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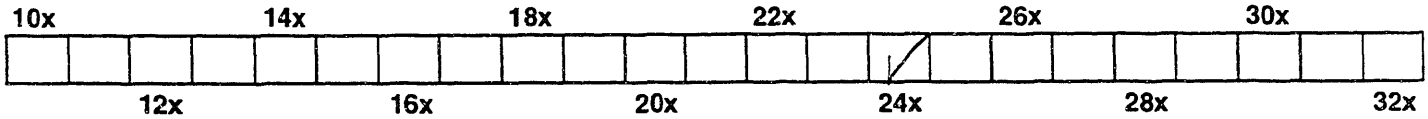

In the Supreme Court of Canada
In Re Prohibition
Filed by the Counsel for the
Distillers & Brewers Assn

REPORT

OF

THE PROCEEDINGS

BEFORE THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON THE HEARING OF

The Petition

OF THE

GOVERNOR-GENERAL OF CANADA

IN RELATION TO THE

DOMINION LIQUOR LICENSE ACTS

OF

1883 AND 1884

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL:
Wednesday, November 11th, 1885.

PRESENT:

The RIGHT HONOURABLE THE LORD CHANCELLOR.
The RIGHT HONOURABLE LORD FITZGERALD.
The RIGHT HONOURABLE LORD MONKSWELL.
The RIGHT HONOURABLE LORD HOBHOUSE.
The RIGHT HONOURABLE SIR MONTAGUE E. SMITH.
The RIGHT HONOURABLE SIR BARNES PEACOCK.
The RIGHT HONOURABLE SIR RICHARD COUCH.

IN THE MATTER of the PETITION of HIS EXCELLENCY the GOVERNOR-GENERAL of CANADA on the Liquor License Acts of 1883 and 1884.

(FROM CANADA.)

Sir FARRER HERSCHELL Q.C., M.P., Mr. G. W. BURBIDGE, Q.C. (of the Canadian Bar), and Mr. JEUNE (instructed by Messrs. BOMPAS, BISCHOFF, DODGSON, & COXE), appeared as Counsel for the Canadian Government.

Mr. HORACE DAVEY, Q.C., M.P., The Honble. C. F. FRASER, Q.C. (of the Ontario Bar), The Honble. J. L. RUGGLES CHURCH, Q.C. (of the Quebec Bar), (instructed by Messrs. FRESHFIELDS & WILLIAMS), and Mr. HALDANE, appeared as Counsel for the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick.

[Transcript from the Shorthand Notes of Messrs. MARTEN & MEREDITH.]

Sir FARRER HERSCHELL: My Lords, I appear in this case on behalf of the Governor-General of Canada, the case being a reference to your Lordships to determine whether or not two Acts passed by the Dominion Parliament of Canada—the

Liquor License Act of 1883, and an Act of 1884, amending that Act, were *intra vires* the powers of the Dominion Parliament. The Dominion Parliament had passed, in the year 1878, an Act called the Canada Temperance Act, which was also impeached as not being *intra vires*. That came before your Lordships for decision ; and your Lordships decided that it was within the powers of the Dominion Parliament. I shall presently, of course, have to call attention to that Act and to that decision. Following upon that the Liquor License Act of 1883 was passed. The power of the Dominion Parliament to pass that Act was questioned, especially by reason of a subsequent decision of your Lordships with regard to an Act passed by one of the Provincial Legislatures ; although in that latter case, as your Lordships will see, the previous decision, which held the Canada Temperance Act to be within the Dominion powers, was not only not intended to be departed from, but was expressly re-affirmed. In consequence of the question that was raised, the Liquor License Act of 1883 and the Amending Act of 1884 were suspended in their operation until it should have been determined by the Supreme Court whether they were or were not within the powers of the Dominion Parliament ; and an Act was passed enabling the matter to be referred on the petition of the Governor-General, by the advice of his Privy Council, to the Supreme Court ; and with the further provision that, if Her Majesty should see fit, it might be referred to your Lordships for final determination. The Governor-General in Council accordingly petitioned the Supreme Court of Canada. The matter was argued at length before that Court, and the Supreme Court held that the Acts were *ultra vires*.

Sir M. E. SMITH : With some exceptions.

Sir FARRER HERSCHELL : Mr. Justice Henry held they were *ultra vires* altogether ; the other Judges with the exception of two sets of provisions, the one set relating to wholesale licenses and the other to vessel licenses. I shall have to deal with those exceptions by and bye. It is sufficient for the present purpose merely to state them.

Now, I think the most convenient course will be, inasmuch as the Canada Temperance Act, 1878, was the commencement of this Temperance Legislation and inasmuch as that Act has been held to be within the Dominion powers, first, to call attention shortly to the provisions of the Canada Temperance Act, 1878 ; then to point out what are the provisions of the Acts with which your Lordships have to deal—I think I may almost say "the "Act"—because I do not think it will be disputed that if the

Act of 1883 is within the Dominion powers the amending Act of 1884 is; and if the original Act is not, I certainly should not contend that the later Act is. Therefore, I think probably it will be sufficient to dwell upon the Liquor License Act, 1883.

Now, my Lords, the first of these Temperance Acts was the Canada Temperance Act, 1878. The preamble is as follows:— "Whereas it is very desirable to promote temperance in the "Dominion, and that there should be uniform legislation in all "the Provinces respecting the traffic in intoxicating liquors: "Therefore Her Majesty, by and with the advice and consent "of the Senate and House of Commons of Canada, enacts as "follows." Now, my Lords, I do not think that it is necessary for me to read at length the provisions of this Act, which are very long and elaborate. I think it will be sufficient to state the effect and purport of them. The effect was to enable localities throughout Canada, in any part where they pleased, to prohibit the sale of intoxicating liquors. It extended to the whole Dominion; but it empowered the localities in any part of the Dominion to prohibit the sale of intoxicating liquors, subject to certain exceptions and limitations, where they might be required for the purpose of medicine, for Sacramental purposes, and other purposes.

Lord HOBHOUSE: When you say "localities," was it the local legislatures, or the municipal powers?

Sir FARRER HERSCHELL: No; it was the cities and counties.

Sir M. E. SMITH: The Act was to be brought into force in counties, upon the application of the counties?

Sir FARRER HERSCHELL: Yes; and in the cities, by the cities, by a bare majority.

Lord MONKSWELL: In the cities by the Municipal Authorities?

Sir FARRER HERSCHELL: No, it is not Municipal Bodies. It is by a vote of the city, or of the county; a vote taken for the purpose and upon the subject by the same persons as would vote for a Member of Parliament. It did not enable the Municipal Bodies to do it, but an actual vote was to be taken on the subject in any county or city where it was desired to put the Act in force.

Sir RICHARD COUCH: The localities were counties or cities?

Sir FARRER HERSCHELL: Yes; and the will of the locality was to be expressed by those who could vote in the election of a Member of Parliament.

Lord MONKSWELL: What is the qualification for a member?

Sir FARRER HERSCHELL : It differs in the different provinces. Down to the present time they have adopted for each province its own previous qualification. I think, my Lords, for the present purpose that will be a sufficient indication of the effect and tenor of the Canada Temperance Act. I may have to refer to some of its provisions hereafter, but I am not now going into detail. I want to put your Lordships in position of what is the point to be decided in the light of the Legislation down to the present time.

Sir BARNES PEACOCK : When adopted in that Act the same provisions were applied to each locality that adopted it ?

Sir FARRER HERSCHELL : Yes ; the provisions were provisions for the whole of Canada, and the power was a power in the county or city in any part of Canada, no matter what province it was in, to adopt the Act. When adopted, then the enactments contained in the Act came into operation in that place —the whole Act *en bloc.*

Sir BARNES PEACOCK : And would be the same in one locality as in another in those that adopted it ?

Sir FARRER HERSCHELL : Yes. Those that did not adopt it were left outside it altogether. Those that adopted it were in a uniform position. Of course it might be adopted throughout in one province and not at all in another, or partly in one province and partly in another. It had nothing to do with the provinces as such. It had only to do with the particular localities within each and all of the provinces, enabling them by a vote to bring in force certain enactments of the Dominion Legislature. Well, now, my Lords, after having called attention to the provisions of the Act that your Lordships have now to consider, I will call attention to the case in which the validity of the Canada Temperance Act came into discussion, because I think that will be a good starting-point for the consideration of the present case. Now I come to the Liquor Licensing Act, 1883. The preamble is : " Whereas it is desirable to " regulate the traffic in the sale of intoxicating liquors, and it is " expedient that the law respecting the same should be uniform " throughout the Dominion, and that provision should be made " in regard thereto for the better preservation of peace and order ; " Therefore Her Majesty, by and with the advice and consent of " the Senate and House of Commons of Canada, enacts as follows. Then there is the title. This is : " An Act respecting the sale " of Intoxicating Liquors, and the issue of licenses therefor." Before I go through, as I must probably briefly do, the provisions f the Act, it may be convenient if I state the general purpose

and effect of it. It will assist your Lordships when I pass through the various parts of it. I have pointed out that the Canada Temperance Act enabled total prohibition in any county or city. I will call it total prohibition—it is a convenient phrase—although there were some exceptions. This Act, like the last, dealt with the whole Dominion, but it would operate in those parts in which the former Act had not been taken advantage of, in which there was not total prohibition. Under this Act power was given to issue licenses by the Government of the Dominion, and no person was to be allowed to deal in intoxicating liquors who had not one such license. There were various classes of licenses: hotel licenses; saloon licenses; wholesale licenses, and vessel licenses. But one or other of these licenses any person must have who has to deal in intoxicating liquors in any part of the Dominion.

Sir MONTAGUE SMITH: Taverns as well.

Sir FARRER HERSCHELL: I am merely stating the effect for the moment. One main object of the Act was to limit the number of licenses, and there are provisions accordingly which will limit in the various areas the number of licenses that are to be granted. So that in those parts of Canada which had not taken advantage of the Act of total prohibition the intention was to regulate the traffic by diminishing the number of persons who were at liberty to deal in these articles.

The LORD CHANCELLOR: Then up to that time was there no limit—could anybody set up a house for the sale of liquors?

Sir FARRER HERSCHELL: No. In many of the provinces licenses were required by municipal regulations. Certainly not in all of them, but I rather think in one of them there was a provision similar to the one in the Dominion, and which would limit the number of licenses; but that was not general at all. They obtained licenses, but there was no statutory limitation of the number of licenses.

The LORD CHANCELLOR: Was there any discretion in granting them? If a person presented himself at the proper office could he get one as of course on payment?

Sir FARRER HERSCHELL: No; the requirements differed in the different provinces.

Sir MONTAGUE SMITH: The 92nd Section gives the Legislature powers in the provinces, and one of the Sub-sections contains licenses of shops, saloons, and so on.

Sir FARRER HERSCHELL: That, I think, has been held not to apply to licenses for purposes such as these.

Sir BARNES PEACOCK: It is "Licenses to raise "revenue."

Sir FARRER HERSCHELL: It is only for the purpose of raising revenue.

Sir MONTAGUE SMITH: That is so; still the conditions might be annexed, and were annexed.

Sir FARRER HERSCHELL: They were. One object, therefore, was the limitation of the number of licenses, and there were provisions which enabled a two-thirds majority in the locality to veto any particular license that was applied for; so that, whereas the former Act enabled the locality to prohibit throughout its whole area the sale altogether, this Act, to begin with, limited the number of licensed houses and enabled the inhabitants of a locality to veto any particular license that was sought for. Of course the object was the same as the object of the Canada Temperance Act. There it was for the purpose of promoting temperance, and the advantages that would flow from increased temperance. Here the object was a strictly temperance one also, and it was intended to restrict the traffic in those places that were not prepared to abolish the traffic altogether. I think that is a sufficient general statement of the obvious purpose and object of the Act. Now I will call your Lordships' attention to the provisions by which that was carried out. I am now on the Act of 1883. The second clause is a definition clause, with which I do not think I need trouble your Lordships for the moment. The 3rd Section is an exception, it excepts from the operation of the Act "Manufacturers of "native wines from grapes grown and produced in Canada, and "who sell such wines in quantities of not less than one gallon, or "two bottles of not less than three half-pints each at one time at "the place of manufacture." Then, secondly, it excludes "Any "person who holds a license as auctioneer selling liquor at "public auction in quantities of not less than two gallons at any "one time"; and, thirdly, it excepts "Any person selling "liquor in any refreshment-room at the Senate, or House of "Commons, or the Legislative Council, or House of Assembly "of any of the Provinces, by the permission and under the "control of the Senate, House of Commons, Legislative Council, "or House of Assembly respectively." Then the 4th Section establishes license districts, and provides "Such districts shall, as "far as possible and convenient, be identical and co-terminous "with existing and future counties or electoral districts or cities." Then the 5th Section establishes a board of license commissioners,

and it provides who are to be the first commissioners in the various provinces, a county court judge, and so on. I do not think I need trouble your Lordships with the constitution of the Board of Commissioners; it will be sufficient to say it creates a Board of Commissioners. Then the 6th Section creates inspectors of licenses, appointed by the Board of Commissioners. The 7th Section provides for the licenses: "The Governor in Council "may direct the issue of licenses on stamped paper, written or "printed, or partly written and partly printed, of the several "kinds or descriptions following, that is to say—Hotel licenses, "Saloon licenses, Shop licenses, Vessel licenses, Wholesale licenses."

Lord MONKSWELL: A shop license would not necessarily have anything to do with the liquor traffic, would it? It means, I suppose, a liquor shop.

Sir FARRER HERSCHELL: Your Lordship will find that one of the objects of this legislation was, to prevent the sale of intoxicating liquors in connection with the sale of groceries.

Lord MONKSWELL: It would not apply to a linen draper's shop?

Sir FARRER HERSCHELL: No. Your Lordship is aware that there has been considerable agitation on the subject engendered by the belief that the sale of liquors in connection with groceries is a temptation to women when they purchase the groceries, to purchase liquors as well.

Lord MONKSWELL: Shop licenses within the 92nd Section would, I suppose, include all shops?

Sir FARRER HERSCHELL: Your Lordship, I suppose, means the 92nd Section of the British North America Act?

Lord MONKSWELL: Yes.

Sir FARRER HERSCHELL: It defines it in Sub-section B (Act of 1883). Sub-section A is "(A) An hotel license or saloon "license shall authorise the licensee to sell and dispose of any "liquors in quantities, not exceeding one quart, which may be "drunk in the hotel or saloon in which the same is sold. (B) A "shop license shall authorise the licensee to sell and dispose of any "liquors not to be drunk in or upon the premises for which the "license is granted, provided that not less in quantity than one pint "shall be sold or disposed of at any one time to any one person." The first is a license to be drunk on the premises, and the shop license is a license to be drunk off the premises. Then a vessel license shall authorise the master of the vessel to sell to any passenger on board. "(D) A wholesale license shall authorise "the licensee to sell and dispose of liquors in his warehouse,

" store, shop, or place defined in the license, in quantities of not less " than two gallons in each cask or vessel; and in any case when " such selling by wholesale is in respect of bottled ale, porter, " beer, wine or other fermented or spirituous liquor, each such sale " shall be in quantities not less than one dozen reputed quart " bottles. Liquors sold under a wholesale license are not to be " consumed in or upon the house or premises in respect of which " the license is granted." I pause upon the "vessel license" and the "wholesale license." They will need your Lordships' special attention, because they have been held by the Supreme Court, one of the Judges dissenting, to be within the competence of the Parliament; and, of course, all in this Act that is for the purpose of carrying out the provisions with regard to these two licenses are also, as I understand, held valid so far as these two licenses are concerned. Then "(2) Hotel, saloon, and shop " licenses, and such other of the licenses by this Act authorised to " be issued, as to which a Provincial Legislature may impose a " tax in order to the raising of a revenue, shall be subject to the " payment of such duty as the Legislature of the Province under " the power conferred on it by the 9th enumerated class of " subjects in Section 92 of the British North America Act, 1867, " may impose for the purpose of raising or in order to raise a " revenue for Provincial, Local, or Municipal purposes." So it saves all their revenue powers. For the purposes of revenue they may still impose a tax and require its payment.

The LORD CHANCELLOR: I suppose "license" there also means having reference to the liquor traffic, does it not?

Sir FARRER HERSCHELL: It does not say "license"—it says "may impose a tax."

The LORD CHANCELLOR: It says "Shop, saloon, " auctioneer, and other licenses."

Sir FARRER HERSCHELL: Under the British North America Act your Lordship will see there is some doubt whether a license to sell intoxicating liquors is within that Licensing Clause at all, because there is an express enumeration of a certain class of licenses, and "other licenses," and the question is whether that is not *ejusdem generis*.

Sir MONTAGUE SMITH: What is the meaning of this, because this is an important section? The Provincial Legislatures may impose a duty, or a tax, or a payment with respect to these licenses.

Sir FARRER HERSCHELL: No, not in respect of these licenses. Supposing this to be within the power of Section 92,

they might say, "Nobody shall carry on any business or trade "in our Province without taking out a trade license; and he shall "pay for the right to carry on any trade, we will say, ten dollars "a year."

Sir MONTAGUE SMITH: Then that would be a double license.

Sir FARRER HERSCHELL: Yes; they might require another license.

Lord MONKSWELL: This seems to me rather a difficult Section. "Hotel, saloon, and shop licenses, and such other of "the licenses by this Act authorised to be issued, as to which a "Provincial Legislature may impose a tax in order to the raising "of a revenue, shall be subject to the payment of such duty as the "Legislature of the Province under the power conferred on it by "the 9th enumerated class of subjects in Section 92 of the British "North America Act, 1867, may impose for the purpose of "raising, or in order to raise, a revenue for Provincial, Local, or "Municipal purposes." It would seem that the issuing of a license for shops, saloons, and so on, for the purpose of selling liquors is to be under this Act and not under the Provincial Act, but the Province may impose a tax.

Sir FARRER HERSCHELL: The Province might impose a license in this sense——

Sir MONTAGUE SMITH: I think that is well worth discussion. It is the difficulty that occurs to me which Lord Monkswell has been putting. This alone constitutes a sort of independent payment to be imposed by the Legislature upon the license granted.

Sir FARRER HERSCHELL: Not necessarily on the license granted.

Sir MONTAGUE SMITH: Having this license under this Act he is authorised to sell liquor.

Sir FARRER HERSCHELL: Having your license under this Act, without which you cannot trade in spirits, shall not exempt you from any local tax that the local Legislature may choose to impose, for example on every person carrying on any trade or this particular trade.

Sir MONTAGUE SMITH: Notwithstanding this license the Local Legislature may impose a tax on the sale. That is what the section says.

Sir FARRER HERSCHELL: Yes.

Lord MONKSWELL: They impose a tax on the license granted under this Act.

Sir FARRER HERSCHELL: No, not on the license granted under this Act.

Lord MONKSWELL: The words are "By this Act "authorised to be issued."

Sir FARRER HERSCHELL: It says: "Hotel, saloon, "and shop licenses, and such other of the licenses by this Act "authorised to be issued as to which a Provincial Legislature "may impose a tax in order to the raising of a revenue, shall "be subject to the payment of such duty as the Legislature of "the Province * * * * may impose for the purpose of "raising, or in order to raise, a revenue for provincial, local, or "municipal purposes."

Sir MONTAGUE SMITH: The section does not seem to contemplate a second license.

Sir FARRER HERSCHELL: I think it does.

Sir RICHARD COUCH: It is to be done under the power conferred by the ninth enumerated clause.

Sir BARNES PEACOCK: They might put a tax upon the license granted under this Act in order to raise a revenue.

Sir FARRER HERSCHELL: I think myself they could only do that by means of a license.

Sir MONTAGUE SMITH: There is no independent power, but the provincial authority may grant licenses for the purpose of revenue.

Lord MONKSWELL: How do you read this section? Do you read it that the Provincial Legislature can impose an additional tax on any license to a shop, for example, or do you hold that the Provincial Legislature may impose an additional license?

Sir FARRER HERSCHELL: An additional license I should say.

Lord MONKSWELL: So that under this Act there would be a license for a shop, and the Provincial Legislature could grant another license and require payment for it.

Sir FARRER HERSCHELL: Yes. That is not a thing unknown even here. You get your excise license and your justices' license in respect of the same place.

The LORD CHANCELLOR: The only question is whether it is on two pieces of paper or one. The two powers are distinct.

Sir FARRER HERSCHELL: Yes. I would remind your Lordships that the Dominion Parliament, whatever it had power to do, had no power either to diminish or to increase the powers of the Provincial Legislature. It could not take away

any power which it had before and it could not give it any power which it had not before. Therefore this Act does not really confer any power on the Provincial Legislature at all, nor does it take away any power that it had. It could not: and all that it does, in effect, is to say, We do not mean to interfere with such rights as the Provincial Legislature had for the purpose of raising revenue. It could not have interfered with them if it wished. Therefore, in the view I take of it, this second Sub-section has no operative effect at all.

Lord MONKSWELL: There is one view put forward in your case that as long as the Imperial Legislature, if we may call it so, does not interfere, the Local Legislature may; but the Local Legislature cannot interfere any longer when the Imperial Legislature has dealt with the question.

Sir FARRER HERSCHELL: No doubt, but of course "interfere" must be somewhat defined. The Local Legislature can always interfere with anything and everything so far as it regards the requiring a license in any case within the power of Section 92 for the purpose of raising a revenue. It cannot interfere with any trade and require a license to be taken except for the purpose of raising revenue. It has been held to be a revenue section only; but for the purpose of raising revenue it can do so in every case, and the Dominion Parliament cannot by any legislation take away their right to impose any tax they please for revenue purposes. Take an analogous case, the case of explosives, where there is a general Act passed, I believe by the Dominion Parliament, something very like our Explosives Act for the public safety. Nothing in that Act of course would prevent the Local Legislature saying that every man who deals in explosives shall pay a license fee of 20 or 50 dols. a year to the Local Revenue. The two things are totally and entirely distinct. You may regulate a trade for the public good, for the safety, order and well-being of the community; you may require those who are subject to those regulations also to pay certain sums for the local taxation purposes. The machinery by which you carry that out is unimportant. But all that I understand this second Sub-section to mean is this—and I think it was really wholly unnecessary—if the hotel, saloon, and shop license keepers are subject to any special tax, or general tax, by the Provincial Parliament, that tax you will have to pay, and it is to be distinctly understood the licenses you get under this Act do not exempt you from the payment of that taxation. I think that is all that this second Sub-section amounts to.

Sir MONTAGUE SMITH: You would not contend, I suppose, that the Dominion could grant these licenses for the purpose of Dominion revenue ?

Sir FARRER HERSCHELL : Oh, no, your Lordships will find that in the scheme of this Act. Of course you never can fix the amount of licenses so exactly as to cover expenses, but the provision is that the money received for the licenses in the first instance is to cover all the expenses of the Board of Commissioners and Inspectors, and the surplus is to be paid over to the revenues of the Province.

Lord MONKSWELL : Suppose a shopkeeper gets no license under this Act, but he gets a license from the Local Legislature, can he sell liquor ?

Sir FARRER HERSCHELL : No.

Sir MONTAGUE SMITH : Upon this question of revenue, just to clear it up, there is a provision you say that the surplus is to be paid over to the Provincial Legislature ?

Sir FARRER HERSCHELL : Yes.

Sir MONTAGUE SMITH: Then the Dominion assumes to tax the provinces for their own benefit.

Sir FARRER HERSCHELL: The license fee is only 5 dols. and 10 dols. The intention is to make a fee which shall cover the expenses.

Lord MONKSWELL : It does to some degree (I am not expressing any opinion, of course) interfere with the powers of the Local Legislature, because the Local Legislature could before give a license to a shopkeeper to sell liquors, whereas now, I understand, they cannot, unless he gets also a license under this Act.

Sir FARRER HERSCHELL : No doubt. So, of course, under the Canada Temperance Act, which is held to be valid, the local authority might license everybody in the county, and by reason of the Canada Temperance Act, the Dominion Act, nobody in the county could sell.

Lord MONKSWELL : I am not putting it as an argument, only to see that we understand the case.

Sir BARNES PEACOCK : Is this which you have just read a Sub-section of Section 7, or is it a Section of the amending Act ? As I read it it is the second amending Act.

Sir FARRER HERSCHELL : No, it is in the original Act. It is a Sub-section of Section 7. Then Section 8 "Every license "shall be issued by the authority and under the direction of the "Board of License Commissioners for the district." And then

there are meetings of the Board. Section 9: "The Board shall "hold a meeting during the month of February, 1884, and may "thereat pass a resolution or resolutions for regulating the "matters following: (*a*) For defining the conditions and "qualifications requisite to obtain hotel or saloon licenses for "the retailing, within the district, or any part thereof, of "liquors, and also shop licenses for the sale, by retail, within the "district, or any part thereof, of liquors, in shops or places "other than hotels, taverns, inns, alehouses, beerhouses, or "places of public entertainment, not contrary to or inconsistent "with the provisions of this Act. (*b*) For limiting the number "of hotel, saloon, and shop licenses respectively within the "maximum prescribed by this Act, and for defining the respective "times and localities within which, and the persons to whom "such limited number may be issued within the year, from "the first day of May of one year, till the thirtieth day of "April, inclusive, of the next ear. (*c*) For declaring the "number of saloon licenses that may be issued in any year. "(*d*) For regulating the hotels, saloons, and shops to be "licensed. (*e*) For fixing and defining the duties, powers, "and privileges of the inspectors of licenses of their district." Then they are to meet yearly, and there is a power of adjournment. The next group of sections is the "Application "for Licenses." "Every application for a license to sell liquors, "by wholesale or retail, shall be by petition of the applicant to "the Board of the district." Then the details of that I do not think I need trouble your Lordships with until we come to Section 16: "The applicant shall, with his application, deposit "a fee of ten dollars to cover expenses of inspection and "advertising." 17: "It shall be the right and privilege of any "ten or more electors of the said polling sub-division, and in "unorganised districts of any five or more out of the twenty "householders residing nearest to the premises for which a license "is required, to object by petition, or in any similar manner, to the "granting of any license. The objections which may be taken to "the granting of a license may be one or more of the following: "(1) That the applicant is of bad fame or character, or of "drunken habits, or has previously forfeited a license, or that "the applicant has been convicted of selling liquor without a "license within a period of three years; or (2) That the premises "in question are out of repair, or have not the accommodation "hereby required, or reasonable accommodation if the premises "be not subject to the said requirements; or (3) That the

" licensing thereof is not required in the neighbourhood, or that " the premises are in the immediate vicinity of a place of public " worship, hospital, or school, or that the quiet of the place in " which such premises are situate will be disturbed if a license " is granted." Section 18: " Every petition having reference " to the granting of a license shall have, in addition to each " signature thereon, a statement of the approximate distance from " the premises to which such petition refers, of the residence or " property of each person signing the same." Then a list is to be kept, and signatures examined, and proceedings and hearings by the Board. The Inspector is to make a report on the character and position of the houses. I think that concludes that group of sections. Section 25 commences a group headed " Accommodation." " Every hotel authorised to be licensed " under the provisions of the Act shall contain, and during the " continuance of the license shall continue to contain, in addition " to what may be needed for the use of the family of the hotel " keeper, in cities and towns, not less than six bedrooms, and in " other places not less than three bedrooms, together with, in " every case, a suitable complement of bedding and furniture; " and (except in cities and incorporated towns) there shall also " be attached to the said hotel, proper stabling for at least six " horses beside his own." The object of that appears to be that they should be real hotels providing accommodation, and not merely under the names of hotels be places for drinking. " No " hotel or saloon shall form a part of, or communicate by " any entrance, with any shop or store wherein any goods or " merchandise are kept for sale." Section 26: " In addition to the " accommodation required by the last preceding section, each hotel " or saloon shall be shown, to the satisfaction of the Board, to " be a well-appointed and sufficient eating-house." This is to prevent the saloons being merely drinking shops, to make them what our public-houses were supposed to be in old times, places for travellers, where you were to get food as well as drink, which now, unfortunately, is the case with comparatively few of them, I believe; " with the appliances requisite for daily serving " meals to travellers, and the requirements of this section shall " apply to all hotels or saloons, save as hereinafter excepted, and " continuously for the whole period of the license. (2) The " Board may, by resolution to be passed before the first day of " May in any year, dispense, as to a certain number of saloons " in any city or town, with the necessity of their having the

" accommodation in the last preceding section mentioned. " Section 27, The Council of any city, incorporated village, " town, township, or parish may, by by-law to be passed " before the first day of March in any year, prescribe for the " then ensuing license year, beginning on the first day of " May, any requirements in addition to those in the last two " preceding sections mentioned as to accommodation to be " possessed by hotels and saloons, which the Council may see " fit; and the Board, upon receiving a copy of such by-law, " shall be bound to observe the provisions thereof; and such " by-law shall continue in full force for such year, and any " future year until repealed." That again is to give the localities who have not adopted complete prohibition extensive power in relation to regulation and limitation. " Every hotel-keeper whose " license is granted in respect of premises to be provided with " stabling shall, at all times, keep upon his licensed premises " a sufficient supply of hay, corn, or other provender, for the " accommodation of travellers." We come next to the " Duties " of the Board." Section 29: " The Board shall ascertain that " the requirements of this Act as to the petition of the applicant, " the certificate of the electors, when necessary, and the report " of the Inspector have been complied with; (2) If the said " pre-requisites have been complied with (but not otherwise) " the Board shall entertain the application. (3) Where the " applicant for an hotel or shop license resides in a remote part " of the district, or where, for any other reason the Board " see fit, they may dispense with the report of the Inspector, " and act upon such information as may satisfy them in the " premises. (4) The Board shall hear and determine all " applications." I do not think I need trouble your Lordships with the details of that Section. Section 31: " No hotel license " shall be granted in respect of any house in any city, town, or " incorporated village, unless such house has a separate front " entrance, in addition to the entrance to the bar or place where " liquors are sold." Section 32: " No license shall be granted if " two-thirds of the electors in the sub-division petition against it, " on the grounds hereinbefore set forth, or any of such grounds." Your Lordships remember the former ground was that the person was an unfit person, that the premises were unfit premises, that it was near a place of worship or a school, or that the necessities of the place did not require it. This gives a limited power of veto to the liquor traffic under Section 33. It extends what previously could be done over the whole county or city

by the whole county or city and allows it to be done for a smaller area by those who are within that smaller area. There is a misprint in my copy; the letter "s" which should belong to the word "shall" has got transferred to the word "license" and it reads "licenses." It is only to enable a veto on a particular license and not on all licenses. It is not a power to say on a petition, "You shall not grant any licenses in the sub-division."

Sir MONTAGUE SMITH: It is a license to be vetoed if two-thirds petition against it.

Sir FARRER HERSCHELL: Section 33: "No license "shall be granted to any person declared in pursuance of this Act "to be a disqualified person, during the continuance of such "disqualification; any license issued to a person so disqualified "shall be void." Section 34: "No license shall be granted to "any person who is a license commissioner."

Lord MONKSWELL: I suppose there is some provision for declaring a person disqualified.

Sir FARRER HERSCHELL: Yes, a person is disqualified who has committed an offence. Section 35: "An hotel, saloon, "or shop license shall not be issued under the provisions of this "Act, for premises within any district of which any of the "License Commissioners or of the Inspectors for such district is "the owner." Those, of course, are to prevent corruption. Section 36: "The Board may also direct to be issued licenses for "vessels or wholesale licenses which have been applied for "within the time hereinbefore prescribed." 37: "No wholesale "license shall be granted to any person who does not carry on the "business of selling by wholesale or in unbroken packages. 38, "Wholesale licenses may be issued in the name of a co-partnership "when two or more persons are carrying on business as one, "but a separate license shall be required in every district "wherein the firm carries on its business." 39: "In any case "where the Board of any district do not think fit, or are unable "to grant a new license to any applicant who has been licensed "during the preceding twelve months, or any part thereof, they may "nevertheless, by resolution, provide for extending the duration "of the existing license for any specified period of the year, not "exceeding three months, at their discretion: and such license "when a certificate of the extension aforesaid has been endorsed "thereon under the hand of the Chief Inspector for the district, "shall remain valid for the period specified in the resolution of "the Board and no longer; but this provision shall not be

" construed to confer on the Board any authority to exceed the " limit prescribed by this Act as to the number of licenses to be " granted in any year: " " 40: Upon the obtaining by the applicant " of the certificate authorising the issuing of a license, the Chief " Inspector shall, on the demand of the applicant so authorised " and upon the payment of a fee of five dollars, and upon his " giving security by bond as hereinafter mentioned, when it is " an hotel, saloon, or shop license that has been directed to issue, " issue to him the license to which he is entitled. (2) Provided " always, that in any province in which in order to the raising of " a revenue for provincial, local, or municipal purposes, a duty " has been imposed under the authority of 'The British North " 'America Act 1867' on any license before the license issues, " the person entitled thereto shall establish to the satisfaction of " the Chief Inspector, that he has paid or tendered such duty." That of course is a provision in favour of the provincial right which secures to them by the operation of this licensing, that if there is any tax imposed on the carrying on of the trade, that tax shall be paid before the man gets his license under this Act.

The LORD CHANCELLOR: That of course would be intelligible, but the former Section seems to me to have no operation at all.

Sir FARRER HERSCHELL: No, I do not think the former Section has any operation. This is perfectly competent. It is protecting the revenue of the provinces. Then the next group is " Security to be given." Section 42: " The aggregate " number of hotel and saloon licenses to be granted, except as " hereinafter provided, in the respective municipalities or parishes, " shall not, in each year, be in excess of the following limitations: " (1) In cities, towns and incorporated villages respectively " according to the following scale, that is to say one for each full " two hundred and fifty of the first one thousand of the population, " and one for each full five hundred over one thousand of the " population: Provided, that two hotel licenses may be granted " in any town or incorporated village wherein the population is " less than five hundred: (2) In incorporated villages, being " county towns, five licenses may be granted, notwithstanding " that according to the population that number could not be " issued: (3) In the Town of Niagara Falls, in the Province of " Ontario, three hotels near the Falls of Niagara, which may be " licensed, may be added to the number which would otherwise " be the maximum limit under this Act: (4) In townships or

"parishes and in places where there is no municipal organization, "the Board of the District shall, by resolution to be passed at their "first meeting in each year, limit the number of licenses to be "issued in each year: (5) The Board may authorise the "granting of two additional hotel licenses beyond the number "limited by this Act in a locality largely resorted to in summer "by visitors, but such licenses shall only be for a period of six "months, commencing on the first day of May in each year; but "this provision is not to apply to the Town of Niagara Falls: "(6) In incorporated villages, townships or parishes, no saloon "licenses shall be granted." Of course 6 is a very important provision.

The LORD CHANCELLOR: I do not understand it. What is it pointed to?

Sir FARRER HERSCHELL: Those are small popular centres, and I suppose the idea is that they desired to put a stop to drinking shops. They do not need the houses of refreshment, the eating and drinking houses, in the same way that they do in the country districts; nothing beyond the hotels. I suppose the idea was that the saloon would degenerate into a mere place of drinking, and so, there, they do not allow saloon licenses, only hotel licenses and shop licenses.

Lord FITZGERALD: There could be no license for the consumption of liquor on the premises, except in hotels.

Sir FARRER HERSCHELL: That is so. Of course it is not so serious as saying that there shall not be any at all. The truth I suppose is that a person would either be able to purchase the liquor if he lived in the place and consumed it at his own house, or if he does not live in the place he has the hotel to resort to. It was aimed, no doubt, at those places, at what is called bar-room drinking. It was thought that people would not need saloons for the purposes of *bona-fide* taking their meals, but that they would degenerate into mere drinking shops, which, no doubt, it was the intention of the Parliament of Canada in its wisdom to put an end to.

Lord FITZGERALD: What would you call the bar of the hotel as distinct from a saloon—it is a mere drinking place—the bar of a Canadian hotel?

Sir FARRER HERSCHELL: Yes, but, of course, the number of those is limited.

Sir MONTAGUE SMITH: Those are all minute regulations.

Sir FARRER HERSCHELL: Of course the only question

is whether it is within the competence of the Dominion Parliament.

The LORD CHANCELLOR : Each of these considerations may affect that question. I doubt very much whether we can draw a line to prevent these considerations entering into the question.

Sir MONTAGUE SMITH: Of course, you may infer the nature and character of the legislation from the details of the particular enactments.

Sir FARRER HERSCHELL : I rely very much upon the details as shewing that the object of this legislation was the promotion of temperance for the benefit of the entire community, as diminishing, as many people do believe it diminishes, crime and pauperism :—Section 43 : " The number of shop licenses to be " granted in the respective municipalities, shall not in each year " be in excess of the following scale."

Sir MONTAGUE SMITH : I suppose this is all under the head of " Limitation ? "

Sir FARRER HERSCHELL : No, under the head " Number " of licenses "—Section 44 : " The Council of any city, town, or " village, may by by-law, to be passed before the first day of " March in any year reduce, within any limit by this Act provided " the number of hotel, saloon, and shop licenses, to be issued " therein for the then ensuing year, or for any future license year " until such by law is altered or repealed." They are to cause a certified copy of such bye-law to be sent to the Chief Inspector.—Section 45 : " No provision in this Act contained " shall affect the powers conferred on the Municipal Councils in " the province of Quebec, of each county, city, town, village, " parish, and township, by the laws in force in the said province, " on the first day of July, 1867, to restrict or prohibit the sale of " intoxicating liquors in the limits of their respective territorial " jurisdiction, and the said powers, and the by-laws now in " force, passed under the authority of the said laws, are hereby " preserved and confirmed." Section 46 points out how the number of the population is to be determined. I need not trouble your Lordships with the details of that. Section 47 : " No " license shall be granted by the Board for the sale of liquors " within the limits of a town, incorporated village, parish " township or other municipality (save and except counties and " cities) when it shall have been made to appear to the Board in " manner hereinafter provided, that a majority of three-fifths of " the duly qualified electors therein, who have voted at a poll

" taken as hereinafter specified, have declared themselves to be in " favour of a prohibition of the sale of intoxicating liquors in " their locality, and against the issue of licenses therefor." Sub-sections 2 and 3 provide how the poll is to be taken.

Lord MONKSWELL : I suppose they adopt the provisions of the former Act of 1878.

Sir FARRER HERSCHELL : No, this enables smaller bodies within their area to prevent licenses being granted in the same way as the larger bodies do under the Act of 1878. Counties and cities were what were provided for in the Act of 1878. Then this provides in addition a similar legislation for incorporated villages, parishes, townships, or other municipalities.

Lord MONKSWELL : It extends the Act of 1878, and gives the powers to bodies other than those mentioned in the Act of 1878.

Sir FARRER HERSCHELL : Yes ; I shall have to call your Lordship's attention to that.

Sir MONTAGUE SMITH : You say it is only to prohibit licenses being granted by this Board. I do not say one way or the other, but if the Board itself is constituted without the power of the Dominion Parliament to constitute it, all this would fall.

Sir FARRER HERSCHELL : It would.

Sir MONTAGUE SMITH : You could not keep that as an independent provision.

Sir FARRER HERSCHELL : No, I do not think you could. Section 48 : " Subject to the provisions of this Act as to removals " and the transfer of licenses, every licence for the sale of liquor " shall be held to be a licence only to the person therein named, " and for the premises therein described." Sections 49 to 53 provide for transfer of licenses. I need not trouble your Lordships with that. Sections 54 and 55 provide for the removal of the license. There is a fee paid on the transfer. I do not think that carries it beyond the original fee. Section 56 : " All sums received " on applications for and on the issue of licenses, or received " by the Inspector for fines and penalties shall form the License " Fund of the District. (2) The License Fund shall be applied " under regulations of the Governor in Council, for the payment of " the salary and expenses of the Commissioners and Inspectors, and " for the expenses of the office of the Board, or otherwise incurred " in carrying the provisions of the law into effect, and the residue " on the thirtieth day of June in each year, and at such other " times as may be prescribed by the regulations of the Governor " in Council, shall be paid over to the Treasurer of the city, town,

" village, parish, or township municipality in which the licensed " premises are respectively situate for the public uses of the " municipality; and in the province of Prince Edward Island, " except in the cities and towns thereof to the Treasurer of that " Province; and in unorganised districts the residue shall be " paid to the Receiver-General. (3) Cheques upon the License " Fund account shall be drawn by the Chief Inspector and " countersigned by the Chairman or any two of the License " Commissioners subject to the regulations made by the Governor " in Council."

Lord FITZGERALD: Who is the officer referred to; is it the Receiver-General of the Dominion?

Sir FARRER HERSCHELL: It is the Receiver-General of the Dominion; that is, in the Territories. Unorganised districts are not called provinces, they are called territories. I believe there is only one now, in the North West, between Manitoba and British Columbia. Section 57: " Two-thirds of any penalty in " money recovered under this Act in cases in which an inspector is " the prosecutor or complainant, shall be paid by the convicting " magistrate to the inspector and paid in by him to the " credit of the 'License Fund Account.' (2). In case the whole " amount of the penalty and costs is not recovered, the amount " recovered shall be applied first to the payment of the costs, and " the balance shall be appropriated as herein provided. (3). In " any case where the Inspector has prosecuted and obtained a " conviction, and has been unable to recover the amount of costs, " the same shall be made good out of the License Fund." Then we come to " Revocation of licenses improperly obtained." Section 58 is as to revocation of licenses obtained by fraud. Section 59: " In municipalities, parishes or townships in which 'The Canada " Temperance Act, 1878,' is not in force, and where there is no " person licensed under an hotel, saloon, or shop license to retail " liquors, the sale of such liquors is permitted, as hereinafter " provided for medicinal purposes only, or for use in divine worship " on the certificate of a physician or of a clergyman, residing in " the municipality or parish, and not otherwise; or for *bona-fide* " use in some art, trade, or manufacture on the certificate of two " justices." Then it provides by whom the certificate may be given, and not more than one pint is to be sold under the certificate. Section 60 commences a series of sections for the purpose of providing a register of licenses. Then we come to " Regulations " and prohibitions." Section 62: " All licenses shall be constantly " and conspicuously exposed in the warehouses and shops, in the

"bar-rooms of hotels, saloons," and so on, and there is to be an inscription over the doors and lamps over the doors, and a penalty not exceeding five dollars; and the Chief Inspector may by endorsement exempt. Section 65: "Not more than one bar "shall be kept in any house or premises licensed under this "Act." Section 66: "As respects all places where intoxicating "liquors are or may be sold by wholesale or retail, no sale or "other disposal of liquors shall take place therein or on the "premises thereof, or out of or from the same to any person or "persons whomsoever, save as hereinafter provided, from or after "the hour of seven of the clock on Saturday night till six of the "clock on Monday morning thereafter," that is what is called Sunday closing, "nor from or after the hour of eleven o'clock at night "until six o'clock the following morning on all the other nights "of the week" save under the authority of a Justice. Sub-section 2: "And no sale or other disposal of liquor shall take place in any "licensed place within the limits of a polling sub-division, on any "polling day for or at any Parliamentary election, or election of "a member for a Legislative assembly." Section 67: "Every "hotel-keeper failing or refusing, either personally or through "anyone acting on his behalf, except for some valid reason, to "supply lodging, meals, or accommodation to travellers, shall for "each offence be liable on conviction to forfeit and pay any sum "not exceeding twenty dollars." Section 68: "If any hotel-keeper "receives in payment, or as a pledge for any liquor or "entertainment supplied in or from his licensed premises, anything "except current money, or the debtor's own cheque on a bank or "banker, he shall for each such offence pay a penalty not "exceeding twenty dollars." Section 69: "If any person "holding a license purchases from any person any wearing "apparel, tools, implements of trade or husbandry, fishing gear, "household goods or furniture, either by way of sale or barter, "directly or indirectly, the consideration for which in whole or "in part is any intoxicating liquor or the price thereof——"

Sir MONTAGUE SMITH: These are all details.

Sir FARRER HERSCHELL: Yes. It is that people might not pawn their goods to get drink. Then there is a penalty for harbouring constables, penalty for using internal communications, for allowing liquor to be consumed on premises by a minor, the case of shop licensees, wholesale licensees, not to allow it to be consumed on the premises. No liquor to be unlawfully consumed on the premises, and so on. I do not think I need trouble you with those. Section 79 commences a series of sections with

regard to adulteration. It is considered by many, quite apart from any other grounds, that there is a special evil in the case of drink, that it is often so adulterated as positively to create a craving for drink, and so lead to intemperance, and accordingly Sections 79 and 80 are provisions against adulteration, imposing penalties.

Sir RICHARD COUCH: These penalties are to go to the license fund.

Sir FARRER HERSCHELL: Yes.

Sir MONTAGUE SMITH: I suppose it is as to adulteration of liquor. It does not go further?

Sir FARRER HERSCHELL: It is only liquor. I am not quite sure that some of these provisions might not apply and could not stand even if the Licensing Board could not be created. It will have to be considered I think whether these provisions in any view would not be within the competence of the Dominion Parliament to make adulteration of any particular article or of all articles an offence, and to impose penal consequences on a breach of the law.

Sir RICHARD COUCH: It may come within the Criminal Law.

Sir FARRER HERSCHELL: Yes. Section 79: "Every "person who sells or offers for sale any liquor with which is "mixed any ingredient or material injurious to health, or whereby "such liquor is rendered injurious to the health of the persons "drinking the same, and every person who sells as unadulterated "any liquor which is adulterated, shall on conviction be liable for "every such offence to a penalty not exceeding fifty dollars." The next sub-section provides for where a licensed person is convicted of any offence. Section 79 is general and absolute, and I think it will require consideration, even if some parts of the Act were to be held *ultra vires*, whether that is not entirely within the powers of the Dominion Parliament. Section 80 provides for obtaining an analysis. Section 81 provides power to enter and search premises, and penalties on persons obstructing the search and so on. Section 83: "No person shall sell by "wholesale or by retail any liquors without having first obtained "a license under this Act authorising him so to do."

The LORD CHANCELLOR: It is a general prohibition?

Sir FARRER HERSCHELL: Yes.

Sir MONTAGUE SMITH: Of course the effect of that would be that if a man had a provincial license, and the province

was deriving any revenue from it, that license would be no use unless he got a license from this Board.

Sir FARRER HERSCHELL: No doubt that is the effect. It might be so under the Explosives Act. A man might have paid for an explosive license, and the Legislature might say no explosive could be kept for sale at all, and the province would equally lose its revenue. It is passed, of course, for the public safety. But then the question is whether you have not, for the public safety, a right to limit the sale of intoxicating liquors. I do not say the two cases are necessarily the same, I simply put them as a sort of illustration. There might be clearly regulations of trade and commerce which were within the functions of the Dominion Legislature beyond dispute, which might, nevertheless, incidentally affect the revenue by reason of licenses that had been granted or could be granted by the Provincial Legislature. Section 86 says: "The said sections, numbered 83 and 84 of "this Act, shall not prevent any chemist or druggist, duly "registered as such under and by virtue of the 'Pharmacy Act' "of the Province of Ontario." By Section 87 inspectors are to visit and inspect licensed premises every three months at least, and prosecute offenders. Section 88: "For the punishment "of offences against Section 66 of this Act"—that is, as to sale at prohibited hours: "A penalty for the first offence "against the provisions thereof of not less than twenty dollars "with costs in case of conviction shall be recoverable." Section 89: "If any purchaser of any liquor from a person who is not "licensed to sell the same to be drunk on the premises, drinks "or causes or permits any other persons to drink such liquor," then he is liable to certain penalties. Section 90 is: "Penalty "on hotel or saloon licensee keeping a disorderly house." Apart from the question of his being licensee, that would undoubtedly be within the jurisdiction of the Dominion Government. It would be within their competence to create what penalty they pleased for keeping a brothel, under their power to legislate in all matters of criminal law. Section 91 provides punishment for selling liquor without a license. Section 92 gives power to justices to forbid the sale of liquor to habitual drunkards. That, of course, might stand by itself, except that "licensee" must be taken to mean licensee under this Act. Section 93: "(*a*) Any husband or wife whose wife or "husband has contracted the habit of drinking intoxicating "liquors to excess. (*b*) The father, mother, curator, tutor, or "employer of any person under the age of 21 years who has

" contracted the habit of drinking intoxicating liquors to excess. " (*c*) The manager or person in charge of any asylum or hospital " or other charitable institution in which any person so addicted " resides or is kept. (*d*) The curator or committee of any " interdicted person or lunatic, or (*e*) the father, mother, brother, " or sister of the husband or wife of such person, may require " the chief Inspector to give notice in writing signed by him to " any person licensed to sell liquors, that he is not to sell or " deliver the same to the person addicted to such habit, or to " such interdicted person or lunatic."

Sir MONTAGUE SMITH: That, again, seems to be mixed up with the person having a license.

Sir FARRER HERSCHELL: Yes, it is; because it is that notice is to be given to any person licensed, and I think that must be under this Act.

Sir MONTAGUE SMITH: That is not an independent matter.

Sir FARRER HERSCHELL: No, I do not think that it is. Then there is "Punishment of License Commissioners or "inspectors taking bribes;" "Penalty for illegally issuing "license;" "Punishment for compounding offences against this "Act;" "Punishment of parties to such offence;" "Penalty for "preventing lawful arrest;" "Penalty for tampering with "witnesses;" Penalty in cases not specially provided for;" and the penalties are not to be remitted and all informations or complaints are to be made within 30 days after the commission of the offence. Section 105 provides where the offender is to be prosecuted and what description of offence is sufficient; the form of the information and the procedure; appeals, evidence, and witnesses. I think it is all procedure until we come to Section 141. That saves the provisions of the Canada Temperance Act. "Nothing in the foregoing provisions of this Act shall be "construed to affect or impair any of the provisions of 'The "'Canada Temperance Act, 1878,' and no hotel, saloon, or shop "license shall be issued or take effect within any county, city, town, "incorporated village, or township in Canada, within which the "second part of the said Act has been brought into force, as by "the said Act provided, or within which any by-law for "prohibiting the sale of liquor under 'The Temperance Act of "'1864,' or any other act, is in force." Then a Board of Commissioners may be nominated for the county though the Act is in force. Section 143: "The Board and the Inspectors shall exercise "and discharge all their respective powers and duties for the

"enforcement of the provisions of 'The Canada Temperance Act, "1878,' and 'The Temperance Act of 1864,' as well as of this "Act, so far as the same apply, within the limits of any county, "city, incorporated village, or township or parish, in which the "first-mentioned Act or any by-law under the secondly "mentioned Act is in force." It may perhaps require consideration whether the formation of the Board would not be within the functions of the Dominion Parliament if any of the purposes for which it is created are valid. I apprehend so far as the Board and the Inspector are to discharge their powers and duties for preventing the sale and disposing of, or traffic in liquor contrary to the Canada Temperance Act, 1878, which has been held to be an act validly passed, it might be difficult, even if in other respects it were beyond their powers, to say that they were not to be appointed for these purposes.

Sir MONTAGUE SMITH: I think the Supreme Court make an exception, do not they?

Sir FARRER HERSCHELL: Yes, they do. That may not be unimportant as regards one or two matters that perhaps might be done by the Board or by the Inspector. There were one or two cases in which it was provided that the Inspector was to do certain things which did not exclusively, in terms, relate to a licensed house or a licensed person under the Act. If you once got your Board and got your Inspectors existing for any purpose, then I apprehend that any of these sections would be valid which gave them powers to deal with any matter within the competence of the Dominion Parliament, apart from the licenses.

The LORD CHANCELLOR: They are a licensing Board, are not they? Is not that their essential nature?

Sir FARRER HERSCHELL: Yes.

Sir MONTAGUE SMITH: It is very difficult to say the Board would stand, because they are to be supported and maintained, and the expenses of the Board are to be paid by the licenses.

Sir FARRER HERSCHELL: That was the fund out of which it was expected to provide the cost of maintaining the Board, but the Board did not look to the fund; the Board were persons appointed by the Dominion Parliament and the Dominion Government.

Sir MONTAGUE SMITH: Supposing the licensing part of it is *ultra vires*, a new legislation would be necessary.

Sir FARRER HERSCHELL: Yes. Then Section 144:

"A wholesale license to be obtained under and subject to the "provisions of this Act, shall be necessary, in order to authorise "or make lawful any sale of liquor in the quantities allowed "under the provisions of 'The Canada Temperance Act, 1878.'" Section 145: "The sale of liquor without license in any "municipality, where 'The Canada Temperance Act, 1878,' "is in force, shall, nevertheless, be a contravention of Sections 83 "and 84 of this Act, and the several provisions of this Act shall "have full force and effect in every such municipality, except in "so far as such provisions relate to granting licenses for the sale "of liquor by retail." Section 146: "Until the first day of May, "in the year 1884, all the laws of Provincial Legislatures of the "Dominion passed for regulating or restraining the traffic in "liquors shall be and they are hereby made as valid and effective "to all intents and purposes as if enacted by the Parliament of "Canada." Section 147: "Subject to the provisions in the next "preceding section contained, this Act shall come into force on the "first day of January in the year 1884, but the licenses to be "issued thereunder shall not be operative until the 1st day of May "following." My Lords, this is the whole of the Act of 1883.

Sir BARNES PEACOCK: I do not think you read Section 5. It shows that the powers and qualifications of the Commissioners in the various localities differ. I think it is important.

Sir FARRER HERSCHELL: I did not read it.

Sir BARNES PEACOCK: It shows that the qualifications of the Commissioners who are to grant the licenses are not the same in all the localities, and especially Clause 2 of Section 5 is important. Powers are given in certain counties—in Quebec—different from what they are in the other provinces.

Sir FARRER HERSCHELL: I think it is only because the corresponding judicial authority bears a different name. There are no County Court Judges in Quebec. There is a judge who fulfils in Quebec similar functions to what they fulfil elsewhere, and in Quebec he is made the person instead of the County Court judge.

Sir BARNES PEACOCK: In the counties of Chicontini, and so on in Quebec, there are powers given which are different from other localities, which tend to show that these are matters of a local nature which must be regulated according to the locality.

Lord MONKSWELL: The reason is that there was no County Court Judge in these two districts, and in an unorganised

district I suppose there was not a County Court Judge, and in default of a County Court Judge the Governor is authorised to appoint some one else.

Sir BARNES PEACOCK: These are to be County Court Judges *ex-officio*. The Commissioners are *ex-officio* County Court Judges.

Sir FARRER HERSCHELL: Yes, but it is the Parliament of Canada that creates them so. They might have created anybody else with the authority. He would have his authority to deal with this, not because he is a County Court Judge, but because the Parliament of Canada has designated him as the person who is to fulfil the function. They might designate anybody in any of these provinces. They choose in each province the person considered the most suitable to be a member of the Board.

Sir BARNES PEACOCK: It does not show that it is not a matter of local consideration dependent on the locality.

Sir FARRER HERSCHELL: Supposing it was a matter which they clearly had the power to deal with, they might give the power to one person in one province, and to another in another. It is the local machinery. I do not know whether my friend Mr. Davey thinks that any of the provisions of the Amending Act of 1884 are worth calling attention to?

Mr. DAVEY: I do not think so.

Sir FARRER HERSCHELL: My friend agrees with me that it depends on the Act of 1883. The Act of 1884 amends it in certain details; but there is no question of detail.

Mr. DAVEY: The Amending Act falls with this.

Sir FARRER HERSCHELL: If the Act of 1883 cannot stand, I agree the Act of 1884 cannot stand; and my friend agrees if the Act of 1883 stands, the Act of 1884 stands too.

Well, now, my Lords, the question of course turns upon the construction of the British North America Act 1867. It is the 30th Victoria chapter 3. I propose to call your Lordships' attention to the language of the Section; but to reserve my discussion of it until I have called your attention to what has been laid down by the Privy Council with regard to it; because I think there are certain principles that have been affirmed and re-affirmed, which probably now your Lordships would not think it right to depart from, and that it would be desirable to call your attention to what those are before making my own comments upon the sections in regard to this particular case. All I propose now to do is not to argue, but simply to call your

attention, before I refer to any authorities, to what the terms of the enactment are. It is the 30th Victoria, chapter 3, and the only two sections are Sections 91 and 92. Section 91: "It shall "be lawful for the Queen, by and with the advice and consent of "the Senate and House of Commons, to make laws for the peace, "order and good government of Canada, in relation to all matters "not coming within the classes of subjects by this Act assigned "exclusively to the Legislatures of the Provinces, and for greater "certainty, but not so as to restrict the generality of the foregoing "terms of this section, it is hereby declared that (notwithstanding "anything in this Act), the exclusive legislative authority of the "Parliament of Canada extends to all matters coming within the "classes of subjects next hereinafter enumerated, that is to say "(1) The public debt and property; (2) The regulation of trade "and commerce; (3) The raising of money by any mode or system "of taxation; (4) The borrowing of money on the public credit; "(5) Postal service; (6) The census and statistics; (7) Militia, "military and naval service and defence; (8) The fixing of and "providing for the salaries and allowances of civil and other "officers of the Government of Canada; (9) Beacons, buoys, "lighthouses, and Sable Island; (10) Navigation and shipping; "(11) Quarantine, and the establishment and maintenance of "marine hospitals; (12) Sea coast and inland fisheries; (13) "Ferries between a province and any British or foreign country, "or between two provinces; (14) Currency and coinage; "(15) Banking, incorporation of banks, and the issue of paper "money; (16) Savings Banks; (17) Weights and measures; "(18) Bills of Exchange and promissory notes; (19) Interest; "(20) Legal Tender; (21) Bankruptcy and Insolvency; (22) "Patents of Invention and Discovery; (23) Copyrights; (24) "Indians, and lands reserved for the Indians; (25) Naturalisation "and Aliens; (26) Marriage and Divorce; (27) The Criminal "Law, except the constitution of Courts of Criminal Jurisdiction, "but including the procedure in Criminal Matters; (28) The "establishment, maintenance and management of Penitentiaries; "(29) Such classes of subjects as are expressly excepted in the "enumeration of the classes of subjects by this Act assigned "exclusively to the Legislatures of the Provinces. And any "matter coming within any of the classes of subjects enumerated "in this section shall not be deemed to come within the class of "matters of a local or private nature, comprised in the "enumeration of the classes of subjects by this Act assigned "exclusively to the Legislatures of the Provinces." Section 92

provides: "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:—(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; " (5) The management and sale of the 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, " and Eleemosynary Institutions in and for the Province, " other than Marine Hospitals; (8) Municipal Institutions " in the province; (9) Shop, saloon, tavern, auctioneer, and " other licenses in order to the raising of a revenue for provincial, " local, or municipal purposes; (10) Local works and undertaking, " other than such as are of the following classses: (*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; (11) The incorporation " of companies with provincial objects; (12) The solemnization of " marriage in the province; (13) Property and civil rights in " the province; (14) The administration of justice in the " province, including the constitution, maintenance, and " organisation of provincial courts, both of civil and of criminal " jurisdiction, and including procedure in civil matters in those " courts; (15) The imposition of punishment by fine, penalty, " or imprisonment for enforcing any law of the province, made " in relation to any matter coming within any of the classes of " subjects enumerated in this section; (16) Generally all matters " of a merely local or private nature in the province." Those, my Lords, are the two sections, and before discussing them, as I have said, I propose to call your Lordships' attention to one

or two cases; but I would desire to point out simply this, that it has been laid down in more than one case, that for determining the question whether any matter is a matter within the exclusive jurisdiction of the province, the proper course is first to look at Section 92, to see whether it comes within any of the clauses enumerated there. If it does not, then there is an end of the contention that it is within the exclusive legislature of the province. But even if you do find it in Section 92, then you have to look to Section 91 and see whether you find it in Section 91, because if it be in Section 91, then so far Section 91 over-rides and limits Section 92. Now, my Lords, I will call your attention at once to the case of Russell *v.* The Queen, which is in the 7th Appeal Cases, page 829. It was an "Appeal from a judgment of the Supreme Court "given in Hilary Term 44 Vict. discharging a rule nisi granted "by the said Court upon the application of the respondent for a "writ of certiorari to remove into the said Court a certain "conviction made by John L. Marsh, Esq., the police magistrate "of the city of Frederickton, within the province, against the "respondent for unlawfully selling, bartering, and disposing of "intoxicating liquors contrary to the second part of the Canada "Temperance Act, 1878. The question raised in this appeal was "as to the validity of the said Act. The Supreme Court followed "the decision of the Supreme Court of Canada in the case of the "City of Frederickton *v.* The Queen, which upheld the validity "of the Act, reversing a decision of the New Brunswick Supreme "Court, which declared its invalidity as being ultra vires the "Dominion Parliament." The judgment of the Privy Council was delivered by Sir Montague E. Smith. There were present at the argument: Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, Sir James Hannen, and Sir Richard Couch. Their Lordships say: "This is an appeal from an order of the Supreme "Court of the province of New Brunswick discharging a rule "nisi which had been granted on the application of the Appellant "for a certiorari to remove a conviction made by the police "magistrate of the city of Frederickton against him for unlawfully "selling intoxicating liquors contrary to the provisions of the "Canada Temperance Act 1878. No question has been raised "as to the sufficiency of the conviction, supposing the "above-mentioned statute is a valid legislative Act of the "Parliament of Canada. The only objection made to the "conviction in the Supreme Court of New Brunswick and "in the appeal to Her Majesty in Council is that,

"having regard to the provisions of the British North "America Act 1867 relating to the distribution of legislative "powers, it was not competent for the Parliament of Canada "to pass the Act in question. The Supreme Court of New "Brunswick made the order now appealed from in deference to a "judgment of the Supreme Court of Canada in the case of the City "of Fredericton *v.* The Queen. In that case the question of the "validity of the Canada Temperance Act, 1878, though in another "shape, directly arose, and the Supreme Court of New Brunswick, "consisting of six judges, then decided—Mr. Justice Palmer "dissenting—that the Act was beyond the competency of the "Dominion Parliament. On the appeal of the City of Fredericton, "this judgment was reversed by the Supreme Court of Canada, "which held—Mr. Justice Henry dissenting—that the Act was "valid." (The case is reported in 3rd Supreme Court of Canada Reports, p. 505.) "The present appeal to Her Majesty is brought "in effect to review the last-mentioned decision." The preamble of the Act in question states that "it is very desirable to promote "temperance in the Dominion, and that there should be uniform "legislation in all the provinces respecting the traffic in "intoxicating liquors. The Act is divided into three parts. "The first relates to 'proceedings for bringing the second part "'of this Act into force'; the second to 'prohibition of traffic "'in intoxicating liquors'; and the third to 'penalties and "'prosecutions for offences against the second part.' The mode "of bringing the second part of the Act into force, stating it "succinctly as follows: On a petition to the Governor in Council, "signed by not less than one-fourth in number of the electors of "any county or city in the Dominion qualified to vote at the "election of a member of the House of Commons, praying that the "second part of the Act should be in force and take effect "in such county or city, and that the votes of all the "electors be taken for or against the adoption of the petition, "the Governor-General after certain prescribed notices and "evidence, may issue a proclamation embodying such petition, "with a view to a poll of the electors being taken for or against "its adoption. When any petition has been adopted by the "electors of the county or city named in it, the Governor-General "in Council may, after the expiration of sixty days from the day "on which the petition was adopted, by Order in Council, "published in the 'Gazette,' declare that the second part of the "Act shall be in force, and take effect in such county or city, "and the same is then to become of force, and take effect

"accordingly. Such Order in Council is not to be revoked for "three years, and only on like petition and procedure. The "most important of the prohibitory enactments contained in the "second part of the Act is S. 99, which enacts that from the day "on which this part of this Act comes into force, and takes effect "in any county or city, and for so long thereafter as the same "continues in force therein, no person, unless it be for exclusively "sacramental or medicinal purposes, or for bonâ fide use in some "art trade or manufacture, under the regulation contained in the "fourth sub-section of this section, or as hereinafter authorised "by one of the four next sub-sections of this section, shall, "within such county or city, by himself, his clerk, servant, or "agent, expose or keep for sale, or directly or indirectly, on any "pretence or upon any device, sell or barter, or in consideration "of the purchase of any other property, give to any other person "any spirituous or other intoxicating liquor, or any mixed liquor, "capable of being used as a beverage, and part of which is "spirituous or otherwise intoxicating. Sub-section 2 provides "that 'neither any license issued to any distiller or brewer' "(and after enumerating other licenses), 'nor yet any other "'description of license whatever shall in any wise avail "'to render legal any act done in violation of this section.' "Sub-section 3 provides for the sale of wine for "sacramental purposes, and Sub-section 4 for the sale of intoxicating "liquors for medicinal and manufacturing purposes, these sales "being made subject to prescribed conditions. Other sub-sections "provide that producers of cider, and distillers, and brewers, may "sell liquors of their own manufacture in certain quantities, which "may be termed wholesale quantities, or for export, subject to "prescribed conditions, and there are provisions of a like nature "with respect to vine growing companies and manufacturers of "native wines. The third part of the Act enacts (Section 100) "that whoever exposes for sale or sells intoxicating liquors in "violation of the second part of the Act, should be liable, on "summary conviction, to a penalty of not less than fifty dollars "for the first offence, and not less than one hundred dollars for "the second offence, and to be imprisoned for a term not "exceeding two months for the third and every subsequent "offence; all intoxicating liquors in respect to which any such "offence has been committed to be forfeited. The effect of the "Act when brought into force in any county or town within the "Dominion is, describing it generally, to prohibit the sale of "intoxicating liquors, except in wholesale quantities, or for certain

"specified purposes, to regulate the traffic in the excepted cases, "and to make sales of liquors in violation of the prohibition and "regulations contained in the Act, criminal offences punishable "by fine, and for the third or subsequent offence by imprisonment. "It was in the first place contended, though not very strongly "relied on, by the appellant's Counsel, that asuming the Parliament "of Canada had authority to pass a law for prohibiting and regulating "the sale of intoxicating liquors, it could not delegate its powers, "and that it had done so by delegating the power to bring into force "the prohibitory and penal provisions of the Act to a majority of "the electors of counties and cities. The short answer to this "objection is that the Act does not delegate any legislative "powers whatever. It contains within itself the whole legislation "on the matters with which it deals. The provision that certain "parts of the Act shall come into operation only on the petition "of a majority of electors does not confer on these persons power "to legislate. Parliament itself enacts the condition and "everything which is to follow upon the condition being fulfilled. "Conditional legislation of this kind is in many cases convenient, "and is certainly not unusual, and the power so to legislate "cannot be denied to the Parliament of Canada when the subject "of legislation is within its competency. Their Lordships entirely "agree with the opinion of Chief Justice Ritchie on this objection. "If authority on the point were necessary it will be found in "the case of The Queen *v.* Burah, lately before this Board. The "general question of the competency of the Dominion Parliament "to pass the Act depends on the construction of the 91st and 92nd "Sections of the British North America Act, 1867, which are "found in Part VI. of the statute, under the heading "'Distribution of Legislative Powers.'" Then His Lordship reads the 91st Section, and proceeds:—"The general scheme of the "British North America Act with regard to the distribution of "legislative powers, and the general scope and effect of sections "91 and 92, and their relation to each other, were fully considered "and commented on by this Board in the case of the 'Citizens' "Insurance Company *v.* Parsons,'" that I shall have presently to call your Lordships' attention to. "According to the principle of "construction there pointed out, the first question to be "determined is, whether the Act now in question falls within "any of the classes of subjects enumerated in Section "92, and assigned exclusively to to the Legislatures of the "Provinces. If it does, then the further question would "arise, viz., whether the subject of the Act does not also

" fall within one of the enumerated classes of subjects in Section " 91, and so does not still belong to the Dominion Parliament. " But if the Act does not fall within any of the classes of subjects " in Section 92, no further question will remain, for it cannot be " contended, and indeed was not contended at their Lordships' " bar, that, if the Act does not come within one of the classes of " subjects assigned to the Provincial Legislatures, the Parliament of " Canada had not, by its general power 'to make laws for the peace, " 'order, and good government of Canada,' full Legislative authority " to pass it. Three classes of subjects enumerated in Section 92 " were referred to, under each of which it was contended by the " appellant's Counsel the present legislation fell. These were:— " [9] Shop, saloon, tavern, auctioneer, and other licenses in order " to the raising of a revenue for provincial, local, or municipal " purposes. [13] Property and civil rights in the province. " [16] Generally all matters of a merely local or private nature " in the province. With regard to the first of these classes " (No. 9), it is to be observed that the power of granting licenses " is not assigned to the Provincial Legislatures for the purpose " of regulating trade, but 'in order to the raising of a revenue " for provincial, local, or municipal purposes.' The Act in " question is not a fiscal law; it is not a law for raising revenue; " on the contrary, the effect of it may be to destroy or diminish " revenue; indeed it was a main objection to the Act that in the " city of Frederickton it did in point of fact diminish the sources " of municipal revenue. It is evident, therefore, that the matter " of the Act is not within the class of subject No. 9, and " consequently that it could not have been passed by the " Provincial Legislature by virtue of any authority conferred " upon it by that sub-section." That appears to be certainly a distinct authority that the fact that the legislation is such as would diminish revenue by preventing money being received for licenses which down to that time had been received, is not a ground for contending that it is not within the powers of the Domininion Parliament.

Sir MONTAGUE SMITH: The discussion there was upon that particular section, and that that Act was not brought within it, as it was not within the power of the Provincial Legislature. The argument is directed to that only.

Sir FARRER HERSCHELL: Yes, but it meets what was suggested to me in the course of the argument, pointing to its not being within the power of the Dominion Parliament, that it

might interfere with the revenue which the Province was seeking to raise by these licenses.

Sir MONTAGUE SMITH: That alone does not prevent its being within the jurisdiction of the Dominion.

Sir FARRER HERSCHELL (*continuing to read from the Judgment*): "It appears that by statutes of the province "of New Brunswick authority has been conferred upon the "Municipality of Frederickton to raise money for municipal "purposes by granting licenses of the nature of those described "in No. 9 of Section 92, and that licenses granted to taverns "for the sale of intoxicating liquors were a profitable source "of revenue to the municipality. It was contended by the "appellants' Counsel, and it was their main argument on this part "of the case that the Temperance Act interfered prejudicially with "the traffic from which this revenue was derived, and thus invaded "a subject assigned exclusively to the Provincial Legislature. "But, supposing the effect of the Act to be prejudicial to "the revenue derived by the municipality from licenses, it does "not follow that the Dominion Parliament might not pass it by "virtue of its general authority to make laws for the peace, order, and "good government of Canada. Assuming that the matter of the Act "does not fall within the class of subject described in No. 9 that "subsection can in no way interfere with the general authority "of the Parliament to deal with that matter. If the argument "of the appellant that the power given to the Provincial "Legislatures to raise a revenue by licenses prevents the "Dominion Parliament from legislating with regard to any "article or commodity which was or might be covered by such "licenses were to prevail, the consequence would be that laws "which might be necessary for the public good or the public "safety could not be enacted at all. Suppose it were deemed to "be necessary or expedient for the national safety, or for "political reasons, to prohibit the sale of arms, or the carrying "of arms, it could not be contended that a Provincial Legislature "would have authority, by virtue of Sub-section 9 (which alone "is now under discussion) to pass any such law, nor, if the "appellant's argument were to prevail, would the Dominion "Parliament be competent to pass it, since such a law would "interfere prejudicially with the revenue derived from licenses "granted under the authority of the Provincial Legislature for the "sale or the carrying of arms. Their Lordships think that the "right construction of the enactments does not lead to any such "inconvenient consequence. It appears to them that legislation "of the kind referred to, though it might interfere with the sale

" or use of an article included in a license granted under Sub-
" section 9, is not in itself legislation upon or within the subject
" of that sub-section, and consequently is not, by reason of it, taken
" out of the general power of the Parliament of the Dominion.
" It is to be observed that the express provision of the Act in
" question that no licenses shall avail to render legal any act done
" in violation of it, is only the expression, inserted probably from
" abundant caution, of what would be necessarily implied from the
" legislation itself assuming it to be valid." I might pause there for a moment to point out, supposing that for public safety the carrying of arms was prohibited in a time of difficulty, or where public revolt was apprehended, by any person not taking a license to carry arms from the Dominion Government of Canada, such a law as that passed throughout the Dominion might no doubt conflict with a law which had been passed in each province, which provided that no person should carry arms who did not take out a license for the carrying of arms, but I apprehend, as is pointed out here, that even although each of the provinces had said no person shall carry arms unless he pays annually ten dollars for a license for carrying arms for the purposes of the provincial revenue, that would not prevent the Dominion Parliament passing a law, at a time when the public safety was endangered, that no person should carry arms without a licence so to do from the Government of Canada, or such authority as they might appoint for the purpose of giving such license.

The LORD CHANCELLOR: " Public safety " there, in the way you use it, would mean the safety of the entire Dominion, of course?

Sir FARRER HERSCHELL: Yes. I merely use that as an illustration, showing as I venture to submit that even if the regulation which was made by the Dominion of Canada for the safety of the entire community of Canada took the form of requiring a license for that purpose, in a case in which for an entirely different purpose the provincial legislature require the license; the fact that they had power to say everybody who carries a gun shall pay us ten dollars a year to help our revenue, would not prevent the Dominion Parliament saying, everybody who carries a gun, whether he has a provincial license or not, shall, for the safety of the community, obtain a license from the Governor-General, or some official appointed by the Act.

Lord MONKSWELL: It would come to this, that the Dominion Parliament would make void licenses of the Local

Legislature. Licensing a man to carry arms means that he may carry arms when he has them, I suppose ?

Sir FARRER HERSCHELL : Yes. The only license the Provincial Legislature is empowered to give—the only exclusive license—is for the purpose of raising a provincial revenue ; but if, when you have given a license for the purpose of raising the revenue, the public safety demands that the man should be prevented from doing the thing to which you have licensed him, it still would be competent for the Dominion Parliament to prevent his doing it, although the Provincial Legislature has said he shall not do it without taking out the license.

Lord MONKSWELL : You would say the public safety, or welfare, perhaps ?

Sir FARRER HERSCHELL : Yes, I should go beyond that. I purposely confined it to public safety, because that was a case there could not be much question about. I put that as the strongest case simply as an illustration that it could not be a sound argument to say that because the Provincial Legislature would have power to require a license for revenue purposes, the Dominion Parliament might not require another license for a totally different purpose, namely, not for revenue purposes, but for the purpose of protecting the safety of the State.

Lord HOBHOUSE : For peace, order, and good government?

Sir FARRER HERSCHELL : Yes. What that extends to I am going to argue by and by. I was merely putting the strongest point for the purpose of showing that that mere power of the Provincial Legislature could not exclude all licensing power by the Dominion Parliament. "Next, their Lordships "cannot think that the Temperance Act in question properly "belongs to the class of subjects, 'Property and Civil Rights.' "It has in its legal aspect an obvious and close similarity to laws "which place restrictions on the sale or custody of poisonous "drugs, or of dangerously explosive substances. These things, "as well as intoxicating liquors, can, of course, be held as "property, but a law placing restrictions on their sale, custody, "or removal, on the ground that the free sale or use of them is "dangerous to public safety, and making it a criminal offence "punishable by fine or imprisonment to violate these restrictions, "cannot properly be deemed a law in relation to property in the "sense in which those words are used in the 92nd Section. What "Parliament is dealing with in legislation of this kind is not a "matter in relation to property and its rights, but one relating to "public order and safety. That is the primary matter dealt with,

"and though incidentally the free use of things in which men "may have property is interfered with, that incidental interference "does not alter the character of the law." Upon the same "considerations the Act in question cannot be regarded as "legislation in relation to civil rights. In however large a sense "these words are used, it could not have been intended to "prevent the Parliament of Canada from declaring and enacting "certain uses of property, and certain acts in relation to property "to be criminal and wrongful. Laws which make it a criminal "offence for a man wilfully to set fire to his own house on the "ground that such an act endangers the public safety, "or to overwork his horse on the ground of cruelty to "the animal, though affecting in some sense property "and the right of a man to do as he pleases with "his own cannot properly be regarded as legislation in "relation to property or to civil rights. Nor could a law which "prohibited or restricted the sale or exposure of cattle having "a contagious disease be so regarded." Supposing that a man was prohibited from selling or exposing cattle without getting a license, that they were free of disease. I venture to think that would be a very analogous case to the present, and would follow the reasoning to which I am calling your Lordships' attention. "Laws of this nature, designed for the promotion of public order, "safety, or morals, and which subject those who contravene them "to criminal procedure and punishment, belong to the subject of "public wrongs rather than to that of civil rights. They are of "a nature which fall within the general authority of Parliament, "to make laws for the order and good government of Canada, "and have direct relation to criminal law, which is one of the "enumerated classes of subjects assigned exclusively to the "Parliament of Canada. It was said in the course of the "judgment of this Board in the case of the Citizens' Insurance "Company of Canada *v.* Parsons, that the two sections (91 and "92) must be read together, and the language of one interpreted, "and, where necessary, modified by that of the other. Few, if "any, laws could be made by Parliament for the peace order, "and good government of Canada, which did not in some incidental "way affect property and civil rights, and it could not have been "intended, when assuring to the provinces, exclusive legislative "authority on the subjects of property and civil rights, to exclude "the Parliament from the exercise of this general power whenever "any such incidental interference would result from it. The true "nature and character of the legislation in the particular instance

" under discussion must always be determined, in order to ascertain " the class of subject to which it really belongs. In the present case " it appears to their Lordships, for the reasons already given, that " the matter of the Act in question does not properly belong to " the class of subjects 'Property and Civil Rights' within the " meaning of subsection 13. It was argued by Mr. Benjamin " that if the Act related to criminal law, it was provincial criminal " law, and he referred to Sub-section 15 of Sec. 92, viz., 'The " 'imposition of punishment by fine, penalty, or imprisonment " 'for enforcing any law of the province made in relation to any " 'matter coming within any of the classes of subjects enumerated " 'in this section.' No doubt this argument would be well founded " if the principal matter of the Act could be brought within any " of these classes of subjects; but as far as they have yet gone, " their Lordships fail to see that this has been done. It was lastly " contended that this Act fell within Sub-sect. 16, of Sec. 92: " 'Generally all matters of a merely local or private nature in " 'the province.' It was not, of course, contended for the appellant " that the legislature of New Brunswick could have passed the " Act in question, which embraces in its enactments all the " provinces; nor was it denied, with respect to this last contention, " that the Parliament of Canada might have passed an Act of the " nature of that under discussion to take effect at the same time " throughout the whole Dominion. Their Lordships understand " the contention to be that at least in the absence of a general law " of the Parliament of Canada, the Provinces might have passed a " local law of a like kind, each for its own province, and that, as " the prohibitory and penal parts of the Act in question were to " come into force in those counties and cities only in which it was " adopted in the manner prescribed, or, as it was said, 'by " local option,' the legislation was in effect, and on its face, " upon a matter of a merely local nature. The judgment " of Allen, C. J., delivered in the Supreme Court of the Province " of New Brunswick, in the case of Barker *v.* City of " Frederickton, which was adverse to the validity of the Act in " question, appears to have been founded upon this view of its " enactments. The learned Chief Justice says :—' Had this Act " ' prohibited the sale of liquor, instead of merely restricting and " ' regulating it, I should have had no doubt about the power of the " ' Parliament to pass such an Act; but I think an Act, which in " ' effect authorises the inhabitants of each town or parish to " ' regulate the sale of liquor, and to direct for whom, for what " ' purposes, and under what conditions spirituous liquors may be

" sold therein, deals with matters of a merely local nature, which, " by the terms of the 16th Sub-section of Sect. 92 of the British " North America Act, are within the exclusive control of the " local Legislature.' Their Lordships cannot concur in this view. " The declared object of Parliament in passing the Act is that " there should be uniform legislation in all the provinces " respecting the traffic in intoxicating liquors, with a view to " promote temperance in the Dominion. Parliament does not treat " the promotion of temperance as desirable in one province more " than in another, but as desirable everywhere throughout the " Dominion. The Act as soon as it was passed became a law for " the whole Dominion, and the enactments of the first part, " relating to the machinery for bringing the second part into " force, took effect and might be put in motion at once and " everywhere within it. It is true that the prohibitory and penal " parts of the Act are only to come into force in any county " or city upon the adoption of a petition to that effect by " a majority of electors, but this conditional application of " these parts of the Act does not convert the Act itself " into legislation in relation to a merely local matter. The " objects and scope of the legislation are still general, viz., to " promote temperance by means of a uniform law throughout the " Dominion." It cannot be doubted that the scope and intention of this Act are precisely the same, they are to promote temperance by means of a uniform law throughout the Dominion, and they are to promote temperance by, in one view of it, enabling smaller localities than those which had the power before to practically prohibit the sale within their area, and in the next place in those parts of Canada in which they are not prepared to prohibit altogether, to regulate and limit. " The " manner of bringing the prohibitions and penalties of the Act " into force which Parliament has thought fit to adopt, does not " alter its general and uniform character. Parliament deals with " the subject as one of general concern to the Dominion, upon " which uniformity of legislation is desirable, and the Parliament " alone can so deal with it. There is no ground or pretence for " saying that the evil or vice struck at by the Act in question is " local, or exists only in one province, and that Parliament, " under colour of general legislation is dealing with a provincial " matter only. It is therefore unnecessary to discuss the " considerations which a state of circumstances of this kind might " present. The present legislation is clearly meant to apply a " remedy to an evil which is assumed to exist throughout the

"Dominion, and the local option as it is called, no more "localizes the subject and scope of the Act than a provision "in an Act for the prevention of contagious diseases in "cattle that a public officer should proclaim in what "districts it should come into effect, would make the statute "itself a mere local law for each of these districts. "In statutes of this kind the legislation is general, and the "provision for the special application of it to particular places "does not alter its character. Their Lordships having come to "the conclusion that the Act in question does not fall within any "of the classes of subjects assigned exclusively to the Provincial "Legislatures, it becomes unnecessary to discuss the further "question whether its provisions also fall within any of the classes "of subjects enumerated in Section 91. In abstaining from this "discussion they must not be understood as intimating any "dissent from the opinion of the Chief Justice of the Supreme "Court of Canada, and the other Judges, who held that the Act "as a general regulation of the traffic in intoxicating liquors "throughout the Dominion fell within the class of subject, 'the "'regulation of trade and commerce,' enumerated in that section, "and was, on that ground, a valid exercise of the legislative power "of the Parliament of Canada." The judgment was accordingly affirmed. That last observation is extremely important, because although their Lordships do not give assent to the view which was taken in this case by the Supreme Court of Canada, they do not dissent from it.

Sir MONTAGUE SMITH: I think the intention was to give no opinion on that. The saying we did not dissent was to show that by not giving judgment on the same ground we did not do it because we dissented.

Sir FARRER HERSCHELL: I do not think I can claim this as an authority for its coming within that provision in Section 91, but I was going to say so far I am entitled to maintain that the decision in that case of the Supreme Court has not been affected, or in any way overruled by the decision of your Lordships. I submit if that ground were correct, if the Act as a general regulation of the traffic in intoxicating liquors throughout the Dominion fell within the class of subjects, "the regulation of "trade and commerce," that would at once maintain the position which I have to maintain before your Lordships, because if it comes within that clause in Section 91, it does not matter whether it comes within Section 92 or not.

The LORD CHANCELLOR: You are going to argue that it does?

Sir FARRER HERSCHELL: Yes. There is nothing in Section 92 exclusively committed to the Provincial Legislature which excludes this action of the Dominion Parliament. That was the view taken by your Lordships in the case of Russell *v.* The Queen, and I certainly rely upon Russell *v.* The Queen as distinct authority in favour of the propositions for which I am contending. I shall maintain that there is no distinction in principle between Russell *v.* The Queen and the present case. The scope, character, and object of the Act is precisely the same in both. In both it deals with intemperance as being an evil affecting the whole Dominion; in both it deals with the question of intemperance by limiting and restricting the sale of intoxicating liquors, and subjecting them to conditions which would be likely to limit their sale, and in each the Act purports to deal alike with the whole Dominion, and to seek to pass one uniform law in that respect for the whole Dominion. Those observations therefore with regard to looking at the scope and character of the Act, to its being not merely local, but dealing with the Dominion as a whole, to its treating the subject matter as one of importance to the entire community of the Dominion alike; all that is said in the case of Russell *v.* The Queen, applies directly to the present case.

Sir MONTAGUE SMITH: Of course in Russell *v.* The Queen the principle of the decision, the *ratio decidendi*, is that it is not within any part of Section 92. But the Temperance Act was a prohibitory Act substantially, and it did not fall within any of the Sections of 92. So it was held.

Sir FARRER HERSCHELL: Yes, and my contention will be, that if they do not fall within it neither will this fall.

Sir MONTAGUE SMITH: The difference seems to be that this is a sort of Regulating Act rather than a Prohibitory Act.

Sir FARRER HERSCHELL: It is to a certain extent regulating.

Sir MONTAGUE SMITH: The primary object of that Act was to prohibit.

Sir FARRER HERSCHELL: Yes, and this is to restrict the sale. The machinery of the legislation no doubt is different, but these licenses are not granted merely as enabling powers, but as limiting and restricting powers. They are not for the purpose of enabling the sale of intoxicating liquors, but they are

for the purpose of restricting and limiting. They enable, because a man cannot do it without obtaining his license, but the purport, scope and object of the Act is by giving powers of veto to the inhabitants to limit and restrict it, and to enable people if they like to be, at all events, in a great measure without it, even though they do not want to be altogether without it. The truth is the one Act is only brought into force where people want to be practically altogether without it. The other is to enable districts who are not prepared for such stringent regulations as that at all events to take part in the limiting to a great extent of the sale.

Lord HOBHOUSE: I do not suppose this Act enlarges any power to sell liquor that before existed.

Sir FARRER HERSCHELL: No, it limits the power.

Lord HOBHOUSE: It limits the liberty that people had before to sell liquor, and in no way enlarges it.

Lord MONKSWELL: You say if the Legislature had power to take away a certain liberty it has power to restrict it.

Sir FARRER HERSCHELL: Yes, if you find the object, scope, and purpose of it is precisely the same. The end sought is the improved temperance of the Dominion, which is supposed to be important to the peace, order, and good government of the Dominion. That was the end sought by the Statute which came before your Lordships in Russell *v.* The Queen. Nobody can doubt that precisely the same object is sought by this Statute, and that all that was said about the importance, in such a matter of uniformity, applies as much in the one case as in the other.

Sir MONTAGUE SMITH: I do not think it was the importance of uniformity. They said local option made it local. The argument was directed very much to that.

Sir FARRER HERSCHELL: Yes. Now I cannot help thinking that a great deal of the difficulty which has arisen with regard to viewing this Act in the same light as the Act under consideration in the case of Russell *v.* The Queen arises from what I should call the machinery of the legislation as distinguished from the purposes and object of the legislation. The machinery of this legislation of limitation and restriction is carried out by means of a license; but the license is the machinery for carrying out the object of the Act. The giving licenses is not the main purpose and end of the Act. The giving of a license by a local body might be for the purpose of raising revenue. The giving of the license is of the very essence of the Act. It is the means by which you raise your revenue. But you may have another case, where the license is

merely the machinery by which you effect your object. Your object is to restrict the number of public-houses. You must in some way determine and say what they are to be, and how many, and where. The machinery by which you carry out your limitation and restriction is the giving of the licenses, and saying that without a license no man shall sell. But the licensing is really only part of the machinery for carrying out your Act, which is the limitation and restriction of the sale of intoxicating liquors, and is no part of the object and purpose of the Act. I think, if that distinction is borne in mind, it will be seen how strictly analagous this case really is to the case of Russell *v.* The Queen, and that the view which has been taken has been very much coloured by the fact that it is by a licensing system that the legislation is sought to be carried into effect, and that no doubt, for certain purposes, licensing is put within the jurisdiction of the provincial legislatures. I believe no reasons were given by the learned Judges of the Supreme Court for the view which they took; they merely certified the result at which they had arrived. I believe it was stated in the course of the argument that but for the case of The Queen *v.* Hodge the view they took would have been different. They consider that the case of The Queen *v.* Hodge, also a case before your Lordships, modified to some extent the decision in the case of Russell *v.* The Queen, and therefore I shall call your Lordships' attention in a moment to the case of The Queen *v.* Hodge. I think it will not be unimportant before I do so to point out the view which has been expressed in more than one case, that an Act which in one aspect of it might be within Section 92, in another aspect of it might be within Section 91, and that it may be that a Provincial Legislature would have power to legislate with regard to certain cases arising within its province, and make regulations with regard to them, even though it was a matter in relation to which the Dominion Parliament might legislate for the whole Dominion.

I think it is important in relation to that to call your Lordships' attention to some remarks made by Lord Selborne in delivering the judgment of your Lordships in the case of L'Union St. Jacques de Montreal *v.* Dame Julie Bélisle, Law Reports, Sixth Privy Council, page 31. That was an Act passed by the Provincial Legislature of Quebec, in relation to a particular Company, or Society, a Benevolent Society, incorporated under the name of L'Union St. Jacques De Montreal. It dealt with that Company, authorising a certain dealing with its funds, that Company being in insolvent

condition. The contention was that that was a matter within the powers of the Dominion Parliament, that it really related to bankruptcy and insolvency. Lord Selborne, in delivering the judgment of your Lordships, said (I am reading from the middle of page 35): "Among those"—that is, matters assigned to the exclusive power and competency of the legislature in each Province—"the last is thus expressed: 'Generally all matters of "'a merely local or private nature in the Province.' If there is "nothing to control that in the 91st Section, it would seem "manifest that the subject-matter of this Act, the 33rd Victoria, "chapter 58, is a matter of a merely local or private nature in "the province, because it relates to a benevolent or benefit "society incorporated in the city of Montreal within the province, "which appears to consist exclusively of members who would "be subject *primâ facie* to the control of the Provincial "Legislature. This Act deals solely with the affairs of that "particular society"—and then it points out the manner in which it does so, and then it goes on: "Clearly this matter is "private; clearly it is local, so far as locality is to be considered, "because it is in the province and in the city of Montreal; and "unless, therefore, the general effect of that head of Section 92 "is for this purpose qualified by something in Section 91, it is a "matter not only within the competency, but within the exclusive "competency of the provincial legislature. Now Section 91 "qualifies it undoubtedly, if it be within any one of the different "classes of subjects there specially enumerated; because the last "and concluding words of Section 91 are: 'And any matter "'coming within any of the classes of subjects enumerated in "'this section shall not be deemed to come within the class "'of matters of a local or private nature comprised in the "'enumeration of the classes of subjects by this Act assigned "'exclusively to the legislatures of the provinces.' But the *onus* "is on the Respondent to show that this, being of itself of a local "or private nature, does also come within one or more of the "classes of subjects specially enumerated in the 91st Section. "Now it has not been alleged that it comes within any other class "of the subjects so enumerated except the 21st 'Bankruptcy "'and Insolvency,' and the question therefore is, whether this is "a matter coming under that Class 21 of Bankruptcy and "Insolvency? Their Lordships observe that the scheme of "enumeration in that section is to mention various categories of "general subjects which may be dealt with by legislation. There "is no indication in any instance of anything being contemplated,

"except what may be properly described as general legislation; "such legislation as is well expressed by Mr. Justice Caron when "he speaks of the general laws governing faillite, bankruptcy, "and insolvency, all which are well known legal terms expressing "systems of legislation with which the subjects of this country, "and probably of most other civilized countries, are perfectly "familiar. The words describe, in their known legal sense, "provisions made by law for the administration of the estates of "persons who may become bankrupt or insolvent according to "rules and definitions prescribed by law, including of course the "conditions in which that law is to be brought into operation, the "manner in which it is to be brought into operation, and the "effect of its operation. Well, no such general law covering this "particular association is alleged ever to have been passed "by the Dominion." Now comes the passage which I think the most important. "The hypothesis was suggested in argument "by Mr. Benjamin, who certainly argued this case with his "usual ingenuity and force, of a law having been previously "passed by the Dominion Legislature, to the effect that any "association of this particular kind throughout the Dominion on "certain specified conditions assumed to be exactly those which "appear upon the face of this statute should thereupon, *ipso* "*facto*, fall under the legal administration in bankruptcy or "insolvency. Their Lordships are by no means prepared to say "that if any such law as that had been passed by the Dominion "Legislature, it would have been beyond their competency; nor "that, if it had been so passed, it would have been within the "competency of the provincial legislature afterwards to take a "particular association out of the scope of a general law of that "land, so competently passed by the authority which had power "to deal with bankruptcy and insolvency. But no such law "ever has been passed; and to suggest the possibility of such a "law as a reason why the power of the provincial legislature "over this local and private association should be in abeyance "or altogether taken away, is to make a suggestion which, if "followed up to its consequences, would go very far to destroy "that power in all cases." Well now, my Lords, I think that view is important, because it shows how you might have, according to the view of your Lordships, who were determining that case, a provincial law properly dealing with a local matter under Section 92, and yet that would not exclude the Dominion Parliament, or establish its incompetency to make a general law prevailing throughout the whole Dominion which should deal

with the same subject matter, and so limit and control the right which would otherwise have existed of the Local Parliament to deal with it as local matter as it pleased.

The LORD CHANCELLOR: There is some little difficulty in following that proposition, is there not?—The Dominion Parliament passed a law of Bankruptcy which described in what way every bankrupt person and company should be dealt with, and how their property should go. The Provincial Legislature passed, with reference to a particular company, in its local limits, a law which overrules that general law of Bankruptcy.

Sir FARRER HERSCHELL: No, his Lordship says it would not overrule it.

The LORD CHANCELLOR: It did as a matter of fact. The particular Act of Parliament which is held to be valid did do so.

Sir FARRER HERSCHELL: No; there was no Bankruptcy law passed by the Dominion which at all interfered with anything that had been done by the Province, or conflicted with it.

The LORD CHANCELLOR: I do not so read it.

Sir FARRER HERSCHELL: Yes, his Lordship says so, I think.—His Lordship says this is not invalid merely because you suggest that the Dominion Parliament might have made a general law within which this case would have fallen, and that in that case the law of the Dominion Parliament would have prevailed.

The LORD CHANCELLOR: I do not read it so.

Sir FARRER HERSCHELL: I will read the passage again, and I think your Lordship will see it is so. The first sentence is this: "Well, no such general law covering this particular "association is alleged ever to have been passed by the Dominion." That is the passage which precedes the passage I particularly dwell upon.

The LORD CHANCELLOR: Now look and see what the general law is that he refers to in that.

Sir FARRER HERSCHELL: There was no general law at all.

Sir MONTAGUE SMITH: There was a Bankruptcy law I suppose?

Sir FARRER HERSCHELL: No, there was no Bankruptcy law which would have applied to those companies at all; it was only an hypothesis. What his Lordship says is this: "Well, "no such general law covering this particular association is "alleged ever to have been passed by the Dominion. The "hypothesis was suggested in argument by Mr. Benjamin, who

" certainly argued this case with his usual ingenuity and force, of a " law having been previously passed by the Dominion Legislature, " to the effect that any association of this particular kind " throughout the Dominion on certain specified conditions " assumed to be exactly those which appear upon the face of this " statute should thereupon, *ipso facto*, fall under the legal " administration in bankruptcy or insolvency. Their Lordships " are by no means prepared to say that if any such law as that had " been passed by the Dominion Legislature, it would have been " beyond their competency; nor that if it had been so passed, " it would have been within the competency of the Provincial " Legislature afterwards to take a particular association out of " the scope of a general law of that kind so competently passed " by the authority which had power to deal with Bankruptcy and " Insolvency. But no such law ever has been passed, and to " suggest the possibility of such a law as a reason why the power " of the Provincial Legislature over this local and private " association should be in abeyance or altogether taken away, is " to make a suggestion which, if followed up to its consequences, " would go far to destroy that power in all cases."

The LORD CHANCELLOR: Do you suggest that but for the particular Act which was then under discussion the affairs of that particular company would not have come within the general law of Bankruptcy?

Sir FARRER HERSCHELL: No; there was no such law. There was an Insolvency Act passed subsequently to that date which would affect such companies, but there was no such law at that time.

Lord MONKSWELL: Was there no general Bankruptcy law at that time?

Sir FARRER HERSCHELL: None which was applicable to companies.

Lord MONKSWELL: There was a general Bankruptcy law, but these companies were not touched by it?

Sir FARRER HERSCHELL: No company was touched by it.

Sir MONTAGUE SMITH: Supposing a general Bankruptcy law this company did not fall under it, and therefore this was legislating for a company which the Bankrupt Laws would not have touched in the state in which the country was when the law was passed.

Sir FARRER HERSCHELL: Nor in the state in which the Bankruptcy Law was. The Bankruptcy Law did not touch

companies at all. The opinion expressed is if the Dominion Parliament had dealt generally with all such bodies, bringing them within the law of Bankruptcy or Insolvency, that then it would not have been competent to the Provincial Legislature to take a particular body of that law, and say " We do that because " this is a local matter."

Lord MONKSWELL : That is intimated. You cannot say more than that.

Sir FARRER HERSCHELL : Yes, I have referred to that because it seems to me important. Certainly it may well be that where the Dominion Parliament has not dealt with certain subject matters, it might be within the competency of the Provincial Parliament to deal with them, and yet that it might be open to the Dominion Parliament, to make a general law relating to the same subject matter, dealing with the whole of the Dominion of Canada, which would override what might otherwise have been done.

Lord MONKSWELL : It is intimated that if the Dominion Parliament had occupied the ground before, then the local Government could not occupy it. But supposing the local Government first occupied the ground?

Sir FARRER HERSCHELL : I do not think it can depend on which is first or last, because if the Dominion Parliament can deal with it at all, it is not a matter exclusively committed to the Provincial Legislature.

Lord MONKSWELL : It would follow if the Dominion Parliament could by a general law exclude the local Parliament from dealing with the matter, it could, after the local Parliament had dealt with it, make it null and void.

Sir FARRER HERSCHELL: Yes. I think it follows, because the powers of the Dominion Parliament are unlimited, except so far as matters have been exclusively given to the Province.

Lord MONKSWELL : It may be so. The two things are not quite the same.

Sir FARRER HERSCHELL: It would not necessarily follow as a matter of reasoning, but on the construction of the two sections.

The LORD CHANCELLOR: I should have thought property and civil rights were essentially matters contemplated by the Bankruptcy Act.

Sir FARRER HERSCHELL: It is so pointed out. I am going to call your Lordships' attention to a case in which that

very argument arose—that a certain matter came within the functions of the province, and not the Dominion Parliament, because it dealt with property and civil rights. It was the taking away of a right of appeal in Bankruptcy cases; and it was said, "You are taking away a civil right," and the Privy Council decided that it was not so, that it was a matter of Bankruptcy and Insolvency, and that you could not have any law of Bankruptcy and Insolvency which did not affect and touch civil rights.

Sir MONTAGUE SMITH: The 91st Section says, Whatever is specially enumerated in 91, is to override anything in 92. What is not specially enumerated is not in that position. Of course Bankruptcy and Insolvency is specially enumerated. Still, you must always look at both clauses. There is that singular one: they have "marriage and divorce" in 91, broadly; and then, in 92, "solemnization of marriage." If you looked at 91 only, it would cover everything.

Sir RICHARD COUCH: They have "bills of exchange and "promisory notes" in 91. That would of course interfere with civil rights?

Sir FARRER HERSCHELL: Yes. The truth is, hardly anything can be done by the Dominion Parliament which would not affect a man's civil right, which is to do everything which the legislature has not said he may not do. You could not have any legislation without its affecting matters in a locality, because the person who offends, or is prevented from doing the thing, is in some locality or other. Therefore it is clear the exclusive power with regard to property and civil rights, and with regard to matters of a local character, must have very considerable limitation.

Sir MONTAGUE SMITH: The fact that a legislation may be under one section or the other is one of the great difficulties in the construction of this Act.

Sir FARRER HERSCHELL: Yes. Now, I think it will probably be convenient that I should call your Lordships' attention, before I go to the case of the Citizens' Insurance Company *v.* Parsons, to the case which is supposed to have qualified this—the case of Hodge *v.* The Queen. That is in the 9th appeal cases, page 117. "The appellant was convicted for that he the "appellant did, on the 7th May, 1881, unlawfully permit and "suffer a billiard table to be used and a game of billiards to be "played thereon in his tavern, in the conviction named and "described as the St. James's Hotel, situate within the City of

" Toronto, during the time prohibited by the Liquor License Act " (Revised Statutes of Ontario, C. 181) for the sale of liquor " therein against the form of the resolution of the License " Commissioners for the City of Toronto for regulating taverns " and shops, passed on the 25th of April, 1881." The Appellant failed on the ground that that conviction was not good, because the imposition of such a restriction was not a matter within the competency of the Provincial Parliament. The restriction was that he was the holder of a liquor license of the Commissioners of the City of Toronto, and that there had been a resolution of the Licensing Commissioners for regulating taverns and shops under which this billiard playing was not permitted, and if the billiard playing took place it was made an offence; and the question was whether that was legislation which was competent for the Provincial Legislature. The judgment of your Lordships' was delivered by Sir Barnes Peacock. There were present—Lord Fitzgerald, Sir Barnes Peacock, Sir Robert Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

Sir BARNES PEACOCK: I do not recollect giving that judgment. I think it was a mistake. I was present at the judgment, but Lord Fitzgerald delivered it.

Sir FARRER HERSCHELL: It is in these terms: " The " Appellant, Archibald Hodge, the proprietor of a tavern known " as the ' St. James' Hotel,' in the City of Toronto, who, on the " 7th of May, 1881, was the holder of a license for the retail of " spirituous liquors in his tavern, and also licensed to keep a " billiard saloon, was summoned before the police magistrate of " Toronto for a breach of the resolutions of the License " Commissioners of Toronto, and was convicted on evidence " sufficient to sustain the conviction if the magistrate had authority " in law to make it." Then it sets out the conviction " for that " he, the said Archibald G. Hodge, being a person who, after the " passing of the resolution hereinafter mentioned, received, and " who, at the time of the committing of the offence hereinafter " mentioned, held a license under the Liquor License Act, for " and in respect of the tavern known as the ' St. James' Hotel,' " situate on York Street, within the City of Toronto, on the 7th " day of May, in the year aforesaid, at the said City of Toronto, " did unlawfully permit, allow, and suffer a billiard table to be " used, and a game of billiards to be played thereon in the said " tavern, during the time prohibited by the Liquor License Act " for the sale of liquor therein, to wit, after the hour of seven

" o'clock at night on the 7th day of May, being Saturday." Then, "On the 27th May, 1881, a rule nisi was obtained to " remove that conviction unto the Court of Queen's Bench for " Ontario, in order that it should be quashed as illegal, on the " grounds first, that the said resolution of the said License " Commissioners is illegal and unauthorised; 2nd, That the " said License Commissioners had no authority to pass the " resolution prohibiting the game of billiards as in the said " resolution, nor had they power to authorise the imposition of " a fine, or, in default of payment thereof, imprisonment for " a violation of the said resolution; 3rd, The Liquor License " Act, under which the said Commissioners have assumed to pass " the said resolution, is beyond the authority of the Legislature of " Ontario, and does not authorise the said resolution. It will be " observed that the question whether the local legislature could " confer the authority on the License Commissioners to make the " resolution in question is not directly raised by the rule nisi. On " the 27th of June 1881, that rule was made absolute, and an " order pronounced by the Court of Queen's Bench to quash the " conviction. The judgment of the Court, which seems to have been " unanimous, was delivered by Hagarty, C. J., with elaborate " reasons, but finally it will be found that the decision of the " Court rests on one ground alone, and does not profess to decide " the question which on this appeal was principally discussed " before their Lordships. The Chief Justice in the course of his " judgment, says :—'It was stated to us that the parties desired " to present directly to the Court the very important " question whether the local Legislature, assuming that it had " the power themselves to make these regulations and create " these offences and annex penalties for their infraction, " could delegate such powers to a Board of Commissioners or " any other authority outside their own legislative body,' and " again, he adds, We are thus brought in face of a very serious " question, viz., the power of the Ontario Legislature to vest " in the License Board the power of creating new offences and " annexing penalties for their commission. And concludes his " judgment thus, referring to the resolutions :—The Legislature " has not enacted any of these, but has merely authorised each " board in its discretion to make them. It seems very difficult " in our judgment, to hold that the Confederation Act gives any " such power of delegating authority, first of creating a *quasi* " offence, and then of punishing it by fine or imprisonment. We " think it is a power that must be exercised by the Legislature

" alone. In all these questions of *ultra vires* the powers of our " Legislature, we consider it our wisest course not to widen the " discussion by considerations not necessarily involved in the " decision of the point in controversy. We, therefore enter " into no general consideration of the powers of the " Legislature to legislate on this subject, but, assuming this " right so to do, we feel constrained to hold that they cannot " devolve or delegate these powers to the discretion of a Local " Board of Commissioners. We think the Defendant has the " right to say that he has not offended against any law of the " Province, and that the convictions cannot be supported.' The " case was taken from the Queen's Bench on appeal to the Court of " Appeal for Ontario, under the Ontario Act, 44 Vict. c. 27, and " on the 30th of June 1882, that Court reversed the decision of " the Queen's Bench, and affirmed the conviction. Two questions " only appear to have been discussed in the Court of Appeal, " first, that the Legislature of Ontario had not authority to enact " such regulations as were enacted by the Board of Commissioners, " and to create offences and annex penalties for their infraction; " and second that if the legislature had such authority, it could " not delegate it to the Board of Commissioners, or any other " authority outside their own legislative body. This second " ground was that on which the judgment of the Court of " Queen's Bench rested. The judgments delivered in the Court " of Appeal by Spragge, C.J., and Burton, J.A., are able and " elaborate, and were adopted by Patterson and Morrison, J.J. " and their Lordships have derived considerable aid from a " careful consideration of the reasons given in both Courts. The " Appellant now seeks to reverse the decision of the Court of " Appeal, both on the two grounds on which the case was " discussed in that Court, and on others technical but substantial " and which were urged before this Board with zeal and ability. " The main questions arise on an Act of the Legislature of " Ontario, and on what have been called the Resolutions of the " License Commissioners. The Act in question, is chapter 181 " of the Revised Statutes of Ontario, 1877, and is cited as 'The " 'Liquor License Act.' Section 3 of this Act provides for the " appointment of a Board of License Commissioners for each " city, county, union of counties, or electoral district as the " Lieutenant Governor may think fit, and Sections 4 and 5 are as " follows: Section 4, License Commissioners may at any time " before the first day in each year, pass a resolution, or " resolutions for regulating and determining the matters following,

that is to say:—(1) For defining the conditions and "qualifications requisite to obtain tavern licenses for the retail, "within the municipality, of spirituous, fermented, or other "manufactured liquors, and also shop licenses for the sale by retail "within the municipality of such liquors in shops or places other "than taverns, inns, ale-houses, beer-houses or places of public "entertainment. (2) For limiting the number of tavern and "shop licenses respectively, and for defining the respective times "and localities within which, and the persons to whom such "limited number may be issued within the year, from the "first day of May on one year till the 30th day of April "inclusive of the next year. (3) For declaring that in cities "a number not exceeding ten persons, and in towns a number "not exceeding four persons qualified to have a tavern license "may be exempted from the necessity of having all the tavern "accommodation required by law. (4) For regulating the "taverns and shops to be licensed. (5) For fixing and defining "the duties, powers, and privileges of the Inspector of Licenses "of their district. Section 5: In and by any such resolution of a "Board of License Commissioners, the said Board may impose "penalties for the infraction thereof. Section 43 prohibits the sale "of intoxicating liquors from or after the hour of seven of the clock "on Saturday, till six of the clock on Monday morning thereafter." Section 51 imposes penalties for violation. Then, at the bottom of the page:—"License Commissioners were duly appointed under "this Statute, who, on the 25th of April, 1881, in pursuance of "its provisions, made the resolution or regulation now questioned "in relation to licensed taverns or shops in the City of Toronto, "which contains (*inter alia*) the following paragraphs, "viz., Nor shall any such licensed person, directly or "indirectly, as aforesaid, permit, allow, or suffer any bowling "alley, billiard or bagatelle table to be used, or any games "or amusements of the like description to be played in "such tavern or shop, or in or upon any premises connected "therewith during the time prohibited by the Liquor License "Act, or by this resolution for the sale of liquor therein. Any "person or persons guilty of any infraction of any of the "provisions of this resolution shall, upon conviction thereof "before the Police Magistrate of the City of Toronto, forfeit "and pay a penalty of twenty dollars and costs; and in default "of payment thereof forthwith, the said Police Magistrate shall "issue his warrant to levy the said penalty by distress and sale "of the goods and chattels of the offender; and in default of

" sufficient distress in that behalf, the said Police Magistrate " shall by warrant commit the offender to the common gaol of " the City of Toronto, with or without hard labour, for the " period of fifteen days, unless the said penalty and costs, and " all costs of distress and commitment be sooner paid. The " Appellant was the holder of a retail license for his tavern, and " had signed an undertaking as follows: We, the undersigned " holders of licenses for taverns and shops in the City of " Toronto, respectively acknowledge that we have severally " and respectively received a copy of the resolution of the " License Commissioners of the City of Toronto to regulate " taverns and shops, passed on the 25th day of April last, " hereunto annexed upon the several dates set opposite to our " respective signatures hereunder written, and we severally and " respectively promise, undertake, and agree to observe and " perform the conditions and provisions of such resolution. " A. C. Hodge, 2nd May, tavern. He was also the " holder of a billiard license for the City of Toronto, to " keep a billiard saloon with one table for the year " 1881, and under it had a billiard table in his tavern. " He did permit this billiard table to be used as such " within the period prohibited by the resolution of the " License Commissioners; and it was for that infraction of their " rules he was prosecuted and convicted. The preceding " statement of the facts is sufficient to enable their Lordships to " determine the questions raised on the appeal. Mr. Kerr, Q.C., " and Mr. Jeune, in their full and very able argument for the " Appellant, informed their Lordships that the first and principal " question in the cause was whether 'The Liquor License Act of " '1877,' in its 4th and 5th sections, was *ultra vires* of the " Ontario Legislature, and properly said that it was a matter of " importance as between the Dominion Parliament and the " Legislature of the Province. Their Lordships do not think it " necessary in the present case to lay down any general rule or " rules for the construction of the British North America Act. " They are impressed with the justice of an observation by " Hagarty (C. J.), that in all these questions of *ultra vires* it is " the wisest course not to widen the discussion by considerations " not necessarily involved in the decision of the point in " controversy. They do not forget that in a previous decision on " this same statute (Citizens' Insurance Company of Canada *v.* " Parsons) their Lordships recommended that 'in performing the " 'difficult duty of determining such questions, it will be a wise

" 'course for those on whom it is thrown to decide each case which
" 'arises as best they can without entering more largely upon the
" ' interpretation of the statute than is necessary for the decision
" ' of the particular question in hand.' The Appellants contended
" that the Legislature of Ontario had no power to pass any Act
" to regulate the liquor traffic ; that the whole power to pass
" such an Act was conferred on the Dominion Parliament, and
" consequently taken from the Provincial Legislature by Section 91
" of the British North America Act, 1867; and that it did not come
" within any of the classes of subjects assigned exclusively to
" the Provincial Legislatures by Section 92. The class in
" Section 91 which the Liquor License Act, 1877, was said to
" infringe was No. 2. 'The Regulation of Trade and Commerce,'
" and it was urged that the decision of this Board in Russell *v.*
" Regina was conclusive that the whole subject of the liquor traffic
" was given to the Dominion Parliament and consequently taken
" away from the Provincial Legislature. It appears to their
" Lordships however that the decision of this tribunal in that
" case has not the effect supposed, and that, when properly
" considered it should be taken rather as an authority in support
" of the judgment of the Court of Appeal. The sole question
" there was whether it was competent to the Dominion
" Parliament, under its general powers, to make laws for the
" peace, order, and good government of the Dominion, to pass
" the Canada Temperance Act, 1878, which was intended to be
" applicable to the several Provinces of the Dominion, or to such
" parts of the Provinces as should locally adopt it. It was not
" doubted that the Dominion Parliament had such authority
" under Section 91, unless the subject fell within some one or
" more of the classes of subjects which by Section 92 were
" assigned exclusively to the Legislatures of the Provinces. It
" was in that case contended that the subject of the Temperance
" Act properly belonged to No. 13 of Section 92, 'Property
" 'and Civil Rights in the Province,' which it was said belonged
" exclusively to the Provincial Legislature ; and it was on what
" seems to be a misapplication of some of the reasons of
" this Board in observing on that contention that the
" Appellant's counsel principally relied. These observations
" should be interpreted according to the subject matter to
" which they were intended to apply. Their Lordships in that
" case, after comparing the Temperance Act with laws relating to
" the sale of poisons, observe that :—'Laws of this nature. designed
" 'for the promotion of public order, safety, or morals, and which

" ' subject those who contravene them to Criminal procedure and
" ' punishment, belong to the subject of public wrongs rather than
" ' to that of civil rights. They are of a nature which fall within
" ' the general authority of Parliament to make laws for the order
" ' and good government of Canada.' And again :—' What
" ' Parliament is dealing with in legislation of this kind is not a
" ' matter in relation to property and its rights, but one relating to
" ' public order and safety. That is the primary matter dealt with;
" ' and though incidentally the free use of things in which men
" ' may have property is interfered with, that incidental interference
" ' does not alter the character of the law.' And their Lordships'
" reasons on that part of the case are thus concluded: ' The true
" ' nature and character of the legislation in the particular instance
" ' under discussion must always be determined in order to ascertain
" ' the class of subject to which it really belongs. In the present
" ' case it appears to their Lordships, for the reasons already
" ' given, that the matter of the Act in question does not properly
" ' belong to the class of subjects " property and civil rights "
" ' within the meaning of Sub-section 13.' It appears to their
" Lordships that Russell *v.* The Queen, when properly understood,
" is not an authority in support of the Appellant's contention,
" and their Lordships do not intend to vary or depart from the
" reasons expressed for their judgment in that case. The principle
" which that case and the case of the Citizens' Insurance Company
" illustrate is that subjects which in one aspect and for one
" purpose fall within Section 92 may in another aspect, and
" for another purpose, fall within Section 91. Their
" Lordships proceed now to consider the subject matter and
" legislative character of Sections 4 and 5 of the Liquor License
" Act of 1877, cap. 181, revised Statutes of Ontario. That Act is
" so far confined in its operation to Municipalities in the Province
" of Ontario; and is entirely local in its character and operation.
" It authorises the appointment of License Commissioners to act
" in each Municipality, and empowers them to pass under the
" name of resolutions what we know as bye-laws or rules to
" define the conditions and qualifications requisite for obtaining
" Tavern or Shop licenses for sale by retail of spirituous liquors
" within the municipality ; for limiting the number of licenses ;
" for declaring that a limited number of persons qualified to
" have tavern licenses may be exempted from having all the
" tavern accommodation required by law, and for regulating
" licensed Taverns and Shops, for defining the duties and powers
" of License Inspectors ; and to impose penalties for infraction of

"their resolutions. These seem to be all matters of a merely "local nature in the province, and to be similar to, though not "identical in all respects with, the powers then belonging to "Municipal Institutions under the previously existing Laws "passed by Local Parliaments. Their Lorships consider that "the powers intended to be conferred by the Act in question, "when properly understood, are to make regulations in "the nature of Police or Municipal regulations of a merely "local character for the good government of taverns, &c., "licensed for the sale of liquors by retail, and such as are "calculated to preserve in the Municipality peace and "public decency, and repress drunkenness, and disorderly "and riotous conduct. As such they cannot be said to interfere "with the general regulation of trade and commerce which "belongs to the Dominion Parliament, and do not conflict with "the provisions of the Canada Temperance Act, which does not "appear to have as yet been locally adopted. The subjects of "legislation in the Ontario Act of 1877, Sections 4 and 5, seem "to come within the heads Nos. 8, 15, and 16 of Section 92 "of British North America Statute, 1867." 8 is Municipal Institutions; 15 is the imposition of a penalty for the enforcing of any law which they may make; and 16, matters of a merely local or private nature of the province. "Their Lordships are, "therefore, of opinion that in relation to sections 4 and 5 of the Act "in question, the Legislature of Ontario acted within the powers "conferred on it by the Imperial Act of 1867, and that in this "respect there is no conflict with the powers of the Dominion "Parliament. Assuming that the local legislature had power to "legislate to the full extent of the resolutions passed by the "License Commissioners, and to have enforced the observance "of their enactments by penalties and imprisonment, with or "without hard labour, it was further contended that the Imperial "Parliament had conferred no authority on the local legislature "to delegate those powers to the License Commissioners." That is, of course, another point. The remainder, I think, is all on that point.

[*Adjourned for a short time.*]

Sir FARRER HERSCHELL: My Lords, I had just finished reading Hodge *v.* The Queen, and I propose to make a few remarks with regard to that case before proceeding to the next case I have to cite. It will be observed that the case of Hodge *v.* The Queen does not purport to control or in any way limit the

decision in Russell *v.* The Queen. It accepts it, approves of it, and re-affirms it; but holds that the case and the decision in question was in no way inconsistent with it. It is therefore perfectly clear that Hodge *v.* The Queen cannot be taken to decide that the liquor traffic in each province is so exclusively committed to the Legislature of the Province as that the Dominion Parliament cannot deal with it. It cannot be taken to decide that, because that of course would have been in direct conflict with Russell *v.* The Queen, which had decided that the Act limiting and regulating the liquor traffic and prohibiting it or enabling it to be prohibited in any part of the Dominion was competent to the Dominion Parliament, which of course it could not have been if the exclusive regulation of the liquor traffic had been committed to the provincial legislatures. All that it seems to decide is this, that so far as it does not conflict with any general law made in relation to the liquor traffic by the Dominion Parliament, it is competent in each province to make local regulations as to the manner in which the business shall be locally conducted. Your Lordships will find, when I come to cite the next case to which I shall allude, that that same distinction is regarded, of its being possible to pass an Act dealing with a particular subject matter throughout the Dominion and yet still possible for the provincial legislature to deal locally within their area with the same subject matter provided that they do not deal with it inconsistently with the general legislation.

The LORD CHANCELLOR: What happens if they do deal with it inconsistently?

Sir FARRER HERSCHELL: Then I should say the legislature of the Dominion Parliament prevails. If the matter were competent to the Dominion Parliament, then as everything is competent which is not exclusively committed to the local parliaments the Dominion Parliament legislation would prevail; but within those limits of its not being inconsistent, one can see that many matters might properly be matters of local regulation. For example, let me illustrate my meaning. Supposing this liquor license law to be good, and to apply throughout the whole of the Dominion, I apprehend it would be a perfectly legitimate municipal regulation for any municipality to make, that no more than a certain number of persons should be allowed to go at any given time upon licensed premises. That would be a matter of local regulation in the locality, which I apprehend it might be perfectly competent for a municipality to make.

The LORD CHANCELLOR: Both might stand together?

Sir FARRER HERSCHELL: Yes.

The LORD CHANCELLOR: But supposing you had a provincial regulation that there should be, say, only twelve publichouses in a particular district, and that the working out of the Dominion statute either allowed less or twice as many—it does not matter which—and that therefore they were inconsistent?

Sir FARRER HERSCHELL: Then I should say the Dominion legislation must prevail. I think Russell *v.* The Queen really decides that, because whereas in Ontario the local legislature had said under certain conditions any persons up to a certain number may obtain licenses, then came in the operation of the Dominion statute which allowed nobody, whether licensed or not, to carry on the traffic; and that Russell *v.* The Queen held was a good law, at once destroying in every part of Ontario where it was put in force by the vote of the inhabitants the effect of the local legislation.

Lord HOBHOUSE: Do you say that a matter is of a "local "or private nature" according to the accident of whether the Dominion has or has not passed a law upon the subject?

Sir FARRER HERSCHELL: Well, my Lord, that seems to be a difficulty. It is difficult to say what a local matter is, because everything that takes place within a locality is, in a sense, a local matter. Everything legislated upon by the Dominion Legislature must be in some Province or other, and then it is a local matter.

The LORD CHANCELLLOR: Then you deprive "local" of any meaning at all.

Sir FARRER HERSCHELL: I should say that a local matter must be a matter affecting the locality, and the locality only.

Sir RICHARD COUCH: The words are "merely local."

Sir FARRER HERSCHELL: Yes, my Lord, "merely "local." If you come to anything which is a matter of interest to the entire Dominion, such as anything is which affects crime, for example, I should say then it ceases to be a merely local matter.

The LORD CHANCELLOR: I do not wish to pin you down, but "a matter of interest," you know, is one of those vague phrases which may mean anything.

Sir FARRER HERSCHELL: Of interest, I mean in this sense—I am adopting, not in exactly the same language, the view taken in Russell *v.* The Queen. They say there the question of temperance is of importance, not merely to individua provinces—it is of importance to the entire community; thereforel

providing regulations which it is supposed will promote temperance, although they are to take effect, from time to time, in particular localities, is not dealing with a matter of a merely local nature.

Lord HOBHOUSE: The difficulty is this: the provincial legislature, you say, has power to deal with such matters as the regulation of saloons and so forth, because they are of a local or private nature within the meaning of Section 92.

Sir FARRER HERSCHELL: I do not only put it on that. It may be that a regulation of that kind, if not inconsistent with Dominion legislation, might be a matter properly confided by the provincial law to municipal authorities.

Lord HOBHOUSE: It may be under No. 8.

Sir FARRER HERSCHELL: Yes, my Lord; but I did not mean to confine it to that.

Lord HOBHOUSE: But under one or the other it comes.

Sir FARRER HERSCHELL: Yes.

Lord HOBHOUSE: Then the Dominion Parliament might have power to limit the provincial power of legislation on those two heads, but the difficulty is to know how it can take away what the Imperial Act has given to the provincial legislature.

Sir FARRER HERSCHELL: Take the very case which I put—power given by the province to a municipality to require licenses to be taken out by anyone for the storing of gunpowder. Suppose such a power conferred on the municipality, and that that was a matter which would be within their competence—would that take away or would that be inconsistent with the power of the Dominion Parliament to pass an Act applying throughout the whole of the Dominion for the public safety, prohibiting altogether the sale of any explosive, or subjecting it to much more stringent regulations? Then you come to a matter which is not merely municipal, because you are dealing with it from another aspect, as is put in this very case—that which from one aspect might be within Section 92 is from another aspect within Section 91. You must look at the scope and object, and if you have legislation for a general purpose which is applicable to and decided to be necessary for the good of the whole country, then to that is subordinated any local legislation merely of a local character.

Lord HOBHOUSE: I quite understand the argument that you must carefully weigh the two Sections, 91 and 92, together, in order to understand what the original powers of the two classes of legislation are, but it is difficult for me to understand the argument that when on comparison of the two sections you

have concluded that a particular power falls within Section 92, the accident that the Dominion Parliament had exercised some power under Section 91 should limit the power already found in Section 92 ; because the two are mutually exclusive.

Sir FARRER HERSCHELL : No, I think they are not mutually exclusive, because Section 91 overrides Section 92.

Lord HOBHOUSE : It may override the construction of Section 92. If you once come to the conclusion that the provincial Legislature has power under Section 92, can that power be either contracted or enlarged by the Act of the Dominion Parliament?

Sir FARRER HERSCHELL : Not if you come to the conclusion that it is an exclusive power under Section 91.

Sir RICHARD COUCH : In Section 92 there is exclusive power unless it comes within Section 91, and if it does not come within Section 91 it is excluded.

Sir FARRER HERSCHELL : It may be an exclusive power to deal with local matters for local purposes, and yet it may not exclude the power of the Dominion Parliament to deal with the matter generally for general purposes.

Lord HOBHOUSE : There is no doubt the argument you are putting is supported by the judgment in the Belisle case.

Lord MONKSWELL : I think it is consistent with The Queen *v.* Russell. That goes as far as this, that if under Sub-section 9 of Section 92 the municipality had granted a license for a shop, and it was kept open under the license, still the Dominion Parliament might altogether do away with it.

Sir FARRER HERSCHELL : Your Lordship sees it did apply to this very case, because this Act, which was being considered in Hodge *v.* The Queen, was an Act of Ontario of 1877, and the Canada Temperance Act was an Act of the following year, 1878, and therefore, when your Lordships held that the Canada Temperance Act was good, you held that it did, in the Province of Ontario, override the liquor legislation of the Province of Ontario, which had been passed in 1877.

Lord MONKSWELL : I was putting the case of a shop being licensed under this Sub-section 9 of Section 92, and then of a petition to apply the Act in that very locality. Then the application of the Act in that very locality would make null and void the license of the shop.

Sir FARRER HERSCHELL : Certainly.

Lord MONKSWELL : And so it would interfere with the legislation of the Provincial Legislature.

Lord HOBHOUSE : It would cut away the subject matter. That is your answer.

Sir MONTAGUE E. SMITH : The distinction, if it be one, between the Act in Russell *v.* The Queen and this Act is that that was a prohibitive Act applying to the whole of the Dominion, regardless of what had been done, and prohibiting the liquor traffic. I do not wish to say how it is, but the question is whether this is not, whatever terms it may use in the preamble, really regulating in each province the local traffic.

Sir FARRER HERSCHELL : Well, my Lord, it regulates it throughout the Dominion.

Sir MONTAGUE E. SMITH : It is very difficult—of course you must look at every Act and see what is the scope and object and purpose of it. This is not really to prohibit, but it is to limit.

Sir FARRER HERSCHELL : Well, it is to regulate by way of limitation. It is a step towards prohibition.

Sir MONTAGUE E. SMITH : The main object of the Act is not to prevent the liquor traffic, but to regulate it.

Sir FARRER HERSCHELL : To regulate it by diminishing it.

Sir MONTAGUE E. SMITH : Every regulation in some sense diminishes the thing regulated.

Sir FARRER HERSCHELL : No, it may enlarge it or leave it as it was.

Sir MONTAGUE E. SMITH : Yes. A regulation may or may not diminish to some extent the traffic—that is, those who do not follow the regulations are prevented from carrying on the traffic.

Sir FARRER HERSCHELL : Here it goes beyond that.

Sir MONTAGUE E. SMITH : I do not wish to discuss it, but only to point out that, to my mind, there is a distinction between the two Acts.

Sir FARRER HERSCHELL : I do not say there is not a distinction. I will deal with that presently.

Sir MONTAGUE E. SMITH : Whether it is a distinction without a difference I do not say.

Sir FARRER HERSCHELL : What I was pointing out was this—as to how far Hodge *v.* The Queen affected the present case. I say that if you accept Russell *v.* The Queen as good law as Hodge *v.* The Queen, Hodge *v.* The Queen cannot mean that the Dominion Parliament cannot pass laws dealing with the liquor traffic inconsistent with and which override the local laws.

Lord MONKSWELL: All that it decided, I suppose, you say is that a local legislature could pass a law imposing licenses and so on, but it does not touch the question whether the Dominion Parliament could pass a subsequent law annulling that.

Sir FARRER HERSCHELL: No; Hodge *v.* The Queen does not decide that because that decided this: that there was a power to regulate the playing of billiards in licensed houses, which is something different. All that they had to decide there was whether an Act which gave the Commissioners power to make regulations, one of which regulations related to the playing of billiards in licensed houses, was to that extent valid.

Lord MONKSWELL: The question did not arise whether the Dominion Act could have overridden that.

Sir FARRER HERSCHELL: No; the man was convicted for allowing the playing of billiards on his premises contrary to a local regulation made by the local Commissioners. No doubt the wider question was decided by the judgment that the Act was valid, but it was not necessary to determine that. It was enough to say, if it would have made a difference, it was open to the Provincial Legislature to give to a local body power to so far regulate licensed houses as that no billiards should be played in them. I do not shut my eyes to the fact that the determination did proceed beyond, and that they held that the Act was within the competence of the Provincial Legislature.

Lord FITZGERALD: Not the whole of the Act, but certain portions of it.

Sir FARRER HERSCHELL: Yes, sections 4 and 5.

Sir BARNES PEACOCK: In 1877, after the Imperial Act of 1867, an Act was passed in Ontario for licensing houses for the sale of liquors. That no doubt was a law for the good government of Upper Canada, but it was not a law for the government of the whole dominion.

Sir FARRER HERSCHELL: No.

Sir BARNES PEACOCK: Well, was that void because it interfered with the general provision of a law for the peace, order and good government of Canada?

Sir FARRER HERSCHELL: No.

Sir BARNES PEACOCK: It was a local law, and one would suppose that that was good, notwithstanding it was for the peace, order, and good government of Upper Canada, but it would not be void because of the general provisions giving power to the Dominion Parliament to legislate for the peace, order, and good government of Canada—that is, Canada as

embracing the whole of the Provinces. Therefore you could not say that if it was a matter of a purely local nature it was not void as interfering with the general power of the Dominion, but then that law did not exclude the general power of the Dominion to legislate when they wanted a similar law extending all over the Provinces.

Sir FARRER HERSCHELL : No.

The LORD CHANCELLOR : It depends on whether the two are consistent with each other.

Sir BARNES PEACOCK : That is the question.

The LORD CHANCELLOR : You must face that question.

Sir FARRER HERSCHELL : To take a simple illustration: it is perfectly clear that a law dealing with civil rights in the provinces of Canada might be overridden by a bankruptcy law dealing with the same civil rights passed by the Dominion Parliament.

The LORD CHANCELLOR : But you have got bankruptcy specially reserved.

Sir FARRER HERSCHELL : I am quite aware of that. I shall contend presently that this comes within the regulation of trade and commerce just as much as regards retail as wholesale. I am merely putting it as an illustration, as showing that the fact that it was a thing which would come within one of the heads of section 92, and might be dealt with by it; did not necessarily show that it might be overridden by reason of its coming within the powers of section 91.

Lord FITZGERALD : We did not decide any such proposition as that in Hodge *v.* The Queen.

Sir FARRER HERSCHELL : No, certainly not.

Lord FITZGERALD: The Ontario Act, which we had before us in Hodge *v.* The Queen, was one dealing with exactly the same subjects as are now specified by the Act of 1883. It was not contended on either side that the Ontario Act was not *intra vires* of the local legislature; but it was contended that certain provisions of sections 4 and 5 were outside its powers, and even if within its powers they could not be delegated to any other person or body to enforce. Now, as I understand this case and your present argument, if this Act of 1883 is, as a whole, within the powers of the Dominion Parliament, it supersedes the whole of the Ontario Act which we were dealing with in Hodge *v.* The Queen.

Sir FARRER HERSCHELL: I do not know about the whole, but a great part of it, no doubt.

Lord FITZGERALD: Its provisions are on the same subject and they came in conflict with the Dominion Act. If the Act of 1883 be *intra vires*, it virtually supersedes and annuls the Ontario Act, which we dealt with in Hodge *v.* The Queen.

Sir FARRER HERSCHELL: I have not gone through enough of the Ontario Act to see whether it does, but no doubt it supersedes it in a great measure.

Sir BARNES PEACOCK: I am not sure that it does supersede the whole of it.

The LORD CHANCELLOR: You must go by steps.

Sir FARRER HERSCHELL: I do; and I say that your Lordships have held that the Temperance Act of 1878 did in any particular county or city, enable that county or city by virtue of something entirely outside of the Provincial Legislature to set aside what the Provincial Legislature had enacted.

Sir BARNES PEACOCK: Suppose a license law for Upper Canada: suppose in Lower Canada they refused to pass a license law, and that there was drunkenness and all kinds of mischief going on in Lower Canada, could not the Dominion say, notwithstanding that Lower Canada does not choose to pass a law similar to Upper Canada, we will legislate for Lower Canada. They could legislate for Lower Canada as part of the whole Dominion, and therefore they would pass a law applicable to the whole Dominion similar to that which Ontario had passed for itself, but as to which Quebec refused to pass a similar law. Therefore, seeing that there would be peace and good order in Ontario under that law, and drunkenness and all sorts of mischief going on in the adjoining province, had not the Dominion then power to say we will pass a law for the peace, order and good government of the whole of Canada, including all the provinces, and we will pass a law which will include Quebec as well as Ontario.

Sir FARRER HERSCHELL: That is, of course, my contention. Now, my Lords, I think that the next case to which I ought to call your attention is one that your Lordships will observe is frequently referred to in Russell *v.* The Queen, and the other authorities. It is the case of the Citizens' Insurance Company of Canada *v.* Parsons, and it is in the 7th Appeal Cases, p. 96. My Lords, the question there regarded the validity of a law passed by the province of Ontario, dealing with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and it prescribed

certain conditions which were to form parts of such contracts. I think that is a sufficient description of the Ontario Act, which came in question. It prescribes that as regards all contracts of insurance upon property in Ontario and made in Ontario, there should be certain implied conditions with regard to the storeage of gunpowder, I think it was, which came up in this particular case. But that was the nature of the Act, and the question was whether the Ontario Act was an Act which the Ontario Legislature had power to pass, or whether it was an Act regulating trade and commerce which they had no power to pass. Two questions arose ; first, whether they had power to pass it ; next, whether it was inconsistent with an Act of the Dominion Parliament which required all Insurance Companies, whether incorporated by foreign dominion or Provincial authority to obtain a license to be granted only upon compliance with the conditions prescribed by the Act. Now this case I think is very important in assisting a consideration of the present case, because it is a case in which the Dominion Parliament had legislated with regard to all Insurance Companies throughout the Dominion. It was a case in which the Provincial legislature had legislated with regard to the contract of insurance relating to property within the province, and the question was whether the last Act was good, and whether it was inconsistent with the first—the Dominion Act. Well, it was argued that it was *ultra vires* of the Provincial Legislature, because it was a matter relating to trade and commerce. It was held by your Lordships that it was not ; that the creation of certain implied conditions in that particular province and relating to the property in that province was a matter dealing with civil rights in that province, and was not a matter overborne by the provisions as to the regulation of trade and commerce. I do not think it was questioned that the Dominion Act was a perfectly good Act, which did require all Insurance Companies throughout the Dominion to take out a Dominion license, but it was held to be not inconsistent with it. Now I do not propose to trouble your Lordships with the earlier part of the judgment.

Sir MONTAGUE E. SMITH : I forget what the facts were, but I suppose that the case did not interfere with the license to be taken out under the Dominion Act.

Sir FARRER HERSCHELL : No, it was this—That the local legislation required that there should be a condition in every policy of insurance with regard to the amount of gunpowder stored.

Sir MONTAGUE E. SMITH: Making it part of the contract?

Sir FARRER HERSCHELL: Yes, and the question was whether that Act was good and made it part of the contract. Now, my Lord, the passage which bears upon this begins at the bottom of page 106. "The distribution of legislative powers is "provided for by Sections 91 to 95 of 'The British North America "Act, 1867,' the most important of these being Section 91, headed "'Powers of the Parliament,' and Section 92, headed 'Exclusive "'Powers of Provincial Legislatures.'" Then your Lordship reads those two sections. Then "The scheme of this legislation "as expressed in the first branch of Section 91, is to give to the "Dominion Parliament authority to make laws for the good "government of Canada in all matters not coming within the "classes of subjects assigned exclusively to the provincial "legislature. If the 91st Section had stopped here, and if the "classes of subjects enumerated in Section 92 had been altogether "distinct and different from those in Section 91, no conflict of "legislative authority could have arisen. The provincial "legislatures would have had exclusive legislative power over "the sixteen classes of subjects assigned to them, and the "Dominion Parliament exclusive power over all other matters "relating to the good government of Canada. But it must have "been foreseen that this sharp and definite distinction had not "been and could not be attained, and that some of the classes of "subjects assigned to the provincial legislatures unavoidably ran "into, and were embraced by, some of the enumerated classes of "subjects in Section 91; hence an endeavour appears to have "been made to provide for cases of apparent conflict; and it "would seem that with this object it was declared in the second "branch of the 91st Section, 'for greater certainty, but not so as "to restrict the generality of the foregoing terms of this section,' "that (notwithstanding anything in the Act) the exclusive "legislative authority of the Parliament of Canada should extend "to all matters coming within the classes of subjects "enumerated in that section. With the same object "apparently, the paragraph at the end of Section 91 was "introduced, though it may be observed that this paragraph "applies, in its grammatical construction, only to No. 16 of "Section 92. Notwithstanding this endeavour to give preeminence "to the Dominion Parliament in cases of a conflict of powers, it "is obvious that in some cases where this apparent conflict exists "the legislature could not have intended that the powers

" exclusively assigned to the provincial legislature should be " absorbed in those given to the Dominion Parliament. Take, " as one instance, the subject 'Marriage and Divorce,' contained " in the enumeration of subjects in Section 91. It is evident that " solemnisation of marriage would come within this general " description; yet 'Solemnization of Marriage in the Province' " is enumerated among the classes of subjects in section 92, and " no one can doubt, notwithstanding the general language of " Section 91, that this subject is still within the exclusive authority " of the legislatures of the provinces. So 'The raising of money " 'by any mode or system of Taxation' is enumerated among " the classes of subjects in Section 91; but though the description " is sufficiently large and general to include 'Direct Taxation " 'within the Province, in order to the raising of a Revenue for " 'provincial purposes,' assigned to the provincial legislatures by " Section 92, it obviously could not have been intended that in " this instance also the general power should override the " particular one. With regard to certain classes of subjects, " therefore, generally described in Section 91, legislative power " may reside as to some matters falling within the general " description of these subjects in the legislatures of the provinces. " In these cases it is the duty of the Courts, however difficult it " may be, to ascertain in what degree, and to what extent, " authority to deal with matters falling within these classes of " subjects exists in each legislature, and to define in the particular " case before them the limits of their respective powers. 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. In this way it may, " in most cases, be found possible to arrive at a reasonable and " practical construction of the language of the sections, so as to " reconcile the respective powers they contain, and give effect to " all of them. In performing this difficult duty, it will be a wise " course for those on whom it is thrown to decide each case " which arises as best they can, without entering more largely " upon an interpretation of the statute than is necessary for the " decision of the particular question in hand. The first question " to be decided is whether the Act impeached in the present " Appeals falls within any of the classes of subjects enumerated in " Section 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 *primâ facie* falls within one of these
" classes of subjects that the further questions arise, viz., whether,
" notwithstanding this is so, the subject of the Act does not also
" fall within one of the enumerated classes of subjects in Section
" 91, and whether the power of the Provincial Legislature is or is
" not thereby overborne. The main contention on the part of
" the Respondent was that the Ontario Act in question had
" relation to matters coming within the class of subjects described
" in No. 13 of Section 92, viz., 'property and civil rights in the
" province.' The Act deals with policies of insurance entered
" into or in force in the province of Ontario, for insuring property
" situate therein against fire, and prescribes certain conditions
" which are to form part of such contracts. These contracts,
" and the rights arising from them, it was argued, came legitimately
" within the class of subject—'Property and civil rights.'
" The Appellants, on the other hand, contended that civil
" rights meant only such rights as flowed from the law,
" and gave as an instance the status of persons. Their
" Lordships cannot think that the latter construction is the
" correct one. They find no sufficient reason in the language
" itself, nor in the other parts of the Act, for giving so
" narrow an interpretation to the words 'civil rights.' The
" words are sufficiently large to embrace, in their fair and
" ordinary meaning, rights arising from contract, and such
" rights are not included in express terms in any of the
" enumerated classes of subjects in Section 91. It becomes
" obvious, as soon as an attempt is made to construe the general
" terms in which the classes of subjects in Sections 91 and 92
" are described, that both sections and the other parts of the Act
" must be looked at to ascertain whether language of a general
" nature must not by necessary implication or reasonable
" intendment be modified and limited. In looking at Section 91
" it will be found not only that there is no class including,
" generally, contracts and the rights arising from them, but that
" one class of contracts is mentioned and enumerated, viz., '18,
" 'bills of exchange and promissory notes' which it would have
" been unnecessary to specify if authority over all contracts and
" the rights arising from them had belonged to the Dominion
" Parliament. The provision found in Section 94 of the British
" North America Act, which is one of the sections relating to
" the distribution of legislative powers, was referred to by the
" learned counsel on both sides, as throwing light upon the
" sense in which the words 'property and civil rights' are used.

" By that section the Parliament of Canada is empowered to " make provision for the uniformity of any laws relative to " ' property and civil rights' in Ontario, Nova Scotia, and New " Brunswick, and to the procedure of the Courts in these three " provinces if the provincial Legislatures choose to adopt the " provision so made. The province of Quebec is omitted from " this section for the obvious reason that the law which governs " property and civil rights in Quebec is in the main the French " law as it existed at the time of the cession of Canada and " not the English law which prevails in the other provinces. " The words ' property and civil rights' are obviously used in " the same sense in this section as in No. 13 of Section 92, and " there seems no reason for presumiug that contracts and the " rights arising from them were not intended to be included in " this provision for uniformity. If, however, the narrow " construction of the words ' civil rights,' contended for by the " Appellants, were to prevail, the Dominion Parliament could, " under its general power, legislate in regard to contracts in all " and each of the provinces, and as a consequence of this the " province of Quebec, though now governed by its own civil code, " founded on the French law as regards contracts and their " incidents, would be subject to have its law on that subject " altered by the Dominion Legislature, and brought into " uniformity with the English law prevailing in the other three " provinces, notwithstanding that Quebec has been carefully left " out of the uniformity section of the Act. It is to be observed " that the same words, ' civil rights,' are employed in the Act of 14 " Geo. 3, c. 83, which made provision for the Government of the " province of Quebec. Section 8 of that Act enacted that His " Majesty's Canadian subjects within the province of Quebec should " enjoy their property, usages, and other civil rights, as they had " before done, and that in all matters of controversy relative to " property and civil rights resort should be had to the laws of Canada, " and be determined agreeably to the said laws. In this statute " the words ' property' and ' civil rights ' are plainly used in " their largest sense; and there is no reason for holding that in " the statute under discussion they are used in a different and " narrower one. The next question for consideration is whether, " assuming the Ontario Act to relate to the subject of property " and civil rights, its enactments and provisions come within " any of the classes of subjects enumerated in Section 91. The " only one which the Appellants suggested as expressly " including the subject of the Ontario Act is No. 2, ' the

"'regulation of trade and commerce.' A question was raised "which led to much discussion in the courts below and this bar, "viz., whether the business of insuring buildings against fire was "a trade. This business, when carried on for the sake of profit, "may no doubt, in some sense of the word, be called a trade. "But contracts of indemnity, made by insurers, can scarcely be "considered trading contracts, nor were insurers, who made "them, held to be traders under the English bankruptcy laws; "they have been made subject to those laws by special "description. Whether the business of fire insurance properly "falls within the description of a 'trade,' must, in their "Lordships' view, depend upon the sense in which that word is "used in the particular statute to be construed; but in the "present case their Lordships do not find it necessary to rest "their decision on the narrow ground that the business of "insurance is not a trade. The words 'regulation of trade and "'commerce' in their unlimited sense are sufficiently wide, if "uncontrolled by the context, and other parts of the Act to "include every regulation of trade, ranging from political "arrangements in regard to trade with foreign governments "requiring the sanction of Parliament, down to minute rules for "regulating particular trades. But a consideration of the Act "shows that the words were not used in this unlimited sense. "In the first place the collocation of No. 2 with classes of subjects "of national and general concern affords an indication that "regulations relating to general trade and commerce were in the "mind of the legislature when conferring this power on the "Dominion Parliament. If the words had been intended to have "the full scope of which in their literal meaning they are "susceptible, the specific mention of several of the other classes "of subjects enumerated in Section 91 would have been "unnecessary; as, 15, banking; 17, weights and measures; 18, "bills of exchange and promissory notes; 19, interest; and even "21, bankruptcy and insolvency."

My Lords, I believe that in the United States very great controversy arose whether "trade and commerce" did include all those subject matters which are specifically enumerated in Section 91. As to some of them it certainly did, and therefore there may have been a reason for enacting them for the sake of greater certainty and putting the matter beyond doubt, even although they might come within "trade and commerce," upon the true construction of those words. "'Regulation of trade "'and commerce' may have been used in some such sense as the

" words 'regulations of trade' in the Act of Union between " England and Scotland (6 Anne, c. 11), and as these words have " been used in Acts of State relating to trade and commerce. " Article V. of the Act of Union enacted that all the subjects of " the United Kingdom should have 'full freedom and intercourse " 'of trade and navigation' to and from all places in the United " Kingdom and the colonies; and Article VI. enacted that all parts " of the United Kingdom from and after the Union should be under " the same 'prohibitions, restrictions, and regulations of trade.' " Parliament has at various times since the Union passed laws " affecting and regulating specific trades in one part of the United " Kingdom only, without its being supposed that it thereby " infringed the Articles of Union. Thus the Acts for regulating " the sale of intoxicating liquors notoriously vary in the two " kingdoms. So with regard to Acts relating to bankruptcy, " and various other matters. Construing, therefore, the words " 'regulation of trade and commerce' by the various aids " to their interpretation above suggested they would include " political arrangements in regard to trade requiring the " sanction of Parliament, regulation of trade in matters of " inter-provincial concern, and it may be that they would include " general regulation of trade affecting the whole Dominion." So that that which is of very considerable importance here is left undecided, and as a "may be," in this case of the Citizen Insurance Company *v.* Parsons. " Their Lordships abstain " on the present occasion from any attempt to define the limits " of the authority of the Dominion Parliament in this direction. " It is enough for the decision of the present case to say that, in " their view, its authority to legislate for the regulation of trade " and commerce does not comprehend the power to regulate by " legislation the contracts of a particular business or trade, such " as the business of fire insurance in a single province, and " therefore that its legislative authority does not in the present " case conflict or compete with the power over property and " civil rights assigned to the legislature of Ontario by No. 13 of " Section 92." It will be observed in this case of the Citizens' Insurance Company *v.* Parsons there could be no doubt that it came specifically within one of the classes enumerated in Section 92.

Sir MONTAGUE E. SMITH: If it had not, all that discussion about trade would have been inapplicable.

Sir F. HERSCHELL: Yes, because it would be very difficult to argue that "property and civil rights" did not cover

the question of what should be the effect of a particular traffic in a particular province.

The LORD CHANCELLOR: In relation to property in that Province.

Sir FARRER HERSCHELL: Yes, my Lord. Therefore the whole question was whether the whole matter being within Section 92 it was overridden by Section 91. "Having taken "this view of the present case it becomes unnecessary to consider "the question how far the general power to make regulations of "trade and commerce, when competently exercised by the Dominion "Parliament, might legally modify or affect property and civil "rights in the Provinces, or the legislative power of the Provincial "Legislatures in relation to those subjects; questions of this kind, "it may be observed, arose, and were treated of by this Board in "the cases of L'Union St. Jacques de Montréal *v.* Belisle; and Cushing "*v.* Dupuy." The first of those cases I have cited to your Lordships for the dictum of Lord Selborne. That was the case of L'Union St. Jacques de Montréal *v.* Belisle. Cushing *v.* Dupuy, I will cite afterwards. "It was contended in the case of the Citizens' "Insurance Company of Canada, that the Company having been "originally incorporated by the Parliament of the late Province "of Canada, and having had its incorporation and corporate "rights confirmed by the Dominion Parliament, could not be "affected by an Act of the Ontario Legislature. But the latter "Act does not assume to interfere with the constitution or "status of corporations. It deals with all insurers alike, including "corporations and companies, whatever may be their origin, "whether incorporated by British authority, as in the case of "the Queen Insurance Company, or by foreign or Colonial "authority, and without touching their status, requires that if "they choose to make contracts of insurance in Ontario, relating "to property in that province, such contracts shall be subject to "certain conditions. It was further urged that the Ontario Act "was repugnant to the Act of the late Province of Canada, "which empowered the company to make contracts for assurance "against fire 'upon such conditions as might be bargained for.'" I do not think I need read that. Now comes a matter which is of importance. "It was further argued on the part of the "Appellants that the Ontario Act was inconsistent with the Act "of the Dominion Parliament, 38 Vict. c. 20, which requires fire "insurance companies to obtain licenses from the Minister of "Finance as a condition to their carrying on the business of "insurance in the Dominion, and that it was beyond the

" competency of the provincial Legislature to subject companies " who had obtained such licenses, as the Appellant companies had " done, to the conditions imposed by the Ontario Act. But the " legislation does not really conflict or present any inconsistency. " The statute of the Dominion Parliament enacts a general law " applicable to the whole Dominion, requiring all insurance " companies, whether incorporated by foreign, dominion, or " provincial authority, to obtain a license from the Minister of " Finance, to be granted only upon compliance with the conditions " prescribed by the Act. Assuming this Act to be within the " competency of the Dominion Parliament as a general law " applicable to foreign and domestic corporations, it in no way " interferes with the authority of the Legislature of the Province " of Ontario to legislate in relation to the contracts which " corporations may enter into in that province." I should like to give an illustration from that which I think is not without pertinence in the present case. A license was required by the Dominion Parliament to be taken out as an assurance of the stability and solvency of the company. It was to prevent bubble companies carrying on business, effecting insurances, and afterwards defrauding the persons who had trusted them. Supposing that for an entirely different purpose the Provincial Parliament had required them to take out licenses, as I believe they have, for the purpose of raising revenue. I apprehend that both these Acts might have been and would have been held perfectly good, though without the Dominion license they could not have carried on business, notwithstanding the Provincial licence, but even when they had the Dominion licenses, it would be still open to the Provincial authorities to require them to take out their licence for the purposes of taxation. I think that that is an illustration throwing some light on the question of two licenses under this Liquor License Act, and which was discussed when I was in the course of reading it. It is another illustration of it. " The Dominion Act contains the following provision, which " clearly recognises the right of the Provincial Legislature to " incorporate insurance companies for carrying on business " within the province itself: 'But nothing herein contained shall " ' prevent any insurance company incorporated by or under any " ' Act of the Legislature of the late province of Canada, or of any " ' province of the Dominion of Canada, from carrying on any " ' business of insurance within the limits of the late province of " Canada, or of such province only according to the powers " ' granted to such insurance company within such limits

" 'as aforesaid, without such license as hereinafter mentioned.'" This recognition is directly opposed to the construction sought to be placed by the Appellant's counsel on the words "provincial " objects," in No. 11 of Section 92—"The incorporation of " companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies. I do not know that there is anything further in this till about the middle of page 116 :—"Taschereau, J. in the course of his " vigorous judgment seeks to place the plaintiff in the action " against the Citizens' Company in a dilemma. He thinks that " the assertion of the right of the province to legislate with " regard to the contracts of insurance companies amounts to a " denial of the right of the Dominion Parliament to do so, and " that this is in effect to deny the right of that Parliament to " incorporate the Citizens' Company so that the plaintiff was " suing a non-existent defendant. Their Lordships cannot think " that this dilemma is established. The learned Judge assumes " that the power of the Dominion Parliament to incorporate " companies to carry on business in the Dominion is derived " from one of the enumerated classes of subjects, viz., 'the " regulation of trade and commerce,' and then argues that if the " authority to incorporate companies is given by this clause, the " exclusive power of regulating them must also be given by it, so " that the denial of one power involves the denial of the other. " But in the first place it is not necessary to rest the authority " of the Dominion Parliament to incorporate companies on this " specific and enumerated power. The authority would belong " to it by its general power over all matters not coming within " the classes of subjects assigned exclusively to the legislatures of " the Provinces, and the only subject on this head assigned to the " Provincial Legislature being 'The incorporation of companies with " 'provincial objects,' it follows that the incorporation of companies " for objects other than provincial falls within the general powers " of the Parliament of Canada. But it by no means " follows (unless indeed the view of the learned Judge is " right as to the scope of the words 'The regulation of trade " 'and commerce') that because the Dominion Parliament " has alone the right to create a corporation to carry on business " throughout the Dominion, that it alone has the right to regulate " its contracts in each of the provinces. Suppose the Dominion " Parliament were to incorporate a company with power, among " other things, to purchase and hold lands throughout Canada in

" mortmain, it could scarcely be contended if such a company " were to carry on business in a province where a law against " holding land in mortmain prevailed (each province having " exclusive legislative power over 'property and civil rights in " the province') that it could hold land in that province in " contravention of the Provincial legislation; and if a company " were incorporated for the sole purpose of purchasing and " holding land in the dominion, it might happen that it could " do no business in any part of it by reason of all the provinces " having passed Mortmain Acts, though the corporation would " still exist and preserve its status as a corporate body." That is all in this judgment which bears on the case. You then come to the particular facts which throw no light upon it. I ought now to call your Lordships' attention to the case of Cushing *v.* Dupuy, which is referred to there. That is in the 5th Appeal Cases, p. 409, and the decision (*quoting from the headnote*) was, that " The British North America Act, 1867, S. 91, in assigning to " the Dominion Parliament the subjects of bankruptcy and " insolvency intended to confer, and did confer on it legislative " power to interfere with property, civil rights and procedure " within the provinces so far as these latter might be affected by " a general law relating to those subjects. Consequently, the " Dominion enactment, 40 Vict. c. 41 s. 28, amending the " Canadian Insolvent Act, and providing that the judgment of " the Court of Appeal in matters of insolvency should be final, " *i.e.* not subject to the appeal as of right to Her Majesty in " Council allowed by the Civil Procedure Code, Art. 1178, is " within the competence of the Canadian Parliament, and does " not infringe the exclusive powers given to the Provincial " Legislatures by Sect. 92 of the Imperial Statute." The judgment was delivered by Sir Montague Smith. His Lordship says: "It was contended for the Appellant that the provisions " of the Insolvency Act interfered with property and civil rights, " and was therefore *ultra vires*. This objection was very faintly " urged, but it was strongly contended that the Parliament of " Canada could not take away the right of appeal to the Queen " from final judgments of the Court of Queen's Bench, which, " it was said, was part of the procedure in civil matters exclusively " assigned to the Legislature of the Province. The answer to " these objections is obvious. It would be impossible to advance " a step in the construction of a scheme for the administration " of insolvent estates without interfering with and modifying " some of the ordinary rights of property and other civil

" rights, nor without providing some mode of special procedure " for the vesting, realisation, and distribution of the estate " and the settlement of the liabilities of the insolvent. Procedure " must necessarily form an essential part of any law dealing " with insolvency. It is therefore to be presumed, indeed " it is a necessary implication, that the Imperial statute, " in assigning to the Dominion Parliament the subjects of " bankruptcy and insolvency, intended to confer on it legislative " power to interfere with property, civil rights, and procedure " within the provinces so far as a general law relating to those " subjects might affect them. Their Lordships therefore think " that the Parliament of Canada would not infringe the exclusive " powers given to the Provincial Legislatures by enacting that the " judgment of the Court of Queen's Bench in matters of insolvency " should be final, and not subject to the appeal as of right to Her " Majesty in Council allowed by Art. 1178 of the Code of " Civil Procedure. Nor in their Lordships' opinion would such " an enactment infringe the Queen's prerogative." That I need not trouble your Lordships with. I think that is the only passage in this case that bears upon the present question. Now, my Lords, I think I have called your Lordships' attention to all the cases that bear upon the subject, because I thought it was desirable your Lordships should have before coming to the consideration of the section before you the views which had been already expressed by this Board on various occasions on the subject of these two sections; and I will now proceed to the consideration of the two sections and to the enquiry first of all whether this legislation is legislation, which under Section 92 is exclusively conferred upon the Provincial Legislature. Now my Lords, first of all I should call your Lordships' attention to the nature of the legislation, what its real aspect is, and what its aim and object is. Its aim and object obviously is the promotion of temperance, the checking of intemperance and the consequent evils of intemperance throughout the Dominion of Canada. It seeks to accomplish that object in those districts which were not prepared absolutely to prohibit the sale of intoxicating liquors, by limiting the extent of their sale, by limiting the number of places where they could be sold, and also by enabling smaller districts than those which were dealt with by the Act of 1878, to effect that prohibition within their area which under the Act of 1878 larger districts could effect. That, I think, is a fair statement of the general scope and object of the Act, and my contention is that such an Act applying to the Dominion throughout, and having such an object is not within any of the

enumerated sub-sections, if one may call them so, of Section 92. I shall contend that if it is to be found in any of them it is overridden by the provisions of Section 91. Now, certainly I am entitled to say that this has been decided, that Section 91 does not exclusively commit to the Provincial Legislatures all the regulations and limitations of the liquor traffic in their provinces, because Russell *v.* The Queen, whatever else it establishes, establishes that conclusively. If Section 92 had given to them exclusively the liquor legislation, namely, the legislation for prohibiting or limiting in their provinces the liquor traffic, then Russell *v.* The Queen could not have been decided as it was because Russell *v.* The Queen was based upon this: That Section 92 had not conferred that power applicable to every province which was exercised in the Canada Temperance Act, in each province upon the Provincial Legislature exclusively—indeed, had not conferred it at all, because the decision in Russell *v.* The Queen did not proceed upon Section 91 overriding Section 92, but upon the power not being within Section 92. I shall of course contend that in principle there is no distinction between an Act having the same ultimate object which enables absolute prohibition, and one which enables or compels restriction and limitation; that in each case the purpose and object is the promotion of temperance, and the consequent repression within the Dominion of the evils which intemperance causes: that there is no distinction for that purpose between prohibition and limitation when you are considering Section 92, and that it is difficult, and as I shall submit impossible to find, if Section 92 did not commit to the Legislature of the province the prohibition exclusively, anything in Section 92 which conferred upon the province the limitation exclusively. Now let us see what are the provisions of Section 92 which are supposed to apply. It is obvious I should think that the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th are all inapplicable, and the first that requires any consideration is "Municipal Institutions in the Province."

Mr. DAVEY: There is No. 4.

Sir FARRER HERSCHELL: My friend says he relies on No. 4, which is "The Establishment and Tenure of Provincial "Offices, and the Appointment and Payment of Provincial Officers." Well, whatever officials or officers are pointed at are not Provincial but Dominion officials. If there was power to deal with the subject matter there must be power to regulate the way in which it is dealt with, and to appoint the persons to carry it out.

The LORD CHANCELLOR: That is true, but that may

be an argument. You know what I mean is that if the Legislation which you are insisting on as being within the competency of the Dominion Parliament comprehended as one of its essential features that there were officers to act in the povince, it might throw some light as to whether that Dominion Parliament was competent.

Sir FARRER HERSCHELL: Yes, my Lord, but they are not to act in the province, or exclusively in the province at all. The function of these persons is to act not in any one province only, but in all the provinces. They are Dominion officers essentially, and not provincial officers. They are not persons whose functions are defined and limited to any province.

Sir MONTAGUE SMITH: You could not, under the guise of making it applicable to all the Dominion, give the Dominion jurisdiction if the officers really are provincial officers, and if the whole scheme of the Act is provincial.

Sir FARRER HERSCHELL: Every officer you appoint for the Dominion of Canada acts in some province or other. Every officer is provincial in the sense that he acts in the province, but Section 91 says that they are to fix and provide "for the "Salaries and Allowances of Civil and other Officers of the "Government of Canada." These are civil officers of the Government of Canada. They are not provincial officers in the sense of persons who are connected with the provincial Governments, or whose duties are provincial.

Lord MONKSWELL: They are appointed for the districts which are constituted by the Act.

Sir F. HERSCHELL: Yes.

Lord MONKSWELL: Not for the province.

Sir F. HERSCHELL: No, but in every case, whatever your law is, all the Dominion officers act within the province.

The LORD CHANCELLOR: In a certain sense, I agree.

Sir F. HERSCHELL: In every case wherever you have power to legislate for the whole of the Dominion, any officers appointed with regard to that legislation act in the various provinces. Take the Customs officers, for example.

Lord HOBHOUSE: That would not be so with regard to the criminal law. If you compare sub-section 27 of section 91 with sub-section 14 of section 92, you would have the same sort of division that I gather the respondents seek to make in this case. The Dominion legislates on criminal law, and the Provincial Legislature on the maintenance of the Courts.

Sir F. HERSCHELL: Yes; that is dealt with expressly

and specifically. That arises from the specific words of Section 91, Sub-section 27. It is quite clear if that "except" had not been put in, the Provincial Legislature would have had no power to deal with it. I apprehend not, but it arises from its having been expressly given them by that "except" being put in. I should apprehend that if this is decided to be Provincial legislation—with which the Provinces only have the right to deal—then the officers might be said to be Provincial, but I should respectfully submit that if it is a matter which is within the Dominion Parliament power, and they appoint officials for carrying it out, those officials are Dominion officials just as much as the Customs officials are, who act in each Province. It really is arguing the same point. I think that that is a new suggestion which has been the fruit of reflection since this matter was argued before. I do not think that that was put before the Supreme Court of Canada.

Mr. BURBIDGE : That was never contended for.

Sir F. HERSCHELL: I made the observation that it was not contended for in the Court below, because they would be so well conversant in every day practice with the distinction between Provincial officers and Dominion officers, who are Dominion officers although they act in the Province, that probably it was not thought a very hopeful argument there.

Now I come to the first of those sub-sections which were relied on in the Court below, namely, that it comes within "Municipal Institutions in the Province." Now I apprehend there would be no difference of opinion upon this, that "Municipal "Institutions" enables the establishment by the Local Legislature of municipal bodies with some powers; but I own I do not understand how or why this is said to come within the exclusive jurisdiction of the Provincial Legislature because they have power to legislate for "Municipal Institutions in the Province." That cannot mean you may establish Municipal Bodies and give them any and every power you please, or even give them every power which has ever been exercised by Municipal Bodies in Canada. The argument in the Court below was this—you find that some Municipal Bodies in some of the Provinces of Canada, before the Dominion Act have dealt with this question of the liquor traffic, therefore when you give exclusive legislation with regard to Municipal Institutions you give them exclusive power to create Municipal Bodies, and you give those Municipal Bodies so created exclusive power over this particular subject. My Lords, I apprehend that that really is an argument that will not bear investigation,

because, of course, the very object of this Act was to take away from the Provincial Legislature some of the powers which they had before possessed, and to confer those powers upon the Central Parliament, and, therefore, to say that they must necessarily have had all the power of legislation which before they could exercise through their Municipal Bodies is an argument that cannot be sustained. I should submit that the exclusive legislation in regard to Municipal Institutions enables them to create Municipal Institutions and to give those Municipal Bodies any powers which come fairly within the subjects with which they are entitled to deal, but that unless you can find from some other provisions here that it is a subject with which they are entitled to deal, the power to create Municipal Institutions cannot give them the power to enable those Municipal Institutions to deal exclusively with a subject of legislation which is nowhere else exclusively committed to them.

The LORD CHANCELLOR: I think you are conceding too much in saying that it gives any other power than that of creating them.

Sir FARRER HERSCHELL: I think you must find *aliunde* other powers in this sense: that they could not give them any power to deal with any matter not within Section 92, but they might limit and control the extent to which they could act when acting within Section 92.

The LORD CHANCELLOR: I should have thought it meant the creation of them—how many they were to consist of, and how they were to be elected. Surely that cannot involve anything that is now before the Committee.

Sir FARRER HERSCHELL: I should think not, but the great stress of the argument in the Court below was certainly that these powers had been exercised by municipal bodies before this time in various provinces, and that therefore when they were given exclusive power to make laws in relation to municipal institutions that gave them the power exclusively to make these liquor laws.

Lord HOBHOUSE: In Hodge *v.* The Queen I think some importance was attributed to the fact that the municipal bodies had exercised the powers that the Act then in question gave.

Sir FARRER HERSCHELL: Yes, I think it was, but it was said that though they were not the same they were of the same character as those which had been previously exercised by municipal bodies. Supposing that any of these municipal bodies had prohibited the sale or had been given power to prohibit the

sale within a particular district of any intoxicating liquor it is quite clear that Russell *v.* The Queen decides that that was not exclusively committed to them, because it has been decided that that is not so exclusively committed to them but that the Dominion Parliament has power to deal with it.

Lord MONKSWELL: Besides, it was not the municipal bodies who had power to deal with the matter.

Sir FARRER HERSCHELL: I am not quite sure whether in any of the provinces there was not some power given to them.

Lord MONKSWELL: I was speaking of the Act of 1877.

Sir FARRER HERSCHELL: Yes, my Lord, but what I am calling your Lordship's attention to is that under an Act in force in Ontario the municipality was given a power of prohibition.

Lord MONKSWELL: Yes, under an Ontario Act.

Sir FARRER HERSCHELL: And yet Russell *v.* The Queen certainly decides that although by provincial legislation a municipal body had been given the power of prohibition within the province, yet that was not a matter so exclusively committed to the provincial Legislature that the Dominion Parliament could not enact the same law with regard to all municipalities throughout the whole Dominion. Now, my Lords, the other two heads under which it may be supposed to come is, "Property and Civil Rights in the Province." Now, I apprehend that the question of the sale of intoxicating liquors, and its restriction and control, is not either a matter of property or civil rights within the province within the meaning of that Sub-section 13. As was pointed out in Russell *v.* The Queen, in a sense it may affect property to say that a man shall not sell any goods without authority, or may be prohibited from selling them; but I submit that it does not come within that sub-section, and it seems to me impossible to contend, if Russell *v.* The Queen was right, that this comes any more within that sub-section of Property and Civil Rights, than did the subject matter of the case of Russell *v.* the Queen. It cannot be that absolute prohibition is not a matter interfering with property and civil rights, but that limitation is a matter interfering with property and civil rights.

I passed over No. 9 accidentally: "Shop, Saloon, Tavern, "Auctioneer, and other Licenses, in order to the raising of a "Revenue for Provincial, Local, or Municipal Purposes." Now, my Lords, there again that power of exclusive legislation in relation

to licenses is not a general power of granting shop, saloon, tavern, auctioneer, and other licenses, but only in order to the raising of a revenue for provincial, local, or municipal purposes. For any other purpose except that, they have no power of legislation given to them in relation to the licensing of shops, saloons, or taverns or auctioneers.

The LORD CHANCELLOR: "Saloon" there of course means drinking saloons.

Sir FARRER HERSCHELL: I think so, my Lord.

Lord MONKSWELL: You understand by that, that all that they could do would be to enact that a keeper of a saloon should have a license if he applied for it, but that they could not give any power to discriminate as to the class of saloon.

Sir FARRER HERSCHELL: Not under the 9th.

Lord MONKSWELL: You say not.

Sir FARRER HERSCHELL: No; of course it may be that they had that power under other provisions but not under the 9th, because under the 9th all that they have power to legislate for is to make laws in relation to shops, saloons, taverns, auctioneers' and other licenses in order for the raising of a revenue.

Lord MONKSWELL: They could not make a regulation that a sober publican should have a license and a drunken publican should not have a license.

Sir FARRER HERSCHELL: I think not under the 9th Sub-section.

Sir MONTAGUE E. SMITH: Might not they annex conditions to their licenses?

Sir FARRER HERSCHELL: If the conditions were conditions for the purposes of raising revenue, but I doubt if they might. I should say that they are not intended to deal with the matter as a matter of regulation of the trade, and that is why the words are added "In order to the raising of a revenue." It is so limited that they may not take upon themselves to deal in the way of licensing with trades so as to affect the trades.

Lord HOBHOUSE: They could not regulate under that particular heading.

Sir FARRER HERSCHELL: Of course, if it comes under any other, that is a different thing. I do not say that it may or may not.

Lord HOBHOUSE: It must be *bonâ fide*, and entirely for the purpose of raising a revenue under that head?

Sir FARRER HERSCHELL: I think so.

The LORD CHANCELLOR: So that, apart from any Dominion legislation on the subject; they could not, unless it comes under some other heading, make any regulations with regard to the liquor trade at all.

Sir FARRER HERSCHELL: No, not unless it comes under some other heading.

The LORD CHANCELLOR: I say so.

Sir FARRER HERSCHELL: They could not do it under the 9th.

Lord MONKSWELL: Could not they define the description of shop which should have a license? Under the 9th heading, could not they say that shops of a certain description should have a license, and others should not?

Sir FARRER HERSCHELL: Yes, they might do it for the purpose of raising revenue:

Sir RICHARD COUCH: They might say that a shop rated at a certain amount should have a license.

Sir FARRER HERSCHELL: Yes.

Lord MONKSWELL: But not that shops should not have a license unless the name of the proprietor was printed above the doorway?

Sir FARRER HERSCHELL: If they required the name of the proprietor as a security for the payment of the revenue, no doubt they could do it.

The LORD CHANCELLOR: But not for police purposes,—not for the purpose of enforcing sobriety?

Sir FARRER HERSCHELL: No, not under the 9th. I think Sub-section 9 puts in those words, "In order to the raising "of a revenue" for the very purpose of not giving a general power of granting such licenses, because I should say that it would be a very grave question whether in general law, licensing trades would not come within the "regulation of trade and commerce," which it was not intended should be dealt with by the separate Provincial Legislatures. But at all events, the words used are and I think they are very strong, because we must read the Legislative part with it—"In each province the Legislature "may exclusively make laws in relation to—shop, saloon, tavern, "auctioneer and other licences in order to the raising of a "revenue for provincial, local, or municipal purposes." It is only in order to that, that they have any power confided to them of exclusively making laws in relation to shops, saloons, and taverns; and I say that that points to the view of the Legislature being that the general interference with these matters was not a matter

intended to be exclusively given to the Provincial Legislature, because it was a trade matter intended to be left to the Dominion Parliament.

The LORD CHANCELLOR: Then that goes to the extent of excluding from the Provinces any jurisdiction in this matter at all, except for the purpose of revenue, does it not?

Sir FARRER HERSCHELL: No, because in Hodge *v.* The Queen they did not hold that it came under that. In that case they held that it came under the 8th or the 16th.

The LORD CHANCELLOR: That was "Municipal institutions in the Province."

Sir FARRER HERSCHELL: Yes, they did not hold that it came under the 9th at all; they held that it was the 8th, the 15th and 16th; the 15th merely being the imposition of penalties for carrying out any of the others. Therefore, it was under that 8th and 16th that they held it in Hodge *v.* The Queen. Then it is certain No. 10 would not be material, nor 11, nor 12. No. 13 I have already dealt with. No. 15 is only as to penalties for matters coming within the classes of subjects as to which the provincial Legislatures have exclusive powers. And then, No. 16 is "Generally all Matters of a merely local or private Nature "in the Province." I think Russell *v.* The Queen certainly decides that the question of promoting temperance by legislation relating to the whole of the Dominion is not a matter of a merely local or private nature in the Province, because their Lordships held that, although it would take effect only in this Province or that Province, or the other Province, or some part of those Provinces, that it was not of a merely local or private nature, but that it was a matter concerning the whole community of the Dominion.

Sir MONTAGUE E. SMITH: I do not think you must pass that over so lightly, because the question may be—granted that the Temperance Act might override by prohibiting the traffic altogether—whether when licenses are to be granted and persons regulated in a police way that is not a local matter. I only say, do not pass over that so lightly.

Sir FARRER HERSCHELL: It struck me that if it is not a local matter to say in any particular locality, You shall have no drink, can it be a really local matter to say in any locality, You shall have only half as much?

Sir MONTAGUE SMITH: The regulation is only the mode of bringing the Act into operation.

Sir FARRER HERSCHELL: Yes; but when the Act was

brought into operation, it operated only in a particular locality. Supposing that, instead of this Act operating at once everywhere, there had been a similar power given to localities to bring it into operation—in order to make the two cases as parallel as possible—and in the one case a locality has power to say, There shall be no drink sold at all; and in the other, There shall be only half as many public-houses as there are at present—is it really a distinction to say that the first is not of a merely local or private nature, and that the second is of a merely local or private nature. The end and aim is precisely the same, only the one is to do the same thing more effectually and thoroughly than the other—the one is entirely to prevent the sale at all, and the other largely to restrict the sale. In each case the object and aim is to diminish drunkenness, and so to add to the peace and order of the community, in which the whole community is interested. My Lords, I should submit that it was impossible to say that the latter was any more of a merely local or private nature than the former. Take the parts of the Act which enable smaller bodies to enact or bring about this entire prohibition of drink, and those seem to be of exactly the same nature as the other. The two great features of the Act are that smaller communities may do what the larger communities could do before. If it was not merely local or private, if the larger communities have power to do it, can it be merely local or private if the smaller communities have power to do it?

Lord MONKSWELL: Supposing this Act contained only one section, saying that the smaller bodies could appply the Act, what would you say then?

Sir FARRER HERSCHELL: I do not see that it would be possible to contend that that was of a merely local or private nature when the other was not. In addition to that provision the Act gives power to restrict the number of licensed houses with the same aim and object of diminishing drinking, and therefore diminishing drunkenness. If the prohibition with that aim and object in any locality is not merely a local or private matter, can the limitation with that object in any locality be of a merely local or private nature? I should submit not, and that Russell *v.* The Queen does dispose of this case, and determines that the case does not fall within any of the categories of Section 92. Now, supposing it to fall within any of the categories of Section 92, hen arises the question, does it not also fall within Section 91? Then it is quite clear that the Dominion Parliament had the power because those who impeach this Act of the Dominion

Parliament must not only show that it comes within Section 92, but that it is not within any of the clauses in Section 91.

The LORD CHANCELLOR: Is that quite so? That authority you were reading to us just now would seem rather to point the other way. Take the case of marriage and the solemnization of marriage.

Sir FARRER HERSCHELL: Well, my Lord, "marriage and divorce" in Section 91 would clearly override the solemnization of marriage, except so far as related to what concerned the solemnization which was expressly mentioned. That is what I mean. Where you do find the express words in Section 92, you would limit and control those words by Section 91. You would limit and control this solemnization of marriage, by saying that marriage and divorce at large were left to the Dominion legislature. You would have to put a narrower construction probably than you would otherwise have put upon the solemnization of matrimony when you are reading Section 92 in the light of Section 91.

Lord HOBHOUSE: You are stating the principle of construction now as it was laid down in the Citizens' Insurance case.

Sir FARRER HERSCHELL: It was laid down in Parson's case and it was laid down in Russell's case. Now Section 91 is in these terms:—"It shall be lawful for the Queen, by and with "the Advice and Consent of the Senate and House of Commons "to make Laws for the Peace, Order, and good Government "of Canada in relation to all Matters not coming within the "Classes of Subjects by this Act assigned exclusively to the "Legislatures of the Provinces and for greater Certainty, but not "so as to restrict the Generality of the foregoing Terms of this "Section, it is hereby declared that (notwithstanding anything "in this Act) the exclusive Legislative Authority of the Parliament "of Canada extends to all Matters coming within the Classes of "Subjects next hereinafter enumerated," so that I take that to say, notwithstanding anything in this Act, notwithstanding the words in Section 92, if it is within those things in Section 91, that overrides Section 92.

The LORD CHANCELLOR: That is why I called your attention to the solemnization of marriage. That is included in Section 92, but is expressly included by the word "marriage" in Section 91.

Sir FARRER HERSCHELL: Unless you can read the two together and give a so much larger meaning to the words in

Section 91, that you can still leave Section 92 to have effect, I should think Section 91 overrode Section 92, because it says, "It "is hereby declared that notwithstanding anything in this Act" —that must include the words in Section 92—"the exclusive "legislative authority of the Parliament of Canada extends to all "matters coming within the classes of subjects next hereinafter "enumerated"—so that I should have said if there was any inconsistency between Section 91 and Section 92, Section 91 overrode Section 92. Now, my Lords, the second of these is one upon which I place much reliance. You may make laws for the peace, order and good government of Canada "in relation to the "regulation of trade and commerce," and my contention is that even if this is a matter coming within any of the heads of Section 92, and I do not think anybody can say that comes in any way specifically or clearly or distinctly within any of the heads of Section 92—it is a matter which comes distinctly within that second heading of Section 91. That was the ground upon which the Court of Appeal in Canada determined in the case of Russell *v.* the Queen when it was before them, which was left open and undetermined by this Board when the matter came before them. But now the Parliament of Canada may make laws for the peace, order, and good government of Canada in relation to the regulation of trade and commerce. Well, to a certain extent the Court below appear to have given effect to that condition because it is only in that way that I can understand their holding that those provisions of this Act which have relation to wholesale licenses were within the competency of the Parliament of Canada. That is what the Supreme Court below have held: Mr. Justice Henry dissenting. Mr. Justice Henry has apparently taken the view throughout that all these Acts were *ultra vires* because he dissented in Russell *v.* The Queen from the rest of the Court there who held that the Temperance Act of 1878 was valid. The other Judges have held that the provision for wholesale licenses is within the competency of the Dominion Parliament although it relates to all the provinces, contains stipulations taking effect in all the provinces, and requires any person in any province who wishes to sell wholesale to take out a wholesale license. They have held that it was competent for the Dominion Parliament to pass such a law. Well, they have not said upon what they found it, but I can hardly doubt that they have founded it upon what they proceeded upon before—that it is a matter coming within the regulation of trade and commerce. I suppose they have considered for some reason or other that the wholesale trade is

more a matter of trade to be regulated than the retail trade. I know it seems a very difficult distinction, not only to follow in point of law, but to see the practical effect of in the working of this Act. The Act is held valid so far as regards the wholesale licenses, and of course all the provisions relate to wholesale licenses. Well, what is wholesale and what is retail? Is the definition of wholesale, which is given by this Dominion Act we are considering, to be taken as determining what is wholesale and what is retail? If so, your Lordships have said that although the Dominion Parliament has no power to legislate with regard to the retail trade, but has power to legislate with regard to the wholesale trade, it can determine by its own legislation what is the wholesale and what is the retail trade. If your Lordships did not say that, then what is to determine what is the wholesale and what is the retail trade. It certainly strikes me that to say that the legislative power of Canada extends to the regulation of wholesale trades, and not to the regulation of retail trades, is a distinction which does not find any warrant in the legislation of this Section 91, and which would be impracticable in its working throughout the Dominion. They have held also that licensing vessels comes also within the power of the Dominion Parliament. Whether that is also as being a regulation of trade, or whether, perhaps, which is more probable, it is as having to do with "navigation and shipping"—the tenth head—I do not know; but certainly to say that a liquor law passed with such an object as this for the purpose of promoting temperance can be maintained in respect of a vessel, although that vessel's trading is entirely provincial and entirely within one province, and not in any way between province and province—that you may not restrict the sale of liquors in buildings in the Province but that you may restrict the sale of liquors requiring a license to be taken out for their sale upon a vessel, although the vessel never went out of the Province—appears a distinction again very difficult to follow. I do not know whether they have founded it upon "navigation and shipping," but if they did, certainly it would be a somewhat remarkable result that you might prohibit or limit the sale of liquors in a floating habitation in the Province whilst you may not limit the sale in the same way in a habitation of a fixed and permanent character.

The LORD CHANCELLOR: Might not they have considered the probability of the vessel going from Province to Province?

Sir FARRER HERSCHELL: I fancy there are some cases

in which the vessels are on lakes and would not go out of the province. There are some cases in which the vessels never would, and never could, go out of the Province, because they are on a body of water which is in the Province, and they could never go elsewhere. Of course there are some cases in which the vessels would go from Province to Province. Might they legislate with regard to vessels which go from Province to Province, and not with regard to vessels which do not ?

The LORD CHANCELLOR : It is possible that that may have been their view.

Sir FARRER HERSCHELL : I do not deny that there are possible cases, but I was putting, as it seemed to me I had a right to do, the hypothesis, which is also a perfectly possible case, of a vessel that could not ply, except within the ambit of the Province.

Mr. BURBIDGE : Vessels plying on the St. John River would not go out of the province of New Brunswick.

Sir FARRER HERSCHELL : Therefore this is, of course, a general enactment throughout the whole Dominion, and would equally apply to those cases where the vessels would always be in a particular Province, as to any other case. But now I revert to the point, is not this really a law for the peace, order, and good government of Canada in relation to the regulation of trade and commerce ? Whatever doubt there may be about other trades the liquor traffic is surely a trade. It is a trade carried on throughout the Province, and, therefore, it raises the question distinctly, which was left with an "it may be," in the Citizens' Insurance Company *v.* Parsons, whether the Dominion Parliament of Canada has not power to make a general regulation affecting all trades, or a particular trade throughout the whole of the Provinces of Canada? Now, my Lords, as regards that question, I do think it is important, because, as has been truly said, these two sections throw mutual light upon one another—I do think it is important to see that there is nothing in Section 92 which points to any regulation of trade or commerce except for revenue purposes. It is true it is suggested that certain regulations for the public good may come under "Municipal institutions." It is suggested that they may come under "Matters of a local or "private character," but without denying for a moment that that is possible, I am justified in saying that there is not one of the sub-heads of Section 92 which points at all specifically or clearly or distinctly to any dealing with or regulation of trade at all.

When they mention legislation which would deal with trades such as "shop, saloon, tavern, auctioneer, and other licenses," they expressly say it is to be "in order to the raising of a revenue "for provincial, local, or municipal purposes." That is the only matter referring to any trade or matter of the kind at all. Therefore when one comes to look at Section 91 which says that you may make laws for the peace, order and good government of Canada in relation to the regulation of trade and commerce, does not that point to power in the Dominion Parliament which one can perfectly well see would be a very valuable power, and it may be of a great importance for the whole Dominion that there should be a power to regulate trades generally throughout the Dominion, and not leave their regulations simply in each case to the Parliament of the Province? There would be uniformity in the way in which trade and commerce is to be dealt with throughout the different Provinces, and the words certainly—I do not mean to say, that in this case or that case, some limitation might not be put upon them or ought not to be put upon them—but the words are certainly of a very wide and general character, and they are more remarkable on account of the silence of the following section in relation to matters of trade at all. Now, my Lords, my contention therefore is, that even if this case can come within some of the provisions of Section 92, it does naturally come within this provision of Section 91. There certainly is no authority in all these cases, which have been before your Lordships, to the contrary of that. There is no dictum even to the contrary of that. It is put in the Citizens' Insurance Company *v.* Carsons with an "it may "be." It is left open in one or other of the previous cases, and therefore it undoubtedly is a question of very great practical and general importance—namely, Can the Legislature of the Dominion deal generally with all trades throughout the Dominion, or with a part of the trade throughout the whole Dominion. My Lords, I have to submit to your Lordships, that it can, and that such a regulation of a particular trade for the general good of the Dominion—for the peace, order, and good government of the Dominion—comes within the provisions of Section 91. As it has been said, you must look at the scope and object of the Act, the clause of which you are interpreting. Now, the object and scope of the Act, as was said in Russell *v.* The Queen, is not a local one but a general one, and what is the object? The object is, the peace, order, and good government of the country. It is not a financial question—it is not a local question—it is for the peace,

order, and good government of the whole community. Now, that being the object, it is a law certainly regulating a trade. Is not it a law for peace, order, and good government of the country in relation to that trade? What I wish to urge upon your Lordships is this, that even if it be held that the words "regulation of trade and commerce" must receive some limitation, so that if the object of legislation is merely local, and has no relation to what one may call the order, or the government of the country, it may be that it does not fall within these general words, but that all legislation for the regulating of trade, if that regulation has in view the peace, order, and good government of the country comes distinctly within the power committed to the Dominion Parliament.

Sir MONTAGUE E. SMITH: Then it would not override any of the powers in section 92?

Sir FARRER HERSCHELL: Yes, my Lord. I say because it is the regulation of trade and commerce.

Sir MONTAGUE E. SMITH: I beg your pardon if I did not understand you, but I thought you said, assuming it was not a regulation of trade and commerce.

Sir FARRER HERSCHELL: No. I said that, assuming that every regulation of trade and commerce would not be necessarily within it, I am contending that any regulation of trade which has for its object the peace, order, and good government of Canada, would be within it.

Sir MONTAGUE E. SMITH: I understand it now.

Sir FARRER HERSCHELL:—That was the point I was desiring to urge upon your Lordships—that it was not necessary for the decision of this case for me to contend that the regulation of trade and commerce had so wide an effect that every regulation of trade and commerce, however local and limited in its operation and scope, would come within these words, but that it would be enough for me if I shewed a power in the Dominion Parliament to regulate any and every trade where the object and purpose of that regulation was the peace, order and good Government of the Dominion at large. Now that is the power which I contend for in the Dominion Parliament, and if I can establish that, that is quite enough for the decision of this case, because it would leave at large many questions which have no doubt been glanced at in the argument in previous cases, and in this case, because if I once establish that whatever else may not come within No. 2, such laws as this come within the second head of Section 91, then I need not discuss any further whether

the matter comes within any of the Headings of Section 92, because under that heading of Section 91, the provisions of Section 92 would be overridden—Now that, as I shall submit, would put all decisions upon a sound and intelligible footing. It is not the grounds upon which the case of Russell *v.* The Queen was decided in this Court. I submit that the grounds upon which the case of Russell *v.* The Queen went are equally applicable to the present case, viz: that it is not within Section 92, but I am assuming now that some distinction can be made between the case of Russell *v.* The Queen and the present case, and that it can be said that, whereas prohibition in localities is not within Section 92, restriction by a machinery of licenses is within Section 92. Even assuming that that be made out, still I say it is within the power of the Dominion Parliament by reason of Section 91. I will not repeat, because I think I have made your Lordships see what my point is—that whatever limitation you put upon the regulation of trade and commerce, you ought not to limit it so as to exclude from the power of the Dominion Parliament any law relating to trade and commerce which it considers necessary for the peace, order, and good government of the country. Now, that would cover of course many of the cases which I put by way of illustration in the argument. Take, for example, the case of explosives. It may be that you would have local regulations with regard to the sale of explosives as merely local matters in a particular community at a time when the matter was not considered one of general importance or when the danger of the explosives had not been realised. But then it comes to be seen that this power as to explosives is liable to abuse and to be a great public danger, and that it is necessary for the peace, order, and good government of the whole Dominion that you should limit and restrict its use. Then I say it would be a case in which for that purpose you would be entitled to pass a law regulating the trade in that particular article. My Lords, there are other cases where such regulations, I believe, I am not sure whether they have not been made, but one can well conceive their being made. With regard to railways, for example, your Lordships will find that railways connecting any Province with any other Province or extending beyond the limits of a Province are taken out of the local legislation.

The LORD CHANCELLOR: There is an obvious reason for that, of course.

Sir FARRER HERSCHELL: Yes.

The LORD CHANCELLOR: It would be necessarily extra-Provincial.

Sir FARRER HERSCHELL: Yes, but what I was going to point out was this—that it may be that under the provisions of Section 92 it would be competent for the local legislature, or it is possible all events (and I put this by way of illustration) that the local legislature might make a regulation with regard to a railway when it passed through a town, such regulation being limited to the safety of some particular part of the town or the town itself, and that yet the general legislation, with regard to the railway, because it extended elsewhere, would be left throughout the whole Dominion to the Dominion Parliament. One might put cases in which a matter might in one aspect, as it has been said, be a merely local matter, and which in another aspect might be a matter of general policy and of importance to the whole country.

Lord HOBHOUSE: The moment it becomes a matter of the peace, order, and good government of the country, then it is lifted into a different sphere of legislation, I suppose, and it may be dealt with. It ceases to be a mere matter of trade if you can make it out to be a matter concerning the peace, order, and good government of the country

Sir FARRER HERSCHELL: I would not say it ceases to be a mere matter of trade, it is still a matter of trade.

Lord HOBHOUSE: But it is lifted into a higher sphere.

Sir FARRER HERSCHELL: It is lifted into a higher sphere in this sense, that whatever power you may say the local legislatures have of dealing purely locally, and for local purposes with any particular trade—even conceding that they have any such power—yet my contention is that as soon as in the opinion of the Dominion Parliament it is necessary to regulate a trade not as a mere trade matter, but as a matter necessary for the peace, order, and good government of the country, then it is a matter which must of itself come within Section 91.

Lord HOBHOUSE: You would not say that that took away the legislative power given by Section 92, but that they so deal with the subject matter that as long as their particular dealing exists legislation may be inoperative?

Sir F. HERSCHELL: Certainly.

Lord HOBHOUSE: It cannot act, because the matter is dealt with on some higher principle.

Sir F. HERSCHELL: Yes; as in the instance I put—we will suppose a municipal regulation that nobody shall carry arms without a license from the municipal authority. Supposing, then,

that the Dominion Parliament considered it necessary to prohibit all traffic whatever; or, suppose a municipal regulation that nobody should sell arms without a license (that would be a better illustration), and then that the Parliament thinks it so important to the safety of the country to limit the use and possession of firearms, that it says nobody shall sell arms without a license, under the hand of the Governor-General, then I should submit that if that regulation of the trade in guns was a regulation of the trade for the peace, order, and good government of the country, it would come within Section 91, Sub-section 2, because it would be a regulation of trade made for the peace, order, and good government of the country.

Lord HOBHOUSE: You would not deny that the Provincial law was a valid law, only it cannot operate, because the whole thing is taken into other hands and dealt with on other principles.

Sir F. HERSCHELL: Yes.

Lord HOBHOUSE: That is, as long as the Dominion law exists.

Sir F. HERSCHELL: Of course, I take it it is perfectly clear that for revenue purposes the Provincial Government might require everybody selling arms to have a licence from the provincial authority.

Lord MONKSWELL: But then the provincial authority could not license a man to carry arms unless he had a governor general's license.

Sir F. HERSCHELL: No.

Lord MONKSWELL: Otherwise the license would be null and void.

Sir F. HERSCHELL: It would be inoperative.

Lord MONKSWELL: That is the same thing as being null and void.

Sir F. HERSCHELL: Yes, because the higher authority in whom is entrusted the supreme regulation of trade and commerce with a view to the peace, order and good government of the country has interposed and exercised its power.

Lord HOBHOUSE: It is the old difficulty I was putting to you some time back.

Sir F. HERSCHELL: Yes it is, and I do not at all deny the difficulty. I do not think that there is any solution of these matters.

Sir MONTAGUE E. SMITH: One could put innumerable cases, but we must confine it to some extent to each Act.

Sir F. HERSCHELL: I think so. I quite feel that.

Sir MONTAGUE SMITH : Supposing the Dominion Parliament passed an Act in the time of danger that arms should be searched for and forfeited, that is an interference with property and civil rights.

Sir F. HERSCHELL : Yes, but, however, the one I have dealt with is one that I place great reliance on as coming clearly within the specific language of Section 91, and not coming within the specific language of Section 92, because it is, undoubtedly, a regulation of trade, and it is a regulation of trade made with the general object of the peace, order and good government of the country. Certainly nothing can be pointed out in Section 92 which so nearly approaches a description of what has been done. You may say it comes under municipal institutions or local matters, or civil rights, or whatever else, but there is nothing which it certainly so nearly comes within the description of as it does, as I say, the regulation of a trade. The Court below have conceded that to the extent that it relates to the wholesale trade.

Sir MONTAGUE SMITH : that is rather the key to their decision. They think you have regulated minutely in a sort of local way a retail trade.

Sir F. HERSCHELL : Yes.

Sir MONTAGUE SMITH : That is the key to what they have done.

Sir F. HERSCHELL : I think it is the key to their view but is not the fallacy this—that wherever the object of the regulation of a trade is the peace, order and good government of the country it must be open to them as much to regulate the retail trade as to regulate the wholesale trade? Indeed it often is more important to regulate the retail trade. In the case of explosives, for example, it would be idle to regulate the wholesale trade in explosives and not to regulate the retail trade in explosives. With the object with which you regulate that trade at all the latter is more important than the former.

Sir MONTAGUE SMITH : I think the words peace, order and good government are restrictive words rather than enlarging words. They would leave all the residuary power in the Dominion Parliament which was not in the Provincial legislature and then it is only for the peace order and good government of Canada.

Sir F. HERSCHELL : Yes.

Lord HOBHOUSE : But the Province would have no such general powers.

The LORD CHANCELLOR: There is some difficulty even about that, because I think the administration of justice in the provinces is one of the exclusive subjects. It is very difficult to say that that is not a matter for the peace, order, and good government of Canada.

Sir FARRER HERSCHELL: That is very much controlled by the 27th heading, because although they may constitute the Courts, still the Criminal Law, that is, what people are to be punished, and the Criminal procedure, which is the way in which they are to be tried, are left to the Dominion Parliament.

The LORD CHANCELLOR: What I was thinking was this. If you use those words so as to comprehend everything within the jurisdiction of the Dominion Parliament, which aims at the peace, order, and good government of the country, you probably would exclude every portion of the administration of the Province.

Sir FARRER HERSCHELL: No; I do not use those words as standing by themselves. I rely on the regulation of trade and commerce. I used them to meet the argument that that does not include every case of regulation. Of course you may have such a mere local regulation for some merely local purpose that it would not come within that. I only meet it in that way: that wherever there is a regulation of trade and commerce which comes within the words, and the aim and the end of it is for the peace, order, and good government of the Dominion, I say that that is a regulation of trade and commerce within the words of Section 91. I do not say I could stand on the words alone, because they must be read in conjunction with each of the headings.

The LORD CHANCELLOR: That is all my observation was pointed at.

Sir FARRER HERSCHELL: But when a reference is made to the words peace, order, and good government of Canada, as it frequently is in Russell *v.* The Queen, I think that what they were pointing out was that the scheme, intention, and purpose of the powers committed to the Dominion Government were the general good government, so to speak, of the whole of the Dominion, except so far as that had been exclusively committed to the Province. My Lords, I think I have put before you fully all the authorities and the arguments that I have to urge.

Lord HOBHOUSE: You have not touched the money clauses. Sub-section 9 of Section 92 is not encroached upon.

Sir FARRER HERSCHELL: My Lords, I will deal with Sub-section 9 of Section 92.

Sir BARNES PEACOCK: Is there anything provided in this Act which is now under discussion for the payment of the municipal officials? I wanted to know whether there was?

Lord HOBHOUSE: That is what I was calling attention to.

Mr. BURBIDGE: The inspectors are paid out of the license fees if there is enough to pay them, otherwise they are paid by grants from Parliament.

Sir BARNES PEACOCK: Is it provided in the Act?

Mr. BURBIDGE: Yes, that the inspectors shall be paid.

Sir BARNES PEACOCK: Will you tell me where? You mean the Inspectors, not the licensed Commissioners?

Mr. BURBIDGE: I do not remember anything about the Commissioners.

Sir FARRER HERSCHELL: The Commissioners are all judicial officers. They are not paid, but the inspectors are. But no doubt the money will come out of the license fund if there is enough, and I daresay the salaries would be fixed with regard to what was expected to come from it. But the inspectors do not look to the fund—they do not get the money out of the fund.

Mr. BURBIDGE: They do in the first instance if there is enough to pay them.

Sir RICHARD COUCH: Then the residue is to be handed over.

Sir FARRER HERSCHELL: But the salary is fixed by the Board, and if the license fund did not afford enough to pay them, I apprehend their salary would be provided for by a grant of the Dominion Parliament.

Sir RICHARD COUCH: Is there any provision for it?

Sir FARRER HERSCHELL: No, I do not suppose that there would be.

Sir RICHARD COUCH: I think it assumes that the license fund would be enough to pay them.

Sir FARRER HERSCHELL: No doubt.

Lord HOBHOUSE: It is contemplated that there shall be a residue of the license fund, which is to go over to local purposes.

Sir RICHARD COUCH: They seem to have had the idea that they would get sufficient from the license fund to pay the salaries.

Lord HOBHOUSE: Then there is Sub-section 4 of Section 92, under which there have been provided local funds raised by a Board operating in a particular locality, for the payment of these

officers acting in the locality, the residue of which is to go to the general funds of the locality.

Sir FARRER HERSCHELL: Yes. "The license fund "shall be applied, under regulations of the Governor in Council, "for the payment of the salary and expenses of the commissioners "and inspectors, and for the expenses of the office of the Board, "or otherwise incurred in carrying the provisions of the law "into effect; and the residue on the thirtieth day of June in "each year, and at such other times as may be prescribed by the "regulations of the Governor in Council, shall be paid over to "the treasurer of the city, town, village, parish, or township."

Lord MONKSWELL: Is that in the nature of direct taxation?

Sir FARRER HERSCHELL: I suppose a license is a direct tax.

The LORD CHANCELLOR: No, I should think not. It is an indirect tax, surely.

Mr. DAVEY: It was so held in the Attorney-General *v.* Reeve.

Sir FARRER HERSCHELL: I do not know that case, but it strikes me as being a very direct tax.

The LORD CHANCELLOR: You are not paying a direct tax to the Government, but you are paying direct for something you get from the Government.

Mr. DAVEY: Your Lordship remembers the case of the stamp on the affidavit. It was all discussed in that case.

Sir FARRER HERSCHELL: Was that in Canada?

Mr. DAVEY: Yes.

Lord MONKSWELL: It does not come within the heading of direct taxation.

Sir FARRER HERSCHELL: Was that a license?

Mr. DAVEY: It was as to the stamp on an affidavit.

Sir FARRER HERSCHELL: I do not know that the stamp on an affidavit would be exactly the same.

Mr. DAVEY: I think you would find Lord Selborne's judgment important.

Sir FARRER HERSCHELL: Certainly the view of those who drew this Act seemed to be rather that it was a direct taxation, for they speak of it as imposing a tax.

Lord MONKSWELL: If it is a direct tax, then it is solely within the powers of the provincial Government.

Sir FARRER HERSCHELL: No, the Dominion Government can raise money by direct taxation.

Lord MONKSWELL: No, it is within Section 92, Sub-section 2.

Sir RICHARD COUCH: Then it must be "in order to the "raising of a revenue for provincial purposes."

The Lord CHANCELLOR: If it is direct the object is not provincial at all.

Sir FARRER HERSCHELL: The Dominion Parliament has the power, under Sub-section 3, to raise money "by any mode "or system of taxation," so that if it is for a Dominion purpose it comes back to the same question. If this Act was an Act which, for Dominion purposes, a Dominion Parliament had power to pass, there is no difficulty about the taxation because they might raise it by any mode they pleased.

Lord HOBHOUSE: That may be so. I do not say it is very material, but direct taxation is a power which is given to the provincial Legislature. That would be another answer that it is not direct taxation; but you have an answer that it is not for provincial purposes.

Sir FARRER HERSCHELL: Yes, I say that it is not for provincial purposes, and that the Dominion Parliament has power to do it in any way they please; and the fact that in case there is a surplus they think it fair that that shall go to the province is important. If it is for Dominion purposes, and a thing competent for them to do for Dominion purposes under the Statute, then it is competent to raise the necessary money: and if it turns out that more is raised than is necessary, it must be competent for them to dispose of that money by handing it over to the various provinces.

SECOND DAY.

November 12th, 1885.

Mr. BURBIDGE: My Lords, my learned friend Mr. Jeune and myself are with Sir Farrer Herschell in this case, but we do not think it necessary to detain your Lordships by attempting to add anything to the arguments presented to your Lordships yesterday.

Mr. HORACE DAVEY: If your Lordships please. I am instructed to argue before your Lordships on behalf of the Lieutenant-Governors of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick. My contention before your Lordships will be that the Act in question, the Act of 1883, is altogether *ultra vires*; I support what I understand to be the opinion of the Court below so far as it held that Act to be *ultra vires*; but I also contend that it is *ultra vires* in points in which they considered that it was within the powers of the Dominion Parliament, namely, as to what are called vessel licenses and wholesale licenses.

Now, my Lords, I am not quite sure that I agree entirely with my learned friend Sir Farrer Herschell in the view which he presented to your Lordships of the construction of the 91st and 92nd Sections of the British North America Act, which are, as your Lordships know, the important Sections in question. The 91st Section gives power for the Queen, "with the advice and "consent of the Senate and House of Commons, to make laws for "the peace, order, and good government of Canada, in relation to "all matters not coming within the classes of subjects by this "Act assigned exclusively to the Legislatures of the Provinces." And therefore if I can show that the Act in question is a matter which is assigned exclusively to the Legislatures of the Provinces, that is to say, if it comes within Section 92, then the Dominion Parliament cannot, under those general words of "making laws "for peace, order, and good government," make any law in respect of that matter. But, my Lords, I venture to submit to your Lordships that all the enumerated matters in Section 91 are subject to those words, In relation to all matters not coming within "the classes of subjects by this Act, assigned "exclusively to the Legislatures of the Provinces." My submission to your Lordships is that the whole Section is governed by those words, and that the enumerated articles in Section 91 are only an illustration inserted for greater certainty, but that those words to which I referred govern the whole of the Section, and therefore if, for example, they make regulations as to trade or commerce (what is the meaning of those words I will show presently), they must make such regulations as will not infringe upon the exclusive power of legislation over the matters mentioned in Section 92, and that the regulations made under the powers given by Section 91 must be such as do not interfere with the exclusive jurisdiction given to the Legislatures of the

Provinces by Section 92. Now, my Lords, how are those enumerated articles in Section 91 introduced? "and for "greater Certainty, but not so as to restrict the Generality of the "foregoing Terms of this Section it is hereby declared that "(notwithstanding anything in this Act), the exclusive Legislative "Authority of the Parliament of Canada extends to all Matters "coming within the Classes of Subjects next hereafter enumerated": that is to say that the enumerated articles are inserted for greater certainty, showing what is included in "peace, order, and good "government of Canada." But the whole Section is governed by the words, in relation to all matters not coming within the classes of subjects exclusively given to the Provincial Legislatures.

Sir MONTAGUE E. SMITH: There is another provision which is also to be read with it. I forget the words of it at this moment.

Mr. HORACE DAVEY: It is the end of the Section. I was just coming to it. I do not want to comment on the details of it at the moment. I was coming to the last words of the Section, which I think your Lordship was referring to: "And "any Matter coming within any of the Classes of Subjects "enumerated in this Section shall not be deemed to come "within the Class of Matters of a local or private Nature "comprised in the Enumeration of the Classes of Subjects by this "Act assigned exclusively to the Legislatures of the Provinces." I understand those words to mean—and I submit the true construction and bearing of them is this—that the Legislatures of the Provinces cannot legislate on any of the enumerated matters for their own provinces under the pretence or under the contention that the legislation is of a provincial or local character. To give an illustration of what I mean: "Bankruptcy and Insolvency" is one of the matters. It is No. 21. I should admit that the Provincial Legislature, the Legislature of Ontario, could not pass a Bankruptcy Act for the Province of Ontario on the allegation or suggestion that it was of a local character confined only to the Province; that that is a class of subjects upon which the Dominion Parliament has the exclusive jurisdiction, and that this Section was intended to prevent the Legislatures of the Provinces legislating on matters included in the 91st Section, on the mere suggestion that the legislation was of a local character confined only to the Province, and that I venture to submit is the meaning of those words. But on the other hand it is equally

true that the Dominion Parliament cannot legislate on matters which are included in Section 92, on the suggestion or contention that the legislation is for the whole of Canada. If I can show that the matter is exclusively assigned to the Provincial Legislatures by Section 92, then the Dominion Parliament has no jurisdiction to legislate on those matters on the suggestion that they pass a general Act which is applicable, not only to the provinces, but also to the whole of Canada. To take an illustration in the same way, "Property and Civil Rights in the Province," I apprehend it would not be competent for the Parliament of Canada to pass a general Act applicable to the whole of the Dominion, to say that real estate, for example, shall vest in the executors of deceased persons instead of the next heir (I do not know what the law of Canada is with respect to that, but I give that as an illustration) on the mere suggestion that that was an Act which was applicable to the whole of the Dominion.

Sir MONTAGUE SMITH: That alone will not do.

Mr. DAVEY: Well, but go further. If the legislation is in its character local, that is to say, if the scope and character of the legislation is such as to be of a local character, to take the present instance, erecting a number of local licensing boards exercising jurisdiction within a restricted locality, and making bye-laws for that particular locality, then you do not bring it with Section 91 by enacting a general Act for the whole of Canada, if the character of the legislation is such that it falls within any of the enumerated articles in Section 92.

Lord MONKSWELL: I should think that would be conceded.

Mr. DAVEY: I do not want to delay your Lordships, but I wanted not to repeat anything. Now, my Lords, my first point is that the Dominion Licensing Act of 1883, has been decided by your Lordships to fall within Section 92. I refer of course to the case which my learned friend commented on of Hodge *v.* The Queen, but I really do not understand (no doubt it was my fault, for my learned friend is always clear) the explanation which he offered on his side, of the case of Hodge *v.* The Queen. If my learned friend's contention is this, that a provincial Licensing Act such as was in question in Hodge *v.* The Queen, and held in Hodge *v.* The Queen, to be within the jurisdiction of the Provincial Legislature, is overruled by a general Act of a precisely similar character applicable to the whole of the Dominion, then my

answer is that that is inconsistent with the scope and with the true interpretation and construction of these two sentences.

The LORD CHANCELLOR: Sir Farrer was desirous of showing that Hodge *v.* The Queen was not inconsistent with but confirmed Russell *v.* The Queen.

Mr. DAVEY: I do not in the least degree quarrel with Russell *v.* The Queen, and when I come to that case I think I shall succeed in showing your Lordships that it is not only not inconsistent with my argument, but that I can pray it in aid. My first point, therefore, is that Hodge *v.* The Queen has decided—and I wish to be accurate, and not to overstate my case—that a Licensing Act through the means of local licensing boards invested with the power of passing regulations and bye-laws, and issuing licenses for the regulation of the traffic, or to put it shortly, the regulation of the liquor traffic, by means of local licensing boards, falls within the 8th article in Section 92 "Municipal Institutions in the Province," and the 16th article as a matter of merely local nature in the Province. That is my first point, and if that be so, then this Act is *ultra vires* the Dominion Parliament, because it is a matter which comes within the class of subjects assigned by Section 92 to the Legislature of the Province.

Sir MONTAGUE SMITH: What is the number of the sub-section with regard to shop licenses?

Mr. DAVEY: That is 9. I shall have a word to say about that presently, I refer now to 8 and 16; 8 is "Municipal "Institutions in the Province," 16 is "Generally all Matters "of a merely local or private Nature in the Province." I shall have a word to say about some other Sections presently. My Lords, what I want to press upon your Lordships is this. I do not think this has been drawn to your Lordships' attention. The Act which was in question in the Ontario case in Hodge *v.* The Queen was identical in many sections in language with the Licensing Act, but in the character of the legislation, in the machinery of the legislation, in the means by which it was carried into effect, the two Acts are identical, and in fact it is perfectly obvious from a minute comparison which has been made for me of the language of the two Acts, that the draughtsman of the Canada Act of 1883 had before him the Ontario Act which was in question in Hodge *v.* The Queen, and has copied even the very language of many of the sections. But the machinery and the means by which the regulations are intended to be carried out in both Acts is identical, there may be

differences of small details—but the only difference in substance in the two Acts is this, that the Act of 1883 applies to the whole of Canada, and the Ontario Act, which was in question in Hodge *v.* The Queen, applies of course only to the Province of Ontario.

Lord HOBHOUSE: In Hodge *v.* The Queen the decision was confined to two sections of the Act.

Mr. DAVEY: That is so. I am quite aware that the argument turned on those two sections, but I think I am not straining what was said by your Lordships too far or what was conceded in the argument too far, when I call in aid the decision in Hodge *v.* The Queen as a decision that that Act which was in question then, was within the powers and competence of the Provincial Legislature. Now, my Lords, if it is within Section 92, it is exclusive; there cannot be a question about that. "In "each Province the Legislature may exclusively make Laws in "relation to Matters coming within the Classes of Subjects "next hereinafter enumerated." If it comes within any of those classes of subjects then the jurisdiction is exclusive, and if Hodge *v.* The Queen—I hope I am not straining it too far, I do not desire to overstate—my point is, as I contend, a decision with regard to an Act of precisely the same character, employing precisely the same machinery, for precisely the same purpose as the Dominion Act of 1883, I say that is in itself a decision that legislation of that character and of that class is within Section 92. Now, my Lords, I said that the machinery and the whole of the Act were identical. I ought to have made this exception, that in the Ontario Act the Commissioners are appointed by the Lieutenant-Governor of the Province, and in the Dominion Act they are appointed by the Governor-General, as you would expect; but, with that exception, I venture to affirm, and it can be verified by a comparison of the two Acts, that you will not find a single variation of substance between the character and the nature of the two Acts. Now, my Lords, as I place naturally great reliance upon Hodge *v.* The Queen, perhaps your Lordships will allow me to refer shortly to that case which is in the 9th Appeal Cases. The nature of the Act is shortly stated in the judgment which was delivered by your Lordships. It is stated thus: "Section 3 of "this Act provides for the appointment of a Board of License "Commissioners for each city, county, union of counties or "electoral district as the Lieutenant-Governor may think fit, "and Sections 4 and 5 are as follows: 'Section 4. License "'Commissioners may, at any time before the first day in each

" ' year, pass a resolution, or resolutions, for regulating and " ' determining the matters following, that is to say: (1) For " ' defining the conditions and qualifications ' "; and so forth. I need not read it, because it has been read to your Lordships.

Lord MONKSWELL: It is confined to retail licenses.

Mr. DAVEY: No; it also contains a description of wholesale licenses.

Lord MONKSWELL: The words here are "for retail."

Mr. DAVEY: Yes, in that section; but it also refers to wholesale licenses. All I want it for for the present purpose is this: that that was an Act for the purpose of regulating the liquor traffic through the machinery of local licensing bodies.

Lord MONKSWELL: It is necessary to bear in mind the distinction between wholesale and retail.

Mr. DAVEY: Yes; I am coming to that presently; all I want at present is to show that the general scope and character of the Act was an Act for the purpose of regulating the liquor traffic through the machinery and by the means of local licensing bodies.

Sir MONTAGUE SMITH: You say the two Acts are identical with an immaterial exception?

Mr. DAVEY: That is my suggestion.

Sir MONTAGUE SMITH: And therefore that this Act is one which the local Legislature might have passed?

Mr. DAVEY: Yes; confined, of course, to the Province. Each Province might have passed the Act for itself. What their Lordships held is this, at page 130. After mentioning Russell *v.* The Queen, with which I shall, of course, have to deal, they say: "Their Lordships proceed now to consider the " subject-matter and legislative character of Sections 4 and 5 of " 'the Liquor License Act of 1877, cap. 181, Revised Statutes of " 'Ontario.' That Act is so far confined in its operation to " municipalities in the Province of Ontario, and is entirely local " in its character and operation. It authorises the appointment " of License Commissioners to act in each municipality, and " empowers them to pass, under the name of resolutions, " what we know as bye-laws or rules to define the " conditions and qualifications requisite for obtaining tavern " or shop licenses for sale by retail of spirituous liquors " within the municipality; for limiting the number of licenses; " for declaring that a limited number of persons qualified to have " tavern licenses may be exempted from having all the tavern " accommodation required by law, and for regulating licensed

" taverns and shops, for defining the duties and powers of License " Inspectors, and to impose penalties for infraction of their " resolutions. These seem to be all matters of a merely local " nature in the Province, and to be similar to, though not " identical in all respects with, the powers then belonging to " municipal institutions under the previously existing laws passed " by the Local Parliaments. Their Lordships consider that the " powers intended to be conferred by the Act in question, when " properly understood, are to make regulations in the nature of " Police or Municipal regulations of a merely local character for " the good government of taverns, &c., licensed for the sale of " liquors by retail, and such as are calculated to preserve in the " municipality, peace and public decency, and repress drunkenness " and disorderly, and riotous conduct. As such they cannot be " said to interfere with the general regulation of trade and " commerce, which belongs to the Dominion Parliament, and do " not conflict with the provisions of the Canada Temperance Act, " which does not appear to have as yet been locally adopted. " The subjects of Legislation in the Ontario Act of 1877, Sections " 4 and 5, seem to come within the heads Nos. 8, 15, and 16, of " Section 92 of British North America Statute, 1867. Their " Lordships are therefore of opinion that in relation to Sections " 4 and 5 of the Act in question, the Legislature of Ontario " acted within the powers conferred on it by the Imperial Act of " 1867, and that in this respect there is no conflict with the powers " of the Dominion Parliament." Your Lordships have the case before you and will form your own opinion ; but my submission to your Lordships is that that is a decision that the regulation of taverns by means of local licensing bodies is a matter coming within " Municipal Institutions," and a matter of a merely local character. If so, then I venture to submit that it is exclusively confined to the Provincial Legislature. If the Provincial Legislature has, as I contend, and maintain is decided by Hodge *v.* The Queen, the right to do so under the head of Municipal Institutions and matters of a merely local nature, then I say that the Legislative power of the Dominion Parliament is excluded. That is my first point.

Lord MONKSWELL: As to retail licenses ?

Mr. DAVEY: Yes, as to 4 and 5 ; I want to take it generally. At present I adopt my learned friend Sir Farrer Herschell's argument as to " wholesale," I agree with him as to the distinction between wholesale and retail. I promise not to forget that the wholesale licenses are to be dealt with, but I want to deal with the question generally, quite apart from the distinction

between wholesale and retail, which in my opinion is an unreal distinction. Now let me call your Lordships' attention to what is the character of this legislation that you have before you. I have here the reference to the corresponding sections of the Ontario Act marked; I do not know whether your Lordships have that. I will now pass to the Act itself, and show that it is an Act of precisely the same character as the Ontario Act which was in question in the other case. I am taking now the Act of 1883, and I want to show that it is an Act of precisely the same character. I will first pause upon the preamble: "Whereas it is desirable to "regulate the traffic in the sale of intoxicating liquors." My learned friend first relied upon that preamble. Well, of course, if it is not a matter within the jurisdiction of the Dominion Parliament, merely saying it is desirable to do so will not give them jurisdiction, "it is expedient that the law respecting the "same should be uniform throughout the Dominion." The same observation applies. If it is a matter as to which each Provincial Legislature is entrusted with the duty of legislating for itself, then the mere statement of its being desirable that the law should be uniform would not give them jurisdiction, because the British North America Act says that on matters coming within Section 92 the law may not be uniform, but each provincial legislature may legislate for itself. "And that provision should be made in regard thereto for the "better preservation of peace and order." My learned friend relied, I think, chiefly upon those words; but your Lordships will not forget that the jurisdiction to legislate for the peace and order of Canada is subject to the exception of those matters which are exclusively confined to the Legislatures of the Province. My Lords, "the licensing boards" I will not stop at. Section 4 is: "The Governor in Council shall, as soon as "conveniently may be after the commencement of this Act, "establish districts for the purposes of this Act, to be called "'license districts,' and may from time to time alter and "re-define the same; and the 'license districts,' when so "established and when altered, shall be announced by "proclamation in the *Canada Gazette*. Such districts shall, as "far as possible and convenient, be identical and co-terminous "with existing and future—(1) counties (2) or electoral districts "(3) or cities"—local distinctions.

The LORD CHANCELLOR: Is there anything which

throws light on this subject, whether a district could be created forming part of two different provinces ?

Mr. DAVEY : I should think not, because as far as possible they are to be identical and co-terminous with counties which of course would be in one province ; electoral districts, which of course would be within one of the provinces ; and cities.

The LORD CHANCELLOR : There are the words " as far " as possible."

Sir BARNES PEACOCK : Suppose the Act had said " partly in one and partly in the other " ?

Mr. DAVEY : Well, my answer is that it does not. Well, then, the 5th Section provides for a Board of License Commissioners.

Sir BARNES PEACOCK : It did not follow that the Legislature at this time was bound to make them co-terminous.

Mr. DAVEY : I think the answer is, " as far as possible " meant with any small local variation ; but the ideal which is to be held up for the formation of the districts is that they are to be co-terminous. That is to be the rule, with any small local exceptions. If there were an outlying district of one county which it was more convenient to unite with another it was intended by the words " as far as possible " to provide for such a case.

The LORD CHANCELLOR: If there were such a district it would be beyond the power of the Provincial Legislature to legislate for it.

Mr. DAVEY : They could only legislate for their own province. There is nothing in this Act which indicates that the districts are to be otherwise than confined within the province.

The LORD CHANCELLOR : I only wanted to know, as I happened to look through the Act carefully, whether there was anything which threw any light on that question. I dare say there is nothing.

Mr. DAVEY : No, I think there is nothing. My learned friend remarks that the next Section perhaps does throw some light upon it. " There shall be a Board of License Commissioners, " to be called ' The Board,' composed of three persons for each " License District : (*a*) The first Commissioner shall be, in the " Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, " and Prince Edward Island, a County Court Judge, or a Junior " Judge of a County, as may be selected by the Governor " in Council." I need not read the rest. (*b*) The second

Commissioner shall be the Warden of the county, or Mayor of the city, which rather shows that they select officers who are exercising jurisdiction within a limited provincial area. "When "there is both a Warden and a Mayor, having jurisdiction "within the License District, the former shall be second "Commissioner. In the cities of Montreal and Quebec, in the "Province of Quebec, the Recorder, and in the Counties of the "Province of Prince Edward Island, the Sheriff of the County "shall be the second Commissioner; but in the Province of "Nova Scotia, where the License District embraces two or more "municipalities, then the Warden of such of the said "municipalities as the Governor in Council may appoint "shall be the second Commissioner. (*c*) The third Commissioner "shall be a person appointed by the Governor in Council, who "shall hold the office for one year, or for the portion of the year "yet unexpired in which he is appointed: but he shall continue "to hold office until his successor is appointed." Then there are details as to a particular county, and so forth. Now, my Lords, the corresponding Section with Sections 4 and 5 in the Ontario Act is this. As I have this open, I will at once answer Lord Monkswell's question by saying that it applies to tavern licenses, shop licenses, and licenses by wholesale, or wholesale licenses.

Lord MONKSWELL: Sections 4 and 5, which only are dealt with in Hodge *v.* The Queen, appear to be confined to retail licenses. That is my only observation.

Mr. DAVEY: That is so. Section 3 is this:—"There "shall be a Board of License Commissioners, to be composed of "three persons, to be appointed from time to time by the "Lieutenant-Governor for each city, county, union of counties, "or electoral districts, as the Lieutenant-Governor may think "fit, and any two of the said Commissioners shall be a quorum, "and each of them shall cease to hold office on the 31st day of "December in each year, but he may be reappointed, and the "said office shall be honorary, and without any remuneration." Now, my Lords, observe in the Second Canada Act it is prescribed that the Governor in Council shall establish districts. In the Ontario Act it is prescribed that the Lieutenant-Governor shall define the districts; and that is the only distinction. In the Ontario Act the Lieutenant-Governor appoints the three Commissioners. In the Canada Act the Governor in Council appoints the three Commissioners, but as to the first and second Commissioners there has to be a particular qualification, which is not in the Ontario Act. The machinery is exactly the same,

through a license commission to be appointed by the executive power acting in a local district. Then Section 6 of the Canada Act provides for license inspectors. "A Chief Inspector "of Licenses, and one or more Inspectors shall be appointed by "the Board of License Commissioners from time to time from "each district, as the Board may see fit, and each License "Inspector shall, before entering upon his duties, give such "security as the Board may require for the due performance of "his duties, and for the payment over of all sums of money "received by him under the provisions of this Act; and the "salary of the Inspectors shall be fixed by the Board, subject to "the approval of the Governor in Council." You will remember how the salary is paid out of the fees received for licenses. I will come to that presently. Now compare Section 6 of the Ontario Act.

Lord MONKSWELL: He is paid out of the same fund here, is he?

Mr. DAVEY: Yes. Section 6 of the Ontario Act provides: "An Inspector of Licenses shall be appointed by the Lieutenant-"Governor from time to time for each City, County, Union of "Counties, or Electoral District, as the Lieutenant-Governor may "think fit; and each Inspector shall, before entering upon his "duties, give such security as the Treasurer of the Province may "require for the due performance of his said duties, and for the "payment over of all sums of money received by him, according "to the provisions of this Act; and the salary of each Inspector "shall be fixed by the Lieutenant-Governor in Council." Exactly the same, with this exception, by the way, that in the Canada Act he is appointed by the Board, subject to the approval of the Governor in Council. In the Ontario Act, he is appointed by the Lieutenant-Governor direct; but in either case there is an Inspector acting in, and for the district. Then Section 7 of the Canada Act defines the licenses—"Hotel licenses, Saloon licenses, "Shop licenses, Vessel licenses, Wholesale licenses;" and the corresponding Sections to that are Section 7 and Section 2 of the Ontario Act.

Lord MONKSWELL: Are there ship licenses too?

Mr. DAVEY: I am told there is a provision as to vessel licenses, the reference to which I will give your Lordships directly, but here you have tavern licenses, shop licenses, licenses by wholesale or wholesale licenses, and the definition is singularly the same. Section 2 of the Ontario Act—"Wholesale license" shall "be construed to mean——

Lord MONKSWELL : Perhaps upon this you would say that the Sections 4 and 5 which were the only ones we had to consider related only to retail, but that the other Sections of the Act were not questioned.

Mr. DAVEY : Yes. Here you have in Section 2 of the Ontario Act, tavern licenses, shop licenses, wholesale licenses ; and without taking up your Lordships' time by reading definitions you will see that they are substantially the same. I think the definition of " wholesale " is a dozen bottles of at least three half-pints each or two dozen bottles of at least three-quarters of a pint. It is very much the same. And in Section 44 of the Ontario Act you have provision made for vessel licenses : " No sale or other " disposal of liquor shall take place thereon or therefrom to be " consumed by any person other than a passenger on the said vessel " while such vessel is at any port, pier, wharf, dock, mooring or " station, nor shall any liquor, whether sold or not, be permitted or " allowed to be consumed in or upon any vessel departing from and " returning to the same port or wharf, dock, mooring, or station " within the time hereinafter in this Section mentioned," and so forth. Now, my Lords, let us look at the powers of the Board. The powers of the Board in the Canada Act are contained in Section 9 :—" The Board shall hold a meeting during the month of " February 1884,and may thereat pass a resolution or resolutions for " regulating the matters following: (*a*) For defining the conditions " and qualifications requisite to obtain hotel or saloon licenses for " the retailing within the district or any part thereof of liquors, " and also shop licenses for the sale, by retail, within the district " or any part thereof, of liquors, in shops, or places other than " hotels, taverns, inns, alehouses, beerhouses, or places of " public entertainment, not contrary to, or inconsistent " with the provisions of this Act. (*b*) For limiting the number " of hotel, saloon, and shop licenses respectively, within the " maximum prescribed by this Act, and for defining the respective " times and localities within which, and the persons to whom such " limited number may by issued within the year, from the first day " of May of one year till the thirtieth day of April inclusive of " the next year. (*c*)For declaring the number of saloon licenses that " may be issued in any year. (*d*) For regulating the hotels, saloons, " and shops to be licensed." That surely is a mere matter of local police. (*e*) " For fixing and defining the duties, powers, and " privileges of the Inspectors of Licenses of their district." Those are local powers, and exactly powers of the same class as those which were in question in the case of Hodge *v.* The Queen.

Now compare that, my Lords, with Section 4 of the Ontario Act, which was the Section in question, and you will see, I think, that it is impossible to avoid the inference that the Canada draughtsman availed himself of the Ontario Act. At least there is a very curious fortuitous similarity of language if it were not so :—" The " License Commissioners may at any time before the 1st day of May " in each year pass a resolution or resolutions for regulating and " determining the matters following, that is to say: (1) For defining " the conditions and qualifications requisite to obtain tavern licenses " for the retail, within the municipality, of spirituous, fermented or " other manufactured liquors, and also shop licenses for the sale " by retail within the municipality of such liquors in shops or " places other than taverns, inns, alehouses, beerhouses or " places of public entertainment; (2) For limiting the number " of tavern and shop licenses respectively and for defining the " respective times and localities within which and the persons to " whom such limited number may be issued within the year " from the first day of May of one year till the 30th day of April " inclusive of the next year. (3) For declaring that in cities a " number not exceeding ten persons, and in towns a number not " exceeding four persons, qualified to have a tavern license, may " be exempt from the necessity of having all the tavern " accommodation required by law." There is a similar provision to that in this Act in another section: "(4) For regulating the " taverns and shops to be licensed." That is exactly the same thing. "(5) For fixing and defining the duties, powers and " privileges of the Inspector of Licenses of their district." The two things are identical. The legislation is not only concurrent but it is identical. I do not feel justified in asking your Lordships to go through with me these two Acts. They have been very carefully compared, and I hope I may be permitted to say that I do not think any substantial difference —I do not say differences of detail—can be pointed out between the character and machinery of the two Acts. My Lords, if this Ontario Act has been declared to be within the exclusive legislative functions of the Province, as being a matter dealing with municipal institutions and of a merely local character, then I think I am warranted in saying that it is excluded from the jurisdiction given to the Dominion Parliament by Section 91, or in other words I should put it in this way—that the regulation of the liquor traffic by means of local licensing boards or commissions—boards they are called—exercising restricted local jurisdiction, and exercising police functions

within those local jurisdictions, is a matter which is exclusively confined to the Provincial Legislatures under Section 91.

The LORD CHANCELLOR: I do not think you are entitled to go so far as to say it was meant to be exclusive. I quite follow your argument. You say if they can do it that of itself makes it exclusive; but the judgment expressly avoids saying that, because you will find it refers to the fact that the Dominion had not dealt with the subject.

Mr. DAVEY: That is quite true.

The LORD CHANCELLOR: You said it was declared to be exclusive.

Mr. DAVEY: I do not wish to press what was said in Hodge *v.* The Queen, one step beyond what was said, but if you once get to this, that it is a matter connected with municipal institutions, and of a merely local character you do not make it Dominion matter by passing a general Act for the whole province on those grounds. The decision in Hodge *v.* The Queen, is that it came within the class of matters which are referred to in the 8th sub-Section as municipal institutions. Now, my Lords, my learned friend naturally relied on and flourished Russell *v.* The Queen. Well, my Lords, I do not quarrel with Russell *v.* The Queen, the least degree in the world. I could not if I wished to; but it seems to me exactly to illustrate my argument. What was the decision in Russell *v.* The Queen? It was that the prohibition of the liquor traffic throughout the Dominion was a matter which was not exclusively assigned to the Provincial Legislatures. That is the decision—that it stood on exactly the same footing as the prohibition of the sale of poisons, for example. Or if my learned friend pleases—I think it was an excellent illustration—the prohibition against carrying arms in the interest of public safety. But why? Because the prohibition of the sale of poisons, or the prohibition of the liquor traffic is not one of the things exclusively assigned to the Provincial Legislature.

Sir MONTAGUE SMITH: That is the ground of the decision, that it did not fall within any of the matters in Section 92; right or wrong, that is the decision.

Mr. DAVEY: That is the decision—that the prohibition of the liquor traffic is one of the matters which are exclusively assigned to the Provincial Legislature.

Lord MONKSWELL: You concede that the Provincial Legislatures, although they could regulate the traffic, could not prohibit it in any portion of the province?

Mr. DAVEY : I do not think it is necessary to concede that.

Lord MONKSWELL : If they could prohibit it, then it would follow that the Dominion Government could not.

Sir MONTAGUE SMITH : No, because it would only be under the general term " Local Matter."

Lord MONKSWELL : According to Mr. Davey's argument, supposing under that term the Local Government could prohibit the sale of liquors, then it would follow that the Provincial Legislature could not.

Mr. DAVEY: No, because if it were prohibited in the interest of public safety—for instance, the bearing of arms——

Lord MONKSWELL : Then it comes to this, that the Dominion Government can, in some cases at all events, override the proper legislation of the Provincial Legislature?

Mr. DAVEY: Lord Selborne says that, and in other cases that is said. When that section, which I do not mean to place much reliance on in this case, about property and civil rights, has been in question, it was pointed out that in many cases legislation, for instance bankruptcy legislation, must override legislation in property and civil rights.

Lord MONKSWELL : We get as far as this, at all events, that there may be some local legislation which, without Dominion legislation, would be invalid.

Mr. DAVEY: It is operative subject to the general laws passed by the Dominion within their jurisdiction.

Lord MONKSWELL : Take the case of a shop license granted by the local legislature. If the majority of the electors in that district apply the Act of 1878 then a shop license becomes inoperative.

Mr. DAVEY: I think the local legislature has provided for that by making a shop license inoperative. I am told it is the Canada Temperance Act.

Sir MONTAGUE SMITH: Surely the two stand together—the Dominion Parliament has power I think over all customs?

Mr. DAVEY: Yes.

Sir MONTAGUE SMITH : Supposing they put a prohibitory duty on wine, and the province had given a wine license to a tavern, the license would become inoperative : it is not a nugatory license, but there is nothing upon which it can act.

Lord MONKSWELL : That comes to no more than I asserted : it may not militate against your argument, but I think you must come to this : that there may be some legislation on

the part of the province which is overriden by the Dominion Parliament.

Mr. DAVEY: Undoubtedly.

Sir MONTAGUE SMITH: As I understand, you are at present saying that this is within 92, and the effect of 91 you will discuss afterwards ?

Mr. DAVEY: Quite so.

Sir BARNES PEACOCK: Do I understand you correctly to admit that Russell *v.* The Queen is not overruled by Hodge *v.* The Queen?

Mr. DAVEY: Certainly. I do not know that your Lordships can overrule a previous decision of your Lordships. The House of Lords cannot!

Sir BARNES PEACOCK: Some of the decisions have been varied by subsequent decisions in the Privy Council.

Mr. DAVEY: Your Lordships do not overrule; you explain.

Sir BARNES PEACOCK: Russell *v.* The Queen is still in force.

Mr. DAVEY: Undoubtedly.

Sir MONTAGUE SMITH: Both decisions, of course, are in force, and they may well stand together. The question is whether this case comes nearer to one or the other.

Mr. DAVEY: What I want to point out is what the decision in Russell *v.* The Queen was. Russell *v.* The Queen was this: Of course, I am bound to accept it as correct, and I do. It may have been explained, but it certainly was not overruled in Hodge *v.* The Queen. Russell *v.* The Queen decided this: That a general law prohibiting the sale of liquors to come into operation subject to a certain condition, was not one of the subjects exclusively confined to the Provincial Legislatures, and therefore it was a law which it was competent for the Dominion Parliament to make in the interest of public order and public safety. That is the decision, I think, fairly stated, of Russell *v.* The Queen.

Lord MONKSWELL: I should think it would almost follow from that that the total prohibition of the sale of liquors was not within the power of a local Parliament.

Mr. DAVEY: Very possibly. I do not know that that would be so, because the local circumstances of a particular province might make it necessary to pass such an Act for a particular province, although the same circumstances did not exist in another province.

Lord MONKSWELL: Still, if the prohibition to sell liquors is within the exclusive jurisdiction of the province, the Dominion

cannot interfere with that by making a general Act for the whole.

Mr. DAVEY: Possibly. I do not forget what was said, that you may look at an Act from different aspects, and that you must have regard to the character of the Act. What I want to point out is this: I do not mean to read the decision in Russell *v.* The Queen again, because my learned friend very fairly read the whole of the judgment to your Lordships, and I assume that it is present to your Lordships' minds, although I will of course refer to it if any of your Lordships wish me to do so. But taking it to its fullest extent, and taking every word that was said in Russell *v.* The Queen to its fullest extent, it amounts to nothing more than this: that the prohibition of the sale of liquors or of poisons throughout the Dominion was not one of the matters exclusively assigned to the Provincial Legislature by Section 92.

Lord MONKSWELL: It is a mere truism, because no local Government can legislate beyond its limits. If it meant no more than that, it would mean scarcely anything.

Mr. DAVEY: In the same way, if I took the illustration given by Sir Farrer Herschell, I should say that, for instance, if there were political disturbances, or a revolt against the Queen's authority in any province of the Dominion, I do not at all deny that it would be competent for the Dominion in the interest of the safety of the Dominion to prohibit the carrying of arms.

Sir MONTAGUE SMITH: Take the case of contagious diseases spreading to a province.

Lord MONKSWELL: If The Queen *v.* Russell only meant that one province could not legislate beyond its ambit, it means nothing at all; it is a mere truism.

Mr. DAVEY: There was no question in The Queen *v.* Russell about the regulation of the liquor traffic through the machinery or by means of local licensing bodies, which your Lordships, in Hodge *v.* The Queen, have determined to come within what I will refer to as Municipial Institutions. My objection to this Act is, that under the guise of passing a general Act for the whole of Canada, it attempts to legislate by the creation of what I will call local or municipal licensing bodies, giving them restricted local jurisdiction, and those matters are exclusively given to the Provincial Legislatures. All the Temperance Act did was to prohibit the sale of liquor except for sacramental and medicinal purposes, and it provided machinery for carrying that into effect. But that is a totally different class and character of legislation, and as your Lordships pointed out in Russell *v.* The Queen, in all

these cases what you have to look at is the character of the legislation. Is the legislation in its character local or not? "Character" is not the exact word, but I cannot find a better word. Is the character of the legislation local or not? Does it purport, or does it affect to create municipal institutions? Is not the principle of the 92nd Section this: that as regards all local matters, matters of local police, matters of local regulation in the interest of decency and order, as regards those matters each province is left to legislate for itself? Therefore, my Lords, I venture to submit that giving its full effect, which I do not desire to pare away in the slightest degree, to every word said in Russell *v.* The Queen, there is nothing in that case inconsistent with what I submit was held in Hodge *v.* The Queen; that is, that the regulation of the liquor traffic by means of local licensing bodies empowered to pass regulations, came within the class of subjects which are referred to as municipal institutions.

The LORD CHANCELLOR: Take the illustration you gave just now. Suppose the case you have spoken of with reference to the sale of arms and what not. You would concede that the Dominion probably would be entitled to make such regulations as it thought fit in the interest of public safety?

Mr. DAVEY: Yes. I do not know where your Lordship is going to lead me, and I give a hesitating "yes;" I am rather afraid of your Lordship.

The LORD CHANCELLOR: All I meant was if the thing to be done is one which must be essentially done through local machinery, you would not deprive the Dominion Parliament of the power of doing it? Take the very case suggested, the inspection of gunsmiths' shops, and the inspection of factories where gunpowder and dynamite were stored. That could only be done by local officers—of course, I do not mean necessarily appointed by the Province, but officers on the spot.

Mr. DAVEY: No doubt. They may be Government officers. There are Government Custom-house Officers at each port or entry where Canada abuts on the States.

The LORD CHANCELLOR: Take that case—the subject matter being within the jurisdiction of the Dominion, and there being the necessity of the application of local inspection. Would you say that no machinery could be created in the Province by which that could be done, but that it must be done by Dominion officers?

Mr. DAVEY: Yes. If it is a Dominion matter it is a matter

for which the Dominion is responsible, and it must be done by Dominion Officers.

The LORD CHANCELLOR: It could not be done by a board of inspectors to visit the gunsmiths' and manufacturers' shops?

Mr. DAVEY: I would rather answer that question when it arises. Of course these questions run very fine, and what we have to try and discover is a principle.

Lord MONKSWELL: Supposing there had been a local law of inspection of gunsmiths' shops, would that prevent the Dominion from enacting a general law for the prohibition of arms?

Mr. DAVEY: In the interests of public safety? No, I do not think it would. If your Lordships were to accede to my learned friend's argument, taking the Province of Ontario, the position of things would be this: It has been held that the 4th and 5th Sections, at any rate, of the Ontario Act, and I think the whole Act, are within the competence of the Local Legislature. If your Lordships were to accede to my learned friend's argument, and overrule the view taken by the Supreme Court of Canada, you would have two concurrent Acts, both of which have been declared by your Lordships to be within the power of the Local Legislature, you would have two concurrent Acts, each working through precisely the same machinery in character, you would have a licensing body appointed by the Governor-General; you would have another licensing body appointed by the Lieutenant-Governor, and each exercising the duty of licensing. Your Lordships will remember what was said in Russell *v.* The Queen, that in every one of these cases you must look at the character of the Act. I would remind your Lordships of that.

Now I wish to go a little further. When my learned friend was reading the 92nd Section I drew his attention to the two Sections 4 and 9, because I think I shall show that they have been infringed by this Act. My learned friend was equally within his right in saying that if these are Dominion Officers—it is a *petitio principii*—if these are Dominion Officers they do not interfere with the established tenure of Provincial Officers, and the appointment and payment of Provincial Officers. But, my Lords, if this Act is sound, I venture to submit to all intents and purposes these are Provincial Officers, because these Commissioners and these Inspectors, exercising exclusively local jurisdiction and paid out of a fund the surplus of which is to go to the municipalities within the Province, are in fact and in

truth Provincial Officers. They are exercising functions, which functions, according to my submission, are assigned to Provincial Officers. But, my Lords, we have the words, "Municipal "Institutions in the Province." I need scarcely do more than refer to what was said in Hodge *v.* The Queen, which I have already read as showing that the "Municipal Institutions in the "Province" is to give a wider interpretation than was suggested, as merely the founding of municipal bodies, the creation of municipalities. It was held in Hodge *v.* The Queen that these licensing bodies, and the assigning of powers to these licensing bodies was competent under the head of "Municipal Institutions." It is not confined merely to the creation of municipalities, but it extends to the creation of bodies and to the defining the rights, powers, duties, and privileges of bodies created for what is called municipal purposes, that is to say, the local regulation of decency, order, and so forth. In Hodge *v.* The Queen it was not thought out of place to refer to what was the existing state of things at the time that the British North America Act was passed. I have here, though I am not going to trouble your Lordships with it, an analysis of a large number of Acts which were in force in all the provinces for this very purpose of regulation of the liquor traffic through the machinery and means of the different municipal bodies in the different provinces which were by the Act united into the Dominion. This legislation is no novelty in Canada. Legislation of the kind existed before the British North America Act, and legislation of exactly this class, the regulation of the liquor traffic through the local bodies created for the purpose.

The LORD CHANCELLOR: That question I asked very early in the argument; was there any system of granting licenses at the time of the passing of the British North America Act?

Mr. DAVEY: Yes, I think so; if your Lordships look at the square book you will find the reference to the different statutes. The Acts are very properly not printed, but on page 4 you will find an enumeration of "Acts relating to the Special "Municipal Incorporation by the Provincial Parliament of the "Province of Canada of Cities and Towns in Lower Canada "before Confederation;" and if you run your eye down that you will see that in Nova Scotia there was an Act in 1864 for granting licenses for the sale of intoxicating liquors; in New Brunswick in 1854 an Act was passed to regulate the sale of spirituous liquors, and in 1860 an Act of New Brunswick was

passed for the sale of spirituous liquors in the city and county of St. John, and then there are various statutes which have been passed by the different provinces after Confederation, a list of which is given on page 5.

I hope your Lordships will allow me to refer to the view which has been taken on this subject, and what has been said by the Courts in the country on this subject. I refer to a case of Slavin *v.* The Corporation of the village of Oreiller. I have a report in the first volume of Mr. Cartwright's Collection of Cases on the British North America Act; and it is page 688 of 1 Cartwright. That case was before the Ontario Court of Queen's Bench. I think what the Chief Justice says is worthy of consideration. The Chief Justice Richards—the Chief Justice of the Ontario Court of Queen's Bench at that time—in the year 1874, says this: "We must assume, what is not probably at all "doubted, that the Imperial Legislature in passing the B.N.A. "Act of 1867, introduced the various provisions as to the "respective powers of the Local and Dominion Legislatures on "the suggestions of, and on conference with the Delegates from "the various Provinces, who had before that met to discuss the "basis of the Confederation. As far as the Province of Upper "Canada was concerned, the Delegates who represented the "views of that section of the United Province of Canada well "knew what the Municipal Institutions of Upper Canada were; "and some one of them had probably introduced, and carried "through the Legislature, only a short time before, the Act passed "on the 15th August 1866, entitled 'An Act respecting the "'Municipal Institutions of Upper Canada,' 29-30 Vic. cap. 51. "They knew that in the sections of that Act already referred to "the power was granted to the Municipalities in Upper Canada, "under certain circumstances, to limit the number of taverns "and to prohibit the license of shops for the sale of "spirituous liquors in the several Municipalities. When, "then, this Imperial Act uses the very words of the title of this "Bill, in giving as one of the classes of subjects on which the "Provincial Legislature may pass laws, viz., 'Municipal "'Institutions in the Province.' Can there be any reasonable "doubt that it was expected and intended that the 'Municipal "'Institutions,' which were to be constituted under that authority, "would possess the same powers as those which were then in "existence under the same name, in the Province? I should "think not. I think we may properly hold that the powers now "contended for were intended to be, and were, vested in the

" Provincial Legislature by these very words. Their being " followed by '(9) shop, saloon, tavern, auctioneer, and other " licenses, in order to the raising of a revenue for provincial, " local, or municipal purposes,' does not, in our opinion, show " it was the intention to limit the exercise of the powers which " Municipal Institutions ought to have, and which they had had, " on limiting the sale by retail in inns, or prohibiting the sale " thereof in shops, but rather to remove all doubts as to their " right to raise a revenue either for provincial, local, or municipal " purposes by the issuing of these and other licenses. The " B. N. A. Act of 1867 must have been passed on a conference " with the Delegates from the different provinces, and the " various provisions as to the powers and subjects of " Legislation by the Dominion and Local Parliaments must " have been suggested by these Delegates. Their suggestions " must have been based on personal knowledge of the " various modes in which Legislation on those subjects had " been had in the various Provinces before the Confederation ; " and if it had been intended that similar legislation should not " have been continued as before by the various provinces, there " is no doubt that such intention would have been expressed in " the Act. And when words and expressions are imported into " that Act, which have been in common use in legislating for " these provinces, we must continue interpreting these words in " the same manner, and to mean the same thing as we decided " they meant in Statutes passed by our own Legislatures. It " would create great difficulties and inconveniences if we did not " act on this rule." Then after referring to some cases, the learned Chief Justice says at page 707 of this book :—" We think " the course of legislation in Canada, previous to the passing of " that Act, shows that the granting of licenses to sell wines and " ardent spirits by retail, was a matter properly entrusted to the " Municipal Institution in this Province, and that the power to " prohibit such sale under certain circumstances was also proper " to be entrusted to those institutions ; that the power to " legislate for such institutions necessarily carries with it the " right to confer on such institutions all such powers, particularly " of police, as could be most conveniently, and with advantage to " the community, exercised by them ; and when such matters " may be said to be of a merely local and private nature in the " Province, they cannot be said to interfere with the rights " possessed by the Dominion Parliament." That is in 1874. My Lords, there is another case later in date, which is also reported

in Cartwright. I refer to a passage in the case of The Queen *v.* Frawley, in 2 Cartwright, page 576. It was before the Ontario Court of Appeal—" A Provincial Legislature has power " to enforce any of its laws by imposing hard labour as a " punishment for the violation of them ; and (through the Chief " Justice Spragge) the jurisdiction of a Provincial Legislature to " legislate respecting licenses is not confined to the object of " raising a revenue." What he says is this, " It is, I think, " clearly so as a matter of police regulation, and, being so, falls " within one of the enumerated classes, viz., 'Municipal " 'Institutions.' With regard to the point made in argument, " that Clause 9 authorises legislation in relation to shop, saloon, " tavern, auctioneer, and other licenses only in order to the " raising of revenue, I observe that in several of the reported " cases it has been assumed that the power to legislate in regard " to licenses is limited by the purpose indicated in Clause 9. It " does not appear to me that that was the purpose of Clause 9. The " power of licensing shops, saloons, taverns, and auctioneers, and " granting some other licenses existed in Municipal Bodies at the " date of Confederation, and that power passed to the Provincial " Legislatures under Clause 8. If Clause 9 is to be read as it is " assumed that it should be read, it abridges the power conferred " by Clause 8, and would limit the power to legislate in relation to " these licenses to cases in which they were necessary in order to " the raising of revenue, however necessary such legislation might " be in the case of houses of public entertainment, to the " prevention of intemperance, and the preservation of order. My " interpretation of Clause 9 is that it is cumulative to Clause 8, and " that it was intended to authorise provincial legislation (or at least " to settle any doubts that might exist upon the point) in " relation to the licenses enumerated, for the purpose of raising " revenue, as well as for the regulation of matters of Police. I " have hesitated in placing this construction upon Clause 9, " because so far as I am aware, the more limited construction " placed upon it in the earlier cases after Confederation, has been " generally accepted as the correct interpretation of the Clause ; " but I am unable myself to concur in that construction." Well, Lords, after Hodge *v.* The Queen, I think I may venture to say that the view taken by the Chief Justice Spragge has received the approval of this Board.

Lord MONKSWELL : It is not based upon the " shop, " saloon, and other license for the purpose of revenue " ?

Mr. DAVEY: No, but it assumed that a power given to the Board—at least it holds that a power conferred by provincial

legislation, the creation of a Board of Licensing Commissioners for the purposes of granting licenses, is within their competence, as being within "Municipal Institutions."

Lord MONKSWELL: Section 9 is not relied upon in Hodge *v.* The Queen; it is 8, 15, and 16.

Mr. DAVEY: Yes, but I am answering an argument of my learned friend. His argument is that Section 9 shows that there is no power (and it seems to me that his argument is inconsistent with Hodge *v.* The Queen), to grant licenses—shop, tavern, auctioneer and other licenses—except for the purpose of raising a revenue. My answer to that argument is this: In the first place I take Hodge *v.* The Queen to be a decision that a provincial legislature was competent to create Licensing Bodies for the purpose of licensing persons to carry on the liquor traffic, as a matter of police and municipal regulation, and that Section 9 is cumulative and not restrictive. My learned friend says restrictive: I say it is cumulative, and I adopt what was said by the Chief Justice Spragge in the case to which I referred, that it was for the purpose of removing doubts. Your Lordships know that under Sub-section 2 of Section 92 the province has the power of direct taxation within the province in order to the raising of a revenue for provincial purposes, and it might have been suggested—I am not going to argue whether correctly or not—that raising money for provincial purposes of revenue by means of licenses was not direct taxation, but indirect taxation; and it therefore gives them the express power of granting licenses for the purpose of raising a revenue as an express power, but really and truly cumulative to what is contained and implied and involved in Sub-section 8 by "Municipal Institutions." It is not restrictive, so as to prohibit them from granting licenses except for the purpose of raising revenue; but it is really and truly cumulative, and for the purpose of removing any doubts whether they might grant licenses for that purpose, as not being a direct taxation. Indirect taxation is, as your Lordships know, confined to the Dominion.

Lord MONKSWELL: If the Section is taken by itself it appears to me very difficult to say that it would exclude the power of imposing some condition. I should have thought it extremely difficult to say that they could not make a regulation to this effect—if a public-house keeper keeps his house open beyond 12 he shall not have a license.

Mr. DAVEY: I should have thought so, too. I should have thought it would have implied the power of fixing some limit.

Lord MONKSWELL: Yes.

Sir MONTAGUE SMITH: It is the power of granting licenses, and for the purpose of revenue. Of course, it is the great misfortune of this Act that they have used such extremely general terms.

Mr. DAVEY: We should not otherwise be here to argue.

Sir MONTAGUE SMITH: It was framed generally to avoid difficulties.

Mr. DAVEY: I am bound to say I think those who framed this Act have created as much work for a very estimable set of people as they conveniently could.

Sir BARNES PEACOCK: Could they deal with such a case except in general terms?

Mr. DAVEY: Perhaps not.

The LORD CHANCELLOR: If they had attempted it it would have been an impossibility.—[Lord Fitzgerald referred to a case reported in 36 Upper Canada Queen's Bench Reports.]

Mr. DAVEY: The Act in question. There was an Act of Upper Canada passed in the year 1866.

Lord FITZGERALD: It is repeated in the later Ontario Act.

Mr. DAVEY: The Act which was before your Lordship in Hodge *v.* The Queen was an amendment of that Act. Having, as I thought, a decision of your Lordships', I did not want to weary you with referring to decisions in the Courts below.

Now, my Lords, I say, therefore, that my learned friend's argument based on Sub-section 9 is unfounded, that that is not restrictive but cumulative, and for the purpose of giving a power of raising revenue by licenses, it being thought that their power of taxation being confined to direct taxation, the power of raising the revenue by means of licenses might not be included within it, but that it does not restrict the power of granting licenses which is implied and included in the legislation over municipal institutions. But, my Lords, I go further, and I say that this Act of 1883 does interfere with that which is and must be admitted to be within the exclusive jurisdiction of the Provincial Legislature, the issue of licenses in order to raise a revenue. My learned friend seems to read that article, and the Dominion Parliament seem to read that article, as if it were merely fixing the duty to be paid on the license, but that is not the language. The language is this: They may exclusively make laws in relation to shop licenses in order to the raising of a revenue. That is what the enactment does. It is not merely that they may fix the duties to put on licenses, but that they may make laws relating

to licenses having that object. My learned friend, Sir Farrer Herschell, referred to the Clause of this Act which saved the payment of any duty affixed by the Provincial Legislature, and he seemed to think that that prevented the Act interfering with their exclusive power under Section 9.

Lord MONKSWELL: I think it is to the effect that where a license is granted under this Act, the local legislature may grant another license and impose a duty upon it.

Mr. DAVEY: They have exclusive power to grant licenses in order to do that.

Well, my Lords, the licenses issued under this Act, with the authority of the Dominion Parliament, licensed a person to sell liquor. Is not that inconsistent with the power conferred on the Provincial Legislature of granting licenses with a view to raising revenue? They may not think fit to grant them on the same conditions; they may think fit to grant them on other conditions as may be most expedient to them for the purpose of raising a revenue. It is not a mere power of fixing the duty or sum which is to be paid on the license, but the power exclusively given by Section 9 is the granting of the license in order to the raising of a revenue. It is the granting of the license, not the mere fixing of the amount of the duty to be paid upon it. But, my Lords, I go further, and I say that this Act does directly tax the subjects of Her Majesty for municipal purposes through the granting of licenses, because your Lordships remember—though I am loth to refer to this Act more than is necessary—that by Section 16 "The applicant "shall, with his application, deposit a fee of ten dollars to cover "expenses of inspection and advertising." Then there is a subsequent Section, 40, "Upon the obtaining by the applicant of "the certificate authorising the issuing of a license, the Chief "Inspector shall, on the demand of the applicant so authorised, "and upon the payment of a fee of five dollars, and upon his "giving security by bond as hereinafter mentioned, when it is an "hotel, saloon, or shop license that has been directed to issue, "issue to him the license to which he is entitled." Then there is a proviso as to the duty to be imposed. Then there is a subsequent section imposing a fee for each transfer of a license. Section 55, "For each transfer of a license, for each certificate "permitting the continuance of the business; for each certificate "of confirmation of license to the husband of a licensed woman; "and for each endorsement of permission to remove to other "premises there shall be paid a fee of ten dollars." Therefore

that is a taxation imposed upon Her Majesty's subjects within the Province. Now let us see for what purpose the taxation is. Section 56, "All sums received on applications for and on the "issue of licenses, or received by the Inspector for fines and "penalties, shall form the License Fund of the District; (2) "The License Fund shall be applied, under regulations of the "Governor in Council, for the payment of the salary and expenses "of the Commissioners and Inspectors." One of your Lordships asked whether the Commissioners had a salary. It is not stated that they are to act without remuneration, as it is in the Ontario Act, but I think there is no actual provision for payment of a salary to them.

Lord MONKSWELL: The expenses are paid, and the Inspector has a salary.

Mr. DAVEY: The Inspector undoubtedly has a salary which by this Act is fixed by the Board with the consent of the Governor in Council. I should infer from this that the Commissioners were intended to have a salary as well as the Inspectors, but it is neither expressly said, as it is in the Ontario Act that they are to act without remuneration, nor is there any provision made for the fixing of their salary, but the Inspector has a salary. "And for the expenses of the office of the Board "or otherwise incurred in carrying the provisions of the law into "effect; and the residue on the thirtieth day of June in each "year, and at such other times as may be prescribed by the "regulations of the Governor in Council, shall be paid over to "the Treasurer of the city, town, village, parish or township "municipality in which the licensed premises are respectively "situate, for the public uses of the municipality." Therefore this License Fund belongs to the municipality. It is raised by the taxation of Her Majesty's subjects within the Province. It belongs to the municipality, subject to the payment thereout of the salary and expenses of the Commissioners, and those salaries and expenses are fixed by the Board under regulations of the Governor in Council. I submit that this is a necessary part of the scheme of the Act, and that it confirms my argument as to the local character of the Act itself, and I venture to submit that it is in direct conflict with and an infringement of the 92nd Section which gives the exclusive taxation of Her Majesty's subjects for municipal purposes or for local purposes to the Provincial Legislature.

Lord HOBHOUSE: Is there any provision in the Act for the payment of costs except out of this License Fund of the District?

Mr. DAVEY: I do not think there is. I am not aware of any.

Lord HOBHOUSE: A sufficient license fund of the district is raised.

Sir FARRER HERSCHELL: It is not a license fund of the district. It all goes into one fund. The Inspector is not paid out of the fund of one district.

Mr. DAVEY: I beg your pardon, it must be so.—" Shall " form the License Fund of the District. (2) The License Fund " shall be applied, under regulations of the Governor in Council, " for the payment of the salary and expenses of the Commissioners " and Inspectors, and for the expenses of the office of the Board, " or otherwise incurred in carrying the provisions of the law " into effect; and the residue, on the thirtieth day of June in each " year, and at such other times as may be prescribed by the " regulations of the Governor in Council, shall be paid over to " the Treasurer of the city, town, village, parish or township " municipality in which the licensed premises are respectively " situate."

The LORD CHANCELLOR: Those are the words of the Section—the " License Fund of the District."

Mr. DAVEY: Yes, as I understand the scheme of the Act, each district has its own fund. It is essentially a local fund received by the taxation of Her Majesty's subjects on payment of what I cannot distinguish from a license duty.

Lord FITZGERALD: In unorganised districts the surplus goes to the Receiver-General.

Mr. DAVEY: That is quite right, because in a territory the Dominion are the governing body.

Sir BARNES PEACOCK: Can you call it a taxation of Her Majesty's subjects? because those subjects are not bound to ask for a license.

Mr. DAVEY: If you charge a fee of five dollars on the issue of a license——

Sir BARNES PEACOCK: They are not bound to ask for a license?

Mr. DAVEY: No.

Sir BARNES PEACOCK: The enactment is that they must not sell without a license.

Mr. DAVEY: None of Her Majesty's subjects are bound to smoke tobacco, but a tobacco duty is generally supposed to be an indirect tax imposed upon those who do smoke tobacco.

Lord MONKSWELL: It is not direct taxation within the express words.

Mr. DAVEY: That probably is the reason why Section 9 is put in, because it was considered to be indirect taxation. I will not repeat my argument about the stamp in another case which I have only got in Cartwright, but I am told it is also in 10 Law Reports. I do not know whether a license fee is direct or indirect taxation.

Sir BARNES PEACOCK: Is it taxation at all?

Mr. DAVEY: Surely.

Lord FITZGERALD: I apprehend it is to be read as raising money for Dominion purposes, and this is not for Dominion purposes.

Sir FARRER HERSCHELL: I concede that entirely. It must be raising money for Dominion purposes. The basis of my argument is that this is a Dominion purpose, because it is one of the things the Dominion has power to do.

Lord FITZGERALD: It is indirect taxation for the payment in the first instance of provincial officers, and the balance, if any, is to go into the provincial exchequer.

Mr. DAVEY: No, into the municipal exchequer. The 9th Sub-section of Section 92 includes municipal and local purposes.

Lord HOBHOUSE: I suppose if the Dominion Parliament had power to raise money by licenses given to localities, it might put such a heavy fee upon the license as to make it perfectly impracticable for the Province to raise any money at all.

Mr. DAVEY: Yes.

Lord HOBHOUSE: It might squeeze it out.

Mr. DAVEY: Yes. Your Lordships remember the words are "shop, saloon, tavern, auctioneer and other licenses in order "to the raising of a revenue for provincial, local or municipal "purposes." In other words, and paraphrasing that, my contention is that it gives the exclusive power of taxation by means of licenses for provincial, local, or municipal purposes, and that this Act is a taxation of Her Majesty's subjects within the Province for municipal purposes, because the balance, after payment of the Inspector's salary, and the expense of the Commissioners, goes into the municipal treasury. Of course that balance will be less or more, according to the number of licenses issued, and according to what the salary is. If the salary of the Inspector is less or more, the surplus will be more or less; therefore the amount of the surplus, whatever it is, is dependent not upon the Provincial

Legislature, but on the action of the Governor-General in Council of the Dominion. I only make this further observation upon that, that the Dominion Parliament affects to fix the amount payable on the license. It fixes the amount in one case at 10 dollars on the application, and in another case a fee of 5 dollars, and on renewal or removal, there is a fee of 10 dollars. So it actually fixes the taxation to be paid by persons taking out licenses or renewing licenses, and so forth, for the benefit of the municipality, and I submit that that is a most clear and obvious infringement of the 9th Sub-section of Section 92.

Lord HOBHOUSE: It is local taxation which is not open to the Dominion. I suppose the money clauses of this Act might be *ultra vires* without affecting the rest of the Act?

Mr. DAVEY: Yes. It is part of the whole scheme of the Act. I use it as showing the local character of the legislation.

Sir BARNES PEACOCK: Do you call the penalty for an offence under this Act taxation?

Mr. DAVEY: That is a question of political economy.

Sir BARNES PEACOCK: No, I do not know that it is.

Mr. DAVEY: I should call it taxation.

Sir BARNES PEACOCK: The Government say you shall not sell liquor without a license, and that if you do you shall be subject to a certain penalty. Suppose it is imprisonment, which it may be, is that taxation?

Mr. DAVEY: No, my Lord.

Sir BARNES PEACOCK: Well, then, is the penalty taxation?

Mr. DAVEY: I should say it was, if it goes into the public exchequer.

The LORD CHANCELLOR: If you had to define the word "taxation" with precision, it would be a little difficult to do it?

Mr. DAVEY: Of course, everything is in one sense taxation which is raised from the subjects of the State for the purpose of forming a public revenue, but it is really a question of words more than anything else. If it goes into the public exchequer it is in a sense taxation because it is one of the contributions of the people, and compulsory. But in another sense I can understand it might not be considered taxation because it is not imposed with a view of raising a revenue but *alio intuitu*.

Sir BARNES PEACOCK: No more is this. A person is not bound to take out a license any more than he is to incur a penalty.

Mr. DAVEY: Nor to smoke tobacco, nor to drink brandy. A

man is not bound to live in a house. He may live in a tent or in a travelling caravan, and then he does not pay rates and taxes.

The LORD CHANCELLOR: If he does he must pay house duty, and then it is generally thought to be taxation.

Mr. DAVEY: I do not say that my learned friend may not pick out particular sections of this Act which would be within the power of the Dominion Parliament. It is quite possible that for instance adulteration—the general provision as to adulteration—might be within the jurisdiction of the Dominion Parliament, but I apprehend we must regard the Act as a whole; and I think in every one of the sections, with the exception of very few, you will find that the provisions of the Act are made applicable to persons licensed under this Act, and if the power of granting licenses under this Act has been badly given and the enactments for that purpose are *ultra vires*, then every enactment which is applicable to persons licensed under this Act of course would fall with it. I do not think it worth while troubling your Lordships with arguments on particular sections. It is quite possible you may pick out one or perhaps half a dozen sections which have a general bearing, and are independent of the general scheme of the Act, but of course the Act must be taken as a whole, and if the Act as a whole is of a local character, and if, as a whole, it comes within the class of matters which are included under "Municipal Institutions," then I venture to submit that the Act is *ultra vires*.

Now, how has my learned friend attempted to support this Act? He says it is the regulation of trade and commerce. Those are very large words, and, taken in their strict and literal sense, it would enable the Dominion Parliament to legislate for every minute regulation and every minute circumstance connected with trade and commerce. But it is perfectly obvious that they cannot have that large sense; and I have the warrant of your Lordships' decision, in a case which my learned friend referred to of The Citizens' Insurance Company *v.* Parsons, for saying that a restricted and less wide meaning must be put upon it; and, indeed, the Section 91 within itself contains an answer to that argument. In the first place, I remind your Lordships of my general argument on the Section that the words, "In relation to "all matters not coming within the class of subjects by this Act "assigned exclusively to the Legislatures of the Province," are applicable to the enumerated matters as well as to the general words, "peace, order, and good government." But, in the second

place, I say that the regulation of trade and commerce cannot be taken in the wide, extended, and unlimited sense which my learned friend would desire to apply to it; and the Section itself shows that that cannot be so, because, for example, if you look at 15—"Banking: incorporation of banks, and the issue of paper "money"—if the regulation of trade and commerce had that wide and unlimited meaning which my learned friend applies to it, it was unnecessary to say that. Well, take again, "Weights "and measures, bills of exchange, and promissory notes; "bankruptcy and insolvency"—all those matters are in one sense implied and included under the words "Regulation of "trade and commerce," if those words are taken in their unlimited and unrestricted sense. But what is the sense in which those words "Regulation of trade and commerce" are used? I take it to be the sense which was adopted by your Lordships' Board in the case of Parsons *v.* The Citizens' Insurance Company, which your Lordships remember was a case referred to by Sir Farrer Herschell. It is in 7th Appeal Cases, page 96. It means general regulations as applicable to trade generally, of what may be called, for want of a better word, a political character, that is for regulating trade and commerce between the Dominion and foreign countries or other countries, including, of course, Great Britain, or for instance, for regulating the trade between the provinces themselves. But they do not include minute regulations affecting the terms and conditions on which persons carrying on particular trades are to be allowed to do so in different localities. I quite agree that the same observation may be made on this point, as on many other points arising under this Act, that it is difficult to draw any exact line of division, but the general scope of the observation which I make I think will be intelligible to your Lordships.

The LORD CHANCELLOR: If it includes everything to be included in those words it would be impossible for the Provincial Government to make any regulation of trade—that is withdrawn from the Provincial Legislature.

Mr. DAVEY: Yes.

Sir MONTAGUE SMITH: As far as this case is concerned in a large sense it may be regulation of trade and commerce except the granting of licenses and so on.

Mr. DAVEY: Yes.

Sir MONTAGUE SMITH: Just as "marriage," and "solemnization of marriage." Marriage would include solemnization clearly, though in the Section it cannot be that marriage is

to include solemnization within the power of the Dominion. So these licenses are expressly mentioned. I am only putting that as an illustration.

Mr. DAVEY: In other words the two Sections must be read together, and that you must give a construction of these large words, "the regulation of trade and commerce," which shall not be inconsistent with the legislative powers which are exclusively given to the Provincial Legislature under Section 91. In the case in the 7th Appeal Cases to which my learned friend, Sir Farrer Herschell referred, of The Citizens' Assurance Company *v.* Parsons, these words were construed, and if I understand the judgment correctly, were construed in the sense which I desire to put upon them.

Sir RICHARD COUCH: It was decided there it did not include the power to regulate the contracts of insurance.

Mr. DAVEY: Contracts of general insurance.

Sir RICHARD COUCH: In that very case it appears that the Dominion Parliament had regulated the business of insurance by requiring insurance companies to take out licenses. The Dominion Parliament had done that apparently without any question.

Mr. DAVEY: Yes.

Sir RICHARD COUCH: So that it had regulated the business of insurance by companies. That was an instance of regulating a particular business.

Mr. DAVEY: If the words "Regulation of trade and "commerce" are used in this large and unlimited sense they would have comprehended legislation as regards bankruptcy and insolvency, for instance, legislation as regards winding up trading Companies; but they are expressly given power to legislate regarding bankruptcy and insolvency, and that is an indication that the Legislature did not intend these words to be used in that large and unlimited sense of interfering with the conditions under which particular trades may be carried on in particular localities. Now, my Lords, what was said in The Citizens' Insurance Company *v.* Parsons was this "The words 'regulation "' of trade and commerce' in their unlimited sense are sufficiently "wide, if uncontrolled by the context and other parts of the Act, "to include every regulation of trade ranging from political "arrangements in regard to trade with foreign Governments "requiring the sanction of Parliament down to minute rules for "regulating particular trades. But a consideration of the Act "shows that the words were not used in this unlimited sense.

" In the first place, the collocation of No. 2 with classes of " subjects of national and general concern affords an indication " that regulations relating to general trade and commerce were " in the mind of the Legislature when conferring this power on " the Dominion Parliament. If the words had been intended to " have the full scope, of which in their literal meaning they are " susceptible, the specific mention of several of the other classes " of subjects enumerated in Section 91, would have been " unnecessary; as, 15, banking; 17, weights and measures; " 18, bills of exchange and promissory notes; 19, interest; and " even 21, bankruptcy and insolvency. 'Regulation of trade " 'and commerce' may have been used in some such sense as " the words 'Regulations of trade' in the Act of Union between " England and Scotland (6 Anne, c. 11), and as these words have " been used in other Acts of State. Article V. of the Act of Union " enacted that all the subjects of the United Kingdom should have " 'full freedom and intercourse of trade and navigation' to and " from all places " in the United Kingdom and the Colonies; and " Article VI. enacted that all parts of the United Kingdom from " and after the Union should be under the same 'prohibitions, " restrictions, and regulations of trade.' Parliament has at various " times since the Union passed laws affecting and regulating specific " trades in one part of the United Kingdom only, without its being " supposed that it thereby infringed the Articles of Union. Thus " the Acts for regulating the sale of intoxicating liquors " notoriously vary in the two kingdoms." I ask your Lordships' attention to that illustration which the learned Lord gives in that Judgment, and which is this very subject. " So with regard to Acts " relating to bankruptcy and various other matters. Construing " therefore the words 'Regulation of trade and commerce' " by the various aids to their interpretation above suggested " they would include political arrangements in regard to trade " requiring the sanction of Parliament, regulation of trade in " matters of inter-provincial concern, and it may be that they " would include general regulation of trade affecting the whole " Dominion"—not regulation of trade by means of local licensing bodies. " Their Lordships abstain on the present occasion from " any attempt to define the limits of the authority of the " Dominion Parliament in this direction. It is enough for the " decision of the present case to say that in their view its " authority to legislate for the regulation of trade and commerce " does not comprehend the power to regulate by legislation the

" contracts of a particular business or trade, such as the business " of fire insurance in a single province, and therefore that its " legislative authority does not in the present case conflict or " compete with the power over property and civil rights."

My Lords, I ask your Lordships to adopt that same construction of those general words, " regulation of trade and " commerce," and to say that they do not include the authority to make local regulations and enforce minute local regulations of particular trades by means of local bodies. That really is the substance, and concludes my argument on the general question.

But I must of course say a few words as to those two matters on which I ask your Lordships to differ from the Court below. So far I ask your Lordships generally to affirm the Court below; but I also ask your Lordships to differ from them in holding that this Act is within the power of Parliament, so far as regards the wholesale licenses and the vessel licenses.

The LORD CHANCELLOR: You and Sir Farrer Herschell are both agreed that that contention is untenable.

Mr. DAVEY: My learned friend has stated my argument more forcibly, I need scarcely say, than I could myself, and more clearly. I agree that no logical distinction whatever can be drawn between wholesale and retail licenses, that there is no logical distinction between regulating the power of a shopkeeper to sell a dozen bottles at a time, and regulating the power of a tavernkeeper to sell one bottle at a time, or half a bottle, or a pint. "Wholesale licenses' may be a convenient expression in the Act, but it is really retail trade.

Sir MONTAGUE SMITH: Whether he sells one bottle or twelve, he is selling by retail.

Mr. DAVEY: Yes, and there is no logical distinction between the two. It is a different kind of retail trade.

Sir MONTAGUE SMITH: It is a convenient phrase to express the meaning, instead of repeating every time the number of bottles.

Mr. DAVEY: What I want to point out to your Lordships is this, that my objection to this Act is that it attempts to regulate this trade through what I call municipal institutions, and that the regulations and the legislation with reference to wholesale licenses is exactly the same as that with reference to shop and tavern licenses. There is no distinction between the two. Of course there are different provisions of the Act which apply to it, but it is all carried out through that which I object to, namely, the local licensing bodies. It is all carried out by the same

machinery, and dealt with in the same way. The legislation with reference to both classes of licenses is of the same character, and although it may be a convenient definition for the purpose of the Act, there is no difference in principle, or in the way in which it is legislated about between what are called the shop and tavern licenses, and the wholesale licenses.

The LORD CHANCELLOR: What was the ground of the decision in the Court in Canada?

Mr. DAVEY: They did not give any judgment.

The LORD CHANCELLOR: There are no reasons given here, but was there no judgment?

Mr. DAVEY: I have not been informed.

The LORD CHANCELLOR: You do not know what the argument was which drew the distinction?

Mr. DAVEY: No.

The LORD CHANCELLOR: There is nothing stated in the books.

Lord MONKSWELL: You will find in Hodge's case we used the word "retail" as I pointed out before. That may or may not be the ground of the decision.

Mr. DAVEY: I expect Lord Monkswell is right, and that the ground was that Hodge's case was only an authority binding them as far as retail trade.

Lord MONKSWELL: Well, certainly, I see in one passage quoted the term "retail license." It may be they thought themselves bound as far as retail was concerned by Hodge's case.

Mr. DAVEY: Very likely. Then I entirely accept and agree with what was so forcibly put by my friend Sir Farrer Herschell, that the Dominion Parliament cannot arrogate to itself the power and give itself jurisdiction by giving its own definition to "wholesale," and that you must look really at the substance of the matter, and if there is no logical or sound distinction that can be drawn between wholesale licenses and shop and tavern licenses, then if, as I say, the Act is *ultra vires* as regards the shop and tavern licenses it is equally *ultra vires* as regards the wholesale licenses, which are really and truly only another branch of retail trade. So with reference to the vessel licenses, I entirely agree with what my learned friend says—that a vessel is nothing more than a floating shop for this purpose, or a floating tavern. Take for instance a vessel which navigates exclusively on a lake or river, entirely within the area of the Province. I cannot see any distinction whatever which can be drawn between the floating taverns, such as are on those large

lake steamers and river steamers and a fixed tavern. Take a steamer which goes from one province to the other. On the St. Lawrence no doubt they pass from the Province of Ontario into the Province of Quebec. What is the consequence? The consequence is this, that as long as it is within the area of Ontario it is subject to the licensing law of Ontaria, and the captain or owners of the vessel, or the person who keeps the bar on board the vessel, cannot carry on the trade within the limits of Ontario, otherwise than subject to the licensing law of Ontario. The moment that a steamer crosses the boundary between the Provinces of Ontario and Quebec, it becomes subject to the local laws of Quebec, and it may be that in the case of a steamer which navigates water passing from one province to another, it is subject to both local laws, and must obtain the proper license which is required by the Provincial Legislatures of both. In truth the captain of the vessel carries on the trade of a tavernkeeper in Ontario, and he carries on the trade of a tavernkeeper in Quebec, and he moves his shop from one to the other as the steamer passes up or down the river, and he must qualify himself for carrying on those trades in both provinces. Just in the same way if he passes out of the Dominion into the United States he must qualify himself to carry on the trade of a tavernkeeper in his floating tavern within the Dominion, and I suppose the United States Authorities will not allow him to carry on the same trade within the States without qualifying himself in the same way; but so long as the vessel is within the area of one province or of the other the carrying on of the trade on board that vessel must be subject to the Provincial Legislature.

The LORD CHANCELLOR: It may be of course that it is included in one of the articles *ejusdem generis*; but it is not included by name in Section 9.

Mr. DAVEY: They are called Vessel Licenses.

The LORD CHANCELLOR: I am speaking of the 92nd Section: "Shop, saloon, tavern, and auctioneer, and other "licenses." It is not there by name.

Mr DAVEY: I should say that it is a tavern license. It is only a floating, movable, tavern. For instance, there are lakes which are entirely within one province. A vessel which navigates on one of those lakes is only a floating tavern. It is moved from one side of the lake to the other, but it is a floating tavern and does not differ in principle from a fixed tavern.

Sir MONTAGUE SMITH: Practically they would hardly

establish these Boards to license vessels if that was the only thing.

Mr. DAVEY: No, my Lord.

Sir BARNES PEACOCK: In addition to the difficulty which I have in distinguishing this case from Russell *v.* The Queen, I have also another difficulty, and I should like to point out to you what it is.

Mr. DAVEY: I should be obliged to your Lordship for pointing it out before I sit down. What Act has your Lordship before you ?

Sir BARNES PEACOCK: The Union Act of 1867, Section 91, says this: "notwithstanding anything in this Act"—that is, notwithstanding anything in Section 92— "the exclusive legislative authority of the Parliament of Canada "extends to all matters coming within the classes of subjects "next hereinafter enumerated," and those are the classes which are enumerated in Section 91. Now, one of the classes is the Criminal law. The Parliament say, in Section 83 of the Act of 1883 that "No person shall sell by wholesale or by retail any liquor, "without having first obtained a license under this Act "authorising him so to do." Then by Section 88 the punishment "for the offences against Section 66 is provided. Then Section 89:—"If any purchaser of any liquor from a person who is not "licensed to sell the same to be drunk on the premises drinks or "causes or permits any other person to drink such liquor on the "premises where the same is sold, the seller of such liquor shall, "if it appears that such drinking was with his privity or consent, "be subject to the following penalties, that is to say——" Then for the first offence so and so, and for the third offence, imprisonment. Now suppose in Section 83 the Legislature had said, No person shall sell by wholesale or by retail any liquors without having first obtained a license under this Act, authorising him so to do, and if any person shall offend against this Act he shall be guilty of felony, and forfeit all his goods and chattels found on the premises, or all his goods and chattels, would not that have been within the power of the Dominion in passing a Criminal Act?

Mr. DAVEY: I should rather deal with that when the case arises.

Sir BARNES PEACOCK: That is my difficulty, that you could not say that the Parliament could not create a criminal offence for selling liquors without a license in the same way as they might create a criminal offence by carrying arms without a

license, or manufacturing dynamite without a license, or carrying dynamite about without a license. I take it that the Parliament of Canada, for the protection of the State, would have the power to say that if any person were to carry arms, or used arms without a license granted under the Act, he would be guilty of felony. Then it does not affect the power of the Parliament, because they have put a lesser offence, namely, imprisonment. The local legislature could not impose a forfeiture of his goods and chattels, but the Dominion Parliament could. The Legislature of the Province could not affect all the provinces. For instance, if one province said, We are quite willing to prevent the sale of liquors without licenses, or, We are quite willing to prevent the sale of arms, or the use of arms, without a license, they could not bind the adjoining province; and although Ontario or Quebec, as the case might be, might pass a law to prevent the carrying of arms within the province, it could not prevent people from carrying arms in the adjoining province; whereas the Parliament of the Dominion, who are bound to protect the State, and provide for the good government of the whole state of Canada, might pass such a law binding both the provinces, or all of them. For instance, suppose the Government wished to pass a law saying no person shall carry arms in the North West Provinces or Rupert's Land, or any part of Rupert's Land, without a license from the Government, and if they do so they shall be guilty of felony—could not they do that? I only throw out this as my difficulty, that you may know it, I do not want to argue it with you at all.

Mr. DAVEY: I am very much obliged to your Lordship because it helps Counsel a great deal to know what the difficulties are in your Lordship's mind.

Sir BARNES PEACOCK: Putting The Queen *v.* Russell out of the question for the present moment, would it not come within Sub-section 27?

Mr. DAVEY: My answer to that is this, that this is not an Act for the purpose of amending the Criminal Law, or for the purpose of creating criminal offences.

Sir BARNES PEACOCK: But does not it create an offence?

Mr. DAVEY: The clauses to which your Lordships have referred imposing penalties, and under certain circumstances imposing imprisonment, are ancillary clauses for the purpose of carrying out that which is the main purpose of the Act, and if your Lordships should come to the conclusion that the main purposes of the Act, namely, the regulation of the liquor traffic by means of Local Licensing Boards is not within the jurisdiction of the

Parliament of the Dominion, then I apprehend those ancillary clauses, which are merely for the purpose of carrying into effect and enforcing the provisions of the main part of the Act, and the purpose of the Act, would go along with it. Undoubtedly the Parliament of Canada has jurisdiction over the criminal law, but, on the other hand, your Lordship has not overlooked Section 92, Sub-section 15 : " The imposition of punishment by fine, " penalty or imprisonment."

Sir BARNES PEACOCK: Not forfeiture of all spirits that might be found on the premises.

Mr. DAVEY: I am not sure of that.

Sir BARNES PEACOCK: Not forfeiture of all his goods and chattels.

Sir MONTAGUE SMITH: What are the words you refer to?

Mr. DAVEY : Sub-section 15, which is one of the exclusive things given to the local legislature : " The imposition of " punishment, by fine, penalty, or imprisonment, for enforcing " any law of the Province made in relation to any matter coming " within any of the classes of subjects enumerated in this section." Therefore if the main purpose and object of the Act are within this 92nd Section, according to my argument, which I will not repeat, then those ancillary provisions, to which your Lordship has been good enough to refer me, for the purpose of providing for the enforcement of the Act, would come under Section 5, and would be the exclusive appanage of the Provincial Legislature.

The LORD CHANCELLOR: That was one of the points raised in Hodge *v.* The Queen, namely, the power of creating an offence, and it was held by this Board that it was within the power of the Provincial Legislature to do it.

Sir MONTAGUE SMITH : In express terms, the power to enforce a law depends on the power which imposes the regulations.

Lord MONKSWELL : By a resolution the Commissioners are empowered to imprison with hard labour.

Mr. DAVEY : Yes, for playing billiards, for instance, which sounds a little oppressive.

The LORD CHANCELLOR: However, this Board held that that was within the power of the Provincial Legislature.

Sir BARNES PEACOCK : But the Provincial Legislature could not have legislated a cause of forfeiture, whereas the Dominion Parliament could have done so for the whole territory. When they have the power to pass a criminal law they may impose

any punishments they think fit. I do not mean to enter into the policy of the thing, but they might have made it a felony.

Mr. DAVEY: But they have not.

Sir BARNES PEACOCK: In the same way as they might make it a felony to carry arms, but it does not follow, though they have not gone to the full extent of their power, that they have not got the power to do something else.

Mr. DAVEY: I do not think I have made myself clear. I will repeat my argument and then leave it. As long as I can make it clear I shall have discharged my duty. The Provincial Legislature has the exclusive power of "the imposition of "punishment by fine, penalty, or imprisonment for enforcing any "law of the Province made in relation to any matter coming "within any of the classes of subjects enumerated in this Section."

Sir BARNES PEACOCK: But notwithstanding there is the provision in the 91st Section that the Dominion Parliament may pass a criminal law.

Mr. DAVEY: No doubt. If, therefore, the principal part of the Act to which these clauses are ancillary is within one of the classes enumerated in the 92nd Section, as to which I say nothing more; *ergo*, those clauses to which your Lordship referred for imposing punishment by fine, penalty, or imprisonment, for enforcing those principal clauses are within the exclusive jurisdiction of the Provincial Legislature, and therefore not within the jurisdiction of the Dominion Parliament.

Now, my Lords, one word more as to The Queen *v.* Russell. In that case the Act in question was the Temperance Act. The Temperance Act, your Lordships remember, did not purport to regulate the traffic; all it did was that it prohibited the traffic. The enacting part of it is contained in one section, as your Lordships point out in your judgment, namely, the 99th. The first part of the Act, down to the 98th Section, provided for the machinery by which the Act might be adopted, or, to adopt the language used in your Lordships' judgment, prescribed the conditions to be fulfilled prior to the second part of the Act coming in force; but the second part of the Act contained the enacting part, and that was actually prohibition. It did not purport to regulate the traffic by means of local or municipal institutions, but it prohibited altogether the sale of intoxicating liquors, except for sacramental and medicinal purposes. Then the third part of the Act imposed the penalties for the offences against the second part. The Act consisted of three parts, Sections 1 to 98 prescribing the conditions to be complied with

before the Act came in force; Section 99 containing the enactment for that; and Sections 100 to the end being the third part, containing the penalties on prosecutions for offences against the second part. What your Lordships held was that the prohibition contained in Section 99 did not come within any of the matters exclusively given to the Provincial Legislatures by Section 92. There was no question in that case about regulating the liquor traffic by means of licensing bodies; but what your Lordships had to deal with was the prohibition of the sale of spirituous liquors, or intoxicating liquors as they are called, altogether. The first part, as I have said, prescribed the conditions, and your Lordships held it was none the less an Act of the Dominion, because certain conditions were to be performed before the Act came into force; and the third part merely provided the penalties by which the enacting part was to be enforced. That, I apprehend, was the decision in The Queen *v.* Russell. That is the view which is taken of it in Hodge *v.* The Queen, and it appears to me, giving its full effect to the decision in The Queen *v.* Russell, it does not in the least degree conflict with the argument which I have ventured to address to your Lordships.

Sir MONTAGUE SMITH: It seems to be this, that the Temperance Act rendered the sale of liquors unlawful, speaking broadly. This Act assumes the sale of liquors to be lawful, and the question is whether the power to license the sale resides in the Dominion.

Mr. DAVEY: Or in other words to provide, as I should put my own argument, municipal institutions for the purpose of regulating it.

Sir BARNES PEACOCK: The difficulty I feel is whether they may not prohibit conditionally; and if they prohibit conditionally whether they may not provide a means for performing that condition.

Mr. DAVEY: Well, my Lord, I must answer your Lordship by saying it is too late to argue that, and my learned friend Sir Farrer Herschell's argument seemed to me throughout to ignore the decision of your Lordships in Hodge *v.* The Queen. I quite recognise the force of what your Lordship says, but my answer really is this, that it is too late to argue that. I do not argue on the one hand that the Provincial Legislatures have the exclusive jurisdiction over Temperance legislation, which is the way in which it is sometimes put; nor on the other hand is it competent for my learned friend, after the decision of your Lordships in

Hodge *v.* The Queen, to argue that the Dominion Parliament have exclusive legislation over Temperance. In fact, that was one point argued in Hodge's case. Russell *v.* The Queen was pressed, if I remember the argument correctly, with great force, and I need scarcely say with great ability, by the other side on your Lordships as having decided that the whole of the Temperance legislation was taken out of the Provincial Legislature. Your Lordships gave your explanation of Russell *v.* The Queen, and to that explanation I loyally adhere; but I submit it is too late to argue now that the effect of Russell *v.* The Queen is to say that the regulation by means of licensing boards is covered by that decision which only went to the extent of saying that the legislation prohibiting the sale throughout the Dominion was not within the matters exclusively given to the Provincial Legislature.

Mr. HALDANE: My Lords, I appear on the same side as my learned friend Mr. Davey, but I only desire to add a very few words to the argument which he has addressed to your Lordships. My Lords, one point to which I would invite your Lordships' attention is the fact that in the decisions which have been quoted: The Citizens' Insurance Company *v.* Parsons, Russell *v.* The Queen, and Hodge *v.* The Queen, there has been laid down a principle for the construction of the Confederation Act, and that principle appears to me to be expressed in this way that the same subject, for example the drink question, may for one aspect and for one purpose be within Section 91, and for another aspect and for another purpose be within Section 92. It may be that an Act of Parliament dealing with one aspect and one purpose, and which comes within Section 92 may clash incidentally with an Act of Parliament which for another aspect and for another purpose comes within the other Section; but that clashing can only be an incidental clashing, and what I must ask your Lordships to bear in mind in construing the Act before you, is that that question does not really arise here. The question is whether an Act which has been passed for one purpose and dealing with one aspect of the subject—the regulation of the drink traffic—is not within Section 92.

Now, my Lords, the principle to which I refer is first I think foreshadowed in that case of The Citizens' and Queen's Insurance Company *v.* Parsons, which was referred to by my learned friend Sir Farrer Herschell, and I think I can show your Lordships very shortly that what was laid down there in very general terms has been specifically laid down as I

have stated it in the later cases. I am about to cite from the judgment in the case of The Citizens' Insurance Company *v.* Parsons, and I am quoting it from Cartwright. Vol. ii. p. 271. The passage begins : " The scheme of this legislation, as expressed in the first " branch of Section 91, is to give to the Dominion Parliament " authority to make laws for the good government of Canada in " all matters not coming within the classes of subjects assigned " exclusively to the Provincial Legislature. If the 91st Section " had stopped here, and if the classes of subjects enumerated in " Section 92 had been altogether distinct and different from those " in Section 91, no conflict of legislative authority could have " arisen. The Provincial Legislatures would have had exclusive " legislative power over the sixteen classes of subjects assigned " to them, and the Dominion Parliament exclusive power over all " other matters relating to the good government of Canada. But " it must have been foreseen that this sharp and definite ' distinction had not been and could not be attained, and that " some of the classes of subjects assigned to the Provincial " Legislatures unavoidably ran into and were embraced by some " of the enumerated classes of subjects in Section 91 ; hence an " endeavour appears to have been made to provide for cases of " apparent conflict ; and it would seem that with this object it " was declared in the second branch of the 91st Section, 'for " ' greater certainty, but not so as to restrict the generality of " ' the foregoing terms of this Section ' that (notwithstanding " anything in the Act) the exclusive legislative authority of the " Parliament of Canada should extend to all matters coming " within the classes of subjects enumerated in that Section. " With the same object, apparently, the paragraph at the " end of Section 91 was introduced, though it may be " observed that this paragraph applies in its grammatical " construction only to No. 16 of Section 92." My Lords, my learned friend, Sir Farrer Herschell, appeared to rely on this passage as showing that the authority given to the Dominion Parliament was intended to be an authority which was paramount for some purposes to the authority given by Section 92 to the Provincial Legislature ; but I think that the paragraph that follows displaces that view altogether of the meaning of the passage I have just read. " Notwithstanding this endeavour to give pre-eminence to the " Dominion Parliament in cases of a conflict of powers," pre-eminence I should say on the question of construction of the Section, not in " conflict, it is obvious that in some cases where this apparent conflict " exists, the Legislature could not have intended that the powers

"exclusively assigned to the Provincial Legislature should be "absorbed in those given to the Dominion Parliament. Take as "one instance the subject 'marriage and divorce,' contained in "the enumeration of subjects in Section 91; it is evident that "solemnization of marriage would come within this general "description; yet 'solemnization of marriage in the province' is "enumerated among the classes of subjects in Section 92, and no "one can doubt, notwithstanding the general language of Section "91, that this subject is still within the exclusive authority of "the Legislatures of the Provinces. So 'the raising of money by "'any mode or system of taxation' is enumerated among the classes "of subjects in Section 91; but, though the description is sufficiently "large and general to include 'direct taxation within the province, "'in order to the raising of a revenue for provincial purposes' "assigned to the Provincial Legislatures by Section 92, it obviously "could not have been intended that, in this instance also, the "general power should override the particular one. With regard to "certain classes of subjects, therefore, generally described in "Section 91, legislative power may reside as to some matters "falling within the general description of these subjects in the "Legislatures of the Provinces. In these cases it is the duty of "the Courts, however difficult it may be, to ascertain in what "degree, and to what extent, authority to deal with matters "falling within these classes of subjects exists in each Legislature, "and to define in the particular case before them the limits of their "respective powers. It could not have been the intention that a "conflict should exist; and, in order to prevent such a result, the "language of the two sections must be read together, and that of "one interpreted, and, where necessary, modified, by that of the "other. In this way it may, in most cases, be found possible to "arrive at a reasonable and practical construction of the language "of the Sections, so as to reconcile the respective powers they "contain, and give effect to all of them. In performing this "difficult duty, it will be a wise course for those on whom it is "thrown, to decide each case which arises as best they can, "without entering more largely upon an interpretation of the "statute than is necessary for the decision of the particular "question in hand."

Now, my Lords, in Russell *v.* The Queen, it seems to me that this was carried just a little further, and what I have read was explained. I am reading now from page 23 of the second volume of Cartwright, and the passage I think is about half way through the judgment:—"It was said in the course of the judgment of

" this Board in the case of The Citizens' Insurance Company " of Canada *v.* Parsons, that the two Sections (91 and 92) " must be read together, and the language of one interpreted, and " where necessary, modified by that of the other. Few, if any laws" —I ask your Lordships' special attention to these words—" could " be made by Parliament for the peace, order, and good " government of Canada which did not in some incidental way " affect property and civil rights; and it could not have been " intended, when assuring to the provinces exclusive legislative " authority on the subjects of property and civil rights, to exclude " the Parliament from the exercise of this general power whenever " any such incidental interference would result from it. The " true nature and character of the legislation in the particular " instance under discussion must always be determined, in order " to ascertain the class of subject to which it really belongs. In " the present case it appears to their Lordships, for the reasons " already given, that the matter of the Act in question does not " properly belong to the class of subjects 'Property and Civil " 'Rights' within the meaning of Sub-section 13."

Then, my Lords, in the case of Hodge *v.* The Queen—which is the only other case with which I will trouble your Lordships—what I have stated seems to me to have been carried a little further still. I am now about to read from page 159 of the report in Cartwright; but I think it is about half-way through the judgment. Their Lordships are citing the decision in Russell *v.* The Queen; and they begin by quoting a passage. They quote from their decision in Russell *v.* The Queen these words:— " What Parliament is dealing with in legislation of this kind is " not a matter in relation to property and its rights, but one " relating to public order and safety. This is the primary matter " dealt with, and though incidentally the free use of things in " which men may have property is interfered with, " that incidental interference does not alter the character " of the law." And their Lordships' reasons on that part of the case are thus concluded:—" The true nature and character of " the legislation in the particular instance under discussion must " always be determined, in order to ascertain the class of subject " to which it really belongs. In the present case it appears to " their Lordships, for the reasons already given, that the matter " of the Act in question does not properly belong to the class of " subjects 'Property and Civil Rights,' within the meaning of " Sub-section 13." And then they say, in commenting upon that, " It appears to their Lordships that Russell *v.* The Queen,

" when properly understood, is not an authority in support of the " Appellant's contention, and their Lordships do not intend to " vary or depart from the reasons expressed for their judgment " in that case. The principle which that case, and the case of " The Citizens' Insurance Company illustrate is, that subjects " which in one aspect, and for one purpose, fall within Section 92, " may in another aspect and for another purpose fall within " Section 91."

My Lords, that appears to me to show that what their Lordships meant to decide was that that aspect of legislation with reference to the drink traffic which dealt with prohibition for the purpose of making the sale of drink, where localities decided to adopt the Temperance Act, a criminal offence, was an aspect and purpose of that subject which was exclusively dealt with, and properly exclusively dealt with, by the Dominion Parliament. On this very Ontario Act, which is substantially identical with the Act which is before your Lordships, they have decided that the regulation of the drink traffic is another aspect and another purpose of the subject, and therefore may, within these words, fall within Section 92 ; and I may add to that, although it may be—I do not say that it is—that the legislation carrying out these two aspects may clash, and that the individual provisions of the two Acts of Parliament may interfere with one another, that is not according to their Lordships' decision a reason for holding one Act or the other invalid. I would further observe to your Lordships that the question in this case is not what is to happen in the event of such incidental clashing turning out to have occurred. So far as I am aware, the question how a particular Section of an Act which is within the competency of one legislature, is to be reconciled with a particular section of an Act which is within the competency of another, where they incidentally clash, has never been before your Lordships. I can conceive several ways in which your Lordships might deal with such a case, but it is not for me to enter into that question just now. The simple question is whether the Act which is before your Lordships is not substantially identical with the Act which was construed, and which was said to be within provincial authority, and exclusive provincial authority, in Hodge *v.* The Queen.

Now I do not propose to follow my learned friend, Mr. Davey, in his argument upon the subject, but I would merely mention a single fact to your Lordships. Not only are the two Acts substantially identical, but they bear with them this very

broad characteristic. So far from promoting uniform legislation, what they do is to empower licensing boards, which would otherwise be municipal institutions, to create a set of regulations which may be different in different districts throughout the Province; so that, in effect, all they do is to empower local bodies to legislate—it may be in different ways in different places.

My Lords, there is only one other thing I would mention to your Lordships. If any of your Lordships desire to know accurately what was the state of provincial legislation with reference to the drink traffic at the time of Confederation, you will find the Acts which prevailed in Ontario set out at page 28 of the printed book which your Lordships have; the Acts which related to Quebec set out at page 32, and the Acts which relate to Nova Scotia set out at pages 57 and 65. My learned friend, who is here from Canada, refers me to page 36, where your Lordships will also find a general provision which is of importance in this matter.

For these reasons I submit that the Act was *ultra vires* of the Dominion Parliament, as falling within the subject-matters in Section 92.

Sir FARRER HERSCHELL: Now, my Lords, I have to reply to the argument of my learned friend, Mr. Davey; and if my learned friend is in a difficulty as to how to distinguish this case from Hodge *v.* The Queen, I am in an equal difficulty as to how he distinguishes it from Russell *v.* The Queen. I think I shall be able to show your Lordships presently, if I have not done so already, how and why it is distinguishable from Hodge *v.* The Queen, and really falls within Russell *v.* The Queen. I take it, that whatever else Russell *v.* The Queen may have decided, it has decided this, that the 92nd Section of the Act does not under any of its heads give the Provincial Legislature exclusive power to deal with the liquor traffic; and I think it establishes this also, that although a matter may be merely local in its operation and confined to a particular province, it is not, therefore, necessarily within the exclusive legislation of the Province, but may be legislated for by the Dominion. Whatever else the case establishes, I think it must be taken to establish those two propositions. The distinction that is taken I understand to be this, that for the purpose of promoting temperance in the interest of good government the Dominion Parliament may pass a law prohibiting the liquor traffic in any part of the Dominion, or enabling a locality in any part to prohibit it; but that it may not for the same purpose and with

the same object limit the liquor traffic in any part of the Dominion —that the first is not a local matter, but that the second is a local matter. Now, I own I have great difficulty in following this proposition; that to pass a law which may have operation only in a locality in one province is not a local matter merely because it may have operation elsewhere too, but that to pass a law which is to have operation in every province is merely a local matter in each province. Because that is the proposition for which my learned friend contends. With regard to what my learned friend has said about its being a local matter, there is no doubt that every piece of legislation, so far as it operates in a locality, is a local matter. My learned friend has spoken as if the Dominion were something different from the mere collection of the provinces. The legislation of the Dominion operates in each and every province. When it so operates in that particular province it is a local matter, and, in a sense, of local interest. The law which prohibits theft prohibits it throughout the Dominion. No doubt it is to the interest of each province that people should not steal there ; and it protects the property of people in each province : but so far as it operates in that province its operation is local ; but it is not therefore a local matter, or a matter merely local. The fact that it operates locally, or that its benefits are felt locally all through the Dominion, does not show it to be a merely local matter, because the words are not "of a local nature," but "of a merely local "nature," which I take to be something in which the Province and the people in that Province, and they alone have an interest —something that is not likely to concern or affect people outside the Province. Of course one sees that theft, and what one may call offences against the public law, although in the first instance they affect the people in the Province, have their general effect too in doing mischief in the Dominion generally, both by example, and by a sense of insecurity, and so on. Just in the same way this Temperance matter is a matter which, although its first effect is felt in the locality in which the intemperance takes place, has its effects upon the whole country and the Dominion generally. Therefore, I apprehend it cannot be said, that because the law operates specially in the first instance in a locality, it is necessarily a merely local matter ; nor can it be said that because it must operate somewhere locally, therefore it is a merely local matter ; because Russell *v.* The Queen has decided the contrary, even if one could not establish that upon authority.

Now, my Lords, my learned friend has argued that Hodge *v.* The Queen has decided that local legislation in the way of licensing is within the exclusive functions of the Provincial Legislatures, and therefore cannot be dealt with by the Dominion Parliament. I do not admit that Hodge *v.* The Queen has decided anything of the kind ; and I maintain that there are matters with which a Provincial Legislature might deal, which, nevertheless, might be dealt with by the Dominion Parliament for the whole Dominion. Let me put an illustration. Before the British North America Act, the keeping of improper houses was dealt with differently in different provinces. In two provinces it was a mere matter of municipal bye-law.

The LORD CHANCELLOR : It was a nuisance at common law.

Sir FARRER HERSCHELL : I do not think it was ever so dealt with. In New Brunswick and other Provinces it was a part of the Criminal Law ; but in certain of the Provinces it was dealt with merely as a Municipal Regulation. There were bye-laws under which people could be punished who kept disorderly houses.

The LORD CHANCELLOR : A part of our Criminal Law is applicable to those countries. I rather think there is a very early statute which applied to them the whole of the Criminal Law of England.

Sir FARRER HERSCHELL: I think not to Quebec—not to Lower Canada.

The LORD CHANCELLOR : I think it was so by an early Act.

Sir FARRER HERSCHELL : I am told your Lordship is right. It may be that it would have been indictable at criminal law, but I was saying it was in point of fact dealt with by Municipal bye-law, and there were penalties imposed for the breach of those bye-laws. Nobody could doubt of course that that is a matter that might be dealt with—it does not matter for my argument whether it was or was not dealt with before by criminal law—but nobody can doubt it was a matter that might be dealt with by the criminal law; and what I am submitting to your Lordships, therefore, is this, that establishing the fact that it would be a legitimate thing for a municipality to make bye-laws regulating such matters in a town, does not show that the same thing might not be dealt with for the whole Dominion

by means of a Criminal Law. I might put many other illustrations by which you may have perfectly good municipal bye-laws with reference to nuisances, and putting things in the streets that would be nuisances and imposing penalties for so exposing them in the streets, the kind of bye-laws that your Lordships will be familiar with as existing in many towns in England—which would be perfectly good municipal regulations, but notwithstanding them it might be made a criminal offence for the good of the country, punishable with a penalty under the Criminal Law to expose any matter in the streets likely to affect the health of the inhabitants or create disease ; and the Dominion Parliament might, in a time when a special disease was apprehended—such as cholera, for example—pass a law creating it a criminal offence to expose the things which were likely to injure the public health, notwithstanding, that in some of the places in the Province you might have municipal bye-laws which might cover to some extent the same ground. I am merely putting this for the purpose of showing that I do not admit that because your Lordships held in Hodge *v.* The Queen that under the Provincial powers municipal bodies might be given certain powers, and that their Municipal bye-laws might be good, therefore that excludes all such matters from the cognisance of the Dominion Parliament, and that thereafter they cannot at all be dealt with by them as part of the general law of Canada for the purposes of general good government.

The LORD CHANCELLOR : Let me put this to you upon that point. You are familiar with this one subject, "marriage and divorce," and "solemnization of marriage." Supposing the Dominion Parliament should be of opinion, which was urged very much in the earlier part of Lord Hardwick's time, that it was very desirable to have marriages solemnized before 12 o'clock in the day, or between 8 and 12 o'clock. Solemnization of marriage is expressly reserved by Section 92. Would you say that with the object of promoting morality and good government, and so on, the Dominion Parliament would have a right to prescribe that the solemnization of marriage should not take place except within those hours?

Sir FARRER HERSCHELL : I should be rather sorry to answer that question; because of all these matters in Sections 91 and 92, the "marriage and divorce" in one and "solemnization of marriage" in the other, give me the greatest difficulty in explaining what are the limitations upon the

Provincial power ; because it is so difficult to see what is to be regarded as included in "solemnization of marriage."

The LORD CHANCELLOR: I suppose the time of solemnization and its details must be included in it?

Sir FARRER HERSCHELL: I am not quite sure. It may merely mean what is the form in which it is to be solemnized.

Sir BARNES PEACOCK: It might require a priest in one case ; or might be like the old Scotch law, a declaration—a Gretna Green marriage.

Sir FARRER HERSCHELL: I think it would come within the "solemnization" whether a religious ceremony was necessary, or a mere civil marriage. I think that would be within "solemnization" ; but what more would be within "solemnization" I admit I have great difficulty in seeing.

The LORD CHANCELLOR: I only wanted to see how far your argument carried you.

Sir FARRER HERSCHELL: In the present case I am not dealing with a matter specifically enumerated in Section 92, as the solemnization of marriage is.

The LORD CHANCELLOR: I do not know about that.

Sir MONTAGUE SMITH: Your opponent's contention is that it is.

The LORD CHANCELLOR: In No. 9.

Sir FARRER HERSCHELL: I am going to deal with No. 9; but No. 9 is only "Licensing in order to the raising of revenue "for provincial, local, or municipal purposes." Your Lordships will find that it has been assumed in the argument that the Canada Temperance Act was a mere act of prohibition, and had nothing to do with licensing. On the contrary, it is a regulation of the liquor traffic as well as prohibition, and requires the taking out of licenses. Therefore The Queen *v.* Russell is not to be taken as merely dealing with the question of an Act which prohibits, or enables people to prohibit, and has nothing to do with regulation or licensing. It has to do with both ; and it is distinctly decided that the Dominion Parliament may require the taking out of licenses, as I will show your Lordships in a moment or two, when I come to that Act. But let me deal with the argument that the present case comes within the exclusive jurisdiction of the Provincial Legislature, because it has power to deal with licenses for shops, saloons, taverns, and so on ; but unless it deals with them in order to the raising of a revenue for provincial, local, or municipal purposes, I say, in terms, it does not come within Sub-section 9.

Sir MONTAGUE SMITH: I do not say how it is, but is it not the meaning of the legislation to give them full power to grant these licenses, and for the purposes of revenue.

Sir FARRER HERSCHELL: Yes.

Sir MONTAGUE SMITH: To give them the jurisdiction over licenses.

Sir FARRER HERSCHELL: But I dispute entirely there is anything to prevent the Dominion Parliament, for the Dominion purposes, requiring everybody to take out a license as a means of taxation, because Section 91, Sub-section 3, gives the Dominion Parliament, for Dominion purposes, the power of raising money by any mode or system of taxation; and therefore if requiring a person to take out a license is a mode or system of taxation, the people who have taken out these licenses, and paid so much for these licenses, for the purposes of provincial revenue, might be required to take out licenses and pay for them to provide Dominion revenue.

Sir MONTAGUE SMITH: You are going to another point now. I thought you said the power was only given for the purposes of revenue. I say the whole power appears to be given to them to impose a license.

Sir FARRER HERSCHELL: But only for a particular purpose. It is not a general licensing power, but only a licensing power for the purpose of raising revenue for Provincial purposes.

Sir MONTAGUE SMITH: Supposing that is not there, but there is a general licensing power, this power will not exclude the power of the Dominion to tax in any way they think fit. This is not a Taxing Act.

Sir FARRER HERSCHELL: No; but Sub-section 9 is a taxing Sub-section, and only a taxing Sub-section.

Sir MONTAGUE SMITH: I do not agree with you in that, that that is only a taxing Sub-section.

Sir FARRER HERSCHELL: Then that one must argue. They may make laws in relation to "shop, saloon, tavern, and "auctioneer, and other licenses, in order to the raising of a "revenue for Provincial, local or municipal purposes."

Sir MONTAGUE SMITH: The argument is that if it is revenue for municipal purposes, and they have the power to license this is dealing with it for the purposes of revenue.

Sir FARRER HERSCHELL: They must be dealt with separately. We will deal with "Municipal Institutions," and see

whether it comes under those; but I venture respectfully to submit that one would be rather apt to confuse than to make the matter clearer by joining the two together. It may be under both. It may be under each, but one must deal with each of them to see whether it comes under that particular one. If it is established that under "Municipal Institutions" you may include the licensing power, well and good. That I am prepared to deal with. But supposing it is not, then is the matter carried any further by this Sub-section 9? All I say upon that is this, that I will read what your Lordships have said in Russell *v.* The Queen. It is not my argument, but it is the judgment of this Board: "With regard to the first of these classes, No. 9, it is to be "observed that the power of granting licenses is not assigned to "the Provincial Legislatures for the purpose of regulating trade, "but in order to the raising of a revenue for provincial, local, or "municipal purposes." That is the criticism on that Sub-section by this Board in relation to the Liquor Traffic Law.

The LORD CHANCELLOR: Is not that in answer to the argument which had been pressed on the Board at the time that it came within the regulation of trade?

Sir FARRER HERSCHELL: It would not be an answer to that, because that would be an argument put forward by the same people who criticised No. 9.

Sir MONTAGUE SMITH: It is an argument directed to show that the Act could not have been passed under that Sub-section because the Sub-section was to grant licenses to do something, and the Act was to prohibit anything being done; therefore it would not come under the Licensing Section.

Sir FARRER HERSCHELL: But still it says this Sub-section is a fiscal Sub-section.

Lord MONKSWELL: You say that.

Sir RICHARD COUCH: It says that, and the Courts in Canada appear to have put that construction upon that.

Sir FARRER HERSCHELL: There is no doubt they have, but this, with great deference, must be perfectly clear, as I shall submit that that power to tax in that way for municipal purposes or provincial purposes by the Provincial Legislature does not include any kind of taxation by the Dominion Parliament, and therefore the fact that that is committed to the Provincial Legislature, and there is the general power of taxation given to the Dominion, I should submit with deference, shows this—that the essence of these words in Section 9 is that it is for provincial purposes—for provincial purposes you may tax in that particular way—and

that that is the way it is to be read when you look at the general power of taxation in every way given to the Dominion Parliament.

Now, my Lords, under "Municipal Institutions" it is said that there may be a power of licensing. I am not denying that, nor am I concerned to deny that there may be a power to make bye-laws in relation to licenses, if you please, under "Municipal "Institutions." I need not dispute it at all, but the question here is whether, if there be such a power that deprives the Dominion Parliament of Canada of any power of dealing with the matter, because what your Lordships have to determine here is whether the Dominion Parliament are ousted of all power to deal with such a matter throughout the Dominion. Now, to a certain extent it is held they have the power, namely, that they may enable localities to prohibit the traffic. That is the way it has been put by my learned friend.

Lord MONKSWELL: They may prohibit it themselves by their own acts.

Sir FARRER HERSCHELL: They could prohibit it themselves and the question is whether if they have power to prohibit it for the purposes of Temperance as a matter of general interest they have not the power to limit and control it for the same purpose. That is the real question.

Now, my Lords, let me call your attention to what the Temperance Act was that Russell *v.* The Queen held good. It was not total prohibition anywhere, because druggists and other vendors specially licensed thereto, may sell for exclusively sacramental or medicinal purposes, or for *bona-fide* use in some art, trade, or manufacture, and therefore people would get special licenses even in the prohibited districts to enable them to sell.

The LORD CHANCELLOR: Not for drink.

Sir FARRER HERSCHELL: Not for drink, but to sell drink. Can it be said that the Dominion Parliament is competent throughout Canada to say people must take out licenses to sell drink? but they may not say people must take out licenses to sell drink for the purpose of being drunk. Of course in each case it is to be drunk.

The LORD CHANCELLOR: No, not when required for a manufacture.

Sir FARRER HERSCHELL: But for medicinal or sacramental purposes. In each case it is to be drunk; but the object and aim of the drinking is not enjoyment or the quenching of thirst. Can it be said that the Dominion Parliament may say

that the people must take out a license to sell drink if the object be not the quenching of thirst, but if the object be the quenching of thirst, then that is beyond the competence of the Dominion Parliament? But that is not all. Under that Act there were special licenses; but in addition to that, the producers of cyder and licensed distillers and brewers might sell under the restrictions named in the Act quantities of not less than ten gallons; or, in the case of ale or beer, not less than eight gallons. That was in the prohibited districts, and therefore it was not a total prohibition.

The LORD CHANCELLOR: No question was brought before the Committee on those Sections.

Sir FARRER HERSCHELL: The whole scope and purpose of the Act was considered.

The LORD CHANCELLOR: Hardly so.

Sir FARRER HERSCHELL: Yes, my Lord.

Sir MONTAGUE SMITH: In that case the Section as to municipal institutions was not argued:

Sir FARRER HERSCHELL: I know it was said it was not, but I have a shorthand note of the argument of the case, in which it was most distinctly brought before your Lordships and urged.

The LORD CHANCELLOR: The case of Russell *v.* The Queen was the quashing of a conviction for selling liquors in spite of the prohibition.

Sir FARRER HERSCHELL: Yes, but the Section under which there is that prohibition is not an absolute prohibition. It is a prohibition except in certain excepted cases. The whole legislation stands together. Then in addition to that, companies incorporated for the purpose of the cultivating and growing of vines, and of making and selling wines and other liquors produced from grapes, may sell such wine and liquor under the circumstances mentioned, in quantities of not less than ten gallons. Then manufacturers of pure native wines made from Canadian grapes may sell in quantities of not less than ten gallons. Then licensed wholesale dealers may, subject to certain restrictions, sell in quantities of not less than ten gallons. Therefore it was not an absolute prohibition, but it said that nobody else but licensed wholesale dealers shall sell, and they shall only sell in quantities of not less than 10 gallons. Therefore the Act was not an Act of total prohibition and prohibition merely: it was an Act regulating. It was an Act prohibiting except in certain cases, and the persons who were to sell in those cases were required to be licensed. Surely that is

extremely analogous to the present case. That Act was held good which contained not absolute prohibition but that limited kind of prohibition—prohibition of anybody except the persons who had licenses, and who then could only sell under certain restrictions and in certain quantities. If that were good, and if the Dominion Parliament could validly pass that Act, what distinction in principle is there between that Act and the present Act?

Now, my Lords, my learned friend has said that the present Act is the old Act of Ontario. It is nothing of the kind. My learned friend has left out of sight many of its most important provisions. It contains the same principle of local option as was contained in the Canada Temperance Act, applied in some respects in a different form. For example, as I have pointed out, that prohibits the granting of licenses in towns and parishes—I refer to Section 47—which enables three-fifths of the duly qualified electors to prevent the issue of any license in their locality: that is to prevent the sale of intoxicating liquors. The issuing of the license is the mere machinery by which the legislation is to be carried into effect. The purpose and object of the legislation is to prevent the sale of intoxicating liquors. Then Section 13 prevents any person getting any license unless one-third of the electors entitled to vote in the polling subdivision sign the certificate in favour of it. Now that is not a fiscal regulation—it is not a licensing regulation in the ordinary sense. It is a mode of preventing, and enabling the people of the locality to prevent, the extending of the sale of intoxicating liquors. Then no new license can be granted to anybody unless they can produce the desires of one-third of the persons within the polling district. What difference is there in principle in enacting such a law throughout the whole of Canada, and enabling the inhabitants of localities to prohibit? My point will be presently that the licensing is the mere machinery for carrying that into effect; that the scope, object, purpose, and even the detailed action of the legislation is the same, only that it is carried into effect by a somewhat different machinery—not an altogether different machinery, because the Canada Temperance Act itself had already recognised the existence of licenses. I may mention to your Lordships that one of the provisions that has been held good by the Court below—I do not think it has been alluded to before—is this: that the licensing board under this Act was substituted for the Lieutenant-Governor for the granting of those licenses which were required under the Canada Temperance Act

of 1878, and so far as this Act amends the Canada Temperance Act of 1878 it has been held good by the Supreme Court, and therefore in that respect amongst others, namely, that now the Licensing Board under this latter Act are to be the people to grant those licenses which are allowed in prohibited districts under the Canada Temperance Act of 1878.

Now, my Lords, I have called your Lordships' attention to Section 13. Then under Section 32 no licenses shall be granted if two-thirds of the electors in the subdivision petition against it on the grounds hereinbefore set forth, or any of such grounds. That again enables two-thirds of the electors to prevent any license being granted. My Lords, are not those distinctly *in pari materia* with the provisions of the Canada Temperance Act of 1878?

Now, it is said under "Municipal Institutions" there may be a power to license, and by licensing to limit the number of public-houses. I want to know why it is to be said that if that can be done under "Municipal Institutions," under Municipal Institutions you could not equally prohibit. What argument can be used to show that "Municipal Institutions" of necessity includes the power to limit by requiring the license not for any fiscal purpose, but for the purpose of limiting the traffic, and that it does not include the power of a municipality to prohibit, and yet the decision in Russell *v.* The Queen, if my learned friend is right in saying that whenever the municipality can do it the Dominion cannot, and *vice versâ*, does decide that a municipal authority could not prohibit. Then, what authority is there for saying that "Municipal Institutions" means that a municipal authority may regulate the liquor traffic by limiting it, but may not regulate it by prohibiting it, or enabling the people within any district or city, to prohibit it. My Lords, I venture to submit that that cannot rest on any sound foundation at all. I have not heard the foundation suggested on which it does rest—that it is open to a municipality to limit and regulate, but not to prohibit by reason of its being able to establish Municipal Institutions, or why the limitation and regulation is more a local matter than the prohibition; and yet my learned friend's view of Russell *v.* The Queen is that it does decide that neither the Provincial Legislature nor a municipality created by it can prohibit even within the Province. If he is right in that, on what does it rest? Would it not, by exactly similar reasoning, be extended to limiting and regulating?

Lord MONKSWELL: Does not your argument go to show

that Hodge *v.* The Queen is wrong? Is it not that they would not have the power of regulating?

Sir FARRER HERSCHELL: My answer as regards Hodge *v.* The Queen is this: that it may be open to hold—and I think that is the only way in which it can be reconciled—that a province may deal with a matter of that sort municipally and locally without preventing at any time the Dominion Parliament dealing with the same subject-matter for general public purposes in the Dominion throughout the whole Dominion.

Lord MONKSWELL: And that the so dealing with them by the Dominion overrides the Provincial Legislature. That is the only way of putting it, it seems to me.

Sir FARRER HERSCHELL: I think that is what is suggested by Lord Selborne in that case of L'Union of S Jacques *v.* Belisle, and that it may be so when a matter is dealt with by the Dominion Parliament, and until it is dealt with the locality might deal with it as a local matter locally. They might say for some purposes we regard it as a local matter; nobody at present thinks it of importance outside us. Then the matter they are dealing with to-day locally may to-morrow become a matter of vital importance to the whole community, and then that is not to prevent the Dominion Parliament dealing with it for the whole Dominion, although there was nothing to prevent the Province in the meantime dealing with it locally for local purposes. The illustration about the arms which has been put is an example of a case in which the locality might well deal for a special purpose with a matter locally for a time without its being possible to contend that the Dominion might not deal with the matter for the whole Dominion in the public interest, and for the safety of the whole Dominion.

The LORD CHANCELLOR: There might be a distinction in principle between regulating a particular traffic inside a Province and passing a general Act of Parliament which should extend to the whole Dominion. The machinery itself would seem to involve a difference.

Sir F. HERSCHELL: I am not quite sure that I follow your Lordship.

The LORD CHANCELLOR: What I mean is this—I put to Mr. Davey, when he was making the same observation, that you may have a regulation that dynamite shall not exist except in certain licensed places. That may or may not be applicable to the whole Dominion, but if you are to have a system of licensing dynamite partly by the local authorities and partly by Dominion

Officers, do you think it was in contemplation in this Statute that there should be different—I will not call them Municipal Institutions, because that perhaps is begging the question—but different Institutions having authority over the same subject matter in the same Province ?

Sir FARRER HERSCHELL : I should say it certainly was, and I will give your Lordships an illustration. Of course that matter has not come before your Lordships, because I do not know that its validity has been doubted, but it affords a good illustration. The Dominion Parliament of Canada passed in 1878 the 41st Victoria, cap. 17, "An Act for the better "prevention of crimes of violence in certain parts of "Canada," and by that Act enabled the Governor-General to proclaim a district. When he had proclaimed that district nobody could carry or sell arms unless he had a license, and that license was granted by certain persons appointed by the Governor in Council. It was an individual or individuals, I do not know whether there were, but it is quite possible that there were in some of the provinces, provisions requiring a license for the carrying of arms for fiscal purposes, I am told there was not any, but that there might have been is perfectly clear. Of course this Act would only have its local operation in the proclaimed districts, and it might be in the particular Province. Could it have been suggested here : this Act is invalid because there is a licensing provision in it, and because by its setting up the people in that district who are to grant licenses you are creating a Municipal Institution ; you are creating Dominion Officers or Officials who are to determine what licenses are to be granted in that proclaimed district. Then take the case of adulteration; I suppose it could hardly be questioned that that is a matter with which the Dominion Parliament might deal throughout the Dominion by making it an offence to adulterate. There are persons, I believe, appointed by the Dominion Parliament for the purpose of investigating questions of adulteration somewhat similar to the persons we have here. They are appointed in particular places ; they act in those places locally, but they are Dominion Officers and Officials. There was an Act passed in 1874, extending to the whole Dominion, to make better provision respecting the inspection of certain staple articles of Canadian produce and the Governor-General from time to time is to designate the places to which it is expedient to appoint Inspectors of the several articles mentioned—flour and meal, wheat and grain. They held office during pleasure, and they

were to inspect these staple articles of industry. They are locally situated and working in the Province, but they are Dominion Officers because the purpose is a Dominion one. That, I submit to your Lordships, is the real test. If the purpose is a Dominion one, then they are the Dominion Officers, and the money raised to pay them is Dominion taxation, if it is taxation at all. All these questions of whether they are Dominion Officers or not, and whether the taxation is legitimate or not, is really, as I venture to submit, arguing in a circle. If the legislation is Dominion Legislation competent to the Dominion Parliament, then the people appointed to carry out the work do their work as Dominion Officers and not Provincial, and the money raised for that purpose is for a Dominion purpose, and not a Provincial purpose. If you can once establish that the matter is not within the competence of the Dominion Parliament, then *cadet quæstio*: but I venture to submit one gets no nearer by going into these questions of the officers or the taxation; because it cannot be disputed that for Dominion purposes you may appoint Dominion Officers whom you may locally appoint to act within any part of the Province or exclusively within a whole Province. They are the Dominion Officers, and not Provincial Officers, and it cannot be disputed that, if the matter is a matter that the Dominion Parliament is competent to legislate upon, it can raise by taxation in any way it pleases the money to carry out that purpose.

The LORD CHANCELLOR: I suppose the only thing would be that one might say it is a legitimate source from which to expound the language of the section to see what would be the result, and to see if this was so, whether you would be interfering in the Province with the ordinary course of daily life.

Sir FARRER HERSCHELL: Every law really which affects the whole Dominion, interferes with daily life in some way or other there. You could not more interfere with daily life than to enable the people in a locality to prohibit drink, because it is not done by everybody in a locality, but by a majority in the locality. That interferes with the daily life. It does not interfere with the daily life so much when they limit the amount of drink, as it does when they prohibit it altogether, and the latter legislation has been held competent to the Dominion Parliament. But what I was rather trying, if I could for the purpose of clearness, to keep separate, was this. I cannot help thinking that there is a danger of some confusion when one goes to look at this question of Dominion Officers or Provincial Officers and the Provincial taxation. If this is really a Provincial purpose, and if in reality

these are Provincial Officers, and this is Provincial Legislation, why, then, the Dominion has not the power. I have got to establish that the Dominion Parliament was competent to deal with this subject in the way of limiting it and regulating it. If I can establish that, then I respectfully submit I am not in any difficulty with reference to these people. Although they are acting for and in the Province they are Dominion Officers. Every Dominion Officer acts for and in some province. For instance, Custom-house Officers, Inspectors, and so on. I am not hampered either by the question of revenue or the way of raising it, because if it is a legitimate Dominion purpose, the Dominion Parliament could raise taxation in any way it pleased. Therefore once let me establish that it is a Dominion purpose competent to the Dominion, then I am free from either of those difficulties; and I cannot help thinking that dealing with either of these is rather apt to confuse than to assist, because what your Lordships have to decide is this—Is it a matter competent for the Dominion Parliament to deal with ?

Therefore, my Lords, I submit on this part of the case that if it is correct to say, as was said in Russell *v.* The Queen, that the prohibition of the liquor traffic was not within the exclusive power of the Provinces, that *pari ratione* it ought to be held that the regulation of it in the way of limitation with the same purpose and object was not within the exclusive power of the localities, and I get rid of the difficulty in Hodge *v.* The Queen, and I reconcile both cases by asking your Lordships to hold that a thing may be at a given time a local matter which may be dealt with locally within the perfect powers of the Provinces, which nevertheless may have to be dealt with by the Dominion as a whole for the whole Dominion at some other time. I think that is the view which really is borne out, not only by Hodge *v.* The Queen, but by Russell *v.* The Queen, because all that is said by Russell *v.* The Queen about the purpose and object of the Act being the general public good and welfare of the Provinces—every word of that general nature is as applicable to the present law as it was to the law in Russell *v.* The Queen. The object and purpose is precisely the same, and I pray in aid, but I do not desire to detain your Lordships by reading the language of the judgment again, all the observations made in Russell *v.* The Queen, as the basis of that dceision as pointing to the distinction I am urging now upon your Lordships, that it is competent to the Dominion to deal with all matters of this sort which are for the general welfare of the

Dominion, notwithstanding such local powers as are given to the local legislatures.

But now, my Lords, I desire to say a few words with reference to the question of its coming within the regulation of trade and commerce. Now, my learned friend has, I think, not dealt with the argument which I desire to put before your Lordships, that whatever limitation you put upon the regulation of trade and commerce, it is competent to the Dominion Parliament to regulate trade and commerce in any matter in which the peace, order, and good government of the Dominion is concerned. If the real and true object of the legislation be the peace, order, and good government of the whole of Canada, and if with that end in view some trade, or all trades are regulated throughout the Dominion, that is a matter in terms given to the Dominion Parliament of Canada. Now, let us see how that has been exercised already. Take the Statute which was under consideration in The Citizens' Insurance Company *v.* Parsons, which was in no way dissapproved by that judgment. The Dominion Parliament of Canada had said, in order for the general safety and to prevent people being swindled by bubble companies, no Insurance Company shall carry on business in the Dominion without a license; that license being granted by the Dominion Government. Of course, these Insurance Companies carried on their business in the provinces; there was nowhere else for them to carry it on, it may be in one or it may be in all. But the Parliament said, you shall not carry on your business without a license from the Dominion Government, and certainly no suggestion was made by this Board in that case that the law was invalid, because that would have been an easy solution of the matter. Instead of that, the Court proceeded to show that the Legislation in the particular case was not inconsistent with the general Dominion legislation. There you had a regulation of a particular business, in the way of requiring a license, by the Dominion Parliament, for the general good of the Dominion. What is the distinction in principle between that case and the present case, saying that no one shall carry on a particular business in the Dominion without getting a license, the requiring that license by the Dominion Parliament being for the same purpose, the good government of the country? I submit it is very difficult to draw any distinction between the two. That Act was valid as coming within the regulation of trade and commerce for the public good; and so I should submit that the present case comes equally within the regulation of trade and

commerce for the public good; and no more interferes in any way than a law requiring a license for the carrying or selling of dynamite, or a law requiring a license for the carrying of arms, from the Dominion Authority, would interfere with any fiscal power to tax persons in a Province carrying on business there for the fiscal purposes of the Province. There is nothing in the least inconsistent between them; and would there be anything illegitimate if such a law were laid down, requiring a payment for that license for the purpose of recouping to the Dominion the expenses incurred in relation to it? If it be a legitimate Dominion purpose, I submit not; because it is within the taxing power. They may tax in any way for any Dominion purpose.

Now are not those cases and illustrations really analogous to the present? The Parliament of Canada have regarded this particular article of consumption as being one of a dangerous character; as leading, by its abuse, to crime, and other public evils; and, so viewing it, it has said: We will regulate this trade in this way, that nobody shall carry it on without a license. Is not that a regulation of that trade, as a matter of fact, by the Parliament of Canada for the peace, order, and good government of Canada; and the line that I submit may well be drawn in regard to any limitation to be put on these words, "the regulation "of trade and commerce," is to look at the purpose and object of the regulation. I should not care to dispute that it might be for certain purposes open to the Provincial Legislatures to do something which would indirectly have the result of regulating or limiting some trade, but I say that that should not prevent the Dominion Parliament of Canada, for the general purposes of the Dominion, regulating that trade.

Now, my Lords, with regard to those words it is rather interesting to observe that in the Federal Constitution of the United States, which no doubt was considered in the drawing of this Federal Constitution, to which it is more analogous than anything else, probably what is left to the Central Legislature there is, "to regulate commerce with foreign nations and "among the several States, and with the native tribes"— a much more limited power of regulating trade and commerce than that which is to be found in this Federal Constitution, which is in much more general terms.

The LORD CHANCELLOR: Even there I think that has given rise to a considerable difference of opinion has it not?

Sir FARRER HERSCHELL: Yes, it has. There have been

various questions which have arisen upon it as to what is the meaning of "among the several States" particularly. I was desiring to call attention to the fact that the much more general words are used here, simply "the regulation of trade and "commerce."

Now, my learned friend said: "But you must put some "limitation upon that, because some of these things that are "afterwards enumerated would come out of it." I submit with great deference that ought not to be pressed too far, because it must be remembered that those are only subordinate enumerations for greater certainty; but not to exclude the generality of the words that go before; and when they are simply specifying things for greater certainty, some of those specifications may very well overlap. They may very well include certain things that would be included within the more general terms, but they specified them for greater certainty.

Sir MONTAGUE SMITH: It is only the enumerated things that are declared to override the exclusive power given to the Provinces under Section 92.

Sir FARRER HERSCHELL: But they might very well for greater certainty insert several things which would be included under the first of them; but to make it quite clear that they are intended to be included, they specify them.

Sir MONTAGUE SMITH: I am not sure they have succeeded in their object by enumerating them.

Sir RICHARD COUCH: The object being greater certainty they repeat it more than once under different names.

Sir FARRER HERSCHELL: For example it had given rise to controversy in the United States what trade and commerce did extend to. The great case was as to whether commerce covered navigation. That gave rise to a great deal of controversy. In any case trade and commerce would include such matters as bankruptcy and insolvency and perhaps such matters as banking —certainly banking is a branch of trade and commerce—and the incorporation of banks and the issue of paper money. The issue of paper money comes very near currency and coinage. It is the issue of paper money as distinguished from bills of exchange and promissory notes. Then when you come to currency and coinage the issue of paper money and the issue of bills of exchange and promissory notes, it is difficult to say they are all exclusive and are to be regarded as meaning something different. Although I am not going to say necessarily that everything would be included in the regulation of trade and commerce, yet I do insist upon this

that the regulation of any trade throughout the whole Dominion for Dominion purposes is a regulation of trade within the meaning of Sub-section 3. It is not for me to specify everything that is within it or to suggest that everything necessarily comes within it. But my contention certainly is that when once you show that any trade is regulated for the whole Dominion, as the insurance business was in that Statute referred to in The Citizens' Insurance Company *v.* Parsons, and that that is done, not for any local purpose, but for the general purposes of the Dominion; then you have shown that it is for the peace, order, and good government of Canada in relation to the regulation of trade, and if I am well founded in that, then that would apply to the liquor trade as much as to any other trade.

Now, my Lords, I only desire to say a word or two with reference to what my learned friend has said as to these licensing boards being municipal institutions. With great deference, that appears to me to be begging the whole question. If the matter was one with which the legislature was competent to deal, they are no more municipal institutions than Inspectors under the Adulteration Act, or anybody else. If it had been committed to one person, would he have been a municipal institution? Is the Inspector of Weights and Measures, which is a matter which is to be dealt with exclusively by the Dominion Parliament, a municipal institution? Is the person whom the Governor-General appoints under that Act I have quoted, to give licenses for arms, a municipal institution? The answer is, No. They are Dominion Officers. Then can it make any difference that when the money is received, if there is a surplus after paying those officials, which, I am told, does not seem at all likely to be the case; but if there is, does it make any difference that that is to be paid over to the provinces. No doubt, what was done in this case was probably founded on what had often been the practice in many of these statutes that penalties recovered for indictable offences against the Dominion Acts are, by the Dominion Statutes, to be handed over to the Provincial Treasury.

No one could say that because the fine for a criminal offence was directed by the Dominion Parliament to be paid into the Provincial Treasury that that has in any degree altered the character of the legislation. Does it do so any more here? Would this Act have been any better if it had provided that the Dominion should keep the whole of this money, or would it have been better if it had provided that the license fees should be so regulated as that the amounts should exactly square, and that

there should be no surplus, or that there should be always, as I believe would be likely to be the case, something needing to be paid out of the Dominion Exchequer for the purpose of carrying out the Act. My Lords, I submit that cannot make any difference. That cannot alter the real character and object and scope of the legislation, and I have to submit to your Lorships that Russell *v.* The Queen really does in substance decide that this is a matter competent to the Dominion Parliament; that that case may be reconciled in the way I have suggested with Hodge *v.* The Queen, and that that way of reconciling it is borne out by suggestions made by your Lordships both in The Citizens' Insurance Company *v.* Parsons and L'Union of St. Jacques *v.* Belisle, and that whether or not it be governed by Russell *v.* The Queen, it is a case which I have established that it comes within a Sub-section of Section 91, and was a matter therefore which the Dominion Parliament was competent to deal with.

The LORD CHANCELLOR: Before you conclude, apart from the great question you have been arguing with regard to those Licensing Boards, and apart from those questions which depend upon and are connected with Licensing Boards, there are some Sections of the Statute you would insist upon as *intra vires* notwithstanding that the others might be *ultra vires.*

Sir FARRER HERSCHELL: Yes, I am not at all sure that I did not yesterday concede too much when I conceded that some of the matters, which were matters creating offences, could only be carried out by the aid of these Licensing Boards and an Inspector appointed under them: because it may be very questionable whether the Act is not—in fact, the Court below have held it apart from the wholesale and vessel question—perfectly good so far as it creates this Board of Commissioners and makes them the persons to deal with the giving licenses under the Canada Temperance Act.

The LORD CHANCELLOR: What I meant was, if you would be good enough to point out to their Lordships those Sections which, apart from the real question you have been arguing, you insist upon are valid, because the question we are asked is whether this Act was valid, and how much of it.

Sir FARRER HERSCHELL: There are first of all the Sections which substitute the Licensing Board for the Lieutenant-Governors who were to give the licenses under the Canada Temperance Act of 1878. That the Court below has held to be valid, and your Lordships will have to consider whether that is so or not. If so it creates the Licensing Boards, and my

argument as to some of the other Sections would depend on whether the Licensing Board was held to be validly created; because if there is a Licensing Board, then quite apart from the general power to grant licenses for the various districts——

The LORD CHANCELLOR: That is what I was rather pointing to. Would it be convenient to hand in on a piece of paper those Sections which you allege to be valid, notwithstanding the other Sections might be decided against you?

Sir FARRER HERSCHELL: If your Lordship would allow me to point out this, that some of them would depend on the view taken by your Lordships on that point, which, as I say, has been decided in favour of the Act by the Court below, namely, the existence of the Licensing Board for some purposes being legitimate; because when once you get it, some of the sections might be valid which would not be valid if you do not get it at all; but I will point out, if your Lordship will allow me, those which I say depend on that question and those which I should say in my view would be valid.

There is one matter, which I am obliged to my learned friend for reminding me of, that I ought to have called attention to, and that is that undoubtedly powers were exercised by some of the municipalities and some of the provinces before this Act of 1867, which I think it is beyond dispute could not be exercised by them now, and which are now matters coming within one or other of the subjects distinctly given to the Dominion Parliament. For example, some have dealt with weights and measures, which would not be competent to them now by reason of the legislation of 1867. Therefore what I mean is that Municipal Institutions cannot be taken to mean all those things which Municipal Institutions had done or could do prior to the passing of the Act of 1867, because undoubtedly some of them are clearly excluded from their functions by the operation of Section 91.

The LORD CHANCELLOR: Excluding those, the regulation is specially dealt with.

Sir FARRER HERSCHELL: Yes, a number; all those Acts are printed in the collection which your Lordship has, showing matters that now come clearly within the powers of Section 91.

The LORD CHANCELLOR: Their Lordships will consider the matter. There will be no judgment delivered here, but their Lordships will report to Her Majesty.