designate where the terminus of any such route is to be maintained, and the power to designate the area within which foreign aircraft may land, of necessity includes the power to designate such area, whether of land or water, within any municipality in any province of Canada deemed suitable for such purpose.

If the validity of the *Aeronautics Act* and the Air Regulations be conceded, it appears to me that this matter must be determined contrary to the contentions of the respondent. It is, however, desirable, in my opinion, that some of the reasons for the conclusion that the field of aeronautics is one exclusively within Federal jurisdiction should be stated. There has been since the First World War an immense development in the use of aircraft flying between the various provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a government controlled company, private companies carry on large operations, particularly between the settled parts of the country and the North and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the North, is essential to the opening up of the country and the development of the resources of the nation. It requires merely a statement of these well recognized facts to demonstrate that the field of aeronautics

is one which concerns the country as a whole. It is an activity, which to adopt the language of Lord Simon in the *Attorney General for Ontario* v. *Canada Temperance Federation* (1), must from its inherent nature be a concern of the Dominion as a whole. The field of legislation is not, in my opinion, capable of division in any practical way. If, by way of illustration, it should be decided that it was in the interests of the inhabitants of some northerly part of the country to have airmail service with centres of population to the south and that for that purpose some private line, prepared to undertake such carriage, should be licensed to do so and to establish the southern terminus for their route at some suitable place in the Municipality of West St. Paul where, apparently, there is an available and suitable field and area of water where planes equipped in a manner enabling them to use the facilities of such an airport might land, it would be intolerable that such a national purpose might be defeated by a rural municipality, the Council of which decided that the noise attendant on the operation of airplanes was objectionable. Indeed, if the argument of the respondents be carried to its logical conclusion the rural municipalities of Manitoba through which the Red River passes between Emerson and Selkirk, and the City of Winnipeg and the Town of Selkirk might prevent the operation of any planes equipped for landing upon water by denying them the right to use the river for that purpose.

It is true that the decision in the *Aeronautics Reference* (2), really turned upon the point that by virtue of s. 132 of the British North America Act it was within the power of Parliament to enact s. 4 of the *Aeronautics Act,* c. 3, R.S.C. 1927, and to authorize the adoption of the Air Regulations referred to in the questions submitted to the Court. There were, however, expressions of opinion on other aspects of the matter in the judgment delivered by Lord Sankey L.C. which are of assistance. At page 70 of the report His Lordship, in referring to the respective field assigned to Parliament and the Legislatures, said in part:

> While the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central government those high

(1) [1946] A.C. 193 at 205. (2) [1932] A.C. 54.

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functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the provinces as members of a constituent whole.

Again, in the conclusions of the judgment, it is stated that their Lordships were influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion. In *A.G. for Ontario* v. *A.G. for Canada* (1), Lord Watson, referring to the authority given to Parliament by the introductory enactment of s. 91 to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislatures of the provinces, said that the exercise of these powers ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance. This passage from Lord Watson's judgment is incorporated in the second of the four propositions stated by Lord Tomlin in *A.G. for Canada* v. *A.G. for British Columbia* (2). The passage from the judgment of Lord Simon in *A.G. for Ontario* v. *Canada Temperance Federation* (3), reads:—

> In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (4), and the *Radio* case (5), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

While the statement of Lord Sankey in the *Aeronautics Reference* that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion as a whole, and that of Lord Simon in the Canada Temperance matter in referring to that case and the *Radio* case, were perhaps unnecessary to the decision of those matters, they support what I consider to be the true view of this matter that the whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of

(1) [1896] A.C. 348 at 360.
(2) [1929] A.C. 111 at 118.
(3) [1946] A.C. 193 at 205.
(4) [1932] A.C. 54.
(5) [1932] A.C. 304.

Canada. S. 921 of *The Municipal Act* (R.S.M. 1940 c. 141) clearly trespasses upon that field and must be declared *ultra vires* the province. As to the by-law I am unable, with respect, to agree with the contention that it is a mere zoning regulation or that, even if it were, it could be sustained. On the contrary, I consider it to be a clear attempt to prevent the carrying on of the operation of commercial aerodromes within the municipality. As the right to do this must depend upon s. 921, the by-law must also be declared *ultra vires.*

If this matter were to be considered as dealing with a legislative field where the powers of Parliament and of the Provincial Legislature overlap, I think the result would necessarily be the same since for the reasons above stated it appears to me that the *Aeronautics Act,* and in particular s. 4, is legislation in this field with which s. 921 of *The Municipal Act* clearly conflicts.

The appeal should be allowed with costs and a declaration made that s. 921 of *The Municipal Act* and the municipal by-law are each *ultra vires.* There should be no order as to costs in the proceedings before Campbell J. and the Court of Appeal.

Appeal allowed.

Solicitors for the appellants: *Andrews, Andrews, Thorvaldson, & Eggertson.*

Solicitors for the respondent: *Dysart & Dysart.*

Solicitor for the Intervenant, The Attorney-General for Manitoba: *A. A. Moffat.*

Solicitor for the Intervenant, The Attorney General of Canada: *F. P. Varcoe.*