*Privy Council Appeal No. 52 of 1924.*

**The Lord's Day Alliance of Canada** - - - - *Appellants*

*v.*

**The Attorney-General of Manitoba** - - - - *Respondent*

AND

**The Attorney-General of Canada** - - - - - *Intervener*

FROM

## THE COURT OF APPEAL FOR MANITOBA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND DECEMBER, 1924.

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*Present at the Hearing:*

THE LORD CHANCELLOR (VISCOUNT CAVE).
LORD DUNEDIN.
LORD CARSON.
LORD BLANESBURGH.
MR. JUSTICE DUFF.

[*Delivered by* LORD BLANESBURGH.]

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This appeal, relating to the permissibility or otherwise of certain Sunday excursions within the Province of Manitoba, raises important questions as to the legislative powers in relation to such matters possessed by the Parliament of Canada on the one hand and the different Provincial Legislatures on the other. Is it open to a Provincial Legislature to permit such excursions within its own Province? Or, is such a matter, even in this aspect of it, now parcel of the criminal law so as to be within the legislative competence of the Dominion Parliament alone? These, it will be found, are the broad questions which emerge on this appeal.

They arise upon a statute passed by the Legislature of Manitoba in the session of 1923. The statute is intituled "An Act to amend the Lord's Day Act" of the Province, being Chapter 119 of the Revised Statutes, 1913, and it provides in Section 1, for the addition to that Act of a clause making it lawful—

> "For any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, notwithstanding anything to the contrary in that or any other Act of the Legislature of Manitoba or in any law in force in the Province over which the Province has legislative authority."

Section 2 amends clause 2 of the principal Act by adding these same excursions to the works of necessity and charity which by that clause are put outside the prohibition of the statute. The Act was not at once to be operative. It was to be brought into force only on proclamation by the Lieutenant-Governor in Council, and before that step had been taken the following questions were, on the 19th of April, 1923, under the authority conferred by ch. 38 of the Revised Statutes of Manitoba, referred by His Honour in Council to the Court of Appeal of the Province for hearing and consideration—

> 1. Is it lawful in Manitoba for any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, assuming that "An Act to amend The Lord's Day Act" enacted at the present session of the Manitoba Legislature has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?
>
> 2. Are either or both of Sections 1 and 2 of an "Act to amend The Lord's Day Act" passed at the present session of the Manitoba Legislature valid, assuming that the said Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?
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> 3. Is "The Lord's Day Act" being Chapter 119 of 1913 Revised Statutes of Manitoba, as amended by "An Act to amend The Lord's Day Act," passed at the present session of the Manitoba Legislature, within the legislative jurisdiction and powers of the Legislature of Manitoba, assuming that the last-mentioned Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council?
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> 4. If the answer to Question 3 is "No," in what particular respect has the Legislature exceeded its powers?

It will be observed that each of these questions is concerned with a state of things resulting from the new Act being duly brought into force. The Lieutenant-Governor-in-Council expresses a desire to be informed as to the legality of the excursions to which he refers only on the assumption that that Act has been made operative, and no question as to their legality apart from the Act is propounded. Their Lordships were, however, strongly urged by the appellants to deal with and dispose of the view that such excursions were lawful in Manitoba independently of the Act altogether—a view expressed by some of the learned Judges of the Court of Appeal in this case and foreshadowed in an earlier decision of the same Court.

Their Lordships will refrain from taking this course, for one compelling reason, which they name out of several which would justify reserve in this matter.

Statutes empowering the executive Government, whether of the Dominion of Canada or of a Canadian Province, to obtain by direct request from the Court answers to questions both of fact and law, although *intra vires* of the respective Legislatures, impose a novel duty to be discharged, but not enlarged by the Court. See *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, 1912, A.C. 571. It is more than ordinarily expedient in the case of such references that a Court should refrain from dealing with questions other than those which on executive responsibility are in express terms referred to it, and their Lordships will here act upon that view.

On the 23rd of May, 1923, the Court of Appeal for Manitoba formally certified its answers to the questions. Its answer to the first was in the affirmative, and to the second question its effective answer was that Section 1 of the Act being valid, Section 2 was inoperative and unnecessary.

Following upon these answers the Act was brought into force by proclamation, and the present appeal from the certificate of the Court of Appeal has been by special leave of that Court presented by the Lord's Day Alliance of Canada, supported by the Attorney-General of the Dominion, who has by leave intervened in the proceedings and been made a respondent to the appeal.

It may be assumed that the Provincial Legislature, in passing the Act of 1923, was purporting to exercise the power which it treated as being reserved to it by Section 8 of the Statute of the Dominion—the Lord's Day Act, 1906. That section is as follows :—

> "It shall not be lawful for any person on the Lord's Day, *except as provided by any provincial Act or Law now or hereafter in force*, 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 passengers for amusement or pleasure, and passengers so conveyed shall not be deemed to be travellers within the meaning of this Act."

The real question raised on this appeal may therefore be thus phrased : "Is the Manitoba Act of 1923, now duly proclaimed, 'a Provincial Act hereafter in force' within the meaning of Section 8 of the Lord's Day Act, 1906?" The full significance of these words can perhaps best be appreciated if some consideration be first given to the legislative history in Canada of this question of Sunday observance since the passing of the British North America Act in 1867.

That history has been somewhat disturbed. For many years after 1867 it was apparently assumed on all hands that the power of legislating with reference to Sunday observance within a Canadian Province was by Section 92 of the Act exclusively committed to the Provincial Legislature as being either a matter (Section 92 (13)) relating to property and civil rights in the Province or as being

one (Section 92 (16) ) of a merely local or private nature in the Province. It was assumed also that appropriate penalties for the non-observance of Sunday might under Section 92 (15) be enacted by the Provincial Legislature as a means of enforcing a law of the Province made in relation to a matter coming within a class of subjects enumerated in the section. So widely held was this view that not only was no Dominion statute with reference to this subject ever promulgated, but in most of the Provinces legislation was passed having for its object the compulsory observance of Sunday within the Province or the laying down of rules of conduct to be followed on that day, accompanied by appropriate sanctions for non-observance or breach. The Lord's Day Act, 1902, of Manitoba is one of these Provincial statutes: The Ontario Act of 1897, c. 246, " An Act to Prevent the Profanation of the Lord's Day " is another.

It was not until 1902 that the validity of any of these enactments was called in question. In that year, however, the Court of Appeal of Ontario were asked whether the Ontario statute was valid, and although the enactment was upheld in that Court, on appeal to this Board it was decided by their Lordships that the Act, *treated as a whole*, was beyond the competency of the Ontario Legislature. The ground of the decision was that an infraction of the Act was an offence against the criminal law, and that the criminal law in its widest sense is by Section 91, Subsection 27, of the British North America Act reserved for the exclusive legislative authority of the Parliament of Canada. See *Att.-General for Ontario* v. *Hamilton Street Railway*, 1903, A.C. 524. Subsequent decisions in Canada showed that in this respect no valid distinction could be drawn between the Ontario statute and other prohibitory statutes with reference to Sunday observance passed by other Provincial Legislatures, and accordingly it was deemed necessary by the Parliament of Canada itself to deal by legislation with the subject, and the Dominion Act of 1906, c. 153, to which reference has already been made, was the result.

The form of that statute is notable. Some of its prohibitions are general and unqualified, as, for example, shooting on Sunday (Section 10) or sale of foreign newspapers on that day (Section 11). Other prohibitions—those, for instance, contained in Sections 5 and 7 and in Section 8, above set forth—are each qualified by the phrase or its equivalent, " except as provided by any provincial Act or law now or hereafter in force." Lastly, there are a great number of activities, stated by the statute to be included in the general expression, " works of necessity or mercy," but many of which, apart from that statutory inclusion, would not naturally be so described, as to which there is no prohibition at all.

The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some

things on that day are everywhere prohibited ; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which the Act recognises that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, provincial views shall within a province prevail. As Mr. Justice Anglin observed in *Ouimet* v. *Bazin*, 46 S.C.R. 502, this course was no doubt adopted

> " to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy."

There is therefore reserved to each Province power in these intermediate cases by, *inter alia*, " a Provincial Act . . . hereafter in force " to exempt that Province from the operation of the general prohibition in whole or in part.

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be " in force " within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular Section 1, is in that sense of these words " in force " in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of the *Hamilton Street Railway* decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognise what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting " Civil Rights in the Province " or as one of " a merely local nature in the Province." Nor would such permission necessarily be otiose. The border-line between the

profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on the 15th of July, 1870, on which day the Dominion Parliament by 51 Vict., c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, Section 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been *intra vires* and effective. The section would have been " in force " in the Province in the fullest meaning of these words as found in the Act of 1906. And the section, if then in " force," would have so continued notwithstanding the passing of that Act. It would have been a " Provincial Act . . . now in force." As Mr. Justice Duff says in *Ouimet* v. *Bazin, ubi supra,* when speaking of the Lord's Day Act, 1906—

> " This latter enactment appears to be framed upon the theory that the Provinces may pass laws governing the conduct of people on Sunday, and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a Provincial legislature professing to do what a Province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactments of the ' British North America Act ' already referred to."

With these observations the Board is in entire agreement.

But his Lordship was there dealing only with Provincial Laws in force when the Act of 1906 was passed. The same principle, however, as it seems to the Board, must apply to Provincial statutes subsequently enacted. That the Parliament of Canada so intended is clear from the language it has used, and there seems no valid reason why that intention should not have effect. The Dominion Legislature, of course, may at any moment by prohibiting Sunday excursions under appropriate sanctions bring these within the domain of the criminal law and thereby at once withdraw such activities entirely from the cognisance of the Legislature of any Province. But what the Parliament of Canada may

do in this matter it may also forbear to do, and permissive Provincial legislation effective for its purpose, because the Parliament of Canada has not previously intervened at all, can be no less effective after such intervention if by its very terms the previous liberty of the Provinces in this matter remains unaffected. In each case the Provincial legislature is exercising a power which, in the one case by silence and in the other case in words, the Parliament of Canada has left intact.

In this view of the matter it becomes unnecessary for their Lordships to consider, as some of the learned Judges of the Court of Appeal have done, whether such Provincial legislation as that now in question may be justified as being in effect Dominion Legislation by delegation or reference. They prefer, without saying more on that matter, to justify it on the grounds they have set forth.

In the result their Lordships agree with the Court of Appeal that the first question of the Lieutenant-Governor-in-Council should be answered in the affirmative.

The learned Judges of that Court preface their answer to the second question, already given, by a statement to the effect that, as Section 2 of the Manitoba Lord's Day Act is prohibitive and provides a penalty for every breach, it invades the field of criminal legislation and is *ultra vires* under the decision in the *Hamilton Street Railway* case, and they go on to say that adding an exception of something valid from a constitutional standpoint to a section that is *ultra vires* does not give validity to the section itself. Their Lordships agree with the Court of Appeal in thinking that Section 2 of the Manitoba Lord's Day Act is, under the *Hamilton Street Railway* case, *ultra vires* the Provincial Legislature, and they do not find it necessary to consider or determine whether the amendment of the section by the Act of 1923 might be severed from and stand independent of that enactment, for in the present case the whole question is academic. Section 2 of the statute of 1923 adds nothing effective to Section 1, and need not be regarded. Their Lordships, therefore, are content merely to express their agreement with the actual answer given to that question by the Court of Appeal.

To the third question the answer of the Court of Appeal was as follows :—

> " This Court is unable to distinguish Chapter 119 of the Revised Statutes of Manitoba, 1913, as it stood before the proposed amendments from the Act pronounced by the Privy Council in *Attorney-General for Ontario* v. *Hamilton Street Railway Company*, 1903, A.C. 524, to be *ultra vires* of the provincial legislature. As to the amending Act submitted, this Court has above expressed the opinion that Section 1 thereof is valid and that Section 2 thereof is inoperative and unnecessary."

With the first part of this answer their Lordships, for reasons which already sufficiently appear in this judgment, are in entire

agreement, and they have already expressed themselves in regard to the statement referred to in the second part.

The Court of Appeal deemed it to be superfluous to answer the fourth question, as do their Lordships.

In the result, their Lordships agreeing in effect with all the answers of the Court of Appeal are of opinion that this appeal from the judgment of that Court should be dismissed. They will humbly advise His Majesty accordingly.

Their Lordships do not propose to make any order with reference to the costs of the appeal. They think that all parties to it should bear their own.

**In the Privy Council.**

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THE LORD'S DAY ALLIANCE OF CANADA

*v.*

THE ATTORNEY-GENERAL OF MANITOBA

AND

THE ATTORNEY-GENERAL OF CANADA.

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DELIVERED BY LORD BLANESBURGH.

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