

Respondents' Factum.

PART I—STATEMENT OF FACTS

This is an appeal from the unanimous decision of the Appeal Division of the Supreme Court of New Brunswick delivered May 1st, 1950, answering certain questions submitted to the said Court by order of The Honourable P. J. Hughes in the Chancery Division of the said Court dated January 17th, 1950.

10 The Respondent claimed damages and an injunction restraining the appellant, his servants and agents, from embussing and debussing passengers within the Province of New Brunswick in and from his public motor buses operating through New Brunswick from points in the United States and Nova Scotia, and vice versa (Record p. 2).

The essential facts are not in dispute and are fully set forth in the said order dated January 17th, 1950 as follows : (Record p. 8).

“ 1. The plaintiff is a company incorporated under and by virtue of the New Brunswick Companies' Act and is in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the Province of New Brunswick.

20 2. The plaintiff holds licenses granted by The Motor Carrier Board of the Province of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the City of Saint John, New Brunswick, over Highway Route No. 1 and between the said City of Saint John and the Nova Scotia border over Highway Route No. 2, for the purpose of carrying passengers and goods for hire or compensation.

3. The plaintiff by its public motor buses maintains a daily passenger service over the routes set out in paragraph (2) hereof.

30 4. The defendant, who resides at Lewiston in the State of Maine, one of the United States of America, is in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or compensation under the name and style of MacKenzie Coach Lines.

5. (a) On the 17th day of June, 1949, on the application of the defendant, the said Motor Carrier Board granted a license to the defendant, permitting him to operate public motor buses from Boston in the Commonwealth of Massachusetts through the Province of New Brunswick on Highways Nos. 1 and 2 to Halifax and Glace Bay in the Province of Nova Scotia and return,

but not to embus or debus passengers in the said Province of New Brunswick after August 1st, 1949.

(b) At the time of making the said application, the defendant challenged the validity of 13 George VI Chapter 47 (1949) and the Motor Carrier Act, 1937 as affected thereby, as being ultra vires of the Legislature of the Province of New Brunswick.

(c) That the said Motor Carrier Board made no specific ruling on the defendant's challenge as set out in sub-paragraph (b), but acted under the said 13 George VI Chapter 47 (1949).

6. The defendant by his motor buses maintains a regular passenger service over the routes set out in paragraph 5 (a) hereof. 10

7. Since August 1st, 1949 the defendant has continually embused and debused passengers within the Province of New Brunswick and it is his intention to continue to do so unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by The Motor Carrier Act 1937 and amendments thereto, or by any other applicable statute or law.

8. The defendant intends to carry passengers not only from points without the Province of New Brunswick to points within the said Province and vice versa, but also, in connection with and incidental to his operations as more particularly described in paragraph (9) hereof, to carry passengers from points within the said province to destinations also within the said province, unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by The Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law. 20

9. (a) The business and undertaking of the defendant, generally referred to in paragraph (4) hereof consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the City of Boston in the Commonwealth of Massachusetts and the Town of Glace Bay in the Province of Nova Scotia and between intermediate points. 30

(b) That the said business and undertaking is conducted by the defendant over that portion of its route which lies between the said City of Boston and the Town of Calais, Maine, under a certificate granted by Interstate Commerce Commission (a Federal commission of the United States of America having jurisdiction, inter alia, over inter-state transportation), permitting the defendant to carry passengers and their baggage, as a motor carrier, as follows :

“ Passengers and their baggage, and express and mail, in the same vehicle with passengers, in seasonal operations from the 1st day of May to the 15th day of December, both inclusive, over a regular route between Boston, Mass., and a point on the United States-Canada Boundary line north of 40

Calais, Maine ; From Boston over U. S. Highway to Portland, Maine, thence over Maine Highway 3 via Auburn, Augusta and Belfast, Maine, to Ellsworth, Maine (also from Augusta, Maine over Maine Highway 100 to Newport Maine, thence over U. S. Highway 2 to Bangor, Maine, thence over U. S. Highway 1 to Ellsworth) thence over U. S. Highway 1 to Franklin Road, Maine, thence over Maine Highway 162 to Cherryfield, Maine (also from Franklin Road over U. S. Highway 1 to Cherryfield), thence over U. S. Highway 1 to Calais, Maine, and thence over bridge to the United States-Canada boundary line and return over the same routes.

10 Service is authorized to and from all intermediate points.”

(c) Subsequently and in addition, Interstate Commerce Commission has permitted the defendant to carry passengers and their baggage as a motor carrier, as follows :

“ Passengers and their baggage, and express, mail and newspapers in the same vehicle with passengers, in a seasonal operation extending from the first of May to the 15th of December, inclusive, of each year, over alternate regular routes for operating convenience only in connection with said carrier’s presently authorized regular-route operations.

20 Between Portland, Maine, and Kittery, Maine : From Bangor over Maine Highway 9 to Calais, and return over the same route.

Service is not authorized to or from intermediate points.”

(d) The Motor Carrier Board of the Province of New Brunswick, on the 17th of June, 1949, on the application of the defendant as set forth in paragraph 5 hereof, purported to license the operation of the defendant, in the Province of New Brunswick, as follows :

30 “ Israel Winner doing business under the name and style of ‘MacKenzie Coach Lines,’ at Lewiston in the State of Maine is granted a license to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on Highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949.”

(e) The Board of Commissioners of Public Utilities for the Province of Nova Scotia has purported to approve the defendant’s operations in the Province of Nova Scotia over the following routes :

- (a) New Brunswick Border to Glace Bay, via Route No. 4 —
Wentworth Valley and Truro.....302 miles ;
- (b) New Brunswick Border to Glace Bay, via Route No. 2 —
Parrsboro and Truro.....319 miles ;
- 40 (c) New Brunswick Border to Glace Bay, via Route No. 6 —
Pugwash, Wallace, Pictou and New Glasgow.....292 miles ;
- (d) Truro to Halifax.....64 miles
(3 miles of which is within the corporate limits of the Town of
Truro and City of Halifax.)”

(f) Subsequently the said Board of Commissioners of Public Utilities for the Province of Nova Scotia amended the certificate granted to the defendant as set out in sub-paragraph (e) hereof as follows :

“ Operation of this route is permitted TO BE SUSPENDED from January 12th, 1949, until May 1st, 1949.”

(g) The defendant in fact, operated as a public motor carrier between the City of Boston aforesaid, the Town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, a copy of which is annexed to the said order and marked “ A ”, between the 1st day of May and the 15th day of December in each year, the period of time covered by the certificates granted by the Interstate Commerce Commission. 10

(h) Between December 15th and May 1st of each year, the defendant proposes to operate as a public motor carrier as aforesaid, between the Provinces of New Brunswick and Nova Scotia, connecting with New England Greyhound Lines, Inc., a company authorized by the Interstate Commerce Commission to operate as a public motor carrier between Calais, Maine and Boston, Massachusetts throughout the entire year.

(j) Incidentally to its operations as aforesaid, the defendant proposes to pick up, within the Province of New Brunswick, passengers and their baggage having a destination also within the Province of New Brunswick.” 20

The questions for the opinion of the court are :

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof, as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937 and amendments thereto, or orders made by the said Motor Carrier Board ?

2. Is 13 George VI Chapter 47 (1949) intra vires of the legislature of the Province of New Brunswick ?

AND IT IS FURTHER ORDERED that after the said questions shall have been answered by the Appellate Division of the Supreme Court of New Brunswick, then the matter shall be referred back to the Supreme Court, Chancery Division, for further proceedings, subject to such rights of appeal as may be available to either of the parties hereto ; AND IT IS FURTHER ORDERED that the making of this order shall be without prejudice to the plaintiff's right to the relief claimed in its statement of claim ; 30

The questions submitted to the Court were enlarged by consent (Record p. 13) by adding thereto :

“ 1. Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof as above set forth prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937, and amendments thereto or orders made by the said Motor Carrier Board or by sections 6, 53 or other 40

provisions of The Motor Vehicle Act and amendments thereto or by regulation No. 13 or by any other regulation promulgated under the provisions of The Motor Vehicle Act ? ”

The Judges of the Appeal Division answered all questions in the affirmative (Record p. 18).

The sections of The Motor Carrier Act 1 George VI (1937) referred to read as follows :

- 10 “ 2. (1) (e) ‘ Motor Carrier ’ means a person, firm or company that operates or causes to be operated in the province a public motor bus or a public motor truck.
- (f) ‘ Public Motor Bus ’ means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.

- “ 4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points.”

- 20 “ 5. (3) In determining whether or not a license shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services.
- (4) If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a license be granted to the applicant in accordance with its finding upon proper security being furnished.
- 30 (5) No license shall be issued to a motor carrier unless there is filed with the Board—
 - (a) A liability insurance policy or bond satisfactory to the Board. . . .”

- “ 11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a license from the Board authorizing such operations and then only as specified in such license and subject to this Act and the Regulations.”

- 40 “ 12. (3) Upon the recommendation of the Board, the Governor in Council may order that the provisions of this Act shall not

apply to a motor vehicle used, or being used, as a public motor bus or a public motor truck for a specified purpose not otherwise exempt from such provisions.”

- “ 17. (1) The Board may from time to time make regulations fixing the schedules and service, rates, fares and charges of licensed motor carriers, prescribing forms, fixing the fees payable to the Province, requiring the filing of returns, reports and other data and generally make regulations concerning motor carriers and public motor buses and public motor trucks as the Board may deem necessary or expedient for carrying out the purposes of this Act and for the safety and convenience of the public . . .” 10

Section 19 provides penalties for violation of the Act by fine and in prisonment.

Sections of the Motor Vehicle Act 1934 and Regulations referred to read as follows :

- “ 6. (1) Except as provided in Sections 14, 16, 20 and 23 of this Act, and except in the case of any motor vehicle used exclusively as an ambulance or by a fire department for protection against fires, every owner of a motor vehicle, trailer or semi-trailer intended to be operated upon any highway in New Brunswick shall, before the same is so operated, apply to the Department for and obtain the registration thereof.” 20

- “ 53. No motor vehicle shall be used or operated upon a highway unless the owner shall have complied in all respects with the requirements of this Act, nor where such highway has been closed to motor traffic under the provisions of the Highway Act.”

Regulation 13 : “ No person operating a motor vehicle as a public carrier between fixed termini outside the Province shall operate such motor vehicle on the highways of the Province unless the operator is in possession of a permit issued by the Department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable.” 30

The Appellant, a resident of the State of Maine, U. S. A., is operating motor buses from Massachusetts through New Brunswick to Nova Scotia and claims to make use of the highways of New Brunswick and compete with the Respondent and other licensed motor carriers in New Brunswick by transporting passengers and goods between points wholly within New Brunswick without being subject to the laws of New Brunswick regulating traffic upon the highways of the Province and without paying any license fees required of other operators whose buses operate wholly within the Province. 40

The Appellant alleges that only the Parliament of Canada under the

B. N. A. Act can make laws affecting the Appellant's operations and that the above mentioned New Brunswick legislation is ultra vires by reason of subsection (10) (a) of Sec. 92 of The B. N. A. Act — which reads as follows :

“ 92. In each Province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :

(10) Local works and undertakings other than such as are of the following classes :

10 (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the Provinces, or extending beyond the limits of the Province.

(b) Lines of steamships between the Province, and any British or foreign country.

(c) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.”

A chronological summary of the amendments of the Motor Carrier Act is attached hereto as Appendix A.

20 The pertinent sections of the B. N. A. Act are attached hereto as Appendix B.

PART II—POINTS IN ISSUE ON THE APPEAL

There are no facts in dispute as the appellant admits in the defence (record p. 5) the allegations contained in the first six paragraphs of the statement of claim which are contained in the order of Hughes, J. dated January 7th, 1950.

The questions of law arising are :

30 1. Are the said sections of the Motor Carrier Act 1937 and the Motor Vehicle Act 1934 and Regulation 13 intra vires as being in pith and substance :

(a) Legislation providing for the safety of traffic upon the highways of New Brunswick under Sec. 91 (16) of the B. N. A. Act ; or

(b) Licensing legislation under Sec. 92 (9) of the B. N. A. Act, or

(c) Legislation affecting property and civil rights within the province under Sec. 92 (13) of the B. N. A. Act ?

2. Is the said legislation in pith and substance the regulation of trade and commerce under Sec. 91 (2) of the B. N. A. Act ?

40 3. Is the Appellants' operation of buses a “ local work or undertaking connecting the Province with any other or others of the provinces, or extending beyond the limits of the Province ” within the meaning of Sec. 92 (10) (a) of the B. N. A. Act ?

PART III—ARGUMENT

The question is, has the Legislature of the Province of New Brunswick jurisdiction to regulate the Appellant's operation as provided in the above quoted sections of the Motor Carrier Act and Motor Vehicle Act and Regulation 13 ?

Sec. 4 of the Motor Carrier Act empowers the Motor Carrier Board to "grant to any person . . . a license to operate . . . public motor buses . . . over specified routes or between specified points." In deciding whether to grant such a license the Board is required by Sec. 5 (3) "to give consideration to the *transportation service being furnished* by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being *permanent and continuous* and the "effect of such proposed service may have upon other transportation services." Under Sec. 5 (4) such a *license* may be granted if "the public convenience will be promoted by the establishment of the proposed service." 10

Sec. 5 (5) provides for the insurance of the safety of the public.

Sec. 11 prohibits unlicensed operations and Sec. 19 provides penalties for violations of the Act.

Sec. 6 (1) of the Motor Vehicle Act requires all the owners of all motor vehicles (with some exceptions) "intended to be operated upon any highway of New Brunswick" . . . "to obtain registration thereof." 20

The appellant's operations or intended operations include :

(a) Carriage of passengers *from points without New Brunswick to points within New Brunswick* and vice versa.

(b) Carriage of passengers from points *within New Brunswick to points within New Brunswick*.

(c) Carriage of passengers and goods from points without New Brunswick, through the Province of New Brunswick to points without New Brunswick.

It is only the operations included in clauses (a) and (b) that the respondent seeks to prevent. 30

It is respectfully submitted that the recognized method of inquiry is that adopted by the Privy Council in *Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96 at p. 109 ; 51 L.J.P.C. 11 at p. 17.

"The first question to be decided is whether the act impeached in the present appeal falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces ; for if it does not, it can be of no validity, and no other question would then arise. It is only when an act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether notwithstanding this 40

is so, the subject of the act does not also fall within one of the enumerated classes of subjects in Sect. 91, and whether the power of the Provincial Legislature is or is not thereby overborne.”

Richards, C. J. (Record p. 21) adopts this method and says :

10 “ The plaintiff says, first, that the object of The Motor Carrier Act is to regulate the transportation by motor vehicle of goods and passengers in the Province so as to ensure safe and efficient service, and to obtain by license fees a revenue to compensate the Province for the use of roads ; but the Act deals exclusively with traffic within the Province. I think the Act may be held to come within the following sub-sections of Section 92 :

- (9) Licenses in order to the raising of a revenue for provincial purposes ;
- (10) Local works and undertakings ;
- (13) Property and civil rights in the Province.”

See also *Reference re Debt Adjustment Act 1937 (Alta.) 1943 2 D.L.R. 1. 1943 1 A.E.R. 240.*

20 The “ true nature and character of the legislation ” — *Russell v. The Queen (1882) 7 A.C. 829 at pp. 839 840 51 L.J.P.C. 77 at 82* — and the “ pith and substance of the legislation ” — *Union Colliery Co. of B.C. v. Bryden (1899) A.C. 580 at p. 587 ; 68 L.J.P.C. 118 at 120* — is to provide a system of licensing and registration of motor vehicles, to regulate the safety of transportation on the public highways of the Province, and to deal with matters of property and civil rights.

HIGHWAY LEGISLATION — B. N. A. Act sec. 92 (13) & (16). Harrison J. (Record p. 30, line 26) pointed out :

30 “ The Motor Carrier Act and The Motor Vehicle Act regulate transportation by motor vehicles insofar as such vehicles make use of provincial highways. These highways are maintained at the expense of the Province and the Province has a right to regulate the use of them and impose charges for such use. For that reason and because the Province has control over the land within its borders, the regulation of vehicular traffic comes within Section 92 (16) and also 92 (13).”

The learned judge adopts the language of Duff C.J.C. and Rinfret J. in *Provincial Secretary of Prince Edward Island v. Egan (1941) 3 D.L.R. 305. at 321 ; 1941 S.C.R. 396 at 414.* In that case Rinfret J. said :

40 “ The provincial legislation in question in this case is, in pith and substance, within the classes of subjects assigned to the provincial Legislatures ; it is licensing legislation confined to the territory of Prince Edward Island.

The right of building highways and of operating them within a Province, whether under direct authority of the Government or by

means of independent companies or municipalities, is wholly within the purview of the Province (*O'Brien v. Allen*, (1900) 30 S.C.R. 340), and so is the right to provide for *the safety of circulation and traffic on such highways*. The aspect of that field is wholly provincial, both from the point of view of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous.”

Richards, C. J. adopts the same language. 10

In *Beauport v. Quebec Railway, Light and Power Company* in the Supreme Court of Canada (1945) 1 D.L.R. 145, Rinfret J. stated at page 152 :

“ The province has the control of its highways (*Provincial Secretary of Prince Edward Island v. Egan* (1941) 3 D.L.R. 305 1941 S.C.R. 396). It has to maintain them and to look after the safety and convenience of the public by regulating and controlling the traffic thereon.”

Also *Harrison J. in S.M.T. (Eastern) Ltd. v. Ruch* (1940) 1 D.L.R. 190 at p. 201 ; 14 M.P.R. 206 at p. 220 said :

“ There are numerous cases decided by the Privy Council upholding the authority of the province to regulate and license persons engaged in a particular trade within the province, notably the liquor license cases : *Hodge v. The Queen* (1883) 9 A.C. 117 : *A.G. Ontario v. A.G. Dominion* (1896) A.C. 348 : *A.G. Manitoba v. Manitoba License Holders Association* (1902) A.C. 73 ”. 20

Harrison J. (Record p. 34, line 20) said :

“ If the Province has the right to regulate motor vehicle traffic within its own borders that must include the right to prohibit such traffic when deemed necessary or expedient.

There are no provisions in the Acts under discussion which discriminate against the defendant. The acts have general application to all motor carriers.” 30

Richards, C. J. (Record p. 24, line 26) also said :

“ However, as set forth above, the legislation in question is entirely local in character. It relates to traffic within the Province. Only incidentally does it affect traffic passing through the Province. It is conceivable, of course, that motor-bus traffic might reach a stage where, as in the case of railways, Dominion legislation, with appropriate safeguards for provincial rights, would become necessary. In the meantime jurisdiction would remain in the Provinces.”

It is obvious that both the Motor Carrier Act and the Motor Vehicle Act 40

of New Brunswick are in pith and substance legislation respecting the highways of the provinces and the control and regulation of Motor Vehicle and Motor Carrier traffic on such highways.

LICENSING LEGISLATION -- B. N. A. Act Sec. 92 (2), (9), (13) and (16).

It has long been established that a Province can regulate a particular trade or business by a system of licensing. Following *Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96 Viscount Dunedin in re *The Insurance Act of Canada* 1932 A.C. 41 at p. 45 ; 101 L.J.P.C. 26 at p. 28.

10 “ It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business, to wit, insurance ; and nothing that the Province can do by legislation can interfere with the status so created ; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.”

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And at p. 52-53 he said :

“ But it has been already decided that this is not so ; that a Dominion license, so far as authorizing transactions of insurance business in a Province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.”

Also in *Shannon v. Lower Mainland Dairy Products Board* 1938 A.C. 708, 107 L.J.P.C. 105, Sec. 92 (2) and (9), (13), (16) were discussed. The Natural Products Marketing (B.C.) Act 1936 provided, by a system of licensing, for the control of particular businesses. The legislation was held to be intra vires. Lord Atkin at p. 721 said :

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“ The answer made was that the legislation was valid under the powers given to the Province to legislate as to the following classes of subjects (s. 92 (2)) ‘ direct taxation within the Province in order ‘ to the raising of a revenue for Provincial purposes ’ ; (s. 92 (9)) ‘ shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes ’ ; (s. 92 (13)) ‘ property and civil rights in the Province ’ ; or, finally (s. 92 (16)) matters of a merely local or private nature in the Province.’ Their Lordships do not consider it necessary to support this legislation by reference to s. 92 (2). Without deciding the matter either way, they can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported.

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If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licenses, must also be admissible. A license itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.”

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In that case reference was made to *Hodge v. The Queen* (1883) 9 A.C. 117, 53 L.J.P.C. 1 in which the right of Provincial Legislatures to regulate taverns by a licensing system was upheld.

The *Shannon* case was followed in *Home Oil Distributors Ltd. v. A.G. of B.C.* 1940 S.C.R. 444, 1940 2 D.L.R. 609. In that case a Board was appointed to regulate and control within the Province the coal and petroleum industries. Likewise the Motor Carrier Board of New Brunswick is appointed to regulate the Motor Carrier business within the province. Crocket J. at p. 448 said :

“ Neither can the fact that the legislation was calculated to compel all international or external corporations desiring and authorized to do business within the limits of the Province to alter their methods and policy regarding the allocation of profits as between the gasoline and fuel oil branches of their so-called integrated industry. If they desire to carry on their business in the Province of British Columbia, they must comply with provincial laws in common with all provincial and independent dealers in the same commodities. In my opinion the judgment of the Judicial Committee in *Shannon v. Lower Mainland Dairy Products Board* is in all essential points indistinguishable from and decisive of the present appeal.”

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The Court of Appeal of Saskatchewan in *Cherry v. The King* 1938 1 D.L.R. 156 held that a Province could regulate the supply, etc., of milk by a licensing system and impose a tax to defray the costs of enforcing the regulations. Martin J. A. at p. 161 in delivering the judgment of the Court referred to the remarks of Duff, C.J.C., in *Reference re Natural Products Marketing Act 1936* 3 D.L.R. 622 at p. 630-1 to the effect that if the Dominion had the power to enact these provisions then “ the Provinces are destitute of the power to regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities.” Martin J. A. went on to say — “ and the licenses provided are ancillary to and probably very necessary to the effective administration of the Act,” following *Hodge v. The Queen* 9 A.C. 117. The Dominion Parliament cannot impose such license fees upon a particular trade : *A. G. Canada v. A.G. Alberta*, 1916 26 D.L.R. 288, 1916 1 A.C. 583. See also *Motor Car Supply Co. of Canada Ltd. v. A.G. Alberta* 1939 3 D.L.R. 660 : *Rea v. Hayes Crescent Dairy Ltd.* 1938 4 D.L.R. 223.

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PROPERTY AND CIVIL RIGHTS—Sec. 19 (13)

In the *Shannon* case (supra) Lord Atkin at p. 718-719 said :

10 “ It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the British North America Act . . . It was suggested that ‘ transportation ’ would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that ‘ transportation ’ is confined to the passage of goods whose transport begins within the Province to a destination also within the Province. It is now well settled that the enumeration in s. 91 of ‘ the regulation of trade and commerce ’ as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province.”

Also in *Abitibi Power Co. v. Montreal Trust Co.* 1943 2 A.E.R. 311 at p. 315, 112 L.J.P.C. 49 at p. 54, Lord Atkin said :

20 “ There appears to be no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience.”

30 The legislation in question prima facie falls within Sec. 92 as legislation respecting provincial highways, or licensing or the regulation of a particular trade or business carried on in the Province.

TRADE AND COMMERCE—Sec. 91 (2) .

The Judicial Committee of the Privy Council in the *Natural Products Marketing Act Case* (1937) A.C. 377 emphatically stated, at p. 387 that :

“ But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the province.”

40 In this latter case a Dominion Act in addition to dealing with foreign and interprovincial trade, also covered, in terms not severable, *transactions completed in a province*, and was held ultra vires as a whole. In the decision of the Supreme Court of Canada (1936) S.C.R. 398, affirmed by the Judicial Committee, Duff J. said at page 410 :

62 “ It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is

used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense ; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.”

And at page 412 :

“ The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King v. Eastern Terminal Elevators* (1925) S.C.R. 434, 1925 3 D.L.R. 1).

It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in *Parson's case*.”

This proposition is strongly supported by the *1916 Insurance Case (A.G. Canada v. A.G. Alberta)* (1916) 26 D.L.R. 288, 1916 1 A.C. 588 where Viscount Haldane states at p. 292 :

“ Their Lordships think that, as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.”

As a result, unless the legislation in question can be held to be legislation in regard to some interprovincial regulation of trade and commerce the jurisdiction lies within the province. The *Motor Carrier Act* is legislation in regard to regulations of the business of motor carriers insofar as that business is carried on in this province and does not purport to regulate it outside of the province.

Richards, C.J. (Record p. 24) properly held that the appellant could not bring his buses within Sec. 92.

LOCAL WORK OR UNDERTAKING—Sec. 92 (10) (a)

The appellant, in the Appeal Division of the Supreme Court of New Brunswick submitted that the operation of his buses on a schedule from

Massachusetts to Nova Scotia through New Brunswick without any local offices, garages or plant, constituted a "work or undertaking" extending beyond the limits of New Brunswick under Sec. 92 (10) (a) and relied upon such cases as :

C. P. R. v. A. G. for B. C. 1950 1 D. L. R. 721 ;

Montreal v. Montreal Street Railway Co. 1912 1 D.L.R. 681 ; 1912 A.C. 333 ;

Re Regulation, etc., of Radio Communication ; A. G. Quebec v. A. G. Canada (1932)

—2 D.L.R. 81 ; 1932 A.C. 304 ; 101 L.J.P.C. 94 ;

10 *Toronto Corporation v. Bell Telephone Co. of Canada* 1905 74 L.J.P.C. 22 ; 1905 A.C. 52 ;

Luscar Colliers Ltd. v. McDonald 1928 97 L.J.P.C. 21 ; 1927 A.C. 925 ;

Beauport v. Quebec Railway, Light & Power Co. (1945) 1 D.L.R. 145.

The learned judges in the Appeal Division dealt with this question as follows :

Harrison, J. (Record p. 31, line 31) said :

20 " Dealing with the first argument : Sub-section (10) of Sec. 92 deals entirely with 'local works and undertakings'. The grammatical reading of sub-section (10) must imply the words 'local works and undertakings' after the word 'such' in the first line. Those works and undertakings which are excepted from the provincial jurisdiction are 'local works and undertakings' which connect the province with any other or extend beyond the limits of the province.

'Local' means local within the province of New Brunswick, the province with which we are dealing. The defendant has no office or location of any kind in New Brunswick : and his timetable annexed to the Judge's Order, shows his only office to be at Lewiston, Maine. The defendant's undertaking is local in the State of Maine ; it is not local in New Brunswick."

Hughes, J., concurred with Harrison, J.

30 Richards, C.J. (Record p. 20, line 40) said :

40 " But there is, I think a definite answer to the contention of the defendant on this point. The *ejusdem generis* rule must be applied to the principal clause of sub-section (10) and the words 'local works and undertakings' must be inserted after the word 'such', making the principal clause to read : 'Local works and undertakings other than such *local works and undertakings* as are of the following classes.' The result is that the works and undertakings referred to in clause(a) would also be local works and undertakings but such as connected the province (in which it has locus) with another province or provinces, or extending beyond the limits of the province. Those undertakings which were entirely local (within the Province) would come within provincial jurisdiction ; those that extended beyond the province would, by virtue of section 91 (29), be transferred to Dominion jurisdiction, but they are all works and undertakings

which have their origin and situs within the province. That is an essential element. A consideration of clauses (b) and (c) supports this conclusion.

It follows therefore that the defendant does not come within the exceptions under (10) (a) of Section 92. The defendant has no office, no place of business no organization no situs in the province. His office or place of business is at Lewiston, in the State of Maine. How can it be said that his undertaking extends beyond the limits of the province ? It extends from the State of Maine into the Province of New Brunswick.”

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It is respectfully submitted that the learned judges of the Appeal Division could have gone further and also held that : (a) A mere collection of busses is not a “ work or undertaking ” any more than a chain of hotels which the Privy Council denied (sic) in *C. P. R. v. A. G. of B. C. 1950, 1 D. L. R. 721* : and (b) if a collection of busses is not a “ work of undertaking ” (local or otherwise) there is no subsection of Sec. 91 within which its regulation is included.

Keeping in mind that the Appellant has no office, no place of business, no permanent staff organization or domicile in New Brunswick it is obvious that the word “ local ” cannot apply to him. Can it be said that he has a “ work or undertaking ” at all ? In *C. P. R. v. A. G. of B. C.* (Supra) Lord Reid at p. 733 pointed out that a chain of hotels regarded as separate from a railway cannot come under the words “ other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province ” because the hotels considered separately do not connect one Province with another. Likewise busses which are far less permanent and which may all be in the State of Maine at one time cannot be regarded as connecting the Province of New Brunswick with Nova Scotia or extending beyond its limits.

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It clearly differs from a Railway line a radio broadcasting system in Canada with permanent towers, transmitters, receiving sets and an organization, or from a permanent telegraph or telephone system. These have permanent links between provinces and continuously extend beyond them. In the case of *Beauport v Quebec Railway, Light and Power Co. 1945 1 D. L. R. 145* the only reason a bus system, which was operated as a feeder for the railway, was considered a “ work or undertaking ” was because it was declared to be so by the Parliament of Canada under Subsection (10) (c) of Sec. 92. There is no such declaration in the case at bar. The bus line in the Beauport case could not be severed from the railway line and formed part of an existing transportation organization.

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The only real work or undertaking is the highway which is constructed and maintained by the Province. The funds for such maintenance are procured by direct taxation in a number of ways, i.e. gasoline taxes, motor vehicle license fees, motor carrier license fees, sales taxes, etc. Likewise the Crown lands of the Province are operated and maintained under a licensing system ; fisheries and game preservation are controlled by a licensing system under

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which a non-resident is charged more than a resident of the Province. Non-residents are required to pay all such license fees. Municipalities in New Brunswick under R. S. N. B. 1927 C. 178, Towns R. S. N. B. 1927 C. 179, and Villages under R. S. N. B. 1927 C. 180 were empowered to issue licenses for a variety of purposes and to collect fees for such licenses. All were authorized to license non-residents who carry on certain trades within such municipal corporations.

10 Surely license fees may be collected by the Provinces for the purposes of controlling traffic on their highways and of raising revenue to maintain such highways. Is the Gasoline Tax Act (Acts of Assembly 1935 C. 17) invalid because it imposes a tax upon the appellant respecting the gasoline used in the Appellant's busses? Obviously not. Even if a few busses, operating on a schedule, constitute a "work or undertaking" the legislation in question is not in relation to that particular undertaking, but is general legislation in relation to all motor vehicles and motor carriers and only incidentally affects the Appellant's busses.

20 The *Radio Case* 1932 2 D.L.R. 81, 1932 A.C. 304 and the *Aviation Case* 1932 1 D.L.R. 58, 1932 A.C. 54, do not support the Appellant's argument, because, as pointed out by Viscount Dunedin in the Radio case at p. 84 there was an International Convention to which Canada was a party and with respect to which only the Canadian Parliament could legislate. Radio was likened to Telegraphs and treated as ejusdem generis under ss. (10) (a) of Sec. 92. A bus system is not comparable with railways and other subjects enumerated.

Assuming that the Appellant's busses are a work or undertaking, the highway is the work or undertaking which is being controlled and regulated by such legislation. There is no question as to the rates or tolls being charged by the Appellant as in the Beauport case (supra).

30 Cannot the Province legislate to control the use of its highways by pedestrians, cyclists, motorists and operators of vehicles of all kinds? The use of its highways by large vehicles may destroy the road surface, endanger life and property and by competing with other means of transportation have a serious effect upon property and civil rights. It is revolutionary to suggest that the Provinces have no right to control such matters. From the moment that a foreign vehicle enters New Brunswick it is subject to all general laws of that Province — both common law and statute. Likewise persons are subject to such laws.

40 The alleged undertaking of the appellant is wholly dependent upon the highway, which must be maintained and properly controlled in order that there may be vehicular traffic upon it. Suppose no highway existed or that it became impassable, how would the appellant conduct his alleged undertaking? It would cease to exist. The operation of a bus service is obviously subject to the proper management, supervision and control of the highway by Provincial authority. In that respect a bus service differs radically from radio communication, aeronautics, telephones and telegraphs. They are independent. From a practical point of view the appellant's undertaking

depends entirely upon the highway. The size and weight of busses may destroy bridges or the road surface. The Provincial authorities may not make repairs, and cannot be compelled to do so. It is not within the power of the appellant to repair the highway, even if he wished to do so, as it is Crown property. Is the bus service then “*connecting the Province with any other*”? The whole undertaking (if any) ceases to exist, and cannot be restored until the highway is made passable.

One may glibly describe the appellant’s few busses operating on a schedule as “an interprovincial undertaking” but without a highway on which to operate there is no service of any kind.

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If the Appellants’ argument were correct unlicensed persons in every border town or city in the U.S.A. could operate taxis and busses in competition with licensed vehicles in the Province. The Dominion Parliament cannot regulate such a trade or business by a licensing system : *Citizens Insurance Co. v Parsons (1881) 7 A.C. 98, 51 L.J.P.C. 11*. The Provincial Legislatures have always done so.

In *Toronto Corporation v Bell Telephone Co. of Canada 1905 A.C. 52, 74 L.J.P.C. 22*, a telephone line was compared to a telegraph company’s undertaking which is obviously similar.

In the Beauport case (*supra*) the railway company was incorporated by a statute of the Parliament of Canada in 1895 and in such statute was “declared to be a work for the general advantage of Canada,” which clearly brought the whole undertaking within Sec. 92 (10) (c) of the B. N. A. Act. An amending Act of the Parliament of Canada in 1939 empowered the railway company “to operate autobusses, trolley busses and all kinds of public conveyances . . . in, over and throughout any of the territory in which it is now authorized to operate.” The question arising was whether the Board of Transport Commissioners of Canada or the Quebec Public Service Board had authority to fix the rates for the carriage of passengers in the company’s busses.

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Rinfret, J. (1945 1 D.L.R. at p. 151-152) said :

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“Accordingly, I am of opinion that the autobusses of the company can properly be brought and integrated into the undertaking which was declared to be for the general advantage of Canada. It would appear that it was the intention of Parliament that newly acquired works would fall within the declaration.”

“The Province has the control of its highways (Provincial Secretary of Prince Edward Island v Egan (1941), 3 D. L. R. 305, 1941, S. C. R. 396, 76 Can. C.C. 227). It has to maintain them and to look after the safety and convenience of the public by regulating and controlling the traffic thereon. An instance of the exercise of that control by the Province might be the fact that the Railway Company held a permit from the Quebec Public Service Board.”

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Hudson J. at p. 159-160 also said :

“ The right to license, regulate and control traffic on streets and highways within a province lies with the Legislature of such Province. Such right has been actively exercised by the Provinces since Confederation and has never been seriously challenged. It has been recognized by provincial Courts on numerous occasions, and recently by this Court in the case of Provincial Secretary of Prince Edward Island v. Egan, (1941), 3 D.L.R. 305, 1941 S.C.R. 396, 76 Can. C.C. 227.”

10 The case at bar is clearly distinguishable in that (a) the bus service is not integrated into any work or undertaking : (b) the Appellant is not a corporation operating under powers conferred by the Parliament of Canada : and (c) there has been no declaration by the Parliament of Canada bringing the appellants' operation within Sec. 92 (10) (c) of the B. N. A. Act.

POSSIBLE CONFLICTS of Sec. 91 and Sec. 92 :

Harrison J. (Record p. 35, line 30) said :

20 “ Those cases do not apply to the legislation before us. This legislation deals primarily with motor vehicle traffic within the Province. In pith and substance these Acts come within provincial powers. Incidentally they affect through traffic that is traffic passing through the Province to outside points. That is an *ancillary matter and when the Parliament of Canada legislates regarding such traffic such legislation will prevail over the provincial acts.*”

Richards, C. J. (Record p. 22) refers to *A. G. for Canada v. A. G. for B. C.* (1930) 99 L. J. P. C. 20, 1930 A.C. 111 and *A. G. for Alberta v. A. G. for Canada* (1943) 1 A.E.R. 240, 1943 A.C. 356, and held that in pith and substance the legislation does not come within Sec. 91.

30 The Motor Carrier Act 1937 with amendments is not legislation in relation to the subject matter as an interprovincial undertaking, it is legislation in relation to the convenience of the public in the use of provincial highways, or as stated by Harrison J. in the *Ruch Case* (supra) at p. 199 :

“ It (The Motor Carrier Act 1937) concerns the use of motor vehicles and of the provincial highways and the rights of passengers and shippers of goods to be protected in their persons and property while within the province.”

That is, the legislation touches the subject matter from the aspect of property and civil rights. The following authorities show that any subject matter may be legislated upon in several different aspects, and it is the aspect upon which the legislation is based that determines the validity of the legislation.

In the *Citizens Insurance Company v. Parsons* (1881) 7 A.C. 96, 51 L.J.P.C. 11 the Judicial Committee stated :

“ It could not have been the intention that a conflict should exist ; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted and, where necessary, modified, by that of the other.”

This so called “ aspect principle ” was clearly stated by Viscount Haldane in the *Insurance Case* (1916) 26 D.L.R. 288, 1916 A.C. 588. In dealing with the case of *Russell v. The Queen* (1882) 7 A.C. 829, 51 L.J.P.C. 77, his Lordship states, at page 291 :

“ The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that *subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within the Dominion legislative jurisdiction.*”

The fallacy to be avoided is well explained by Duff J. in *Goldseal Limited v. Atty-General for Alberta* (1921) 62 S.C.R. 424 at p. 460 as follows :

“ The fallacy lies in failing to distinguish between legislation *affecting* civil rights and legislation ‘ *in relation to* ’ civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if, in its true character, it is not legislation ‘ *in relation to* ’ the subject matter of ‘ *property and civil rights* ’ within the provinces, within the meaning of sect. 92 of the British North America Act, then that is no objection, although it be passed in exercise of the residuary authority conferred by the introductory clause.”

These authorities indicate that a subject matter may be legislated upon from several different aspects. It is submitted that the Motor Carrier Act and Motor Vehicle Act are legislation *in relation to* property and civil rights, licensing and the use of provincial highways.

Even if the buses of the Appellant constitute an interprovincial or international undertaking within the meaning of sec. 92, 10 (a) of the B. N. A. Act, they are subject to the Motor Carrier Act and Motor Vehicle Act and amendments, as both are laws of general application. The province has undoubted jurisdiction to pass laws of general application affecting all persons or corporations in the province, including interprovincial and international undertakings.

It has been held in numerous cases that Dominion incorporated companies as well as Dominion railroads, must abide by the laws of the province in which their operations are carried on. As to railways, an example is the case of *C. P. R. v. Notre Dame de Bonsecours* (1899) A.C. 367, 68 L.J.C.P. 54, wherein it was held by the Judicial Committee of the Privy Council that provincial

legislation upon the subject matter of ditches on either side of a railway would be valid if the legislation pertained to the subject matter in its aspect as legislation regarding health, and that the railway was subject thereto. Lord Watson says at p. 372 :

10 “ The British North America Act, whilst it gives the legislative control of the appellants’ railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinions of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company ; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.”

In the case of *Lymburn v. Mayland* (1932) 2 *D.L.R.* 6, 1932 A.C. 318, their Lordships stated at page 9 :

20 “ A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and may find its special activities completely paralyzed as by legislation against drink traffic or by the laws as to holding land.”

It is therefore respectfully submitted that even if the defendant’s buses constitute an interprovincial undertaking and is thus within Dominion jurisdiction it is still liable to abide by the provincial laws of general application. The Motor Carrier Act and Motor Vehicle Act are provincial laws of general application.

30 The mere fact that the legislation in question might result in the prohibition of an interprovincial bus line’s activities within the province could only be ground for holding the legislation to be *ultra vires* if the legislation is not of general application, but is directed specifically to the subject matter concerned. This was the case in the *Alberta Taxation Case*, (*A. G. Alta. v. A. G. Can.*) (1939) A.C. 117, 108 L.J.P.C. 1, wherein it was held that certain Alberta taxation legislation was *ultra vires* because it was directed only at banks and was of a particularly discriminatory nature, and was not of general application.

40 The Motor Carrier Act and the Motor Vehicle Act are Statutes of general application and are not in any way discriminatory against interprovincial bus lines or any other works or undertakings within the exclusive jurisdiction of the Dominion. It therefore follows that since it is legislation pertaining to the subject matter of motor carriers from the aspect of property and civil rights, the legislation in question is within Provincial jurisdiction. The

language of Crocket J. in *Home Oil Distributors Ltd. v A. G. of B. C.* 1940 S.C.R. 444, 1940 2 D.L.R. 609, at p. 448 is appropriate to the case at bar.

THE "UNOCCUPIED FIELD" RULE

Assuming that the subject matter of the legislation in question, insofar as it affects the defendant's operations, may be within Dominion jurisdiction, the legislation is still valid because the Dominion has not exercised its powers in respect thereto, the legislation in question being prima facie within provincial jurisdiction.

In *Atty-Gen. of Ontario v Atty-Gen. of Canada* (1894) A.C. 189, 63 L.J.P.C. 59, the Privy Council considered the validity of an Ontario act relating to assignments and preferences by insolvent persons which postponed judgments and executions, not completely executed by payment, to an assignment for the benefit of creditors under the act. It was held by their lordships that the legislation in question was prima facie within "property and civil rights". It also was considered that the legislation was ancillary to legislation under the heading "bankruptcy and insolvency" in sec. 91. Their lordships' conclusion was that since the legislation was prima facie within provincial jurisdiction, and the Dominion Parliament not having exercised its power to legislate on that particular topic, the provincial legislation was valid. 10

In *Grand Trunk Railway of Canada v The Atty-Gen. of Canada* (1907) 20 A.C. 65, 76 L.J.P.C. 23, their lordships stated at page 68 :

"But a comparison of two cases decided in the year 1894 viz. *Atty-Gen. of Ontario v Atty-Gen. of Canada* (1894) A.C. 189 and *Tennant v Union Bank* (1894) A.C. 31, seems to establish these two propositions : first, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear ; and, secondly that if the field is not clear, and in such a domain the two legislations meet then the Dominion legislation must prevail."

This statement was confirmed in *Atty-Gen. for Canada v Atty-Gen. for B. C.* (1930) A.C. 111 99 L.J.P.C. 20. 30

In reference re the *Debt Adjustments Act of Alberta* (1943) 2 D.L.R. 1, 1943 1 A.E.R. 240, Viscount Maugham states the rule as follows at page 9 :

"There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since the year 1894 it has been a settled proposition that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in sec. 91 and is properly within one of the subjects enumerated in sec. 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation." 40

As Richards, C.J., (Record p. 23) says in dealing with *A.G. for Alberta v A. G. for Canada 1943 A. C. 356*, 1943 1 A. E. R. 240, to render Provincial legislation ultra vires where the field is unoccupied the subject-matter in pith and substance must be within Sec. 91. The *Egan* case (supra) clearly indicates that legislation such as the Motor Vehicle Act and Motor Carrier Act is in pith and substance within Sec. 92. Therefore as the field is unoccupied by the Parliament of Canada the Provincial legislation is valid.

As stated by Lord Reid in *C. P. R. v A. G. of B. C. 1950 1 D. L. R. 721* at p. 728 :

10 “ But their Lordships can find neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly falls within the enumerated heads in s. 92 and cannot be brought within any of the enumerated heads in s. 91 merely because the activities of one of the parties concerned in the matter have created a unified system which is widespread and important in the Dominion.”

20 The appellant must show that the Dominion Parliament has already occupied the field of legislation covered by the Motor Carrier Act and the Motor Vehicle Act in order to succeed in this action. This is made abundantly clear from the decision of the Privy Council in *Forbes v Attorney-General of Manitoba 1937 A. C. 260 at p. 273-274* 106 L.J.P.C. 17.

If the Motor Vehicle Act and the Motor Carrier Act are intra vires obviously Regulation 13 is also intra vires. Therefore it is respectfully submitted that the operations or proposed operations of the defendants are within the jurisdiction of the legislature of the Province of New Brunswick while his motor busses operate within the territorial limits of the said province. In conclusion it is respectfully submitted that the answers to the questions given by the Appeal Division of the Supreme Court of New Brunswick are correct and this appeal should be dismissed with costs.

30 DATED this 31st day of August, A.D. 1950.

C. F. INCHES
A. B. GILBERT
Of Counsel for Respondent.

APPENDIX “ A ”

R. S. N. B. 1927 Chapter 27 :

2. In this Chapter unless the context otherwise requires :
 - (d) “ Motor Carrier ” means a person, firm, corporation, lessee, trustee or receiver operating a motor vehicle, with or without a trailer

or trailers attached, upon a public highway for the transportation of persons or property, for compensation, between fixed termini or over a regular route, even though there may be periodic or irregular departures and travel from, between or over the said fixed termini or route.

(e) "Motor Vehicle" means an automobile, automobile truck, motor bus or any other self propelled vehicle operated for compensation by a motor carrier and not operated or driven on fixed rails or tracks.

4. (1) The Board may specify the routes over which a motor carrier may operate ; fix the maximum or minimum or maximum and minimum rates, fares and charges on routes over which a motor carrier proposes to operate ; regulate and supervise the schedules and service of motor carriers and the method of operating motor vehicles ; require the filing of returns, reports and any other data by motor carriers, and supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the travelling public. 10

(2) The Board may prescribe rules and regulations concerning motor carriers and motor vehicles as it may deem necessary for the safety of the public.

21 GEORGE V, 1931, Chapter 24 :

Section 2 (c) 20

By section 2, the following was substituted for 2 (e) as above set forth :

"The term 'motor vehicle' means any motor vehicle as defined by The Motor Vehicle Act."

The Motor Vehicle Act, Chapter 26, Section 2 (i) defines motor vehicle as follows :

"Motor vehicle includes all vehicles propelled by power, other than muscular power, except such vehicles as run only on rails or trucks and road rollers."

I GEORGE VI, 1937, Chapter 43 :

This Act repeals R. S. N. B. 1927, Chapter 27 and the Amending Acts thereto. 30

2. (1) In this Act unless the context otherwise requires :

(e) "Motor Carrier" means a person, firm or company that operates or causes to be operated in the province a public motor bus or a public motor truck.

(f) "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares to, from or in any part of the province.

(g) "Public Motor Truck" means a motor vehicle, with or without a trailer, carrying or used to carry goods or chattels for hire to, from or in any part of the Province.

4. The Board may grant to any person firm or company a license to operate or cause to be operated within the province public motor buses or public motor trucks over specified routes and between specified points.

3 GEORGE VI, 1939, Chapter 37 :

10 1. Paragraph (f) of Sub-section (1) of Section 2 of Chapter 43 of 1 George VI, (1937) is hereby amended by striking out all the words after the word "fares" in the third line thereof and substituting therefor the words "from any point within the Province to a destination also within the Province."

2. Paragraph (g) of Sub-section (1) of Section 2 of the said Chapter is hereby amended by striking out all the words after the word "hire" in the third line thereof and substituting therefor the words "from any point within the Province to a destination also within the Province."

3. Section 4 of the said Chapter is hereby amended by striking out the words "within the Province" in the second and third lines thereof and adding the said words at the end of the said section.

13 GEORGE VI, 1949, Chapter 47 :

20 1. Clause (f) of Sub-section (1) of Section 2 of Chapter 43 of 1 George VI, (1937) The Motor Carrier Act, 1937, as amended by Chapter 37 of 3 George VI, (1939) is hereby further amended by striking out everything in the said clause after the word "fares" in the third line thereof.

2. Clause (g) of Sub-section (1) of Section 2 of the said Chapter, as amended by Chapter 37 of 3 George VI, (1939) is hereby further amended by striking out everything in the said clause after the word "hire" in the third line thereof.

30 3. Section 4 of the said Chapter, as amended by Chapter 37 of 3 George VI, (1939) is hereby further amended by striking out the word "and" in the fourth line thereof and substituting therefor the word "or," and by striking out the words "within the province" being the last three words of the said section.

SUMMARY :

1937

2. (1) (f) "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry passengers at separate fares to, from or in any part of the province.

4. The Board may grant to any person, firm or company a license to operate or cause to be operated within the province public motor buses or public motor trucks over specified routes and between specified points.

1939

2. (1) (f) "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares from any point within the Province to a destination also within the Province.

4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the Province. 10

1949

2. (1) (f) "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.

4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses and public motor trucks over specified routes and between specified points.

APPENDIX " B "

The British North America Act, 1867 — Sec. 92 :

" In each Province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say — 20

(1) The amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor.

(2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

(3) The borrowing of money on the sole credit of the Province.

(4) The establishment and tenure of Provincial offices, and the appointment and payment of Provincial officers. 30

(5) The management and sale of public lands belonging to the Province, and of the timber and wood thereon.

(6) The establishment, maintenance and management of public and reformatory prisons, in and for the Province.

(7) The establishment, maintenance and management of hospitals, asylums, charities, eleemosynary institutions, in and for the Province, other than marine hospitals.